

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Norwalk Board of Education

Appearing on behalf of the Parents:

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Appearing on behalf of the Board of Education:

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Appearing before: Attorney Justino Rosado, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the program offered by the Board for the school year 2001-2002 provides the student with a Free and Appropriate Public Education (“FAPE”)? If not,
2. Does the unilateral placement, by the parents, at The Meeting School provide the student with “FAPE”?
3. Should the parents be reimbursed for the unilateral placement at The Meeting School?

PROCEDURAL HISTORY:

On October 5, 2001, the parents through their attorney requested a due process hearing for the school year 2001-2002. The hearing convened on nine days as follows: November 1, 9, 14 and 30 and December 5, 7, 10, 13, 14, 2001. A post trial brief was scheduled with the parties being allowed 17 days from receipt of all the hearing date transcripts to file simultaneous briefs. The parties either in writing or on the record waived their right to a forty-five day written decision. The date for the mailing of the final decision and order was extended, at the request of the parents, four times, twice in order have enough time to conduct the hearing, twice to allow the parties time to receive all the transcripts and submit their post trial briefs. Due to a family illness, the parents’ attorney filed her post

trial brief one week late. The post trial briefs were received on March 11, 2002. The date for the mailing of the final decision and order was extended to April 2, 2002.

SUMMARY:

The student is a 14 years and 10 months-old young man who has been identified as being Other Health Impaired and therefore eligible for special education and related service as required in Individuals with Disabilities Education Act (“IDEA”) 20 U.S. C. §§ 1400 et seq. and the Connecticut General Statute Section 10-76d(a)(1). The parents requested a residential placement for the student and the Board refused, believing that their program provided the student with “FAPE”. The parents’ unilaterally placed the student at the Meeting School in Rinde, New Hampshire.

FINDINGS OF FACT:

1. The student has been enrolled in the Board’s school system since kindergarten. (Board’s Exhibit 1)¹ In the 3rd grade the student’s report card noted that the student had been receiving special services as an artistically gifted student. (Exhibit B-4)
2. During the student’s 4th grade, he seemed unhappy and demonstrated behavior problems. The parents engaged a psychiatric social worker to assist the student with his behavior problem. The social worker recommended an evaluation of the student by a psychologist. The student was evaluated on or about December 1996 while the student was still in the 4th grade. (Testimony of Mother and Mr. Geller)
3. The evaluator recommended that the parents inform the Board of the results of the evaluation, that the student obtain a psychiatric evaluation and that the psychiatric social worker continue to work with the student. The Board was not told or given a copy of the psychological evaluation until the student’s 5th grade. (Exhibit B-5, Testimony of Mother)
4. In the 5th grade the parent was happy with the student’s placement and the parent felt that the student was benefiting from his program and the modifications. The student was appropriately placed in 5th grade mainstream. (Testimony of Mother)
5. A PPT meeting was held on March 20, 1998 at the Board’s middle school, the student was found eligible for special education and related services as a student with a speech and language impairment. He was provided with pragmatic language therapy as well as some modifications in the regular education classroom. (Exhibit B-9) The parents agreed with this determination and believed the program to be appropriate. (Exhibit B-9 & Mother’s Testimony)
6. The student entered the sixth grade in West Rocks Middle School in September 1999. His transitional PPT meeting recommended continuing the current IEP, which included speech and language services. In addition he was placed on the cooperative

¹ The Board’s Exhibits will be hereafter designated with “B”.

teaching team. The student had been diagnosed with Asperger's Syndrome and showed a high anxiety. The team recommended that he be monitored by social work and receive those services as necessary. (Exhibit B-10)

7. In the 6th grade the student's disability changed from speech and language impaired to other health impaired. The parents invited Dr. Greenbaum to attend the PPT. It was the Doctor's opinion the student did not have Asperger's Syndrome. (Exhibit B-13, Testimony of Mother)
8. The Parents expressed concern at the November 1998 PPT meeting that the student was experiencing anxiety in school relative to schoolwork and peer interactions. The PPT agreed to develop a social group that would be appropriate for the student. Both the Parents and Mr. Geller agreed that this was appropriate. (Exhibit B12, Testimony of Mother & Mr. Geller)
9. The social group was a called a lunch bunch. It consisted of five students. They met on Fridays in the office not in the cafeteria. The speech and language therapist was invited to be with the group and incorporate role-playing in the lunch bunch. The students benefited and volunteered with no problem. (Testimony Guidance Counselor)
10. The student was involved with the marching band. The student had an incident during one of the marching bands exhibitions. The student started to experience anxiety in the band so it was discontinued in the 7th and 8th grade. (Testimony Guidance Counselor)
11. The parents obtained a central auditory processing evaluation. It was found that, when noise is present, the student had a significant difficulty with the ability to integrate information between the two hemispheres of the brain. It was recommended that the student use an FM system. This device made the speech signal louder than the noise. (Exhibits B-17, B-18 & Testimony of Speech & Language Therapist)
12. The parent testified that through the 3 years the student was at the Middle School, his needs were not being met. The parent did not ask for a due process hearing during this time. At the March 27, 2000 PPT, the parent expressed that the student was not making progress towards his annual goals. A due process hearing was not requested. (Testimony of Mother, Exhibit B-23)
13. In December 1999, the school psychologist conducted a psychological evaluation of the student for his triennial evaluation. The evaluation consisted of intelligence testing, obtaining results as follows on the WISC III: verbal IQ range 108-119, performance IQ range 96-109, and full-scale IQ range 104-113. The student was also administered the Wechsler Individual Achievement Test (WIAT), obtaining results in the average range. The results of the WIAT achievement test are consistent with the results of the Woodcock Johnson Achievement Test administered by the special education teacher during this same triennial evaluation. The school psychologist felt

that the student presented many social issues and anxiety issues consistent with a child who has been diagnosed with Asperger's Syndrome. (Exhibits B-19 & B-21)

14. A PPT was held on 1/10/2000 to review the triennial evaluations. It was found that the student still had difficulties with pragmatic language skills and had difficulty meeting his interpersonal communication skills in the classroom. Math calculations were the student's weakest area. It was recommended that the student continue with his assistive listening devices, receive support from the speech pathologist, special education teacher and guidance counselor. The parents were in agreement with the recommendations. (Exhibit B-22)
15. The student's report card for 7th grade at West Rocks Middle School reflects that he continued to achieve satisfactory grades in the B to C range in all mainstream academic classes, with supplementary aids and services provided by special education. The student also received grades of A to B+ in all of his "special area" classes including art, health, physical education, and music. (Exhibit B-24). His report card for the first semester of 8th grade reflected that he continued to receive educational benefit from his mainstream academic classes with special education supplementary aids and services. The student's grades for the second marking period of 8th grade were largely in the B range. (Exhibit B-29)
16. Homework was a continuing difficulty for the student. He had a huge problem organizing papers, so sometimes he did not know what his homework was, the assignment having become lost in the sea of paper. Or he left the book he needed at school. Or he would forget to turn in homework he had completed. At one point one of his teachers agreed to fax home a list of his homework assignments every night. This sometimes created more anxiety than it relieved. He also had great difficulty approaching and completing the actual work, once the disorganization was out of the way. He would write an essay, and refuse to correct, revise or rewrite and edit. He would misunderstand assignments, or be too literal in interpreting the rules, and assume he could not make up missed work. (Testimony of Mother)
17. The student in his 1/10/2000 IEP has only made satisfactory progress in all his objectives. In Goal No. 1, "The student will be come less anxious regarding assignments across curriculum", the IEP showed unsatisfactory progress even though the 3 objectives related to this goal showed satisfactory progress. (Exhibit B- 22). This goal was not continued in the 3/27/00 IEP. (Exhibit B-23)
18. At the 3/27/00 PPT, the parent felt that the student needed a smaller school setting. They did not agree with the PPT that the student's goals and objectives were being met. The PPT refused the parent's request, they felt that the student's IEP was appropriate and in the least restrictive environment. (Exhibit B-23)
19. The student has difficulties with social skills. His speech was sometimes abnormal in its tones. He does not catch social cues and required explicit cuing for when a meeting was to stop. Educationally he is progressing generally well. (Testimony of

Dorothy Stubbe). In a structured social situation the student does well; whenever the situation is less structured the student presents as anxious and insecure. (Exhibit B-23 pg. 15)

20. The student's social worker, paid by the parent, was of the opinion that the student did not need a residential program. The student could be maintained at home at a day program in a small environment. (Testimony Mr. Geller).
21. Dr. Dorothy E. Stubbe did an evaluation of the student at the request of the school, with the knowledge and agreement of the parents. The evaluator recommended that the student should be involved in a small classroom setting at least once a day. The goals and objectives in the student's transitional IEP for the Board's High School would fit the student's needs and all components of her recommendations were implemented in the IEP. (Exhibits B-25, B-30 & Testimony Dr. Dorothy E. Stubbe)
22. Dr. Stubbe diagnosed the student with mild Pervasive Developmental Disorder ("PDD"), stating that the student's symptoms best fit the criteria for a new diagnostic category not yet reflected in the Diagnostic and Statistical Manual of Mental Disorders ("DSM IV") called "Multiplex". Dr. Stubbe noted that she was not able to diagnose the student with Asperger's Syndrome because aspects of that diagnosis were not present in the student's profile. She also noted that the student seemed mildly dysphoric, presenting with a flat affect, that he had a history of psychotic disorder characterized by some hallucinations and suicidal ideation and that he had a nonverbal learning disorder profile. Dr. Stubbe explained in her testimony that she obtained the information regarding this nonverbal learning disorder profile from previous psychological evaluations of the student which suggested that his verbal skills were stronger than his nonverbal skills, that he had difficulties with social skills, and that he had difficulties with math. (Exhibit B-30 & Testimony of Dr. Stubbe)
23. The parent was concerned about the environment at the Board's High School. The mother felt that the large environment at the middle school was difficult for the student and that a larger school would be harder for the student to manage. The high school psychologist felt that finding a peer who had the same classes as the student and would be comfortable with the student could rectify the issue of the student in a larger school. Another recommendation was to provide the student with an aide for a short time to assist him in managing the school. (Testimony of High School Psychologist)
24. In order to assist in the student's transition to the high school, it was recommended that the student enroll in the Board's summer enrichment program at the high school. The parent disagreed because she thought it was a penalty for the student to go to school during the summer. (Testimony of Mother).
25. Marcia B. Rubenstein, an independent consultant for the parents, testified about the student's non-verbal learning disorder. Nonverbal learning disorders are seen as a

syndrome of assets and deficits where the children affected have deficits in visual, spatial, social and psychomotor aspects. They have assets in rote memory and verbalization. Ms. Rubinstein also described the problems children with this disorder have in seeing the big picture. This disorder is not a recognized disability. Ms. Rubinstein suggested The Meeting School, a residential school for grades nine through post graduate, for the student. She has not seen the Meeting School or is she familiar with its program. (Testimony of Marcia B. Rubenstein)

26. All classes at The Meeting School are composed of students from all four-grade levels, and all are graded on a “pass/fail” basis. Students are not tested on their mastery of material taught in the course. If the teacher judges through their class participation and their work product that they have improved over their personal starting point at the beginning of the term, they are judged to have made good effort in the class and they “pass”. If a student does not make an effort and does not improve, the student “fails”. (Testimony, Ms. Stillwell, Ms. Bartelme)
27. Dr. Stubbe was asked by Parents’ counsel to review the literature regarding The Meeting School and provide an opinion regarding whether the school could provide an appropriate program for the student. After reviewing the literature, Dr. Stubbe stated that, in her opinion, the school could not provide the student with an appropriate program. She was particularly concerned that the school lacks the necessary resources to handle the student if he should have a serious emotional issue and require the services of a mental health professional. Dr. Stubbe saw that the small class size was a positive point because the student would receive more attention, but concerned that there was no component to meet the student’s special education needs. (Testimony, Dr. Stubbe). Ms. Stillwell testified that if they were to have a serious problem with the student’s behavior, they would simply exclude him from the program – send him home. (Testimony, Ms. Stillwell)
28. Ms. Bartelme testified that in her opinion, The Meeting School was not providing an appropriate program for the student. In addition to the lack of special education services and mental health resources, Ms. Bartelme was concerned about the quality of educational services. She did not see how the student’s IEP for 2001 could be implemented or who could evaluate the student’s goals and objectives. The teachers at The Meeting School do not have adequate credentials or skills and the student does not appear to be academically challenged by the program. There are inadequate facilities to provide him with adequate coursework in such fields as science and computers, and he is not being prepared socially to re-enter a mainstream program with his peers. (Testimony, Ms. Bartelme, Ms. Stillwell)
29. The Board’s High School speech and language pathologist had written goals 4 through 6 of the student’s 2001 IEP. The pathologist would first work with the student individually and get to know him, then incorporate other students into a social skills group. She would be providing the student with 45 minutes per week of speech and language therapy in the student’s regular classroom and 30 minutes per week of

consultation to the regular education staff. (Testimony of High School speech and language pathologist)

30. The transitional PPT for the school year 2001-2002 had more goals and objectives to address the student's needs than any prior IEP. The Board increased the student's time in the resource room to 1 period each day and was agreeable to change the IEP if the student needed more time in resource room. (Exhibit B-34, Testimony of Joan Foley)
31. The student's parents attended the 8/15/2001 PPT meeting. The parents rejected the Board's IEP for the student's first year in High School. The parents requested placement at the Meeting School. The parents felt that the student would not do well socially at the Board's High School. The IEP was rejected because the parents felt the Meeting School would meet the student's social issues better. The parents did not have any concern about the student's academics. (Exhibit B-37)

CONCLUSIONS OF LAW:

1. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (S. D. Tex. 1993)
2. There is no dispute that the student is eligible to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) pursuant to IDEA, the Individual with Education Disabilities Act, 20 U.S.C. §§ 1400 *et seq.*, and Connecticut General Statute, Section 10-76d(a)(1)
3. The Board of Education has the burden of demonstrating by a preponderance of the evidence that it has complied with the requirements of IDEA, Regulations of Connecticut State Agencies ("Regulations"), Section 10-76h-14.
4. The standard for determining whether FAPE has been provided begins with the two prong test established by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982). First, the procedural requirements of the IDEA must have been met by the school district. Second, the individualized educational program must be reasonably calculated to enable the child to receive some educational benefit. In the present case, there is no claim that the procedural requirements of IDEA were not met. A review of the record shows that the parents received their Procedural Safeguards and there is no claim that they did not receive copies of the IEP or notice of the PPT meetings.
5. The second prong of *Rowley* requires a close look at the student's IEP and questioning it would allow the student to benefit from it. Since *Rowley*, courts have clarified the requirements of FAPE to hold that individualized educational programs offered to children with disabilities must provide more than a trivial educational benefit. The Fourth Circuit Court agreed "*Rowley* implicitly recognized that Congress

did not intend a school system to be able to discharge its duty by providing a program that produces some minimal academic achievement, no matter how trivial." *Hall v. Vance County Board of Education*, 774 F.2d 629, 630 (4th Cir. 1985). While the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit, the *Hall* court held that grade promotions and test scores are not always enough to show educational progress. 774 F.2d at 635. The Court in *Hall* considered the students' capabilities, intellectual progress, and what the school had offered him, in making a decision about the appropriateness of the district's program. (See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), cert. denied 488 U.S. 1030 (1989) and *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3rd Cir. 1993)) However, the IDEA does not require that the educational potential of each child be maximized. (Rowley at 189)

The parents had stated that the reason for the unilateral placement was because of their concern for the student's social needs, and not his academic program. (Findings of Facts # 31). There was a lot of testimony about the student's 7th and 8th grade program but they were not raised as an issue in this hearing. His parents on various occasions found the student's program appropriate and agreed with recommended changes. (Findings of Facts 5, 8 & 14). When the parents disagreed with the student's program, there was no request for due process. (Findings of facts 12 & 18). The Board listened to the parents and addressed their concerns. From 1998 to 2001, the student had 4 PPT's in 1998 (1/10, 3/20, 6/9 and 11/98), three in 1999 (4/28, 6/11 & 11/10/99), two in 2000 (1/10 & 3/27/00) and 4 in 2001 (1/10, 3/20, 5/2 & 8/15/2001). The transitional IEP goals and objectives were crafted to try and address the student's needs but at the same time the Board realized that changes might need to be made to the IEP once the student entered high school. (Findings of facts # 23 & 30). The new IEP for 2001-2002 school year was appropriate for the student.

6. In addition to the provision of FAPE, the law also requires that children with disabilities be educated in the least restrictive environment ("LRE") to the maximum extent appropriate with children who are not disabled. Education must be provided in the appropriate LRE to meet the unique needs of each disabled student. The parents were not willing to give the student an opportunity to see if he could succeed in the Board's high school in the LRE. The Board recommended a summer in enrichment program to see how the student managed at the high school; the parents refused to enroll the student. (Findings of Facts # 24). Instead, the student was enrolled in a residential placement, which is a more restrictive environment even though most of the students in the program are disabled.
7. 34 C.F.R. Section 300.550(b)(2) requires, "That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The student's disability does not require removal to a residential placement. The student's private social worker stated that the student did not require

residential placement. (Findings of facts # 20). The high school would have been a new placement for the student and if the environment was overwhelming, the student's time in the resource room could have been increased or a PPT called to see what modifications would need to be made or if a placement in another environment was needed.

8. Under the line of cases that includes *Burlington v. Dept. of Educ.* 736 F.2d 773 (1st Cir. 1984) aff'd 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 359 (1985), a parent can unilaterally place their child in a private school and seek payment for such placement from their school district. Such funding requires, first that a finding that the Board's proposed program was not appropriate, and second, that the parental placement is appropriate. Under Regulations of Connecticut Agencies Sec. 10-76h-14, the Board of Education has the burden of proving the appropriateness of the child's proposed educational program by a preponderance of the evidence while the Parents must prove the appropriateness of their private placement. It is not necessary to look at the appropriateness of the private placement, as the proposed educational program offered by the Board was appropriate.

FINAL DECISION AND ORDER:

1. The Program offered by the Board for the 2001 2002 school year is appropriate.
2. Issue No. 2 is mute. In order to reach this issue the Board's Program would need to be inappropriate for the student.
3. The Board does not have to reimburse the parent for the 2001-2002 school-year program at the Meeting School.