

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Ridgefield Board of Education

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Appearing on behalf of the Board: Attorney Nicole A. Bernabo
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Appearing before: Attorney Margaret J. Slez, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the parents breach the settlement agreement by failing to place the student in the Board preschool program for the 2002-2003 school year?
2. Did the Board offer the student an appropriate program for the 2002-2003 school year?
3. Is the Foundation School an appropriate placement for the student?
4. Are the parents entitled to reimbursement for the costs of the student's placement at the Foundation School?

SUMMARY:

The student, now 5 years old, has been diagnosed with pervasive development disorder/NOS with autistic characteristics. At the end of the 2001-2002 school year, the parents objected to the program proposed by the Board for the 2002-2003 school year and requested placement of the student at the Foundation School. The Board denied the request and the parents then requested due process hearing on July 25, 2002 (Exhibit B-71). On October 2, 2002, the parties entered into a settlement agreement (Exhibit B-70). The parents contend, however, that the Board failed to offer an appropriate program notwithstanding the parties' agreement. The Board contends that the parents' refusal to bring the student to the Board preschool program prevented implementation of a program and, in doing so, the parents breached the parties' agreement. At a PPT meeting on December 17, 2002, the parties failed to resolve the issues regarding an appropriate program for the student. In January 2003, the parents unilaterally placed the student at the Foundation School. On February 26, 2003, the parents requested due process hearing, seeking reimbursement for the cost of the student's placement at the Foundation School.

PROCEDURAL HISTORY:

The parents' request for due process hearing, dated February 26, 2003, was received by the Department on March 3, 2003. A prehearing conference took place on March 12, 2003, and hearing of this matter was scheduled for April 10, 2003. Pursuant to proper request for extension of time for further hearing dates, in accordance with R.C.S.A. Sec. 10-76h-9, additional hearing dates were scheduled for May 14, 15, and 20, 2003. The hearing was not convened on April 10, 2003, but did go forward on May 14, 15, and 20, 2003. At the conclusion of the first day of hearing, the parents made an oral motion for summary judgment which was denied by the hearing officer on the grounds that there were genuine issues of material fact for which fairness required further hearing. On the second hearing day, at the conclusion of the parents' case, the parents' renewed their oral motion for summary judgment which was also denied by the hearing officer.

FINDINGS OF FACT:

1. In September 1999, at the age of 16 months, the student was evaluated for Birth-to-Three services. Exhibit B-1. Along with Birth-to-Three services at the Rubino Center, the student received 15 hours a week of a home-based program which included sensory integration therapy, play skills, and language therapy. Exhibit B-32, p. 2.
2. In October 2000, the student was referred to the Board for special education and related services. In March and April 2001, the Board conducted occupational therapy and physical therapy evaluations. A psychological evaluation was also conducted by the Board school psychologist in March and April 2001, which evaluation indicated that the student presented with significant language delays and behavioral features of PDD-NOS. Exhibit B-15. On May 4, 2001, the PPT met to design an IEP for the student and decided to place the student in the Board three-hour morning preschool program, during which time the student would receive speech services, physical therapy, and occupational therapy. Exhibit B-18.
3. At the May 4, 2001, PPT meeting, the parents made three requests which were denied by the Board: An additional 8 hours per week of home tutoring to be provided in the afternoon; a guarantee of some one-on-one speech therapy to be included in the 2.5 hours weekly allotment; an additional paraprofessional to be assigned to the preschool for both the summer and school-year sessions. Exhibit B-22. After the parents met with the Board director of pupil personnel and special education services, the third request was agreed to and a paraprofessional began working with the student. Exhibit B-22. On July 2, 2001, the parents requested a due process hearing based upon the Board's refusal to provide increased services and a home program for the student. Exhibit B-25, p. 2. Although requested by the parents, the Board would not agree to mediation. Exhibit B-25, p. 1. The parents filed a second request for due process hearing on July 24, 2001. Exhibit B-26.

4. On June 15, 2001, the student was evaluated at the Center for Communication Disorders, Southern Connecticut State University. The evaluation showed that the student's receptive language skills were substantially delayed but due to inconsistent responses it was difficult to accurately estimate the level of the student's receptive language skills. It was noted that the inconsistent responses could be attributed to the student's difficulty attending to the environmental and language input, sensory integration difficulties, and/or overall delay in language comprehension. The student's expressive language skills were also found to be delayed, however such delays were less substantial than the receptive language delays. The student displayed age appropriate phonology but vocabulary was limited in structure and language function. The pattern of receptive and expressive language characteristics displayed by the student were found to be "suggestive of a language delay typical of children who may exhibit Pervasive Developmental Disorder-Not Otherwise Specified." Exhibit B-3, p. 5.
5. The evaluation report recommended that the student would benefit from a combination of individual and group/classroom based intervention. Individual intervention would increase the student's ability to focus on communication and would reduce distractions and sensory overload, an ideal setting for consistent and selective reinforcement of language behaviors. Group/classroom based intervention would provide a context for focus on social use of language and natural consequences and reinforcers for communication. It was further recommended that the student would benefit from environmental engineering that includes a consistent and predictable classroom routine, a retreat area with reduced visual and auditory distractions in order to withdraw from sensory overload and receive more individualized instructional attention, reduction of ambient noise from fans, refrigerator, etc. through the use of carpets, curtains, and sound absorbent tile for the walls and ceiling, and incorporation of a structured sensory integration schedule into the student's school day and home environment to help reduce sensory overload. It was further noted that the student would continue to benefit from the home based tutor to reinforce and carryover skills learned at school and home routines and would benefit from structured opportunities to play and interact with typically developing children at home, school, and during play. Exhibit B-3.
6. In September 2001, when the student was 3 years and 4 months old, the parents sought the opinion of Adrienne G. Smaller, Ph.D., regarding the student's current level of functioning and educational program, and referred the student for a psycho-educational/psychological evaluation. Dr. Smaller did testing on September 5th and 7th, and observed the student in the Board preschool setting on September 10, 2001. Exhibit B-32, p. 1. In order to determine whether or not the Board offered the student an appropriate program, it is important to describe Dr. Smaller's findings here in detail. The student's current level of cognitive functioning was assessed using the Mullen Scales of Early Learning. The student's skills in the area of gross motor, fine motor were at the age-equivalent level of approximately 2 years; expressive language skills were at the 21-month level, as were visual/reception skills; receptive language skills were assessed to be at the 14-month level. "It [was] evident that [the student] is

severely delayed in all areas of development.” Exhibit B-32, p. 10. Dr. Smaller’s report states that although the fact that it was possible to measure the student’s cognitive skills utilizing standardized measurements was “quite positive,” it was important to note that the student has various behaviors that appear to significantly disrupt the student’s ability to sustain effort during assessment. Such behaviors included difficulty sustaining attention, being distracted by both external and internal stimuli, and difficulty exhibiting deliberate visual scanning and goal-directed behaviors. Dr. Smaller also pointed out that the student’s “escape behaviors,” such as squealing and running from an activity will require behavioral intervention. While the student “appears to be able to sit at the table with adult support and shows ‘ready-to-learn’ behavior, [the student] has significant delays in [the] ability to learn from demonstration, imitation, and association.” Dr. Smaller described the student’s delay in processing auditory input as “quite significant” and sensory needs as “substantial.” Dr. Smaller stated that it is evident that the student displays many of the characteristics of autism spectrum disorder, but severe language impairment and early medical problems have complicated that picture. Therefore, the student’s “pattern of delays suggest at this time a diagnosis of Pervasive Development Disorder-NOS.” Exhibit B-32, p. 10.

7. At the conclusion of her report, Dr. Smaller made twelve very detailed recommendations, three of which are pertinent to the issues in this case: 1.) With regard to the general educational environment, the student will need one-on-one instruction in the area of communication. Given the student’s passivity and inconsistency in responses, the student will need an ABA approach with discrete trial learning, in order to intrude on the student and gather consistent data as to the acquisition of skills, reinforcement of those skills, and the student’s response time. A consistent and intensive work routine needs to be maintained with ample room for sensory diet. The program must have continuity across staff and various therapies. The classroom should be very simple, devoid of unnecessary visual stimuli, so that the student’s ability to focus on a given activity is maximized. 2.) Since the student displays severe deficits in attention and engagement, as well as escape behaviors, it will be essential for the student to be assigned to a full time paraprofessional who will consistently reinforce the need for an adult to meet the student’s needs, as well as reinforce the consistent approach across settings and therapies. Since the student displays running off and darting behavior, safety is an issue, requiring the need for a paraprofessional to be with the student throughout the day, including during therapies. 3.) Given the student’s severe language and communication delays, it is essential that the student receive no less than a half hour daily of individual language and communication therapy. Small group instruction can be a reinforcement in the classroom, with the teacher focusing on the communication objectives of the therapy. Exhibit B-32, pp. 11-12. Dr. Smaller testified that she recommended private placement to the parents, but the parents said they wanted to work with the Board. Testimony, May 15, 2003.
8. On November 6, 2001, the parties entered into an agreement regarding services for the student and the parents withdrew their request for due process hearing. Exhibit

- B-34. A new IEP for the 2001-2002 school year was developed to conform to the terms of the agreement, including but not limited to 10 hours per week in the preschool classroom, 10 hours per week of ABA to be provided in the student's home, 2.5 hours per week of one-on-one speech services, and "[o]ne paraprofessional [who] will always be monitoring [the student's] safety." Exhibit B-36. Although the parties had also agreed on November 6, 2001, that the Board would perform a functional behavioral assessment, observation for such assessment did not take place until mid-January 2002 and a behavioral support plan was not in place until late January. Exhibit B-39, pp. 5-12.
9. On November 6, 2001, the parties had also agreed that an audiological evaluation would be undertaken. Exhibit B-34, p. 5. The audiological evaluation took place on April 29, 2002, and the student was diagnosed with severe auditory attention disorder and mild conductive hearing loss. Exhibit B-43.
 10. The PPT met on May 22, 2002, to develop programs for summer 2002 and the 2002-2003 school year, and, at which time, the parents provided the Board with the report of the audiological evaluation and the ABA tutoring report. Exhibits B-45, B-47.
 11. The ABA tutoring report, covering the period from November 6, 2001, to May 18, 2002, describes the "ABA trained skills" mastered and generalized by the student over the course 6 months, through an average of 8 hours of home tutoring per week. Such skills include non-verbal imitation using "do this;" knowledge of 18 body parts; recognition of 15 classroom objects; identification and naming of familiar people; expressive and receptive identification of 50+ food items, 7 shapes, 11 colors, 20+ items of clothing, 50+ animals, 60+ household objects and rooms; appropriate response to 35+ receptive instructions; identification of 60+ verbs in pictures and in vivo. The student had made progress in the use of verbs, the use of "yes" and "no," simple turn-taking games, making choices, eye contact with others, and spontaneous requesting. The ABA tutor's report concludes with the observation that the student "continues to function best when the environment is free from external distractions." Exhibit B-44.
 12. At the PPT meeting on May 22, 2002, the Board offered the student a choice of two programs for the summer: 1.) Attend the partial day special education preschool program for 5 weeks, only 4 of which weeks would include therapies; or 2.) ABA tutoring at home for a total of 50 hours over the course of 12 weeks. In light of the student's significant developmental needs and their understanding of the Board's agreement to provide an extended year program, the parents objected to both choices. Exhibit B-45.
 13. On June 3, 2002, Dr. Smaller did another observation of the student in the Board preschool setting. She noted in her report of the observation and in her testimony that the student had made some progress during the 2001-2002 school year in that the student appeared to have adjusted to transitions, to the classroom routine, and imitation skills had improved. However, the student was continuing to have

- difficulty with attention and focus, eye contact, joint referencing, communication intent, and relatedness. Dr. Smaller observed only one attempt by the student to purposefully communicate, which was crying and squealing, and all other responses were prompt-dependent or echolalic. Since the student's skills "in language and communication continue to be severely deficient," Dr. Smaller found the type of lesson she observed to be "meaningless [to the student] at this stage in [the student's] language development." Dr. Smaller had expressed "great reservations" about the student's program in September 2001, and described herself in June 2002 as "more convinced" that the student requires a full day intensive program, unlike the Board program, and that the "window of opportunity" to access language acquisition at this crucial time in the student's development was being missed. Exhibit B-49; Testimony, May 15, 2003. The student's father testified that when the parents asked that Dr. Smaller attend the PPT meeting to be held in June 2002, they were told that her attendance would not be productive since her observations were advisory only and not binding on the Board. Testimony, May 15, 2003.
14. The PPT met on June 13, 2002, at which time the Board rejected the parents' requests for programming to be implemented by the Board. The parents rejected the summer program offered by the Board as well as the program offered for the 2002-2003 school year and requested that the student be placed at the Foundation School. The Board denied the parents' request for the private placement. The parents then requested mediation, but the Board PPT coordinator stated that the Board would prefer to go to hearing. Exhibit B-53. On July 25, 2002, the parents requested a due process hearing. Exhibit B-71.
 15. On October 2, 2002, the parties entered into a settlement agreement. Exhibit B-70. Paragraph 2 of the agreement states that as of October 3, 2002, and until such time as the PPT recommends that changes be made, the Board will provide the student, weekly, 2.5 hours of individual speech and language therapy, 1 hour of physical therapy, 10 hours of ABA, and 1.5 hours of occupational therapy. There is no dispute regarding the delivery of such agreed-to services.
 16. Paragraph 1 of the parties' October 6, 2002, agreement provides that the Board will hire a mutually-agreed upon consultant for the purpose of assisting the planning and placement team with recommendations regarding the student's 2002-2003 program in the Board schools. According to the agreement, and pertinent to the issues in this case, the consultant would review the student's records, meet with the student's parents and Board staff, "[o]bserve the Board's preschool programs and observe [the student]," attend "one PPT" [sic] for the purpose of developing and finalizing the IEP for the 2002-2003 school year, "observe the preschool program while [the student] is in attendance two times a month over the [following] three months to assess the implementation of the program and to determine whether or not any changes or modifications are needed." The consultant was to begin performing these services not later than October 30, 2002. Exhibit B-70.

17. The Board and the consultant, Lynn Zimmerman, Ph.D., believe that the agreement required the student to begin attending the Board school immediately after the parties entered into the agreement. The student did not immediately begin attending the Board school. The student's father testified that between October 2, 2002, and December 17, 2002, there was no discussion of goals and objectives and no proposed IEP for the student's attendance at the Board school. The student's father also testified that because of the student's escape and darting behaviors, the parents had concerns about the student's safety. Testimony, May 15, 2003. Although Dr. Zimmerman testified that she had observed the student's program, when Dr. Smaller inquired about observing the student's program she was told that there was no program in place. Dr. Zimmerman testified that she found the goals and objectives developed for the May/June 2002 IEP to be acceptable, but added that it is "not helpful, not my practice to parse an IEP." Dr. Zimmerman further testified that she never discussed with the student's parents their objections to the May/June 2002 IEP. Testimony, May 15, 2003. The student's father testified that when Dr. Zimmerman met with the parents on December 3, 2002, she said it was her role ("she felt compelled") to come up with suggestions/recommendations that would be approved/accepted by the Board. Testimony, May 15, 2003. Dr. Zimmerman's recommendations provide no details regarding an actual, existing program. Exhibit B-65, pp. 11-12.
18. The PPT met on December 17, 2002, to develop, review and/or revise the student's IEP. Exhibit B-64. Based on Dr. Zimmerman's recommendations, however, the May/June 2002 IEP was not revised at the December 17, 2002, meeting and there was no discussion regarding the appropriateness of the goals and objectives drafted in May/June 2002, notwithstanding the passage of almost seven months and notwithstanding the fact that the parents had sought due process hearing in July 2002 because they had rejected the very same IEP being offered again in December 2002. The parents read a statement in which they acknowledged, to the extent possible, the positive steps which had been taken by the Board to plan a program for the student, and their willingness to work with the Board in developing a program for the 2003-2004 school year. However, the parents' statement also requested that the student be immediately placed at the Foundation School on the grounds that the Board was not yet able to provide a program appropriate to meet the student's needs. Exhibit B-65.
19. The Board refused the parents' request for placement at the Foundation School. On January 13, 2003, the student began attending the Foundation School. The parents requested due process hearing on February 26, 2003.
20. On May 10, 2003, Dr. Smaller observed the student the Foundation School for 2 hours and 15 minutes in a small room devoid of visual distractions, a one-to-one setting, and testified that she observed "dramatic improvement." Compared to her observation of the student in June 2002, Dr. Smaller observed the student to be more attentive, relating to the therapist, making good eye contact, and using spontaneous language not previously seen by Dr. Smaller. The student's self-stimulating behaviors (hand-flapping, echolalia, etc.) were dramatically reduced, the student was

making needs known, distinguishing between self and the other person, commenting, and engaging in reciprocal social response. Dr. Smaller concluded that the student has responded positively to the Foundation School program. Testimony, May 15, 2003.

CONCLUSIONS OF LAW:

1. The IDEA does not require a Board to develop IEPs that “maximize the potential of handicapped children.” Board of Education v. Rowley, 458 U.S. 176, 189, 102 S.Ct. 3034, 3042 (1982). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by loving parents.” Walczak v. Florida Union Free School District, 142 F.3d 119, 132 (2d Cir. 1998), citing Tucker v. Bay Shore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). Nonetheless, pursuant to 34 CFR Section 300.342(a), each public agency “shall have an IEP in effect for each child with a disability within its jurisdiction” at the beginning of each school year. At the beginning of the 2002-2003 school year, the parties were in due process proceedings and the student was in a “stay-put” placement, the Board presumably operating under the IEP developed for the 2001-2002 school year. Between October 6, 2002, the date of the parties’ settlement agreement, and December 17, 2002, the last PPT meeting prior to the request which triggered this due process hearing, no new IEP was developed and the Board claims that the IEP developed in May/June 2002 was the IEP in effect for the student. Therefore, accepting the Board’s claim, the Board has the burden of proving the appropriateness of the May/June 2002 IEP, which burden shall be met by a preponderance of the evidence. R.C.S.A. Section 10-76h-14. The Board has failed to meet its burden.
2. According to Rowley, it must be determined whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-07, 102 S.Ct. at 3051. None of the Board witnesses provided testimony that would demonstrate that the May/June 2002 IEP was reasonably calculated to enable the student to receive educational benefit. There was no evidence or testimony to establish that, over two months after the parties’ agreement, the necessary transition and behavior plans were in place; no diagnostic placement was considered. Dr. Zimmerman’s testimony was that it would have been appropriate for the student to attend the Board preschool and “try out things.” Testimony and evidence regarding the IEP was too vague and imprecise to satisfy the measure of “reasonably calculated to enable the child to receive educational benefits.”
3. Instead, the thrust of the Board’s case here was that the parents failed to deliver the student to the Board preschool program pursuant to the agreement and, thus, the Board was prevented from implementing the IEP. The Board appears to claim that since the parents agreed to withdraw with prejudice their request for due process hearing regarding the May/June 2002 IEP, the parents are estopped from challenging that same IEP when it was offered to them in December 2002. In D.R. by M.R. and

B.R. v. East Brunswick Board of Education, 25 IDELR 734 (3rd Cir. 1997), the court expressed concern “that a decision that would allow parents to void settlement agreements when they became unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements.” However, it is concluded in this case that the terms of the parties’ agreement cannot supercede the requirement of the IDEA that the Board provide a free, appropriate public education. The parents did not breach the October 6, 2002, agreement by failing to deliver the student to the Board preschool. The Board failed to demonstrate to the parents, and to this hearing officer, that there was an appropriate IEP in place for the student’s arrival.

4. In order to be entitled to reimbursement, parents need only to demonstrate that the public school placement is improper under the IDEA and that the private school placement complies with the IDEA minimum standard of appropriateness, namely, that it is reasonably calculated to provide educational benefit. Florence County School District v. Shannon Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). Here, the testimony of both parents as well as the highly credible testimony and reports of Dr. Smaller have sufficiently demonstrated that the Board has not offered the student an appropriate placement, specifically designed to address the student’s unique needs, in a timely fashion. Based on Dr. Smaller’s testimony, the program at the Foundation School is reasonably calculated to provide educational benefit and the student is making great progress. The parents are entitled to reimbursement for the cost of the Foundation School for the 2002-2003 school year.

FINAL DECISION AND ORDER:

1. The Board failed to meet its burden of proving that an IEP reasonably calculated to provide educational benefit was offered to the student for the 2002-2003 school year.
2. The Foundation School is an appropriate placement for the student for the balance of the 2002-2003 school year.
3. The Board is ordered to reimburse the parents for the cost of the Foundation School for the 2002-2003 school year.