

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Waterbury Board of Education

Appearing on behalf of the Parents: pro se

Appearing on behalf of the Board of Education: Attorney Maurice B. Mosley
Office of Corporation Counsel
236 Grand Street
Waterbury, CT 06702

Appearing before: Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

- I. Whether the student's Extended School Year Program provides the child with a free and appropriate public education.
- II. Whether the child should have compensatory education for time the child should have been offered a program.

PROCEDURAL HISTORY

The parents filed a claim for hearing on June 20, 2003. At a prehearing conference on June 25, 2003 the parties agreed to convene the first day of hearing on July 11, 2003. Additional days of hearing convened on July 14, August 12, and August 13, 2003. The parties agreed to submit briefs two weeks after transcripts were received at which time the record was to close. The hearing officer received briefs on October 8, 2003.

SUMMARY

The parents dispute the time and duration of the child's extended school year. They claim the program fails to address the individual needs of the child. They claim the time and duration scheduled for the program are unilaterally determined by the local education agency based on programs provided to other children in the district with the child's disability. The program implements the child's individual education program. He has a

one-to-one behavior therapist who provides ABA/ discreet trial instruction which is constantly modified to meet the child's individual needs. The amount of hours and duration of the program fully considers the child's needs and are not an improper or unilateral limitation to his extended school year program.

FINDINGS OF FACT:

1. The child is ten years old and diagnosed with autism. The parties agree the child is disabled and eligible to receive special education and related services. (Exhibit B-4, Testimony Parent, Testimony, Cullinan)
2. The Institute of Professional Practice (IPP) serves as a consultant to the school for children on the autism spectrum. They oversee the child's special education program offered by the local educational agency (LEA). IPP provides a behavior therapist, who works with the child on a one-to-one basis for all aspects of the child's program. IPP provides a clinical supervisor who oversees the work of the behavior therapist. The therapist, clinical supervisor, school staff and parents meet and consult weekly and monthly to constantly assess, review and implement the child's program in the LEA school. The behavior therapist uses Applied Behavior Analysis (ABA)/discreet trial instruction. She coordinates and oversees most aspects of the child's day-to-day program. (Exhibit B-1, B-8, Testimony Nunez, Testimony, Mazaleski)
3. The clinical supervisor has a Masters degree in experimental analysis and three additional years of study towards a Ph.D. She has worked with disabled children for 15 years and autistic children for eight years. The child's behavior therapist has a Masters degree from Columbia Teacher's College and three years experience working with autistic children. (Testimony, Mazaleski, Testimony, Nunez)
4. The clinical supervisor outlined the child's progress over the past year. The child receives ABA in the learning center, joining learning center activities such as calendar, spelling and snack. The child experiences academic/cognitive delays and requires socialization and behavioral interventions. This year's progress includes the following: the child has a number of strengths; he is able to stay on task, follows the instructions of his behavior therapist, who has conditioned herself as a re-enforcer to engage the child in learning. He is using language, speaking in six and seven word sentences, asks "W-H" questions and uses language spontaneously. He is learning to discriminate auditory questions and distinguishes social questions and responds correctly. He is more connected and showing his personality. He is able to perform far point copy independently, no longer requiring prompts. He has increased his sight word vocabulary by 50 words and can add one column of numbers independently. New interventions are planned for target behaviors, new goals and objectives will be added to expand socialization. (Exhibit B-8, Testimony, Mazaleski)
5. The parents believe the child's problematic behaviors continue, in particular chair rocking, urinating in his pants, throwing-up and placing elbows and knees in the

toilet. The school staff acknowledges the parents' concerns and has programmed to reduce the behaviors. The child is having some success overall despite occasions when urinating increased at the time the child had a fever, possibly linking the cause to a urinary tract infection. The parents told the behavior therapist the child's throwing up might be related to allergy. The parents were unclear whether the child had medical problems which caused these behaviors.

6. The Institute of Professional Practice (IPP) reports success in addressing the behaviors overall, observing a reduction in maladaptive behaviors in the school setting. New strategies will be to provide a cushion for the child's chair and blocking elbows and knees in from the toilet. Behaviors are being adequately addressed by modifying the interventions as the child's needs indicate. (Exhibit B-8, B-12, Testimony, Parents, Testimony, Nunez)
7. Dr. Michael Powers of the Center for Children with Special Needs, is a consultant to the IEP Team. He reviewed the IEP and observed the new location for the child's program for the 2003-2004, school-year. The observation of the program was subsequent to the 6/4/03 IEP meeting. Dr. Powers made a specific recommendation that the peer group at the Generali School met the child's needs. He had an opportunity to consider whether the child should be placed with non-disabled peers during the ESY program and raised no objection to the program as planned. (Exhibit B-4, B-8, B-14, Testimony, Nunez)
8. Dr. Powers' 2001 evaluation recommends the child participate in a full day program to be developed over four years. The program should provide a minimum of 35 hours of discreet trial per week with direct teaching following the Applied Behavior Analysis system of instruction. Dr. Powers recommended ESY services in his 2001 evaluation stating specific hours and duration in his recommendation. In June 2003, Dr. Powers observed and approved the program, service providers and location for the child and relayed his approval of the quantity of program time offered the child as supplemented by one week of home instruction. (Exhibit, P-6, B-14, Testimony Cullinan, Testimony, Parent)
9. The parents disagreed with the amount of time the child was scheduled to attend the ESY program. The program time and duration differs from programs offered in ESY for 2002. The 2003 program offers five weeks, three days for five hours per day, with an additional week of a home component. The parents are concerned there is less timeto meet the child's needs such as socialization, behavior interventions, adjustment to a new peer group, time with non-disabled peers, instruction for academic delays and transition to a new location for the child's 2003-2004 program. (Exhibit P-6, B-4, B-14, Testimony, Parent, Testimony, Nunez, Testimony, Mazaleski).
10. The parents believe the child's maladaptive behaviors and other delays require that the child spend more time in ESY programming. The testimony of the school staff is credible that the behaviors are being addressed and the child is responsive to the

interventions. The parents have difficulty dealing with the child's constant need for supervision and appear to want more programming to help them cope with caring for him. (Testimony, Mazelski, Testimony, Parent)

11. The parents raised a request for stay-put after the start of the hearing. At the hearing, the parties agreed the stay-put request would be a claim for compensatory education should the parents prevail. The parents argue the June 4, 2003, IEP document was the last agreed upon IEP for the child. (Exhibit B-4, B-12, Testimony, Parent, Testimony, Cullinan)
12. The school administration claims the dates and time offered for the ESY on June 4, 2003 were a mistake. The June 4, 2003 offer was written without careful review of the school-year calendar. The dates and times entered on Exhibit B-4, for ESY, are written over and impossible to read. The school staff testified the 2003 school-year was two weeks longer than 2002 to make-up snow days.
13. The hours and duration for the ESY program were first discussed at the end of the annual review at the IEP meeting held on June 4, 2003. The team discussed a new location for the child's 2003-2004 program and planned for Dr. Powers to visit the program and location. At the June 19, 2003 IEP meeting, everyone agreed the child would transition to the Generali program for the 2003-2004 school-year and that the transition would occur over the summer. The IEP document (Exhibit B-12) stated different dates, times and duration for the ESY program because the Generali program was different from the Carrington program. The June 4, 2003 IEP meeting did not result in a finalized IEP for the 2003-2004 school-year. It was not finalized until June 19, 2003. Therefore it is found that the dates entered on June 4, 2003 were in error and not the agreed upon program for ESY, 2003. (Exhibit B-4, B-12, B-14, Testimony, Parent, Testimony, Amato, Testimony, Cullinan, Testimony, Mazaleski).
14. The parents object to the hours and duration for the ESY program at Generali claiming the school improperly limits the time the child receives ESY to that offered by the Generali school, which fails to meet the child's individualized needs. (Testimony, Parent)
15. The Generali school program was selected with Dr. Powers' approval because it services children who are older and more advanced than the Carrington preschool program. The Generali program meets four days a week for four hours per day. The child ultimately participated in a program five days per week, five hours per day, for five weeks and three days. The parents refused to allow the child to participate in the one week home program scheduled from August 11-15, 2003. The child had a two-week summer vacation prior to the start of the new school year. Dr. Powers approved of the plan and endorsed the home component of the program. Dr. Powers had an opportunity to consider and raised no objection to the issue of the time the child would spend in summer programs. He thought the child should participate in the in-home component. (Exhibit B-4, B-8, Testimony Nunez, Testimony, Cullinan)

16. The child's progress is monitored, utilizing Applied Behavioral Analysis (ABA) discreet trials. The data supports that the child has made progress and supports the team conclusion, that the child does not experience any unusual regression and recoupment during the program breaks. The child's strengths listed on his IEP include a good memory. The clinical supervisor reviewed data from periods of time following school breaks of two weeks.
17. The parents misunderstood how the data was interpreted believing a zero score on the data forms was associated with lost skills. The clinical supervisor was able to clarify that the zero score indicates the introduction of a new set of skills. The voluminous data, in fact, corroborates the clinical supervisor's testimony that the child does not have problems with regression and recoupment following breaks in the program. Even when the child experiences typical regression the data supports he rapidly recoups the skill. (Exhibit B-15-34, B-16-B-34, Testimony Mazaleski, Testimony, Nunez)
18. The child has significant academic delays, in fact in the past the IPP professional testified some of the child's problems with behavior and learning were because of poor instruction offered by CREC and other providers. The IPP program has rectified the problem and the child is experiencing progress in all areas of programming. The fact that the child still has problem behaviors does not mean he has not made progress.
19. The parents are advocating for the maximum amount of instruction for their child. The parents claimed a home program in past years was not successful because the child was distracted by the home environment. Behaviors at home include increased urination, difficulty with bedtime routine, bed-wetting, and bowel movements. IPP believes the child would benefit by having analysis of home behaviors to help the child generalize school skills to the home environment.
20. The parents appear to want the child's program to continue as recommended by evaluations performed several years ago, not on the current status of the child. Dr. Powers had an opportunity to address the changes in the child's ESY program. He tried to contact the parents to relay the information to them and reported, through school-staff, that the ESY program met the child's needs. He was invited to testify at the hearing but declined to do so. (Testimony, Parents, Nunez, Mazaleski, Cullinan)
21. The child's data confirms he is able to tolerate breaks in the program, in fact the clinical supervisor strongly advises that he should be able to have a break from school which he attends year-round including an extended school day. If the parents are experiencing any increase in inappropriate behaviors in the home, they had the opportunity to have highly qualified IPP staff come to observe the problems and assist in the home setting. The child could benefit from the behavior therapist observation of environmental variables that occur with the inappropriate behavior. The motivation system used with the child in school has resulted in a nice reduction of inappropriate behaviors. The same technique could help in the home setting.

22. Overall, it is the instruction that helps the child makes progress. The child is able to learn skills quickly and retain what he learns. The child appears to tolerate some variations in the number of hours, days and weeks of programming. (Exhibit B-8, B-15, B-17, B-24, Testimony, Mazaleski)

CONCLUSIONS OF LAW:

1. There is no dispute between the parties about the child's identification as an autistic child who is eligible to receive a free and appropriate public education (FAPE) with special education instruction and supplementary aids and services as required by the provisions of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1401 *et seq.*; and the Connecticut General Statutes 10-76 *et seq.*
2. The local educational agency (LEA) has the burden of proving whether an appropriate program has been offered by a preponderance of the evidence. R.S.C.A. §10-76h-14.
3. Whether a program provides FAPE is determined by the two-prong test first articulated in *The Hendrick Hudson Sch. Dist.v. Rowley*, 459 U.S. 176 (1982). The first prong requires the LEA to follow the procedural requirements of IDEA. The Supreme Court notes that emphasis on the procedural safeguards of IDEA reflects a conviction that adequate compliance with the prescribed procedures would in most cases assure much, if not all, of what Congress wished in the way of substantive content in a child's individual education program (IEP). *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998) quoting *Rowley*, 458 U.S. at 206. There is no claim the local education agency (LEA) failed to meet procedural safeguards. The second prong of *Rowley* requires that the IEP offered by the LEA must be reasonably calculated to enable the child to receive an educational benefit. The IDEA was enacted to assure that all children with disabilities have available to them a free and appropriate education which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary, to permit the child to benefit from the instruction, *Rowley*, at 458 U. S. 189.
4. In the present case the parents dispute the amount of time the child is scheduled to participate in the extended year program (ESY). At issue is whether the time and duration of the ESY program provides the child with a FAPE. Whether the curriculum provided in the ESY program is based on the individual needs of the child and whether the LEA unilaterally limits the child's program or in any way improperly limits the ESY program offered to the child is at issue in this case.
5. There is no disagreement between the parties that the child is eligible to receive extended school year services. 34 C.F.R. § 309 provides the LEA shall ensure that ESY services are available only if the IEP team determines, on an individual basis, in

accordance the child's IEP that the services are necessary to provide FAPE to the child.

6. Whether the child is eligible to receive ESY services is not in dispute in this case. The LEA, the parents, the Institute of Professional Practice (IPP) and Dr. Powers all agree, the child is eligible to receive extended school year services. Therefore, there is no need to analyze the degree of regression suffered in the past, the ability of the parents to provide structure at home, the student's behavior and physical problems, since there is no dispute as to whether the child should receive ESY services.
7. Is the ESY program individualized as required by 34 C.F.R. § 309? Once it is determined the child is eligible to receive ESY services the federal regulation requires the program meet the individual needs of the child. In the present case the ESY program implements the child's 2003-2004 IEP, which the parties agree is appropriate for the child. The IEP provides for discreet trials, transition to the new location, a more appropriate peer group, and a one-to-one behavior therapist, who is present during all aspects of the child's ESY day, to implement the child's individual program.
8. Following his observation of the child's program, Dr. Powers wrote a summary dated June 20, 2003. The summary content is directed to the overall program the Institute of Professional Practice (IPP) provides to the student for the LEA, and the observations were of "school year" classes rather than ESY classes. However, he recommends the child attend the larger more comprehensive program IPP provides at the LEA's Generali school. Dr. Powers states, "IPP provides a well organized, comprehensive, delivery model with well trained staff, utilizing behavior analytic teaching strategies and evaluation methods which are consistent with exceptional practice."
9. 34 C.F. R. § 309(3) provides that, when implementing the provision of ESY services, the LEA cannot limit services to particular categories of disabilities or unilaterally limit the type, amount or duration of those services
10. The LEA offered an ESY program for 2003 to run five weeks and three days, five hours a day, five days a week with an additional week of home instruction for three hours a day. The parents requested the program run seven weeks, six hours a day, five days a week. From June 4, 2003 until June 19, 2003 the parties discussed a number of possible solutions to compromising on the total hours for the ESY program.
11. The parents disagree with the time and duration for ESY services. Presumably they believe that the time and duration of the program is limited to the time offered to other autistic children in the LEA's district, in effect, unilaterally limiting the services offered to the child in a way that does not take the child's individual needs into consideration. The facts of the case do not support the presumption.

12. The LEA made several attempts to adjust the time the child would spend in the program by offering an additional time and an additional day from those typically offered in the ESY. The child attended the program from 8:00-9:00 a.m., time not programmed for most other children attending the Generali program. A home component was proposed, to provide the consistency of behavioral support and strategies the child requires in order to experience success in multiple environments. The home program offered either two additional hours of programming at home at the end of the ESY school day or one additional week at the end of ESY. The parent rejected the home program seeking instead to have the Institute of Professional Practice provide the child with services in a school or camp setting for one week.
13. The Assistant Superintendent of Schools and the parents placed calls to Dr. Powers office to request his approval /disapproval of the proposals for ESY programming. The Assistant Superintendent made Dr. Powers aware of the two week break between the ESY and new school year and programming options, either to provide a home component or time in a school where he was the only student. Dr. Powers stated year-round programming is essential for this student but did not specifically state whether any break, even for a two week family vacation, should be avoided. He had the opportunity to make that point in his contact with school personnel and in a subsequent message he left with the parents. Dr. Powers did state to the Assistant Superintendent of Schools that he preferred the home based program. Dr. Powers said he would contact the parents to let them know his opinion. The father and the mother acknowledge receiving a message about the home program from Dr. Powers but state they did not recall the content. The Assistant Superintendent's testimony regarding the home program is credible and the parents' testimony was evasive on this point. (Testimony Mother, Father, Cullinan)
14. Dr. Powers recommended ESY services in his 2001 evaluation specifically stating hours and duration of some of the hours applicable to his recommendations. Dr. Powers observed the IPP program in June 2003. He approved the program, service providers, and quantity of program time offered the child as supplemented by the week of home instruction.
15. The specific features of the ESY program do not violate the requirements of 20 U.S. C. §1412(a)(1) and 34 C.F.R. § 309(3)(ii) which prohibits the LEA from unilaterally limiting the type, amount and duration of services. To the contrary, from June 4, 2003 to commencement of the program, the LEA offered several variations of the program in an attempt to reach a resolution with the parents.
16. The short summer season of seven weeks rather than ten is a legitimate factor for the LEA to consider when proposing a program and locations for the child. School closures to prepare the building for the start of the upcoming school year are legitimate reasons to make adjustments to the program offered, particularly since neither the IPP staff or Dr. Powers objected to the program as proposed.

17. After the commencement of the hearing the parents requested stay-put relief. The hearing date scheduled to argue the motion occurred after the time the program in question ended. The parties agreed any remedy related to the parents successful prosecution of the stay-put motion would be in the form of compensatory education. The parents argue the child's stay-put IEP was the one proposed on June 4, 2003. (Exhibit B-4)
18. Both parties agree there was no dispute as to whether or not the child should have an ESY. Discussion of the specific dates times and duration occurred at the end of annual IEP review. The record does not support the parents' assertion that the dates, times and duration of the child's program were finalized on June 4, 2003.
19. The LEA testified the dates and times were not possible because the school calendar with snow dates resulted in seven weeks of summer vacation in 2003. Testimony supports the LEA position that there was a mistake in entering ESY dates on the June 4, 2003 IEP form. The parents and the LEA understood there would be an additional IEP meeting after Dr. Powers' observation of the program. Another IEP meeting convened on June 19, 2003. The LEA is credible in their account of the error which failed to consider the shortened summer vacation. The plan to meet again as the parties did on June 19, 2003 further supports testimony that the IEP was not finalized and agreed upon on June 4, 2003. The offer of the home component approved by Dr. Powers would have provided the child with a full summer of programming with a two-week break prior to the 2003-2004 school-year. The parents would not have prevailed in a request for stay-put, therefore they are not entitled to the agreed upon remedy of compensatory education.
20. The parents rejected the home component of the program due to a negative past experience with another provider. Many of the behaviors which concern the parents appear to be more problematic in the home setting and the time would have been beneficial to both the child and the parents. It is not possible to force the parents to accept the home program. The Institute of Professional Practice consultants and Dr. Powers believe it to be an appropriate addition to the child's program.
21. The team decided the child was eligible to receive an extended school year. The services the child received are based on his individual needs. There is nothing in the record, testimony or exhibits, which state a two-week break from school for school holidays and vacations is inappropriate for this child. The time and duration of the program offered to the child is not based on school policy, but is calculated to provide the child sufficient time in a program that is appropriated to meet his individual needs. The local educational agency has proven by a preponderance of the evidence that the ESY program is appropriate for the child.

FINAL DECISION AND ORDER:

1. The ESY program offered for the summer of 2003 was appropriate for the child. The parents' request for additional time is denied.
2. The parents' request for compensatory education is denied.