

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Southington Board of Education

Appearing on behalf of the Student: Parent, Pro Se

Appearing on behalf of the Board: Attorney Nicole Bernabo
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646 Prospect Avenue
Hartford, CT 06105-4286

Appearing before: Attorney Christine B. Spak
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

- 1) Should the Student undergo a psychiatric evaluation by a psychiatrist of the Board's choosing?
- 2) Should the hearing officer override the family's refusal to consent to special education services to be provided by the Board?

PROCEDURAL HISTORY

The prehearing conference was held on August 28, 2003. Neither parent was available at the telephone numbers provided to the hearing officer by the Board. The father left his work telephone number on the hearing officer's voicemail shortly after the prehearing conference ended. On or about September 5, 2003, the father left another voicemail on the hearing officer's voicemail indicating that he would not attend the hearing because he couldn't afford to take more time off from work and that he objected to the special education program and psychiatric evaluation and would never let his son participate in a special education program.

The hearing convened on September 11, 2003. Neither the parents nor the Student appeared at the hearing. The Board's attorney left a voicemail message for the father at his work number, and Ms. Frances Haag, Senior Coordinator for Special Education, left a message for the parents regarding the hearing. Neither parent appeared at the hearing. Because of the father's telephone reference to work hours, the hearing officer left open the evidentiary portion of the hearing for thirteen days after the conclusion of the September 11, 2003 hearing in order for the family to request another hearing date in the

evening hours to put on their case. Communication was mailed to the parents advising them of this opportunity and of the fact that, if requested, the hearing would be held in the evening to accommodate the parents' work schedules. Neither parent responded to this communication. Accordingly, the evidentiary portion of the hearing was closed at the end of business on September 24, 2003.

The Board submitted a written brief regarding its proposed findings of fact and conclusions of law on October 17, 2003. The parents did not submit anything after the date of hearing.

FINDINGS OF FACT:

1. The Student is currently in 5th grade and is 9 years old. The Student's parents are divorced. He lives with his father in Southington.
2. The Board provided alternative strategies to the Student through an early intervention plan, counseling services, behavior modification programs in the classroom and teacher/parent communication. [B-15; Testimony of Linda Reilly]
3. On or about March 18, 2002, the Student was referred for special education identification because he was increasingly off task over a course of months, and exhibited a variety of avoidance behaviors (e.g. bathroom, nurse). [B-4; testimony of Linda Reilly]
4. A PPT was held on April 10, 2002 to discuss a referral to special education and consider/plan an evaluation. [B-6 – B-8] The PPT recommended a full psycho-educational test battery to be completed by the school psychologist, speech and language pathologist and special education teacher. [B-7 and B-8] The PPT recommended that it reconvene to discuss identification and possible services once the evaluations were completed. [B-8]
5. The psychological evaluation was conducted on the following dates: April 23, 24, 26, 30, May 2 and 22, 2003. [B-10; Testimony of Geoffrey Zeruk]. His report indicated that:

[The Student] has overall average intellectual functioning (FSIQ: 100). His verbal, or language skills (VIQ: 104) are better developed than his nonverbal, visual-motor skills (PIQ: 96). The difference is not significant. [The Student] demonstrated a significant strength in short-term auditory memory and weaknesses in processing speed and abstract thinking.... Projective measures [and teacher rating scales] found the Student to be a sensitive individual with feelings of anxiety, anger, and sadness with events that have occurred in school, but especially at home. He has a difficult time relating to his peer group and feels inferior to them. He has a difficult time accepting responsibility for his actions and has a difficult time adjusting to change.

[B-10, p.8]

6. The speech and language evaluation was conducted over a two week period for one half hour each session to assess his language skills. [B-11] The evaluator found no significant discrepancy between his receptive and expressive language skills. [Id.] The evaluator concluded that the Student

...has some difficulty using grammatical markers in speech and writing. He does, however, have a strong knowledge of grammatical structures. [the Student] is overall in the average range and does not qualify for language therapy at this time.

[Id.]

7. A report from Francine T. Walko-Strazdas, Guidance Counselor at Thalberg School, indicated that she began seeing the Student in November 1999 when he was in Grade One. [B-13] She stated in the report that

[t]he focus of our sessions was on behavior, communication of feelings and anger management. Counseling services continued in Grade Two and [the Student] participated in a behavior modification program for appropriate behavior, on task behavior, completion of work and positive peer relationships.

[Id.] She further reported that in Grade Three, although the Student started off the year with many successes, his behavior deteriorated during the early month of November and continued into spring. [Id.] In sum, she reported that the Student

...appeared confused, helpless, afraid and preoccupied with his current relationship with his mother. His behaviors were unpredictable and he would exhibit extreme mood swings, experiencing highs and lows within a counseling session, depending on the topics that were being discussed.”

[Id.] The counselor concluded that the Student is emotionally at risk and that he will benefit from continued in school counseling when he enters Grade Four for emotional support and close communication between school and home.

The Student had an excellent and trusting relationship with the Guidance Counselor Francine Walko-Strazdas, and their sessions were important to the Student and were helping him until the father objected to the sessions continuing. Testimony of Geoffrey Zeruk, School Psychologist.

8. The educational evaluation ruled out any learning disability and found that the Student's achievement scores match his aptitude level. [B-17] His written expression was an area of concern. [Id.]

9. At the May 29, 2002 PPT meeting the team reviewed the evaluations and determined that the Student was eligible for special education as emotionally disturbed. [B-15-B-16] The team recommended that he receive guidance services 20 minutes per week and one hour per week of special education services for written expression. [B-16] The parents refused special education services. [B-15; B-12]

10. A functional behavioral analysis was conducted on the Student and a behavioral intervention plan was developed. [B-19]

11. According to his fourth grade teacher, the Student has 'so much ability' and a very kind heart, but that his behaviors interfere with other students being able to see that side of him. [Testimony of Linda Reilly]

12. The Student was increasingly off task during his fourth grade year despite her interventions. [Testimony of Linda Reilly; B-23] The Student continuously talked out during structured teaching lesson, played with objects nearby, lied, told inappropriate stories, and used inappropriate language. [Id.] He had difficulty accepting responsibility for his negative behaviors and was unable to interact positively with his peers and maintain relationships. [Id.]

13. As a result of the Student's continued negative behaviors in school, the team scheduled another PPT on June 19, 2003 to again identify the Student for special education services and review programming. [B-26] The PPT determined that the Student was still eligible for special education services as an emotionally disturbed Student. [Id.; B-27] The team recommended that the Student receive 3 hours of academic support and 30 minutes of counseling per week. [Id.] The team developed an IEP and also recommended a psychiatric evaluation in order to help with the Student's social/emotional functioning and well being. [Id.] The parents left the PPT meeting prior to its conclusion and they were informed that the team would continue with the recommendations, including the development of goals and objectives. [Testimony of Geoff Zeruk] Again, the parents refused the special education services and the psychiatric evaluation. [B-28; B-29]

14. Geoff Zeruk testified at the hearing that he would like to see the Student receive additional services in school in order to help him academically. [Testimony of Geoff Zeruk] The Student is suffering because of his negative behaviors and is unable to perform consistent with his abilities. [Id.] He has a difficult time producing academic work. [Id.] An independent psychiatric evaluation would be of assistance so that the Student's medication regime can be reviewed by a medical professional with full understanding of the educational impact the medical interventions are or are not having and his social/emotional functioning can be assessed to determine what additional accommodations may be needed for the Student. [Id.]

15. Some of the Student's behaviors are extremely alarming. [Testimony of Linda Reilly] He participates in the "Don't Laugh At Me Program" in school regarding bullying and threatening behaviors with peers; yet he draws pictures and/or writes things

about other students stating that he will “bash his head in.” [Id.] He will sit in the classroom and shut down completely at times where he sits Indian style and crosses his arms refusing to do work. [Id.] The alternative regular education strategies that have been used with the Student for over two years have not been helpful to improve the Student’s behaviors and he needs more intervention through special education services at this time. [Id.] Furthermore, Ms. Reilly testified that she has concerns about the Student’s safety. [Id.]

CONCLUSIONS OF LAW:

1. The Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §1401, et seq.
2. The term “child with a disability” means a child (i) with...emotional disturbance; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. §1401(3), 34 C.F.R. §300.8(a)(1).
3. Emotional disturbance is defined under the federal regulations as follows:
 - (i)The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - (C) Inappropriate types of behavior or feelings under normal circumstances;
 - (D) A general pervasive mood of unhappiness or depression;
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems;
 - (ii) ...The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance.
4. If, after evaluation, a child is found to have an emotional disturbance, the team must also find that the child, by reason of this condition, requires special education. 34 C.F.R. §300.7(a)(1). Special education is defined as “specially designed instruction”. 34 C.F.R. §300.26(a)(1). Specially designed instruction means adapting “the content, methodology, or delivery of instruction...to address the unique needs of the child...[and]...ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 C.F.R. 300.26(b)(3).
5. Taking these requirements together, in order to find a student eligible for special education services as a child with having a Serious Emotional Disturbance [SED],

- the Planning and Placement Team (PPT) must find that the student exhibits one of five characteristics of emotional disturbance (1) over a long period of time (2) to a marked degree, such that it (3) adversely affects the Student's educational performance, (4) causing the child to require specially designed instruction in order to receive a free appropriate public education.
6. The PPT appropriately found that the Student meets the criteria of emotional disturbance based on an inability to learn that cannot be explained by other factors, or a tendency to develop physical symptoms or fears associated with person or school problems. Signs of depression are also noted, and the Student has admitted to being sad, angry and anxious. Furthermore, it is reported and observed that the Student has an inability to maintain satisfactory interpersonal relationships with peers and exhibits inappropriate types of behavior or feelings under normal circumstances, all of which is very stressful, particularly for a young child.
 7. The Board is seeking a psychiatric evaluation of the Student to determine an appropriate program for the Student and to further assist the Student with his social/emotional needs. In conducting its evaluation, the Board is required to ensure that a complete evaluation study is conducted. Conn. Agencies Regs. §10-76h-9(a) The evaluation study shall include reports concerning the child's educational progress, structured observation and such psychological, medical, developmental and social evaluations as may be appropriate in determining the nature and scope of the child's exceptionality. Conn. Agencies Regs. §10-76-9(a).
 8. It is the obligation of the PPT to review existing assessment data regarding a child and to determine whether additional information is necessary in order to program for the child. Initially the PPT reviews existing evaluation data and identifies:
 - What additional data, if any, are needed to determine –
 - (i) Whether the child has a particular category of disability, as described in Section 300.7, or, in the case of a reevaluation of a child, whether the child continues to have such a disability;
 - (ii) The present levels of performance and educational needs of the child;
 - (iii) Whether the child needs special education and related services, or, in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP

of the child and to participate, as appropriate, in the general curriculum.

34 C.F.R. Section 300.533(a)

9. In this case, the Student's presentation and demeanor have created a challenge for the members of the PPT to address successfully, as it is unclear whether the Student's educational problems are due to a psychiatric disorder, and, if so, how to appropriately draft an IEP for the Student. Additional assessment information is needed to make this determination.
10. The parents have refused to consent to a psychiatric evaluation. The Board is entitled to the requested evaluation in order to fulfill the need to have current assessment data to ascertain the child's disability and level of functioning pursuant to 34 C.F.R. Section 300.533(a)(2).
11. In the absence of parental consent for evaluations, hearing officers may order special education evaluations without the consent of the parent. Conn. General Statutes §10-76h(d)(1) The federal regulations specifically indicate that when the parents of a child with a disability refuse consent for initial evaluation or a reevaluation, the Board may continue to pursue the evaluations through the due process procedures. 34 C.F.R. Section 300.505(b) The Board has appropriately brought such a request, and the evidence supports that the psychiatric evaluation is necessary so that the evaluation of the Student is sufficiently comprehensive to identify all of the child's special education and related services needs. 34 C.F.R. Section 300.532(h)
12. The Board is also seeking the hearing officer to override the parents' refusal to consent to special education. The parents have refused consent to special education services. A hearing officer cannot order the parents to consent to special education, it is within the hearing officer's jurisdiction to order a diagnostic placement of the Student in accordance with Conn. Agencies Regs. §10-76d-14(b). The purpose of the diagnostic placement is to assess the needs of a child for whom an individualized educational program may be needed, but for whom the evaluation study is either inconclusive or the data insufficient to determine the child's individualized education program. Conn. Agencies Regs. §10-76h-14(b) The diagnostic placement is a method of evaluation, not educational placement. *See, e.g., West Hartford Board of Education, OCR 01-86-1016, 352 IDELR 300 (1986)*
13. The diagnostic placement may not exceed eight weeks in duration, the PPT must specify in writing the diagnostic goals and objectives as well as the types and amounts of services needed to conduct the program in order to determine more conclusively the child's needs, the PPT must meet at least once every two weeks with personnel working with the child to discuss the child's progress and to revise, where necessary, the services being provided, and the PPT must convene five

days before the end of the diagnostic program to complete the IEP. Conn. Agencies Regs. §10-76d-14(b)(1)(2)(5). Therefore, in the absence of parental consent for special education programming, a diagnostic placement is ordered. Conn. General Statutes §10-76h(d)(1)

14. The strong and compelling evidence presented indicate that there are valid concerns regarding the emotional status of the Student. The school psychologist has indicated the need to assess the Student to determine an appropriate comprehensive broad-based program for the Student's needs. It is clear that the alternative strategies used by the school have not gone far enough to assist the Student in school. The PPT's recommendation for special education services and the current IEP, which has not been challenged in due process by either parent, and does not appear unreasonable given the information the team has at this time, is not in dispute here.

FINAL DECISION AND ORDER:

1. The Student shall be evaluated by an independent psychiatrist of the Board's choosing.
2. The hearing officer has no authority to order a parent or a Student to participate in a special education program. The hearing officer does have the authority to order a diagnostic placement which is hereby ordered. Because of the complex emotional components of the Student's behavioral difficulties, in designing the diagnostic placement, the Board should consider utilizing to the fullest extent possible, personnel with whom the Student has had a trusting and productive relationship.