

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Newtown Board of Education

Appearing on Behalf of the Parents: Attorney Cecelia M. Barnum
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Appearing on Behalf of the Board: Attorney Frederick L. Dorsey
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Appearing Before: Attorney Justino Rosado, Hearing Officer

FINAL ORDER AND DECISION

ISSUES:

1. Is the program offered by the Board for the 2004-2005 school years appropriate?
If not;
2. Does the program offered at Ben Bronz Academy offer the student an appropriate education as defined in 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a?

PROCEDURAL HISTORY:

The Parents' attorney filed a request for due process on May 14, 2004. (Hearing Officer (Hereinafter HO) Exhibit 1). A pre-hearing conference was held on May 25, 2004 at which time a hearing dates of June 17, 29 and July 20, 2004 were selected at the convenience of the parties. The Parents made an oral Motion to include compensatory education as an issue for the 2004-2005 school year. This motion was not granted. The Parent did not object to the Hearing Officers decision.

The Hearing Officer requested that Dr. Armand Thies perform an analysis of the Board's I.E.P. for the 2004-2005 school-year.(H.O.2) The Board, based on the evaluation of the April 4, 2004 IEP by Dr. Thies, made an Oral Motion for the Hearing Officer to order a PPT and Dismiss the Due Process Hearing. The Parents objected to this Oral Motion and the Board's Motion was Denied.

The Order and Decision date was extended to September 7, 2004.

SUMMARY:

The student is a 13 year-old young man who has been identified as learning disabled and is entitled to receive a free and appropriate public education. The student had shown a deficiency in his reading and writing and test performed showed no growth in his reading. The Parents rejected the 2004-2005 IEP and requested placement at Ben Bronz Academy at the Board's expense. The Board refused the Parents' request and the Parents requested a Due Process Hearing.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. To the extent that the summary and findings of fact actually represent conclusions of law, they should be so considered and vice versa. For reference, *see SAS Institute Inc. v. S. & H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D.Tenn. 1985) and *Bonnie Ann F. v. Callallen Independent School Board*, 835 F.Supp. 340 (S.D.Tex. 1993).

STATEMENT OF FACTS:

1. The student is a 13 year-old young man who has been identified as learning disabled and is entitled to receive a free and appropriate public education ("FAPE") with special education and related services under the provisions of the Individual with Disabilities Education Act ("IDEA"), 20U.S.C. §1401 et seq. and Connecticut General Statutes, § 10-76, et seq.
2. The student transferred from another state's public school to the Board's elementary school at the beginning of the 2000-2001 school-year. While in the first grade at the other state's district school, the student was evaluated and found to be eligible for special education with a diagnosis of dyslexic and speech and language impaired. While in that state's school district, the student repeated the second grade at Parents' request. (Testimony of Father)
3. In September 2000, the Board evaluated the student and identified him as speech and language impaired. The evaluator found the student to be having a basic reading skill of 2.8 grade equivalent and 8.3 age equivalent. The student at the time of testing was 9.1 years-old and in grade 3.1. The student was given a WISC-III and obtained a Full Scale IQ of 91. (Testimony of Father, Board's Exhibit (Hereafter "B")-13, p.8, B-16 p. 7 and B-17 pg. 4)
4. In December 2002 the special education teacher did another achievement assessment of the student. The student's test scores showed a decline since his September 2000 test. The teacher attributed this decline to the student's attitude. (B-31)

5. On May 5, 2003, Dr. Armand Thies gave the student a neuropsychological evaluation. The evaluator found that the student's reading comprehension was so poor that it is severely discrepant from his measured intelligence even when the discrepancy is corrected for regression. The evaluator recommended the application of the student's phonetic decoding skills and training in keyboard skills to permit word processing. (B-38 p. 3) In March 2003 the same doctor performed another neuropsychological evaluation, the student showed significant improvement in reading comprehension even though his overall reading quotient remained the same. The student's relative standing in respect to peers indicated the same rate of growth as peers. This evaluation continued to show that the student was not employing the phonetic decoding skills that he possessed. (B-58 p. 3)
6. The March 2004 psychological evaluation showed that reading was not a functional skill for writing and writing was barely adequate for the most elementary functional uses. The student does not apply skills that he has learned. (B-58 pp. 4 & 5)
7. The student has an aide that is assigned to work with him for 2 periods each day for 2 days each week. The aide also assists him in the learning laboratory for ½ hour. The aide assists the student in his social studies and science class. The aide obtains information for the student on the internet and shares it with him. The aide notices that the student gets frustrated when he cannot read. (Testimony of Student's Education Assistant)
8. The student's April 2003 and June 2003 IEPs did not require any assistive technology. (B-39 & B-41). On July 17, 2003 the PPT revised the student's 2003-2004 IEP. The assistive technology was revised to include Kurzweil and Inspiration software to assist the student in his program. (B-48 p.5) The student was to be evaluated for assistive technology. There was no evaluation done of the student for assistive technology. (Testimony of Mother).
9. The Kurzweil software in the student's 2003-2004 IEP was not made available to the student until the beginning of 2004. The student still has not been given the Inspiration Program that is part of his 2003-2004 IEP. (Testimony of Mother and Director of Pupil Services)
10. On November 25, 2003 a Final Order and Decision was rendered on a request for Due Process for the 2003-2004 school-year. The Final Order and Decision ordered that the student be provided with a computer for his own use while in the Board's School. (B-53) The student shares a computer with the other students in his class. In March 2004, the Board obtained a computer for the student's use but has not made it available to him. (Testimony of Director of Pupil Services)

11. The student has three cognitive impediments to learning:
 - a. A deficiency in his reading fluency.
 - b. A deficiency in his writing,
 - c. A difficulty in integrating elemental skills into more complex functional tasks.

The student also shows difficulty organizing himself, in order to do his homework. The student's November 13, 2003 IEP did have interventions that were appropriate. This IEP was geared for the student to master coding skills instead of the application of these skills. (Testimony of Dr. Armand Thies)
12. The student's 2004-2005 IEP does not address his low production in writing and time management and scheduling. (Testimony of Dr. Armand Thies)
13. Ben Bronz Academy's program focuses on organizational and executive kinds of functions. The student would be a good candidate for the Ben Bronz Program. (Testimony of Dr. Armand Thies)
14. Ben Bronz Academy has programs for children with average intelligence who have reading problem. This program is designed to get the children to grade level. Ben Bronz would do its own evaluation and would create a program specific for the student. The Academy would use the periods necessary to get the student to grade level. (Testimony of Parents' Educational Consultant)
15. The student's I.E.P. does not reflect what reading program will be used during the 2004-2005 school year. The special education teacher was of the opinion that it is not necessary to write in the IEP the strategies of a program or anything that is going to be used to get the student to master his goals and objectives. If another teacher were to teach the student, the new teacher would have all the notes and reports from the prior teacher in order to continue the student's goal. The teacher should decide what would work for a student. (Testimony of Special Education Teacher).
16. The student can be educated in the Board's school provided the Board can provide the proper interventions. The student can make some progress but it is not likely that he will close his gap. (Testimony of Dr. Armand Thies)
17. The student has not attained functional reading and writing skills. The Board reviewed the evaluation of the 2004-2005 IEP by Dr. Thies and was willing to modify the IEP and increase the student's writing and entertain the doctor's recommendations and obtain his input. (Testimony of Director of Pupil Services)

CONCLUSIONS OF LAW:

1. The student is entitled to special education and related services to be provide at public expense pursuant to 20 U.S.C. §§ 1401, et seq (IDEA) and Connecticut State Regulations §76a-1(d).
2. Connecticut Regulations provide that "the public agency has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency." Conn. Reg. 10-76h-14(a) *see also Walczak v. Florida Union Free School Dist.*, 142 F.2d 119, 122 (2d Cir. 1998).
3. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al v. Rowley*, 458 U S 176 (1982), 102 S Ct 3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized education program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.
4. The first prong under the *Rowley, supra*, test; require a review to ensure that the Board complied with the procedural requirements of IDEA.

Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with Sec. 300.342(c), an IFSP). *34 C.F.R. §300.343(a)*

IDEA regulations require, A statement of --

(i) How the child's progress toward the annual goals described in paragraph (a) (2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year. *34 C.F.R. §300.347(a)(7)*.

There was no showing by the Parents that the Board committed any procedural violations. The Parents made no charge that they did not receive proper notice for the PPT or any other violations in the preparing of the IEP for the 2004-2005 school-year. The school year in question had not commenced prior to the hearing. At the Due Proces Hearing for the 2003-2004 school year, the Board had indicated that it would implement the assistive technology portion of the IEP. (Due Process Hearing Order and Decision Case # 03-215, November 25, 2003) There was testimony presented by the Parents and the Board that the assistive technology as presented at the prior hearing had not been implemented. (Findings of Facts #8 & 9).

5. The second prong of IDEA asks if the IEP was reasonably calculated to enable the child to receive educational benefit. Dr. Thies testified that the student could be taught in the Board's school as long as the Board provided the proper interventions. After the receipt of Dr. Thies' evaluation of the 2004-2005 IEP, the Board made an oral motion for the Hearing Officer to order the conveyance of a PPT and dismiss the hearing. The Director of Pupil Services stated that the Board was willing to modify the IEP to include the recommendations of Dr. Thies. (Testimony of Director of Pupil Services, Findings of Facts #15)

6. The Parents have present sufficient evidence to show that the program offered by the Board is not appropriate. The Board has shown their concern and desire for the student to receive FAPE but this concern has not been proven by actions. The student's school years have shown that the Board provides IEP's but does not implement them in order to provide the student with FAPE even prior hearing officer orders and decisions were ignored by the Board. (Findings of Facts # 4, 8, 9 and 10) The Parents presented valid testimony and evidence that the student had not progressed in the Board's school in prior years with prior IEPs. The Board's willingness to modify the current IEP is fine but modification without complete implementation would doom this student to minimal progress in the Board's school without the opportunity to at least reduce the gap in his deficiencies, since the prognosis is that he will not be able to completely close the gap. (Findings of Facts # 15) Dr. Thies testified that the Board's 2004-2005 IEP did not address the student's writing needs and organizational issues, even though they had been highlighted in previous evaluations. (Findings of Facts # 11) The doctor was of the opinion that the student would be a good candidate for Ben Bronz Academy. There was testimony that the student had made progress and progressed at the same rate as his peers. Minimal progress is not sufficient for this student.

7. The Board presents the argument that the Parents requested placement at Ben Bronz Academy is not the least restrictive environment for the student and that the Board's school is the LRE for the student and complies with IDEA: *Each public agency shall ensure- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (2) 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.* 34 C.F.R. §300.550(b). Dr. Thies testified that student could be educated in the Board's school provided the Board can provide the proper interventions. The Board has not shown that the education of the student can be achieved satisfactorily in the type of environment sought by the Board. *See, Lachman v. Illinois State Board of Education*, 852 F.2d. 290, 295 (7th Cir. 1988). The Board was not convincing that any modifications that they would make to the student's IEP would be enacted. The LRE for this student is Ben Bronz Academy.

FINAL ORDER AND DECISION:

1. The program offered by the Board to the student is not appropriate.
2. The program at Ben Bronz Academy is appropriate.
3. The Board shall be responsible for the student's program at Ben Bronz Academy.