

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Appearing on behalf of the Parent: Parent appeared *pro se*

Appearing on behalf of the Board: Attorney Nicole A. Bernabo
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Appearing before: Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

- I. Whether the Local Educational Agency (LEA) can propose a diagnostic placement to evaluate a disabled child when the parent has withdrawn consent to evaluate the child?

PROCEDURAL HISTORY

The parent filed a claim for a hearing when she and the LEA failed to reach an agreement for an evaluation in a diagnostic placement. The LEA filed for a hearing with the same issue after the parent's counsel withdrew from the case. At the request of the LEA the two cases were joined under the same case number. The parent subsequently refused to participate in a telephone planning conference, withdrew her claim for hearing; the hearing proceeded in her absence.

SUMMARY

The child is identified as having attention deficit disorder (ADD), serious emotional disturbance (SED) and a specific learning disability. He fails to progress in his individual education program (IEP) despite extensive modifications to his program and behavior intervention plan (BIP). The IEP team obtained input from two independent consultants, provided an alternative education program and now seeks comprehensive assessments in a diagnostic placement as a foundation for developing an appropriate IEP for the child. The parent withdrew consent to evaluate and opposes the diagnostic placement chosen by the LEA.

FINDINGS OF FACT

There is no dispute the student is identified as disabled. His diagnosis includes a specific learning disability, Attention Deficit Disorder and Serious Emotional Disturbance. The child is, therefore, eligible to receive specialized instruction and services pursuant to the Individuals with Disabilities Education Act. (Testimony, Special Education Teacher, School Psychologist)

The child's classroom teacher describes the child as sometimes polite, happy, content, giving, helpful, friendly with young children and caring. He has another side and can be verbally and physically aggressive, bullying, swearing and manipulative. (Testimony, Special Education Teacher)

Academically the child is below grade level in reading and math and has strength in expository writing. Class performance is tied to his emotional state; he often refuses instruction from his teachers. At times, he is so disruptive when the teacher attends to other students that the other students have to be removed from class. The disruptions often occur when he returns from recess. It is documented the nurse has seen the child one-hundred times in one year for headaches and other ailments. The team scheduled instruction for times when the child would be most likely to learn. They limited nurse visits to times when the child had a break in his work schedule. (Testimony, Special Education Teacher)

In November of 2004, the IEP team proposed, an alternative education placement, which the parent refused. Next, the team modified his program with interventions to meet the child's needs within the public school setting using the school curriculum. There is a Behavior Intervention Plan (BIP) with charts, a token economy and a log for the parent. Van transportation replaced school bus travel. The child's schedule was changed to provide him with a half-hour to acclimate to the school day. The classroom aid kept a record of daily events because the child made dishonest reports to the parent, further disrupting an already strained relationship between parent and staff. The child needs additional testing to analyze the problems he encounters despite all the program modifications. He has had nine suspensions for the year; a manifestation determination followed an incident when he struck his teacher. (Testimony Special Education Teacher, Exhibit B-4)

The child was evaluated by Dr. Black, an independent evaluator, (Exhibit B-4). The report is credible and consistent with the findings and conclusions of the IEP team. Dr. Black recommends an alternative learning environment and a BIP which includes several levels of intervention, from optional breaks, warnings, a token economy and consequences. The teaching staff viewed the BIP as a recipe to follow and they recorded data on its effectiveness. The team planned to have Dr. Black remain involved by observing at school, the parent rejected this plan. A planned triennial evaluation includes psychological evaluations and behavior rating scales. (Testimony Special Education Teacher, Exhibits, B-4, B-6, B-7)

Following the incident when the child struck his teacher the team decided more information is necessary to provide the child with an appropriate school program. The team determined a diagnostic placement in a therapeutic setting is appropriate. The parent did not agree to the plan. The LEA then planned for a consultant to come to the school and perform a functional behavior assessment, the parent agreed in part, to participate. The parent later refused to cooperate and made claims she planned to move out of the district. The witness testified the parent claimed she was planning to move on several occasions in the past. The child reported to the parent the independent consultant hit him; after the accusation the consultant withdrew from the case. (Testimony Special Education Teacher, Exhibit B-8, B-10)

The school psychologist has known the child several years and provided direct services in 2004-2005. He confirms much of the special education teacher's testimony. The psychologist was able to establish a good rapport with the child; he was able to observe the mood swings, and manipulative tactics. The child can be physically and verbally abusive, threatening and manipulative. He wants to please, and be successful and can be socially engaging in an immature way, but he has a low tolerance for frustration. He refuses to work with his teachers. The BIP was appropriately modified and, initially, the token economy engaged the child he showed increased compliance with school rules. The child's goals and objectives were again modified in March of 2005 as a result of Dr. Black's recommendations. Placement in an alternative educational setting is consistent with Dr. Black's recommendations. (Testimony School Psychologist, Exhibit B-2, B-4, B-6, B-7)

The school psychologist believes a neuro-psychiatric evaluation is necessary to assess the child's headaches and what impact medication has on the child. The school psychologist recommends a diagnostic placement at the Rushford Center because of its convenient location, its day treatment program is in a small group setting with a psychologist on the premises and there is a family counseling component. The witness fears for the child if the family does not pursue understanding his emotional status. (Testimony, School Psychologist, Exhibit 8)

Overall, the team is concerned the child is unable to form a working relationship with his teachers, he is not learning in this environment. The team wants a neuro-psychiatric evaluation, updated evaluations from Dr. Black, and a thorough behavior assessment conducted in a diagnostic placement. The parent prefers other diagnostic placements but discontinued her participation in the hearing process before she identified her choice of diagnostic placements. (Testimony Special Education Teacher, School Psychologist, Exhibit, B-4, B-10)

The parent appeared on the first day of hearing without counsel, who withdrew his appearance, a short time prior to the hearing. The parent argued she required time to reschedule the hearing, stating counsel might remain involved in the case. She believed there are other diagnostic placements which are more appropriate for her child. The LEA requested their claim for hearing be joined with the present case so the hearing would

continue if the parent subsequently withdraws her claim for due process. It was so ordered; and the matter was joined under the same case number. The LEA and parent agreed at the hearing the parent would participate in a conference call after she had an opportunity to speak with her counsel. On the designated day the parent answered the phone but refused to participate in the conference call. The hearing proceeded in her absence on the scheduled hearing dates.

CONCLUSIONS OF LAW

There is no dispute that the child is identified as a child with a disability and therefore entitled to receive specialized instruction and services in the provision of a free and appropriate public education (FAPE) pursuant to The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1401 *et. seq.*, as revised, and its regulations at 34 C.F.R. § 300.520-300.526 and Connecticut General Statutes § 10-76 *et. seq.*, as revised.

The IEP team worked continually to provide the child with a free and appropriate public education. They modified the child's program and provided him with a Behavior Intervention Plan (BIP) which was modified to provide for escalating behaviors, a token economy and positive rewards. The IEP team sought interventions from independent and well-respected professionals such as Dr. Black, who confirmed the need for an alternative educational environment and a BIP.

The child had nine suspensions, and went to the nurse's office 100 times in a school year. He is not learning in the classroom. He refuses instruction and is unable to be in a class with other students without making serious disruptions; and he struck his classroom teacher, all at a time when his program provided extensive interventions. The child cannot be placed in a less restrictive placement until more is known about his disability. Dr. Black's continued involvement is appropriate. The neuro-psychiatric evaluation as recommended by the school psychologist is appropriate to investigate the child's headaches and whether medication is causing problems. The IEP team proposes the Rushford Center day treatment program.

20 U.S.C. § 1414 (b)(2)(A) provides for reevaluation of a child with a disability if a parent or teacher requests the action, in the present case the special education teacher, school psychologist, Dr. Black and the independent behavior consultant all agree a diagnostic placement is appropriate to obtain information necessary to meet the educational needs of the child. If the parent refuses to consent to the evaluation, the LEA may seek an order for an evaluation by means of due process procedures under section 1415 except as limited by state law relating to parental consent, 20 U.S.C. 1414 (b) (C) (i) (ii).

Connecticut General Statutes and its Regulations provides for evaluation or reevaluation upon the request of personnel working with the child, Conn. Agencies Regs. § 10-76d-9. The testing must meet the conditions set forth in the regulation which provides for evaluation procedures, Conn. Agencies Regs. §10-76d-9 (b).

A trial placement for diagnostic purposes is authorized by Conn. Agencies Regs § 10-76d-14(b), for a period not to exceed eight weeks duration, the purpose of which is to assess the needs of the child for whom an individualized education program may be needed but for whom evaluations are inconclusive for determining an appropriate education program. Such a program is an evaluation and not a placement, *West Hartford Board of Education, OCR 01-86-1016*, 352 IDELR 300(1986).

State law in Connecticut provides, whenever the LEA proposes an evaluation for a child and the parent refuses to give consent to evaluate or withdraws such consent, the LEA shall request a hearing in accordance with this section. The hearing officer shall have the authority to confirm, modify or reject the identification, evaluation or educational placement of the child. In the case where the parent refuses consent for evaluation, the hearing officer may order evaluation without the consent of such parent, except that if the parent appeals such decision pursuant to subdivision (4) of this subsection, the child or pupil may not be evaluated or placed pending the disposition of the appeal, Conn. Gen. Stat. § 10-76h (d) (1).

The LEA has demonstrated its attempt to involve the parent in planning the child's program as required by 34 C.F.R. § 300.345(d). It has provided notice to the parent, its intent to evaluate or reevaluate the child as required 34 C.F.R. § 300.503. The IEP team determined that more information about the child's needs must be obtained in a diagnostic placement for the student to receive FAPE. The parent withdrew consent to evaluate the child.

The LEA has met its burden at a due process hearing, that it has demonstrated the need for a diagnostic placement. The LEA has tried measures in less restrictive environments, all without success. The IEP team needs further information about the child's emotional status, strengths, weaknesses, and unique learning style in order to provide the child with a free and appropriate public education.

FINAL DECISION AND ORDER

1. If the child is enrolled in the LEA school the IEP team shall convene an IEP team meeting to discuss the appropriate diagnostic placement for the child. If the parent and school team are unable to agree to the diagnostic placement, they shall immediately call Dr. Black for his recommendation, which shall control the choice of diagnostic placement.
2. The evaluations are to include a neuro-psychiatric evaluation, an update of Dr. Black's evaluation, a functional behavior assessment, a behavior intervention plan and any other evaluation deemed to be required by the staff at the diagnostic placement.