

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Newtown Board of Education

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Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board failed to properly evaluate the Student.
2. Whether the Board failed to identify the Student as eligible for special education and related services.
3. Whether the Board shall reimburse the Parents for their unilateral placement of the Student for the 2003-2004, 2004-2005 and 2005-2006 school years at Trinity Pawling School, including the residential costs.
4. Whether the Board shall reimburse the Parents for Dr. Kruger's evaluation.

SUMMARY:

The Student was home schooled through eighth grade. In his eighth grade year, the Parents requested that the Board evaluate the Student for special education, indicating that the Student wanted to attend the Board high school beginning in ninth grade. Prior to the evaluation being conducted, the Parents unilaterally placed the Student at Trinity Pawling School, a residential college preparatory school. Subsequently, the Board found that the Student was not eligible for special education. The Parents requested this hearing, challenging the eligibility determination, and seeking reimbursement for the placement at Trinity Pawling School and for Dr. Kruger's evaluation.

PROCEDURAL HISTORY:

The Parents requested this hearing on June 24, 2004. [Exhibit H.O.-1]

The mailing date of the decision was extended by request of the parties to schedule additional hearing dates for presentation of their case. The hearing convened on four dates, in September and October 2005. Additional extensions were granted so that the parties could submit briefs in this matter. Briefs were filed on December 20.

The Parents' witnesses were the Mother; Gregory Carpiniello of Trinity Pawling; and Robert Kruger, psychologist.

The Board's witness was Michael Regan, Board director of pupil services.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

FINDINGS OF FACT:

1. The Student is currently 17 years old and is in 11th grade at Trinity Pawling School in New York.
2. The Student was home schooled through eighth grade by his Mother. The Student has never attended the Board schools, although the family has lived in the district since the Student was three years old. While the Parents attempted to characterize the Mother as having specialized knowledge and training akin to a special educator, the Mother was not and has never been a certified teacher. [Testimony Mother]
3. In fall of the Student's eight grade year, the Student had a psychoeducational evaluation completed by Dyanne Wooldridge, a consulting school psychologist. The purpose of this evaluation as stated in the report was so that the Parents and

- the Student could consider secondary school placement options. At the time of this report, the Student's older brother was a boarding student at Trinity Pawling School. [Exhibit B-3]
4. In her report, Ms. Wooldridge concluded that the Student possessed average to above average intellectual capabilities. Weaknesses were identified on tasks requiring processing speed, long term retrieval and graphomotor functioning. Ms. Wooldridge noted that the Student's "ability to efficiently process and/or produce written material is significantly slow as reflected in his low reading, writing and math fluency." She noted that "[a]lthough some level of anxiety may be present as a result of his lack of automaticity and fluency and from his retrieval difficulty, the nature and degree of his difficulty appear to primarily reflect an area of cognitive processing weakness." In her report Ms. Wooldridge explained that in the area of written language, the Student's spelling ability and writing fluency measure well below average. She concluded that the Student met the criteria for a learning disability under DMS IV. [Exhibit B-3]
 5. Ms. Wooldridge made recommendations for the Student which included an academic setting that offers low student-teacher ratios and can provide the opportunity for small group instruction and individualized academic support, a teaching method that involves a simultaneous multisensory approach to remediation and reinforcement with frequent review and repetition to practice mastery, extended time on both classroom and standardized testing, modification of written or reading assignments, provision of notes, use of computer, and ongoing monitoring of the Student's academic skills to monitor growth. Ms. Wooldridge concluded that the Student should do well in a school environment that can both encourage his strengths as well as provide an appropriate remedial program, academic support services and accommodations for students with learning differences. [Exhibit B-3]
 6. In May 2003, while the Student was in his eighth grade year, the Parents contacted the Board to request a Planning and Placement Team [PPT] meeting, indicating that the Student wanted to attend the Board high school and that the Parents had academic concerns regarding the Student. [Testimony Mother]
 7. The PPT convened on June 13, 2003. The Parents discussed the curriculum that the Mother had provided the Student, and shared with the PPT their concerns that the Student had a processing disorder. Robert Chiapetta, the former Board director of pupil services requested that the Student take the eighth grade end of the year assessments in language arts and math to ascertain his level of knowledge in those areas. The director also provided the Parents with reading and math worksheets to obtain additional information on the Student's home schooling program. [Testimony Mother, Exhibit B-2]
 8. In June 2003 the Student completed the eighth grade final exams, provided by the Board, and the Parents returned the exams, the reading worksheet and the math

- worksheet to the Board director of pupil services. [Testimony Mother, Exhibit B-4] The reading and math worksheets sought information from the Parent, who had been home schooling the Student, about the Student's instruction including the interventions provided to the child and the classroom curriculum and instruction received. [Exhibit B-4] The current director of pupil services testified that he did not review the results of the eighth grade exams. The results of these exams would provide little relevant information about the Student's knowledge in those areas, as the exams were specific to the curriculum of the classes and were not standardized assessments. [Testimony Dr. Regan]
9. The PPT reconvened on July 15, 2003. At this time, the Board had a new director of pupil services. At this meeting, the PPT agreed to conduct a psychological and educational evaluation of the Student, to which the Parents provided consent. The team also recommended that the Student receive focused intervention for reading fluency and written language at the commencement of the school year. The next PPT was scheduled for September 30, 2003. [Testimony Mother, Dr. Regan; Exhibit B-7] The Parents were informed at this PPT that the process of testing would be completed in the fall, although the Parents expressed their preference that the Student be evaluated during the summer. [Testimony Mother] The Board was not required to conduct the testing in the summer between the school years.
 10. The Board director of pupil services noted in the July 2003 PPT meeting that the Board wanted to provide the Student with intensive intervention in reading to see if the Student would show a positive response to that intervention. This intensive reading intervention would provide the Student with reading instruction by a reading teacher who could address the apparent reading difficulties based on the Parents' report. Dr. Regan explained that in determining whether to identify a Student with a learning disability, the Student must be given small group instruction to monitor his progress, to see how he responds to that intervention. [Testimony Dr. Regan] This response was reasonable as the Student had never attended the Board schools, or any school, as of this time.
 11. On August 25, 2003, the Parents faxed a letter to the Board informing Dr. Regan that they were unilaterally placing the Student at Trinity Pawling School for the 2003-2004 school year. The Mother testified that they decided that they couldn't wait and decided to send the Student to Trinity Pawling. [Testimony Mother, Exhibit B-8]
 12. The Board did not have an opportunity to provide intensive reading interventions because the Student never attended the Board school. [Testimony Dr. Regan]
 13. Trinity Pawling was described as a boys' residential college preparatory school. Trinity Pawling has a remedial language program which is available to students. The language program has three components, including a basic composition class and a reading comprehension course taught in the students' first year, and an analytical writing program in the second year of the program. The Student was

- placed in the language program. Trinity Pawling is not a special education facility, and has been described as having a rigorous, college preparatory curriculum. The Trinity Pawling dean of residential life testified that the school gives all students “accommodations” which are built into the structure of the school, including availability of teachers into the evenings, longer time periods for completion of exams, and modification of homework by some of the teachers. [Testimony Mr. Carpiniello] None of these interventions differ from the regular education interventions that would have been available to the Student had he attended the Board school and received accommodations available under Section 504.
14. On September 3, the Board school psychologist contacted the Parents to set up a time for the Student’s evaluation, and offered Saturday, September 6, Monday, September 9¹ and Tuesday, September 10 as possible dates for the evaluation. At that time, the Parents questioned whether there was a need for an additional evaluation. The school psychologist discussed the Parents’ concerns with the Board director of pupil services, and contacted the Parent on the next day. The school psychologist informed the Parent the next day that the Board had the right to do its own testing. The Parent objected to some of the specific assessments, and told the school psychologist that they would speak directly with the Board director regarding their concerns. [Testimony Mother, Exhibit B-9]
 15. The Parents eventually agreed to a date for the Board to conduct its evaluation. The evaluation was completed over the Thanksgiving holiday, as the Parents did not want to take the Student out of school for the testing. [Testimony Mother]
 16. The Board completed a psychological evaluation and an educational evaluation of the Student on November 24 and 25, 2003. [Exhibits B-10, B-11]
 17. The school psychologist administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). The Student’s overall cognitive ability was found to be in the average range as measured by the WISC-IV, with a full scale IQ of 99. The Student’s composite/index scores on the WISC-IV were: verbal comprehension, 102; perceptual reasoning, 108; working memory, 91 and processing speed, 88. [Exhibit B-10]
 18. The special education teacher administered the Woodcock Johnson Psycho-Educational Battery Third Edition (WJ-III). On the WJ-III the Student received a standard score of 90 in broad reading, with subtest scores of 116 on letter-word identification, 74 on reading fluency and 103 on passage comprehension. He received a standard score of 94 in broad writing, with subtest scores of 127 on writing samples, 91 on writing fluency and 86 on spelling. The Student received

¹ The school psychologist’s notes indicated the dates of Monday, September 9 and Tuesday, September 10, although in 2003, Monday was September 8, not the 9th. This minor discrepancy is of no import. The Parents were provided dates, including a Saturday and did not agree to the evaluation at that time.

- a standard score of 104 on broad math, with subtest scores of 111 on calculation, 1120 on applied problems, and 72 on math fluency. The evaluator noted that the Student's achievement scores were in the average range on the broad clusters, and that academic fluency was a weakness. The evaluator recommended that the Student be provided with time extensions for reading and math assignments, access to a word processor with spell check and no penalty for spelling mistakes on class work. [Exhibit B-11]
19. The PPT reconvened on January 16 to review the evaluations and determine eligibility. At this PPT meeting the team agreed that the Student had a severe discrepancy between ability and achievement. The Board wanted to obtain additional information regarding whether the Student had responded to the interventions provided by Trinity Pawling. The team agreed to reconvene the PPT to January 30 after they received this information from the Student's current school. [Testimony Mother; Exhibit B-14]
 20. At the January 30, 2004 PPT meeting, the Board reviewed the multidisciplinary evaluation form for students suspected of having a learning disability. The Board members of the PPT found that the Student was ineligible for special education given the responsiveness to the interventions that the Student had shown. The Parents disagreed with that determination. [Testimony Mother, Exhibit B-14] The basis for the determination that the Student did not require special education was that the Student did not require direct instruction from a special educator. When the Board staff reviewed the information from Trinity Pawling, it indicated that the alternative strategies had been provided to the Student, and he had made progress without a special education program. [Testimony Dr. Regan]
 21. On March 9, 2004, the Parents filed their first request for a due process hearing. [Exhibit B-16]
 22. On June 15, 2004, the Board indicated in a correspondence that it was responding to a verbal request for an independent evaluation of the Student. At that time, the Board arranged for an appointment in the fall with the Connecticut Pediatric Neuropsychology Associates to conduct an independent evaluation. [Testimony Dr. Regan, Exhibit B-17]
 23. On June 23, 2004, the Parents' attorney withdrew their initial request for a due process hearing. [Exhibit B-19] The Parents' attorney indicated to the Board's attorney, through a correspondence, that the Parents did not verbally request an independent evaluation. The Parents' attorney informed the Board that it planned to evaluate the Student at their own expense, and would share the results with the District. [Exhibit P-1]
 24. The Parents referred the Student to Robert Kruger, Ph.D., for an evaluation. In this evaluation, the Student was administered the Wechsler Individual Achievement Test-II. His standard scores were word reading, 102; reading

- comprehension, 121; pseudo word decoding, 100; reading composite, 106; math reading, 122, spelling, 79; written expression, 94; and written language composite, 85. [Exhibit B-20] Dr. Kruger's testing indicated that the Student could decode nonsense words at an average of other kids his age. Dr. Kruger also noted that the Student's reading rate was "abysmally slow." [Testimony Dr. Kruger, Exhibit B-20] Dr. Kruger noted that the Student had a long history of dyslexia, and his slow speed of reading poses a severe obstacle for his ability to function in a mainstream academic environment. [Exhibit B-20]
25. While the Dr. Kruger's testing results are not necessarily questioned, the results do not require a finding that the Student has a specific learning disability under IDEA. The evaluator's findings are part of the Student's profile, but cannot be considered in isolation. Moreover, the evaluator's conclusion that Trinity Pawling is an appropriate placement for the Student is not compelling, as that recommendation was made without any knowledge of the Board's regular education program, and despite the fact that the Student was progressing very well in all of his academic courses at Trinity Pawling.
26. The Student attended Trinity Pawling for the 2004-2005 school year. In the fall term, teacher reports included comments that the Student was a "positive contributor in all areas of school life," and was on the headmaster's list for high achievement and strong effort. In his modern history course, the teacher noted that the Student's performance had been tremendous, and that he was especially successful on a challenging French Revolution test that included some very tricky spelling assessments. The teacher noted that "[t]rue to form, [the Student] learned these words and was among the few students in either class to successfully spell these terms en route to scoring a class high 93." He was described as the "type of student every teacher wishes for – one that takes instruction, works hard and learns the information," noting that "I only wish many of [the Student's] peers would take note of his recipe for success." In biology, the teacher noted that "[the Student] continues to be the top achiever in class," missing only 5 points of 230 in his term exam. [Exhibit B-22]
27. None of the reports from Trinity Pawling indicated that the Student was having any difficulties with the general curriculum. The Student was receiving educational benefit from regular education interventions. [Testimony Dr. Regan] The record reflects that the Student has been an exemplary student at Trinity Pawling.
28. A PPT meeting was scheduled for February 11, 2005, but was cancelled due to an illness of the Parents' attorney. [Exhibits B-23, B-24] The Parents' attorney attempted to reschedule the PPT for many weeks, coordinating between the private school personnel and Dr. Kruger, as was noted in a correspondence on March 31, 2005. [Exhibit B-25] On April 4, a notice of a PPT meeting was sent to the Parents, scheduling it for May 20, 2005. [Exhibit B-26]

29. At the May 20, 2005 meeting, the PPT reviewed Dr. Krueger's evaluation, the central auditory processing evaluation and the Student's progress reports. The Parents expressed their concerns, and the Trinity Pawling staff shared their input on the Student's progress. The Gray Oral Reading Tests indicated that the Student had made good gains, maintaining growth at grade level, according to the Board director of pupil services. The Board director noted at this PPT meeting that the Student was showing success in school and responding to the general instruction at Trinity Pawling. The Board members of the PPT found that the Student was not eligible for special education services. The Parents disagreed with this determination, requesting that the Student be identified as eligible for special education. [Testimony Dr. Regan, Exhibit B-27]
30. As of the 2005-2006 school year, the Student continued to attend Trinity Pawling School. He was no longer enrolled in the school's language program, as it is a two year program. The Mother testified that the Student was doing well during the 2005-2006 school year at Trinity Pawling. [Testimony Mother]

DISCUSSION/CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA of 2004], and its predecessor the Individuals with Disabilities Education Act [IDEA] provide for services to children with disabilities, from birth through age 21. This hearing relates to actions that occurred primarily under the IDEA, before IDEA of 2004 was effective on July 1. The new regulations have not yet been promulgated, so references to any regulations relate to the current regulations, not the proposed regulations that are not yet effective.

I. Burden of Proof

The Supreme Court recently addressed the issue of the burden of proof for IDEA cases in *Schaffer v. Weast*, 546 U.S. ____, No. 04-698 (U.S. 2005). In *Schaffer*, the Court noted that states have responsibility generally for establishing fair hearing procedures. The plain text of IDEA is silent in the allocation of the burden of persuasion, as was the Maryland state law. Under those circumstances the Court found that the

burden of persuasion/burden of proof falls upon the party seeking the relief. The Court declined to decide the issue of the burden of proof when states have their own laws or regulations which place the burden on the school district.

In Connecticut, the regulations expressly state that the Board has the burden of proving the appropriateness of the student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14 In a careful reading of the Court's decision in *Schaffer*, it is found that the Board continues to have the burden of proof in this state as is specifically stated in the regulations². The Board has met its burden in this case.

II. Evaluation and Eligibility

The primary issues to be decided are whether the Student is eligible for special education, and whether the Board failed to properly evaluate the Student.

The Student would be eligible for special education if, after an evaluation, the Student is found to be a "child with a disability." The term "child with a disability" means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; **and (ii) who, by reason thereof, needs special education and related services.** 20 U.S.C. Sec. 1401(3), 34 C.F.R. Sec. 300.17(a)(1) [Emphasis added]

² Interestingly, in his dissent, Justice Breyer indicated he would remand the case because the state ALJ should have considered state law under the rules of state administrative procedures and the body of state administrative law, rather than looking to federal law for a burden of persuasion rule. Justice Breyer pointed out that the IDEA says that the establishment of procedures is a matter for states, and that the administrative hearing is to be conducted by the State or local educational agency. The statute as a whole foresees state implementation of federal standards. *Schafer, Id.*

A. *Evaluation*

The Board does have the reasonable opportunity to conduct its own evaluation of the Student, and a board does not have to rely solely on a parent's evaluation of the student. *See, Patricia P. v. Oak Park*, 203 F.3d 462 (7th Cir. 2000) The Board, however, must conduct an appropriate and comprehensive evaluation of the Student, a full and individual evaluation, in accordance with 20 U.S.C. §1414(a)(1) and 34 C.F.R. Sec. 300.531.

In conducting its evaluation, the Board shall ensure that a complete evaluation study is conducted for each child referred. Conn. Agencies Regs. Sec. 10-76d-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. Sec. 10-76-9(a)

In evaluating the Student, the Board must utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the child. 34 C.F.R. Sec. 300.532(b) The Student should be assessed in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 C.F.R. Sec. 300.532(g) The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. Sec. 300.532(h)

In interpreting evaluation data, the Board shall draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher

recommendations, physical condition, social or cultural background and adaptive behavior; and ensure that information obtained from these sources is documented and carefully considered. 34 C.F.R. Sec. 300.535

In this case, the Board conducted an appropriate comprehensive evaluation, and included information from a variety of sources, including parental input and the input from the Student's current school, including the reading and math worksheets completed by the Student's teachers at Trinity Pawling and by the Parent.³ All of this information was carefully considered.

B. Identifying a child with a Specific Learning Disability.

The federal regulations provide that the team may determine that a child has a specific learning disability *if* the child does not achieve commensurate with his or her age and abilities in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; *and* (2) the team finds that the child has a severe discrepancy between achievement and intellectual ability in on or more of the following areas: (i) oral expression, (ii) listening comprehension, (iii) written expression, (iv) basic reading skill, (v) reading comprehension, (vi) mathematics calculation, (vii) mathematics reasoning. 34 C.F.R. Sec. 300.541 The Connecticut regulations further state that having an identifiable learning disability "means a child who demonstrates a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in

³ While the Parents, in their brief, have asserted that the Board had an obligation to conduct a classroom observation of the Student at his out of district residential school, it is not found that the evaluation was inappropriate because the Board did not do so. The Board received written input from the private school, and the private school personnel participated in the PPT meeting.

one or more of the basic psychological processes as indicated by a diminished ability to listen, speak, read, write, spell or do mathematical reasoning.” Conn. Agencies Regs.

Sec. 10-76a-2(d)

The Student has made significant progress at Trinity Pawling, a college preparatory school. In his first two years at Trinity Pawling, the Student received some remedial assistance in the language program. The Student’s education at Trinity Pawling, including this language program, is not found to be a special education program, despite the Parents’ assertions. The Parents further opine that the Student required substantial hours of assistance from the teachers who are available at night to the students, which is why the Student has progressed at Trinity Pawling. While it is commendable that the Student avails himself of such teacher assistance, a skill that will serve him well in the future, that does not change the fact that Trinity Pawling is a college preparatory school. Furthermore, this teacher assistance in the evening hours, while convenient for the Student at his residential college preparatory program, is also not found to constitute special education. The Student has made progress in a regular education program, and therefore, despite the discrepancy, he is achieving commensurate with his age and ability. He has also demonstrated that he can make progress and obtain educational benefit without special education. Having a diagnosed learning disability does not necessarily result in a determination that a student has a “specific learning disability” under IDEA, as in this case, when the Student’s learning disability does not adversely impact his educational performance.

The Board does not have to provide everything that might be thought desirable by loving parents. *See, e.g., Tucker v. Bay Shore Union Free School District*, 873 F. 2d 563,

567 (2nd Cir. 1989) While the Parents have been active participants in the Student's educational program, and appear to want to maximize his educational experience, that is not the appropriate standard. The Student does not require special education to obtain educational benefit from regular education. Lacking this essential element, i.e., that the Student requires special education, the Student is not eligible for special education.⁴

III. Request for reimbursement of Kruger's evaluation

The Parents have also sought reimbursement for Dr. Kruger's evaluation in this hearing. The Parents' attorney had indicated the Parents would have Dr. Kruger's evaluation completed at their own expense when they rejected the Board's offer for an independent evaluation. There is no basis for reimbursement of this evaluation, as the Board's evaluation was appropriate. The Parents are not entitled to reimbursement for Dr. Kruger's evaluation.

FINAL DECISION AND ORDER:

1. The Board's evaluation of the Student was appropriate.
2. The Student is not eligible for special education.
3. The Parents are not entitled to reimbursement for the unilateral placement of the Student for the 2003-2004, 2004-2005 and 2005-2006 school years.
4. The Parents are not entitled to reimbursement for Dr. Kruger's evaluation.

⁴ While the Student is not eligible for special education, he may be eligible for modifications, services and protections under Section 504. That issue is not addressed in this decision.