

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Woodbridge Board of Education

Appearing on behalf of the Parent:

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Appearing on behalf of the Board:

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Appearing before:

Mary H.B. Gelfman, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board's offer of placement in their pre-school program with speech support was appropriate to Student's special education needs in the least restrictive environment.
2. Whether the Board was required to provide speech and language therapy at Student's day care program, which is located in an adjacent town.

PROCEDURAL HISTORY:

This hearing was requested on October 13, 2005, by the filing of a copy of the Connecticut model form, completed by Mother. By letter dated October 19, 2005, the Board challenged the sufficiency of Mother's request for hearing. The Hearing Officer found the request for hearing sufficient on October 21, 2005 (Ex. HO-2).

A pre-hearing conference by conference telephone call was held on October 26, 2005, at which time Mother was represented by an attorney. Mother, her attorney, the Board's attorney and two Board staff members participated in the pre-hearing conference.

By motion dated November 4, 2005, the Board requested an order to permit observation of Student in his daycare setting. The Hearing Officer responded that if parental permission for observation had not been obtained prior to the hearing on November 16, 2005, she would hear argument on the motion at the opening of the hearing. When the hearing convened on November 16, 2005, Parent agreed to allow observation.

The hearing convened on November 16 and 22, 2005. The parties requested an opportunity to provide briefs in lieu of final oral argument: the Hearing Officer granted this request. Briefs were to be due on December 12; therefore, the deadline for the final decision and order was extended 30 days, from November 28 to December 28, 2005. Reply briefs would be accepted if there were factual errors in a brief. The briefs were received in a timely manner. The Board filed a reply brief on December 16, 2005.

All motions and objections not previously ruled upon, if any, are hereby overruled.

SUMMARY:

Student is a trilingual four-year-old with speech/language (S/L) delays. He has been in a full-day daycare setting for several years. After an evaluation performed in the daycare setting, the Board's Planning and Placement Team (PPT) recommended placement in the Board's pre-school program, with S/L support. Parents oppose placement in the Board's school, requesting that S/L services be provided at Student's daycare program, in an adjacent town.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F. Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

FINDINGS OF FACT:

From a review of all documents entered on the record of the hearing and testimony offered on behalf of the parties, I make the following Findings of Fact.

Note: The chronological record of this case includes some conflicts between the Mother's testimony, a school staff member's typed copy of her log of contacts, and letters and E-mails dated and stamped "received" on different dates. Therefore some of the dates may be off by a day or two. These variances do not affect the overall outcome of the case.

1. Student was born on May 22, 2001, and is now four years old. He is being raised trilingually, speaking English in his daycare program, and speaking Spanish at home with his mother and French at home with his father. He has attended this licensed family daycare program since before his first birthday. (Ex. HO-1, Testimony of Mother; Testimony, Daycare Provider)

2. Father, who works at the school where the Board's pre-school program is located, inquired about enrolling Student as a non-disabled peer in the Board's pre-school program in February or March, 2004. The Pre-School Teacher gave him forms to fill out and the date of an orientation meeting about the program: Father did not fill out the forms or attend the meeting. (Testimony, Pre-School Teacher)
3. Mother inquired about S/L services toward the end of the month of August, 2004. The Pre-School Teacher and the School's S/L Pathologist responded that they would observe Student in his daycare placement "as soon as school starts". (Ex. B-20; Testimony, Mother; Testimony, S/L Pathologist)
4. After observing Student on September 10, 2004, the S/L Pathologist called Mother and suggested a PPT meeting to discuss a formal evaluation. A referral for special education was made on September 24, 2004, and a PPT meeting was scheduled for October 6, 2004. Father attended the meeting and signed permission for an evaluation. (Ex. B-1, B-2, B-3, B-4, B-20; Testimony, S/L Pathologist)
5. The S/L Pathologist spoke with Mother on October 8, 2004. The evaluation had been scheduled for October 22, 2004, at Student's daycare facility. The S/L Pathologist explained that if Student qualified for special education services, transportation would be a problem because the daycare placement was not in the same town as the School. Mother then stated that she did not want an evaluation. The S/L Pathologist asked Mother to send a letter rescinding consent. Relying on Mother's oral withdrawal of consent, the School cancelled the evaluation. (Ex. B-20; Testimony, Mother; Testimony, S/L Pathologist)
6. At some time after her telephone conversation with Mother, the Board's S/L Pathologist saw Father at school, and asked about the status of consent for an evaluation. He told her not to do an evaluation. This contact was not recorded in her contact log that is in evidence. (Testimony, S/L Pathologist)
7. Mother contacted the School S/L Pathologist by E-mail dated December 13, 2004, and received on January 14, 2005, to inquire about the evaluation. Upon the advice of a consultant in the Bureau of Special Education, Connecticut State Department of Education, the School requested a second consent, by letter dated January 31, 2005, enclosing a consent form. (Ex. B-6, B-7, B-20; Testimony, Mother; Testimony, S/L Pathologist)
8. Mother refused to sign a second consent, stating that the earlier consent was still valid. The School again consulted the State Bureau of Special Education, and a different consultant advised that the evaluation could be done with the earlier consent. This consultant also confirmed that the School was responsible for transportation of students placed in private schools by their parents only within the Town lines. (Ex. B-8, B-20; Testimony, S/L Pathologist; Testimony, Mother)

9. The evaluation was performed at Student's daycare facility on February 18 and March 14, 2005. The Goldman-Fristoe Test of Articulation-2 and the Clinical Evaluation of Language Fundamentals-Preschool (CELF) were performed. The S/L Pathologist also observed Student in his daycare setting and took a S/L sample. The report of this evaluation included a summary:

[Student] was a very sweet and cooperative child during his speech and language evaluation. He worked fairly attentively when compared with same-age peers, and was brought back to task with relative ease. While his speech production is characterized by developmental distortions and sound substitutions on formal testing, his spontaneous utterances are much harder to understand. The reverse was observed during the formal language assessment when [Student] appeared to have less functional language during assessment than in his daily interactions. Indeed, overall, his language skills were tested at the first percentile with a total language standard score of 58.

Speech and language support is recommended for [Student] at this time to increase his communication skills for both speech production and language development.

This S/L Pathologist holds a B.A. in Speech Pathology and Audiology and an M.A. in Communication Disorders. She has almost ten years of experience with young children. (Ex. B-9, p. 3)
10. The S/L Pathologist secured a S/L graduate student who spoke Spanish to assist in the evaluation. When Student was questioned in Spanish he responded (correctly) in English. (Ex. B-9, p.3; Testimony, S/L Pathologist)
11. The PPT met on April 14, 2005, and found Student eligible for special education. The PPT proposed an Individualized Education Program (IEP) with S/L goals and a goal addressing transition into the pre-school program, with placement in the Board's 10 hour a week pre-school program. This program meets four days a week for 2½ hours each day, with non-disabled peers on three of those days. Mother refused placement in the School's pre-school program, saying that they preferred to continue with the daycare placement. Mother also questioned the accuracy of the Board's evaluation and the appropriateness of the proposed goals and objectives in the IEP. The PPT offered to discuss Service Plan options for providing S/L support at the daycare placement, and Mother refused that offer. Mother requested an independent evaluation. (Ex. B-14, B-20; Testimony, S/L Pathologist; Testimony, Pre-School Teacher; Testimony, Mother)
12. The independent evaluation by a licensed S/L Pathologist included an unremarkable history, except for ear infections. The Independent S/L Pathologist reported using "non-standardized measures and subtests considering his trilingual history". This evaluator concluded:

[Student] demonstrates an expressive and receptive language delay. I believe this is impacted by his trilingual language development. [Student] demonstrates stimulability for success with intervention and has a supportive family and

preschool environment. Considering these factors, [Student's] prognosis is good with skilled intervention.

This evaluator also made specific recommendations, including direct S/L therapy in his current placement, and provision of information to the family and the daycare provider to "further enhance his language skills outside of direct therapy interactions". In an undated addendum, this S/L Pathologist added:

Subtest used for the qualitative assessment of [Student] included the Preschool Language Scale 3 and the Clinical Evaluation of Language Fundamentals (Preschool Edition). Normative data was not obtained, as testing protocol to use these standards was not adhered to considering the child's ability and behavior. A comprehensive qualitative assessment was performed and presented at his PPT on June 20, 2005.

This S/L Pathologist had a child in Student's daycare program, and had visited with Mother and Student in that setting throughout the school year (2004-2005). (Ex. P-1, B-18; Testimony, Independent S/L Pathologist)

13. Student's Daycare Provider, who has significant experience with pre-school children, wrote to the Board's PPT Coordinator, describing Student's strengths and concerns she had about his speech and language development, which she reported as "improving". Her testimony in the hearing was professional and her knowledge and concern were evident. She described the age range of children in her program, which includes both pre-school children and a few after-school older children. (Ex. B-13, B-17; Testimony, Daycare Provider)
14. The Board's PPT re-convened on June 20, 2005, to discuss the independent evaluation. The PPT repeated their recommendation of placement in the Board's pre-school program for ten hours a week, with one hour of direct S/L support. The PPT also added a few goals and objectives suggested by the Independent S/L evaluator. Transportation would be provided. The PPT also recommended an extended year program for the summer. At this meeting, the Board's Director of Special Education explained about the change in the federal law effective July 1, 2005. Prior to that date, the district of residence had been responsible for providing services to children who have been privately placed by their parents: after that date, the responsibility would shift to the school district where the private placement is located. (Ex. B-19, B-20)
15. The PPT re-convened on November 8, 2005. Parents had requested compensatory services, based on the delay in evaluating Student. The PPT offered 24 hours of compensatory S/L services, covering "the time period from the Month of November 2004 to April 14, 2005", and reiterated the offer of placement in the pre-school program. Mother refused these services. (Ex. B-24)
16. The Board's Pre-School Teacher reported on her observation of Student in his daycare placement on November 18, 2005. He had many of the skills listed in the Connecticut Preschool Assessment Framework. She felt that the other children in the daycare placement, all younger than Student, were not as good models for S/L

development as the non-disabled peers in the Board's pre-school program. (Ex. B-26, B-27; Testimony, Pre-School Teacher)

17. From written referral on September 24, 2004, until Mother withdrew consent orally on October 8, 2004, and then from receipt of Mother's inquiry on January 14, 2005, to the PPT meeting on April 14, 2005, when Student was found eligible for special education services and offered an IEP and placement in the Board's pre-school program (which Mother refused), there were a total of approximately 67 school days. The period of uncertainty about consent (October 8, 2004 to January 13, 2005) lasted approximately 60 school days.

CONCLUSIONS OF LAW AND DISCUSSION:

1. There is no dispute that Student is eligible for pre-school special education services on the basis of delayed speech/language, pursuant to Section 10-76a-1(4)(B), Regulations of Connecticut State Agencies (RCSA) and 34 CFR §300.7(b).
2. The standard for determining whether a free appropriate public education (FAPE) has been provided begins with the two-prong test established by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982). First, the procedural requirements of the IDEA must have been met by the school district. Second, the IEP must be reasonably calculated to enable the child to receive some educational benefit.
3. Parents have asked that speech support services be provided in the private daycare facility that Student has been attending, in a town adjacent to the Board's town. Prior to the December, 2004, amendments to the Individuals with Disabilities Education Act (IDEA), the rule for provision of special education and related services to students enrolled in private schools by their parents was that the school district of the child's residence was responsible for identifying and evaluating children with disabilities. The district of residence then offered a public school program: if parents preferred their private school program, the school district obligation was limited to consultation with the private schools serving school district residents and allocation of services funded by the federal government. No child placed in a private school by his or her parents is guaranteed special education services comparable to those available in the public schools.
As of July 1, 2005, the 2004 amendments to IDEA included changing the responsible school district for private school students who were eligible for special education from the district of residence to the district where the private school is located (IDEA 2004 Section 612(a)(10)(A)(i)). Therefore, if Student is to receive services in his daycare placement during the current school year, Parents must make that request to the school district where the daycare facility is located.
Student received his evaluation under the prior requirement that services be provided by the district of residence. If Parent had consented to a "service plan" for services at the daycare facility prior to July 1, 2005, the Board would have been obligated to

consider the request and to determine whether speech/language services were being provided by the Board with federal funds to pre-school children in private placements. If this group of children in private schools was receiving such services, then Student would have also been eligible to receive services, until June 30, 2005.

4. Pursuant to Section 10-281, Connecticut General Statutes (CGS), transportation must be provided for students within a school district attending private, non-profit schools within the district. However, Section 10-280a, CGS, makes publicly funded transportation of children to private, non-profit schools in another school district discretionary. A special education hearing officer lacks the authority to order that transportation be provided by a school district, in order to deliver a resident student to a private school in another school district, unless that placement was made by the school district.
5. Pursuant to Section 10-76d-13(a)(1), RCSA, an IEP shall be implemented within 45 days of referral or notice, exclusive of the time required to obtain parental consent. "Days" means "school days", as provided at Sec. 10-76a-1(5), RCSA. During the period from Oct. 8, 2004, when Mother orally withdrew consent, until January 14, 2005, when Mother inquired about the evaluation, consent was in question. Counting school days, and excluding the period when consent was in question, the Board allowed a total of approximately 67 school days to pass between Student's referral and the offer of special education services. The offer of special education services was at least 22 school days late.
6. There is no legal requirement for follow-up concerning an oral withdrawal of consent. However, two weeks seems like a reasonable period of time to wait for a written confirmation, and in the absence of such written confirmation, further timely inquiry by the Board might have avoided this hearing. A delay of 60 school days occurred before the issue of consent was resolved. The Board also had the option of requesting a due process hearing to establish whether the consent had been legally withdrawn and whether Parents' refusal should be overridden (34 CFR §300.505(b)).
7. Addressing the apparent conflict between the Connecticut requirement of no more than 45 school days from referral to provision of services and the federal requirements of evaluation within 60 days and services within 30 more days, the Connecticut State Department of Education Bureau of Special Education cited the federal provision that if there is a state requirement, it prevails (IDEA 2004 Section 614(a)(1)(C)(i)(I)).
8. On April 14, 2005, Mother refused consent for an initial special education placement and requested an independent evaluation. If a parent refuses to consent to an initial special education placement, the school district has no further obligation and is prevented from using a due process hearing by IDEA 2004 Section 614(a)(1)(D)(ii)(II) and (III).

9. While the two S/L evaluations are quite different in style and content, their recommendations for speech/language support are similar. Both S/L Pathologists provided testimony that confirmed their professional competence; however, the independent evaluator was not truly independent in the daycare setting attended by her own child, with prior contacts with Student and his Parents.
10. The daycare facility sounds excellent for its purpose, but it lacks the opportunities for professional collaboration and reinforcement of speech/language goals and objectives throughout the program. While the population of children in the daycare placement varies, the predominance of ones younger than Student makes for a less rich pool of S/L models than is available from the non-disabled peers in the Board's program.
11. The Board's pre-school placement with S/L support is appropriate to Student's special education needs in the least restrictive environment. While the Board offered an appropriate program, it failed to meet the procedural timeline between referral and placement. Because of this significant procedural error, compensatory services are due Student. Based on the 22 day delay from referral to the April 14, 2005, PPT offer of an IEP and placement, which works out to approximately six four-day weeks, Student is due six hours of S/L therapy.

FINAL DECISION AND ORDER:

1. The Board's pre-school program is an appropriate placement for Student, and the IEPs proposed on April 14 and June 20, 2005, are appropriate to his special education needs.
2. The Board is not required to provide special education services to a Student enrolled in a private school in another school district by his parents.
3. Due to the delay in offering services during the 2004-2005 school year, the Board is responsible for providing six hours of compensatory speech/language therapy. These services may be provided at any location within the Board's district that is agreeable to the parties; however, the Board cannot be required to transport Student from another school district to receive these services. In the alternative, the Board may contract with the district within which Student's daycare facility is located to provide the services; or if Parents have been providing weekly services by a licensed S/L pathologist, the Board may meet its obligation by reimbursing Parents for six hours of such services, upon the presentation of appropriate documentation.
4. If Parents still seek S/L services to be provided at Student's daycare facility, they should make that request to the school district within which the daycare facility is located.