

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Britain Board of Education

Appearing on behalf of the Parents: Parents, pro se

Appearing on behalf of the Board: Attorney Susan L. Scott
Sullivan, Schoen, Campane & Connon, LLC
646 Prospect Avenue
Hartford, CT 06105-4286

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

PROCEDURAL HISTORY

This hearing request was received at the State Department of Education (SDE) on November 17, 2005. This hearing officer was assigned to the case on that date. The Board received the request for hearing on November 22, 2005. The Parents asked for a Spanish interpreter for the proceedings. A prehearing conference was held on December 7, 2005 at the Board offices with an interpreter, the Parents, the Board's attorney, the Board's Special Education Coordinator and its Interim Lead Nurse. Hearing dates were scheduled for January 17 and 23, 2006. The decision deadline was set at February 6, 2006. The parties were directed to file witness lists and exhibits by January 10. The Board filed Exhibits B-1 through B-18 and a witness list.

The Parents had the services of an interpreter provided by the SDE on all the hearing dates. The hearing convened on January 17, 2006. The Parents, through the interpreter, presented their case. They offered an exhibit, but no witness list. They stated that they would be the only witnesses. The hearing request was marked as Hearing Officer Exhibit 1 (HO-1). The Parents' exhibit was marked for identification as P-1. The first matter heard was objections to exhibits. The Parents did not object to any Board exhibits. The Board Exhibits were entered as full exhibits. The Board objected to Parents' Exhibit 1, which was marked for identification subject to later offer into evidence and ruling on objections. The parties presented opening statements. The Father, through the interpreter, stated that the Parents want a personal nurse for the Student. They want a nurse who would not have to care for other students. The Board argued that the Student did not require a one-to-one nurse and that the nursing services offered are appropriate. Parents then presented testimony from the Father. After his cross-examination, the Mother testified. The Parents rested their case. The Board moved to dismiss the case. Decision on the motion was deferred.

The Board presented testimony of Dr. Robert Dudley, a pediatrician who has been the school district's medical advisor for nine years. This was followed by testimony of Patricia Fennessey, former Lead Nurse and Jacqueline Maddy, interim Lead Nurse for the school district. The January 23 hearing was canceled because of a snowstorm. The hearing was rescheduled for February 10. The decision deadline was extended to March 6 because of the need for an additional hearing date. The Board presented testimony from Sandra Netupski, RN, school nurse assigned to the classroom for students with medical needs at Pulaski Middle School. Exhibit B-19, a document concerning the January 10, 2006 PPT meeting, was admitted into evidence without objection. The Board rested its case. The Parents offered rebuttal testimony from the Father, who offered a letter written by the Student's doctor purporting to show that she needed one-to-one nursing care. The Board objected to the letter because it had not been provided to them five days prior to the hearing. Although the Hearing Officer was mailed a copy several days before the hearing, the Parents did not mail a copy to the Board. The document was marked P-2 for identification and the Board was given one week to respond with additional evidence or documents. Over the Board's objection, the Hearing Officer ruled that the letter would be admitted as a full exhibit on February 17. The Board then called Carl Gross, Special Education Coordinator, as a rebuttal witness. There was a discussion of the need for an additional hearing date. The Parties agreed to add February 21 as hearing date and the decision deadline was extended to March 17, 2006. The hearing concluded on February 21 with additional testimony from Dr. Dudley and an additional exhibit, B-20, a letter dated February 15, 2006 from the Student's doctor, which had been e-mailed to Dr. Dudley. This was entered into evidence without objection. The Parents had intended to call another rebuttal witness, but she was on vacation. The Parents were asked what her testimony would be. It was indicated that she was the interpreter at a meeting with the Parents, Ms. Netupski, the classroom teacher and the supervisor of nursing. The Hearing Officer ruled that this testimony would be cumulative and that there was no need for a continuance to have this witness testify. Both parties then rested.

The parties were offered the opportunity for oral or written closing arguments. The parties agreed to submit written briefs by March 7. The decision deadline was extended to March 24, 2006. The Parents submitted a letter dated March 1 in support of their case. The Board submitted a brief on March 7 containing Proposed Findings of Fact, Conclusions of Law and a Proposed Order. On March 17 the Hearing Officer wrote to the parties that in order to allow sufficient time for mailing the decision, the full 24 days following the submission of briefs was needed. The decision deadline was reset at March 31, 2006. The parties did not object.

The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record.

ISSUES

1. Does the Student require one-to-one nursing services in order to receive a free appropriate public education ("FAPE")?
2. If not, were the nursing services provided to the Student in the 2004-2005 school year adequate for the Student to receive a FAPE?
3. Were the nursing services offered to the Student in the IEP for the 2005-06 school year adequate for the Student to receive a FAPE?

SUMMARY

The Student is a 20 year-old student with multiple disabilities who has attended school at a public middle school in a classroom for medically fragile students. The parties agree that she is entitled to special education and related services, including nursing services, which are necessary for her to attend school. The parties disagree as to the extent of services needed. The Parents also do not want the current nurse to continue providing services to the Student. They have asked the Board numerous times for a change in nursing personnel. The Parents believe the Student's life was in danger in two incidents, which occurred in October 2004 and January 2005. The Student has not returned to school since the second incident on January 7, 2005. The teacher has provided homebound services at the hospital where the Student lives, and the Parents are satisfied with them. The Board believes that the Student has been medically cleared to return to school and that it has provided and will continue to provide adequate medical services for her to participate in school.

FINDINGS OF FACT

1. The Student has a birth date of February 23, 1986 and is currently enrolled in the twelfth grade in the School District. She resides in the Hospital for Special Care (HSC) in New Britain. Exhibits B-2; B-19. The Student has daily contact with her Parents who visit her at the HSC and frequently take her for walks on hospital grounds. Exhibit B-8; Testimony of Parents.
2. The Student attended the "multiple physical handicapped" (MPH) classroom at Pulaski Middle School until January 7, 2005. There are eight medically fragile students in the class. Testimony of Father; Ms. Fennessey and Ms. Netupski.
3. The Student has multiple disabilities including cerebral palsy and severe intellectual disability. She is non-verbal and non-ambulatory. She uses a customized wheelchair and is dependent on caregivers for all activities of daily living. She has a tracheostomy and gastronomy tube. Exhibits B-2; B-4; and B-7.
4. In order for the Student to attend school she requires transportation to and from school under the care of a nurse. There are two other students on the bus. Testimony of Ms. Netupski.

5. In the December 7, 2004 IEP, the nurse provides direct services to the Student for 16.5 hours per week, which does not include the bus transportation time. In addition the nurse is in the classroom working with the other students the remainder of the day. She has the Student in her line of vision throughout the day. Id.; and Exhibit B-2. There is also another full-time nurse present at the school who can provide additional assistance if needed. Testimony of Ms. Maddy and Ms. Netupski.

6. The Student is assigned a one-to-one paraprofessional who is with her during the school day, except when she has a break and another person takes her place. The paraprofessional assists the nurse with monitoring the Student and with incontinence care. Id.

7. The school nurse assigned to the Student has to be certified by the HSC in order to work with her. Testimony of Dr. Dudley.

8. Ms. Netupski is a registered nurse who has been licensed by the State of Connecticut since 1998. Prior to that, she had many years of experience working with medically fragile adults and children. Testimony of Ms. Netupski. She began working with the school district in August 2004. Ms. Netupski was sent for training and certified by HSC prior to working with the Student. She also received follow up training in district. Id. and Testimony of Ms. Fennessey.

9. The Student uses a machine to assist with keeping her lungs inflated. This machine is called a CPAP, Constant Positive Airway Pressure. It does not breathe for the Student, but helps force the air into her lungs. She can be taken off the machine for short periods of time. Testimony of Dr. Dudley.

10. The tracheostomy tube must be suctioned periodically by the nurse in order to prevent the build-up of secretions, which can block the airway. Id.

11. The Student has to be fed prescribed liquids through her gastronomy tube at certain times of the school day. Certain medications are also given through this tube. The Student's doctor has specified each of her needs, similarly to writing a prescription. These orders authorize the school to administer nutrition, respiratory management with the CPAP, medication for respiratory distress, fever or discomfort, and GERD, G-tube replacement as needed, lavage and suction of tracheostomy, and a do not resuscitate (DNR) order. Id. and Exhibit B-11.

12. There were three incidents of concern involving the Student in October and November 2004 and in January 2005. In the latter two incidents, the Parents believed that the Student's life was in danger. Testimony of Parents, Ms. Fennessey and Ms. Netupski.

13. On October 5, 2004, the Student was crying uncontrollably at school and Ms. Netupski called the HSC for direction. She was advised to return the Student to HSC where it was found by nursing staff that the Student's tracheostomy tube was bent, which indicated that her airway was blocked. After the tube was changed, the Student had no further agitation. Testimony of Ms. Netupski; and Exhibits P-1 and B-13.

14. On November 10, 2004, while Ms. Netupski was working with another student, someone came for her to attend the Student who was sweaty and breathing poorly. Ms. Netupski thought there might be a mucus plug deeper in the lungs than she was licensed to clear. She believed it was an emergency and called 911. There was an issue whether the Student could be transported to New Britain General Hospital because of the DNR order. The HSC advised the school to send the Student to the emergency room via ambulance. Id. She was taken there and Parents were advised that the Student had thick phlegm blocking her airway. She was treated and returned to HSC. Testimony of Parents.

15. The DNR order was clarified by the Student's doctor. He stated in a letter dated November 15, 2004:

In the event of a cardio-pulmonary arrest no resuscitative measures should be undertaken. Specifically, in the event of a cardio-pulmonary arrest, there should be no chest compressions, no bagging, no administration of resuscitative medications, no electro-cardioversion, etc. In the absence of a cardio-pulmonary arrest all usual care should be provided including bagging, suctioning, administration of medications, etc. Should a potentially life threatening acute problem develop, all possible care should be provided to prevent the problem from progressing to an arrest.

Exhibit B-14.

16. This letter was used to draft an emergency procedure for the Student, which Ms. Netupski put in place at school on November 16, 2004. Exhibit B-15.

17. On January 7, 2005 the Student had been crying while she was being put on the bus. The battery in the CPAP machine went dead and the alarms rang on the machine. Ms. Netupski felt it was better to get the Student to the HSC, which was a ten-minute drive, rather than stop and call 911. Ms. Netupski monitored the Student on the bus and she seemed fine until they reached the parking lot at HSC when she had labored breathing. As they got off the bus ramp, the Student became cyanotic so Ms. Netupski bagged her, using a hand-squeezed bag connected to the tracheostomy tube. A nurse from HSC met them and assisted with taking the Student to her unit. A respiratory therapist and charge nurse took over. When Ms. Netupski left, the Student looked fine and was smiling. Testimony of Ms. Netupski.

18. HSC had procedures to follow in situations where the CPAP battery failed. Ms. Netupski did not follow these instructions because she hadn't been trained on them. Testimony of Dr. Dudley.

19. The Parents were very upset about what they considered to be lapses in care for the Student. Dr. Dudley admitted the incidents were sad, but the Student was never injured or in danger. The Student can be taken off the CPAP machine for short periods of time without any harm to her. Ms. Netupski was sent to HSC for further training. Id.

20. In January 2005 the HSC called Ms. Fennessey and said that they didn't think Ms. Netupski was able to provide for the Student's needs. Ms. Fennessey asked for the additional training for Ms. Netupski. Ms. Netupski had the training to address troubleshooting of mechanical problems with the CPAP. She told Ms. Fennessey that the training covered a number of items that had not been covered in her original training. Ms. Fennessey asked HSC to create a checklist of skills to be used in future training to be sure that all necessary topics were covered. Testimony of Ms. Fennessey.

21. On January 26, 2005, the Student's doctor wrote a letter to the Pulaski Middle School Pupil Services and Special Education staff stating that the Student will be unable to attend classes at Pulaski for the foreseeable future and will require "homebound" services. Exhibit B-18.

22. In the spring of 2005, Dr. Dudley and Ms. Fennessey met with the Student's doctor and other personnel at HSC. No objections were raised to Ms. Netupski continuing to provide care for the Student. Testimony of Dr. Dudley and Ms. Fennessey.

23. On May 24, 2005 a PPT meeting was convened to discuss the Student's return to school. The Parents wanted to continue the homebound services, which was agreed to by the PPT through the end of the school year and the extended school year program. It was recommended that the Lead Nurse contact HSC prior to the school year to obtain current medical status. Exhibit B-4.

24. Ms. Fennessey left the district on August 2 or 3, 2005. Testimony of Ms. Fennessey. Ms. Maddy has been employed with the New Britain School District for approximately four and one-half years. On August 23, 2005 she took over the position as Interim Lead Nurse while the district searches for a permanent replacement for Ms. Fennessey. Testimony of Ms. Maddy.

25. On September 1, 2005, Ms. Maddy made a "home visit" to the HSC. She had called the Student's doctor regarding the Student's medical status and was told she was cleared to go to school. Ms. Maddy did an assessment to determine if the Student's medical needs had changed since January. The HSC indicated that the nurse had to be trained at HSC to show competency in all tasks related to the Student's care. The paraprofessional had to be trained at the HSC in transfers, repositioning, and incontinence care. The Student did not have one-to-one nursing staff at HSC. Id. and Exhibit B-8.

26. On October 12, 2005 the PPT met to discuss the Student's return to school. The Parents stated they did not think the Student was safe with Ms. Netupski. They wanted a change in the nurse and then they would send the Student back to school. The HSC representative at the PPT meeting thought the Parents had a valid concern. The team stated that the district does not make a practice of changing staff, nor is an IEP written with specific staff person's name as service provider. It was agreed that the Student would continue homebound services through December 22, 2005. Exhibit B-7.

27. On October 14, 2005, Ms. Netupski attended training at HSC regarding trach care, lavage and suctioning, G-tube feeding, medication administration, and troubleshooting with trach and CPAP malfunction. After that training, Ms. Netupski was re-certified for all procedures to care for the Student. Testimony of Ms. Netupski, Ms. Maddy and Dr. Dudley; and Exhibit B-9.

28. On January 6, 2006 a PPT meeting was convened. The Parents did not attend. The Student's IEP was reviewed and one hour of nursing time was added, bringing the total hours of direct nursing care to 17.5 per week for the period from January 24 through December 22, 2006. Exhibit B-19.

29. On January 20, 2006, the Student's doctor wrote a letter to the school stating that: "Due to K['s] tracheostomy she must be constantly attended by a nurse or other licensed healthcare professional comfortable with and capable of addressing potential acute medical problems relating to the tracheostomy and [the Student's] other chronic problems." Exhibit P-2.

30. After Dr. Dudley contacted him for clarification of the letter, the doctor wrote another letter on February 15, 2006 stating that: "One-to-one nursing care is not required to comply with this recommendation." Testimony of Dr. Dudley and Exhibit B-20.

CONCLUSIONS OF LAW

1. The Parties agree that the Student qualifies for and is entitled to receive a free appropriate public education ("FAPE") with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76a et seq. and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq. The Parties also agree that the Student is a child with multiple disabilities. 34 C.F.R. Section 300.7(c)(7).

2. FAPE is defined in the IDEA and regulations:
As used in this part, the term *free appropriate public education* or FAPE means special education and related services that—
- (a) Are provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the SEA, including the requirements of this part;
 - (c) Include preschool, elementary school, or secondary school education in the State; and
 - (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sections 300.340-300.350.

34 C.F.R. Section 300.13. 20 U.S.C. Section 1401(8).

3. The standard for determining whether FAPE has been provided is set forth in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have

been met and second is whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 206-207. The Board must establish these by a preponderance of the evidence. Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998). Conn. State Regs., Section 10-76h-14. “Of course, a child's academic progress must be viewed in light of the limitations imposed by the child's disability.” Mrs. B. ex rel. M.M. v. Milford Board of Education, 103 F.3d 1114, 1121 (2d Cir.1997). In this case the Parents are not challenging the goals and objectives in the IEP. They are claiming that the Student requires one-to-one nursing care at all times of the school day.

4. Nursing services falls under the category of related services, which are defined in 34 C.F.R. Section 300.24(b)(12): “School health services means services provided by a qualified school nurse or other qualified person.” Qualified personnel means: “As used in this part, the term qualified personnel means personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services.” 34 CFR Section 300.23; 20 U.S.C. Section 1221e-3. In this case the nursing services in the IEP are to be provided by a “nurse.” There is no particular staff person identified in the IEP. Since September 2004 the nurse assigned to the MPH classroom has been Ms. Netupski, who is a registered nurse licensed by the State of Connecticut. She has been certified by the HSC in all areas of nursing care required by the Student. Therefore, she meets the requirements of the IDEA regulations cited above.

5. The Hearing Officer may “grant such relief as [she] determines is appropriate.” 20 U.S.C. Section 1415(i)(2)(B)(iii). See also Conn. Gen. Stats., Section 10-76h(d)(1):

The hearing officer . . . shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil . . . or to prescribe alternate special educational programs for the child or pupil. . . .

6. “Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.” Board of Hendrick Hudson School District v. Rowley, supra at 208. The Board is not obligated to assign a particular staff member to a Student unless the IEP specifies it. In Gellerman v. Calaveras Unified Sch. Dist., 37 IDELR 125 (9th Cir. 2002); the Ninth Circuit held that under Rowley, the District Court should not have ordered the school district to hire the Student’s home-based aide to work with him in school where the school had assigned a qualified paraprofessional to work with the Student. The converse applies here. This Hearing Officer cannot order the school district to replace a qualified nurse with another nurse.

7. The opinion of the Parents, who are devoted to the care of their daughter, is not sufficient evidence that the Student requires one-to-one nursing care. Her physician and the school district’s medical advisor have stated that it is not medically necessary.

FINAL DECISION AND ORDER

1. The Student does not require one-to-one nursing services in order to receive a FAPE.
2. The nursing services provided in the 2004-2005 school year were adequate to provide the Student with a FAPE.
3. The nursing services provided in the 2005-2006 school year were adequate to provide the Student with a FAPE.

COMMENTS ON CONDUCT OF HEARING

The Parents were understandably concerned about the incidents where their daughter had crises in breathing. The Board's medical and nursing staff addressed each of these situations and are prepared for the Student's return to school. The parties are encouraged to work together to make this happen.