

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on behalf of the Parent: The Parent proceeded *pro se*.

Appearing on behalf of the Board: Attorney Michelle C. Laubin
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board's proposed placement of the Student at Élan is appropriate.
2. If not, whether the Board shall provide multiple options for residential placement.
3. Whether the Parent's proposed placement at The Fold or Teen Challenge is appropriate.

SUMMARY:

The Student is repeating 10th grade for a second year, and is enrolled at the Board high school. He has not attended school since November 2005. The Parent and the Board agree that the Student is eligible for special education as a student with an emotional disturbance, and that the Student requires a residential placement. The Parent disagrees with the Board's proposed placement at Élan School, and seeks a placement for the Student at a Christian faith-based residential placement.

PROCEDURAL HISTORY:

The Board received this hearing request filed by the Parent on February 7, 2006. [Exhibit H.O.-1] The prehearing conference was held on February 14, and a Notice of Scheduled Hearing Dates was forwarded to both parties, based on the agreed upon hearing dates.

The hearing convened on March 16, at which time the Parent did not appear. The Parent submitted an untimely notice requesting that the hearing be postponed so that she could

retain an attorney. Although the request was not filed in a timely manner, the hearing was continued to allow the Parent to attempt to seek legal counsel.

At the second hearing date, the Parent appeared, and indicated that she could not retain an attorney, noting that she was unemployed but not eligible for free legal services. At this second hearing date, the Parent stated that the Student was at home and currently not being educated. The Parent noted that she wanted to continue with the hearing, despite being unable to retain legal counsel. As the Parent wanted to proceed with the hearing, the hearing was continued to the next hearing date so that the Parent could be afforded additional time to prepare to testify and submit exhibits.

The hearing proceeded for three additional hearing dates, with closing argument presented by the Parent and the Board's attorney on the final hearing date of April 4.

The Parent was the sole witness for the Student's case. The Board's witnesses were Frank McDermott, Élan director of education and Andrea Leonardi, Board director of special education, pupil services and special programs.

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 16 years old, and is in his second year as a tenth grade Student at the Board high school.
2. While the Student is enrolled at the Board high school, he has not attended school since approximately November 2005. [Testimony Parent]
3. It is undisputed that the Student is eligible for special education and related services under the designation of emotional disturbance. [Testimony Parent, Ms. Leonardi] The Student's disability is manifested as a lack of commitment and connection to following through on reaching goals and objectives. He is oppositional, and has difficulty forming connections with peers and staff. The Student needs a great deal of external motivation to meet his goals. These problems are pervasive for the Student. [Testimony Ms. Leonardi]
4. The Parent and the Board agree that the Student requires a residential placement. [Testimony Parent, Ms. Leonardi] The Parent testified that the sole dispute is a disagreement with the Student's placement. The Parent seeks a placement for the Student at a Christian school, and disagrees with the Board's proposed placement of the Student at Élan School in Poland, Maine. [Testimony Parent; Exhibits P1, P-2, P-3]

5. The Student's academic history has been one of repeated failures. During the 2005-2006 school year, the Student has been repeating 10th grade. As of this hearing, the Student has not attended school for at least four months. [Testimony Parent] The Student's current cumulative grade point average is 0.8375. His most recent report card noted that the Student cuts class excessively and seldom turns in assignments. [Exhibit B-42]
6. Prior to entering high school, the Board members of the Planning and Placement Team [PPT] had recommended that the Student attend the alternative high school program PAL. [Exhibit B-11, Testimony Ms. Leonardi] The duties of the Board director of special education include serving as the principal of PAL, a small program with 15 to 20 students which provides a general education curriculum in the core academics with some electives. PAL has a behavioral construct, where positive behaviors earn rewards. It is a structured setting that is off campus from the high school. The director opined that the Student was a candidate for PAL, as she had concerns about the Student's ability to maneuver in a less structured setting. Prior to entering ninth grade, some of the concerns regarding the Student included attending classes and completion of work. [Testimony Ms. Leonardi] The Parent declined placement at PAL. [Testimony Mother]
7. During the Student's ninth grade, in the 2003-2004 school year, the Student received services in the learning center six times per week. [Testimony Parent, Exhibit B-11] In ninth grade, the Student continued to struggle in school, receiving Ds and Fs in classes. The Student also continued to cut classes, was suspended for 9 days and had 8 excused absences, 17 tardies and 6 early dismissals. [Testimony Parent]
8. The Board convened a PPT meeting in January 2004 to review the Student's program. The Board members of the PPT reiterated their recommendation that the Student be placed in the PAL program to address the behavioral concerns. [Exhibit B-12] The Parent refused the PAL placement, as she was concerned about the other students in the program, whom she perceived were "delinquents." [Testimony Parent, Exhibit B-12]
9. The Board reconvened the PPT in March 2004, indicating that motivation was a big issue for the Student. Teachers' reports at this time indicated that the Student failed to complete his work and was not participating in class. The learning center time was increased by three more periods at this time. [Exhibit B-14]
10. In June 2004, the PPT reconvened. Once again, a placement at PAL was recommended but the Parent refused that recommendation. The Student was continuing to receive poor grades and was being referred on a daily basis to the dean of students due to behavioral issues. [Testimony Parent, Exhibit B-15] At this time, the Parent reiterated that she would not agree to the PAL program. Based on this, the PPT agreed to continue the program with learning center

- assistance five times per week, and would reassess the Student's progress in the fall. [Exhibit B-15]
11. While the Student was in 10th grade in the 2004-2005 school year, the Board continued to recommend the PAL placement; the Parent continued to decline that placement. In February 2005, the Parent acquiesced, and the Student was placed in the PAL program as a diagnostic placement. This diagnostic placement at PAL was during the second half of the year until the Board agreed to the Parent's request that the Student return to the high school placement. At this time, the Board recommended a residential placement for the Student at Élan School. [Testimony Parent; Exhibits B-19, B-21, B-23, B-25]
 12. During the spring 2005, the Student's behavioral issues continued to impact his performance in his courses. He had many tardies and absences, he failed to complete his work, he was not in compliance with the behavioral intervention plan, and he had loss of credits. [Exhibit B-31] The needs and concerns for the Student continued to be noncompliant behavior, inability to have independent work habits, attention seeking behavior, and difficulty in maintaining the Student's attention span. The Board continued to recommend a residential placement at Élan. [Exhibit B-33]
 13. In summer 2005, the Parent visited Élan School in Poland, Maine. She felt it was a good academic program which was appropriate for the Student. The Parent was aware that Élan is an approved special education school in the State of Maine. After the tour, the Parent expressed her concerns with a group counseling session she had overheard during her visit at Élan. During that tour, she had heard the Élan students yelling and swearing at each other. [Testimony Parent] The education director at Élan had explained that the group counseling session that the Parent heard was a confrontation session, a twice weekly confrontational group session in which the students have the ability to respond to issues that have occurred at other times during the week. [Testimony Mr. McDermott]
 14. During the 2005-2006 school year, the Student repeated his sophomore year. At this time his program was at the Board high school, at the Parent's request. The Student's noncompliance continued and he was not making academic progress. The Parent agreed to a residential placement at the November 1, 2005 PPT meeting, but did not agree with the placement at Élan. Around this time, the Student stopped attending the Board school. [Testimony Parent]
 15. In November 2005, the Student's triennial evaluation was completed. His overall cognitive ability was an average full scale IQ of 95. The Student's relatively weak skills were in the area of numerical operations and math reasoning. [Exhibit B-39]
 16. The PPT convened on January 13, 2006 to determine the Student's placement. At this PPT meeting the Parent requested placement of the Student at the Fold, a

- Christian school in Vermont. The Parent also requested an alternative placement at Teen Challenge, a Christian military school in Florida. The Board members of the PPT recommended that the Student be placed at Élan School. [Testimony Parent, Exhibit B-41]
17. The Fold is a Christian religious based school that teaches a home schooling curriculum. It is not approved to provide special education. The Fold program is described as Christ-centered residential care for children. [Testimony Parent, Exhibit B-44]
 18. Teen Challenge is a Christian school with a military component with drill instructors. It is not approved to provide special education, and provides a home schooling curriculum, described as a Christian character building curriculum. Students are required to attend worship as part of the program, and receive physical consequences for their behavior. [Testimony Parent, Exhibits P-1, B-46]
 19. The criteria in the Parent's selection of the Fold and Teen Challenge were that she preferred the Student to be at a Christian faith-based placement. [Testimony Parent]
 20. The Parent placed the Student at the Fold for a total of 23 days in February 2006, which included a one week home visit. The Student did not continue at the Fold, a religious based parochial school. [Testimony Parent] The Fold home director characterized the Student as one who struggles with self control, respecting authority and personal discipline, and that the Student does not recognize any need for change. [Exhibit P-3]
 21. The director of education for Élan School, a residential school in Poland, Maine, testified at the hearing regarding the school's program. Élan's director of education is in his seventh year at the school. He has 34 years of experience in public schools in Maine, including 10 years as an assistant superintendent and two years as a superintendent. He holds a superintendent and principal certification with the state of Maine. He is responsible for the academic program at Élan. [Testimony Mr. McDermott]
 22. Élan is certified by the state of Maine as a special purpose school for grades 7 to 12. A special purpose school is a certification from the state of Maine that allows the school to provide special education to students with disabilities. Élan's director of education explained that the school is for bright students, usually ones who are oppositional in their social behavior. The goal for students in the program is to achieve emotional and academic growth. The goal of the emotional growth portion of the program is to allow the students to see how they are acting, and work to change their outlook. Academically, the goal is to have students achieve a high school diploma and have post secondary options. All of the teachers are certified by the state of Maine. The vast majority of the students in the Élan School who are designated as eligible for special education are identified

- as having a serious emotional disturbance. The Élan School implements the Individual Education Program [IEP] for the students who are placed in their program who have IEPs. [Testimony Mr. McDermott, Exhibit B-45]
23. Élan's therapeutic program takes place in the house program, with group counseling that occurs for at least two hours per day, five days per week. Students also receive individual therapy as necessary at Élan. [Testimony Mr. McDermott]
 24. The director of education explained that the Student presented as a typical student who could benefit educationally from Élan, as he has a pattern of failure in classes and refuses to attend class. Mr. McDermott has extensive experience in public schools and has been an employee at Élan for more than six years. [Testimony Mr. McDermott] Mr. McDermott's testimony that the Student would benefit educationally from the current program at Élan is found credible and persuasive. It is also compelling evidence that Élan is a residential special education school which is approved by the State of Maine. [Testimony Mr. McDermott]
 25. The Board director of special education has been employed in the education field for 19 years as a special education teacher, special education supervisor and director. Her testimony was credible, well reasoned and empathetic to the Student and family's concerns and needs. The director was also personally familiar with the Student, his programs and placements and the Parent's concerns. The director described the Student as having a lack of commitment and connection to following through in reaching goals and objectives that is pervasive. He has difficulty forming connections with peers and staff, and he's oppositional. She has been working with the family on the Student's program since the Student was in seventh or eighth grade. Typical behavioral interventions have been attempted for the Student with no success, and there has not been consistent follow through 24 hours a day, seven days a week with the behavioral interventions. [Testimony Ms. Leonardi]
 26. The Board director has personal knowledge of the program at Élan School, as she has been involved in the placement of other students from the Board schools at Élan. She has toured the facility and has had met with students from who have been placed at Élan by the Board, who have discussed their experience at Élan with her. The Board director has been very impressed with other students' progress at Élan, and with the long-term benefits of the school's program. [Testimony Ms. Leonardi]
 27. The Board director reviewed the list of approved special education schools in Connecticut with the Parent, and discussed other potential placements. Some of the programs were not appropriate as the focus was psychiatrically-related, fragile students. The Student does not fit this type of profile. The Board director also thoroughly investigated the Parent's requested placements for the Student. After a thorough review of all possible placements, the Board recommended Élan for the

Student. The director expressed her concern that placement for the Student at this time is critical, as every passing week is troubling for the Student. The Board director felt it was incumbent on the Board to offer a specific program, which it did when it offered Élan. [Testimony Ms. Leonardi]

28. The Board declined the Parent's request for placement at the Fold and at Teen Challenge for two-fold reasons, that they were both religious schools, and the programs were inappropriate as they were home school Christian based curriculums with no special education services. The Board thoroughly reviewed these programs and discussed concerns about these programs with the Parent. [Testimony Ms. Leonardi]

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. It is undisputed that the Student is eligible for special education and related services as a student with an emotional disturbance, and that he requires a residential placement.

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 The Board has met its burden in this case.¹

¹ 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 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 regulations.

The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be determined whether the Board complied with the procedural requirements of the Act. No testimony was presented, nor any claim made, that the Board violated the procedural requirements of the Act. It is found that the Board complied with all procedural requirements of the Act.

The second inquiry is a determination of whether the Individualized Educational Plan [IEP] is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-207.

The IEP should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Hendrick Hudson v. Rowley* 458 U.S. at 204. The Student has not advanced from grade to grade in the program at the Board high school, the program that the Parent had consistently requested for the Student. The Board’s proposed program at Élan is reasonably calculated to allow the Student to receive educational benefits.

In determining whether the IEP is reasonably calculated to confer educational benefits, it must be determined whether the IEP states (1) the child’s present level of educational performance; (2) the annual goals for the child, including short-term instructional objectives; (3) the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs; (4) the transition services needed for a child as he or she begins to leave a school setting; (5) the projected initiation date and duration for proposed services; and (6)

objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. *M.S. v. Yonkers*, 231 F. 3d 96 (2nd Cir. 2000), *citing Walczak v. Florida Union Free School*, 142 F. 3d 119, 122. The Student's IEP meets these requirements.

In an action considering whether an educational placement is appropriate under the IDEA, it must be determined whether the educational program offered to the student is reasonably calculated to allow the child to receive educational benefits. *Mrs. B. v. Milford*, 103 F.2d 1114, 25 IDELR 217 (2nd Cir. 1997). The Board has attempted to work cooperatively with the Parent, agreeing with the Parent's insistence that the Student not be placed at the alternative PAL program and maintaining the Student in his high school placement and program. The Student's educational interests are now severely endangered as he is currently receiving no educational services, despite the Board's offers and attempts to work with the Parent and the Student. Due to the Student's behavioral issues, severe academic problems and failures and lack of educational progress in the prior programs, the Student requires the residential setting. The Parent agrees with this conclusion. The Board appropriately drafted an IEP for the Student and offered an appropriate placement at Élan. The Board is not required to provide multiple options for placement, but rather to determine which placement is appropriate for the Student based on his IEP. The Board also reasonably investigated the programs proposed by the Parent and found that they were inappropriate.

Élan School is an appropriate placement which meets the Student's educational needs, and meets the appropriate standards for private special educational facilities in the state of Maine, in accordance with Conn. General Statute §10-76d(d).

In evaluation of a program, the appropriate standard is whether the Student can derive meaningful educational benefit from the proposed program, not everything that might be thought desirable by a loving parent. *Tucker v. Bay Shore Union Free School District*, 873 F. 2d. 563, 567 (2nd Cir. 1989) The Parent demonstrated her loving commitment to the Student at this hearing, and her desire to have him educated at a faith-based school. The Parent can decide to send the Student to the religious school or other school of her choice, but it is not the Board's responsibility to fund such a placement when it is determined, as it is here, that the Board has proposed an appropriate program and placement for the Student.

The program and placement proposed by the Board is appropriate for the Student, considers his strengths and weaknesses and is developed so that the Student can derive meaningful educational benefit.

When it is found, as it is in this instance, that the Board's program is appropriate, it is not necessary to determine the appropriateness of the Parent's proposed placement. *See, Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), *Florence Co. School District v. Carter*, 114 S. Ct. 361 (1993) (Reimbursement for a private school placement is only awarded *when the district's program was not appropriate* and when the private placement could provide an appropriate educational program for the child)² The Board's proposed program at Élan School would provide the Student with a free appropriate public education.

² While the Board provided a thorough legal analysis on the issue of whether the Board is prohibited under the Establishment Clause to fund the Student's placement at a religious school, this issue need not be decided as it is expressly found that the Board's proposed program provides a free appropriate public education to the Student. When an issue can be decided on grounds other than as a constitutional issue, it is appropriate to conclude so without deciding the constitutional question.

FINAL DECISION AND ORDER:

1. The Board's proposed placement of the Student at Élan is appropriate.
2. The Board is not required to provide additional options for residential placement for the Student.
3. It is not necessary to determine whether the Parent's proposed placement at the Fold or Teen Challenge is appropriate, as it is found that the Board's proposed program is appropriate.