

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Ellington Board of Education v. Student

On behalf of the Student:

Parent, *Pro Se*¹

On behalf of the Board of Education:

**Attorney Linda L. Yoder
Shipman & Goodwin, LLP
One Constitution Plaza
Hartford, CT 06103-1919**

Appearing before:

Stacy M. Owens, Esq., Hearing Officer

FINAL DECISION AND ORDER

ISSUES

1. Whether the individualized educational program (“IEP”) developed by the PPT for the Student’s 2006 Extended School Year (“ESY”) and 2006-2007 school year is adequate to meet the special needs of the Student. If so, is the Board entitled to an order implementing the Student’s IEP.
2. Whether the Hearing Officer should override the Parents’ refusal to consent to a comprehensive psychiatric evaluation, as requested by the Board.²

SUMMARY

The Student is eligible to receive special education services and has been identified as Emotionally Disturbed and Learning Disabled. The Student suffers from Agoraphobia with Panic Disorder and Generalized Anxiety Disorder. The Student’s agoraphobic symptoms have escalated in recent years requiring her to receive her education through homebound tutoring.

The Planning and Placement Team (“PPT”) devised and proposed an IEP to progressively transition the Student into a regular school setting to receive her education. The Board does not

¹ The Student, age 18, has provided written authorization for her Parents to represent her needs in this due process proceeding. Exh. P3.

² The Board has clarified in its Post Hearing Brief that it is seeking an order for “a psychiatric evaluation *and/or an assessment by a clinical psychologist*” (emphasis added) See 12/14/06 Post Hearing Brief of the Ellington Public Schools, pp. 9, 10.

believe the Student is receiving a free and appropriate public education if the Student continues to limit her educational experience to homebound tutoring. The Parents disagree with the proposed IEP, fearing that such plan will compound the Student's symptoms by increasing the frequency and intensity of her panic attacks, and making the Student withdraw more.

PROCEDURAL HISTORY

On October 23, 2006, the State of Connecticut Department of Education received a request for hearing from the Board's attorney, Linda L. Yoder. On the same day, the undersigned was appointed as hearing officer to preside over the hearing, rule on all motions, determine findings of fact and conclusions of law, and issue an order.

A prehearing conference was conducted on November 10, 2006. The hearing in this matter took place on November 27, 2006.

Briefs were submitted/postmarked on December 14, 2006, and reply briefs were submitted/postmarked on December 21, 2006.

FINDINGS OF FACT

1. The Student is 18 years old and is currently enrolled in the Ellington Public Schools.³
2. Prior to entering the Ellington Public Schools, the Student received special education and related services in the Shelton school district due to a specific learning disability.
3. The Student attended Shelton High School during her 9th grade year in February 2003, and continued to attend Shelton High School through the end of her 11th grade year in June 2006. Exhs. B1-B5, B7-B11, B13-B16, B18-B22.
4. During 10th grade, the Student was diagnosed with Panic Disorder and Agoraphobia. Extreme fear and panic are symptomatic of Anxiety Disorders. Exhs. B6, B12; 11/27/06 Testimony of Dr. Nicholas Maltby.
5. In January 2005, the Student underwent a psycho-educational assessment, which indicated that "a shortened day program and frequent absences due to panic disorder, were noted," and that "the presence of significant learning and emotional factors . . . are hindering [the Student's] academic progress." Exh. B17.
6. From 9th grade through 11th grade, the Student's absences from school became more frequent, increasingly impacting her ability to pass her classes. The Student was ultimately held back to repeat the 11th grade. Exhs. B1-B5, B7-B11, B13-B16, B18-B22, B30.

³ The Student has authorized, in writing, for her Parents to represent her interests in this matter.

7. The Student enrolled in the Ellington Public Schools in September 2005, re-entering her 11th grade year. She carried 11.5 credits, requiring a total of 21 credits to graduate.⁴ Exh. B94.
8. A PPT meeting convened on September 16, 2005 to review the records and IEP developed for the Student by the Shelton school district, and to put a program in place for the Student in Ellington. Exhs. B23, B26.
9. The PPT considered courses to meet the Student's special needs, "with the intent of providing smaller class sizes," and "discussed plans of action to address anxiety-provoking situations" for the Student. Exh. B26.
10. The Student began attending Ellington High School on September 20, 2005, but within a couple of days she was hospitalized with concerns for potential harm to herself and/or others, and to this date has not returned to Ellington High School. Exhs. B30, B31.
11. After several unsuccessful attempts were made to contact the Student's Parents to discuss the Student's education program and her return to school, the PPT scheduled and convened a meeting on November 8, 2005. Exhs. B31, B32, B35.
12. The Parents attended the November 8, 2005 PPT meeting, during which, they signed a Release of Information form from Manchester Hospital and Dr. Peter Benet, the Student's psychiatrist. During the meeting Mr. Brettschneider, Director of Special Services, recommended homebound tutoring for the Student 10 hours a week to cover the subjects of Math, English, Science and Civic/Government. The homebound tutoring, Patricia Kenny, was recommended as a temporary placement until the PPT and the Student's doctors communicated and discussed "strategies to address the behaviors of concern and transition [the Student] back to school. The PPT agreed to reconvene in December 2006. Exhs. B28, B29, B35.
13. Catherine Lebron, school psychologist, made several attempts by facsimile and telephonically to reach Dr. Benet, but Dr. Benet was never available and did not return her calls.⁵ Exhs. B33, B95.
14. A PPT meeting convened on December 20, 2005, during which it was decided to: Continue the Student with homebound tutoring 10 hours per week; add a half-year course for tutoring beginning the second semester, reconvene a PPT at the end of February 2006; and, invite the Student's psychiatrist and psychologist to attend the February 2006

⁴ As testified by Patricia Kenny, tutor, the Student may have earned additional credits that were not properly recorded on her school transcript. The Board's attorney ensured that the Board would review the matter and properly record any additional credits not reflected in the Student's school transcript.

⁵ The record remained open after the hearing for the submission of an Affidavit from Catherine Lebron, school psychologist, to which the Parents were granted the opportunity to provide comments or objections to the Affidavit in their Brief or under separate cover. Such Affidavit is hereby entered into the record as Board Exhibit B95.

- PPT meeting. The Parents signed Release of Information forms to enable Ms. Lebron to contact the Student's doctors. Exhs. B36-B38.
15. Ms. Kenny noted marked improvement in the Student's progress during her tutoring sessions. The Student was able to complete assignments, exhibited a willingness to work, and was able to stay focused for as long as four hours during two tutoring sessions. B39.
 16. The PPT suggested Ms. Kenny to try to get the Student to go to the Public Library for some tutor sessions in an effort to gradually transition the Student out of the home. Although the Student initially agreed to the plan to have tutor sessions at the library, she ultimately reneged, citing her ability to get out of house with her boyfriend as evidence of her progress. Exh. B38; 11/27/06 Testimony of Patricia Kenny.
 17. The PPT convened on February 27, 2006, and Dr. Anna Mulhauser, the Student's psychologist was present. Dr. Mulhauser reported that the Student was diagnosed with severe Agoraphobia and General Anxiety Disorder, which impacted her ability to attend school in a regular school setting. Dr. Mulhauser recommended the Student attend a day school program or anxiety clinic. Exh. B44.
 18. During the February 27, 2006 PPT meeting, the Board agreed to support the Student's enrollment in the education program at the Institute of Living Anxiety Disorder Clinic if an opening came up and continued homebound tutoring. Exh. B44.
 19. As of the April 13, 2006 PPT meeting, the Institute of Living still did not have an opening in its Anxiety Disorder Clinic. The Board agreed to continue homebound tutoring and discussed changing the Student's primary exceptionality to ED since it appeared to be the most significant impediment to the Student's ability to receive an education. Exh. B48.
 20. On May 9, 2006, Dr. Mulhauser submitted a report to Ms. Lebron diagnosing the Student with Agoraphobia with Panic Disorder, Major Depressive Disorder and Generalized Anxiety Disorder. Dr. Mulhauser explained that despite multiple relaxation and anxiety reducing techniques taught to the Student during therapy sessions, the Student continued to suffer from panic attacks at the "mere thought" of leaving her house and attending school. The inability to attend school, and lead a "normal" teenage lifestyle has led the Student to periods of depression. Exh. B49.
 21. Dr. Mulhauser recommended in her May 9, 2006 report that the Student attend the Institute of Living Anxiety Disorder Clinic and an Intensive Outpatient Program "to experience therapy in a group setting where she can learn social skills and learn how to cope with anxiety in a social setting." Dr. Mulhauser recommended the Student eventually be transitioned into a "highly structured school with a low teacher to student ratio within a clinical setting." Exh. 49.

22. Sometime between May 9 and June 12, 2006, the Student began her enrollment in the Institute of Living Anxiety Disorder Clinic and was being treated by psychologist, Scott Hannan. Exh. 53.
23. On June 12, 2006 the PPT convened to conduct an annual review and to consider qualifying ED as the Student's primary exceptionality. In doing so, the PPT reviewed the Student's educational records from Shelton, team member observations, Dr. Mulhauser's report, and completed the SED checklist. Exh. B53.
24. During the June 12, 2006 PPT meeting, the team decided to: Designate ED as the Student's primary disability; continue homebound tutoring for the remainder of the school year plus one additional week during the summer to complete coursework and exams; support a summer program if recommended by Dr. Hannan; support outside placement at the Grace Webb School Refusal Program⁶; reconvene at the beginning of the 2006-2007 school year to review the Student's socio-emotional progress and educational placement; and, develop goals to address the Student's emotional/behavioral issues and academic needs. Exh. B53.
25. During the summer of 2006, the Student's anxiety remained severe. The Student was able to leave the home with only a few people with whom she felt safe. Exh. B66; 11/27/06 Testimony of Parent.
26. On September 15, 2006, a PPT meeting convened to review the Student's progress, review the Student's current status, and make recommendations for the 2006-2007 school year. Exhs. B61, B64-B66.
27. The PPT made the following recommendations at the September 15, 2006 PPT meeting:
 - a. The Board will provide the Student a Distance Learning Program via internet access to allow the Student to fulfill course requirements for graduation and eventually learn outside of the home and eventually in the Grace Webb School Refusal Program. Computer and internet access and support will be provided by the Board to facilitate the program.⁷
 - b. A tutor will be assigned to the Student to provide direction and evaluate the Student's performance with the Distance Learning Program.
 - c. Weekly in-home therapy by a qualified outside therapist for 1 ½ hours to help transition the Student from her home to another learning environment. Exh. H.O.1; B66.

⁶ The Grace Webb School Refusal Program is a program offered at the Institute of Living for students resistant to attending school in a regular education setting.

⁷ As a result of information presented at the hearing, the Board has withdrawn its request to replace the Student's homebound tutoring with a distance learning program in accordance with the Student's IEP until evaluations and assessments can be conducted and reviewed by the PPT. See 12/14/06 Post Hearing Brief of the Ellington Public Schools, p. 10.

28. The Parents disagreed with the recommendations made by the PPT during the September 16, 2006 meeting. Exhs. B66, B76; 11/27/06 Testimony of Parent.
28. Treatment of an anxiety disorder requires small steps. In the beginning, therapy is one-to-one with an eventual path to a larger setting. While treating the Student, Dr. Hannan commenced the Student's treatment in the home approximately once a week, working towards treatment in the Anxiety Disorder Clinic. Dr. Hannan was engaging the progressive method of therapy and was making strides until the Student abruptly ceased his services.⁸ Exhs. B64, B66; 11/27/06 Testimonies of Parent and Dr. Nicholas Maltby.
29. Prior to implementing the IEP developed for the Student's 2006-2007 school year, the Board requested a Release of Information from the Parents to contact the psychotherapists working with the Student to assist in their endeavors to transition the Student from her home. Exh. B67.
30. On September 28, 2006, the Board received its first communication from the Student's psychiatrist, Dr. Benet since Ms. Lebron's attempts to first contact him on November 8, 2005. Dr. Benet wrote a letter stating, "[The Student] suffers from both social anxiety and learning disabilities. The former prevents her from attending school at this time and the latter prevents her from home study without a tutor." Exhs. B71, P1.
31. A PPT meeting convened on October 13, 2006, during which the PPT continued to make the recommendations established during the September 15, 2006, offered the Webb Transition Academy as an alternative therapeutic program, and requested the Parents consent to obtain a psychiatric evaluation of the Student to ascertain the Student's current psychological status and to assist with developing goals. The Parents refused and considered Dr. Benet's September 28, 2006 letter to be sufficient. The Parents continued to disagree with the PPT's recommendations.⁹ Exh. B73; 11/27/06 Testimony of Parent.
32. The Parent testified that the Student had been subjected to enough evaluations and that she had already been "evaluated" by Dr. Hannan, Dr. Mulhauser, Dr. Benet, Dr. Benjamin J. Zigan from Manchester Memorial Hospital, Paulette Trueblood, MA, LMFT, from Christian Counseling and Judith Burry, School Psychologist, from the Shelton school district. Exhs. B12, B17, B27, B49, B71; 11/27/06 Testimony of Parent.
33. Despite the Parent's claim that evaluations have been conducted and reports written, such information has not been shared with the Board to assist in the development of an IEP for the Student. 11/27/06 Testimony of Parent.

⁸ Dr. Hannan supported the recommendations made at the September 8, 2006 PPT meeting. The Parents, who did not agree with the recommendations, testified that the Student ceased Dr. Hannan's services purportedly because the Student felt Dr. Hannan, who was originally retained by the family, was "bought" by the Board when the Board offered to retain Dr. Hannan to provide the weekly therapy services recommended at the September 8, 2006 PPT meeting. The Student reportedly felt betrayed by Dr. Hannan for this arrangement. 11/27/06 Testimony of Parent.

⁹ As a result of the Parents and Board's disagreement concerning the Student's 2006-2007 IEP, the Board requested mediation, which was unsuccessful. The Board then requested a hearing, upon which this decision is based. Pending a decision, the Board has agreed to continue homebound tutoring for the Student. Exhs. B77-B93.

34. By letter dated November 20, 2006, Dr. Mulhauser indicated that she reviewed the Board's proposed IEP for the Student and thought the recommendations were appropriate with some modification. Specifically, Dr. Mulhauser noted that the Student would benefit from "daily structured tutoring" to assist with the use of the Distance Learning Program and goal to transition to the Grace Webb School, and daily in home therapy to overcome her severe anxiety, as opposed to the 1½ hours of therapy a week proposed by the PPT. Exhs. P2, B66.
35. The Student continues to receive homebound tutoring from two special education teachers (not Patricia Kenny) less than ten hours a week pending the outcome of this decision. Exhs. B86, B87; 11/27/06 Testimony Mr. Brettschneider.

CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act ("IDEA") mandates all school districts to provide students a free and appropriate public education ("FAPE"). FAPE is defined as:

Special education and related services that (a) have been provided at public expense, under public supervision and direction and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program (IEP) under [this Act]. 20 U.S.C. §1401(8).

The Supreme Court in the case of *Hendrick Hudson Board of Education v. Rowley* established a two-tier review to determine whether a student's education is "appropriate." The first tier of review is to analyze procedural compliance with the IDEA by the Board. The second tier of review is to analyze whether the IEP developed for the student is reasonably calculated to enable the child to receive educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982).

During preliminary discussions at the hearing on November 27, 2006, the Parents alleged the Board made several procedural violations. However, the Parents failed to file a counterclaim in response to the Board's October 23, 2006, request for hearing, nor did the Parents raise such issue during the prehearing conference on November 10, 2006. The Parents untimely claim of procedural violations are deemed to unjustly prejudice the Board by providing insufficient notice of any counterclaims against it. As such, procedural compliance by the Board is not an issue for review in this matter. However, the sufficiency of the IEP developed for the Student's 2006

ESY and 2006-2007 school year is under scrutiny to determine whether the PPT devised a program that provides the Student a free and appropriate public education.

Section 10-76h-14 of the Regulations of Connecticut State Agencies provides that the Board has the burden of proving by a preponderance of the evidence that the Student's educational program and placement is appropriate.

To ensure a child receives a free and appropriate public education in accordance with the IDEA, the student's educational program should be "reasonably calculated to enable the child to receive educational benefit." *Rowley* at 3051. Educational benefit is measured as the basic floor of opportunity, not a program maximizing a child's educational potential. *Id.* The threshold for determining the appropriateness of a program is not what is considered more desirable by the parents, but again, whether the student can derive meaningful educational benefit. *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Mainstreaming is another major component to determine the appropriateness of a child's educational program. Students are required to be educated in the least restrictive environment in which their special needs can be met. *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2d Cir. 1998). This requirement is fulfilled when the child is educated in a regular classroom with supplementary aids and services, or mainstreamed to the "maximum extent possible." *Oberti v. Board of Education*, 995 F. 2d 1204, 1216, 1217 (3d Cir. 1993).

The Student continues to earn credits towards her diploma, but some of the key factors to gaining educational benefit include social development, interpersonal relations and transitioning into the community. Mainstreaming to the maximum extent possible is a means by which the Student can gain the educational benefits of these factors, but continuous homebound tutoring without a plan to transition the Student out of the home, could potentially deprive the Student of deriving the full spectrum of "meaning educational benefits."

"Anxiety tends to worsen unless addressed." 11/27/06 Testimony of Dr. Nicholas Maltby.

In this particular case, the Student is at risk. Her anxiety is in danger of worsening if homebound tutoring becomes a crutch in her educational experience. The Student has been receiving homebound tutoring from the Board since September 2005. Despite the Board's constant attempts to secure information crucial to assessing the Student's individual needs, the Parents and Student have consistently failed to share or provide access to information that could

assist in the development of an appropriate program for the Student. As a result, the Board has been forced to decipher the pieces of the puzzle presented to them and propose what it deems to be an appropriate program to meet the Student's needs. However, the facts establish that an appropriate program cannot be created for the Student, absent vital information, but the Board certainly has made commendable efforts in proposing a program *more* appropriate than what she is receiving.

The Parents fear that the Student will quit school if she is required to transition too quickly into a therapeutic setting outside of the home. This Hearing Officer is unable to discern whether the Parents are correct - that homebound tutoring is the maximum extent possible for mainstreaming the Student. The Parents' concerns are not baseless, but a more concise profile of the Student's condition and needs are necessary to determine what is deemed the least restrictive environment in which the Student can gain educational benefit. Unless the Parents are privy to professional assessments essential to the development of an appropriate program for the Student, the Parents are on equal plane with the Board in knowing precisely how to address the Student's educational needs.

In contrast to the continuation of homebound tutoring for a longer duration, as desired by the Parents, the Board has focused its efforts on educating the Student in an inclusive setting, allowing her to benefit from social development uniquely strengthened through her interactions with non-disabled peers. Right now the Student has people in her life that she regards as "safe." These are people she feels comfortable enough to go with outside of the home. Educational instruction confined to the home greatly limits the Student's opportunities to interact and establish additional relationships of trust.

The expert testimony of Dr. Maltby revealed that there is a high rate of turning anxiety around, but it must be addressed, and done so in very small steps. The Student has not taken any steps away from homebound tutoring. The Parent testified that Dr. Hannan began to take small steps one-to-one with the Student in that direction, but as the facts establish, Dr. Hannan's therapeutic services were severed.

In accordance with 34 C.F.R. §§300.300(a) and (c), when a public agency proposes to conduct an initial evaluation or re-evaluation, parental consent is required.

If a parent refuses to give consent for an evaluation, a public agency may seek to override the parent's refusal through mediation or due process proceedings. 34 C.F.R. §§300.300(a)(3) and 300.300(c)(1)(ii).

Section 10-76h-13 of the Regulations of Connecticut State Agencies provides that "The hearing officer may require a complete and independent evaluation or prescription of educational programs by any qualified person, the cost of which shall be paid by the public agency."

Although the Board made good faith efforts to ensure the Student is educated in the least restrictive environment, absent a comprehensive psychiatric evaluation, it becomes speculative whether the Board's proposed IEP adequately fulfills the Student's special needs. The comprehensive psychiatric evaluation is a missing piece in the puzzle necessary to make a complete and thorough assessment of the Student's disabilities and the special education services required for the Student to gain educational benefit.

As such, absent more current psychiatric and psychological evaluations of the Student, there is insufficient evidence to establish whether the IEP proposed by the Board for the Student's 2006 ESY and 2006-2007 school year is adequate to meet the special needs of the Student.

FINAL DECISION AND ORDER

1. The undersigned hereby overrides the Parents' and Student's refusals to consent to a comprehensive psychiatric evaluation and orders the Board to retain a licensed professional to conduct such evaluation in accordance with Section 34 C.F.R. 300.304.
2. The Parents and Student are ordered to provide the Board with all evaluation and assessment reports prepared by Dr. Anna Muhlhauser, licensed psychologist, in the course of her therapeutic treatment of the Student.
 - a. If Dr. Muhlhauser has not conducted any evaluations or assessments of the Student, the Parents and Student are given thirty days from the date of this Decision to secure an evaluation report from Dr. Muhlhauser to be shared with the Board.
 - b. If an evaluation report is not produced by Dr. Muhlhauser within thirty days of the date of this Decision, the Board is ordered to retain a licensed professional to conduct a clinical psychological evaluation of the Student in accordance with Section 34 C.F.R. 300.304.

3. Once a comprehensive psychiatric evaluation and a clinical psychological evaluation of the Student are conducted, the Board is ordered to convene a PPT meeting to revisit and modify the Student's IEP developed for her 2006-2007 school year, reflective of recommendations made in the psychiatric and psychological evaluation reports.
4. Until the Student's IEP is reviewed after the submission of evaluations, the Board is ordered to provide the Student with homebound tutoring for a minimum of 10 hours per week.