

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Ashford Board of Education

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

Appearing on behalf of the Board: Attorney Michelle 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:

Parents' issues:

1. Whether the Board's program for the Student for the 2004-2005 school year was appropriate.
2. If not, whether the Parents shall be reimbursed for the Parents' placement of the Student at the Rectory School for the 2005-2006 school year.

Board's issue:

1. Are the Parents entitled to reimbursement for their unilateral placement for the 2005-2006 school year given any and all equitable considerations applicable to this matter, including but not limited to the failure of the Parents to provide notice to the Board that FAPE was at issue or that they were making a unilateral placement for the 2005-2006 school year.

PROCEDURAL HISTORY:

The Board received this request for hearing on April 16, 2007 [Exhibit H.O.-1] and a prehearing conference was held on April 23, 2007. The issues were initially clarified at the prehearing conference, and were identified in the Notice of Scheduled Hearing Date dated April 23, 2007. [Exhibit H.O.-2] The Parents submitted a notification correcting issue number 1, which initially stated that the question to be decided was the appropriateness of the Board's program for the Student for the 2005-2006 school year. The Parents corrected this, stating that the first issue related to the appropriateness of

Board's program for the Student for the 2004-2005 school year. [Exhibit H.O. -3] The Parents' request to correct that issue was confirmed at the first day of hearing, without objection from the Board's attorney.

The Board submitted a Motion to Dismiss and a Request that Regional School District No. 19 be added to this hearing. These Motions were considered on the first day of hearing.

The Board's Motion to Dismiss any and all claims that pre-date April 16, 2005, i.e., two years prior to the filing of the Request for hearing was granted on the record, on the first day of the hearing. The scope of the hearing was limited to any claims against the Board commencing April 16, 2005.

The Board also sought to join Regional School District No. 19 as a party, as it is the high school district for all residents of the Town of Ashford. The Regional School District's attorney submitted a notice that it would object to the joinder as it entered into a settlement agreement with the Parents regarding any and all claims against the District through the end of the 2006-2007 school year and included all prior years. The Parents objected to the joinder of the District as a party. The Board's motion for joinder was denied on the record, as Regional School District No. 19 was not a necessary party for this action. The scope of this hearing was limited to any claims the Parents had against the Ashford Board of Education only.

This hearing proceeded with testimony on three hearing dates [June 8, 12 and 19] with closing argument by the Parents and the Board's attorney on the final hearing date.

The Parents' witnesses were the Mother and the Grandmother.

The Board's witnesses were Donna Backhaus, the Board math teacher; Marina Demos Brand, the Board school psychologist; and Carol Camiros, the Board special education teacher.

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. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

SUMMARY:

During the 2004-2005 school year, the Student was in 8th grade at the Board school. He had been receiving accommodations under a 504 plan for his Attention Deficit Disorder. Due to declining grades and classroom performance, a PPT meeting convened in April 2005, at which time the Student was determined eligible for special education under the category of OHI. At the conclusion of 8th grade, the Student was promoted to 9th grade and was no longer a student of the Board schools, as the Regional School District No. 19 provides education to high school students from Ashford, Mansfield and Willington.

The Parents brought this request for a due process hearing to challenge the appropriateness of the Board's program for the Student for the 2004-2005 school year and his promotion to 9th grade. The Parents sought reimbursement for the Student's education at the

Rectory School, a private school, at which the Student repeated 8th grade during the 2005-2006 school year.

FINDINGS OF FACTS:

1. The Student is 16 years old, and as he is no longer in the elementary grade levels, is no longer a student at the Board schools.
2. In his early elementary school years, the Student was identified as eligible for special education as speech impaired in first grade. [Exhibit B-9] The following year, when he was in second grade, the Board members of the Planning and Placement Team [PPT] and the Mother agreed to exit the Student from special education. [Exhibit B-15]
3. In 2001, the Student was evaluated by Richard Herklots, M.D., M.A., who diagnosed the Student with attention deficit hyperactivity disorder of the combined type. [Exhibit B-23]
4. The Student continued to progress well through elementary school. In seventh grade the Student exceeded the class and school average on the reading and mathematics portions of the Connecticut Mastery Test. [Exhibits B-24, B-32, B-40]
5. In December 2003, during the Student's 7th grade year, Dr. Herklots recommended that the Student be determined eligible for Section 504 accommodations. [Exhibit B-41] In response to that, the Board convened a 504 meeting on January 4, 2004, and implemented the necessary accommodations for the Student. The Parent was present at this 504 meeting. [Exhibit B-42]
6. In January 2004, the Parents also requested that a PPT meeting convene for consideration of eligibility for special education services. [Exhibit B-44] The Parents received a copy of their procedural safeguards at this time, which they received many times subsequent to that. [Exhibit B-44, Testimony Mother] The Board routinely provides the procedural safeguards through the mail, as well as at every PPT meeting. The copies of the IEP are also sent in every case. The Parents never asked for a clarification of their procedural safeguards. [Testimony Ms. Brand]
7. On January 21, 2004, the PPT convened, and all present at the meeting agreed that the Student would undergo an initial evaluation, and the Section 504 accommodations would continue while the evaluation was conducted. [Exhibit B-45]
8. The psycho-educational evaluation of the Student was completed in February 2004, by the Board school psychologist and the Board special education teacher. In the evaluation, the Student's general cognitive ability was found to be within the high average range of intellectual functioning, as measured by the Wechsler Intelligence Scale for Children – Third Edition. The Student's verbal IQ was 108, his performance IQ was 121 and his full scale IQ was 116. The psychologist administered selected subtests of the Woodcock Johnson III Tests of Cognitive Abilities to assess short term memory and processing speed abilities. In this testing, the Student's cognitive abilities were in the average range

in short-term memory, processing speed and working memory. The Student's scores on the cognitive efficiency, processing speed and short term memory were within the average range. Although these subtest results were lower than his measured intellectual ability, the evaluator noted that his performance on these subtests may have been adversely affected by his attentional difficulties. [Exhibit B-47] The 13 point difference between the verbal and performance IQ was not clinically significant. [Testimony Ms. Brand]

9. In the Auchenbach Child Behavior Checklist, the teachers did not report that the Student exhibited any clinically significant difficulties, although they did report that he exhibited some behaviors that are suggestive of attention problems and withdrawal/depression. In this evaluation, the Parents reported significant problems with behaviors that were suggestive of anxiety, depression, social problems and attention deficit disorder. [Exhibit B-47]
10. In the Woodcock-Johnson III Tests of Achievement, the Student's Broad Reading Score was 112; Broad Math was 111; Broad Written Language was 116 and Oral Language was 102. No discrepancies were found among the Student's achievement areas. [Exhibit B-47]
11. The psycho-educational evaluation concluded that the results suggest the Student is a child of high average intellectual ability who possesses superior nonverbal abilities. It was noted that his difficulties with inattention and distractibility contribute to the relative weakness that he demonstrates in processing speed and short-term memory. His academic achievement, as measured by the Woodcock- Johnson III and the results of the Connecticut Mastery Tests, was generally consistent with his intellectual ability, which indicated that the Student was learning, despite experiencing problems with work completion. [Exhibit B-47]
12. The PPT reconvened on March 15, 2004, and determined that the Student was not eligible for special education. The team found that the Student did not meet criteria for eligibility for special education under any category.[Exhibit B-51] The team reviewed the results of the evaluation, and concluded that the Student did not require specialized instruction as he was learning and making good academic progress. [Testimony Ms. Brand] The Student's achievement tests showed average to above average performance, and comparing it with the psychological testing, it did not show that the Student had a Specific Learning Disability. [Testimony Ms. Camiros] The Parents agreed with this determination, and procedural safeguards were made available at this meeting. [Exhibit B-51] The Student's treating psychologist, Michael Coyle, was also present at this meeting, and he agreed with the determination that the Student was not eligible for special education. [Testimony Ms. Brand, Exhibit B-51]
13. A 504 accommodation plan meeting was convened on April 6, 2004, and the team agreed to continue accommodations to assist the Student in completion of homework and handing it in. [Exhibit B-52]

14. The Student's 7th and 8th grade math teacher noted that the Student had difficulty with work completion and organization difficulties, as well as attentional issues. These issues were addressed with accommodations, which the teacher provided in her classroom, including preferential seating, redirection and monitoring in the classroom, as well as monitoring homework completion. The math teacher concurred that despite the work completion and other organizational difficulties, the Student was learning the material. His test grades would decline because the Student was simply not prepared for the tests. [Testimony Ms. Backhaus]
15. The Student scored at the goal level, and above the school average on reading, writing and mathematics in his grade 8 Connecticut Mastery Test. [Exhibit B-55] This also provided objective information that the Student was learning the material. [Testimony Ms. Backhaus]
16. During the Student's 8th grade year, the 504 team convened in October and November to review the Student's accommodation plan related to the Student's work completion issues. [Exhibits B-56, B-57]
17. On April 15, 2005, the 504 team convened. At this time, the Student was continuing to have difficulty completing and handing in homework, and was intentionally avoiding bringing work home. The team noted that there was little to no studying for test and quizzes, and that the Student was reluctant to ask questions. The 504 team referred the Student to a PPT meeting based on these concerns. [Exhibit B-59]
18. On April 15, 2005, the Parents were sent a notice of a PPT meeting to be held on April 27, 2005. Again, a copy of the procedural safeguards was sent to the Parents. [Exhibit B-60]
19. At the PPT meeting, the Parents and the Board members of the team agreed that the Student was eligible for special education and related services under Other Health Impairment [OHI] and that the IEP dated April 27, 2005 would be implemented to provide 5 hours per week of academic support to the Student. This determination was based on the prior results of the psycho-educational evaluation administered in February 2004. At that time, the team noted that the Student was not found eligible for special education because his standard scores were in the average range and comparable to his IQ scores. Despite the strong scores, the PPT team concluded at this meeting that the Student's declining classroom performance illustrated that he was not actively learning, following directions, completing work and collaborating with his peers, which the team attributed to the Student's ADHD. [Exhibit B-61] The OHI eligibility was based on the attentional issues that had been noted by Dr. Herklots and the Achenbach checklists. [Testimony Ms. Camiros, Exhibit B-47] The eligibility determination was made due to the Student's declining performance in the classroom and in homework completion. At that time, the Student's grades were declining, as a result of a decline in the Student's classroom performance and homework completion. [Testimony Ms. Brand]

20. The Student's IEP provided for assistance in homework completion, organization and study strategies to pass tests and complete assignments. The services started on May 2, 2005. [Exhibit B-61] The Parent did not object to the IEP goals and the services to be provided to the Student. [Exhibit B-61, Testimony Mother] This assistance in a structured small work environment with instruction from the special education teacher was appropriate for the Student. [Testimony Ms. Brand]
21. The teachers provided input into the accommodations and modifications, as well as the IEP goal and objectives, and these met the Student's needs. [Testimony Ms. Backhaus]
22. The Mother signed the consent to the special education placement on April 27, 2005. [Exhibit B-62]
23. Nothing in the record supports a conclusion, as claimed by the Mother, that the Board should have addressed a claimed diagnosis of Asperger's Syndrome or any other diagnosis in April 2005. The evaluation was appropriate and the Parent agreed to the services which addressed the Student's recognized needs.
24. The Student was provided with special education, including specialized instruction to assist the Student with his weakness in homework completion. While the Mother testified that the Student claimed it was "just a study hall" that he was provided, the IEP was appropriate to meet his needs. [Testimony Mother] The services provided were not "just a study hall," but were appropriate specialized instruction to meet the Student's individual needs.
25. The IEP was absolutely appropriate to meet the Student's needs based on the math teacher's classroom experience with the Student. The organization and attentional issues were impeding him, and the Board staff addressed these needs in this plan. There were no other services that the Student needed that were not provided in the IEP. [Testimony Ms. Backhaus]
26. The IEP goal was developed at the PPT, and all the members of the PPT agreed upon the goals and objectives. The IEP provided meaningful benefit. It recognized the Student's needs and provided remediation and opportunities to work through them. He was provided organization strategies, preferential seating, positive reinforcement, instructional strategies, reminders, assignments lists and all appropriate attentional and organizational assistance. [Testimony Ms. Camiros]
27. The special education teacher provided the services that were recommended at the PPT, and which were in the Student's IEP. [Testimony Ms. Camiros]
28. At some point, the Parent asked the school psychologist about possible retention of the Student in 8th grade. The school psychologist informed the Parent that the Student did not qualify for academic jeopardy under the retention/promotion policy, and that the Student would not be retained. [Testimony Ms. Brand]

29. The Student completed 8th grade, and was promoted to 9th grade. The Student had no failing final grades in any of his courses. As of the conclusion of the school year, and the Student's promotion to 9th grade, the Student had been provided special education for approximately 6 weeks. [Exhibit B-64, Testimony Ms. Backhaus] The Student had the readiness for 9th grade, and has met all the standards for promotion, and was ready to move onto 9th grade. [Testimony Ms. Backhaus, Ms. Brand; Exhibit B-71] This was not merely a sham promotion. Rather, the Student's promotion to high school was well-earned. The Student was appropriately promoted to the 9th grade at the conclusion of the 2004-2005 school year.
30. After the Student graduated from 8th grade, he was no longer a Student in the Ashford Board schools. Based on the system, students from Ashford go to a different school system, Regional School District No. 19, and attend high school at E.O. Smith High School. Regional School District 19 is responsible for the high school education of all students from the towns of Ashford, Mansfield and Willington. [Testimony Ms. Brand]
31. The Parents enrolled the Student at Rectory School, a private school for the 2005-2006 school year. While staff at Rectory School reportedly told the Parents that the Student must repeat 8th grade to progress academically, that was a decision of the private school with the agreement of the Parents. [Testimony Mother] The Board cannot and shall not be bound by determinations of a private school that the Student must be placed at a certain grade level. The Student in this case was appropriately promoted to 9th grade.
32. Upon completion of the Student's 8th grade year in Ashford, the Parent did not contact E.O. Smith, the Regional School District 19, to make them aware of the Student's needs. [Testimony Mother]
33. The Parent did not send the Board a letter indicating that she was making a unilateral placement at public expense and that she expected the Board to pay, from April 15, 2005 through the end of the school year in June 2005. Moreover, at no time after June 2005, until the Parent requested due process, did the Parent send a letter to the Board indicating that she expected them to pay for the unilateral placement. There was never a PPT meeting where the Parents requested that the Student be placed at Rectory School, and that the Board pay for such a placement. [Testimony Mother]
34. Subsequent to the PPT meeting and the determination of the Student's eligibility for special education, a feedback conference was held on June 2, 2005, for an interdisciplinary evaluation conducted by the Child Development Center, an affiliate of Connecticut Children's Medical Center [CCMC]. The Student was referred to CCMC by Dr. Herklots to obtain clarification of the Student's profile and needs and to rule out possible Asperger's Syndrome/ Pervasive Development Disorder. The evaluator noted that given the Student's performance on the current evaluation, "he appears to present with a normal neurocognitive profile." It was noted that the Student did not appear to have particular areas of deficit which suggest of an underlying neurological process or learning disability, and he continued to meet criteria for ADHD- Inattentive Type. The evaluator noted that although the Parents report a number of symptoms consistent with a

Pervasive Developmental Disability, such as Asperger's syndrome, given the nature of his presentation and his history, it is more suggestive of anxiety symptoms, rather than an Autism Spectrum Disorder. [Exhibit B-63] The Board school psychologist never received a copy of the CCMC report, and did not have a copy of it in her file. [Testimony Ms. Brand] While the Board did not have the benefit of receiving this document at or prior to the PPT meeting, the recommendations of the CCMC evaluation were consistent with those recommended by the PPT members in April 2005.

35. In 2005, after discussion with Dr. Herklots and members of the Rectory School, the Parents decided that the Student would repeat 8th grade at Rectory School during the 2005-2006 school year. [Testimony Mother]
36. The Grandmother testified that the Board gave the Student services too little, too late. While the Grandmother has worked as a psychologist in educational settings for 40 years, she never observed the Student in the school setting, did not evaluate the Student, did not participate in any PPT meeting with the Board, has never seen the program provided to the Student commencing in April 2005, and her conclusions were based on reviewing report cards and reports from the Mother. Therefore, her conclusions are not persuasive, and are not relied upon in this decision. [Testimony Grandmother]
37. While the Parents requested mediation in March 6, 2007 [Exhibit B-67], this submission of a request for mediation was not a request for hearing, and cannot be found to relate back the filing of this case for purposes of the statute of limitations.
38. While the Parent noted that the teachers reported about the Student's educational difficulties in questionnaires as part of the CCMC evaluation which was completed in June 2005, these attentional issues were addressed in the 504 accommodations, and subsequently in the IEP drafted in April 2005. [Exhibit P-12]
39. By letter dated May 18, 2007, more than 2 years after the PPT determined the Student was eligible for special education, Perry Mandanis, M.D., confirmed the Student's ADD, and also indicated that the Student's history, and examination on March 17, 2007, revealed a diagnosis of Asperger's Syndrome. [Exhibit P-23] No physician, neuropsychologist or psychologist has been able to confirm the diagnosis of Asperger's Syndrome prior to the letter of May 2007 from Dr. Mandanis.

CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Act provides for services to children with disabilities, from birth through age 21. It is undisputed that the Student was found eligible for special education in April 2005.

I. Statute of Limitations bars claims prior to April 16, 2005

The claims that arose prior to April 16, 2005, two years from the time when the request for this due process hearing was submitted, are barred by the statute of limitations. The specific statute of limitations for the special education claims provides: "A party shall have two years to

request a hearing from the time the board of education proposed or refused to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education to such child or pupil provided, if such parent, guardian, pupil or surrogate parent is not given notice of the procedural safeguards, in accordance with the regulations adopted by the State Board of Education, including notice of the limitations contained in this section, such two-year limitation shall be calculated from the time notice of the safeguards is properly given.” Conn. Gen. Stat. Sec. 10-76h(a)(3) The Parents were provided their procedural safeguards on a number of occasions before April 16, 2005, and subsequent thereto. This two year period allows sufficient time to initiate litigation when a student’s educational needs have not been met, but provides the parties ample opportunity to attempt to resolve any disputes before resorting to litigation. *M.D. v. Southington Bd. Of Educ.*, 334 F.2d 217, 223(2nd Cir. 2003) The statute of limitations is “long enough to provide parents with an opportunity to protect the rights of their children to a free and appropriate public education through litigation.” *Id.* The Parents had sufficient opportunity to file a request for hearing to assert their claims, but did not do so until April 16, 2007. As was noted in the interim ruling on the first day of the hearing, the claims that arose prior to April 16, 2005 are barred by this statute of limitations.

II. Free Appropriate Public Education

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. 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.

Procedural flaws do not automatically require a finding of a denial of a free appropriate public education [FAPE]. Procedural inadequacies resulting in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in formulating the Individualized Education Program [IEP], clearly result in a denial of FAPE. *Shapiro v. Paradise Valley Unified School District No. 69*, 317 F. 3d 1072, 38 IDELR 91 (9th Cir. 2003), *citing W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F. 2d 1479, 18 IDELR 1019 (9th Cir. 1992), *accord, W.A. v. Pascarella*, 153 F. Supp. 2d 144, 35 IDELR 91 (D. Conn 2001)

The Parents received their procedural safeguards and were fully capable of reading and understanding these safeguards. The Parents were active participants in the Student’s education. There were no procedural inadequacies which resulted in any denial of a free appropriate public education.

In determining whether the second prong of *Rowley* is met, the requirement of a free appropriate public education [FAPE] is satisfied by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Board of Education v. Rowley*, 458 U.S. at 201 Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. *Board of Education v. Rowley*, 458 U.S. at 203

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 When the child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit. *Mrs. B. ex rel M.M. v. Milford Board of Education*, 103 F. 3d 1114, 1121 (2d Cir. 1997), citing *Board of Education v. Rowley, Id.* In determining whether the IEP was 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; (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 record reflects that the program provided to the Student in the 2004-2005 school year provided the Student with meaningful educational benefit. The essential issue is whether the Board provided FAPE to the Student for the final six weeks of the 2004-2005 school year; any claims prior to that are barred by the statute of limitations.

In the relevant time frame the Board notified the Parents of a PPT meeting on April 15, 2005, which convened on April 27, 2005. All members of the PPT, including the Parents, agreed that the Student was eligible for special education as OHI as a result of the Student’s ADD. The Student’s grades had recently begun to drop, and as a result of this, the PPT concluded that the Student could benefit from specialized instruction to address his attentional and organizational issues. As of the April 2005 PPT meeting, the Student had not been diagnosed with any other disability and the Board did not suspect and would not reasonably suspect any other disability.

The Student’s IEP provided for specialized instruction to meet specific needs of homework, class work and organization and provided for modifications for distractibility. The Student was provided special education services for one hour per day to assist him in clarifying homework issues and begin his homework in a structured setting with the benefit of a special education instructor to assist him. This program met the Student’s unique needs, the IEP was developed and agreed to at the PPT meeting, and the program was implemented for the Student’s last six weeks in the Board school. The Student passed his classes and was promoted. He did not receive any modifications regarding his grades. The promotion to 9th grade was appropriate, and in accordance with the Student’s standardized testing and CMT scores, which showed that he was mastering the material at an age appropriate level. As of the Student’s promotion to 9th grade, he was no longer a student in the Board’s schools, as he was a student in Regional School District No. 19.

The Board’s IEP for the 2004-2005 school year was appropriate. It was reasonably calculated to enable the Student to obtain education benefit, it was appropriately drafted based on the Student’s individual needs and it was appropriately implemented.

The Parent chose to enroll the Student to Rectory School and determined, on advice of the Rectory School and Dr. Herklots, that the Student repeat 8th grade during the 2005-2006 school year. While the Parents may have been motivated by determining what they thought was best for their son, the Board does not have to provide everything that might be thought desirable by loving parents. *See, e.g., Tucker v. Bay Shore Union Free School District*, 873 F. 2d 563, 567 (2nd Cir. 1989)

When it is determined that the Board's program is appropriate, the parent is not entitled to reimbursement of the private school placement. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985).

FINAL DECISION AND ORDER:

1. The Board's program for the Student for the 2004-2005 school year was appropriate.
2. The Parents shall not be reimbursed for the Parents' placement of the Student at the Rectory School for the 2005-2006 school year.