

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Windsor Board of Education

Appearing on behalf of the Student:

Mother, Pro Se

Appearing on behalf of the Board:

Attorney Leander A. Dolphin
Shipman & Goodwin LLC
One Constitution Plaza
Hartford, CT 06102

Appearing before:

Attorney Ann F. Bird, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Does the Student require extended day services in order to receive a free appropriate public education (FAPE)?
2. If so, did the Board of Education (BOE) offer the Student appropriate extended day services during the relevant time?

PROCEDURAL HISTORY:

The Windsor Board of Education (BOE) received the Student's Request for Impartial Special Education Hearing, dated June 7, 2012, on June 13, 2012. The Impartial Hearing Officer was appointed on June 12, 2012. A telephonic pre-hearing conference was held on June 29, 2012. The Student's mother appeared on behalf of the Student, Pro Se, and Attorney Leander Dolphin appeared on behalf of the BOE. A hearing was scheduled to take place on August 9, 2012.

On June 22, 2012, the BOE filed a timely Motion to Dismiss and Sufficiency Challenge. On July 2, 2012, the Impartial Hearing Officer granted the BOE's Sufficiency Challenge, but allowed the Student leave to amend. On July 6, 2012, the Student submitted an Amended Request for Impartial Special Education Hearing (Amended Request).

The Student did not appear for the hearing on August 9, 2012. During a telephone call on that day, the Student requested that the matter be continued and further hearing dates scheduled. The request was granted, and further hearings were scheduled.

The timelines to conduct the hearing and to file the final decision in this case were extended with the consent of the parties in order to accommodate the hearing dates and mailing of the final decision and order. The deadline for completing the hearing and mailing the final decision and order is November 16, 2012.

Confidential evidentiary hearings were conducted on September 20, 21 and 24, 2012. The Student and the BOE each had a full opportunity to present testamentary and documentary evidence and to cross-examine the other's witnesses. The Student and the BOE submitted written closing arguments on October 26, 2012.

The Hearing Officer admitted Exhibits HO-1 through HO-5 as full exhibits. The Student submitted Student Exhibits S-1 through S-8; of these S-1 and S-7 were admitted as full exhibits. The Board's Exhibits B-1 through B-48 were all admitted as full exhibits. In addition, the Student called Dr. Karen Lapienski and herself as witnesses. The Board called Angela Ehrenwerth, Joanne Craig-Nelson, Cindy Mansigian, Alla Riley, Christina Burns and Jody Lefkowitz as witnesses.

This Final Decision and Order sets forth the Impartial Hearing Officer's summary, findings of fact and conclusions of law. The findings of fact and conclusions of law set forth herein, which refer to certain exhibits and witness testimony, are not meant to exclude other supporting evidence in the record. All admitted evidence was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Calallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993); SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985).

SUMMARY:

The Student is a nine-year-old male with multiple and significant disabilities, including substantial cognitive deficits. He claimed entitlement to extended day services in order for his program to satisfy the standard as a free appropriate public education. The evidence presented to the Student's Planning and Placement Team (PPT) and at this hearing, however, did not show that the Student's program was inappropriate or that the Student needed extended year services in order to receive FAPE.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes Section 10-76h (CGS §) and related regulations, 20 United States Code Section 1415(f) (20 USC §) and related regulations, and in accordance with the Uniform Administrative Procedure Act, CGS §§ 4-176e to 4-178, inclusive, § 4-181a and § 4-186.

FINDINGS OF FACT:

After considering the evidence presented, including documentary evidence and testimony of witnesses, I find the following facts:

1. The Student is a nine-year-old male in the fifth grade. He resides in Windsor, Connecticut with his mother. (Board Exhibit 36)(B-36)
2. The Student is identified as a student eligible to receive special education and related services under the disability category of Multiple Disabilities. (B-36). Significant global developmental delays were observed at birth, and the Student has been receiving interventional educational

services since infancy. More recently, he has been described as having a significant intellectual disability as well as a chromosomal disorder. He also suffers from seizures. (B-3; B-7)

3. The Student attended an Applied Behavior Analysis (ABA) pre-school program at the BOE's Roger Walcott School. He then moved to the BOE's ABA program at Poquonock School for his first grade through the middle of fourth grade. (Testimony of Ehrenwerth)
4. The BOE's ABA program provided individual learning and behavior services using discrete trial instruction. (Testimony of Ehrenwerth)
5. The BOE conducted the Student's triennial evaluation in 2010. The process included psychological, educational, occupational and physical therapy and speech-language evaluations as well as a social developmental history. (B-3; B-4; B-5; B-7; B-8; B-9; B-42)
6. The Student's intellectual and adaptive functioning was reported to be in the Significantly Below Average range. He has significant needs in the areas of behavior, communication, fine and gross motor skills and socialization. His adaptive skills are in the Extremely Low range of functioning. (B-7; Testimony of Ehrenwerth)
7. The Student requires constant supervision and redirection. He can be a "nightmare" at home. His mother reports that he is aggressive and frequently has tantrums at home – screaming, throwing things and hitting others – and that these behaviors are getting worse as he gets older and stronger. (B-3; Testimony of Mother; Testimony of Lapienski)
8. The BOE also conducted a Functional Behavioral Assessment (FBA) in September 2010. Using the FBA, the BOE then developed a Behavior Intervention Plan (BIP) for the Student to address target behaviors observed at school, including grounding, disruption and aggression. (B-16; Testimony of Craig-Nelson)
9. The Student's mother sought and obtained Voluntary Services from the State of Connecticut Department of Children and Families in January 2011 to assist her with managing his behavior at home. (Testimony of Mother)
10. The Student made progress in his educational program for the 2010-2011 School Year. He mastered or made satisfactory progress on nearly all goals. (B-14; B-20; B-43; Testimony of Riley; Testimony of Craig-Nelson)
11. The Student's progress included behavior improvement during the 2010-2011 School Year, as there was a steady decrease in target behaviors monitored in his BIP. (B-14; B-16; Testimony of Craig-Nelson)
12. The Student's mother told the PPT on May 31, 2011, that the State of Connecticut Department of Developmental Services (DDS) would fund the Student's attendance at the Extended Day Program (EDP) at River Street School for three days each week beginning in August 2011. (B-14)

13. The BOE voluntarily agreed to provide transportation for the Student to and from the River Street School EDP and later from the EDP to his home, even though the EDP was never part of the Student's Individualized Education Program (IEP). (B-18; B-34)
14. The Student began attending the EDP at River Street School for three days per week in September, 2011. He usually does not return to his home until about after 7:00 p.m. on the days he attends the EDP. (B-21)
15. Although the River Street School EDP focuses on some of the goals and objectives contained in the Student's IEP, the EDP does not provide the Student with specially designed instruction in his academic areas. (B32)
16. The frequency and severity of the Student's target behaviors during the school day spiked in September 2011, when the EDP at the River Street School was introduced for three days per week under DDS funding. (B-22; B-23; B-25; Testimony of Craig-Nelson).
17. Although the Student continued to make academic progress in September and October of 2011, his PPT recommended a change of placement to a more restrictive, out-of-district program in order to meet his intensifying behavioral needs. His mother did not object to the change, and provided consent for the new placement. (B-25; B-26; B-29; Testimony of Ehrenwerth; Testimony of Lefkowitz)
18. As a result of the PPT recommendation, the Student's placement was changed to River Street School in Windsor, Connecticut, in January 2012. (B-25; B-29; Testimony of Mansigian) River Street School is a special education public school program operated by a regional education service center. It focuses on functional academics, functional activities, independent living skills and socialization and communication skills. (Testimony of Mansigian)
19. The Student made a smooth transition to River Street School in January 2012. (B-32) His behavior improved during January and February 2012, and he was making educational progress. (B-31; B-32; B-33)
20. At a PPT meeting on December 19, 2011, the Student's mother asked DCF, and then the BOE, to fund another two days of the River Street School EDP for her son. DCF denied the request, but the BOE agreed to revisit the issue at a later date. (B-29)
21. At a February 13, 2012 PPT meeting, the Student's mother again asked that the BOE fund two days per week of EDP at the River Street School. In evaluating this request, the PPT reviewed data showing that the Student's behavior had improved since entering River Street School, and that he was making progress in his educational program. (B-31; Testimony of Mansigian)
22. The data also demonstrated that the Student did not regress in his acquisition of skills but instead retained skills that he learned. Nor did there appear to be any difference in the Student's performance or behavior on the days that he attended the EDP, compared to the days that he did not attend. (B-31; B-32; B-33; Testimony of Ehrenwerth; Testimony of Mansigian; Testimony of Lefkowitz)

23. DDS later increased its funding to allow the Student to attend the EDP every school day of the week, beginning in March 2012. (B-35)
24. Again, when the Student began attending the River Street School EDP every school day of the week, his target behaviors spiked during the school day. (B-38; Testimony of Craig-Nelson; Testimony of Riley)
25. DDS has not threatened to stop funding the Student's EDP. (Testimony of Mother)
26. The Student made progress in his educational program during the 2011-2012 School Year as a whole, making satisfactory progress in most one of his goals. (B-31; B-32; B-33; B-37; B-38; Testimony of Craig-Nelson; Testimony of Riley)
27. The Student's IEPs for the 2010-2011 and 2011-2012 School Years provided for extended year services during the summer break. They did not provide for extended day services during the school year. (B-5; B-14; B-29; B-31; B-36)
28. The Student's IEP for the 2010-2011 School Year was reasonably calculated to allow the Student to make meaningful academic and behavioral progress. (B-5; B-14)
29. The Student's IEP for the 2011-2012 School Year was also reasonably calculated to allow the Student to make meaningful academic and behavioral progress. (B-14; B-25; B-29; B-31)

CONCLUSIONS OF LAW AND DISCUSSION:

1. There is no dispute that the Student suffers from disabling conditions that qualify him to receive special education and related services from the Windsor BOE under state and federal law. CGS §§ 10-76a et seq.; 20 USC §§ 1401 et seq. Accordingly, the BOE is legally required to provide the Student with FAPE, including adherence to all procedural requirements and safeguards.
2. There is no claim that the BOE failed to honor any procedural requirement or safeguard in this case.
3. It was the BOE's burden to prove by a preponderance of the evidence that the IEP provided to the Student met the requirements of FAPE. Regulations of Connecticut State Agencies (RSCA) § 10-76h-14(a).
4. The standard for determining whether the BOE met its burden, and that the IEP offers FAPE, is two-fold. First, the BOE must show that it has followed all procedural requirements in connection with identification and evaluation of the Student and development and implementation of the Student's IEP. Second, the BOE must show that the IEP is reasonably calculated to enable the Student to receive meaningful educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) (Rowley); Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1120 (2d Cir. 1997).

5. Significantly, the BOE's obligation is not to provide the best educational program possible for the Student or to maximize the Student's educational progress, but only to provide a program that is likely to produce progress, not regression. Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1121 (2d Cir. 1997).
6. A BOE must offer extended services when such services are necessary in order for a student to receive FAPE. 34 CFR § 300.106. "Extended year services" for this purpose include extended day services, or educational services that extend beyond the regular school day. (71 FR 46582 (2006))
7. The Connecticut Department of Education maintains that consideration of extended year services involves both a "regression/recoupment criteria" and "nonregression criteria". The factors to consider in this analysis include:

(a) The nature or severity of the student's disability; (b) [Whether] the student is likely to lose critical skills or fail to recover these skills within a reasonable time as compared to typical students; (c) The student's progress in the areas of learning crucial to attaining self-sufficiency and independence from caretakers); (d) [Whether] the student's stereotypic, ritualistic, aggressive or self-injurious interfering behaviors prevent the student from receiving some educational benefit from the program during the school year; or (e) Other special circumstances identified by the IEP team such as: the ability of the student to interact with other non-disabled students; the areas of the student's curriculum that need continuous attention; the student's vocational needs; or the availability of alternative resources.

(Topic Brief, Connecticut State Department of Education, March 15, 2007)

8. In this case, the evidence demonstrated that the Student's IEP for both the 2010-2011 and 2011-2012 School Years were reasonably calculated to, and actually did, produce meaningful progress in the Student's academic and behavioral skills. These IEPs, therefore, offered the Student FAPE as they were written, even though they did not include extended services after the school day.
9. Moreover, the evidence did not establish that the Student tended to regress in his learning, required atypical time for recoupment of learning, or that his disabling conditions, behaviors or any special circumstances required that he receive extended school day services.
10. Although the Student's mother testified that she does not believe the school's reports of her son's progress on his goals and objectives, she did not produce persuasive evidence to support her claim that the school's reports were inaccurate.
11. The mother testified, for instance, that her son did not replicate some of the skills the school reported he had mastered in school at home. She did not, however, articulate specific examples of such skills inaccurately reported as mastered or provide documentation of her claim. Indeed, since both the BOE's staff and River Street School staff reported and testified to the Student's progress in his goals and objectives, acceptance of the mother's claim would require the Hearing Officer to

find that many individuals essentially falsified the Student's records over a long period of time, including before this controversy arose. There was insufficient evidence to support such a finding.

12. The Student's special education teacher at River Street School cited specific examples of the Student's progress on his IEP goals. She reported that at the end of the 2011-2012 School Year, the Student was able to count out nine items of a larger set, and that he could wait for 35 seconds before taking his turn. (B-38) The Student's mother did not refute these specific claims.
13. The Student's mother also argued that her son was coached or assisted excessively by school staff in performing skills during assessments, such as buttoning his sweater. Yet, a student's performance of any particular skill may properly be assessed as "assisted" or as "independent." In the end, there was little or no credible evidence to contradict the recorded assessments of both BOE and River Street School staff showing the Student's progress on his goals and objectives.
14. Nor can the Student's overall academic or behavioral progress be attributed to the fact that he did participate in the River Street School EDP for three days, and then five days, per week. First, the evidence demonstrated that the Student's behavior deteriorated with both the initial introduction of the EDP in September 2011 and again when the EDP was increased from three to five days per week in March 2012. Second, although the River Street School EDP attended to some of the Student's behavior goals and objectives, it did not include special education instruction in the academic areas outlined in the Student's IEP. These facts strongly suggest that the EDP did not contribute to the Student's recorded success in his IEP.
15. Significantly, neither the professional that the Student's mother brought to the hearing nor any other professional testified that the IEP was not reasonably calculated to produce meaningful educational benefit or that an extended school day was necessary in order for the Student to receive FAPE. While the Student's witness and others did testify that the Student requires constant supervision, supervision and educational services are not the same thing. The BOE is not legally required to fund supervision.
16. This Student's disabilities are profound. His progress has been, and likely will continue to be, slower than anyone would like. However, his mother's belief that for such a needy student, more services are better than fewer services, was not born out by the evidence in this case. Even so, the BOE is not legally obligated to provide more services where, as here, the services it does provide are reasonably calculated to produce educational progress - even if more services would produce more progress. Extended day services are not necessary for the Student to receive FAPE.

FINAL DECISION AND ORDER:

1. The Student does not require extended day services in order to receive FAPE.
2. The BOE was not required to offer extended day services during the relevant time.