

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Westport Board of Education v. Student

Appearing on behalf of the Parent: No appearance

Appearing on behalf of the Board: Marsha Moses, Esq.
Berchem, Moses & Devlin, PC
75 Broad Street
Milford, CT 06460

Appearing before: Sylvia Ho, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Are the District’s evaluations appropriate?
2. Are Parents entitled to a neuropsychological independent educational evaluation (“IEE”) at public expense?

PROCEDURAL HISTORY:

The Board filed the Due Process Complaint/Hearing Request on June 22, 2017. On August 4, 2017, the Hearing Officer granted the Board’s request to extend the mailing date of the Final Decision to September 1, 2017 to allow the parties time to settle to dispute. A Prehearing Conference was scheduled for August 9, 2017 but was cancelled. On August 9, 2017, the Father sent an electronic mail message stating that the Parents could not participate due to an urgent family matter and that the Parents would reach out as to their availability. There was no subsequent communication from the Parents. The Hearing Officer rescheduled the prehearing conference and sent notice to Parents and Board. The Prehearing Conference was conducted on August 28, 2017. The Parents did not participate. The hearing was scheduled for September 14, 2017. The Board’s request to extend the timelines was granted and the Mailing Date of the Final Decision was extend to September 29, 2017.

The hearing convened on September 14, 2017. The Parents did not participate despite being sent the hearing notice. At the beginning of the hearing, the Board’s representative, Michael Rizzo stated that he had spoken to the Mother and she was aware of the hearing and informed him that the Parents were planning to proceed. However, neither Parent was present at the hearing.

The Board presented the testimony of three witnesses: Lorraine DiNapoli, Special Education Coordinator; Rebecca Anderson-Furlong and Tom Viviano, School Psychologist. The Board

submitted as full exhibits B-1 through B-14. The Board's Due Process Complaint/Hearing Request was admitted as HO-1.

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

SUMMARY:

The Board filed a Due Process Complaint to defend its Triennial Evaluations of a high school student. The Parents did not disagree with the results of the Board's evaluations but requested an independent neurological educational evaluation.

STATEMENT OF JURISDICTION:

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

FINDINGS OF FACT:

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

1. Student was born on July 24, 2002 and is a 10th grade student at Staples High School at the time of this decision.
2. The academic record shows that beginning in the 6th grade at the District's Bedford Middle School, the Parents made a referral to a Planning and Placement Team (PPT) to review the results of a private psychological evaluation conducted by Dr. Kristina Kops. The Student had previously been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and had received Section 504 accommodations and counseling support services in school. The Parents had referred the Student to assess her strengths and weaknesses as well as information processing deficits and emotional components because the Student was having difficulty both at home and at school. The Student was reported as being emotionally variable. Additionally, the Student struggled socially, often being teased and picked on by peers. Student was being treated therapeutically and psychiatrically with medications to address executive functioning and mood. Dr. Kops administered a battery of assessments including behavioral rating scales, which revealed T-scores in the clinically significant range in areas of attention and memory consistent with ADHD as well as reports of elevated ranges of emotional distress, worrying, social problems, hyperactivity/impulsivity, separation fears and physical symptoms. Problem behaviors were reported to affect the

Student's functioning very frequently in academic, social and home settings. Dr. Kops diagnosed the Student as having ADHD, Generalized Anxiety Disorder and Unspecified Depressive Disorder. (B-1; B-3)

3. Following a review of Dr. Kops' evaluation, the PPT met and recommended a psychological evaluation and additional testing to determine the Student's educational needs. The PPT ordered a psychological evaluation that included assessments of the Student's memory, executive functions, attention and rating scales of behavioral and social-emotional functioning. An evaluation of academic achievement was also conducted. The evaluation included teacher observations. Dr. Kelly Ann Barker, the School Psychologist conducted the psychological evaluation, which included a record review, classroom observations and Parent and teacher reports. Teachers reported that the Student often appeared nervous and often worried. She expressed numerous somatic complaints even though she was in good health. Dr. Barker agreed with Dr. Kops and the Students' psychiatrist that Student's profile was consistent with a diagnosis of ADHD and Generalized Anxiety Disorder. (B-3).
4. The PPT met on May 24, 2014 to review the results of the evaluation and concluded that Student was eligible for special education under the category of Emotional Disturbance. An Individualized Education Program (IEP) was developed. The PPT also recommended a Functional Behavior Assessment (FBA) be conducted in the 2014-2015 school year. Student ended the 6th grade with the following grades: Language Arts (C), Math (C), Science (C+), Social Studies (C) and Spanish (B+). (B-11)
5. The PPT reconvened in October of 2014 to review the results of the FBA, which concluded that the major behaviors that impacted the Student's academic functioning were off-task behaviors. The Student would generally disengage when teachers were talking and from classroom discussions and would doodle and fidget. The team developed a behavior plan to help Student increase her awareness when she was off task. (B-11)
6. In the 7th grade Annual Review in May of 2015, Student's special education teacher reported that she had made good progress on her goals and objectives and mastered a reading comprehension goal. Student was requiring little prompting to remain on task in the classroom. However, homework completion was inconsistent. Goals were revised to address identifying and managing triggers of anxiety and targeting inaccurate thinking. The Student finished 7th grade with the following grades: Language Arts (B+), Pre-Algebra (B+), Science (B+) and Social Studies (B).
7. The PPT met and conducted the 8th grade Annual Review in May of 2016. Teachers noted her progress, including reading comprehension and homework completion which was reported at 90% overall. The Student was also making progress on management of attention. Her special education teacher observed that the Student had improved and was engaging in off task behaviors less frequently. The 9th grade IEP was developed to include individual counseling and relationships group skills. Student finished the 8th grade with the following grades: Language Arts (B-), Pre-Algebra (B+), Science (B), Engineering and Design (A) and Social Studies (B).
8. The May 24, 2016 PPT also planned the Student's upcoming Triennial Review evaluation, would be due in 2017. The PPT proposed and the Parents agreed to individualized tests, rating scales, observations, record reviews and updated developmental history for cognitive

- functioning, attention, social-emotional function to be conducted by the school psychologist and academic achievement in reading and writing to be conducted by the special education teacher. (B-5)
9. The PPT met in April of 2017, at the end of the Student's 9th grade year to review progress and to discuss the upcoming triennial evaluation. In attendance were Parents; a Parent Advocate; Ms. DiNapoli, the Special Education Coordinator; Ms. Anderson-Furlong, the Special Education Teacher; the social worker and the Regular Education Teacher. Student also participated in the PPT meeting. The Student had inconsistent progress and struggled in the 9th grade. The accommodations that were being implemented in the IEP did not improve the Student's performance. (B-8)
 10. The Father stated that he thought that the accommodations were ineffective and the constant prompting and cuing by the teacher for Student to pay attention made the situation worse. The Father asked for an independent neuropsychological evaluation to be conducted in addition to the other assessments to measure the Student's distractibility. The Parents felt that the Staples High School environment was not conducive to Student's learning style and that a neuropsychological evaluation would be helpful in a recommendation to private school. Ms. DiNapoli stated that the request for an independent neuropsychological was being denied because the school had not yet conducted an evaluation. However, the PPT ordered additional testing of memory processing to address the Parent concerns over distractibility and attentional issues. (Testimony, DiNapoli, B-5 (p. 21 of 23) and B-8).
 11. Rebecca Anderson-Furlong is the Student's Special Education Teacher. She performed the academic achievement testing of Student. Ms. Anderson-Furlong has certifications as a Professional Educator and a Special Education Teacher and has worked as a special education teacher for 17 years. As a special education teacher, she administers academic achievement testing to students throughout her career. Since 2009, she has been a special education teacher at Staples High School where she is responsible for creation and implementation of IEPs and completing academic testing measures to goals and objectives in IEPs. She evaluated the Student over the period of 6 days using three measures. She administered the Wechsler Individual Achievement Test (WIAT III), a widely used comprehensive assessment of student academic achievement to assess academic areas including reading, decoding, reading comprehension, oral reading, math problem solving, numerical operations, math fluency, spelling, sentence composition, written expression, essay composition, oral language skills, listening skills, receptive vocabulary, listening comprehension, oral vocabulary, word fluency, sentence syntactic knowledge. She administered GORT-5, one of the most widely used measures of oral reading fluency and comprehension in the United States. This measure provides information relating to the Student's reading rate, accuracy, fluency and comprehension. She also administered a subtest of the TORC-4 text comprehension measure. All measures were administered in a manner design by the test-producer. (Testimony, Anderson-Furlong; B-14)
 12. She testified that she felt the Student was performing below what she expected academically at the end of the 9th grade. She testified that Student was performing well at the beginning of the year. She testified that the Student's academic testing revealed that she had strong abilities in individual areas. She took note that the Student would fidget during testing of reading comprehension on the GORT-V and this resulted in a relative

weakness to Student's other abilities. She testified that the fidgeting interfered with the Student's reading comprehension. She did not know why the Student was fidgeting and wanted to know if she was fidgeting due to a lack of cognitive understanding of the reading material or the inability to attend to the material. She conducted additional assessments and, after administering the TORC-4 assessment, was able to conclude that the Student's problem with reading comprehension stems from attentional issues. She testified that all new academic goals and objectives were developed as a result of the academic achievement evaluation. These goals were targeted to improve the Student's reading comprehension, written expression and a goal directed toward self-regulations. (Testimony, Anderson-Furlong, B-10, B-12, B-14).

13. Dr. Thomas Viviano is the School Psychologist on the Student's school team. He conducted the Psychological Evaluation of the Student for the Triennial Evaluation. As school psychologist at Staples High School, he conducts comprehensive initial and triennial psychological testing for the purpose of educational planning and placement. Dr. Viviano holds a PhD in School Psychology and certification for School Psychology in the state of Connecticut. (Testimony, Viviano; B-14)
14. The Student had attended Dr. Viviano's weekly small group counseling session in the 9th grade. The Student was an active participant who was helpful to other students in the group. The Student was sometimes off task. In conducting the psychological evaluation, Dr. Viviano first met and interviewed the Student before reviewing records and talking to teachers. He testified that he did this because he wanted to have an accurate picture of the Student from her perspective. He then conducted assessments, reviewed records and discussed the Student with teachers and the Social Worker and Ms. Anderson-Furlong. He conducted an extensive and detailed review of the Student's academic history and previous psychological testing. His report is remarkable in the detail and analysis of the Student's academic progress and attendant behaviors that interfered with academic functioning in from year-to-year as well as how the Student fared in the general education curriculum from year-to-year. In addition, Dr. Viviano observed Student in two classes for 40 minutes each so that he could see how the Student performed in her favorite class (Biology) and another class (English). Afterwards, he interviewed each teacher to learn how the Student was performing in each class. (Testimony, Viviano)
15. Dr. Viviano performed 12 assessments and rating scales, most of which he has administered over 100 times during the course of his career. He administered the assessments in a manner designed by the test producers. These included the following widely used and accepted assessments in the field of school psychology: Weschler Intelligence Scale for Children, 5th Edition (WISC-V); Woodcock-Johnson Tests of Cognitive Abilities, 4th Edition (WJ-IV); Wide Range Assessment of Memory and Learning, 2nd Edition (WRAML-2); Delis Kaplan Executive Function System (D-KEFs); Wisconsin Card Sorting Test (WCST); Rey Complex Figure Task (RCFT); Behavior Rating Inventory of Executive Function, 2nd Edition (BRIEF-2); Conners-3 Self Report Short Form; Conners Continuous Performance Test, 3rd Edition (CPT-3); Behavior Assessment System for Children, 3rd Edition (BASC-3); Rotter Incomplete Sentences Blank (RISB). Each of these assessments and rating scales addressed a variety of cognitive functioning, executive functioning and socio-emotional functioning. Dr. Viviano chose select subtests within these assessments to pinpoint data along with obtaining data through

- the Student's self-report for deeper analysis to understand the Student's educational profile and how her disabilities were affecting her learning and academic functioning. (Testimony, Viviano)
16. The result of the assessments was a detailed 19-page single spaced report with extensive assessment results; quoted phrases from interviews and the Student's self-report which produced a comprehensive profile of the Student. Dr. Viviano's evaluation revealed a Student who is capable of high average academic work and who shows good initiation, impulse control, abstract reasoning, concept formation, problem solving ability, cognitive fluency, cognitive flexibility and ability to sustain effort over a relatively short period of time. However, academic functioning is impaired when Student is required to sustain effort and focus over more significant periods of time. Her ability to self-monitor is also impaired during longer periods. Dr. Viviano also found that the Student's perceptions of her disabilities in executive functioning were not to the degree of her teachers' perceptions. The Student's lack of self-awareness is a weakness. Historical review of the Student's records reveal that there has been an overall improvement in social emotional functioning and that this was no longer the main area impacting the Student's academic functioning. (Testimony, Viviano: B-11)
 17. Dr. Viviano concluded that the Student's ADHD, difficulties with executive functioning and lack of self-awareness of these issues are likely the primary disabilities currently impacting her academic functioning. As a result, he concluded that individualized supports and highly structured academic environments would be necessary. He also concluded that Student should receive direct instruction to address her ADHD and associated weaknesses in executive functioning. He also suggested supports to help Student increase self-awareness, managing anxiety and independence in learning. (Testimony, Viviano; B-11).
 18. The PPT met on May 24, 2017 to review the results of the Triennial Evaluation. Based upon the results of the Triennial Evaluation, the PPT changed the primary category of eligibility from Emotional Disturbance to OHI-ADD/ADHD. The PPT developed a new IEP with new goals and objective geared to addressing the weaknesses that impacted the Student's academic functioning. For instance, Goal 3 is a new goal, which includes direct instruction and practice in self-regulation to increase focus and attention. Goal 4 is a new goal that provides for direct instruction on mindfulness skills to improve self-awareness and emotional control. Goals 1-2 are new goals that addressed the weaknesses in reading comprehension that Ms. Anderson-Furlong pinpointed her academic testing using the TORC-4 subtest. (B-12)
 19. The witnesses who testified at the hearing were consistent in their testimony that the Parents were complimentary about the Board's evaluation at the May 27, 2017 PPT to review the evaluations. They agreed the results were accurate and did not voice disagreement with the results. (Testimony, DiNapoli; Testimony, Viviano; Testimony, Anderson-Furlong)
 20. However, the Parents requested an independent neuropsychological evaluation. The IEP Summary states that at the PPT, the Parent Advocate stated that the parents were asking for an IEE based on the fact that the Student's past IEP had not worked. The Father was concerned that the school team had not accurately diagnosed the Student's area of need. The Parent Advocate stated that the Parents might want a second opinion. (B-12)

21. The Due Process Hearing was duly noticed. (Record, Notice of Hearing) The Parents knew about the hearing date. (Record, Board representative). Nevertheless, the Parents did not participate despite having the opportunity to do so. (Record of hearing).

CONCLUSIONS OF LAW AND DISCUSSION:

1. To ensure every child receives a free and appropriate public education as required by the IDEA, each eligible child must have an Individual Education Program (“IEP”). An IEP must include: (1) a statement of the child’s levels of academic achievement and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured and when progress reports will be provided, and (4) a statement of the special education services and supplementary aids to be provided. 20 U.S.C. § 1414(d)(1)(A); see 34 C.F.R. §300.320(a).
2. The IEP must be "reasonably calculated to enable the child to receive educational benefits." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 at 206-07 (1982). An IEP need not maximize the potential of a disabled student, because Congress did not intend the IDEA to guarantee a specific outcome, but to provide a basic level of educational opportunity. *Rowley*, 458 U.S. at 192, quoting S. Rep. No. 94-168, at 11 (1975).
3. Under the IDEA and Connecticut state law, a school district must reevaluate a student who receives special education services at least once every three years. This triennial reevaluation’s purpose is to evaluate a student’s relevant functional, developmental, and academic skills to determine whether the student continues to be eligible for special education services and to provide any necessary updates to the student’s IEP. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R. §300.305(a)(2)(1)(B)(iv), R.C.S.A. Sec. 10-76d-9.
4. If a student receives an evaluation with which the parent disagrees, a parent has a right to an independent educational evaluation (“IEE”) at public expense, which means at no cost to the parent. 34 C.F.R. § 300.502, R.C.S.A. Sec. 10-76d-9(c)(1) and (2). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. If the impartial hearing officer finds that a school district’s evaluation is appropriate, a parent may not obtain an IEE at public expense. 34 C.F.R. § 300.502; R.C.S.A. Sec. 10-76d-9(c)(2)
5. The IDEA only requires "the door of public education [to] be opened for a disabled child in a 'meaningful' way." *Walczak v Florida Union Free School District*, 27 IDELR 1135, 142 F.3d at 130 (2d Cir 1998), *citing Rowley, supra*. However, it does not guarantee "everything that might be thought desirable by loving parents." *Id.* at 132. An “appropriate” reevaluation is one that complies with IDEA and Connecticut regulations to produce information Student’s relevant functional, developmental, and academic skills to determine whether the student continues to be eligible for special education services and to determine to provide any necessary updates to the student’s IEP. 34 C.F.R §300.301-§300.305; R.C.S.A. Sec. 10-76d-9.

6. The purpose of reevaluation under the IDEA is to determine continuing eligibility and to provide necessary updates and modifications for the Student's IEP. A particular eligibility classification is immaterial to providing a free and appropriate public education so long as the IEP is tailored to the unique needs of the student. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R. §300.305(a)(2)(1)(B)(iv), R.C.S.A. Sec. 10-76d-9; *Fort Osage R-1 School District v. Sims*, 56 IDELR 282 (8th Cir. 2011); see also *Torda v. Fairfax County School Board*, 61 IDELR 4 (4th Cir. 2013, unpublished), cert. denied, (U.S. 03/24/14) (No. 13-6908).
7. IDEA regulations provide standards for the manner in which evaluations are to be conducted. These standards are set forth in 34 C.F.R. §300.300 to 34 C.F.R. §300.311. Connecticut state regulations implement IDEA regulations in R.C.S.A. Sec. 10-76d-9(a).
8. The evaluation must include a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent. The tools used must be nondiscriminatory on a racial or cultural basis and be administered in a language or form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally and be geared to providing relevant information to assist in determining the educational needs of the child. 20 U.S.C. §1414(a)(2)(B)(ii), (3)(A)(i-ii); 34 C.F.R. §304; R.C.S.A. Sec. 10-76-9(a)
9. No single measure or assessment may be used as the sole criterion for determining eligibility for special education services and for determining the appropriate program. Evaluators must be trained and knowledgeable and appropriately certified and/or licensed to administer assessments and measures and administer the assessments in accordance with the test producer's instructions. 34 C.F.R. §300.304(b)(1) and (2) and (c)(iv); R.C.S.A. Sec. 10-76-9(a).
10. The instruments used for assessments must be technically sound and may be used to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. See 34 C.F.R. §300.304(b)(3). "Technically sound instruments generally refers to assessments that have been shown through research to be valid and reliable." 34 C.F.R. § 300.304 *Comments* (2006). The assessments employed are widely accepted as being valid and reliable.
11. The chosen assessments must be tailored to assess specific areas of educational need of the child and not merely those that are designed to provide a single general intelligence quotient. See 34 C.F.R. §300.304(b)(2).
12. Assessments must be selected and administered so as to best ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure). 34 C.F.R. §300.304(c)(3).
13. The child should be assessed in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence,

- academic performance, communicative status, and motor abilities. 24 C.F.R. §300.304(4).
14. Applying the IDEA and Connecticut regulations cited above, this Hearing Officer finds that the Psychoeducational Evaluation was appropriate for the following reasons:
 15. In compliance with the IDEA, an evaluation of Student was conducted by Dr. Viviano and Ms. Anderson-Furlong, evaluators who were trained, knowledgeable and appropriately certified and who employed a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the Student, including information provided by the Student to determine whether Student continued to be eligible for special education services and to update Student's IEP. R.S.C.A. Sec 10-76-9(a) 34 C.F.R. §300.304(b)(4). (Findings of Fact No. 11 and 13).
 16. No single measure or assessment was used as the sole criterion for determining eligibility for special education services and the determination of eligibility did not rest on an intelligence quotient. The determination of continuing eligibility also took into account factors such as Student's functional physical, medical and developmental history and student's present academic performance. 34 C.F.R. §300.304(b)(1) and (2); 34 C.F.R. §300.304(c)(2) and (3). (Findings of Fact No. 11, 12, 14, 15, 16 and 17)
 17. Both Dr. Viviano and Ms. Anderson-Furlong are experienced professionals who are trained and knowledgeable and appropriately experienced and certified to conduct the assessments and administered the assessments in accordance with the test producer's instructions. 34 C.F.R. §300.304(c)(1)(iv) and (v). (Findings of Fact No. 11 and 13)
 18. The testing instruments are widely recognized as technically sound instruments. 34 C.F.R. §300.304 (b)(3) and 34 C.F.R. §300.304(c)(3) and the chosen assessments (Findings of Fact No. 11 and 15)
 19. The results of the assessments were used to determine that the Student remained eligible for special education services and to create new IEP goals and objectives for the Student's IEP. (Findings of Fact No. 12, 17 and 18)
 20. The Board's evaluation was in compliance with 34 C.F.R. §300.301- 305 and R.C.S.A. Sec. 10-76d-9(a).

FINAL DECISION AND ORDER:

1. The Board's evaluations were appropriate.
2. The Parents are not entitled to a neuropsychological IEE at public expense.