

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Amity Region 5 Board of Education

Appearing on behalf of the Parents:

Pro Se Parent

Appearing on behalf of the Board:

Attorney Christine Sullivan
Berchem Moses PC
75 Broad St.
Milford, CT 06460

Appearing before:

Attorney Susan Dixon
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Is the Student receiving a scientifically research-based intervention (“SRBI”) specifically designed to meet his individual needs?
2. Is the 2018-2019 Individual Education Plan (“IEP”) currently in place and offered to Student by the Board reasonably calculated to provide educational benefit?
3. Is the Orton Gillingham instruction that was recommended in the two Independent Educational Evaluations (“IEEs”) done by separate evaluators currently being provided to Student and is that appropriate for him, adequate, and designed to provide Student with a Free and Appropriate Public Education (“FAPE”)?
4. Is the current instructor working with Student qualified and experienced enough to provide Student with the level of service he has been found to require?
5. If the services provided by the Board are found to be inadequate, should the Student be provided with compensatory services for the instruction time that has been missed since the start of the school year in August, 2018?

PROCEDURAL HISTORY:

The Due Process Hearing Request in this case was initiated by the Parent (“Parent”) on December 7, 2018 to address the above issues. This Impartial Hearing Officer was assigned to the case on December 7, 2018.

At the pre-hearing conference convened on December 11, 2018, the Parent appeared *pro se*, and Attorney Christine Sullivan appeared on behalf of the Board of Education. Evidentiary hearing dates were scheduled for January 14 and 28, 2019, with the deadline for mailing the Final Decision and Order set for February 21, 2019.

The hearing convened on January 14 and 28, 2019. The parties rested their cases on the last hearing date and agreed upon February 5, 2019 as the deadline to file briefs in the matter. Briefs from both parties were received on February 5, 2019.

The following witnesses testified at the evidentiary hearing on January 14, 2019:

Student's Study Skills Teacher
Director of Pupil Services
Student's Reading Teacher
Parent

The following witnesses testified at the January 28, 2019 hearing:

Ms. J. Cohen, Consultant
Director of Pupil Services

Both Parents and the Student's Grandmother were present at the hearings.

Hearing Officer Exhibit HO-1 was entered as a full exhibit.

The Board's Exhibits B-1 through B-18 were entered as full exhibits.

Board Exhibit B-19 was objected to by the Parent. The objection to this exhibit was overruled, and the exhibit was admitted.

Board Exhibits B-20-30 were not objected to and admitted as full exhibits.

The Parent Exhibits P-1-P-23, P-37-38, and P-55 were marked for identification and objected to by the Board. P-1-P-23 were admitted only for the limited purpose of background information.

Exhibits P-37, P-38 and P-55 were not admitted.

Counsel for the Board objected to Parent Exhibit P-41, which was a Confidential Settlement Agreement between the parties covering all claims prior to August 21, 2019. The Hearing Officer sustained the Board's Objection, did not consider Exhibit P-41 in the hearing, and excluded all claims for actions by the Board prior to August 21, 2018.

All other Parent Exhibits were admitted.

All motions and objections not previously ruled upon, if any, are hereby overruled.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law set forth herein, which reference certain exhibits and witness testimony, and 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 fact actually represent conclusions of law, they should be so 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. v. Calallen Independent School Board*, 835 F. Supp. 340 (S. D. Tex., 1993)

SUMMARY:

The fourteen-year old Student is attending the ninth grade at Amity Regional High School. He is identified as a student with Specific Learning Disabilities/Dyslexia.

Prior to bringing this case, a settlement was reached on August 21, 2018, resolving all claims against the Board up until that date, therefore, this decision is restricted to consideration of claims occurring after that date.

The parties do not disagree that the Orton Gillingham (“OG”), Wilson or Structured Literacy types of programs of reading instruction are most likely to provide Student with appropriate educational benefit. An Orton Gillingham Fellow was retained by the Board to conduct an evaluation and provide recommendations and consulting. The Parent contends, however, that only a teacher that has had achieved certification in the “practicum” component of the program can be adequately qualified to instruct the Student. The Board initially provided a teacher certified in the first level of OG, but due to an unforeseen and unfortunate situation, this teacher was not available to Student after October, 2018. Student did not have a certified instructor for approximately three months, despite good faith efforts to obtain one. The Student has been denied FAPE thereby. The Hearing Officer orders the Board to provide reading instruction to Student for the remainder of the academic year, under the supervision of a certified Orton Gillingham Fellow. The Board is further ordered to provide compensatory education as set forth herein, and ESY services for the summer of 2019.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 United States Code (“U.S.C.”) §1400 et seq., according to the specified procedures of 20 U.S.C. §1415, and related regulations, Connecticut General Statutes (“C.G.S.”) §10-76h and related regulations, and in accordance with the Connecticut 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 of the evidence submitted by the parties, including documentary evidence and testimony of witnesses, I find the following facts:

1. Student is currently enrolled in the ninth grade in the Board's Amity Regional High School.
2. Student has been and is identified as eligible for special education services with the category of Specific Learning Disability/Dyslexia.
3. Mr. M. was the reading teacher assigned to Student for the 9th Grade. (B-7)
4. At an August 21, 2018 Planning and Placement Team (“PPT”) meeting (“the August PPT”), changes were made to the services to be provided to Student according to Student's Individualized Educational Plan (“IEP”).
5. Going forward, the agreement reached by the August PPT team was for the Board to engage the services of Literacy How, a mutually agreeable consultant that is a certified practitioner of Orton Gillingham, for an evaluation and assessment of Student, and that Literacy How would provide input on Student's reading program on an ongoing basis. (B-4, B-6)¹
6. Orton Gillingham is known as one of several programs (other examples include Wilson and Structured Literacy) developed with the goal of improving literacy for students with Dyslexia, and has been found to be beneficial to the student in the past. (Testimony, Director, Cohen)
7. Joan Cohen, a representative from Literacy How, is a certified Orton Gillingham Fellow, and is the individual that performed the evaluation and assessment of Student. (B-24)
8. Ms. Cohen's evaluation was comprised of a review of Student's records, an assessment of his

1. ¹Other accommodations were agreed on, such as to provide Student with written notes for certain classes, study guides, and allow a language waiver, but these are not the subject of Parent's Due Process request.

- reading difficulties, meetings with the Student, observing him in class, and interviews of his teachers and support staff. (B-9)
9. Ms. Cohen was tasked to perform an objective assessment of Student's reading ability, and also to prepare a report recommending educational strategies that would benefit Student. (B-8)
 10. Ms. Cohen administered the following tests:
 - a. Phonological Assessment Screening Test (“PAST”)
 - b. San Diego Quick Assessment
 - c. WORD ID: Assessment Across the Content Areas
 - d. 2-column note practice
 - e. Grammar/Identification of Word Function
 - f. Sentence Dictations
 - g. Comprehensive Test of Phonological Processing 2 (CTOPP-2) – Rapid Naming Subtests (B-8)
 11. The results of these tests were summarized in Ms. Cohen's assessment report and indicate that Student was not functioning at grade level in phonological awareness, has deficits in decoding and encoding, and that his ability to read “fluctuates across the year.” (B-8)
 12. In the course of her evaluation, Ms. Cohen also met with the reading teacher, Mr. M., and the Director of Pupil Services on September 20, 2018 and observed Student in Mr. M.'s class on October 4, 2018. (B-9)
 13. On the basis of her evaluation and observations, Ms. Cohen made recommendations to the school staff for revisions to Student's IEP. (Testimony, Cohen, B-12)
 14. From September 17, 2018 to November 13, 2018, Student's STAR Reading Score had dropped from 734 to 686. (B-7, B-13, Testimony, Parent)
 15. An PPT was convened on October 29, 2018 (“the October PPT”) to review the evaluation and recommendations provided by Ms. Cohen, and the IEP (“the October IEP”) was the product of revisions made by the team comporting to the evaluation, to include utilizing a “structured literacy approach.” (B-12)
 16. The Director testified that she and Ms. Cohen worked “several hours on making sure the goals correctly reflect what the report and her findings were so we revised his IEP to include her recommendations and it's been our intention to continue that through the remainder of the school year.” (Testimony, Director)
 17. Ms. Cohen recommended that Student have OG tutoring in reading after school. (Testimony, Cohen)
 18. Ms. Cohen recommended several other modifications addressing Student's difficulty with homework, Study Skills and Reading classroom instruction. (Testimony, Cohen, B-12)
 19. In the October IEP, the PPT team revised Goal #2 by adding a short-term objective and also adjusted to increase Student's Study Skills classroom time, but the tutoring was not specifically addressed. (B-12)
 20. Ms. Cohen also proposed a plan to “scaffold” support; i.e. to develop skills to gradually allow Student to gain more independence. (Testimony, Cohen, B-12)
 21. According to the October IEP, the Student was to be provided with 8.31 hours of Special Education and included 24.19 hours of education with his non-disabled peers, in the form of 1.90/hr per 4 day cycle of reading instruction, and two sessions of study skills instruction of 2.85 hr/ per 4 day cycle and 1.90/hr per 4 day cycle. (B-12)
 22. The October, 2018 IEP Goals were directed at: 1) teaching Student strategies for learning and 2) improving Student's literacy, fluency and basic reading skills. (B-12)
 23. Ms. Cohen also advised some restructuring of the class, i.e. implementing “some phonological

- awareness tasks with the David Kilpatrick text, working on sentence structure, verbalizing and visualizing, increasing opportunities to focus on prosody, working on word matrices and lots of scaffolding.” (B-8, B-9, B-12)
24. Ms. Cohen further detailed a plan to “target weaknesses in sound/symbol correspondence, word structure and spelling rules, morphological knowledge addressing semantic and syntactical influences of affixes on word roots, sentence structures and cohesive ties that create coherence, inference making and improve the rate of reading.” (Testimony, Cohen, B-8)
 25. Ms. Cohen's report included the expectation that she would be consulting frequently with the Student's reading teacher, who was OG certified, to assist him in putting these concepts into place. (B-8)
 26. There was a directive in the October IEP that Mr. M., the Student's reading teacher would be collaborating with Ms. Cohen to implement her recommendations. (B-12)
 27. Shortly after the October PPT, however, Mr. M. unexpectedly became extremely ill and had to take an extended medical leave of absence. (B-11)
 28. This unfortunate circumstance left Student without the benefit of a teacher to fulfill the expectations and requirements of the October IEP. (Testimony, Cohen, B-28)
 29. The extended absence of Student's teacher could not reasonably have been anticipated or prevented by the school, but nevertheless impacted Student's educational progress. (Testimony, Director)
 30. The Student missed at least 11 reading classes without the OG-qualified reading teacher. (Testimony, Director, B-28)
 31. Although the recommended “structured literacy approach” was included in the October IEP, there was no uniquely qualified teacher available for a significant number of weeks to provide this specific program of instruction or collaborate with Ms. Cohen. (B-28)
 32. It was the task of the Director of Pupil Services to search for appropriate personnel to provide the agreed-upon services to Student. (B-23)
 33. Ms. Cohen recommended, and testified that she “fully supports” the Student to have the services of an after school reading tutor. (Testimony, Cohen, B-22)
 34. In October, 2018, the Director not only was trying to find a reading teacher, but also a qualified reading tutor. (Testimony, Director)
 35. Even though a tutor was not specifically mandated in the October IEP, the PPT team was aware of that recommendation, and intended that a tutor should be provided. (Testimony, Director)
 36. The Director contacted several resources, including Ms. Cohen herself, for assistance in locating a qualified (OG or substantially similarly) trained teacher. (Testimony, Director, Cohen)
 37. Despite diligent efforts, the Director was unable to find and hire a candidate sufficiently trained in Orton Gillingham, Wilson or Structured Literacy to provide the instruction in the area of reading from October 1, 2018 to December 4, 2018. (Testimony, Director, B-28)
 38. The Director attempted to follow Ms. Cohen's directive, and find a tutor to work with Student one-on-one after school, but she was unsuccessful. (Testimony, Director)
 39. Beginning in early December, 2018, the Student did begin to receive classroom instruction from a new substitute reading teacher. (Testimony, Parent)
 40. Although she is very experienced in the teaching of reading to students in grades K-8, the new teacher, Ms. N., has not taught high school students, has no specific background in teaching students with Dyslexia, nor has she been trained in OG or any similar program of instruction. (B-25)
 41. This teacher has testified that “OG would work really well for Student.” (Testimony, N)

42. Even though Ms. Cohen is still consulting on the case, Student is still not receiving the full benefit of the agreed-on services to which he is entitled, and was supposed to receive, according to the October IEP. (Testimony, Parent, B-12)
43. It is not clear, as of the date of the conclusion of the hearing, when Mr. M., who has, at least, the basic first-level OG training, is expected to return to work. (Testimony, Director)
44. Despite the stated intention to do so, no tutor has yet been engaged for Student by the Board to the date of the conclusion of the hearing. (Testimony, Director)

CONCLUSIONS OF LAW AND DISCUSSION:

CONCLUSIONS OF LAW:

1. There is no dispute that the Student is entitled to special education and related services as a student identified with Specific Learning Disability/Dyslexia and thereby entitled to receive a free and appropriate public education ("FAPE") pursuant to 20 U.S.C. §1400 et. seq., the Individuals with Disabilities Education Act ("IDEA", also "the Act"), 34 C.F.R §300.7(a) and Section 10-76a-1(d) of the Regulations of Connecticut State Agencies (RCSA).
2. The Act defines FAPE as special education and related services which:

"(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 required under Sec. 614(d)."

20 U.S.C. Section 1401(8); 34 C. F. R. §300.13
3. The party who filed for due process has the burden of going forward with the evidence. In all cases, however, the public agency has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence, except for hearings conducted pursuant to 34 C.F.R. §300.521. R.C.S.A. §10-76h-14(a)
4. The benchmark case on the definition of FAPE is provided in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U. S. 176 (1982) In 2017, the U.S. Supreme Court clarified that, in order to provide FAPE, a district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 998-9 (2017) The *Endrew* decision goes on to say that the child's educational program must be appropriately ambitious in light of his or her circumstances and every child should have the chance to meet challenging objectives. *Endrew*, at 1000-1
5. The Act guarantees every child an appropriate education, but "not one that provides everything that might be thought desirable by loving parents." *Walczak v. Florida Union Free School District*, 142 F. 3rd 119, 132 (2nd Cir. 1998) "While Boards do not have the responsibility to provide the best education that money can buy, the benefit to be conferred under the IDEA requires more than a trivial educational benefit." *Polk v. Central Susquehanna*, 853 F.2d 171,180 (3d. Cir. 1988). The IEP is so critical to the IDEA that it has been termed "the key operative feature of the federal Act." *David D. v. Dartmouth*

School Comm., 775 F.2d 411, 423 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790 (1986).

6. The IEP must set forth goals and objectives which provide a mechanism to determine whether the placement and services are enabling the child to make educational progress. 20 U.S.C. §1401(a)(20). Connecticut courts have determined that in order for an IEP to be found appropriate, it must provide more than mere trivial advancement, it must be one that is " ... likely to produce progress, not regress." *Mrs. B. v. Milford B.O.E.*, 103 F.2d 1114, 1121 (2d Cir. 1997), *Walczak v. Florida Union Free School District*, 142 F. 3rd 119, 132 (2nd Cir. 1998).

7. The student's capabilities, intellectual progress and what the LEA has offered must be considered along with grade promotions and test scores in determining whether the program offered is reasonably calculated to confer a nontrivial or meaningful educational benefit to the child. See. *Hall v. Vance County Bd. of Ed.* 774 F.2d 629, 635 (1985). Objective factors such as passing marks and advancement from grade to grade can be indicators of meaningful educational benefits but are not in and of themselves dispositive. See. *Mrs. B. v. Milford Bd. of Ed.*, at 1120.

8. Compensatory education is the "replacement of educational services the child should have received in the first place" and should "elevate [the Student] to the position he would have occupied absent the school board's failures." *Reid ex rel. Reid v. Board of Columbia*, 401 F. 3d 516, 518, 524-27 (D.C. Cir. 2005)

9. Compensatory education has been recognized as an available remedy under IDEA for failure of the Board to provide FAPE. See, *K.P. v. Juzwic*, 891 F. Supp. 703 (D. Conn. 1995); *Burr v. Arnback*, 863 F.2d 1071 (2d Cir. 1988)

10. Hearing Officers have the authority to provide compensatory education as an equitable remedy for denial of FAPE. *Student v. Greenwich B.O.E.*, Conn. DOE Case No. 06-005 at 19; *Inquiry of Kohn*, 17 EHLR 522 (OSEP) (2113I91) (*citing with approval Lester H v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

DISCUSSION:

The parties do not dispute that the Orton Gillingham method is the appropriate one for the Student.² The testimony from Ms. Cohen and also, significantly, from the Director, revealed that the structured literacy method and specifically the elements of the Orton Gillingham program detailed in the most recent IEP, would continue to be effective for Student.

I find, based on the documentary evidence and the witnesses' testimony, that the Student's IEP for the 2018-19 school year was reasonably calculated to provide him with educational benefit, provided a qualified teacher was made available to him. I further find that the Orton Gillingham program would be appropriate, adequate and designed to provide Student with FAPE, if he were to receive it. For a significant portion of the 2018-19 school year, however, he has been denied FAPE, due to the absence of a qualified teacher and implementation of the structured literacy program recommended by Ms. Cohen (FF 27-32, 37, 40-42)

The parties differed as to the adequacy of training necessary to become qualified to provide a program

² There was no evidence presented at the hearing on the question of whether Orton Gillingham is a "Scientifically Based Research Intervention" and so that issue is abandoned.

of “structured literacy” to Student. The Parents claim that a qualified teacher for Student must be one that is not only OG certified but has also completed its practicum component as well. However, there was no evidence presented at the hearing on the issue that Student was denied FAPE because no certified reading teacher had completed the OG practicum. Therefore, Student was not denied FAPE on the basis that Parents allege, i.e. that a OG certified teacher must have completed the practicum component in order to be a qualified OG teacher. Ms. Cohen, as an OG Fellow, was certainly qualified to consult upon Student's reading program and provide the supervision required of an OG practicum. (FF 7)

Ms. Cohen's testimony described, in great detail, certain approaches to reading fluency and ability she would have implemented via Student's teacher. Her consulting services were predicated on collaborating with an experienced, certified reading teacher. (FF 16-26, 31)

Due to the situation, the Student had neither a qualified reading teacher, nor the benefit of the implementation of the recommendations by Joan Cohen contained in his IEP, for a significant period of time. (FF 5, 11,13, 16-25, 27-31)

The testimony of the School Director also detailed the sequence of events leading to the leave of absence of the reading teacher and that the Board admits that the search for a qualified substitute teacher was difficult and unsuccessful until one was found in the first week of December, 2018. (FF 27-32, 34-40)

The documents in evidence indicate the Student regressed in his reading skills, according to comparison of his STAR scores from September to December 2018 showing a decline of nearly fifty (50) points. (FF 14), and that he was having difficulty with his homework. (FF 17) Progress on both these issues was stalled by the lack of a certified reading teacher and delayed implementation of Ms. Cohen's plan.

While the IEP facially appeared to provide FAPE, the lack of implementation of the recommendations operated to deprive Student of appropriate progress in light of his circumstances.

Accordingly, because the Student was denied FAPE for the period from October 1 to December 4, 2018, he deserves compensatory education services as set forth below.

FINAL DECISION AND ORDER:

1. No expert testimony was offered on the issue of whether the Student was receiving a scientifically research-based intervention (“SRBI”) specifically designed to meet his individual needs, and this issue was not directly addressed at the hearing.
2. The 2018-2019 Individual Education Plan (“IEP”) currently in place and offered to Student by the Board was reasonably calculated to provide educational benefit if it is fully implemented.
3. The Orton Gillingham instruction that was recommended in the two Independent Educational Evaluations (“IEEs”) done by separate evaluators is not currently being provided to Student; however, a modified structured literacy program of that type is appropriate for him, adequate, and designed to provide Student with a Free and Appropriate Public Education (“FAPE”).
4. Student has been denied a Free and Appropriate Public Education by not receiving the agreed-upon and recommended services set out in his IEP from October 1, 2018 to December 3, 2018. In addition,

the present substitute reading instructor working with Student is not qualified and experienced enough to provide Student with the level of service he has been found to require, but I find that the original reading teacher would be sufficiently qualified and experienced, in the event he returns to work.

5. The Student is to be provided with compensatory services for the instruction time that has been missed since the start of the school year in August, 2018.

The agreed-on services of the most recent IEP must be provided as stated therein without further delay. The Board is ordered to place Student in a reading class with a certified reading teacher that will consult on the subject of Student's reading progress with Ms. Joan Cohen on at least a once-weekly basis for the remainder of the academic year. In the event Mr. M. returns to work, Student shall return to his class and he shall consult with Ms. Cohen as above. The PPT team shall incorporate the recommendations of Ms. Cohen on an ongoing basis into the Student's IEP in order to improve and advance Student's academic and literacy achievement. Ms. Cohen shall be compensated by the Board at her usual and customary rate for such services. Ms. Cohen shall also be allowed to administer such tests as she may reasonably require, at Board's expense, to assess the Student's progress. Ms. Cohen shall share her reports with the Director and the Parents on a timely basis.

Compensatory education shall be provided to the Student for the remainder of the academic year as follows: Student shall, at Board expense, be provided with a tutor that is certified in a nationally recognized reading/literacy program focused on Dyslexia, such as Orton Gillingham, Wilson, Structured Literacy or comparable, together with transportation to and from such tutoring, for three (3) hours per week. As further compensatory education, the Board shall provide at least 16 hours of reading instruction in the summer to Student. Board shall provide transportation if necessary.