

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Fairfield Board of Education v. Student

Appearing on behalf of the Parents: Pro Se

Appearing on behalf of the Board: Attorney Michele C. Laubin
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, Ct 06460

Appearing before: Justino Rosado, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Was the neuropsychological evaluation conducted by the Board appropriate? If not;
2. Should the Board conduct an independent neuropsychological evaluation at public expense?

JURISDICTION:

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

SUMMARY:

The Student has been identified with Autism and is entitled to receive a free and appropriate public education (FAPE) as defined in the Individuals with Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a et seq. At a planning and placement team (PPT) meeting, the Parent stated that the neuropsychological evaluation conducted by the Board was not appropriate and requested an independent neuropsychological evaluation at public expense. The Board denied the Parent's request and on August 14, 2014, the Board filed for due process.

PROCEDURAL HISTORY:

An impartial hearing officer was appointed on August 14, 2014 and a pre-hearing conference was held on September 4, 2014. Hearing dates of October 21, 2014, November 21, 2014 and December 16 and 18, 2014 were chosen by the parties. The November 21, 2014 hearing date was cancelled. The Board presented Exhibits 1 thru 58 which were full exhibits of the hearing. Parents presented Exhibits 1 through 87. Parents' Exhibits¹ 3-82 and 85-86 were marked for identification only, but were later accepted as full exhibits. Parents' Exhibits 1, 2, 83 and 84 were excluded as exhibits of the hearing. Parents' Exhibit P-87 was accepted as a full exhibit of the hearing.

¹ Hereafter Parents' Exhibits will be noted as "P" followed by the number of the exhibit.

The Parents presented four witnesses and the Board presented two witnesses. The Board objected to the Parents' opening statement on issues that were not issues of the hearing, and that the Board had other documents that were not provided to the Parents. The objection was sustained.

At the conclusion of the evidentiary portion of the hearing, a briefing schedule was discussed and the parties agreed to file, on January 20, 2015, simultaneous post trial briefs. The briefs were timely filed by both parties. The parties were instructed that any factual references and arguments presented in the briefs had to have a factual basis of prior evidence presented during the course of the hearing².

This Final Decision and Order set forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented 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. SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and Bonnie Ann F.v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

The date for the mailing of the Final Decision and Order was extended to accommodate the hearing date and the briefing schedule. The date for mailing the Final Decision and Order is February 25, 2015.

FINDINGS OF FACT:

1. The Student is diagnosed with Autism and eligible to receive special education and related services as defined in the Individuals with Disabilities Educational Improvement Act ("IDEA") 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. (Board's Exhibit³ No. 23)
2. In March 2008, the Parents referred the Student for evaluations. The Parents were concerned with the Student's language development and lack of eye contact. The Student was exhibiting behaviors consistent with autism (hand flapping). The evaluators found that the Student's communication skill development, adaptive skills development, and fine motor skills were significantly delayed. (Testimony of Father, B -1)
3. At the July 8, 2009 PPT meeting, the Student was found to be eligible to receive special education and related services as defined in IDEA under the classification of Developmental Delay. The Student was provided with speech and language and occupational therapy services. (B-9)
4. At the April 25, 2010 PPT meeting, the team determined that the Student's classification under IDEA should be Speech and Language Impaired. The Teacher rated the Student's social skills as at risk. The Student was provided with speech and language services, occupational therapy

² Parents' Post Trial Brief makes a page by page analysis of Dr. Grayson's neuropsychological evaluation. This is the evaluation that is the issue of the hearing. Most of the Parents' analysis was not provided as testimony during the evidentiary portion of the hearing and cannot be considered as evidence of the hearing and a basis of the argument of the Parents' Post Trial Brief.

³ Hereafter Board's Exhibits will be noted as "B" followed by the number of the exhibit.

services and adaptive physical education. He was provided with social skills group service for 10 days as extended school year. (B-17)

5. In September 2011, the Parents expressed concerns about the Student and requested reevaluations to determine if the Student had an undiagnosed disorder. Based on the Parents' concern a reevaluation was agreed to by the team. (B-19)
6. At the February 10, 2012 PPT, the team changed the Student's classification to Autism. This change was based on the reevaluations conducted at the request of the Parents and the Worksheet for Eligibility Determination for Autism. A new individualized education program (IEP) was created with goals and objectives to address the Student's needs. (B-23, B-24)
7. During the 2013-2014 school year, the Student attended the second grade at the Board's elementary school. Based on concerns raised by the Parents at the October 18, 2013 PPT meeting, the team recommended that behavior strategies be used to help the Student. (B-29)
8. On November 27, 2013, a Behavior Plan was created to address the unaccepted behavioral concerns raised by the team at the October 18, 2013 PPT meeting. A Board Certified Behavioral Analyst (BCBA) would provide ongoing consults in regard to the effectiveness of the plan, the implementation of strategies and staff training. (B-29, B-30)
9. On January 27, 2014, the Student became upset that he was not picked in a game that was being played in the music class. The Student bolted from the room and was stopped by the school psychologist and the para-professional. (P-16)
10. The occupational therapist noted that the Student was significantly resistant to accept help, had difficulty completing adult-directed tasks, difficulty transitioning back to class, difficulty with self-regulation and difficulty with frustration tolerance. The Student's special education teacher recommended to the Parents to move up the Student's triennial evaluation in order to conduct evaluations to try and ascertain why certain academic tasks resulted in behavioral outbursts. (B-34, Testimony of Special Education Teacher (SET))
11. At the February 7, 2014 PPT, the district recommended moving up the triennial reevaluations to address the concerns about the Student's difficulties that resulted in classroom outbursts. The Parents' advocate stated that the Parents were not in agreement with conducting triennial evaluations at that time. (Testimony of SET, B-35)
12. The Parents requested an outside neuropsychological evaluation and a Functional Behavioral Assessment. (FBA). The Parents were concerned about the Student's classroom outbursts and his academic performance. (Testimony of Mother and Father)
13. The PPT agreed to the neuropsychological evaluations and the FBA. The district provided the Parents with two evaluators to conduct the neuropsychological evaluation and the name of a BCBA assigned to conduct the FBA. The Parents chose Dr. Richard Grayson to conduct the neuropsychological evaluation. (P-25, P-26, P-29)
14. On March 7, 2014, Dr. Grayson contacted the Parents in order to advise them of his scheduling procedures in conducting an evaluation. (P-44)

15. The FBA was completed on April 7, 2014 and was presented on April 11, 2014 at the PPT. The FBA recommended adjusting the current behavioral plan; antecedent modifications to alleviate the escape behavior; teaching the Student replacement behaviors; frequent reviews of the behavior plan during the course of the day; and providing the Student supports within the classroom setting. The team agreed to modify the Student's IEP. (B-46, B-47)
16. The Parent was impressed with the FBA conducted by the Board and the Student was not displaying problems this school year. (Testimony of Mother)
17. In their retainer letter, the Board erroneously identified the evaluator as a psychiatrist and the evaluation as a psychiatric evaluation. The evaluator is a Pediatric Neuropsychologist and he conducted a neuropsychological evaluation. (B-58)
18. The neuropsychological evaluation was conducted on April 7, 14 and 29, 2014 in the Student's 2nd grade general education classroom. In preparation for the evaluation, the evaluator reviewed the Student's prior IEPs and evaluations, conducted an interview with the Parents, and met with school staff to obtain their concerns. (Testimony of Dr. Grayson, B-49)
19. The Board presented the evaluator with three issues for the evaluation: (1) the Student's current academic abilities, (2) If there were any psychological factors impacting the Student, and (3) updated information on his autism diagnosis. (B-60)
20. At the time of the evaluation, the Student was taking Guanfacine under the supervision of his psychiatrist. Two weeks after the evaluation, the Student's medication was changed to Risperdal. (B-49, Testimony of Father)
21. Dr. Grayson used the following assessment tools to evaluate the Student: (1) Stanford Binet Intelligence Scales-5th Edition(SB-V), (2) Woodcock-Johnson III Normative Updates Test of Achievement (Form A), (3) Conners' Continuous Performance Test-2nd Edition (CPT-II), (4) Wide Range Assessment of Memory and Learning 2 (WRAM L2), (5) Wechsler Intelligence Scale for Children –IV (WISC-IV), (6) Developmental Neuropsychological Assessment-2nd Edition (NEPSY-II), (7) Behavior Rating Inventory of Executive Function (BRIEF), (8) Test of Visual Perceptual Skills 3rd Edition (TVPS), (9) Autism Diagnostic Observation Schedule (ADOS), (10) Social Response Scales-2nd Edition (SRS), (11) Achenbach Child Behavior Checklists (CBCL-TRF), (12) Conners' Parent/Teacher Rating Scales- 3rd Edition, and (13) Conners' Teachers Rating Scale Long Form-Revised. (B-49)
22. The Parents filled out rating scales as provided by the evaluator. The Father stated he filled out the rating scales questionnaires in relationship to the Student's behaviors in school, not at home. The Father first stated that this was the first time he filled out a questionnaire. He was not familiar with filling out questionnaires. The Father's credibility was put in question by his statement that he was aware of the behavioral rating scales completed by the Mother for the April 25, 2010 PPT, and that he had previously completed behavior rating scales for the February 10, 2012 PPT. The Parent informed Dr. Grayson that a nephew had Down Syndrome and during the divorce proceedings he had taken Paxil. (Testimony of Father, B-13, B-21, B-23)

23. The evaluator observed the Student in his second grade general education class for 45 minutes. During the observation, it was noted that the Student had issues staying on task, that he did not attempt to catch up when he was not staying on task nor did he request assistance or question what he might have missed. (Testimony of Dr. Grayson)
24. During the WISC-IV it was difficult to maintain the Student on task and he needed more positive reinforcements. During this testing, the Student lashed out and became aggressive. He was difficult to regroup and sustain his attention. The evaluator stopped the test. The overall global processing speed (WISC-IV) was invalid. (Testimony of Dr. Grayson, B-49)
25. The CPT-II, a test of the Student's attention/executive ability, was another test that the evaluator marked as invalid. The Student was required to press the space bar for every letter except X that appeared on the screen. He was unable to sustain his attention for the 14-15 minutes of the test. (Testimony of Dr. Grayson, B-49)
26. The evaluator was not able to assess the Student's reading/decoding, mathematical, and written language skills utilizing the Woodcock Johnson III. The Student was resistant and non-complaint. At times, he demonstrated threatening, aggressive behavior. The evaluator was of the opinion that forcing the Student would give a false result. In standardization it is important to follow strict protocol. Any change in testing would skew the results. The Student was able to write numbers, and in reading, when the words became difficult, he would stop. The assessment was incomplete and invalid. (Testimony of Dr. Grayson, B-49)
27. Dr. Grayson diagnosed the Student with Mixed Disturbance of Conduct and Emotions, Autistic Disorder (requiring substantial support) and Academic or Education Problems. The doctor was of the opinion that the Student's negative behaviors have a significant impact on his daily functioning over multiple domains and impede his ability to engage appropriately with peers and develop relationships. The comorbidity of ADHD or a Generalized Anxiety Disorder was not sufficient to warrant a formal independent diagnosis. (B-49)
28. The rating scales were explained to the Father. The Father's inability to properly complete the rating scales that were provided to him did not change the Evaluator's impression that the Student is autistic. Dr. Grayson's contract for the evaluations required him to provide the District with the evaluation and not discuss it with anyone outside the District without prior authorization. (Testimony of Dr. Grayson, P-67, B-59)
29. Dr. Grayson made the following recommendations:
 - a. Placement in less structured setting, and if the Student continues not making adequate progress, placement should be changed to a more highly structured setting which offers a multi-disciplinary curriculum.
 - b. Continuation of formal speech and language therapy.
 - c. Provide the Student with a consistent schedule of daily assignments with clearly defined instructions. This will address his executive functioning difficulties.
 - d. The school psychologist should continue to develop and modify a behavioral program based on the FBA and this evaluation.
 - e. Due to his limited self-monitoring abilities and help refusal, any and all modifications should be consistently monitored for compliance and/or usage.(B-49)

30. The Evaluator also provided the Parents with generalized instructions recommending a psychiatric assessment to rule out Intermittent Explosive Disorder and/or Unspecified Bipolar Disorder and Related Disorder. The Evaluator recommended Psychopharmacological interventions and coordinated clinical care in which he can receive long-term psychotherapy. (B-49)
31. The Evaluator made generalized recommendations for the Student in his evaluation. These recommendations would be brought to the PPT where he would listen to the team discussions. When he presents to the team, in response to the discussions, he would then make more specific recommendations. This is his usual practice. (Testimony of Dr. Grayson)
32. The Parents and their advocate disagreed with the neuropsychological evaluation performed by Dr. Grayson. They were concerned with the factual information in the report. They did not agree with family history statements and that the Student's behavioral/motivational and academic difficulties date back to pre-school. The Parents contend that the Student did not have behavioral difficulties until second grade. (Testimony of Father, B-54)
33. On November 5, 2014, Dr. Cristina Ciocca provided the Parents with her evaluation of the Student. This evaluation was not reviewed by the PPT. The standard for her evaluations is a full day observation but less than a full day does not invalidate the report. Testing protocols for testing the Student call for no one to be present during the testing, but when Student displayed difficulties, Dr. Ciocca entered the room to encourage the Student to continue. When the Student was difficult and she was getting no data, she uses, "the Boston Approach": coax the Student by motivating him. If she did not coax the Student, he might not have completed the test and she would have had to write "test not completed" as Dr. Grayson did in his evaluation. (Testimony of Dr. Cristina Ciocca) A change in standardization skews results because the Student is doing something he cannot do. (Testimony of Dr. Grayson)

CONCLUSIONS OF LAW and ARGUMENT:

1. It is undisputed that the Student is eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 1401, et seq. FAPE is defined as special education and related services that are provided at public expense, meet the standards of the state educational agency, include an appropriate school education, and that are provided in conformity with the IEP. (20 U.S.C. §1401(8)).
2. The Board filed this request for due process in accordance with the provisions of 34 C.F.R. Section 302.502(b)(2) which provides that, "[I]f a parent requests an independent evaluation at public expense, the public agency must, without unnecessary delay... i) [f]ile a due process request to show that its evaluation is appropriate," if the parents' request is not granted. The sole issue to be determined in this matter is whether the Board's evaluation is appropriate.
3. In determining the standard of appropriateness of the evaluation, 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 regulations implement IDEA regulations in R.C.S.A. §10-76d-9a(a).

4. In reviewing the standard of appropriateness of an evaluation, the focus is on whether the evaluation (1) used a variety of essential tools; (2) was administered by trained, knowledgeable, and qualified personnel; (3) was administered and conducted under standard conditions and in accordance with instructions provided by the producer of the assessments; (4) incorporated information from various sources such as classroom observations and review of existing data; and (5) whether the independent evaluation would provide any new or additional information. *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3rd Cir. 1999)
5. The Parents alleged that facts in Dr. Grayson's report were incorrect. (Findings of Fact No. 32) The Student's behavioral outbursts were prevalent in the second grade, but his motivation and academic difficulties were notable throughout his educational history. (Findings of Fact Nos. 2, 3, 4, 7, 8 and 10) Parental statements of a familial history of Down syndrome and a Parental need of Paxil (even for a short time) are something that would be noted in the Student's history in an evaluation.
6. The evaluation performed by Dr. Grayson was not appropriate. One of the main issues that were to be addressed in the evaluation was the Student's current academic abilities. This was not clearly addressed in the evaluation. (Findings of Fact No. 19) Dr. Grayson clearly had difficulties eliciting responses from the Student. The Student's behavior did not permit Dr. Grayson to receive valid responses from three of the assessments utilized. (Findings of Fact Nos. 24, 25 and 26) The recommendations present in the Neuropsychological evaluation were generalized recommendations that were to be expanded during the dialog at the PPT. This dialog did not occur. (Findings of Fact No. 31) Any additional or new information that is obtained from the evaluation is supposed to be contained in the evaluation. This evaluation is a document that follows the Student during the course of his entire educational experience. It is a document which any school staff member, Parent or future evaluator should be able to review and to determine what has previously been recommended for the Student. The PPT only memorializes part of what occurs during the meeting and much of the dialog that occurs is not recorded. Generalizing recommendations that later can be expanded in response to the team's discussions does not provide a clear blueprint to address the Student's educational, social or emotional needs in order to provide guidance for the Student's educational experience.
7. Dr. Ciocca's evaluation of the Student was not utilized in this decision. The evaluation was obtained when the Parents decided to challenge the neuropsychological evaluation performed by Dr. Grayson. Her report was not reviewed by the PPT and was obtained months after the "window" of this hearing and therefore would be retrospective evidence. R.E. v. New York City Department of Education, 59 IDELR 241 (2d Cir. 2012). The issues presented for this hearing were: Whether the neuropsychological evaluation performed by the Board was appropriate? If not; Should the Board conduct an independent neuropsychological evaluation at public expense? Assessments derived by Dr. Ciocca's evaluation are not for the review of this hearing officer in this hearing and were not assessed to determine the appropriateness of the evaluation.⁴ This hearing is not about a comparison of evaluations to determine whose assessment is better.

⁴ Dr. Ciocca's use of coaxing the Student to elicit answers puts into question the validity of the results of her evaluation. There was no clarification of how much coaxing was done, if there was a cutoff period to the coaxing and if this a valid exemption to the protocols of the assessments. Dr. Ciocca's testimony did not present any evidence stating that "The Boston Approach" (Findings of Fact No. 30) is a valid exemption to the protocols of assessments. (Testimony of Dr. Grayson)

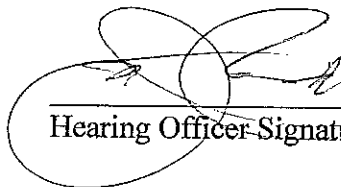
8. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL DECISION AND ORDER:

1. The neuropsychological evaluation conducted by the Board is not appropriate.
2. The Board shall pay for the independent neuropsychological evaluation of the Student.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

Justino Rosado
Hearing Officer Name in Print