

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

East Hartford Board of Education v. Student

Appearing on Behalf of the Parents:

Pro Se

Appearing on Behalf of the Board:

Attorney Linda Yoder  
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One Constitution Plaza  
Hartford, CT 06103-1919

Appearing Before:

Attorney Justino Rosado, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Is therapeutic day placement at Lincoln Academy appropriate and will it provide the Student with a free and appropriate public education (FAPE) in the Least Restrictive Environment (LRE)? If not;
2. Will the residential placement of the student at The Learning Clinic provide the student with FAPE in the LRE?

**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. At an IEP meeting, the Parent rejected the District's recommended residential placement. The Parent requested placement at Grove School. The Board refused the Parent's request and the Board filed for due process.

**PROCEDURAL HISTORY:**

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 Procedures Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186. On or about July 26, 2011, the Parent received notice of the Board's request for due process. An impartial hearing officer was appointed on July 26, 2011, the hearing officer recused herself and a new hearing officer was appointed on July 26, 2011. A pre-hearing conference was held on August 3, 2011. Hearing dates of September 28 and September 30, 2011 were chosen by the parties.

The mailing of the Final Decision and Order was extended thirty days on the record on the last day of hearing with the agreement of all parties, in order to accommodate the mailing of the Final Decision and Order. The mailing date of the Final Decision and Order is November 8, 2011.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of fact 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).

### **FINDINGS OF FACT:**

1. The Student is diagnosed with Asperger's Disorder and Non-verbal Learning Disorder. The Student has been found eligible to receive special education and related services under IDEA. (Testimony Of Supervisor of Special Education, Board's Exhibit<sup>1</sup> No. 14)
2. In May 2009, the doctor from PATH Outpatient Services noted that the Student was having suicidal ideation without clear intent and was then struggling with the setting being offered. The doctor strongly recommended a residential placement for the Student. (B-14)
3. The Parent requested a PPT and on May 5, 2009 the Board complied with Parent's request. The PPT recommended a clinical day program which the Parent rejected. The Parent requested a residential placement and the Board refused the Parent's request. The Board agreed to continue homebound tutoring. The Board's consultant psychiatrist recommended psychiatric and psychological evaluations once the Student starts a clinical day school program. The Parent agreed to the evaluations at Grace Webb School, a clinical day school program, but did not follow through with the placement. The Student did not visit any of the placements recommended by the Board. (B-5)
4. On or about September 8, 2009, the doctor from PATH Outpatient Services sent another letter advising that the Student had 2 additional hospitalizations since his original letter and again strongly recommended residential placement for the Student. (B-7)
5. The Student was placed at Grace Webb School for the purpose of re-evaluations and to determine placement. The Student attended two days and refused to continue attending the school. The Board agreed that the Student's refusal to attend school would require them to look for residential placement in order to conduct re-evaluations and determine his placement. The Student remains on homebound tutoring until a placement has been found. (B-9)
6. The Student was referred to the Northwest Village School but a placement could not be secured. Another school with a residential component was recommended but the Parent refused the placement. The Parent agreed to refer the Student to Lincoln Academy, a program provided by CREC (Capital Regional Education Council). (B-11)
7. The special education teacher at CREC conducted a general observation of the student and recommended that the Student would benefit from a highly structured learning environment with a

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<sup>1</sup> Hereafter Parent's Exhibits will be noted as "P" followed by the exhibit number and Board Exhibits will be noted with a "B" followed by the exhibit number.

strong clinical component, small group instruction and having assignments and activities broken into smaller components. He should have structured timelines and plans for any changes in his educational placement. (B-13)

8. The Student was given a psychological evaluation at CREC. The Student was found to have problems in his executive function and processing, and social-emotional disorder. The evaluator was of the opinion that the Student could qualify for special education under the classification of Emotional Disturbance. The evaluator recommended that the Student requires an educational setting with a high level of structure and support and small classroom size. The evaluator recommended that the Student be given regular and planned check-ins with school personnel in order to monitor his feelings and adjust the in-school environment if necessary. It was recommended that a residential program should be explored. The exposure to a residential program could be stressful for the Student, since it would require him to be away from home; hospitalization could be part of the adjustment process. (B-14)
9. The psychiatric evaluation recommended a highly structured environment for the Student in a self contained classroom with a low staff to student ratio. (B-16)
10. The Student's attendance at Lincoln Academy at CREC progressed from a single class to the inclusion of lunch so that he could eat in the school. There was discussion about extending the diagnostic placement if it continued to proceed well. (B-15)
11. On or about April 16, 2010 the Student stopped attending Lincoln Academy. Prior to his abrupt departure, he had been attending the school as a fulltime student for 4 days. The Student was compliant with his work and although there appeared to be concerns about his behavior it was found to be appropriate. The Parent requested Devereux as a placement for the Student. (B-20)
12. At the May 26, 2010 PPT, the Parent requested that Devereux be removed as a placement for the Student. The Parent requested that The Learning Clinic (TLC) be considered as an appropriate placement for the Student. The Board agreed to forward an application packet to TLC in order to have it considered as a day placement for the Student. TLC would not accept the Student in its day program because of his school avoidance behavior. They were of the opinion that he required a higher level of programming than the day program would offer. TLC was willing to consider a residential program for the Student. (B-20 & B-21)
13. On September 16, 2010 the TLC admission team met with the Student and mother. They were of the opinion that their program structure, residential living program, psycho-educational orientation and cognitive behavior multi-modal intervention model would be helpful to the Student. (B-22)
14. The PPT met on November 4, 2010 and agreed to support a residential program for the Student at TLC. The Parent refused the placement at TLC and recommended placement at Grove School. The Parent felt more comfortable with the staff at Grove School and had better rapport with them. There was also a golf course close to the school that might be of interest to the Student. The Board was concerned that they did not have access to the Student and were making the referral based on Parent information. The Student was close to his 18<sup>th</sup> birthday and the Board wanted to inform him of his rights. The Board proposed that the school psychologist speak with the Student to identify

the Student's interests and desires. The Parent refused to allow the Board to speak with the Student and required that all communications be in writing. The parties agree that homebound tutoring is not appropriate. The Student has continued in the homebound tutoring program until a proper program is found for him. (Testimony of Mother, B-23)

15. Dr. Joseph Brown, a licensed clinical psychologist, had been treating the Student for five years. The doctor recommended a residential program for the Student. He expressed the opinion that the Grove School would be a "good match" because the Student favored attending the school. He was of the opinion that the Student would not attend TLC because he had already expressed his disinterest in the school. The doctor opined that a residential therapeutic environment would meet the Student's needs and a day program had already proven to be highly unsuccessful. These recommendations were reviewed and discussed at a February 2, 2011 PPT. The team was of the opinion that TLC was the appropriate placement but a referral packet was sent to the Grove School as requested by the Parent. (B-25, B-27)
16. The Student requires a small environment where he can receive individualized attention and instruction. He does not like noise or chaos although this is not a behavior issue. He needs a place where he can go when he becomes anxious. The Student would benefit from areas he enjoys. He is verbal and enjoys the computer. The only way the Student can move forward in his education is in a residential program where he can receive support. (Testimony of Supervisor of Special Education)
17. The Supervisor of Special Education met with the counseling director, the residential director and the academic director at The Learning Clinic (TLC). After the visit she was of the opinion that this was the appropriate placement for Student. TLC could offer an academic day program and extended day program and also has a bridge program where the Student could obtain college credits. The program at TLC could assist the Student to become an independent person. (Testimony of Supervisor of Special Education)
18. The Student was afraid to go to CREC because of the violence he perceived and observed. His ambition is to be a psychiatrist. He understands the importance of an education. He does not want to go to TLC because he feels it would be too restrictive. The Student is willing to go to a day program. The Student was under the impression that the Grove School was an option and he was not aware that Dr. Brown was recommending a residential program for the Student. (Testimony of Student)
19. The Grove School responded to the referral of the Student. At the time of the referral, the school did not have any placements available. (B-28, Testimony of Director of Pupil Services)
20. The PPT met on June 17, 2011 to discuss the Student's placement and the lack of a placement at the Grove School for the Student. The Parent did not attend but sent a message through her advocate that she would call and ask for a postponement. The PPT went forward; 40 minutes into the PPT the Parent called and requested a postponement. The Student's IEP was not changed at this PPT but the Board recommended that the Student be placed at TLC. The PPT was informed that the Student had been advised of his rights when he reached the age of eighteen. (Testimony of Director of Pupil Services, B-29)

21. On or about August 8, 2011, the Grove School informed the Board that after further consideration, they did not have any placements available for the Student. They were of the opinion that they could not meet the Student's needs. (B-31)

### CONCLUSIONS OF LAW:

1. The Student qualifies for, and is entitled to receive, a free and appropriate public education (FAPE) with special education and related services provided under the provisions of state and federal laws (CGS § 10-76, et seq. and the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1401, et seq.).
2. IDEA opens the door of public education to children with disabilities. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). Under IDEA, a local educational agency (LEA), such as the Board, must provide to each qualifying student a FAPE in the least restrictive environment. 20 U.S.C. § 1401(19).
3. The purpose of IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes special education and related services "designed to meet their unique needs and prepare them for further education, employment and independent living" and to "ensure that the rights of children with disabilities and parents of such children are protected ..." 20 U.S.C. § 1400(d)(1).
4. An "appropriate" education is one that is reasonably calculated to confer some educational benefit. *See Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-7 (1982); *Walczak v. Florida Union Free Sch. Dist.* 142 F.3d 119,130 (2d Cir. 1998).
5. Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192. The *Rowley* Court determined that the IDEA requires school districts to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Supreme Court found Congress' intent in passing the IDEA was "...more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.
6. However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein v. Greater Clark County School Corporation*, 95 F.Supp.2d 961, 973 (S.D. Ind. 2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a

handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

7. Under *Rowley*, there are two components to the FAPE analysis: one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have "compromised the pupil's right to an appropriate education"; (2) when the district's conduct has "seriously hampered the parents' opportunity to participate in the formulation process"; or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D.*, 88 F.3d at 556. Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard and "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Rowley*, 458 U.S. at 200; *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985).
8. In this matter the first prong of *Rowley* has not been violated. There has been no evidence of any procedural violations committed by the Board.
9. In addressing the 2<sup>nd</sup> prong of *Rowley*, IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP. The Supreme Court, however, has specifically rejected the contention that the "appropriate education" mandated by IDEA requires states to "maximize the potential of handicapped children." *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2d Cir. 1998), citing *Rowley*, supra. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* The goal of IDEA is not to maximize a special education child's potential, but rather to provide access to public education for such children. *K.P. v. Juzwiec*, 891 F. Supp. 703, 718 (D.Conn. 1995). This access is considered a "basic floor of opportunity" for the students. *Banks v. Danbury Board of Education*, 238 F. Supp. 2d 428 [D. Conn. 2003].
10. There is no one standard for determining what constitutes a meaningful educational benefit. 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, e.g., *Hall*, 774 F.2d at 635. 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, e.g., *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1120 (2nd Cir. 1997).
11. In this matter the parties are in agreement that the Student's current placement of homebound tutoring is not appropriate. (Findings of Fact No.14).
12. The Board proposes a day program for the Student. On prior occasions, the Student had attended a day program but after awhile refused to attend the program. (Findings of Fact Nos. 5 and 10). TLC refused to accept the Student in their day program. (Findings of Fact No. 12). The Student's doctor recommended a therapeutic residential program and stated that a day program would not be

successful. (Findings of Fact No. 15). The Board's proposal that the Student attend a day program is not appropriate. The Student's actions make his attendance at a day program highly inappropriate and a guarantee of failure. Professionals who have seen the Student are in agreement that a day program is not appropriate.

13. The parties are in agreement that a residential program is appropriate for the Student. The Parent requests that the Student attend the Grove School. The Grove School has made it clear that it does not have a placement or a program for the Student. (Findings of Fact No. 21). An order to require the Board to send the Student to the Grove School would be inappropriate as the Grove School has already stated that they do not have a place for the Student; the hearing officer has no authority to require a private program to accept the Student.
14. The Board has proposed TLC as a residential placement for the Student. The Student is now of the age to decide for himself whether or not he would attend any placement ordered by the hearing officer. In his testimony the Student demonstrated that he has very high ambitions for his life. These can only be accomplished with an education. The Student's concern with TLC as being restrictive is correct. In the continuum of alternative placements, a residential program is one of the most restrictive settings; however, in order to attain his goals, the Student requires a residential setting. The Student's doctor, the Board and even his Parent were looking for a residential setting. (Findings of Fact Nos. 3, 14, 15 and 18). The Board's request for placement at TLC is appropriate and would provide the Student with FAPE in the LRE.
15. 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 therapeutic day placement of the Student at Lincoln Academy is not appropriate and will not provide the Student with FAPE in the least restrictive environment.
2. The residential placement of the Student at The Learning Clinic is appropriate and will provide the Student with FAPE in the least restrictive environment.