

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Groton Board of Education

Appearing on behalf of the Student:

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Appearing before:

Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board's proposed program for the Student for the 2009-10 school year was appropriate;
2. Whether the Board's proposed program for the Student for the 2010-11 school year was appropriate;
3. Whether the Parents shall be reimbursed for the placement of the Student at Franklin Academy as of January 2010 and through the 2010-11 school year.

SUMMARY:

The 14 year old Student who is identified as eligible for special education and related services has been diagnosed with Asperger's disorder, generalized anxiety disorder and depression. The Parents unilaterally placed the Student at Franklin Academy in January 2010. The parties resolved the claims relating to the 2009-10 school year during the course of this hearing.

The Board offered the Student a therapeutic day program at a state approved private placement for the 2010-11 school year, which the Parents refused. The Parents proceeded with this hearing requesting reimbursement for the Student's placement at Franklin Academy for the 2010-11 school year.

PROCEDURAL HISTORY:

The Board received this request for hearing on November 4, 2010 [H.O.-1] and a prehearing conference convened on November 17. The resolution period was waived by both parties, which

altered the initial mailing date of the decision to December 30, 2010. Requests for extension of the mailing date of the decision were granted to allow the parties to schedule additional hearing dates and submit closing argument.

On the first day of hearing the Board submitted a document entitled "Offer of Judgment" for payment of \$44,000 to resolve all claims pertaining to the 2009-10 school year. While the Parents asserted that the submission did not constitute a timely offer of judgment, the Parents accepted the offer and the hearing proceeded on Issue No. 2 and the portion of Issue No. 3 relative to the 2010-11 school year only.

The hearing convened on six hearing dates from December 16, 2010 to March 15, 2011. One hearing date was cancelled due to inclement weather.

Written closing arguments were submitted by both parties on April 8.

The Parents' witnesses were Michael Blefeld, M.D., the Student's pediatrician; Elda Chesebrough, LCSW, the Student's therapist; Seymore Thomas Hays, educational director of Franklin Academy; Rebecca Hays, clinical director of Franklin Academy; Wilbur Nelson, clinical psychologist; and the Father.

The Board's witnesses were Suzanne Talbot, Board school psychologist; Patricia Berrgren, Board special education teacher, Kristen Pellinen, speech language pathologist; Antonina White, Benhaven consultant; Raymond DuCharme, executive director of The Learning Clinic; and Denise Doolittle, Board director of pupil services.

The Parents submitted exhibits numbered P-1 through P-34. Objections to exhibits P-25 through P-29 were sustained, and these documents were not entered as full exhibits. The remaining exhibits were full exhibits.

The Board submitted exhibits number B-1 through B-100, which were entered as full exhibits.

All exhibits and the testimony of the witnesses were thoroughly reviewed and given their due consideration in this decision.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

STATEMENT OF 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 Administrative Procedure Act ("UAPA"), CGS §§ 4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACTS:

1. The Student is 14 years old and is currently attending Franklin Academy, where she has been unilaterally placed by the Parents since January 2010.
2. It is undisputed that the Student is eligible for special education and related services under the category of autism.
3. The Student's therapist explained the Student's diagnoses and how they manifest themselves. The Student has been diagnosed with Asperger's disorder, as well as generalized anxiety disorder and depressive episodes. The Student exhibits the traits of Asperger's disorder, including limited social skills, problems with social interactions, difficulty understanding the nuances of communication such as body language, a lack of common sense and impulsivity. Some of her actions could offend or irritate others. The Student's anxiety is a prevalent part of her presentation, which she expresses on a regular basis. The Student has problems with transitions and with changes in expectations and she has difficulty adjusting and adapting. The Student has also suffered from depressive episodes, which were very pervasive in the fall 2009. [Testimony Ms. Chesebrough]
4. During the summer 2009 the Student had a negative experience at a summer camp in which she was ostracized and bullied by the other campers in her cabin who were also classmates at her school. She left the camp early due to the difficult situation. [Testimony Ms. Chesebrough, Father]
5. After this summer camp incident, the Student's therapist saw the Student who told her she was terrified to go back to school and very concerned about retaliation. [Testimony Ms. Chesebrough]
6. Prior to the start of the 2009-10 school year, the school psychologist was told of the summer camp bullying incident by the Board guidance counselors. The Parents had provided a list of students that were separated by the type of relationship the Student had with the students, a "black list" that indicated that the students had a bad experience with the Student, a "grey list" in which the Student was neutral about the students and a "white list" which indicated that the students listed had a good relationship with the Student. The guidance department took those into account in terms of class schedule and the students on the black list were not placed in the Student's academic classes. [Testimony Ms. Talbot]
7. As part of the Student's program to assist her in her emotional regulation and social issues, the Student continued to have a checkout procedure during the 2009-10 school year which was based on the recommendation of the Benhaven consultant and was carried out by the school psychologist. This daily checkout provided the Student with an opportunity to meet with the school psychologist about her day in a process of self reflection. [Testimony Ms. White, Ms. Talbot]

8. During the beginning of the school year, the school psychologist monitored the Student's interactions with her classmates. At her regular checkout procedure with the school psychologist at the end of each day, the Student reported that her experiences with her classmates were relatively uneventful. There was one incident in which a student in her math class said something inappropriate, which was dealt with accordingly by the school psychologist. The transition into school after the negative summer camp incident went well at the beginning of the school year due to the appropriate interventions of the Board staff. [Testimony Ms. Talbot]
9. In October 2009, the students at the Board middle school were commencing a long term language arts/film project. The project was introduced to the students earlier than anticipated, and the Student had great difficulty in participating in the portion of the project which included selecting a group of students with whom to work on the project. [Testimony Father]
10. The language arts project is completed in groups of students. The students select the group of four students with whom they'd like to work on the long term project. While this project unusually begins in January, the language arts teachers determined that the students were prepared to commence the project in October. The language arts project did not come up in the Student's weekly team meeting, so the school psychologist had not prepared a plan for how to facilitate the selection of the group for the Student. [Testimony Ms. Talbot]
11. When the students selected groups for the project, the Student was unable to find a successful fit for herself. While one or two groups approached her, she declined and did not find another group which would accept her, although she did attempt to approach some people with whom she wanted to work, but they rejected her. At the time of this language arts/film project, the Student arrived at the checkout with the school psychologist visibly upset, reporting that the groups were chosen for the project and she was left out. At checkout, the Student expressed her concern about the group problem, and the school psychologist told her she would work to make it better for the Student. The school psychologist went to the language arts teacher after school and asked what happened. That teacher agreed that the selection process didn't go well for the Student. [Testimony Ms. Talbot]
12. When the Student arrived home that day she was distraught. The Parents contacted the school psychologist to determine what happened and how the situation could be fixed. The school psychologist said she'd need time to work on the problem and thought it could be resolved by end of school on the next day. [Testimony Father]
13. The Student went to school the next day, but she experienced an emotional meltdown. When the Parents went to pick the Student up from school, they could hear her crying from down the hall from the school psychologist's office where she was waiting. In the office she was shaking, sobbing and wailing. [Testimony Father]

14. On October 26, the Monday following the group project incident, the Student's team meeting convened. The Student was not attending school at this time. At that meeting the Parents notified the Board staff that they were in the process of obtaining a note from the Student's pediatrician to confirm that the Student was too emotionally fragile to return to the school. [Testimony Ms. Talbot, Exhibit B-81]
15. The Student's team reconvened on October 30 to discuss possible options for the Student's language arts project. At the meeting the Parents provided a note from her physician requesting that the Student receive homebound tutoring for two weeks and the Parents told the Board staff that they had contacted an attorney to assist in determining the best placement for the Student. [Testimony Ms. Talbot, Exhibits B-83, P-22]
16. In November the Student's therapist submitted a request to the Board that the Student continue to receive homebound tutoring as a short term solution. [Testimony Ms. Chesebrough, Exhibit P-21]
17. The Student was provided homebound services, including counseling services from the school psychologist. [Testimony Ms. Talbot]
18. On December 21, the Pediatrician wrote a correspondence to the Board stating that due to the Student's fragile emotional state the Student would benefit from a placement at Franklin Academy for the remainder of the year. During this time the Student was presenting herself in a very distressed state when she met with her doctor. Dr. Blefeld based his suggestion for Franklin on a conversation he had with another patient's parent who was an art teacher at Franklin Academy. This letter was not a recommendation for Franklin Academy, but merely a "suggestion." [Testimony Dr. Blefeld, Exhibit P-19]
19. In December the Student's therapist also wrote a letter noting that it was her professional opinion that the Student would be best served by an out of district educational placement and requested that the Board support the Student's placement at Franklin Academy. She wrote this letter because she no longer felt that the Board's school was a safe place for the Student and it wasn't a good educational experience for her. The therapist stated that at the school, the Student was ostracized, exploited, bullied, did not feel safe and her anxiety was overwhelming. This experience was interfering with the Student's ability to absorb information. The therapist based her recommendation for the Franklin Academy program on the information that the Parents provided to her, as well as her visit to the program approximately seven years ago. [Testimony Ms. Chesebrough, Exhibit P-14]
20. Effective January 14, 2010, the Parents enrolled the Student in Franklin Academy and requested that the Board financially support her program at Franklin. [Testimony Father, Exhibit B-89]
21. In February 2010 the Board agreed with the Parents to hire Dr. Wilbur Nelson, Jr., Ph.D., to complete an evaluation of the Student. [Testimony Dr. Nelson, Exhibit P-6]

22. Dr. Nelson confirmed that he could complete the evaluation, but not until April. The Board agreed to this timeframe as most professionals in the field have time constraints due to caseloads and the parties had mutually agreed to have this professional complete the evaluation. [Testimony Ms. Doolittle]
23. Dr. Nelson evaluated the Student on April 22, May 6 and May 22. [Exhibit B-93] The Board was not provided a copy of the evaluation report until the night before the June Planning and Placement Team [PPT] meeting. [Testimony Ms. Doolittle]
24. Dr. Nelson confirmed that the Student's diagnosis was Asperger's disorder, general anxiety disorder and major depressive disorder, single episode in partial remission. [Testimony Dr. Nelson, Exhibit B-93]
25. The report concluded that the Student should not return to the public school for the 2010-11 school year. The psychologist recommended that the Student be educated in an alternate placement as it would be emotionally damaging to return to the public school. The report noted that the Student carries strong and powerful memories regarding her painful interactions with peers in the middle school. The psychologist also noted that with time and proper planning the Student could return to the Board high school, as long as there is substantial preparation to assist the Student with the transition. [Testimony Ms. Doolittle, Exhibit B-93]
26. The Board Director conveyed to the psychologist that she was not pleased to receive the report the night before the PPT meeting without a phone call before, as it was difficult to plan a recommendation for placement for the Student. The Director reviewed the report and shared her draft recommendation with the psychologist that she would recommend two approved special education programs with which she was familiar, The Learning Clinic and High Roads, and he informed the Director that those placements would be appropriate. [Testimony Ms. Doolittle]
27. The PPT convened on June 9, 2010. Dr. Nelson attended the meeting and presented his report. The Board offered the Student an Individualized Education Program [IEP] for the 2010-11 school year at a therapeutic day program, either The Learning Clinic or High Roads. This recommendation was consistent with Dr. Nelson's suggestion that the Student be educated in an alternate placement away from the painful interactions with her peers. The Board requested that the Parents consent to release of the Student's records to both programs. The Parents refused consent to release the records to either program and requested placement at Franklin Academy. [Testimony Ms. Doolittle, Father; Exhibit P-94] The Parents would not allow the release of the Student's records and application submission to either program because "she wasn't going there." [Testimony Father]
28. At the time of the PPT meeting, Dr. Nelson did not opine that the Student should not be moved from Franklin nor did his report state such an opinion. Months after the PPT meeting and during the course of the hearing, Dr. Nelson offered his opinion that the Student should not be moved from the school now, although he also testified that he could not comment on the educational program at Franklin, nor did he recommend that

the Student attend Franklin Academy. He also testified that he doesn't make recommendations for or endorse programs. Offering an opinion that she should not be moved from Franklin would have been valuable and important input for planning of the Student's program, but while he attended the PPT meeting he never indicated that was his position until he testified in January 2011, seven months after the meeting and about eight months after he had last seen the Student. [Testimony Dr. Nelson, Ms. Doolittle]

29. The Board has successfully transitioned the Student from the elementary school to the middle school and the Student was able to transition to Franklin Academy. [Testimony Ms. White, Dr. Nelson]
30. The Director is familiar with The Learning Clinic as the Board has experience with another student with Asperger's disorder who attended the program and made considerable progress. The Director has met the staff at the program and observed in the classroom. It is a state approved program with certified staff and is located in their region. The Director felt it would be a very appropriate placement for the Student. [Testimony Ms. Doolittle, Exhibit B-98]
31. The Director also had experience with a student who had attended High Roads, and she was familiar with their program and comfortable and confident in their methodology. She felt High Roads had comprehensive services and would be another option that she would consider. [Testimony Ms. Doolittle, Exhibit B-99]
32. The Director felt that The Learning Clinic would be the best fit and she was hopeful that they could come to an agreement with the Parents once they saw both programs. [Testimony Ms. Doolittle]
33. The Student should be in an approved special education school because she has the potential to be a successful college student but needs the support of well-trained special education teachers. She would benefit from a research-based teaching style, and it is important for the school to be able to implement an IEP. The Student should be exposed to and participate in the curriculum of a typical ninth grade student. [Testimony Ms. Berggren] Both The Learning Clinic and High Roads would provide such an educational experience to the Student, as well as provide the necessary counseling and emotional support. [Testimony Ms. Doolittle]
34. At the June PPT meeting, the parties also discussed a transition plan to return the Student to public school for the 2011-12 school year, in accordance with Dr. Nelson's recommendations. The transition meetings didn't take place as the Parents initiated due process in fall 2010 and it was unclear what program the Student would be attending and from where she would be transitioning. Therefore, it was unclear how to direct staff on a transition. [Testimony Ms. Doolittle]
35. The Parents refused to look into either of the placements proposed by the Board and refused permission for her application and records to be provided to these schools. They would not cooperate in this process as they were not going to agree that she could go to

either of the schools. [Testimony Father] The Parents never contacted the Board about either placement subsequent to the PPT meeting and did not request that the Board set up visits for either placement. [Testimony Ms. Doolittle]

36. The Student is currently attending Franklin Academy as a residential placement. A residential placement is not necessary for the Student to meet her objectives in her IEP and obtain educational benefit from the program. If the Student were provided instruction following appropriate methodologies she would make appropriate progress in a day program. [Testimony Ms. Doolittle, Ms. White, Ms. Talbot]
37. Franklin Academy is not a special education school approved by the State of Connecticut. Franklin does not implement IEPs for students, nor do they monitor a student's progress on their IEP. Franklin does not align its program with Connecticut standards, nor does it align its program with the courses high school students are expected to take. Franklin does not use research based methodologies that are based on peer review. [Testimony Mr. Hays] The Student's current counselor at Franklin Academy is not licensed in Connecticut. [Testimony Ms. Hays]
38. The Franklin Academy clinical director could not provide a professional opinion about the impact of removing her from the Franklin Academy school environment. [Testimony Ms. Hays]
39. The Learning Clinic is approved by the State Department of Education and can issue a high school diploma. It follows the core curriculum and provides counseling through a staff of licensed clinicians. They develop IEPs which are collaborative. They chart data for every student and compare gains empirically against the baseline. They also assist in the transition of students back to their home school. [Testimony Dr. DuCharme]
40. The Learning Clinic has a place in their program for a 14 year old ninth grade girl, but would have to complete an intake process to determine whether the Student would be accepted. [Testimony Dr. DuCharme]

DISCUSSION/CONCLUSIONS OF LAW:

The Parents brought this action in accordance with the Individuals with Disabilities Education Act [IDEA] which provides for special education and related services to children with disabilities, from birth through age 21. It is undisputed that the Student is entitled to receive a free and appropriate public education ("FAPE") with special education and related services under the disability category autism pursuant to state and federal laws. See Conn. Gen. Stat. §§ 10-76 *et. seq.*; the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401, *et seq.*

The standard for determining whether a FAPE has been provided is set forth in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The two-pronged inquiry set forth in Rowley asks first whether the procedural requirements of IDEA have been reasonably met and, second, whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” Id. at 206-207

Nothing in the record supports the conclusion that there were any procedural violations which resulted in a denial of FAPE to the Student.

The second prong of Rowley is the determination of whether the Board offered the Student an appropriate IEP. The proper gauge for determining the IEP is substantively appropriate is the question of “whether the educational program provided for a child is reasonably calculated to allow the child to receive ‘meaningful’ educational benefits.” Mrs. B. v. Milford Board of Education, 103 F.3d 1114, 1120 (2nd Cir. 1997). Meaningful educational benefits are “not everything that might be thought desirable by loving parents.” Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563, 567 (2nd Cir. 1989). Rather, school districts are required to provide a “‘basic floor of opportunity’ . . . [by providing] access to specialized services which are individually designed to provide educational benefit to the handicapped child.” Rowley, supra, 458 U.S. at 201; see also K.P. v. Juzwic, 891 F. Supp. 703, 718 (D.Conn. 1995) (the goal of the IDEA is to provide access to public education for disabled students, not to maximize a disabled child’s potential)

The Board’s proposed IEP for the Student provided the appropriate supports and services to enable the Student to obtain educational benefit in a state approved therapeutic day program. [Exhibit B-94] Her IEP appropriately addressed her needs for organizational skills, as well as the social skills and emotional supports which are vital for the Student. While the evaluator

noted that it was reported that the Student's mood was better due to a "more benign peer environment, along with the opportunity to live apart from her family" [Exhibit B-93], nothing in the record supports a conclusion that the Student requires a residential placement to obtain educational benefit.

While Dr. Nelson stated during testimony that *now* the Student shouldn't be removed from Franklin Academy because he understands she feels comfortable and safe, that testimony was unpersuasive. The members of the PPT did not have the benefit of this input at the critical time, i.e., during the PPT meeting when they were planning the Student's program. It was unclear from his testimony whether Dr. Nelson had a new opinion in retrospect or was basing his opinion merely on the fact that the Student was there, so she should not be moved as of his testimony in January 2011. But either way, the failure to provide this opinion in June did not allow the members of the PPT to use this input to plan a program for the Student at that time. Moreover, Dr. Nelson's opinion that the Student should not be moved from the Franklin Academy program was that she felt safe and comfortable there. Dr. Nelson has not seen the Student at Franklin Academy since May 2010 when he was conducting his evaluation, so it is wholly unclear why he opines that she should not be moved "now." Dr. Nelson apparently is basing his opinion on someone's report to him that the Student feels safe and comfortable there, since he had had no contact with the Student for many months. It is not based on his first hand knowledge of the Student's emotional presentation, nor a conclusion of an updated evaluation. Therefore, this conclusion is unpersuasive.

The Board has met its burden of proof, demonstrating by a preponderance of evidence that the IEP for the 2010-2011 school year offers the Student a FAPE.

Because the IEP offers an appropriate program in the LRE, the Parents are not entitled to reimbursement for any other placement as the IDEA “does not require [a local educational agency] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made FAPE available to the child and the parents elected to place the child in a private school facility.*” 34 C.F.R. § 300.403(a) (emphasis added); see also M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed., 226 F. 3d 60, 66 (2d Cir. 2000)¹

It also must be noted that the Parents thwarted the Board’s ability to process the Student’s intake at either therapeutic day program because they refused to sign the consent to release records to either program and would not allow an application to be made on behalf of the Student to either program. Failure to cooperate in providing consent to or making students available for evaluations can be reason to refuse reimbursement for tuition spent on private programs and services. See P.S. v. Brookfield Board of Education, 353 F.Supp. 2d 306 (D.Conn. 2005) While it is already found that the Board has offered the Student an appropriate program, it must be noted that such lack of consent did thwart the ability to further process the Student’s intake at either program, and such lack of consent is an inappropriate tactic to be taken by Parents, which on its face would be sufficient reason to deny a reimbursement claim.

The Board has developed and offered an appropriate IEP for the Student for the 2010-11 school year. Therefore, the Parents’ request for reimbursement for the cost of placement at Franklin Academy must be denied.

¹ Only if it is concluded that the IEP is procedurally or substantively deficient must we reach the final step and ask whether the Parents’ placement is appropriate to meet the needs of the Student. A.C. and M.C. v. Board of Education of Chappaqua Central School District, 553 F. 3d 165, 51 IDELR 147 (2nd Cir. 2009)

FINAL DECISION AND ORDER

1. The Board offered the Student an appropriate program for the 2010-11 school year.
2. The Board is not responsible for reimbursement of the Parents' unilateral placement of the Student at Franklin Academy during the 2010-11 school year.