

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

East Windsor Board of Education v. Parent

Appearing on behalf of the Student:	Parent
Appearing on behalf of the Board:	Attorney Christine Chinni Chinni and Meuser, LLC One Darling Drive Avon, CT 06001
Appearing before:	Attorney Brette H. Fitton Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUE:**

Was the Board's most recent recommendation of a diagnostic placement of Student appropriate?

**PROCEDURAL HISTORY:**

This hearing was requested by Board on March 31, 2014 and the Hearing Officer was appointed on that same date. The date for mailing the decision is May 15, 2014. The pre-hearing conference was held on April 28, 2014. The hearing was scheduled for May 7, 2014 and convened on that date.

The Board's witnesses were Patrick Tudryn, Director of Special Education; Jason Smith, Assistant Principal; Patrick Gibbons, Special Education Teacher; Patricia O'Connor, School Counselor; and Donald Casella, School Behavioral Interventionist and Safe School Climate Coordinator. The Parent served as Student's only witness. Parent declined to stay for the entire hearing and left before the Board had finished presenting its case.

The Parent submitted an exhibit P-1 which was entered as a full exhibit. The Board submitted exhibits numbered B-1 to B-16 which were entered as full exhibits. The Board's Special Education Due Process Hearing Request was entered as Hearing Officer's exhibit and marked HO-1.

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

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. For reference, *see SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

**SUMMARY:**

The Student is thirteen years old and currently enrolled in seventh grade at East Windsor Middle School. Student entered the East Windsor School District in the 2012-2013 academic year as a regular education student. Student was referred for an evaluation to determine if he was eligible for Special Education in sixth grade. Educational and Psychological Evaluations were conducted and the Student was identified as eligible for Special Education under the Disability Category of Other Health Impaired-Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder. Beginning shortly after his enrollment in the East Windsor School District, Student began to engage in behaviors that significantly impeded his learning and his ability to successfully interact with his peers. In response to Student's behaviors, Student was placed in an intensive program with six students. This program was implemented on-site at the East Windsor Middle School and was staffed by a special education teacher and two tutors and had in place additional supports in the form of counseling and consultation with other professionals on an as needed basis. Student was placed in this intensive program so that Student could learn to identify and change those behaviors that negatively impacted Student socially and academically. Despite being placed in a highly structured environment with clear expectations, reduced distractions and modified expectations, Student's behavior failed to respond to the Behavior Intervention Plan and little progress was made in meeting Student's Individualized Education Program ("IEP") goals and objectives. The PPT determined that it required more information in order to better understand Student's needs and address those needs in Student's IEP. The PPT recommended a diagnostic placement for Student, where a clinical psychological evaluation could be conducted. Parent rejected the PPT recommendation and the Board filed a Special Education Due Process Hearing in response.

**STATEMENT OF JURISDICTION:**

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

**FINDINGS OF FACT:**

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

1. Student was born on September 13, 2000, and is now thirteen years of age. He is eligible for Special Education and Related Services under the Primary Disability Category of Other Health Impaired-Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder. (Exhibits HO-1 and B-9)
2. Student had a transition in residential custody between parents in the past year. (Testimony of Parent)

3. Student was enrolled in the East Windsor School District beginning in the 2012-2013 school year. Student's prior enrollment was in the Enfield Public Schools. (Testimony of Assistant Principal) The Enfield Public Schools had conducted testing on Student in fourth grade but found him ineligible at that time. (Id.)
4. Soon after enrollment, Student began to engage in behaviors that were disruptive to his learning and that of other students. (Testimony of Assistant Principal, B-16) Student also struggled with acknowledging wrong-doing and taking personal responsibility for his actions. (Id.)
5. Student's behavior included bullying, making threats and swearing at a teacher. (Testimony of Assistant Principal) Consequences instituted by the school included revoking walking home privileges, and in-school and out of school suspensions. (Id.)
6. By December 5, 2013, Student had 13 discipline referrals for acts including creating a disturbance, bullying bus incidents, violating school rules, inappropriate classroom behavior, inappropriate language, and disrespect of a staff member. (Testimony of Assistant Principal; B-7)
7. Discipline of Student was addressed by Assistant Principal for the first two months of the 2012-2013 school year. (Testimony of Assistant Principal)
8. By the end of October of the 2012-2013 academic year, the School had identified social and emotional concerns that they felt necessitated a referral to determine eligibility for Special Education and Related Services. (Testimony of Assistant Principal; B-1)
9. In addition to disciplinary actions taken by the Assistant Principal, the School had attempted to address Student's behavior by permitting Student to complete work in different classrooms when a conflict arose and to take self-directed time-outs in the library. (B-1)
10. A Planning and Placement Team Meeting ("PPT") was held on October 23, 2013. (B-2) During this PPT Meeting, the Board recommended a 45 day diagnostic placement in the Discovery Program, a self-contained program offered on-site at the East Windsor Middle School. (B-2) The PPT agreed to place Student in the Discovery Program and he was then transitioned into that program. (Id.)
11. On December 12, 2013, a PPT meeting was held to review evaluation results and determine eligibility for Special Education. (B-8)
12. The educational evaluation of Student conducted on December 1, 2013 indicates that Student's overall level of achievement is average. (B-6) The Woodcock-Johnson III test results, on which the educational evaluation was based, indicate that Student's oral language skills are in the low average range, while his broad written language, written expression and brief writing scores are in the average to high average range. (Testimony of Special Education Teacher, B-6)

13. The psychological evaluation of Student dated December 5, 2013, found that Student was rated At-Risk or Clinically Significant in a number of areas on the Behavior Assessment System for Children (BASC-2). Areas of concern identified were: locus of control, attitude to teachers, aggression, conduct problems, anxiety, depression, atypicality, withdrawal, hyperactivity, attention problems, relationship with parents, interpersonal relationships, adaptability, social skills, leadership, and functional communications. (B-7) Student's cognitive testing indicated that his overall intellectual functioning falls in the low average range. (Id.) The school psychologist found that based on Student's cognitive functioning, Student should be able to meet grade level requirements with minor assistance. (Id.) Counseling was a suggested component of Student's program. (Id.)
14. The PPT, on December 12, 2013, after reviewing the evaluation results and teacher reports, determined that the Student was eligible for Special Education under the OHI-ADD/ADHD disability category and developed an Individualized Education Program "IEP" for the Student. (B-9) A Behavioral Intervention Plan ("BIP") was a component of Student's IEP. (Id.)
15. Student's first IEP goal was to demonstrate an improvement in socially acceptable behaviors in the school environment. (B-9) This goal was supported by the following objectives: complying with classroom rules and regulations, remaining on task during the class lessons and completing classwork and eliminating avoidance behaviors that involve leaving the classroom, complying with school rules and regulations throughout the day and during unstructured time, complying with teacher directives and requests in a socially acceptable manner, and accepting limits imposed by adults in the educational environment. (B-9)
16. Student's second IEP goal was to demonstrate an improvement in decision-making skills. (B-9) Objectives aligned with this goal were to demonstrate the ability to define the available choices in a given situation and the projected outcomes of each choice and demonstrate the ability to formulate a plan for responsible decision-making. (Id.)
17. Accommodations provided to the Student to address academic needs included extra time to complete assignments, small group work and test settings, posted assignments, minimizing and structuring transitions and preferential seating. (B-9) Accommodations to address behavioral concerns included charting progress and maintaining data, daily feedback to Student, de-escalation strategies and positive reinforcement. (Id.)
18. IEP goals and objectives were addressed within the Discovery Program in which the Student remained enrolled. (Testimony of Special Education Teacher, B-9) The Discovery Program is a staff-intensive program in a small group setting delivered on-site at East Windsor Middle School. (Testimony of Special Education Teacher and Director of Special Education) There are only 6 students, who are served by two tutors and a special education teacher. (Id.) A therapeutic component of the program is delivered by the school social worker who works with students enrolled in the program, both individually and in group work. (Testimony of Social Worker) A Behavior Specialist also served as a consultant for Student's program. (Testimony of Assistant Principal)

19. Although Student initially seemed to buy into the program, he almost immediately disengaged from it. (Testimony of Special Education Worker and Director of Special Education) The Discovery Program employs a points system in which points are earned for targeted behavior. (Id.) A student who earns a certain number of points over a specified amount of time may earn his way back into regular education classes. (Id.) To date, Student has not earned sufficient points on a consistent basis to earn back a regular education class. (Testimony of Special Education Teacher; B-13)
20. Student's behavior in the Discovery Program relative to other peers in the program was so divisive and disruptive to the group that staff determined it was necessary to divide the group of students into two different age groups, so that Student was usually alone or with one other student. (Testimony of Special Education Teacher and Director of Special Education) This was the first time in the history of the program this step was necessary. (Id.)
21. Student's on-task academic time within the Discovery Program has been observed to be less than 50%. (Testimony of Director of Special Education) Student spends a significant amount of the academic day sleeping and physically removing himself from the academic setting, by leaving his assigned work area within the classroom or leaving the room he is assigned to be in and wandering the building. (Testimony of Special Education Teacher and Director of Special Education)
22. Student's behavior has included sexually inappropriate comments toward staff. (Testimony of Special Education Director) Student regularly engages in mean-spirited and highly personal verbal attacks on staff and other students. (Testimony of Special Education Teacher and Director of Special Education)
23. Despite the identified need for counseling, Student does not take advantage of the counseling support offered. (Testimony of School Social Worker) Student does not participate in counseling sessions, and is often non-communicative with the School Social Worker or avoids her by walking a distance apart from her when she attempts to do her morning check-in with him. (Id.)
24. On February 27, 2014, a PPT meeting was held to conduct a manifestation determination, address behavioral concerns, and review or revise the IEP. (B-11) The school based team determined that the Student's behavior was not a manifestation of his disability and recommended a 45-day diagnostic placement to conduct a clinical psychological evaluation. (Id.) Parent refused the diagnostic placement recommendation and the Student continued to be educated in the Discovery Program pursuant to the existing IEP. (Id.)
25. Student's behavior continued to deteriorate over the 2013-2014 academic year. (Testimony of Director of Special Education, Special Education Teacher and School Social Worker) Of particular concern was an incident in which the Student left his assigned work area and roamed the hallways of the school, eventually inserting himself into a music class that was in session, in which Student was not enrolled. (Testimony of Special Education Teacher) Student refused repeated attempts to redirect him and required several staff members be diverted from other tasks to monitor him during this time. (Id.) Other incidents included

insubordination of staff by refusing to go to locations as directed by staff on February 27, 2014 and a physical altercation with another student on March 21, 2014, in which Student slapped another student, in front of staff, after the staff member had broken up a fight. (B-16) In addition, Student has produced writing samples containing troubling violent imagery. (B-15)

26. On April 9, 2014, another PPT meeting was held to conduct a manifestation determination and address the continuing behavioral concerns regarding the Student. (B-14) The school based team determined that the Student's behavior was not a manifestation of his disability and recommended a 45-day diagnostic placement to conduct a clinical psychological evaluation. (Id.) Parent again refused the diagnostic placement recommendation and in response the Board filed a Special Education Due Process Hearing Request. (HO-1, B-14)
27. The Board's recommended diagnostic placement was the Springdale School in Holyoke, MA. (Testimony of School Behavioral Interventionist) The Springdale School has the resources to provide Student with a strong academic program and the clinical psychological evaluation being requested by the Board. (Id.)
28. Student has undergone a significant transition in his living arrangements with a switch of primary custodial parent. (Testimony of Parent) Student's medication may not have been consistently given to Student in the past, but is now being administered consistently by Parent. (Id.)
29. Student was able to reach a level 3, the daily goal under the Discovery Program point system, on certain days in April 2014. (P-1) However, Student was not able to sustain this achievement and there are other days in April in which Student did not engage in his program at all at various points throughout the day. (B-16)
30. Student is still not accessing the supports available to him on a consistent basis. (Testimony of School Social Worker, Special Education Teacher, and Special Education Director)

### **CONCLUSIONS OF LAW AND DISCUSSION:**

1. As an initial evaluation and eligibility determination has already been made by the Board, the clinical psychological evaluation diagnostic placement being proposed is a request for a reevaluation. 34. C.F.R. § 300.303 provides in relevant part that: "A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.301 through 300.311 (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation or (2) If the child's parent or teacher requests a reevaluation."
2. Compelling and strong evidence has been presented that Student is currently available for learning, at best, only 50% of the time he is in school. This is despite significant and sustained intervention in the form of a highly structured program with a high student to staff

ratio. Achievement and cognitive testing indicate that the Student should be accessing the regular curriculum and succeeding with minimum supports. The discrepancy between the Student's abilities and performance clearly support a finding that a reevaluation of the Student is necessary, because the IEP developed by the School based on the existing evaluations is not facilitating progress toward the existing goals and objectives.

3. Pursuant to its obligation under 34 C.F.R. § 300.300 (c), Board sought to obtain Parent's consent for a diagnostic placement so that a clinical psychological evaluation of Student could be conducted.
4. Parent refused to provide consent for the diagnostic placement at the two PPT meetings when the recommendation was made. While parental consent for a reevaluation is required under 34 C.F.R. § 300.300 (c) (i), the Board has the option of requesting parent's consent be overridden by using the consent override procedures set out in 34 C.F.R. § 300.300 (a) (3), which permit the Board to utilize the due process procedures under 34 C.F.R. §§ 300.507 through 300.516.
5. The Board is seeking a diagnostic placement of the Student in accordance with R.C.S. A. Section 10-76d-14 (b) which permits a trial placement for diagnostic purposes as part of a reevaluation of a child. A diagnostic placement is permissible where additional data is needed in order to develop Student's IEP. (Id.) The diagnostic placement is a method of evaluation, not educational placement. *See, e.g., West Hartford Board of Education*, OCR 01-86-1016, 352 IDELR 300(1986). Where a parent does not consent to a diagnostic placement, hearing officers may order the diagnostic placement without the consent of the parent, as it is a method of evaluation. *In Re Student with Disability*, 41 IDELR 143 (2004).
6. The Board's request for a diagnostic placement lasting 45 days violates R.C.S.A. Section 10-76d-14 (b) which limits the duration of diagnostic placements to 40 days.
7. While the Student has evidenced minor improvement over the past month, it is not of sufficient duration or consistency to overcome the clear and pressing need for a better understanding of why this Student is struggling to receive even a minimal benefit from his educational environment.
8. Despite the intensive nature of the Discovery Program and Student's Behavior Intervention Plan, Student has not made meaningful progress on his IEP goals and objectives. Student does not evidence the sustained engagement necessary to "graduate" from the program and transition back into the regular education program. It is clear that despite the good faith efforts of school staff, the Board is struggling to fully understand and meet the Student's needs. The Board is rightfully seeking more information so that Student's IEP can be revised to provide Student with a greater opportunity to learn and experience success. Under these circumstances, a clinical psychological evaluation in a diagnostic placement is appropriate.

**FINAL DECISION AND ORDER:**

1. The Board's most recent recommendation of a diagnostic placement of Student was appropriate.
2. The Board is ordered to immediately convene a PPT meeting to develop an interim IEP that sets out the specific conditions for the diagnostic placement and limits such placement to 40 school days.
3. The Board is ordered to place the Student in Springdale School in Holyoke, Massachusetts for the purposes of a diagnostic placement lasting no more than 40 school days, during which time a clinical psychological evaluation shall be conducted. Placement at the Springdale School, shall be contingent on that program having an Extended School Year program so that the evaluation can proceed and be completed without delay. In the event that the Springdale School does not have an Extended School Year program, the Board is directed to identify and place the Student in a program equivalent to the Springdale School in terms of staff qualifications that does have an Extended School Year program as soon as possible. The Board shall arrange and pay for Student's transportation to and from the Student's placement.
4. The Board is ordered to comply with the deadlines and requirements set out in R.C.S.A. 10-76d-14(b) for reconvening a PPT before the end of the diagnostic program in order to review and revise the child's IEP as necessary.