

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Haven Board of Education

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Appearing before: Justino Rosado, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Is the program offered by the Board from the start of the 2012-2013 school year appropriate and does it provide the Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)? If not;
2. Does the program at ACES Village provide the Student with FAPE in the LRE?

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, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

SUMMARY:

The Student has been identified with Multiple Disabilities and is entitled to receive 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 program offered the Student for the 2012-2013 school year was not appropriate and requested a change in placement. The Board denied the Parent's request. The parties attended a resolution meeting but were not able to resolve the matter.

PROCEDURAL HISTORY:

On April 12, 2013, the Board received notice of the Parent's request for due process.

An impartial hearing officer was appointed on April 12, 2013, a pre-hearing conference was held on April 24, 2013. Hearing dates of May 30, 2013, June 18, 2013, July 1 and July 2, 2013 were chosen by the parties. The Board presented Exhibits 1 thru 110 which were full exhibits of the hearing. The Parent presented one exhibit and it was accepted as a full exhibit of the hearing. A Spanish speaking interpreter was provided to the Parent at all the hearing dates. The Parent presented two witnesses and the Board presented five witnesses.

This Final Decision and Order sets 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 dates and the briefing schedule. The date for mailing the Final Decision and Order is August 23, 2013.

FINDINGS OF FACT:

1. The Student is diagnosed with Multiple Disabilities 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 Exhibit¹ No. 35).
2. The Student's developmental skills are of a child under the age of one. He is not able to walk or stand. The Student has not learned to roll over but can transition himself to a

¹ Hereafter Board's Exhibits will be noted as "B" followed by the number of the exhibit.

sitting position using his arms and going to his side. His trunk strength is poor and when sitting independently, he falls. (Testimony of Physical Therapist).

3. The Student demonstrates severe delays in receptive and expressive language skills and is non-verbal. He communicates using facial expressions, gestures and reflexive noises. The Student is unable to be formally tested with standardized assessments due to the severity of his impairment. The Student has a left vocal paralysis and this would affect his speech. (Testimony of Speech Therapist).
4. The Student has Cortical Visual Impairment ("CVI"). This is a neurological impairment and relates to how the brain processes information. CVI can cause fluctuation in visual functioning and difficulty with getting around, recognizing objects, focusing on near objects, have fast eye movements, and visual field loss. Due to his CVI diagnosis the Student receives services from the Bureau of Education and Services for the Blind ("BESB"). (B-50 and B-77).
5. The Student was diagnosed with hip dysplasia in both hips. This disability causes pain and muscle spasms for which he received Valium as a muscle relaxant. This medication causes drowsiness and makes the student sleepy. The Student underwent surgery for the right hip dysplasia in 2008 and in January of 2013 for the left hip. The Student uses a wheelchair to ambulate. The Student, in the future, should be able to stand independently. The Student is also diagnosed with severe anoxic encephalopathy, a brain disease. (Testimony of Student's Pediatrician).
6. The Student has a hypoplastic left heart. This defect of the heart effects the pumping of blood through the body. The Student's oxygen saturation level is 80-84; the norm is 96-100. This restriction of oxygen through the body affects the Student's response. (Testimony of Student's Pediatrician).
7. The Mother has visited the Student's classroom approximately one to two times per week. The Student likes to have things in his mouth. The Parent has observed the Student in the classroom putting things in his mouth. She has observed the Student staring at a monitor rather than having someone working with him. The Parent did not say anything because she was timid. The Student did not allow himself to be touched. The Parent has offered to go to school and work with the Student. (Testimony of Mother).
8. At the March 20, 2013 PPT meeting, the Mother expressed concerns regarding the use of videos during class time, the communication between home and school, and the introduction of toilet training. (B-74).
9. The Mother asked the PPT for a change of placement. This was denied. The Parent has not visited the out of district placement she has requested for the Student. (Testimony of Mother).
10. The Student is observed by the school nurse when he gets off the school bus. The school nurse also sees him approximately 3-4 times each day to ensure that he is awake, his

color is fine and to administer any medication he might need. (Testimony of School Nurse).

11. The Student has significant global delays with very limited physical abilities. He requires maximum assistance with daily living skills. The Student is dependent upon adult assistance to engage in academic activities. His lack of communication skills makes it unclear if he is receiving academic skills presented. (B-70).
12. When the Student entered the Board's school, he could track objects but only to midline. He internally isolated things around him, did not cooperate. He would withdraw, rock, shut his eyes or turn his head in avoidance. Due to his visual impairment he needed to have things presented to his left side. He would place everything in his mouth. The Student demonstrated difficulty in complying with hand over hand activities. (Testimony of Special Education Teacher).
13. The Student, until his January 2013 left hip dysplasia surgery, presented as being in physical pain much of the time. He demonstrated facial grimacing and crying from the pain. The classroom staff would change and alter his position. The change in position would alleviate the pain. (Testimony of Special Education Teacher).
14. The Student's daily schedule is composed of breakfast, morning circle time, sensory activities and social interaction in the mainstream setting with non-disabled peers. After lunch, the Student has free time where he is taken out of his wheelchair to do things and lastly computer time as part of his school day. (Testimony of Special Education Teacher).
15. The Student received special education instruction, occupational therapy, physical therapy and speech and language pathology therapy. The Parent has enrolled the Student in aquatic therapy. This has improved the Student's trunk strength. (Testimony of Special Education Teacher and Parent).
16. The occupational therapist and the physical therapist develop and execute their own goals and objectives for the Student. They provide in-service training to the school staff on how to implement the plan. They provide direction to the classroom staff. (Testimony of Special Education Teacher).
17. The Student is a non-verbal communicator. He uses reflexive language, facial expressions and hand gestures to communicate. Prior to the left hip dysplasia surgery, the student was distracted by the pain. The Student would nap during the day due to the medication administration. This nap would last approximately 20 minutes. On occasions the Student was in such deep sleep that he could not be awoken for therapy. If therapy was missed, the therapy time would be made up on another occasion. (Testimony of Speech Therapist).
18. The Student demonstrated satisfactory progress in his 2011-2012 communication goal. He did not master this goal because his response to auditory noises was inconsistent. The Student required a full prompt hand-under-hand to move his hand. The fourth objective

of his communication goal was not introduced because the Student would get frustrated trying to differentiate between a knock on the door and a horn. (Testimony of Speech Therapist).

19. The Student was absent approximately 57 times during the 2011-2012 school year. School attendance is important for consistency. (Testimony of Speech Therapist).
20. On May 5, 2012, the speech pathologist reevaluated the Student as part of his triennial evaluation. The evaluator used a Functional Communication Profile to evaluate the Student. The Student requires physical prompting to imitate motor movements. His receptive language skills demonstrate limited understanding of single words and phrases, no desire to look at pictures and does not consistently respond to his name. The Student expressive language skills show evidence of attending to tasks when playing with a musical switch and a pop-up toy. The Student is a nonverbal communicator. He inconsistently shows interest in others and activities. (B-66, Testimony of Speech Therapist).
21. On May 14, 2012, the Student was evaluated by BESB. The evaluator recommended for best visual functioning that the Student:
 - a. Have materials presented within 3 feet.
 - b. Have preferential seating.
 - c. Use toys and materials that have good contrast.
 - d. Present one item at a time against contrasting backgrounds.
 - e. Use real items rather than symbols.
 - f. Use repetitive and familiar routines.(B-60).
22. The BESB evaluator also found that the Student does not have a hearing impairment. He is a non-verbal communicator that requires hand-under-hand to complete all tasks. The evaluator found that the Student is not afraid to try new things and can grasp and manipulate a toy up to 5 seconds. He is able to localize a sound and respond to his name. He enjoys interacting with adults and can distinguish between his classmates. The Student receives consultative services from Teacher of Students with Visual Impairment once a month. The evaluator recommended services by a certified Teacher of Students with Visual Impairment 5 times a year. (B-60).
23. On May 22, 2012, the Student had a physical therapy evaluation. The evaluator found that the Student had made progress in his tolerance for sitting in a wheelchair and for change in his position throughout his school day. The Student had been provided with a body brace because of an increased curvature and concern he was not able to sit straight. The brace was not used in school because it did not fit properly, seemed too tight and was causing a breathing problem. (B-62 and Testimony of Physical Therapist).
24. At the June 2013 PPT meeting, the team recommended that the Student's cardiologist review the brace and make recommendations or adjustments with respect to its fitting. (Testimony of Mother).

25. The Student's 2011-2012 Progress Report showed that academically he had mastered three objectives: track an object vertically; respond to sensory stimulation; and attend auditory stimuli and respond with an appropriate gesture. The Student had made satisfactory progress in two objectives and in one, grasps a pencil or crayon conventionally, he had made no progress. (B-64).
26. The Student made satisfactory progress in his fine/gross motor goal number 4. He was able to master objective two: engage in activities using a variety of classroom tools with maximum assistance and objective three: bring a utensil to his mouth with minimal assistance. (B-64 and Testimony of Occupational Therapist).
27. The Parent did not see the progress in the Student's program. She has seen improvements in the Student's speech and he tries to pronounce "water". The Mother did not voice her opinion because she was timid and expected thing to improve. In March 2013 the Parent obtained an advocate. (Testimony of Mother).
28. The Student's 2012-2013 Individualized Education Program (IEP) consisted of five goals:
- a. An academic goal to improve his basic concepts and cognitive prerequisite skills to learn and progress toward achieving the learning standard.
 - b. A social skills goal to improve social accepted behaviors in the school environment.
 - c. A communication goal to improve language skills to listen to information to improve understanding, expression and social interaction.
 - d. A fine motors skills goal to increase participation in fine/visual motor and self-care tasks.
 - e. A gross motor skills goal to improve strength, flexibility and balance for participation with the school program.
- (B-71).
29. On October 23, 2012, the school nurse noticed that the Student's eyes were red and secreting some fluid. The Student was sent home and she advised the Parent to take the Student to his physician. The Student was diagnosed with conjunctivitis. The School nurse was provided with a Seizure Action Plan. If the Student had a seizure the nurse was to administer medication. The Student on January 7, 2013, underwent surgery for the left hip dysplasia. (Testimony of School Nurse and B-85).
30. The Student was absent from school following the surgery for left hip dysplasia until April 8, 2013. Once the student was able to receive instruction, he was provided with homebound tutoring following his surgery. The Parent was satisfied with the Student's home bound instruction. (Testimony of Mother).
31. Prior to his surgery, the Student had been making satisfactory progress in his 2012-2013 goals and objects. The April marking period showed a lack of progress in all his goals

and objectives. This was due to the Student's absence from school from January 7, 2013 to April 8, 2013. (Testimony of Special Education Teacher and B-79).

32. Since the surgery, the Student does not experience the debilitating pain he showed in school. The Student's attitude has changed since the surgery. He shows more interest in school activities and those around him. He is more available to learn. The Student has demonstrated playing by touching a ball suspended from the ceiling and other students touching it back. (Testimony of Special Education Teacher).
33. The Student has shown progress in his ability to listen. He now responds to auditory noises in a more consistent manner. The Student responds to color switches that are musical. When the Student is asked, "Are you here?" He will independently press the switch in response saying, "I am here." If the Student's motor skills improve, the speech therapist may decide to add sign language or a variation of sign language to his program. (Testimony of Speech Therapist).
34. Before, the Student would place a toy in his mouth, now, he uses it in an intentional manner. (Testimony of Special Education Teacher).
35. The communication log is used to inform the Parent of the Student's progress and what he is doing in school. With this information, the Parent could work at home with these skills. The Parent did not respond to the communication log because she was not aware that she should. The Parent stated that she follows the communication log's recommendations. (Testimony of Speech Therapist).
36. The initiation of a toileting protocol was a concern of the Mother. This protocol was considered by the occupational therapist and she discussed it with the private therapist from Yale. The Yale therapist said the Parent had not expressed this concern but needed a note from the Student's doctor, that he had the readiness skills for this protocol and the sensation necessary to indicate a need to use the toilet. Neither the Student's doctor nor the private occupational therapist has recommended the initiation of a toileting program. The Mother has not spoken with the school nurse about a toileting program. (Testimony of Occupational Therapist and Mother).
37. Initiating a transfer of the Student from his wheel chair to a change table required two persons. Since the Student's January 2013 operation this now can be accomplished by one person with the assistance of the Student. The Student is now able to bear some of his own weight. (Testimony of Occupational Therapist).
38. The Mother has not visited the school or program that is being recommended for the Student. She was given a note telling her what is available at ACES. They have a swimming program and they utilize music. (Testimony of Mother).

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. Once a Board has identified a child as eligible for IDEA services, it must create and implement an IEP based on the student's needs and areas of disability. Boards are not, however, required to "maximize the potential" of each handicapped student. Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 197 n. 21 (1982)). Instead, to satisfy the IDEA, the Board must offer an IEP that is "reasonably calculated" to enable the child to receive "meaningful" educational benefits in light of the student's intellectual potential. Id. at 206-207. Once the Board has designed and administered an IEP that is reasonably calculated to enable the receipt of meaningful educational benefits, it has satisfied its obligation to provide the child with FAPE.
3. If the Parent or the Student is not satisfied or that the program will not provide FAPE, they can challenge the educational placement. 34 C.F.R. §300.507(a)(1). It is the Board's responsibility of proving, by a preponderance of the evidence, the appropriateness of the program and placement it has provided to the Student. Conn. Gen. Stat. (CGS) §10-76h-14(a).
4. The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in Rowley. It must first be determined whether the Board complied with the procedural requirements of IDEA. The second inquiry is a determination of whether the IEP is "reasonably calculated to enable the child to receive educational benefits." Id. at 206-207.
5. The IDEA's procedural requirements and safeguards are designed to assure that the parents of a child with a disability have a full and meaningful opportunity to participate along with LEA personnel in developing, reviewing and revising their child's IEP. Compliance with the IDEA's procedural requirements is the responsibility of the Board and not the Parents. Unified Sch. Dist. v. Dept. of Ed., 64 Conn. App. 273, 285 (2001). Procedural violations alone can be deemed a denial of FAPE. Student v. Newtown B.O.E., CT DOE Case No. 07-075 (8/23/07). In order to conclude that procedural violations resulted in a denial of a FAPE, the Parents must show that the procedural errors resulted in a loss of educational opportunity. Id. at 22; See, Burke County Bd. of Ed. v. Denton, 895 F.2d 973, 982 (4th Cir. 1999); Evans v. District No. 17, 841 F.2d 824, 830 (8th Cir. 1988); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484-85 (9th Cir. 1992). When a procedural violation is alleged, a Hearing Officer may find that a Student did not receive FAPE if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the Parents' child, or caused a deprivation of educational benefit. 34 CFR §300.513(a) (2) (i-iii); Id. at 22; See,

Burke at 982; Evans at 830; W.G. at 1484-8. Procedural violations that interfere with Parents' participation in the IEP formulation process undermine the very essence of IDEA. Amanda J. ex rel Annette J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001). An IEP addresses the unique needs of the child and cannot be developed if those people most familiar with the child's needs are not involved or fully informed. Id. Procedural safeguards are set forth in 20 U.S.C. §1415 and 34 CFR §§500-536 and include: the right for Parents to participate in all meetings (CFR §300.501(b)); the right for Parental involvement in placement decisions (CFR §300.501(c)); the right of Parents to examine all educational records (CFR §300.501(a)); the right for Parents to obtain an Independent Educational Evaluation (IEE) of their child (§300.502(b)); the requirement for Boards to consider evaluations provided by Parents at private expense in the deciding FAPE (CRF §300.502(c)). IDEA expects strong Parental input at PPT meetings, Warren G. v. Cumberland County Sch. Dist., 190 F. 3d 80, 86 (3d Cir. 1993). The IEP is to be collaborative developed by the Parents of the Student, educators and other specialists and Congress repeatedly emphasized the "importance and indeed the necessity of Parental participation in both the development of the IEP and any subsequent assessments." Honig v. Doe 484 U.S. 305, 311 (1988). Failure by the Board to develop an IEP in accordance with procedures mandated by IDEIA, in and of itself, can be deemed a denial of FAPE. Amanda J. ex rel Annette J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir.2001).

6. There are no allegations that the Board committed any procedural violations and the testimony provided does not demonstrate that Board failed to provide the Parent her procedural safeguards. She was given the opportunity to be a meaningful participant at the PPT. (Findings of Fact No. 8).
7. The second inquiry of the Rowley test specifically addresses whether the respective Student's IEP provided FAPE. Appropriateness is determined by focusing on what was or was not, objectively reasonable when a snapshot of the IEP was taken. D.F. and D.F. on behalf of N.F. v. Ramapo Central School District, 403 F3d. 595 (2d. Circuit 2005).
8. The Board fulfills its obligation under the second inquiry if it provides an IEP that is "likely to produce progress, not regression," and if the IEP affords the Student with an opportunity greater than "trivial advancement." Walczak v. Florida Union Free School District, 142 F.3d at 130.
9. The Student's 2012-2013 program was in the LRE. This mandate requires: (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34C.F.R. §300.114(a)(2).

10. The Student's program provided time for him to be in a classroom with non-disabled peers. (Findings of Fact No. 14).
11. The Student was making satisfactory progress in his IEP goals and objectives for the November and January marking periods. This progress came to an abrupt reversal in his April marking period. (Findings of Fact No. 31).
12. Student's lack of progress during the April marking period of the 2012-2013 school year does not demonstrate that the Board failed to offer a program reasonably calculated to offer meaningful educational benefit. In Lessard v. Wilton-Lyndeborough Cooperative School District, 49 IDELR 180, 518 F.3d 18, 29 (1st Cir. 2008), the court ruled that limited progress after implementation of the IEP does not render an IEP inappropriate. While educational progress can demonstrate that an IEP provides FAPE, the lack of progress does not mean that the IEP was not appropriate:

But to impose the inverse of this rule – that a lack of progress necessarily betokens an IEP's inadequacy – would contradict the fundamental concept that an IEP is a snapshot, not a retrospective. Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology ex post merely because the disabled child's progress does not meet the parents' or the educators' expectations. (internal citations omitted).

In holding that the district's IEP offered the Student FAPE, the court noted that "levels of progress must be judged with respect to the potential of the particular child." See also Fuhrmann v. East Hanover Board of Education, 19 IDELR 1065 (3rd Cir. 1993)
13. 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.
14. The Student's potential is extremely limited by the multiple disabilities that affect all facets of his life skills. (Findings of Fact No. 2-8). Accomplishments that are normally taken for granted, responding to auditory noises, are a challenge for the Student. (Findings of Fact No. 18) If anything spoke of the Student's condition was the facial expressions and crying from the pain he was enduring from the hip dysplasia. His lack of communication skills made it unclear if he was receiving the academic skills presented. (Findings of Fact No. 11 and 13). His progress in his goals and objectives, prior to his January 2013 operation, was satisfactory and all indications since his return to school in April 8, 2013 indicate that he will continue making progress. The Student demonstrates playing by touching a ball, he responds to color switches that are musical, he uses toys as they are intended and doesn't place them in his mouth. The Student independently presses the colored switch to state he is present. (Findings of Fact No. 32-34). There is no evidence that the progress of the IEP's goals and objectives being shown will not continue.
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 program offered by the Board for the 2012-2013 school is appropriate and does provide the Student with a FAPE in the LRE.
2. The second issue of whether the program at ACES is appropriate is moot based on the finding that the Board's program was appropriate. Also the evidence provided did not demonstrate what the ACES program offered the Student.