

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Killingly Board of Education

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Appearing before: Attorney Margaret J. Slez, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer an appropriate IEP for the 2002-03 school year?
2. Is the Melmark School an appropriate placement for the student?

SUMMARY:

The 15 year-old student, currently enrolled at the Board intermediate school, is identified as multi-handicapped and has been receiving special education and related services since preschool. At a PPT meeting on March 6, 2002, planning for the student's move to the Board high school, the Board presented a proposed IEP for the 2002-03 school year (Exhibit B-97). Finding the proposed IEP to be inadequate to meet the student's needs at this time, the parent requested placement of the student at The Melmark School in Berwyn, Pennsylvania, for the 2002-03 school year. Upon the Board's refusal to place the student at The Melmark School, the parent requested due process hearing by letter dated March 12, 2002, and received at the Due Process Unit on March 13, 2002. H.O. Exhibit 1.

PROCEDURAL HISTORY:

Formal sessions of the hearing were convened on April 10 and May 16, 2002. On April 25, 2002, the hearing officer observed the student in the school setting and at home after the school day. The original date for the mailing of the final decision and order was April 29, 2002. Upon

motion of the parent for a thirty-day extension, the hearing officer extended the date to May 29, 2002, to allow an additional hearing date.

FINDINGS OF FACT:

1. According to the school psychiatric consultation report of Joel D. Bregman, M.D., the student presents with a highly complex neurodevelopmental profile that includes congenital hydrocephalus (treated with shunt revisions), mental retardation of a moderate to severe degree, deficits in both verbal and non-verbal communication, cerebral palsy, a significant visual impairment, and serious limitations in adaptive skills. The student frequently engages in a range of stereotypic vocalizations, behaviors, and rituals that interfere with adaptive functioning. The student also has a history of qualitative impairments in social reciprocity, emotion perception, pragmatic communication, and in the range and nature of preferred activities. The student's developmental pattern has been interpreted as reflecting an autism spectrum condition. (Exhibit B-99)
2. The student has received special education and related services since preschool, including language and communication therapy, occupational therapy, physical therapy, and modified academics. Dr. Bregman's report states that it has been extremely difficult to determine the student's true potential and capability since the student is non-verbal, socially detached, and largely unmotivated to "produce" at the request of others. Dr. Bregman also reported that despite severe and pervasive impairments, the student exhibits "some impressive splinter skills, such as the ability to identify words and phrases, spell, recall facts of personal interest, and use communication devices." (Exhibit B-99)
3. Testimony of the student's mother was compelling in terms of the range and severity of the student's disabilities. Since the student has an extremely high tolerance for pain and cannot express thoughts or feelings, the mother often does not know when the student is not well. By way of example, the mother testified about an incident in which the student's shunt was broken but it was almost two months before she knew it. Because of the cerebral palsy, the student's balance is not always good; the student falls easily, scuffs when walking, and drags a leg when not feeling well. Although she reported that the student's autism was "not severe," the mother testified that the student regularly engages in rocking, repetitive behavior, and "stimming." The student is legally blind in the right eye. The student has not had a grand mal seizure in approximately five years, but the mother is aware of petit mal seizures, somewhat increased since the student has reached puberty, by the student's vacant stare, fluttering of the eyes, and shaking on the right side. The student takes 45 mg. of phenobarbital in the morning and 45 mg. in the evening. The student is not toilet-trained and cannot anticipate or communicate the need for urination or bowel movement. The student is only able to use a spoon and is working on chewing and swallowing. The student ordinarily stuffs food into his mouth and must be watched, cued, and prompted constantly when eating. The student has no concept of danger, which poses extreme risks, for example, with regard to cars and trucks (on which the student fixates), crossing the street, a local brook, a wood stove, and the kitchen stove. The student's mother described the student as needing to be constantly busy and monitored, giving examples of behavior when bored, frustrated, and not

monitored (turning on the water tap and flooding the kitchen; dumping sugar, cereal, ashes and playing in it). From time to time, the student bites and/or scratches himself or others when struggling, being disciplined, or getting off the school bus. Sexuality issues have become a very large problem in that the student is exceedingly attracted to vibrating surfaces (wooden floor above the home water pump, refrigerators, washing machines, soda machines), which cause the student to engage in masturbatory behaviors. The mother reported incidents of the student's grabbing at her clothes and those of the 17 year-old sister. The student has no independent hygiene skills and can dress only with assistance. The student's father died suddenly in the spring of 2001. For respite care, the student spends a Friday-Saturday overnight once a month at a Department of Mental Retardation facility. (Testimony, student's mother, April 10, 2002)

4. On April 25, 2002, the hearing officer observed the student in the school setting, a special education classroom, from 11:30 a.m. to approximately 2:15 p.m. In addition to the student, there were seven other pupils in the class, most of whom seemed about the same age or younger than the student and only one of whom appeared to be as severely disabled as the student in this case. The little communication there was by the student was accomplished through the student's use of a Cresspeaker, referred to as the student's "talker," as in "Use your talker to tell me." The student has a one-to-one aide who needed to constantly direct and re-direct the student's attention, hands, and head. During the entire observation period, the student engaged in no interaction with other students. Lunch was eaten in the mainstream cafeteria but the special education students sat at tables apart from the mainstream students. The student seemed oblivious to the full, noisy cafeteria, but was attracted to the soda machine. The Board physical therapist assisted the student to the cafeteria, through the food line, to the table, and sat next to the student at lunch, assisting the student in managing the food on the tray and verbally reminding the student not to stuff large amounts into the mouth. The verbal prompts were unheeded by the student and there was no indication of precisely what was being done to correct the habit of stuffing the mouth. The student needed assistance putting on and zipping a jacket to go outside after lunch. "Recess" was spent outside with some of the other special education pupils, but the student was not engaged with the others or attracted by the ball with which they played a bit. There was no structured outdoor activity during the recess time. In the home economics classroom, the student's aide attempted to engage the student in loading a washing machine, putting in the soap, turning the washer on, opening the dryer, emptying the dryer, folding and putting away dish towels. The aide used her hand over the student's hand to accomplish most of these tasks since the student did not independently respond to her verbal prompts and commands. Although the student was clearly distracted by and kept trying to get next to the vibrating washing machine, the student completely ignored the fairly large group of regular education students who came into the room and the directions being given to them by the cooking teacher. At various times during the observation, the hearing officer observed the student at a computer "working" at, variously, a coin recognition exercise, a digital and analog clock game, and a word recognition/spelling list of twenty one-syllable words. Despite the nearly constant head-rolling, the student sat well, was focused on the monitor, and, upon the coaxing and prompts of the aide, typed in mostly correct responses. Near the end of the school day, the aide told the student, "This is your free time," a baffling statement in that the student otherwise needs so much direction and assistance. Nevertheless, the student was handed what looked like a magazine about cars, which the student randomly paged through for a couple of minutes. No direct instruction or therapy

occurred during the observation. At the end of the school day, the student got on a small school bus with other special education students and rode home.

5. The hearing officer observed the student return home from school. The student turned on the television and then, away from the television, sat down in front of a window looking onto the road, holding a brightly-colored stuffed toy that was playing music. Other than eating dinner, there was no indication that the student would be engaged in any other activity until bedtime.
6. For the Board, testimony regarding the student's current program and the proposed IEP (Exhibit B-97) was presented by the assistant director of special education, a speech/language pathologist, an occupational therapist, and a physical therapist. The speech/language pathologist, the occupational therapist, and the physical therapist currently work with the student and are familiar with the student's specific strengths and weaknesses.
7. The proposed IEP (Exhibit B-97) calls for the student to attend the Board high school for the 2002-03 school year. The only transition planned is for the student (presumably, with the other eighth grade special education students at the intermediate school) to visit the high school for one day, meet "the teacher," and have lunch in the cafeteria. The Chrysalis Program at the high school is a "highly individualized" Board program with one teacher for 8-10 students between the ages of 14 and 19+. Most of the students have a 1-to-1 or 2-to-1 aide or assistant. The curriculum, described as "broad," focuses on vocational, independent living, and community skills, as well as "networking with agencies." Examples of the social skills/community component of the program include going to a restaurant, ordering from a menu, and eating appropriately; using the post office; doing grocery and other shopping; and time at a fitness center once a week. The vocational component of the program, STEP (school-to-employment program), offers "trials" in various job settings, starting in the school and then moving to community sites including a local grocery store, McDonald's, nursing homes, auto repair, yard care, and the local community college. With regard to other providers, classroom-based services include a social worker for the social skills component of the program and "some instruction" by the speech/language pathologist. The proposed IEP (Exhibit B-97, p. 1) calls for 1.5 hours per week of speech service. There was no program-specific testimony concerning physical or occupational therapies at the high school. The proposed IEP calls for 45 minutes per *month* of physical therapy for toileting issues (Exhibit B-97, p. 1, 2) and 60 minutes per week of direct/indirect occupational therapy. With regard to assistive technology, "there are several computer labs at the high school" which the student could "always access." Concerning other activities, the special education students have "equal access" to dances and sports, with assistance provided. Testimony, Brouwer, Jarvis, Duffy, May 16, 2002.
8. To address the student's inability to generalize learning from school to the home environment, the Board has proposed an extended school day described as three hours a day, five days a week. The Board would contract with an outside agency, possibly Project Genesis, and the agency person would spend one hour in the morning, before school, at the student's home working on "daily living skills," and two hours after the school day working on community contact and leisure activities. The agency person would not be hired until "after the student's needs are determined." Once the agency person has been hired, that person would work with Board staff and the parent to decide "what is working and what is not." With regard to sexuality issues and the problematic masturbatory

behavior, the assistant director of special education said, “We’d like to” work with a clinical psychologist who would work with the staff and, possibly, the parent and student. The physical therapist would address toileting issues with the same “trip-training” process which, thus far, has proved ineffective. Testimony, Brouwer, May 16, 2002.

9. At the PPT meeting on March 6, 2002, the student’s mother requested residential placement at The Melmark School in Berwyn, Pennsylvania, and described the advantages of the Melmark program for the student. Exhibit B-97, p. 3. There was no evidence or testimony that the Board offered and/or discussed any options other than the program set forth in the proposed IEP, a placement first described as the “Chrysalis Program” during the due process hearing. There was no testimony or evidence that a critically necessary extended school year was planned and/or discussed at any time.
10. The proposed IEP calls for the use of the Teach Me Language program and Laureate software, but the speech/language pathologist testified that she is unfamiliar and has no experience with those programs. Exhibit B-97, p. 2; Testimony, Leone, May 16, 2002.
11. There was no testimony or evidence that any Board staff are specifically trained to do ABA discrete trial work. “Trip training” has not successfully addressed the student’s toileting issues, but there was no testimony or evidence that other options would or could be tried. There is no baseline data to establish that the student has *any* vocational or prevocational skills.
12. The Melmark School is a Pennsylvania-approved private day and boarding school licensed by the Pennsylvania Bureau of Private Academic Schools with program approval from the Pennsylvania Bureau of Special Education. Melmark serves children from 5 to 21 years of age with challenging behaviors and learning difficulties secondary to a diagnosis of autism, pervasive developmental disorder, acquired brain injury and other neurological impairments. At admission, all members of the interdisciplinary team, including school districts and parents, complete an initial assessment and formulate the student’s IEP. A student’s instructional team includes teachers and specialists who provide services as indicated in the IEP, as well as staff members who provide support and enrichment activities. Program components include special education, ABA, speech/language therapy, occupational therapy and multi-sensory integration, physical therapy, adapted physical education, medical and health services. Interactions among team members are continuous in the delivery of integrated services both in the school and living areas. Clinical and teaching interventions are monitored in regular intervals throughout the day and are reported to parents on a quarterly basis. When parents come to visit, they are given training. The IEP was referred to as a “24-hour itinerary.” Exhibit P-1, p. 2; Testimony, Adriana Lopez, Assistant Education Director, The Melmark School, by phone conference May 16, 2002.
13. Jamie Pagliaro testified for The Melmark School regarding the residential component. There are four homes on the campus with 8-15 students in each home, two students to a bedroom, based on the “good fit” of peers’ cognitive level, behavior needs, and age. Based on the student’s visit to the school, he would very likely be placed in an all-male house with 13 other students age 11 to 18/19. At Melmark, the educational and residential treatment philosophies overlap in that school staff come to the residences at 7 a.m. to assist the students in daily living skills, hygiene, dressing, eating, and preparation for the school day. From 3 p.m. to bedtime, there is a structured schedule and adaptive

skill programs for each child. In the residence there is at least one staff member available for every eight students, there is staff awake and available 24 hours a day, and students are checked every 15 minutes during sleep time. A large portion of the residential program is systematic attention to self-help skills goals. All staff are trained in standardized crisis management, using graduated intervention strategies from the least intrusive to most intrusive. Students' programs are adjusted to address specific behaviors. Staff are trained to deal with toileting and sexuality issues on an individual basis. With regard to leisure skill development, each student has an individualized, structured program for community trips, participation in sports and swimming, and arts and crafts. Testimony, Jamie Pagliaro, The Melmark School, by phone conference on May 16, 2002.

CONCLUSIONS OF LAW:

1. A school district must provide instruction "sufficient to confer some educational benefit upon the handicapped child." Board of Education v. Rowley, 458 U.S. 176, 200 (1982). In Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert denied*, 488 U.S. 1030 (1989) and Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986), the court made clear that an appropriate IEP must result in more than *de minimis* benefits to satisfy Rowley's "some educational benefit" standard. A plan for a severely handicapped student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial advancement." *Id.* At 991.
2. The goals and objectives set forth in the proposed IEP (Exhibit B-97, pp. 7-32) carefully track the student's weaknesses, but they presume an amount of undemonstrated ability and instruction time so vast as to render such goals and objectives doomed to be unattainable *in the context of the limited Board program* and, thus, inappropriate. The proposed program has too many gaps and unknowns for it to be likely to result in anything more than trivial advancement or provide more than *de minimis* benefit to the student. Based on the hearing officer's observation as well as all the testimony and evidence, the student requires an intensive, round-the-clock, highly-structured residential setting where a consistent educational program can be implemented throughout the student's waking hours. The program offered by the board is not appropriate to meet the unique needs of the student.
3. The Board has the burden of proving, by a preponderance of the evidence, the appropriateness of the child's program or placement, or of the program or placement proposed by the Board. R.C.S.A. Sec. 10-76h-14(a). Notwithstanding subsection (a), upon a finding that the Board's placement or program or proposed placement or program is not appropriate, the party seeking reimbursement for a unilateral placement or program shall prove the appropriateness of such placement or program by a preponderance of the evidence. R.C.S.A. Sec. 10-76h-14(c). A parental placement may be found to be appropriate by a hearing officer even if it does not meet the State standards that apply to education provided by the SEA or LEA. 34 C.F.R. Sec. 300.403(c). By a preponderance of the evidence, the parent has proved the appropriateness of The Melmark School for the student.

4. “If placement in a public or private residential program is necessary to provide a free and appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.” North v. District of Columbia Bd. of Education, 551 IDELR 157 (1979). At this time, placement in a private residential program is necessary to provide a free and appropriate program to the student. The Board is obligated to bear the cost of the student’s placement at The Melmark School.

FINAL DECISION AND ORDER:

1. The Board has failed to prove, by a preponderance of the evidence, that an appropriate program has been offered to the student.
2. The parent has proved, by a preponderance of the evidence, that The Melmark School is an appropriate placement for the student.
3. The Board shall bear the cost of the student’s placement, including non-medical and room and board, at The Melmark School for the 2002-03 school year.