

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Norwalk Board of Education

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Appearing on behalf of the Board: Attorney Michelle Laubin
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Appearing before: Attorney Deborah R. Kearns, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Norwalk Board of Education offered an appropriate program for the 2002-2003 school year.
2. Whether the parents should be reimbursed for the child's placement at a private out-of-district placement for the 2002-2003 school year.

PROCEDURAL HISTORY:

The parents requested due process on September 19, 2002. There was a prehearing conference on September 24, 2002. The attorney for the parents requested a postponement by letter for the first day of hearing, there was no objection by the Board's Attorney and the motion was granted. Hearings convened on October 7, October 31, November 13, November 22, December 4, 2002 and January 6, 2003. The parties requested a briefing schedule, the attorneys both requested an extension to file briefs and reply briefs, the hearing officer requested an extension to file the decision since the delays caused a scheduling problem. The record closed on March 3, 2003. Both parties agreed the decision would be delivered to the State Department of Education on April 14, 2003 for distribution to the parties.

SUMMARY:

The parents and the local education agency (LEA) agreed the child's program would be at Villa Maria for the 2001-2002 school year. Two weeks prior to the start of the 2002-2003 school year the LEA proposed the child's program should be at the LEA's school. The parents disagreed and filed for due process. The child made excellent progress at Villa Maria during the placement earning very good grades and progressing more than a year in most of his academic areas performing at or close to grade level. The IEP, which proposed the child return to the Board's school for 2002-2003 school year was one calculated to provide the child with an educational benefit. The parents request for reimbursement for the child's 2002-2003 school year at Villa Maria is denied.

FINDINGS OF FACT:

1. By agreement of the parties the child's placement was at Villa Maria, an out-of-district private placement, for the 2001-2002 school year.
2. On August 15, 2002, the LEA proposed the student return to the LEA's program for the 2002-2003 school year. The proposed change of placement came less than two weeks prior to the start of the new school year. The parents retained the child in the placement and pursued due process.
3. The child was first identified as eligible to receive special education services in the first grade. The parties do not dispute the child's eligibility to receive special education services. The learning disability included a two-year delay in broad reading (scoring in the 2nd percentile) on the Woodcock- Johnson Test of Achievement (W-J R) and generally a significant discrepancy between ability and achievement in reading. The student is identified with a primary disability of Learning Disabled and a secondary disability of Speech/Articulation Disorder. The Speech/Articulation Disorder has since been resolved. (Exhibits B-27, B-29, B-31)
4. The child's individual education program ("IEP") provided for delivery of the program in the mainstream with modifications and 2.5 hour of resource room for first, second, and third grade. The IEP provided mainstream education and 3.5 hours of resource room for fourth grade. During the fifth grade the program provided mainstream class with modifications but the resource room time was reduced to 2.5 hours for the remainder of the school year. In the sixth grade the child transitioned to the middle school and the program provided mainstream programming with modifications and 2.25 hours of resource room. (Exhibits B-29, p.6, B-39, p.6, B-46-6, B- 55, p. 6, B-65, p. 8, B-69, p. 5-7)
5. The child's modifications in the regular education class include extra time on written work, no spelling penalty, preferential seating and a multi-sensory approach to learning. (Exhibit B-69, Testimony, R. Belade, Testimony, P. Loris)

6. During the sixth grade the parents became very concerned about the child. He was having difficulty completing homework despite the fact that his parents report extensive effort including the student, often working until ten or eleven at night. (Testimony, Parent)
7. The student received private tutoring for severe language processing deficits from the third to the sixth grade. The tutor is a linguist with Orton Gillingham training. The child made progress at a very slow pace due to processing problems. When the student was overwhelmed, he would just sit. The tutor worked with the child, one-to-one, and was able to maneuver around the problem or sometimes just move to the computer. The child was unable to spell. The tutor began to find the child unreachable in their sessions and referred the child to Dr. Nancy Spector for a psychological evaluation. (Exhibit B-2, Testimony, S. Miller, Tutor, 1/6/03)
8. The child has a long history of shutting down. It is well documented primarily by LEA staff that this has been a consistent problem. An evaluator notes, the child was reluctant to guess at test answers, just sitting there. (B-27, pp.1-2) When tested on another occasion, the evaluator had to continuously keep the child refocused and encourage him to answer or he would have given up. (B-38, pp1-2) The child continues to shut down when work proves too difficult for him. He does not take risks unless he is most certain that he has the correct answer. (B-42 p.2) The child's special education teacher reports the child has difficulty maintaining attention and staying on task both in the larger mainstream classroom and the smaller groups in the resource room. The school psychologist notes the child has difficulty following directions, is sometimes inattentive and sometimes stares blankly. (Exhibit, B-50 p.3) When the tutor was questioned about the child becoming unreachable, she believes it is not a behavior the child would out-grow. After several years of working with the child her concerns were that it would be more difficult to reach him and in general, bad for his psychological well-being. (Testimony, S. Miller, Tutor)
9. The tutor concurred with Dr. Spector's evaluation, dated 4/24/01. Dr. Spector finds the child to have average cognitive ability, with some deficit areas consistent with reading difficulty. On the Wechsler Individual Achievement Test (WIAT) his reading skills were in the low-average range. In math he scored higher on the mathematics reasoning (75th) percentile than on the math operations (9th) percentile. On the language portion, his listening comprehension score is in the (1st) percentile and his oral expression is in the (70th) percentile. His overall writing is in the (3rd) percentile. The child's scores on the WIAT are significantly lower than predicted for a student with his general cognitive ability, as indicated by his full scale I.Q. score on the WISC-III. On the Personality Inventory for Children, (PIC-R), the child's profile is consistent with students who have poor school performance and problems in reading, spelling or math. Classroom performance may reflect children who have difficulty with distractibility, or in completing assignments. Secondary emotional and conduct problems may result from the lack of identification of cognitive deficits and their proper remediation. On the Conners Teacher Scale (Revised Long Form) the

child displays significant signs of anxiety in the classroom. In summary, a reading disorder and a disorder of written expression are diagnosed. The child is depressed.

10. The psychologist recommends the child receive intensive remediation and psychotherapy and that he continue to work with the tutor. The psychologist makes numerous specific program and intervention strategies for both home and school. She suggests an alternative educational setting, such as Villa Maria, Eagle Hill, Hope Academy or Winward, where the child can receive intensive programming. If he were to remain in his current educational setting, he would benefit from more intensive work with his tutor. There were no updates to this evaluation presented at the hearing. Dr. Spector did not testify at the hearing. (Exhibit B-76, Testimony S, Miller, Tutor)
11. Dr. DePisa prepared a psychological evaluation in 1998. (Exhibit B-50) His evaluation is consistent with Dr. Spector's evaluation, both finding the child in the average range for cognitive ability. The WRAML (Exhibit B-76) and the NEPSY (Exhibit B-50) show similar findings which explain some of the child's difficulty focusing attention, retrieving information from long-term memory, and analyzing visual memory. Dr. DiPisa states the child is not inattentive or uncooperative but is avoidant with difficult tasks. He could have modifications to help him function in school. As the child gets older reading comprehension becomes more important than decoding; the child has more difficulty with his basic reading. The child could use a plan to more efficiently develop cheat sheets to condense study material, thus avoiding some of his reading difficulty. Dr. DePisa testified he reviewed Dr. Spector's evaluation and believed the LEA would be able to make effective use of resource room time to support the regular education classroom. (Exhibit B-50, B-76 and Testimony, Dr. DiPisa)
12. The child's IEP dated, 5/10/2000, provides that the child receive modified grades and curriculum in all academic areas except math. The child's grades for sixth grade are "Bs" and "Cs" in all academic areas. The September, 2000, Connecticut Mastery Test (CMT) results are approximately two levels behind the State average; math (207, State average 250), reading (219, State average 250), and writing (202, State average 249). (Exhibits B-84, B-88)
13. The child was able to participate in grade level curriculum in all academic subjects at Villa Maria. The Woodcock-Johnson was administered by Villa Maria staff before the student started school in July, 2001 and again in May, 2002. The difference between the two test results follows: Word Identification went from the 21st percentile and 4.2 grade equivalent to the 42nd percentile and 6.9 grade equivalent, Word Attack went from the 44th percentile and the 6.7 grade equivalent to the 53rd percentile and 8.0 grade equivalent. Passage Comprehension dropped significantly, from the 53rd percentile and 7.0 grade equivalent to the 21st percentile and the 5.0 grade equivalent. The Total Reading Cluster went from 34th percentile and the 5.2 grade level to the 40th percentile and the 6.7 grade equivalent. Key Math, Basic Concepts went from the 53rd percentile and 6.9 grade equivalent to the 73rd percentile and 10.4 grade

equivalent. Math Operations went from the 25th percentile and 6.9 grade equivalent to the 73rd percentile and the 10.4 grade equivalent. Math Applications went from the 45th percentile and the 6.3 grade equivalent to the 53rd percentile and the 8.2 grade equivalent. The Total Math score went from the 34th percentile and the 5.9 grade equivalent to the 53rd percentile and the 8.0 grade equivalent. (Exhibits B-85, B-87)

14. The tutor believes the proposed 3.75 hours per week of resource room is insufficient because the child needs to learn so much, he shuts down easily and gets severely blocked. She refers to Exhibit B-76, pages 17-22, of the psychologist's evaluation, which contained six pages of recommendations. Her knowledge of the child's learning style leads her to conclude the work requires a full remediation program. Everything he learns has to be broken down. In the public school setting there are so many gaps. The witness is credible. She had first hand knowledge of the child and his work limitations during the time she worked with him. She worked with the child supplementing and supporting the public school program for four years but did not recommend a change until the sixth grade. Her extensive knowledge of the child makes her recommendation important, but she has not worked with the child since June of 2001. He has learned much since that time. (Exhibit B-76, Testimony, S. Miller, Tutor)
15. The mainstream teacher testified she did not receive a copy of the child's IEP or evaluations. Teachers and staff are given a one page synopsis of the IEP. She testified the information was available to her for review; but the testimony was not clear as to whether she ever actually reviewed the child's evaluations and complete IEP. It is fair to say the child's profile is, at the very least, complex with significant strengths and weakness as noted in both Dr. DePisa's and Dr. Spector's evaluations. The child's IEP is an eleven page document. The child's record contains a psychological evaluation (Exhibit B-50) and other educational test results which provide critical information about the child which is helpful if not necessary, to delivering a program to the child. (Exhibits B-50, B-76, Testimony, Ms. Loris)
16. The many psychologist and teacher evaluations which are part of the record, generally, report the child works hard, gives good effort, and is cooperative. Both parents testified the child struggled to complete sixth grade homework. They saw it as a nightly struggle with the child sometimes working until 11:00 p.m. The classroom teachers addressed the homework completion problem by implementing home-school communication which noted class progress and assignments. The child was receiving resource room support, tutor support and the assistance of his parents and still was not able to keep up with the pace. On one occasion the child prepared a monthly project confusing which project was due in which month. The confusion would not likely occur with sufficient coordination between the mainstream teacher and the resource room teacher. He earned A/B grades in the seventh grade. The parents note there was a change in the child's behavior after the student started attending Villa Maria. (Exhibit B-77, Testimony, Parents 12/4/02)

CONCLUSIONS OF LAW:

1. There is no dispute between the parties as to the child's eligibility for special education. They agree he is entitled to a free and appropriate education ("FAPE") pursuant to the Individual with Disabilities Education Act ("IDEA") 20 U.S.C. §1400 *et seq.* and the Connecticut General Statutes § 10-76. *et seq.*
2. The child is enrolled in an out-of-district placement pursuant to a settlement agreement reached by the parties concerning the 2001-2002 school year. A dispute arose between the parties when the LEA proposed the child return to the Board's program for the 2002-2003 school year. The parents claim the LEA's program is inappropriate.
3. Whether a program is inappropriate is determined by the two-prong test articulated in *The Bd. of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982). The first prong requires that LEA must follow the procedural requirements of IDEA. The Supreme Court notes emphasis on the procedural requirement of IDEA reflects a conviction that adequate compliance with the prescribed procedures would in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP, *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998) quoting *Rowley*, 458 U.S. at 206. In the present case there is no dispute between the parties regarding procedural matters.
4. The second prong of *Rowley*, requires the individualized education program ("IEP") offered by the LEA must be reasonably calculated to enable the child to receive an educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. at 177. Subsequent decisions elaborate on how much benefit is sufficient to be meaningful. The Act requires educational *progress* rather than a program that is merely of benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 488 U.S. 1030 (1989) (Emphasis original). The IDEA was enacted to assure that all children with disabilities have available to them a free and appropriate public education which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction, *Rowley*, 458 U.S. 188-189. The instruction must be at public expense and under public supervision, meet the State's education standard, approximate the grade levels used in the State's regular education program and comport with the child's IEP, *Rowley*, 458 U.S. at 189. The IDEA does not require States to maximize the potential of the handicapped children, *id.* at 197 n. 21, 102 S. Ct. 3034, but the IEP must be reasonably calculated in order for the child to receive educational benefits, *M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Ed.*, 226 F.3d 60, 62 (2d Cir. 2000)
5. The LEA prepared an IEP for the child's 2001-2002 school year. (Exhibit B-80). The parents rejected the IEP based in part on Dr. Spector's psychological evaluation dated, April 24, 2001, (B-76). The IEP team agreed by way of settlement agreement,

to educate the child for the 2001-2002 school year, at an out-of-district placement, Villa Maria.

6. The program to be reviewed for the purposes of determining whether the child made progress or received an educational benefit is the 2001-2002 program at Villa Maria; and whether the program developed at the August 15, 2002 IEP meeting was reasonably calculated to provide the child with an educational benefit for the 2002-2003 school year.
7. The regulations promulgated pursuant to IDEA, 20 U.S.C. § 1414 (a) (4), (a) (10) (B) provide the LEA as described in 34 C.F.R. § 300.2, shall provide special education and related services either directly by contract or through other arrangements. The LEA shall at the beginning of each school year have in effect for each child with a disability within its jurisdiction an IEP, 34 C.F. R. §300.342(a) (1). Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising the IEP of a child with a disability. Each LEA shall ensure that the IEP team reviews the child's IEP, no less than annually, to determine whether there is lack of progress towards the annual goals described in § 300.347(a), and in the general curriculum; or to address the results of reevaluations conducted under [the regulations]...and [review] information about the child, provided to or by the parents under § 300.533 (a)(1) or about the child's anticipated needs; or other matters, 34 C.F.R § 300.343(c) (1), (2) (ii) - (iv).
8. The LEA convened the IEP on August 15, 2002 to plan for the 2002-2003 school. The IEP team reviewed the child's progress at Villa Maria (Exhibits B-85, B-86, B-87, B-88, B-89) and prepared an IEP (Exhibit B-90). The findings of fact provide extensive review of the documents which contain glowing reports of the child's progress and the Woodcock-Johnson administered as a pre-test and a post-test, to measure the child's achievement for the seventh grade year. In summary, the child is able to perform very satisfactorily in the program with a somewhat modified curriculum. The record is not clear as to the precise curriculum modifications referred to in the IEP (Exhibit B-80) and or from the testimony of the Villa Maria staff, but the child appears to be able to be successful with something close to grade level performance. The Woodcock-Johnson Test of Achievement, dated 5/1/02, (Exhibit B-87) shows solidly average performance and grade level achievement in all areas with the exception of one subtest, which could be erroneous because it is inconsistent with past test results.
9. Dr. Spector administered tests which might explain, how, if at all, the child would be impacted by the IEP (Exhibit B-90) which proposes returning the child to the LEA's program. The psychologist reports secondary psychological impact from the child's sixth grade school problems (Exhibit B-76). She neither appeared at the hearing nor did she revise her evaluation to consider the child's progress since the time she last saw him in April, 2001. Without updated information or the ability to cross-examine her on her report, it is impossible to speculate about her concerns for the child in

moving from a contained, small-group setting at Villa Maria, to a mainstream environment; and whether or not the transition would be a problem for the child.

10. The child's prior tutor, Ms. Miller, was credible when she expressed her concerns about the gaps in the LEA program as it existed in the sixth grade year. The program did not appear to be well coordinated between mainstream and resource room staff. Clearly, the school's response to incomplete homework, which was addressed in March, 2002, (Exhibit B-77), was too little too late. Based on all the witnesses' testimony, there appeared to be too little communication to school staff when the tutor observed that she was unable to "reach" the child during tutoring sessions. The LEA further compounds misunderstanding the child by engaging in a practice which provides mainstream staff with a one-page summary of the child's evaluations and IEP goals and objectives. The child, also, appeared to lack sufficient instruction to permit him to approach his work with adequate skills. The connection between overwhelming work and the student's anxiety is supported by the school records, psychological evaluations and testimony of a number of the witnesses. There is no question the tutor contributed to and supported to the child's progress during the years she worked with the child. Since the time the tutor last worked with the child in June, 2001, several important factors changed. The factors are, the increased resource room time in the program proposed by the LEA, (Exhibit B-90), the child's improved skills, and increased maturity. Her experience with the child is too far removed to be a reason for concluding the program today is not reasonably calculated to provide the child with an educational benefit.
11. For the purposes of determining if the IEP (Exhibit B-90) satisfies the standard articulated in *Rowley*, one must consider whether it is reasonably calculated to provide the child with an educational benefit. They must consider the child's unique special education needs and academic skills. The proposed program increases resource room time to 3.75 hours per week and adds .75 hour per week of counseling. The program at Villa Maria helped remediate many of the child's educational deficiencies. He now performs at or near grade level. (Exhibits B-87, B-88)
12. The line of cases which provides for public school funding for education in private schools includes *Burlington v. Dept. of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 359 (1985). Public school funding of private education requires a finding that the program offered by the LEA does not provide a free and appropriate public education. The LEA has the burden of proving by a preponderance of the evidence that the child's program is appropriate, Regulations of Connecticut Agencies § 10-76h-14. If the challenged IEP is adequate, then there is no further inquiry. The LEA has proven by a preponderance of the evidence that the IEP for the 2002-2003 school year offers the child a free and appropriate education and is reasonably calculated for the child to receive educational benefit.

FINAL DECISION AND ORDER:

The program offered by the IEP for the 2002-2003 school year provides the child with a free and appropriate public education. The parents request for reimbursement is **denied**.