

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Waterbury Board of Education

Appearing on behalf of the Parents: Attorney Alyce L. Alfano
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Appearing on behalf of the Board of Education: Attorney Elaine M. Skoronski
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Appearing before: Attorney Justino Rosado
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board provide the student with an appropriate program for the 2002-2003 school year? If not,
2. Does the program at Perkins School for the Blind provide the student with an appropriate program?
3. Should the student receive compensatory education for the 2002-2003 school year?

PROCEDURAL HISTORY:

The parents' attorney filed a request for due process on October 17, 2002. Hearing Officer (Hereinafter HO) Exhibit 1. A pre-hearing conference was held on October 24, 2002 at which time a hearing date of January 6, 2003 was selected at the convenience of the parties. The hearing date was not started at an earlier date because the parties were in the process of going to mediation. On December 18, 2002 a request to cancel the January 6, 2003 hearing date was received because the parties were going to utilize the advisory opinion process. An advisory opinion was scheduled for January 22, 2003. The advisory

opinion process was not successful and the parties agreed to new hearing dates. The new hearing dates were March 28, April 1 and April 2, 2003. Additional hearing dates of May 6, 2003 and June 9, 2003 were later chosen in order to conclude the hearing. The parties agreed that the date for the filing of the decision and order would be decided at the last date of hearing.

The Board filed a Motion to Disqualify the parents' attorney and their law firm from representing the parents. The issue was that the parents' attorney had spoken to one of the Board's teachers. The parents wanted the teacher to be one of their witnesses and did not consult the Board before speaking to the teacher. Oral arguments were held on this motion on April 1, 2003. The motion was dismissed and the hearing officer refused to disqualify the Law Firm or the attorney representing the parents. The employee the parents' attorney spoke with was one of the student's teachers and was not one of the witnesses the Board had on their witness list. If there was any error made in this contact, it did not prejudice the Board as they had no plan to call this teacher as their witness. The parents' attorney needed to speak to the witness in preparation for his testimony as the parents' witness. The contact did not result in any confidential information that this witness might have been privy to being obtained by the parents' attorney. The Board also had ample opportunity to cross exam the witness.

The parents presented three witnesses and the Board presented five witnesses. The parents had 19 exhibits of which Exhibit 16 and 18 were objected to by the Board because they contained notes. The parents cured this defect and all exhibits became full exhibits. The Board presented 33 exhibits, which became full exhibits. The parties submitted post hearing briefs. The Date for the Final Decision and Order was extended to August 28, 2003.

SUMMARY:

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The student is a 14 year old girl who has multiple disabilities, mental retardation and visual impairment and therefore eligible for special education and related services. Board witnesses have testified that the student's program in the middle school prior to the 2002-2003 school-year was not appropriate. The parents do not agree with the program the Board has offered for the 2002-2003 school-year and requested that the student be placed at the Perkins School for the Blind. The Board has refused the parents' request. The Board had hired a new teacher for the visually impaired and has increased the services of this teacher to the student. The parents still do not agree that the program being offered is appropriate and in addition to a residential placement; they have requested that the student be given compensatory education for the school-years 2000-2001, 2001-2002 and 2002-2003.

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. To the extent that the 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. 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).

FINDINGS OF FACT:

1. The student is a 14 year old girl who has multiple disabilities, mental retardation and visual impairment and therefore eligible for special education and related services as stated in the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§1401 et seq.
2. The student has been in the Board's public schools since preschool and has been attending the Board's middle school since the 2000-2001 school year. (Testimony of Mother).
3. On January 24, 2001, the student's visual aid teacher's annual progress report recommended that the student's consultative service for the visually impaired be continued at 45 minutes per week for the 2000-2001 school year. (Board Exhibit # 17 pp. 12-14) At the 1/24/2001 PPT, the team reduced the consultative services of the teacher for the visually impaired to .25 hours per week. There was no explanation for this reduction of services.
4. During the student's two years in the middle school the teacher for the visually impaired did not see the student on a weekly basis. He saw the student every 2-2 ½ weeks. The teacher for the visually impaired would see the student for 1 hour if in a classroom but this would include other students. There was no teacher for the visually impaired servicing the student. The current teacher was only required to provide consultative services for the student. (Testimony of teacher for the visually impaired and B-18)
5. The student was provided with a music class while in the elementary school. This program was to be continued in the middle school. It was not done because there was no contract for the music teacher to work with the student. (Testimony of teacher for the visually impaired)
6. The student's 1/24/2001 IEP showed that the student had made no noticeable improvement in her academic goals in math. (B-17 pg.9) The student's special education teacher spoke with her supervisor and school principal that the student's visual needs were not being met during the 2000-2001 school year. (Testimony Michele Mouco)
7. The student had a PPT on 9/20/01. The parent stated at the PPT that the student would benefit from a school for the blind. The PPT continued the student in the Scope Program. There was no notice given to the parents that their request was denied. (B-19, Testimony of Mother)

8. On or about December 17, 2001, at the request of the student's visual aid teacher, an evaluation of the student was conducted by a communication specialist. The evaluator found that the student's most pressing needs were in the areas of socialization, communication, cognitive development and functional living. The day of her observation of the student these needs were not being met in any substantial way. The evaluator noted that, besides the student's cane, there were no noticeable accommodations provided for the student. The evaluator found that the student's program was not meeting the student's educational needs. (P-1)
9. On 2/21/02 a PPT meeting was held and the student's time with her visual aid teacher was increased to 10 hours per week. The student did not receive this service because the teacher for the visually impaired could see the student only one time every three weeks. (Testimony of teacher for the visually impaired) The PPT determined that instructions in the use of Braille were not appropriate for the student. The PPT does not state what evaluations of the student were used to come to that conclusion. The student's IEP states that she will have music in a regular education class but the placement summary states that she will spend no time with non-disabled peers. (B-20 pp. 14-15)
10. On 2/20/02 the student's speech and language pathologist submitted a report to be used for the student's triennial review. The student met two of 5 objectives, two other objectives were partially met and one showed no progress. The pathologist noted that in the student's IEP it was noted that she should have music therapy but the Board was not providing it. (B-20 pp. 18-20)
11. The special education supervisor looked to increase the availability of the teacher for the visually impaired and hired another visual aid teacher. This teacher has been working with the student since July 2002. (Testimony of special education supervisor)
12. During the student's 2002 summer program, the student worked with a new visual aid teacher. The new visual aid teacher changed the student's goals because in general the student's needs were not being met. At the PPT of 7/31/02, the visual aid teacher added 5 new goals, 1a, 2a, 3a, 4a and 5a, to the student's IEP. The goals were included in a draft IEP that was not approved by the parents. These goals were added in response to the evaluation of 12/17/01 by the communication specialist. The new goals did not state any evaluating procedure nor any performance and measuring criteria. Only one of the eleven objectives of the 5 new goals contained an evaluation procedure. The evaluation procedures and criteria were filled in after the PPT. The evaluation done by the communication specialist (B-1) was considered but not used in developing the student's new goals. (B-22, Testimony of Kate Fox)
13. Goal 2a objective 2 of the 7/31/02 IEP required that the student participate in a community based setting. This goal required preparatory work before the student went into the community; this was not included in the student's IEP. The

- community-based component that needed to be developed required a release from the principal, this was not included in the IEP and the release was not obtained until April 2003, 9 months after the goal was written. (B-22, Testimony Kate Fox)
14. At the October 1, 2002 PPT, the student's IEP contained Goals #1 and 5a in order to improve her social skills. These goals each contained an Objective 1 and 2 which contained the same objectives but required different criteria in order to master. (B-27 pp. 11-12)
 15. At the 2/21/02 PPT, Goal # 3 was added to the student's IEP. One of this goal's objectives was that the student carry a personal identification card at all times. The student has not been supplied with the identification card (Testimony of Michele Mouco) but the goal was not rewritten nor that objective removed. At the 12/20/02 PPT, Goal # 3 showed satisfactory progress even though the student did not have an identification card. (P-14 pg 15)
 16. The student's October 1, 2002 IEP states that the student will spend 2.5 hours each week in regular education. The IEP does not state where in the student program is the student is going to spend these 2.5 hours. (P-11 pg.15)
 17. Perkins School for the Blind evaluated the student on October 8 and 9, 2002. The evaluation was provided to the Board and a PPT was called on December 20, 2002 to review the evaluations, the student's program and placement. (P12, 13 & 14) The student's IEP states that the student will spend 5.5 hours each week with nondisabled peers. This participation will be in music and lunch. The IEP of December 20, 2002, does not state at what sites this will take place and how the student will spend her lunch time with nondisabled peers while she is with her aide. (P-15)
 18. The parents, at the PPTs, did not asked for an increase in the student's speech, occupational therapy, or an increase in the services of the vision teacher. The only request the Board has received from the parents is that the student should be placed at Perkins School for the Blind. The student is provided with a one to one aide. The aide has been with the student for three years.(Testimony of Supervisor of Special Education)
 19. The teacher for the visually impaired consults with the student's other teachers even though this is not written in the student's IEP. The 10 hours spent by the student with the teacher for the visually impaired does not require additional time for collaboration in the IEP. (Testimony Kate Fox)
 20. The student's pre-Braille awareness goal, 4a, contained only one objective. This goal was just begun by the visually impaired teacher. The student did not understand the symbols in this goal so the teacher did hand over hand to help the student learn and progress in this goal. The goal was not revised to show the hand over hand teaching methodology. The student has mastered the goal and no

- revision to continue the pre-Braille awareness has been written. The progress on the student's goals with the teacher for the visually impaired was limited.
(Testimony Kate Fox)
21. The Board would provide work in the community for the student in her future programs and the student's needs can be provided within the Board's program.
(Testimony Kate Fox, Ms. Mouco and the supervisor of special education)
 22. The student needs fewer cues when brushing teeth and is doing better with putting on her coat. (Testimony Kate Fox) In the 12/20/03 IEP, goals 1a, 2a, 3a, 4a and 5a contains no reporting dates and do not show whether the student has made any progress. These goals were included in the student's IEP on 7/31/02. Goals 1-3 show that the student is making satisfactory progress. The student's functional communication goal and Goal # 10 for self help have no evaluation for progress even though they were included in the student's IEP on 2/21/02. The student's IEP was revised to include objectives to address parents' concerns about the student's safety.(P-14 pp. 6-18)
 23. The student would be attending the secondary program at Perkins School for the Blind (PSB). This would be a language based program with mobility reading readiness, occupational therapy, adaptive physical education class and physical therapy. The student would have 6-7 classes per day. The classes would include food preparation, living skills, social time therapy and mobility training. The "PSB" works with public schools to transition student's back to their classroom. The student's program would be based on the student's IEP. The student's illness would impact on her program because it is not known how much vision the student currently has. (Testimony of Cynthia Essex)
 24. Education staff at PSB work as a team. Therapists are school staff and cottage staff attends meetings so they can work with the student and get any training they might need. The student would not obtain a high school diploma at PSB. She would get a certificate completing the program. The student could go into the community upon completing the program. (Testimony of Cynthia Essex)
 25. The program from PSB could be implemented in the Board's setting. (Testimony of Cynthia Essex) The Board's program for the student is like PSB's program, language based. (Testimony of Supervisor of Special Education)

CONCLUSIONS OF LAW:

1. The student is entitled to special education and related services to be provide at public expense pursuant to 20 U.S.C. §§ 1401, et seq (IDEA) and Connecticut State Regulations §76a-1(d).

2. The student's attorney in her post hearing brief requested a finding that the program for the school years 2000-2001 and 2001-2002 were not appropriate. The Hearing Officer makes no Conclusions of Law as to whether the program offered to the Student for the 2000-2001 academic year satisfied, or for the 2001-2002 academic year satisfies the requirements of the IDEA. These school years were not presented as issues that required a decision in this hearing and the student's attorney in her post hearing brief page 1 does not present them as an issue of this hearing nor were they presented as an issue on the first day of hearing.

3. The student's attorney in her post hearing brief requests compensatory education for the 2000-2001 and 2001-2002 school years. As stated *Supra*, these school years were not an issue of this hearing. Even though from the findings of fact one could easily note the egregious violations of IDEA for those school years, this hearing officer cannot make a conclusion of law as to compensatory education for those two school years. One would need to first find that the student was not provided with an appropriate education for 2000-2001 and 2001-2002 school years in order to be able to consider compensatory education. Compensatory education is equal to time lost while a school district denied a free, appropriate public education to a handicapped child. *Valarie J. v. Derry Cooperative School District*, 771 F.Supp. 483 (D.N.H. 1991); *Burr by Burr v. Ambach*, 863 F.2d 1070 (2nd Cir. 1988), vacated and remanded, 492 U.S. 902, 109 S.Ct 3209, 106 L.Ed 2d 560, reaff'd on recons. 888 F.2d 258 (1989). In *Valerie, supra*, the student had been denied 7 1/2 months of a FAPE when the Board conditioned services on the parents' agreement to medicate.

4. Connecticut regulations provide that "the public agency has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency." Conn. Reg. 10-76h-14(a) *see also Walczak v. Florida Union Free School Dist.*, 142 F.2d 119, 122 (2d Cir. 1998).

5. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al v. Rowley*, 458 U S 176 (1982), 102 S Ct 3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized education program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.

6. The first prong under the *Rowley, supra*, test require a review to ensure that the Board complied with the procedural requirements of IDEA. A review of the record shows that during the 2002-2003 school year, the Board committed gross procedural violations of IDEA. The teacher for the visually impaired testified that the goals she developed for the student, the evaluation procedures and criteria were filled in after the PPT. (Findings of Facts # 12) IDEA requires the IEP be written at the PPT meeting and be done by the team and not by one individual after the PPT. 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 (or, if consistent with Sec. 300.342(c), an IFSP).” 34 C.F.R. §300.343(a)

This also means that the parents’ input in the development of these goals, as members of the PPT, were not considered necessary.

IDEA also requires that the goals and objectives be measurable in order to see how the student has progressed. Five of the six goals created by the teacher for the visually impaired contained no reporting dates or if the student had made any progress in achieving the goals, a clear violation of IDEA. (Findings of Fact # 12, 22) IDEA regulations require, A statement of --

- (i) How the child's progress toward the annual goals described in paragraph (a) (2) of this section will be measured; and
- (ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--
 - (A) Their child's progress toward the annual goals; and
 - (B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year. 34 C.F.R. §300.347(a)(7).

7. The second prong of *Rowley* asks if the IEP was reasonably calculated to enable the child to receive educational benefit. A review of the record shows that the student’s benefit from her IEP was trivial. The student’s IEP does not show her mastering any goal. Even though the teacher for the visually impaired testified that the student mastered her pre-Braille goal, there is no record that this goal was rewritten even though IDEA requires the Board to provide for instruction in Braille if the team deemed it appropriate. 20 U.S.C. §1414 (d)(3)(B)(iii) Goals for the student’s safety (provide with an identification tag) were not complied with. (Findings of Fact # 9 & 15) Even the obtaining of a release from the school principal was not obtained nor included in her IEP. (Findings of Fact 13)

8. The Board’s procedural violations of IDEA stated above are sufficient to require that compensatory education be given to the student for the 2002-2003 school year. In order to be awarded compensatory education in Connecticut, the parents have to show by a preponderance of evidence that the Board committed gross procedural violations. *Garro v. State of Connecticut*, 23 F.3d 734; 1994 U.S. Court of Appeals, Second Circuit, *Mrs. C. v. Wheaton*, 916 F.2d 69, 1990 U.S. Court of Appeals 2nd Circuit. Every procedural violation of the IDEA may not justify an award of compensatory education, citing, *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated sub. nom. Sobol v. Burr*, 492 U.S. 902, 109 S.Ct. 3209, *reaff’d*, *Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, 494 U.S. 1005, 110 S.Ct. 1298 (1990), where such compensation was awarded only on the basis that the provisions of the federal act had been "grossly violated." The court held, however, that the failure to develop an individual educational plan with the parent's participation essentially deprived the child in that case of the needed special education and, for that reason, justified "a claim for compensatory educational relief." *Mrs. C. v. Wheaton*, *supra*, 916 F.2d at 75.

9. In addition to the free appropriate public education requirement, IDEA's preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs. *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998) IDEA sets forth a strong congressional preference for integrating children with disabilities in the regular classrooms *Oberti v Board of Education*, 995 F 2d 1204 (3d Cir 1993). School districts must evaluate whether a child with a disability can be educated in a regular classroom if provided with supplementary aids and services *Oberti*, 995 F 2d at 1216, *Mavis v Sobol*, 839 F Supp 968, 985-986. The Act's least restrictive environment requirement is met when the child with a disability is educated in the regular classroom, or when the child who cannot be fully included is mainstreamed to the "maximum extent possible ." *Oberti*, 995 F 2d at 1217. The district must examine the educational benefits, both academic and nonacademic, to the student in a regular classroom. Among the factors to be considered are the advantages from the modeling the behavior and language of non-disabled students, effects of such inclusion on the other students in the class.

10. In the present hearing the Board presents that placing the student in PSB would not comply with IDEA as the student's LRE. The student's current IEP states that she will be 5.5 hours with non-disabled peers but the Board was not clear in the IEP how the student would be with non-disabled peers when she has a aide present at all times. Testimony also showed that the student had to rush in order to be able to finish her lunch. There has been no showing that the student has benefited from any time spent with non-disabled peers or that the student is obtaining educational benefit. At PSB the student's program also includes a community based portion were she would have contact with non-disabled peers, but at this juncture of her education the student's needs for FAPE would best be met in a residential placement.

FINAL ORDER AND DECISION:

1. The program offered by the Board to the student is not appropriate.
2. The program at Perkins School for the Blind is appropriate.
3. The Board shall pay for the student's program at Perkins School for the Blind.
4. The student is entitled to one year of compensatory education.