

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

Appearing on Behalf of the Parents: Attorney Alyce L. Alfano
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Appearing on Behalf of the Board: Attorney Valerie E. Maze
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Appearing Before: Attorney Gail K. Mangs, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the school district offer an appropriate program and placement for the Student?
2. If not, what is the appropriate program and placement for the Student?
3. Did the school district properly impose a 45 day exclusion of the Student from the high school for disciplinary reasons?

PROCEDURAL HISTORY:

This hearing was requested as an expedited hearing on September 4, 2003. The prehearing conference was held on September 16, 2003. The hearing convened on September 23, and 24, 2003. The Parents called the Student's father as their only witness. The Board's witnesses were as follows: Nancy C. James, middle school physical education teacher; James Mullins, middle school American history teacher; Dr. Jo Frame, assistant principal of the Student's middle school; Barbara Varanelli, program coordinator of the Arch Program; Anthony Mullen, special education teacher at the Arch Program; and Stacey Gross, headmaster of Kantor House at the school district's high school. Both parties made final arguments on September 24, 2003.

SUMMARY:

The Student, who is now 14 years old, is in the ninth grade. He attended parochial schools through the 6th grade, moving to the school district's middle school for seventh grade. While academically gifted, the Student has been diagnosed with social dyssemia, a condition characterized by an inability to read social cues. This condition has led to misunderstandings, disputes with teachers and peers, and depression and anxiety in the Student. From the time the Student entered the school district's middle school, the Parents have requested 504/PPT meetings and evaluations. Because the Student was performing well academically, the school district did not identify the Student as eligible to receive special services or accommodations. However, towards the end of the 2002-2003 school year, the Student's grades began to slide and his absences from school became more frequent due to depression and anxiety. A 504 plan was created on June 16, 2003. On June 19, 2003, the Student became involved in an altercation with another student, hitting the other student on the head and leg with a chair. Criminal charges were filed and the Student was suspended from school. On September 2, 2003, a PPT was convened at which time the Student was identified as emotionally disturbed. A manifestation determination concluded that the Student's behavior on June 19 was a result of his disability. The school district then offered the Student a program in a highly restrictive alternative high school. The Parents refused the placement after which the school district ordered a 45 day interim alternative educational placement for the student. The Parents refused to send the Student to the alternative setting and filed an expedited request for due process.

FINDINGS OF FACT:

1. The Student was born on September 24, 1989. He attended private parochial school through the sixth grade. While in the fourth grade, his teachers recommended that he be evaluated due to his poor social skills and difficulty with organization and attention. An evaluation was performed by the Eagle Hill Foundation Diagnostic Unit in April, 1999. The Student's full scale score on the WISC-III was 138; on the Gray Oral Reading Test-3, his reading quotient was greater than the 99th percentile. Despite these scores, the Student displayed weakness in the area of executive functioning. The evaluator concluded that the Student processes in a superficial way which affects him both academically and socially. He misreads social and environmental cues and has difficulty processing and coping with complex emotional stimuli; this tends to make him depressed and anxious. A highly structured educational program as well as social skills training were recommended. After the evaluation, the Student met with a psychologist for six months to address his social skills. When the Student was in the sixth grade, he met with a psychiatrist, Dr. Sanders Stein, who diagnosed the Student with social dyssemia, a condition on the pervasive developmental disorder spectrum characterized by difficulty recognizing and understanding nonverbal communication. (Exhibits B-1, P-6, Testimony of Father)
2. Believing that the school district could program more effectively for their son, the Parents moved the Student to the public middle school for seventh grade (the 2001-2002 school year). The Parents met with their son's teachers to explain his condition and

donated two books about dyssemia to the school. In November, 2001, the Parents requested a 504 evaluation for their son and offered to have their son's psychiatrist speak with the vice-principal. The guidance counselor responded stating that there was no need for further evaluations, but that he would speak to the Student's psychiatrist before scheduling a 504 meeting. There was no follow-up to this interaction; during the Student's seventh grade year, the Parents never received any notice of their due process rights and neither a PPT nor a 504 meeting was convened. The Student's father testified that he did not follow up on his request for an evaluation because in his culture (the family is from the Philippines), once a request is made to people in authority, it is expected that they will do their job; it is unacceptable to press them for a response. (Exhibit B-4, Testimony of Father)

3. On December 17, 2001, the guidance counselor circulated a message to the Student's team explaining the Student's diagnosis of dyssemia. He noted that the Student did not handle stress well and may need to visit the guidance counselor to work out his feelings. The guidance counselor recommended being firm but flexible with the Student. The Parents were unaware of this communication; to their knowledge, no formal action was taken on behalf of their son during seventh grade. (Exhibit B-4, Testimony of Father)

4. Throughout the seventh and eighth grades, the Parents were contacted several times by Dr. Frame about incidents resulting from the Student's difficulties with social interactions. In March, 2003, after the Student was suspended for two days for fighting on the school bus, Dr. Frame suggested that the Parents formally request a 504 meeting. Accordingly, in a letter dated March 17, 2003 and addressed to Dr. Frame, the Parents again requested a "Section 504 Individual Educational Program (IEP)" for the Student. They repeated their understanding of their son's disability and their belief that the school's lack of understanding of dyssemia had impacted his psychosocial functioning and academic performance. (Exhibits P-5, P-6, Testimony of Father, Dr. Frame)

5. At this point in time, the Parents had only a minimal understanding of the difference between special education services and 504 accommodations; having been given no information by the school district, they also did not understand their due process rights. This led to some confusion in the wording of their requests. (Testimony of Father)

6. On April 4, 2003, a Pupil Study Team meeting was held. The team concluded that an evaluation was not warranted. (Exhibit B-6)

7. On April 24, 2003, a PPT meeting was convened during which, for the first time, the Parents received a copy of their due process rights. The school district members of the team determined that the Student was not eligible for special education services because his grades were good and he was in no danger of failing. (During the seventh and eighth grades, the Student received grades of mostly "A's" and "B's". Mr. Mullins testified that the Student was often the best student in the class.) The PPT was then adjourned to a 504 meeting but the team determined that the Student also did not qualify for 504 accommodations. The team did recommend informal supports that some teachers were already using, such as having a chair outside the classroom where the Student could go when he needed to cool off. According to the Parents, another meeting was held on May 22, 2003 in which accommodations were again discussed but the Student was not

formally identified as eligible for either 504 or special education services. There is no documentation of this meeting in the record. (Exhibits B-8, B-24, P-9, Testimony of Father, James Mullins)

8. The Student had several disciplinary incidents during the 2002-2003 school year other than the bus incident that had led to a suspension; most were altercations and misunderstandings brought about by the Student's inability to appropriately process and respond to the social cues of peers and teachers. According to Dr. Frame, none were particularly worrisome or unusual for middle school students. (Exhibit B-24, Testimony of Dr. Frame)

9. In a letter dated June 11, 2003 to Dr. Frame, the Student's Parents requested a written explanation for the school's refusal to formally identify the Student as eligible for 504 or special education services. The Parents requested that another PPT be scheduled in order to plan for the Student's move to the high school. (Exhibit P-9)

10. In response to the Parents' request, a 504 Team meeting was convened on June 16, 2003 at which time a Student Accommodation Plan was created. The plan noted that the Student had numerous absences and his grades had dropped due to depression and anxiety brought on by his inability to read non-verbal social cues and the resulting misunderstandings. The plan called for teachers to observe the Student so that he could be separated from stressful situations before losing control and becoming agitated. In addition, teachers were to allow the Student to leave a class and seek help from his guidance counselor, social worker or school psychologist as necessary. (Exhibit B-9)

11. On June 18, 2003, an eighth grade dance was held; the Student brought a video camera to the dance. While filming, another student ("student x") who was not part of the Student's usual social group, stood in front of the camera and said "I'm going to (expletive) kill you." The incident was brief and the Student seemed to brush it off. The next day, "student x" repeatedly teased the Student about a large pimple on his nose (large enough that several months later his teachers remembered it). The Student claims that he asked Mr. Mullins to intervene, but Mr. Mullins did nothing. The teasing continued until the lunch period when the Student, after another bout of teasing, picked up a chair and hit "student x" over the head and on his leg. "Student x" was taken by ambulance to the hospital where he received stitches. The Student was arrested and charged with assault and risk of injury to a minor. He was taken to a detention center where he was held for four days. The school district did not inform the police that the Student was receiving 504 accommodations. The Student was also suspended for the final days of the school year and the principal of the middle school recommended that the Student be expelled from the first semester of the 2003-2004 school year. (Exhibits B-15, B-24, B-27, P-1, Testimony of Father, James Mullins, Ms. James)

12. Ms. James, who was in the cafeteria at the time with two other teachers and about 50 students, testified that there appeared to be no precipitating event prior to the incident. There was nothing to indicate that the Student was agitated. Usually, the Student would request support if upset or Ms. James would hear some noise indicating that a problem was brewing. She also stated that the Student swung the chair at "student x" three times; the last two swings came after another teacher told the Student to put the chair down.

Ms. James testified that she does not believe that the Student would act out without some provocation, even if he was mistaken in his perception of the social cue. (Testimony of Nancy James)

13. Mr. Mullins testified that the Student was in his class the morning of June 19, 2003, but there were no disturbances. He did not recall the Student requesting assistance with “student x” and that “student x” was not even in the same class with the Student. While Mr. Mullins did talk to the Student that day when the Student was asked to briefly leave an assembly, the Student did not ask him to speak to “student x” at any time on June 19, 2003. Mr. Mullins testified that he could usually tell when the Student was agitated; at his worst, the Student might use foul language or punch a locker or wall. Mr. Mullins also stated that the Student would not act out without a perceived provocation. (Testimony of James Mullins)

14. The school district postponed the expulsion hearing pending an assessment of the Student to determine whether he was eligible for special education services. On July 17, 2003, the PPT met to plan for psychological, educational and social evaluations for which the Parents gave their consent. The evaluations described the Student as intellectually gifted but with flawed social judgment, variable processing speed and organizational and time management issues. Additionally, they noted that the Student had been experiencing increasing anxiety and depression and difficulty controlling impulsive, aggressive behavior. The social worker recommended that the Student receive counseling with the high school’s mental health staff and that the Student’s private mental health providers coordinate with mental health staff at the high school. (Exhibits B-12, B-13, B-14, B-17)

15. The Court required the Student to undergo psychological and psychiatric evaluations. During the summer, the Parents brought the Student to Dr. Carl Mueller (psychiatrist) for medication management and evaluation, and Dr. Mark Ostrowski (psychologist) for weekly counseling.

16. In a letter dated July 29, 2003, Dr. F. Carl Mueller wrote to Stacey Gross, headmaster of the administrative house in the high school where the Student was to be placed in the fall. He described the Student as having exceptional cognitive ability but poor interpersonal skills. Dr. Mueller stated that the Student had “...learned to contain his disinhibited social impulses with emotional and social isolation. He will often quietly absorb social content then when taunted explode.” He diagnosed the Student with Dysthymic Disorder, aspects of Attention Deficit Disorder, aspects of Impulse Control Disorder and aspects of Various Developmental Disorders. Dr. Mueller also encouraged the school district to support the Student and to encourage him to talk to staff. He concluded that “...should... [the Student]... be aggressively bullied and threatened, as he recently was, it is difficult to predict the self-defensive actions any person might take. However, at this point, I see no reason that he cannot return to school.” (Exhibit B-16)

17. In August, 2003, the Student received a packet of information from the high school that included orientation information and the Student’s academic schedule. The Student was placed in mostly honors level classes. At that point, no other placement options had

been proposed and the Parents expected that the Student would be attending the high school in the fall. (Exhibit P-24, Testimony of Father)

18. The school district high school currently has about 2600 students divided among 5 administrative houses. The high school consists of wings that feed into a one acre student center, through which up to 2000 students pass between classes. Stacey Gross expressed concerns about the Student's ability to safely navigate the student center during such unstructured times. (Testimony of Stacey Gross)

19. A PPT was convened on September 2, 2003. First, the PPT determined that the Student was eligible for special education services and should be identified as Emotionally Disturbed. Next, a Manifestation Determination was conducted; it was concluded that the incident at the middle school was a manifestation of the Student's disability. Finally, school members of the team presented three possible options for an educational placement but recommended that the Student be placed at the school district's Arch Program, an alternative high school that serves 15-20 students who, for emotional, conduct, or psychiatric reasons, are unable to be educated in the high school. Arch classes meet on one floor of a community building. A general high school curriculum is taught by 3 special education teachers and 3 aides; honors and advanced placement classes are taught in one on one tutorials. The Parents refused the Arch placement and requested a program at the high school with an aide accompanying the Student if the team thought that was necessary. The team was surprised by the Parents' refusal. After taking a break to confer with the school district's attorney, the school district members of the PPT determined that the Student would be placed in an Interim Alternative Educational Setting for up to 45 days based upon the Student's use of a chair as a weapon. The Parents refused to discuss a functional behavior assessment or behavior plan because they were to be considered only within the context of the 45 day placement. The Parents were told they could seek due process if they disagreed with the proposed placement. The Parents provided an addendum to the PPT minutes stating that the PPT had disregarded the evaluations of Dr. Mueller and the school social worker, that the school district had failed to evaluate their son for two years despite parental requests, and that the PPT had refused to seriously consider any placements other than the Arch Program. (Exhibits B-18, B-23, P-25, P-29, Testimony of Father, Barbara Varinelli, Stacey Gross)

20. The school district members of the PPT attended the September 2, 2003 PPT with a draft IEP prepared by Barbara Varinelli and Anthony Mullen of the Arch Program. Representatives of the other possible placements were not asked to prepare a draft IEP. Ms. Varinelli testified that she had been told by Stacey Gross that Arch was the program that would be recommended at the PPT. While school district representatives testified that they were prepared to modify or amend the IEP during the PPT, it is clear that the Arch Program was the only program the school district was willing to offer the Student. (Exhibit P-26, Testimony of Barbara Varinelli)

21. The Father testified that at all times the Parents have offered to have the Student's therapists contact the school district. They have never refused consent to release medical information or prohibited communication between their doctors and the school district.

The school district offered no testimony that would contradict this. (Testimony of Father)

22. On September 3, 2003, the first day of school, the Student did not attend the high school or the tutoring program at Arch. Currently, the Student remains under the care of Drs. Mueller and Ostrowski and takes two anti-depressant medications. The school district is providing homebound tutoring during the pendency of this hearing. (Exhibit B-26, Testimony of Father)

CONCLUSIONS OF LAW:

1. There is no dispute that the Student, who has been identified as emotionally disturbed, is eligible for a free and appropriate public education (“FAPE”) with special education and related services as provided for under the provisions of the Connecticut General Statutes Sections 10-76 et seq. and the Individuals with Disabilities Education Act (“IDEA”) 20 U.S.C. 1401 et seq.
2. The local educational agency has the burden of proving whether an appropriate program has been offered by a preponderance of the evidence. (Regulations of Connecticut Agencies Section 10-76h-14)
3. The standard for determining whether FAPE has been offered begins with the test established by the Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). First, it must be shown that the procedural requirements of the IDEA have been met by the school district. Second, the individualized program must be reasonably calculated to enable the child to receive educational benefit.
4. The Rowley test alone, however, is not dispositive of whether FAPE has been offered. The IDEA also requires that children with disabilities be educated in the least restrictive environment (“LRE”); that is, to the maximum extent appropriate, children with disabilities are to be removed from the regular education environment “...only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (20 U.S.C. Section 1412(a)(5)(A)) Supplementary aids and services has been defined to mean “...aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...” (20 U.S.C. Section 1402(29)).
5. The court in Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3rd Cir. 1993) adopted and added to a test found in Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989) for determining whether a school district has met IDEA’s LRE requirement. First, it must be determined whether a child can be satisfactorily educated in a regular classroom with supplementary aids and services; the whole range of supplemental aids and services appropriate to the child’s disabilities must be considered. Second the educational benefit the child will receive in

the regular classroom must be compared to the benefits to be received in the segregated placement. And finally, the Oberti court stated that the possible negative effect the child's inclusion may have on the education of the other children must be considered. The Oberti court emphasized that "...in considering the possible negative effect of the child's presence on the other students, the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities...An adequate individualized program with such aids and services may prevent disruption that would otherwise occur." (Oberti at 1217)

6. Therefore, in considering whether the school district has offered an appropriate program to the Student by proposing placement at the Arch Program, the Oberti test must be applied. The Arch program does not offer an appropriate program in the least restrictive environment. The first part of the test asks whether satisfactory education can be achieved in the regular classroom when supplemental aids and services are provided: the answer is yes. The Student is an extraordinarily competent student; the school district delayed identifying him because his academic abilities are so strong. He achieved mostly superior grades despite his disability; there was no suggestion that he required any support of any kind in the classroom. It is in the area of interpersonal skills that he is weak and in need of support, therapy and instruction. There are times when the Student requires adult mediation to avoid conflict; the provision of an aide would meet this need. While there was testimony that having an aide might stigmatize the Student, this need not happen with a well-trained aide. All the Student requires to navigate the large and sometimes chaotic high school is an aide who is relatively inconspicuous to others because he or she intervenes only when necessary. The Student does not require an aide to sit constantly at his elbow; he just needs someone who will consistently observe, offer guidance, and step in only as needed. The school district offered no other testimony as to why the Student could not be placed at the high school with an aide. In contrast, the Arch Program is far more restrictive than placement in the high school with an aide. Arch is located in a building separate from the high school. Students have no access to any of the varied academic offerings at the high school and no interaction with regular education peers. The Arch program is simply not the least restrictive environment in which this Student can be appropriately educated.

7. The second part of the Oberti test is a comparison of the educational benefit offered by the placements. The Student was initially placed in mostly honors classes in the high school. In the Arch program, honors classes can only be taught through one on one tutoring. Receiving education in this way would deprive the Student of the intellectual stimulation and interaction available in a mainstream classroom. For a student of his ability, the educational benefit he would receive at the high school is clearly superior to what he would receive at the Arch program. There was a suggestion by the school district that the Student would have a better opportunity to learn impulse control at Arch. The Student is currently receiving therapy and, as a student at the high school, would have access to a guidance counselor, social worker, and school psychologist. Along with his aide, these members of his team would be equally capable of helping the Student become more socially adept.

8. The final portion of the Oberti test is determining whether the student's inclusion will have a negative affect on the other students. The school district is quite properly

concerned about the danger the Student may pose to other students in the high school. They take the position that the June 19 incident was sudden, unforeseeable, and impossible to stop. This may be true when 3 teachers are watching 50 children. But if a well-trained aide is assigned to the Student as his or her sole responsibility, then there is no reason why the Student can not be safely placed in the general education environment.

9. This in no way discounts the seriousness of the Student's action. It was violent, frightening and could have had an even more serious result. However, the school district's proposal does not offer appropriate educational benefit in the least restrictive environment. Placement in the high school with an aide will provide the Student with a free and appropriate public education in the least restrictive environment without any negative impact on the other students. Therefore, the school district has not met its burden of proving that an appropriate program was offered.

10. It is clear that the school district was taken aback by the Parents' refusal of the Arch placement. Imposition of the 45 day placement appears to have been an emergency measure invoked because the school district was unprepared to offer any other placement. 34 C.F.R. Section 300.520(a)(2) states that school personnel may order "...A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if - (I) The child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency..." An argument can be made for use of the 45 day placement due to the seriousness of the Student's action. But in this situation, it had never been raised previously as a possibility; it seems to have arisen solely from a discussion with the school district attorney during a break in the September 2, 2003 PPT, when a stopgap placement had to be provided after the Parents refused the Arch Program. It was ordered after it had been determined that the Student's action was a manifestation of his disability, after the school district had refused special education services for almost two school years (see no. 11, below), and after the Parents had refused the school district's proposed program. In this case, it was inappropriate to the situation and inappropriate for the child.

11. There is also a Rowley issue here as to whether procedural requirements of the IDEA were appropriately met. While the Parents were somewhat confused as to the difference between special education and 504 identification, it is clear that they were requesting assistance from the school but were essentially ignored for almost two school years. Not only were PPT/504 meetings not convened, but the Parents had no awareness nor were they given any notice of their due process rights during that time. In addition, there are procedural issues with regard to the September 2, 2003 PPT. While a school district is free to bring a draft IEP to a PPT for purposes of discussion, it is fairly obvious that the school district was prepared to propose only one program: the Arch Program. It was the only draft IEP prepared (see Finding of Fact No. 20) and the PPT precluded full discussion of any other program. In addition, the PPT was not open to any real consideration of the Parents' proposal; in essence, the Parents were denied their right to meaningfully participate in planning an educational program for their child.

12. Parents have also claimed that the 504 plan was not followed on June 19, 2003. They feel that neither Mr. Mullins nor the teachers on duty in the cafeteria responded

appropriately to the Student by either removing him from a troublesome situation or helping him process whatever confusion he was feeling. In both cases there is conflicting evidence about what actually happened. Mr. Mullins claims that the Student never approached him for help on that day; Ms. James testified that there was no indication that a problem was about to occur. However both Mr. Mullins and Ms. James agreed that the Student would not act out if he did not believe that he had been wrongfully provoked. Finally, the Student's story that "student x" was teasing him in the cafeteria has not been corroborated during this hearing. While there is no reason to doubt the testimony of either Mr. Mullins or Ms. James, it does not really matter which version of the stories are true. As has been more fully discussed, an appropriate program with a well trained aide nearby could have anticipated the Student's needs and potential response and contained the conflict.

13. The remedy for these violations is placement of the Student in the high school with an aide. The PPT shall immediately convene to design an IEP that appropriately meets the Student's special education needs and provides a placement in the school district's high school with a full time, one on one aide. A functional behavior assessment is to be performed and a behavior plan created based upon the assessment. The IEP must insure that communication occurs between the Student's therapists and his guidance counselor, social worker and school psychologist at the high school. The PPT shall follow the recommendations of the Student's therapists in designing an appropriate in-school counseling program. The IEP must also require that all the Student's teachers are educated as to his disability, his behavior plan and the types of services and accommodations he needs to function within the high school. The Student's IEP must also provide for the appropriate selection and training of a one to one aide (as described in Conclusion of Law No. 6) who will accompany the Student throughout his day for the remainder of the 2003-2004 school year. The PPT shall meet at least every eight weeks to review the IEP and make modifications as needed.

FINAL DECISION AND ORDER:

1. The school district did not offer an appropriate program and placement.
2. The PPT shall immediately meet to plan and implement an appropriate IEP that places the Student in the high school with an educational program and full time, one on one aide as described in Conclusions of Law No. 6 and 13.
3. The school district did not appropriately impose a 45 day exclusion of the Student from the high school. The Student shall be placed as described in Order no. 2, above.