

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Fairfield Board of Education v. Student

Appearing on Behalf of the Parents: Parent, Pro Se

Appearing on Behalf of the Board: Attorney Marsha Belman Moses
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing Before: Attorney Gail K. Mangs, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board perform an appropriate evaluation of the Student?
2. If not, is the Board obligated to pay for an independent evaluation of the Student by a certified applied behavior analyst?

PROCEDURAL HISTORY:

This hearing was requested on July 16, 2004. The prehearing conference was convened on July 27, 2004. A 30-day continuance was granted to allow the parties to participate in the advisory opinion process. The hearing convened on September 14, October 14 and November 23, 2004 with postponements granted due to the Parents' difficulty in scheduling a witness. The Parents called the following witnesses: The Student's Mother; and Barbara Agnello, a New Jersey special education teacher and applied behavior analyst. The Board of Education called the following witnesses: Jacalyn Papstein, Board special education teacher; Dr. John Molteni, a Board consultant and Senior behavioral analyst from the Center for Children with Special Needs; and Christine Mountzouris, Board speech and language pathologist.

SUMMARY:

The Student, who is now five years old, has been identified as eligible to receive special education services as a student with autism. During infancy, the Student began receiving

services from the Connecticut Birth to Three System. During the 2002-2003 and 2003-2004 school years, the Student attended the Connecticut Center for Child Development (CCCD). In preparation for developing an IEP for the 2004-2005 school year, the Board performed an evaluation that included observations and the review of assessments. Based upon this evaluation, the PPT then drafted goals and objectives that were included in a proposed IEP. Although the Student began attending the Board's program in the fall of 2004, the Parents disagreed with part of the evaluation and requested an additional assessment to be performed by a certified applied behavior analyst. The school district requested this hearing to defend the appropriateness of its evaluation.

FINDINGS OF FACT:

1. The Student was born on November 12, 1999. He received services from the Connecticut Birth to Three Program based on developmental delays in the areas of gross and fine motor skills, visual reception and social/emotional and self-help skills. (Exhibits B-1, B-5)
2. At the request of the Student's Parents, a psychological evaluation was performed on November 2, 2001, by Dr. Michael D. Powers of The Center for Children with Special Needs, L.L.C. Dr. Powers made the following diagnoses: Pervasive Developmental Disorder, Not Otherwise Specified, Central Hypotonia and Global Developmental Delay. On the Childhood Autism Rating Scale, the Student's total score was 35.5 placing the Student within the range of children more moderately affected by behaviors common to Autism Spectrum Disorder. Dr. Powers noted significant motor deficits, central hypotonia, oral motor deficits and difficulties in the areas of receptive and expressive language and engagement and social exchange. Dr. Powers recommended services including occupational, physical and speech and language therapy as well as 20 to 25 hours of direct instruction following an applied behavior analytic model ("ABA therapy") under the supervision of an organization such as the Connecticut Center for Child Development ("CCCD"). (Exhibit B-6)
3. On April 28, 2002, Barbara Agnello performed an "ABA Evaluation." She observed the Student in the home as well as videos of home therapy sessions. She noted significant developmental delays and stereotypical behaviors and recommended 25 hours per week of ABA therapy. (Exhibit B-22)
4. In preparation for the Student's transition to the Board of Education, a PPT was convened on May 29, 2002; observations by Board staff were planned. After observations were conducted, another PPT was convened on September 11, 2002, at which time the observations were reviewed and the Student was found eligible for special education services as a child with autism. A program was planned that included direct instruction, speech, occupational and physical therapy and an extended school year program. The Parents rejected the offered program and decided to keep the Student at CCCD where they had enrolled the Student in early September, 2002. (Exhibits B-28 through B-39)
5. Dr. Powers performed another psychological evaluation of the Student on September 10, 2002. Dr. Powers noted variable but positive gains. The Student's score on the

Childhood Autism Rating Scale was 34, placing the Student among the range of children more mildly affected by the symptoms of Autism Spectrum Disorder. Dr. Powers noted the same deficits and difficulties discussed in his November, 2001 evaluation and recommended 30 hours of direct instruction per week of which 20 to 25 hours would be one to one discrete trial teaching. Dr. Powers also supported ongoing placement at CCCD although he recommended that the Parents and the Board reassess placement when planning for the 2003-2004 school year took place. (Exhibit B-46)

6. The Parents obtained a neurological consultation with Dr. Arnold Gold in April, 2003. Dr. Gold noted significant deficits in speech and language, interactive communication and fine and oral-motor skills. He recommended 30 to 40 hours per week of ABA therapy. (Exhibit B-53)

7. In the spring of 2003, the Board created a comprehensive autism program that began in the fall of 2003; consultation was and is provided by Dr. Michael Powers and his staff from The Center for Children with Special Needs. Jacalyn Papstein is the teacher and case manager. The program offers ABA therapy and other services for children with intensive needs. Data collection is viewed as essential and used extensively in order to meet the children's needs. Behavioral analysts from Dr. Powers' group, Dr. John Molteni and Michael J. Soderlund, spend approximately four days per week providing various consultative services to the autism program including development of curriculum, training of teachers and ABA therapists, assessment of students and their programs, parent workshops and focused home visits to deal with the problem areas of individual children. Dr. Powers visits the program two or three times per year. (Testimony of Jacalyn Papstein and Dr. John Molteni)

8. The Student attended CCCD during the 2003-2004 school year. (Testimony of Mother)

9. On April 5, 2004, a PPT was convened to discuss the Student's progress and plan an evaluation. It was agreed that Board and CCCD staff would collaborate on developing the Student's goals and objectives for the 2003-2004 school year after Board staff members observed the Student in CCCD's program, CCCD staff observed the Board's program, and information about the Student as possessed by the Parents, Board and CCCD was shared by all parties. The entire PPT, including the Parents, agreed with this evaluation plan. (Exhibit B-65)

10. The PPT reconvened on June 25, 2004. The Student's progress was reviewed. The following written report of observations were reviewed by the PPT:

- a. an observation by Dr. John Molteni of some of the Student's daily routines at CCCD including an ABA therapy session (Dr. Molteni observed for approximately 1.5 hours);
- b. an observation by a physical therapist from Rehabilitation Associates of a physical therapy session with the Student at The Center for Pediatric Therapy;
- c. an observation by the Board speech and language therapist of a private speech therapy session with the Student;
- d. observations by a Board occupational therapist and a Board teacher of the hearing impaired of an occupational therapy session at Pediatric OT.

The PPT also reviewed:

- e. an annual educational report from the Board of Education and Services for the Blind;
- f. a progress report from Kathy Sinclair, the Student's private speech and language therapist;
- g. a vision assessment from the Student's behavioral optometrist;
- h. physical and occupational evaluations from the Center for Pediatric Therapy;
- i. a February 21, 2004 neurological consultation from Dr. Arnold Gold (who recommended 40 hours per week of ABA therapy);
- j. Data from CCCD including assessments, ABA programs and pre and post baseline behavioral data;
- k. Additionally, the PPT reviewed Dr. Powers' latest evaluation of the Student (dated November 3, 2003) in which he continued to describe the Student as being more mildly affected by the symptoms of Autism Spectrum Disorder based upon the Student's performance on the Childhood Autism Scale. However, Dr. Powers also described the Student as having a complex neurocognitive profile with significant deficits and abilities well below age expectations.

The information received from all the observations and evaluations was consistent in describing the Student's needs and strengths. (Exhibits B-65, B-70, Testimony of Jacalyn Papstein, Dr. John Molteni)

11. After reviewing the observations and assessments, the Board drafted goals and objectives that were then discussed at the June 25, 2004 PPT. Many of the goals and objectives were modeled on goals and objectives developed for the Student by CCCD. The involvement in the program of consultants from the Center for Children with Special Needs was also discussed, as was the Student's current functioning and levels of performance. Everyone at the PPT agreed to the final list of the Student's strengths and needs including the Parents and staff from CCCD. A program was developed that provided a total of 32.5 hours of programming including ABA therapy, speech, occupational and physical therapy, a one on one paraprofessional, parent training and biweekly team meetings. The Parents requested vision therapy, a home program for 10 hours per week and an oral-motor assessment; the Board agreed only to provide the assessment. No other assessments were requested nor did anyone state that more data was necessary in order to create an appropriate program for the Student. Both the Board and the Parents were represented by counsel at the PPT. (Exhibit B-70, Testimony of Jacalyn Papstein and Christine Mountzouris)

12. On July 13, 2004, the Parents requested an independent evaluation by a certified applied behavior analyst who specializes in autism. They based this request upon the number of hours of ABA offered in the June 25, 2004 IEP. (Exhibit B-71)

13. At some point before Dr. Powers' October, 2002 evaluation of the Student, the Parents became aware that Dr. Powers would be working with the Board to develop a program for children with autism. At the time, they were pleased by the news. But at the June 25, 2004 PPT, when the Student's service hours were reduced from what they had been at CCCD and the request for a home program was refused, the Parents began to question Dr. Powers' evaluation and his objectivity. (Testimony of Mother)

14. The Parents dispute the objectivity of Dr. Michael Powers due to the contract his Center for Children with Special Needs has with the Board to provide consultation services to the Board program for children with Autism Spectrum Disorder. They believe that the American Psychological Association's "Ethical Principles of Psychologists and Code of Conduct" (adopted August 21, 2002, effective June 1, 2003 and published December, 2002) should have constrained Dr. Powers from performing an evaluation of the Student. The pertinent section of the code reads as follows:

"3.06 Conflict of Interest

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation."

The Parents believe that the evaluation of the Student performed by Dr. Powers in November 2003 in which he stated that the Student is more mildly affected by the symptoms of Autism Spectrum Disorder, is evidence of a financial conflict of interest. They believe that his interpretation of the Student's performance on the Childhood Autism Rating Scale was affected by his financial relationship with the Board and should, therefore, be disregarded. For that reason, the Parents argue that an independent evaluation of the Student is necessary.

15. Board members of the PPT do not agree that the Student is only mildly or moderately affected by autism, as Dr. Powers has stated with regard to the Student's score on the Childhood Autism Rating Scale. However, they believe that the remainder of Dr. Powers' evaluation is correct and do not believe that the results of one instrument, and Dr. Powers' interpretation of the score on that instrument, invalidates his entire evaluation. In addition, in planning for the Student, the Board looked at the Student's needs; they did not rely on the Student's score on the Childhood Autism Rating Scale to develop the Student's goals and objectives. The Board does not believe that more data is needed or that any further assessments beyond what is done on a regular basis is necessary. (Testimony of Jacalyn Papstein, Dr. John Molteni, Christine Mountzouris)

16. Barbara Agnello testified that Dr. Powers' evaluation, except for the score on the Childhood Autism Rating Scale, is consistent with what she has observed of the Student. She also testified that a comprehensive evaluation could contain an inconsistent score; consideration must be given to the totality of the evaluation. (Testimony of Barbara Agnello)

17. The Student is currently attending the Board of Education's program. (Testimony of Mother)

CONCLUSIONS OF LAW:

1. Both parties agree that the Student, who has been identified as a student with autism, is entitled to a free and appropriate public education ("FAPE") with special education and related services as provided for under the provisions of Connecticut General Statutes

Sections 10-76 et seq. and the Individuals with Disabilities Education Act (“IDEA”) 20 U.S.C. 1401 et seq.

2. Under 34 C.F.R. Section 300.502, parents of a child with a disability have the right to obtain an independent educational evaluation of the child. Parents also have the right to an independent evaluation at public expense if they disagree with the evaluation obtained by the school. In that situation, the school district must either initiate a hearing to show that its evaluation is appropriate or pay for the parents’ independent evaluation (unless the school district can prove in a hearing that the independent evaluation does not meet its criteria). Accordingly, the Board requested this hearing to defend the appropriateness of its evaluation.

3. 34 C.F.R. Section 33.532 sets forth the minimum requirements that must be met if an evaluation is to be deemed appropriate including the following requirements:

- a. Tests and other evaluations must be selected and administered so as not to be discriminatory on a racial or cultural basis; they must be administered in the child’s native language.
- b. A variety of assessment tools and strategies must be used to gather relevant functional and developmental information including information provided by the parent and information related to enabling the child to be involved in and progress in the general curriculum.
- c. Standardized tests must be validated for the specific purposes for which they are used, and administered by trained and knowledgeable personnel in accordance with instructions provided by the test producer.
- d. Tests administered to a child with impaired sensory, manual or speaking skills must accurately reflect the child’s aptitude or achievement level or whatever the test purports to measure rather than reflect the child’s impaired sensory, manual or speaking skills (unless those skills are the factors that the test purports to measure).
- e. No single procedure may be used as the sole criterion for determining an appropriate educational program for the child.
- f. The child must be assessed in all areas related to the suspected disability and must be sufficiently comprehensive to identify all of the child’s special education and related services needs.

4. 34 C.F.R. Section 300.533 requires that evaluations include the review of existing evaluation data, such as evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and observations by teachers and related services providers.

5. Connecticut statutes and regulations track the federal requirements. RCSA Section 10-76d-9 states that a complete evaluation study shall be conducted for each child referred who may require special education and related services. The regulation also requires that the study include reports on the child’s educational progress, structured observations, and psychological, medical, developmental and social evaluations as may be appropriate. In addition, more than one evaluation tool must be used as the basis for placement.

6. The Board's evaluation of the Student was appropriate. As required by state and federal law, this comprehensive evaluation was performed by a multidisciplinary team, employed a variety of appropriate assessment tools and included extensive observations and reports from Board staff, CCCD staff and private providers. All areas of suspected disability were examined including vision and physical, speech and language and occupational therapy needs. No single procedure was relied upon in determining the Student's needs, strength, goals and objectives. In addition, both the Board and the Parents agreed to the evaluation plan and CCCD, a school chosen by the Parents, played a major role in the evaluation and program planning process. (See Findings of Fact No. 9 and 10) Due to this determination that the Board's evaluation was appropriate, the Board is not obligated to pay for an independent evaluation by a certified behavior analyst.

7. It would be outside a hearing officer's area of expertise to comment on whether Dr. Powers violated the American Psychological Association code of conduct although it may not be best practice for a professional to perform an outside evaluation on a child when that professional is also working for and receiving financial remuneration from the school district. However in this situation, Dr. Powers had a previous relationship with the child and the family and had already evaluated the child twice before accepting a contract with the child's school district. The Parents were aware of Dr. Powers' contract with the Board when they brought the Student for the November, 2003 evaluation. The Parents gave the Board all three evaluations without ever expressing any disagreement with them. In addition, the three evaluations were consistent with each other; Dr. Powers' diagnoses and recommendations in each report were essentially the same. Despite Dr. Powers' interpretation of the Student's score on the Childhood Autism Rating Scale, he continued to view the Student as a complex child with Pervasive Developmental Disorder and as having significant deficits, abilities way below age expectations and extensive programming needs including ABA therapy. Finally, Board staff was credible in their testimony that they were not influenced by the Student's score on the Childhood Autism Rating Scale in developing the Student's IEP.

8. This was not a hearing about the nature of the Student's programming or hours of service. The issue in this hearing was whether the Board's evaluation was appropriate; the Parents agreed that this was the issue. It appears, however, that the Parents did not question Dr. Powers' evaluation until they became concerned about the number of program hours (specifically, the ABA hours). As was explained to the Parents, they may request a hearing with regard to these programmatic issues.

FINAL DECISION AND ORDER:

The Board's evaluation was appropriate. The Board is not obligated to pay for an independent evaluation by a certified behavior analyst.