

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Appearing on behalf of the Parents/Student: Attorney H. Daniel Murphy  
Maya & Associates, P.C.  
266 Post Road East  
Westport, CT 06880<sup>1</sup>

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

Appearing before: Attorney Mary Elizabeth Oppenheim  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Whether the Student was eligible for special education and related services during the 2004-2005 and 2005-2006 school years.
2. If so, whether the Parents' placement of the Student at Family Foundation School for the 2004-2005 and 2005-2006 school years was appropriate.
3. Whether the Parents are entitled to reimbursement for this placement.
4. Whether the Board received appropriate notice of this unilateral placement in accordance with IDEA.<sup>2</sup>

---

<sup>1</sup> Attorney Murphy stated on the record that he represented both the Parents and the Student in this case, as the Student has now reached the age of majority.

<sup>2</sup> These are the issues that were identified on the first day of the hearing. While the Parents'/Student's attorney set forth a different list of issues in his brief, the issues so identified were not the issues that the counsel for both parties agreed on the record were the issues for this hearing.

**SUMMARY:**

The Student, now entering college, was unilaterally placed in a private 12-step program school by the Parents in November 2004, with less than a week's notice to the Board. The Student had not been identified as eligible for special education at the time of the unilateral placement, and was abusing substances prior to the placement. The Board had repeatedly urged the Parents to consent to have the Student drug tested during the school year prior to this unilateral placement.

The Parents brought this hearing request seeking a determination that the Student was eligible for special education and requesting reimbursement for the placement at the Family Foundation School for the 2004-2005 and 2005-2006 school years.

**PROCEDURAL HISTORY:**

The Parents requested this hearing on June 9, 2006, and this hearing was assigned to this hearing officer on June 22, 2006. [Exhibit H.O.-1]

The mailing date of the decision was extended by requests of the parties to schedule additional hearing dates for presentation of their case. The hearing convened on eight days in August, September and October 2006.<sup>3</sup>

An additional extension was granted so that the parties could submit briefs in this matter. Briefs were filed on November 13.

The Parents' witnesses were the Wendy Van Kirk, the Father and the Mother.

The Board's witnesses were Lisa Melillo, Board school psychologist; Diane Fraser, Board school nurse; Mark Schwarz, Board dean of students and subsequently Board assistant principal and Deborah Simons, Board school counselor.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

---

<sup>3</sup> On the sixth hearing date, Attorney Maya from the Parents' attorney's office was present at the hearing and asked if it was ok for him to "sit in" on the hearing. Then, during the examination of a witness, he began to interject objections, although Attorney Murphy was appearing at this time. The attorneys were informed that only one attorney can question a witness at a time, and argue objections. Attorney Maya was rude and attempted to continue to join in with Attorney Murphy; again Attorney Maya was cautioned that such a "tag team" approach was not appropriate. Attorney Maya then took exception to not being able to question the witness and respond to or interject objections at the same time as Attorney Murphy, and then left the hearing room. At the beginning of the hearing at the next hearing day, Attorney Murphy was asked whether he needed any assistance in proceeding as counsel, and he indicate that he didn't.

**FINDINGS OF FACT:**

1. The Student is currently 18 years old and was matriculating to Plymouth State College at the time of this hearing. [Testimony Father]
2. The Student had attended the Board schools since his kindergarten year. [Exhibit B-1]
3. While the Parents testified that the Student was first diagnosed with ADD/ADHD in first grade, no documentation of that diagnosis was provided at that time, and this diagnosis was not shared with the Board until the Student was involved in some disciplinary issues in 2003. [Testimony Father, Mother; Exhibit B-19]
4. The Student was administered the Otis Lennon School Ability Test in fifth grade, as a part of the assessment of all fifth graders in the district. The Otis Lennon School Ability Test is essentially a group IQ test, according to the Board school psychologist. In this test, the Student's scores were in the average to above average range. In the Metropolitan Achievement Test, also administered to all students in grade five, the Student scored in the average to above-average range. The Student took the Degrees of Reading Power test to measure reading comprehension, and obtained a score of 66, which exceeded the reading goal for his grade, placing him in the 88<sup>th</sup> national percentile. These scores reflect that the Student was learning, making excellent progress and performing at a high level in all areas. [Testimony Ms. Melillo; Exhibits B-9, B-10]
5. The Student made appropriate progress in the regular education curriculum in his elementary and middle school grades. In eighth grade, he met goal in the Connecticut Mastery Test, exceeding the school average and district average in all areas. [Exhibit B-16] The Student consistently performed well on standardized tests through middle school. As for the Student's behavior, the Parents only recall possibly being called into school once regarding a disciplinary issue in middle school. [Testimony Father]
6. While the Father testified that he always had behavioral issues with the Student, those alleged issues were not present at school during the elementary, middle and early high school. [Testimony Father]
7. The Father testified that the Student began using drugs in the summer after eighth grade, right before high school, although the Parents did not suspect the Student was using drugs until much later. [Testimony Father]
8. The Student entered the Board Masuk High School at the beginning of the 2002-2003 school year, in his ninth grade. He played on the freshman football team. He began the school year enrolled in an honors level history class, but when he

- had difficulty with that class, he was transferred to a college preparatory class for history. The Student had no disciplinary issues in ninth grade. While the Student's grades were inconsistent in ninth grade, nothing in the Student's report card would cause a concern that the Student had a disability. [Testimony Mr. Schwarz; Exhibits B-18, B-51]
9. The Parents never discussed what they perceived to be the Student's anxiety or his ADD/ADHD with any of the school administrators or teachers during the Student's ninth grade year. Although the Student had been placed on medication for ADD in the spring 2003, the Mother did not share this information with the school nurse. [Testimony Mother, Ms. Fraser]
  10. During the summer between ninth and tenth grade, the Student was first arrested for domestic violence. [Testimony Father] The Student was placed on probation that summer, but the Parents did not share that information with the Board staff as the Mother considered it privileged information about a minor. [Testimony Mother]
  11. In October of the Student's tenth grade year, the Student was involved in a verbal altercation with another Student, and was issued a student agreement about the threatening behavior. The student agreement is an agreement signed by students pledging that they will not threaten anyone physically or verbally. [Testimony Mr. Schwarz, Exhibit B-20]
  12. On the same day as that behavioral incident occurred the Parent procured a note from Owen Schneider, M.D., that the Student was "diagnosed with ADHD and symptoms of mood disorder" and that he "is a candidate for 504 accommodations." The Parents also obtained a form letter from S. Nallainathan, M.D., dated October 24, stating that the Student has an underlying attention deficit disorder. Dr. Nallainathan's form letter requested a 504 plan to include preferential seating in class, extra time for test taking, modification of homework assignments, positive reinforcement, and special test accommodations. [Exhibits B-19, B-21] With the Parent's submission of these forms to the school, this was the first notification to the Board that the Student was diagnosed with ADHD, and that the medical providers recommended 504 accommodations.
  13. The Parents also obtained a letter from Robert Margolies, Ph.D., a psychologist dated October 26, 2003. In that letter Dr. Margolies recommended that the Student receive modifications for students with ADD. [Exhibit B-23]
  14. A Masuk Student Assistance Team [MSAT]<sup>4</sup> meeting and a 504 accommodations meeting were convened in response to the letters from the Student's providers. [Testimony Ms. Mellilo, Exhibits B-24]

---

<sup>4</sup> The Masuk Student Assistance Team [MSAT] is the high school's referring and crisis intervention team. The team, which is composed of teachers, guidance staff, administration, special education staff and the school psychologist, meets daily to review and discuss students who may be at some academic risk. The

15. At the 504 meeting held on November 3, 2003, all present, including the Parents, agreed with the 504 plan for the Student which included preferential seating, additional time for tests and quizzes, extended time for exams, and MACC room support daily. The MACC room was a structured regular education tutorial center at the high school which provided academic mentoring, organizational support and time extension. [Testimony Ms. Mellilo; Exhibits B-25, B-26]
16. In January 2004, the Student was involved in some disciplinary actions. In one incident, the Student was involved in a pushing another Student, and was suspended from school for one day. The dean of students discussed this incident with the Student and the Mother, and was concerned about this behavior. [Testimony Mr. Schwarz, Exhibit B-28] Later in January, the Student was given an administrative detention for not being in history class for two days. The Student initially did not serve his detention, but subsequently it was served. The dean of student's level of concern for the Student increased at that time, and the Student was referred for another MSAT on January 22, 2004. [Testimony Mr. Schwarz, Exhibits B-29]
17. Progress reports were gathered for the Student, and a MSAT meeting was scheduled for the Student for January 30, 2004. [Testimony Mr. Schwarz, Exhibit B-33]
18. Prior to the MSAT convening the Student was involved in another behavioral incident at school, involving a mutually physical fight with another student. The dean of students met with the Student about his incident, and was concerned about the increase in poor behavior and the Student's physical appearance, noting that he was not as well kempt as he had been previously. With the increase in behavioral issues, change in physical appearance and lack of motivation, the dean of students suspected that the Student might be involved in substance abuse. At the end of January, the dean of students had discussed this incident with the Mother, and shared his concern of the Student's potential substance abuse with her. [Testimony Mr. Schwarz, Exhibit B-32] At this time, the staff at the school shared the dean of student's concerns that the Student was abusing substances. [Testimony Mr. Schwarz, Ms. Fraser] The Student was suspended one day for this incident. [Testimony Mr. Schwarz, Exhibit B-32]
19. The MSAT convened, and recommended that the 504 meeting be held to address the Student's issues. The MSAT also discussed a possible MBC referral for the Student. [Testimony Mr. Schwarz; Exhibits B-33, B-77] MBC, an acronym for Monroe Builds Community, is a satellite drug and alcohol program with a full time drug and alcohol abuse counselor housed in the school building. [Testimony

---

team identifies those students at risk and provides interventions, strategies and supports to assist them in the learning environment. The team then monitors progress of these students. The SAT also refers when appropriate to a 504 team, a Planning and Placement Team [PPT], and/or to MBC, the satellite drug and alcohol program located at the high school. [Testimony Ms. Mellilo, Mr. Schwarz, Ms. Fraser]

- Ms. Mellilo] The MBC counselor is not an employee of the Board schools. This individual is trained to assist students whose academic success is impaired due to use of substances. Parental consent is required for students to meet regularly with the MBC counselor. [Testimony Mr. Schwartz]
20. The 504 meeting convened on February 5, 2004. At the 504 meeting the Student's progress was discussed, and the progress reports from the teachers were reviewed. The Board staff discussed their concerns with the Parents that the Student was possibly involved in abusing substances. The dean of students suggested that the Student might be using steroids or marijuana, based on the Student's behavior and physical appearance, coupled with concerns regarding the other students the Student was spending time with at school. The dean of students recommended to the Parents that the Student referred to the MBC counselor to address substance abuse and explained the MBC program to the Parents. The dean of students also explained that if the Student participated in MBC, he would be drug tested as part of the program. The Parents declined the MBC referral. The dean of students pressed the Parents further, suggesting that even if the Parents declined the MBC counselor, he recommended that the Parents follow up with their personal physician to have a urine test done to rule out substance abuse. The 504 team agreed to increase the MACC room time for the Student, and discussed adjustment for the Student's classes. The Parents sought no other evaluations or services for the Student at that time, and agreed with the outcome of the 504 meeting, except for their refusal to have the Student participate in substance abuse counseling with the MBC counselor. [Testimony Mr. Schwarz; Exhibits B-35, B-77]
  21. The Student continued to have disciplinary issues during the 2003-2004 school year. He had multiple tardies for the first period class. [Exhibit B-37] He also served an office detention, and was issued another student agreement on April 28, 2004 for being in an unauthorized area. [Testimony Mr. Schwarz, Exhibit B-37]
  22. The dean of students continued to be concerned of the Student's possible substance abuse in late April 2004. The Student's guidance counselor, the school psychologist and the school nurse shared this concern about possible substance abuse. [Testimony Mr. Schwarz]
  23. On April 30, 2004, progress report forms were sent to all of the Student's teachers in preparation for another MSAT meeting to be held on May 7. [Testimony Mr. Schwarz, Exhibit B-38]
  24. The school nurse contacted the Mother, speaking with her six or seven times during the 2003-2004 school year about her concerns that the Student was abusing substances, and her recommendation that the Parents submit the Student to urine testing. The Mother told the nurse that they weren't ready to do that. [Testimony Ms. Fraser]

25. The Mother repeatedly was evasive about recalling whether the Board dean of students and school nurse had mentioned on a number of occasions their concerns that the Student was using drugs and their recommendation that the Student undergo drug testing, which was testified by the dean of students and the school nurse and identified in various documents in evidence. Her lack of recollection appeared to be evasive. Such notification by the school would be alarming to parents, and the Mother's repeated evasive responses are absolutely not credible.
26. On May 7, 2004, the MSAT convened and discussed the concern for the Student's grades and his refusal to attend school. The team recommended a parent conference, and once again recommended that the Student receive substance abuse counseling from the MBC counselor. [Exhibit B-40]
27. In May 2004, the dean of students telephoned the Parents to express his continuing concern about the possible substance abuse, and discussed MBC counseling and urine testing. The Mother indicated that they were not interested in pursuing that. [Testimony Mr. Schwartz]
28. On May 10, 2004, the dean of students sent the Parents notification that the Student was issued a one day suspension, which was related to failing to serve an office detention for cutting class. [Testimony Mr. Schwarz, Exhibit B-43]
29. On June 2, 2004, the 504 team convened, and agreed that the Student would be placed in the tutorial program for the remainder of the school year, as the Student was not attending school. The Parent agreed with the tutorial program for the remainder of the year. [Testimony Mr. Schwarz, Exhibit B-43] Tutorial is a regular education cooperative program between the Board and a neighboring town which provides individualized tutorial to students in certain unique situations. [Testimony Mr. Schwarz] The 504 team also recommended that the Student be assessed for Project Real, a Board regular education program for students with substance abuse issues, for the beginning of the next school year. [Exhibit B-43]
30. At this time, the Parents finally consented to urine testing on the Student. The school nurse followed up on this testing, and the Student tested positive for THC in June 2004, based on a collection date of June 2, 2004, and a final lab report date of June 4, 2004. [Testimony Ms. Fraser, Exhibit B-73]
31. Project Real is a regular education alternative program designed for students who were not making academic progress due to substance abuse. [Testimony Mr. Schwarz, Ms. Simons] The Student fit the profile for placement in this Project Real program. [Testimony Mr. Schwarz]
32. On June 8, 2004, the MSAT met. At this meeting, the team confirmed that the Student did not attend the tutorial program as he was arrested the previous day and had been transported to Hall-Brooke. The team also discussed that the

- Student had had positive urine testing for drugs. [Testimony Ms. Mellilo, Exhibit B-45]
33. This arrest related to a domestic violence incident, which occurred after a police officer came to the home to discuss another charge that the Student was accused of sexually assaulting a female student. [Testimony Father] The police officer had been at the home, asking the Student about the sexual assault allegation, and the officer requested that the Student come to the police station the following day. Once the officer left the house, the Student engaged in a shoving match with the Father. The Student's brother intervened and the Student pushed his mother, smashed dishes in the house and went into the basement. The Parents called 911 and police officers responded, going to the basement and wrestling the Student to the ground. The Student was taken to St. Vincent's Hospital, where he remained for 12 to 24 hours; a urine screen there was positive for PCP. From there, the Student was taken to Hall-Brooke Hospital where he remained for approximately 10 days before being transferred to Hall-Brooke's outpatient program. [Testimony Mother] During the entire time the Student was an outpatient for substance abuse treatment at Hall-Brooke, he was abusing substances. [Testimony Father, Exhibit P-6]
  34. Towards the end of June, after school had ended, the Mother met with the dean of students. At that time the Student was dealing with the court and was under house arrest. The Mother requested a document to provide to the court that the Student needed to go to summer school during the time of his house arrest. [Testimony Mr. Schwarz]
  35. The dean of students provided a letter to the Parents to share with the court which indicated that the Student was recommended to attend Project Real for the next school year, and that it was recommended that the Student attend the summer school program. [Testimony Mr. Schwarz, Exhibit B-46]
  36. The Student successfully participated in summer school, receiving an A- in his history class. With the summer school participation, the Student received credit for all sophomore classes. [Testimony Mr. Schwarz, Exhibit B-51]
  37. The Student was discharged from the adolescent intensive outpatient program at Hall-Brooke on July 19, 2004. The discharge diagnoses included polysubstance abuse and mood disorder, and the report noted that the Student continued to use marijuana while in the outpatient program, and refused to attend AA/NA meetings. [Exhibit P-6]
  38. The Parents did not provide the Hall-Brooke Behavioral Health Services discharge summary to the Board until it was submitted as an exhibit in this hearing, nor did the Parents provide information that the Student had tested positive for drugs in June by St. Vincent's Hospital. [Testimony Mother, Exhibit P-6]



39. On July 7, prior to the Student's discharge from the Hall-Brooke outpatient program, and while the Student was continuing to abuse substances, the Student underwent a court-ordered psychological assessment by Dr. Ralph Balducci, a psychologist appointed by the court. Dr. Balducci's report, dated July 13, 2004, was provided to the Board for the first time as part of the exhibits in this hearing. This report reflects that the Student was before the court "due to a charge of sexual assault in the third degree." The Student, while reporting some substance abuse, did not accurately report the scope or extent of his drug abuse to Dr. Balducci. This report included a parent interview, in which the Parents reported to him that the Student was "capable of achieving success in school when allowed some extra time to complete tasks." They further told Dr. Balducci that "numerous persons involved with assisting the Student, including school staff, had gone well out of their way to help the Student via whatever means possible." The Parents also revealed to Dr. Balducci that they were considering the possibility that the Student required a boarding school type placement. [Testimony Ms. Mellilo, Exhibit P-7]
40. In the evaluation by Dr. Balducci, the Student obtained a full scale score of 84, which is in the low average range and which Dr. Balducci found to be "an accurate assessment of current intellectual functioning." Dr. Balducci found that the Student qualified for diagnoses of dysthymic disorder, early onset; oppositional defiant disorder and cannabis abuse. He also cited parent-child interactional problem as an Axis I diagnosis. His recommendation was that the Student ". . . requires some specialized focus on substance use/abuse issues to address his motivation for abstaining from any and all use of alcohol or drugs and to learn ways to effectively do so. If [the Student] is unable to utilize the intensive outpatient services currently being provided to him, or if he fails to adhere to the orders of the Court and the expectations of his parents, then he should promptly be referred for a therapeutic residential placement at a facility such as the Connecticut Junior Republic or if there is an intensification of his substance abuse via the Stonington Institute dual diagnosis program." His report contained no educational recommendations. [Testimony Ms. Mellilo, Exhibit P-5]
41. On August 27, 2004, the principal, the Mother and the guidance counselor met and agreed that the Student would enroll in Project Real beginning with the school opening in September. It was agreed that the Student would remain in that program for the full school year, or could move to the Alternative School if his participation in Project Real had been successful. [Exhibit B-48]
42. The Board's Alternative School is on the same site as Project Real. Project Real is for students who are having problems attributed to substance abuse; the Alternative School is an alternative regular education school. [Testimony Mr. Schwarz]

43. In September 2004, the Student was placed on probation after pleading no contest to the second arrest. The terms of his probation included drug testing, staying away from the female victim of sexual assault and continuing in private treatment. [Testimony Mother, Father]
44. On September 2, 2004, a Project Real orientation meeting was held, attended by the Project Real teacher, the dean of students, the Project Real counselor, the Student, the Mother, the school nurse and the guidance counselor. At that meeting, the Board staff discussed the Student's placement in the program and the rules of the program with the Student and the Mother. The Board staff explained to the Student and the Mother that Project Real is a regular education program where the students are in a closely supervised environment, where the substance abuse is "on the table." They were told that the students enrolled in Project Real are given counseling regarding good decision making and are subjected to drug testing. While Project Real was explained to the Mother and Student as a program that included counseling, it was explained that it was not a drug treatment program. [Testimony Mr. Schwarz]
45. The Students at Project Real have random drug testing about once per week. If a test is refused it is automatically considered a positive drug test. If a student tests positive, they are allowed to remain in the program. Parents are informed of positive tests, and the students are counseled about this continued substance abuse. [Testimony Ms. Simons]
46. The school day is a shorter, more intensive academic program at Project Real. There is a more stringent attendance policy, which provides that the Student fails a quarter if they miss 10 days. Students are provided an opportunity to restore their grades, which procedure is highly individualized. [Testimony Ms. Simons]
47. The Mother and the Student signed the Project Real contract which identified the expectations for the Student in the program, and placed the Student and the Mother on notice of the random drug testing at Project Real. [Testimony Ms. Simons, Exhibit B-50]
48. According to the Project Real counselor, the Student was a perfect candidate for the program, as the Student needed the extra aspect of substance abuse counseling in a smaller educational setting. [Testimony Ms. Simons]
49. While the Parents met with the Project Real counselor about their concerns of the Student's behavior at home, the Student was not violent, physically aggressive, disrespectful or angry at Project Real. The Parents never expressed concerns to the Board about the Student's education at Project Real. [Testimony Ms. Simons]
50. The Student's drug testing results confirmed that the Student was using substances. On five occasions in September and October, the Student refused the

- drug testing. On September 24, he tested positive for THC 296. On November 3 he had a negative drug test. [Exhibit B-50]
51. In November 2004, the Student had begun to demonstrate that he was buying into the program at Project Real. Trust was developing, and the counseling was beginning to be able to work on his issues. As a result, the Student was having more success in his academics. While the Student was attending Project Real, it was clear that the program was well suited for the Student, meeting his educational needs while dealing with the Student's substance abuse issues. The Student was respectful, and was appropriately getting oriented to the program at Project Real. [Testimony Ms. Simons]<sup>5</sup>
52. The Student was enrolled at Project Real for 41 school days before being removed by his Parents. He was absent 12 days and tardy 7 days. The tenth day that the Student was absent, which was the day he would fail his first quarter classes according to the Project Real attendance policy, was October 18, 2004. There were 13 school days following that point in time prior to the Student being removed from the program. Despite the fact that he had received Fs for the first quarter based on his attendance, the Student attended 10 of those last 13 days. This was evidence that the Student was buying into the program and making progress in Project Real. [Testimony Simons, Exhibit B-50]
53. On November 3, 2004, the MSAT met and discussed that the Student had been making improvement at his placement at Project Real. His attendance was improving and his work in some classes had improved. [Testimony Ms. Mellilo, Exhibit B-52]
54. On November 4 the Parents notified the Board that due to a "grave concern that led us to the conclusion that we are in an extreme emergency situation" the Parents intended to place the Student immediately, as of November 8, 2004, in the residential treatment facility, the Family Foundation School in Hancock, New York. [Exhibit B-53]
55. The Father described this "extreme emergency situation" as "violence" of "implied intimidation" and punching walls. The Father claimed that the drug use, violence, anger, truancy and short school day kept the Student from accessing his education at Project Real. [Testimony Father] The Mother described the Student as unapproachable, distant, defiant, belligerent and uncommunicative during the beginning of the 2004-2005 school year, but the Mother testified that there was no

---

<sup>5</sup> The Mother had testified that she was appalled that the students in Project Real were permitted to smoke cigarettes while at the program. The Board made a reasonable decision to allow students in the program to smoke cigarettes while working on their other substance abuse addictions. This was based on a substantial amount of research on substance abuse, which recommended that cigarette smoking be permitted while people worked on their other issues of substance abuse. While the students are permitted to smoke in the program, students work on quitting smoking within 30 days of leaving Project Real. [Testimony Ms. Simons]

- specific crisis in October 2004 that led to the decision for placement at the Family Foundation School. The Mother felt the Student was a threat to the other people in the home, and she saw the Student as a “powder keg” just needing a little spark to set him off. The Mother gave an example of this “powder keg” behavior that she would throw water on the son when he wouldn’t get out of bed, and he jumped out of bed and rushed at her. [Testimony Mother]<sup>6</sup>
56. The Parents had chosen the Family Foundation School by doing an on-line search for boarding schools. The Father said he found the school by chance, serendipity. [Testimony Father] Prior to deciding to place the Student at another school, the Parents did not speak with any Board staff about any recommendations that the school might have for changes in the Student’s education. The Parents never informed Project Real staff or any Board staff that they felt that Project Real was not working for the Student. [Testimony Mother] The first time they notified the Board that they were looking for another school placement was when the Parents submitted a letter informing the Board that the placement decision had already been made, although the Parents were contemplating it at least since the July evaluation completed by Dr. Balducci. [Testimony Mother, Exhibit P-5]
57. Just prior to this placement, around October 28, the Parents had hired a person who has designated herself as an “educational consultant” to assist in finding a placement due to an issue of violence at home. While this “educational consultant” Wendy Van Kirk was paid approximately \$1600 for her educational consulting services by the Parents, she has no educational degrees or background. Ms. Van Kirk received a bachelor’s degree in zoology from Connecticut College in 1982, and worked as a computer programmer and analyst. Ms. Van Kirk opened her business, Developmental Disability Advocacy Consultants, in June 2002. She testified that her role was not to serve as an educational advocate, but as a consultant to review a student’s program and make recommendations for changes to it. At that time, the “consultant” did not meet the Student, although she was aware that the Student was abusing marijuana and alcohol at that time, including daily marijuana use. The “consultant” testified that substance abuse is something that she hasn’t had a lot of experience in, and she couldn’t make recommendations to address substance abuse. [Testimony Ms. Van Kirk]
58. The “consultant” never observed the Family Foundation School, never spoke to anyone at Family Foundation School prior to the Student’s enrollment there, and never recommended that placement to the Parents prior to the enrollment of the Student. The “consultant” never had any conversations with Family Foundation Staff until the day after she initially testified at this hearing. Ms. Van Kirk’s cross examination was postponed at the request of the Parents’ attorney due to a family medical crisis involving the witness. In the middle of this crisis, the witness

---

<sup>6</sup> While the Parents’ attorney claims in his brief that the “rapid decline both in and out of the classroom created an emergency situation” nothing in the record supports this assertion that the Student was rapidly declining in the classroom. Rather, the record amply reflects that the Student was buying into the program and making progress in Project Real.

- telephoned the staff at the Family Foundation School, and then spoke with Family Foundation staff a second time, the morning prior to the continuation of her cross examination. Ms. Van Kirk did not have signed consent from the Student, who has reached the age of majority, prior to speaking with Family Foundation about the Student's confidential records. [Testimony Ms. Van Kirk]<sup>7</sup>
59. The application and the acceptance to Family Foundation School were on the same date. [Testimony Ms. Van Kirk, Father] On the day that the Student was enrolled in Family Foundation School, the Student was escorted by two large people while in handcuffs. He was taken into a car and driven to the school in the middle of the night. [Testimony Ms. Van Kirk]
60. The Parents' Guide for the Family Foundation School describes the school as a private New York State registered boarding school. It is based on the spiritual and moral principles provided by 12 step programs, and notes that it prepares students to enter and succeed in college. [Exhibit P-22]
61. According to the initial interviews of the consulting psychologist and psychiatrist at Family Foundation School, the Student was diagnosed with conduct disorder, cannabis abuse and alcohol abuse. He was not diagnosed with ADD/ADHD by Family Foundation School. [Exhibit P-10]
62. The Planning and Placement Team [PPT] convened on November 19, 2004. [Testimony Ms. Mellilo, Exhibit B-65] The team reviewed the Student's academic history, and found that the Student's grades were good up to freshmen year when the grades became inconsistent. Historically, the Student had met all goals on standardized tests, and the Student was at least average and above average in terms of achievement. In grades 10 and 11, the grades were inconsistent and deteriorated up to the point that the Student was placed at Project Real. The PPT discussed that the Student was having some issues regarding attendance and lack of work, but that he did well when he did the work. There was a general consensus at this PPT meeting that the Student was drug involved, as he had tested positive at Project Real. [Testimony Ms. Mellilo]
63. At the November 2004 PPT, the Board offered to conduct an evaluation of the Student. The Parents did not grant consent for the evaluation at that time. [Testimony Mother, Ms. Mellilo; Exhibit B-65] While the Parents were provided the consent form on November 19, 2004, they did not consent to the evaluation

---

<sup>7</sup> It is unfortunate for the Parents that they relied on the inaccurate advice of the "consultant." This "consultant" did not provide the Parents with reliable information, and did not have the appropriate background and experience to provide an educational recommendation to the Parents. She expressly testified that she had no experience in providing recommendations on students with substance abuse, and her background and experience did not provide any expertise in assessing the Student's program and placement. Moreover, the evidence presented indicates that the "consultant" did absolutely no review of the Family Foundation School program prior to the Student's placement there. She inappropriately contacted the private school in the midst of her testimony to attempt to shore up her testimony, and failed to obtain the Student's consent to obtain confidential information about him.

- until October 26, 2005, almost one year later. [Testimony Mother, Exhibit B-65] The Board had informed the Parents that it would evaluate the Student when the Student was made available at the Board town, and when the drug testing of the Student was negative, as the evaluation would be inconclusive and invalid until the drug testing was negative. [Testimony Mother, Ms. Mellilo] The Board offered a full psychoeducational battery along with a psychiatric evaluation. At the PPT, it was explained to the Parents that they needed to make the Student available to the district for evaluation, and that unless and until an evaluation was conducted, the PPT could not make any determination about eligibility. [Testimony Ms. Mellilo, Exhibit B-65]
64. During the November 2004 PPT, the Parents requested that the Board fund the Parents' unilateral placement of the Student at the Family Foundation School, a 12 step program with 24 hour supervision. This request was denied. [Testimony Ms. Mellilo, Exhibit B-65]
65. The Student did poorly at the Family Foundation School for the first four to five months. He continued to fail courses during the marking periods for a year at Family Foundation School. Family Foundation School did not allow the Student to return until more than a year after his enrollment in the school. [Testimony Mother]
66. Family Foundation school is not an approved special education school, and the "education consultant" was "under the impression" that a lot of the students were there due to substance abuse issues. [Testimony Ms. Van Kirk]
67. The PPT reconvened on October 6, 2005. As of that time, the Parents had not yet signed the consent for the evaluation, but the Parents did sign a release form so that the Board staff could consult with the Family Foundation School about the Student. At this PPT the Parents again requested placement at Family Foundation School, and testing of the Student at the out of state school. The Board denied these requests. [Testimony Ms. Mellilo, Exhibit B-67]
68. The Board school psychologist contacted the Family Foundation School sometime after the October 2005 PPT. The staff at Family Foundation School discussed the Student's entry into the school, noting that the Student had polysubstance abuse and conduct disorder at the time. The conduct disorder was characterized as threatening, lying, stealing and being disruptive. The staff described their 12 step program and indicated that the Student was now sober. [Testimony Ms. Mellilo]
69. The Parents did not make the Student available for evaluation until late February 2006, although the Student was home before that for the holidays. The Mother did not want the Student's time at home over the holidays to be disrupted, so she refused to make the Student available for evaluation at that time. [Testimony Mother]

70. The school psychologist noted that the Student was alert, respectful, cooperative and very pleasant at the time of the evaluation. The school psychologist asked the Student if he knew why he was being tested, and he responded that his Parents needed money and this is about money. During the evaluation, the Student said that he was at Family Foundation School because he was abusing alcohol, marijuana, sleeping pills and prescribed drugs. He referred to himself as an addict, addicted to marijuana, and said he was abusing drugs since his freshmen year. He indicated he had been a daily user. [Testimony Ms. Mellilo]
71. The evaluation noted that the Student's cognitive profile indicates average intellectual functioning with index and composite scores indicating consistent, average functioning in all domains, with no evidence of severe processing deficits associated with a learning disorder. The Student's personality and behavioral functioning suggested an adjusted individual who may experience some feelings of regret and guilt about past behavior, and someone who remains somewhat vulnerable to engage in sensation seeking activities which have a potential element of risk involved. The evaluator noted that the previously diagnosed neurodevelopmental concerns regarding ADHD issues were mildly evident in both the Student's self report and the Parents' rating scales. Behavioral data from all raters across all contexts including his teachers appeared to rule out clinically significant observations regarding conduct, his ability to relate to others, and various social emotional and behavioral disorders. In terms of academic achievement, the Student was at least average to above average in all areas of academics. When comparing all aspects of academic skills to the Student's intellectual ability, the scores were commensurate. [Testimony Ms. Mellilo, Exhibit B-71]
72. The evaluation included reports from teachers at Family Foundation, none of whom placed him on the ADD/ADHD "spectrum." [Testimony Ms. Van Kirk]
73. Based on her assessment, the school psychologist concluded that the Student did not demonstrate any indications of a learning disability, that he had average intellectual functioning and that he was well adjusted. [Testimony Ms. Mellilo, Exhibit B-71]
74. The Board also conducted an educational evaluation of the Student, a Woodcock Johnson III. This was administered by Fran Pacheco, one of the Board's special education teachers. The results reflected that the Student performed in the average range to high average in all areas. These results were consistent with his cognitive functioning. [Testimony Ms. Mellilo, Exhibit B-71]<sup>8</sup>

---

<sup>8</sup> The parties agreed that given the test results, there was no need to conduct the psychiatric evaluation initially recommended by the team. [Testimony Mother; Exhibit B-70, B-71]

75. The school psychologist met with the Mother to review the testing prior to the PPT meeting, and believed that the Mother was satisfied with the test results. [Testimony Ms. Mellilo]
76. The PPT reconvened on May 30, 2006 to review the evaluation. During the PPT meeting, the Parent and their “consultant” sought to have the Student deemed eligible for special education under the category Serious Emotional Disturbance [SED]. The team reviewed the PPT worksheet to determine eligibility for special education due to SED. The Board members of the team agreed that the Student was not SED, but the Parents disagreed with that decision. [Testimony Ms. Mellilo, Exhibit B-71]
77. At the time of the PPT, the Parents had not shared the evaluation completed for the court system by Ralph Balducci, Ph.D. Dr. Balducci’s report shows much less ability on the cognitive domain, and his scaled scores are significantly depressed. This testing was completed by court order during legal proceedings, at a time when the Student was polysubstance abusing. Therefore, the results cannot be relied upon as they were completed while the Student was substance abusing, and his cognitive functioning as measured in the Otis Lennon School Ability Test in 5<sup>th</sup> grade and the 2006 testing by the school psychologist were consistent and showed higher functioning than what was in the Dr. Balducci report. [Testimony Ms. Mellilo, Exhibit P-5] The Student admitted that at the time of the Dr. Balducci’s evaluation he was using drugs. This substance abuse would have depressed Dr. Balducci’s testing scores. [Testimony Ms. Mellilo]
78. As of March 24, 2006, the Family Foundation School noted that the Student had been substance free since his enrollment, and that his substance abuse issues are currently in remission. [Exhibit P-12]<sup>9</sup>
79. The Student graduated from Family Foundation School with a high school degree in spring 2006. [Testimony Father]

### **DISCUSSION/CONCLUSIONS OF LAW:**

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA]

provide for services to children with disabilities, from birth through age 21. The Parents

---

<sup>9</sup> While this letter notes that the Student had been enrolled since January 17, 2005, the testimony presented and Exhibit P-10 indicated that he had enrolled at Family Foundation School in November 2004.



seek a determination that the Student was eligible for special education at the time of the unilateral placement of the Student at the Family Foundation School, and for the remainder of the Student's placement at that school, until his graduation in June 2006.<sup>10</sup>

The initial issue to be decided is whether Board was obligated to conduct an evaluation of the Student prior to his unilateral placement by the Parents in November 2004. "Child find" is the affirmative, ongoing obligation of the state and local schools to identify, locate and evaluate all children with disabilities who are suspected of having disabilities and need special education as a result of those disabilities. 20 U.S. C. 1412(a), 34 CFR 300.125(a), 34 CFR 300.200(a) The child find duty "is triggered when the [school] has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability." *Dept. of Education, State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D.Haw. 2001]

The Board did not have reason to suspect the Student had a disability. He had made good academic progress throughout his early and middle school years. He had no serious disciplinary issues, and he demonstrated progress on standard assessments. The Board had no reason to suspect that the Student had a disability, to convene a PPT meeting and evaluate the Student prior the Parents' precipitous removal of the Student from the Board school in November 2004. The Board had reason to suspect the Student was a substance abuser. That suspicion was validated on several occasions of positive drug testing, and by the testimony of the Parents.

---

<sup>10</sup> While the only category of eligibility the Parents and their "consultant" advanced at the PPT meetings was SED, this decision will address the other categories as eligibility that the Parents' attorney advocated in his brief, including OHI and SLD. The Student is not found eligible for special education under any category of disability.

In his high school years, it was appropriate for the Board to provide the 504 accommodations, which were agreed to be the Parents. The Parents sought no further evaluations and agreed to the 504 plan.

The Student, by virtue of his ADD diagnosis, was not eligible for special education. Diagnosis with ADD and 504 eligibility due to ADD do not automatically result in eligibility for special education. Some students with ADD/ADHD are eligible for special education under the category of OHI, other health impaired. Other Health Impaired means having limited strength, vitality or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and (ii) adversely affects a child's educational performance. 34 C.F.R. 300.7(c)(9). According to the intake diagnosis of the private school, the Student was not diagnosed with ADD or ADHD in November 2004, and it was merely mildly evident at the time of the evaluation in 2006. The Student's ADD/ADHD diagnosis was present only intermittently and not at the time of the Student's unilateral placement according to Family Foundation School. It did not adversely affect the Student's educational performance. It is expressly found that the Student was not eligible for special education and related services due to his ADD/ADHD.

The Board did suspect the Student of having substance abuse issues, and repeatedly urged the Parents to consent to the Student's counseling and testing through the MBC program, or to obtain testing privately. The concern about the Student's

substance abuse was validated. The record is replete with evidence that the Student was a polysubstance abuser. While it is understandable that the Parents may have had some issues with acceptance that their son was dealing with these addiction issues, the evidence is clear. The Student was abusing drugs, and by reason of that, he was having severe behavioral issues at home, as well as intermittent disciplinary issues at school.

The Student would be eligible for special education if, after an evaluation, the Student is found to be a “child with a disability.” The term “child with a disability” means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. Sec. 1401(3), 34 C.F.R. Sec. 300.7(a)(1)<sup>11</sup>

When the Board was notified that the Parents had unilaterally placed the Student at Family Foundation School, the Parents had not provided the Board with an opportunity to evaluate the Student. The Board does have the reasonable opportunity to conduct its own evaluation of the Student, and a board does not have to rely solely on a parent’s evaluation of the student, nor does the board have any obligation to travel out of state to conduct the evaluation. *See, Patricia P. v. Oak Park*, 203 F.3d 462 (7<sup>th</sup> Cir. 2000) The Parents in this case were fully uncooperative with the evaluation of the Student, removing the Student with less than a week’s notice, refusing to consent to an evaluation for almost one year, and failing to return the Student to the Board town for the evaluation until almost 1 ½ years after placing the Student at the out of state school.

---

<sup>11</sup> As noted, *supra*, the Student is not eligible for special education as other health impaired.

When the Parents finally consented to the evaluation, and made the Student available for the evaluation, the Board conducted an appropriate and comprehensive evaluation of the Student, a full and individual evaluation, in accordance with 20 U.S.C. §1414(a)(1) and 34 C.F.R. Sec. 300.531. The evaluation was consistent with the Student's earlier school testing, showing average ability, and commensurate achievement.

In conducting its evaluation, the Board ensured that a complete evaluation study was conducted for the Student. Conn. Agencies Regs. Sec. 10-76d-9(a) The evaluation study included reports concerning the child's educational progress, input from the private school, and such psychological, medical, developmental and social evaluations as were appropriate in determining the nature and scope of the child's exceptionality. Conn. Agencies Regs. Sec. 10-76-9(a)

In evaluating the Student, the Board utilized a variety of assessment tools and strategies to gather relevant functional and developmental information about the child. 34 C.F.R. Sec. 300.532(b) The evaluation was sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. Sec. 300.532(h)

In interpreting evaluation data, the Board shall draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background and adaptive behavior; and ensure that information obtained from these sources is documented and carefully considered. 34 C.F.R. Sec. 300.535 The Board ensured that all this information was gathered and carefully considered.

In this case, the Board conducted an appropriate comprehensive evaluation, and included information from a variety of sources. All of this relevant information was carefully considered.

The Student is also not eligible for special education as a student with a Specific Learning Disability [SLD]. The federal regulations provide that the team may determine that a child has a specific learning disability *if* the child does not achieve commensurate with his or her age and abilities in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; *and* (2) the team finds that the child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression, (ii) listening comprehension, (iii) written expression, (iv) basic reading skill, (v) reading comprehension, (vi) mathematics calculation, (vii) mathematics reasoning.

34 C.F.R. Sec. 300.541 The Connecticut regulations further state that having an identifiable learning disability "means a child who demonstrates a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes as indicated by a diminished ability to listen, speak, read, write, spell or do mathematical reasoning." Conn. Agencies Regs. Sec. 10-76a-2(d)

Nothing in the record supports the conclusion that the Student is eligible for special education as SLD. Rather, the record reflects that the Student's ability is commensurate with his achievement. The Student was able to obtain benefit from his regular education curriculum when he was not engaged in substance abuse.

The Student is not eligible for special education as a student with a Serious Emotional Disturbance [SED]. Emotional disturbance is defined under the federal regulations as follows:

The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (C) Inappropriate types of behavior or feelings under normal circumstances;
- (D) A general pervasive mood of unhappiness or depression;
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems;

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance.

34 C.F.R. Sec. 300.7(c)(4)

If, after evaluation, a child is found to have an emotional disturbance, the team must also find that the child, by reason of this condition, requires special education. 34 C.F.R. Sec. 300.7(a)(1). Special education is defined as "specially designed instruction". 34 C.F.R. Sec. 300.26(a)(1). Specially designed instruction means adapting "the content, methodology, or delivery of instruction...to address the unique needs of the child...[and]...ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. 300.26(b)(3).

Taking these requirements together, in order to find a student eligible for special education services as a child with having a Serious Emotional Disturbance [SED], the Planning and Placement Team (PPT) must find that the student exhibits one of five characteristics of emotional disturbance (1) over a long period of time (2) to a marked degree, such that it (3) adversely affects the student's educational performance, (4) causing the child to require specially designed instruction in order to receive a free appropriate public education.

The PPT considered the SED designation and found that the Student was not eligible for special education under SED. The Student did not meet any of the conditions that are a prerequisite for a determination of eligibility as SED. Rather, as suspected, the at home and intermittent school disciplinary issues related to the Student's substance abuse. The dysthymic disorder, *early onset*, diagnosis of Dr. Balducci by its express words did not meet the necessary *over a long period of time*, nor *to a marked degree* required to meet SED eligibility. Moreover, the Parents never presented Dr. Balducci's report to the Board until it became an exhibit in this hearing. With or without the consideration of Dr. Balducci's report, the Student would not be found eligible for special education as SED. None of the Student's evaluations, discharge reports or intake reports supports a conclusion that the Student was eligible as SED

The tumultuous relationship the Student had with his Parents does not, by itself, create eligibility under IDEA. *See, e.g., Letter to Anonymous*, 213 EHLR 247 (OSEP 1989) The Parents were dealing with serious issues at home, which included police involvement. Now sober, the Student is better able to cooperate and exist in the family environment, and as of the time of this hearing, was entering college. While the Parents

seek reimbursement for the Family Foundation School placement, which reportedly addressed the Student's polysubstance abuse, they are not entitled to reimbursement for that placement. The Student did not meet the criteria for special education eligibility pursuant to 34 C.F.R. Section 300.7(c)(4) As in ADA and Section 504, a Student who is engaged in the illegal use of drugs is not considered a "qualified individual with a disability" and thus is not covered under the law. *Letter to Zirkel*, 22 IDELR 667 (OCR 1995)

The Board does not have to provide everything that might be thought desirable by loving parents. *See, e.g., Tucker v. Bay Shore Union Free School District*, 873 F. 2d 563, 567 (2<sup>nd</sup> Cir. 1989) While the Parents were confronted with a child with serious substance abuse issues, the Student, as a polysubstance abuser, was not a student who required special education to obtain educational benefit from education. Rather, he was a polysubstance abuser who required drug treatment for these issues, treatment that is not provided under IDEA. The Student was not eligible for special education.

**FINAL DECISION AND ORDER:**

1. The Student was not eligible for special education and related services during the 2004-2005 and 2005-2006 school years.
2. Since the Student was not eligible for special education and related services, it is not necessary to determine the appropriateness of the Parents' unilateral placement.
3. The Parents are not entitled to reimbursement for this placement.
4. The Board did not receive appropriate notice of this unilateral placement.