

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Board of Education<sup>1</sup> v. Student

Appearing on behalf of the Board: Attorney Michelle Laubin  
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75 Broad Street  
Milford, CT 06460

Appearing on behalf of the Student: *Pro se*<sup>2</sup>

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUE:**

Whether the Board shall be permitted to complete an evaluation of the Student including a diagnostic placement at a therapeutic day school, psychiatric evaluation by Dr. Dorothy Stubbe, an occupational therapy evaluation and an assistive technology evaluation in the absence of parental consent.

**PROCEDURAL HISTORY:**

The Board submitted this request for hearing on August 13, 2009 and a prehearing conference was convened on September 1, 2009. The Board's request for extension of the mailing date was granted, and this matter convened on two hearing dates, September 24, 2009 and September 29, 2009.

The Board's witnesses were James Obst, Connecticut Junior Republic director of education; Daniel French, director of the emotional disabilities unit of Cooperative Educational Services and the Board Supervisor of Special Education.

The Mother testified on behalf of the Student.

The Board submitted a substantial number of exhibits – more than 260 – all of which were thoroughly reviewed and considered in this decision. No exhibits were submitted by the Parents.

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<sup>1</sup> The names of the Board and the Board Supervisor of Special Education are intentionally omitted from this decision by the hearing officer. The facts set forth in this decision could lead to the identification of the Student involved in this case. This information is omitted to protect the Student's privacy rights under the Federal Educational Rights and Privacy Act [FERPA].

<sup>2</sup> The Parents are divorced. The Mother participated in the prehearing conference and appeared and testified at the hearing. The Father did not participate in the prehearing conference and did not appear at the hearing.

To the extent that the procedural history, summary and findings of fact actually represent 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)

### **SUMMARY:**

The Student is a 16 year old tenth grader who has not attended school since December 2008. It is undisputed that the Student has complex and severe disabilities that interfere with his life and his ability to obtain educational benefit.

The Student has been receiving homebound and private tutoring after the most recent unsuccessful placement at a private therapeutic day school, and while being evaluated for a juvenile justice department assessment. The Board proposed that the Student be evaluated by a psychiatrist, and also be given an assistive technology and occupational therapy assessment. In addition, the Board proposed that the Student be evaluated in a diagnostic placement at a therapeutic day program. The Parents did not consent to these requests, and the Board filed this request for hearing to override the lack of parental consent.

### **FINDINGS OF FACTS:**

1. The Student is 16 years old and is currently receiving his education from a tutoring service. [Testimony Mother, Board Supervisor]
2. It is undisputed that the Student is eligible for special education and related services. Because of the Student's complex and severe behavioral difficulties and disabilities it is important to outline his special education history in this decision.
3. The Student moved to the district in spring 2000 from Alabama. At that time he had been identified as eligible for special education, and the Board continued to find him eligible for special education. [Testimony Board Supervisor, Exhibit B-8]
4. In January 2002, when the Student was in second grade, he was exited from special education as he had met all of his goals. [Testimony Board Supervisor, Exhibit B-15]
5. In November 2005, when the Student was in sixth grade, a Planning and Placement Team [PPT] convened and recommended that the Student be evaluated, including a diagnostic placement in special education. This followed an increase in negative behaviors exhibited by the Student, including an attempt to physically assault a guest teacher which resulted in a two day school suspension. At this time, the Student's psychiatrist Dr. McWilliams diagnosed the Student with bipolar disorder. [Testimony Board Supervisor; Exhibits B-21, B-26, B-32]
6. A psychological evaluation of the Student was completed in January 2006. The evaluation noted a history of attentional issues, impulsivity, difficulties with on-task behavior and work completion, mood changes and angry aggressive behaviors. The evaluator concluded that the Student requires a small, highly structured learning environment that emphasizes behavioral management techniques and provides an opportunity for immediate counseling intervention.

[Exhibit B-32] Subsequent to this evaluation, the PPT convened and the team recommended a change of placement to ACCESS. [Testimony Board Supervisor, Exhibit B-33] The Parent consented to the placement of the Student at ACCESS, the out of district placement. [Testimony Board Supervisor; Exhibit B-35]

7. The ACCESS progress report in June 2006 noted that the Student was doing well in a small structured academic setting with limited transitions and minimal environmental stimulation. The report noted that the Student had the most success when the staff and setting allowed for a great deal of flexibility in tailoring expectations to what his mood and energy level are at the time. [Exhibit B-40]
8. The PPT convened in June 2006 and continued the Student's placement at ACCESS, with a plan to review the Student's progress in October to consider an incremental approach to including the Student in the Board middle school. [Exhibit B-41]
9. On October 11, 2006, as planned, the PPT reconvened to plan for a transition to the Board middle school. The team set the criteria for success for return to middle school that the Student be free of target behaviors 85 percent of the time, with a plan to phase in time at the Board middle school. [Exhibit B-51]
10. Commencing on October 18, 2006, the Student was hospitalized at Silver Hill Hospital for 8 days. The summary of care from Silver Hill noted that the Student had been increasingly impulsive, irritable and unable to follow the rules at school or at home in the past two weeks. The summary further noted that the Student reported that he had wanted to hurt his sister when she was flashing a bright light at him. The summary noted that the Student had refused to follow directions at school, was asked to leave and refused to get in the car with a family friend. The school then called the ambulance to take him to the hospital. At discharge, the Student was referred to his psychiatrist, Dr. McWilliams. The Silver Hill staff identified the Student's diagnoses as bipolar disorder most recent episode manic and history of attention deficit disorder. [Exhibit B-53]
11. The PPT reconvened in November 2006, and postponed the Student's transition to the middle school until the Student demonstrated consistent success. His placement at ACCESS was continued. [Exhibit B-58] In January 2007, the PPT reconvened and planned a transition to the Board middle school to begin in February 2007. [Exhibit B-63]
12. In March 2007, the Student's shortened day at the Board middle school continued, and his ACCESS services were discontinued. [Exhibit B-72]
13. The PPT convened in May 2007 to plan for the Student's program for the 2007-08 school year. It was determined that the Student would start at the Board middle school full time. [Exhibit B-75]
14. In December 2007, the Student was involved in a behavioral incident at the middle school involving threatening, intimidating and aggressive behavior. [Exhibit B-83] The Student was arrested due to this incident. [Testimony Board Supervisor]

15. The PPT convened on January 4, 2008 and determined that the misconduct of December 2007 was a manifestation of the Student's disability. The team agreed that the Student should be placed in an out of district placement and that homebound tutoring was to be provided until that outplacement could be made. [Exhibit B-82]
16. The Board attempted to find an appropriate outplacement at that time. The Board explored options for placement at Lorraine D. Foster Day School, and ultimately determined that the Cooperative Educational Services [CES] therapeutic day program would be an appropriate placement for the Student. The Student was then placed at the program at CES. [Exhibits B-91, B-92, B-93]
17. In March 2008, the Student had behavioral incidents at CES including entering and blockading offices, becoming physically intimidating, roaming the hallways and making disruptive statements. These incidents resulted in suspensions. [Exhibit B-96]
18. Later in March, the Student's behavior had improved, and the PPT agreed to continue his placement at CES. [Exhibit B-104]
19. The Student's behavior began to decline in April 2008, and the Parent informed CES staff that she would consult with the Student's psychiatrist regarding the Student's manic presentation. [Exhibit B-111]
20. In April 2008, the PPT reconvened and agreed that the Student would be moved to a different class at CES's therapeutic day program to see if he would behave more appropriately in the other setting at CES with a different set of peers. [Exhibit B-115]
21. In late May 2008, the police were contacted by CES due to the prolonged and severe nature of the Student's behavioral outbursts which including yelling, slamming doors, throwing the phone and threatening and aggressive behaviors toward staff members. When the police arrived, they attempted to provide the Student with a warning to refrain from the outbursts, but because the Student was "highly uncooperative and belligerent" with the police officers he was arrested. [Exhibit B-118]
22. In the 2008-09 school year, the Student continued at CES. On August 27, the Student was suspended for one day after he entered into a restricted area in the nurse's office where the medicine is stored and would not leave the area. [Exhibit B-121]
23. In September 2008, the Student's probation officer secured Intensive In-Home Child & Adolescent Psychiatric Service [IICAPS] for the Student. [Exhibit B-123]
24. The IICAPS assessment form noted that the Student was referred to IICAPS by the Juvenile Probation after the arrest in May/June 2008 in school. The assessment noted that the Student had a longstanding history of chronic and extremely severe disturbance in behavioral, emotional, cognition and education and social functioning. The diagnosis on this assessment was changed to

Asperger's disorder, oppositional defiant disorder, ADHD, combined type and r/o bipolar. [Exhibit B-126]

25. On October 11, a few of weeks after this IICAPS assessment form set forth the Student's changed diagnosis, the IICAPS clinician from Wellpath sent a second change in diagnosis, indicating the new diagnoses are Asperger's disorder, ADHD, combined type and ODD. [Exhibit B-128] The IICAPS clinician was not a licensed psychologist, and was not a licensed social worker, but had a master's degree. [Testimony Board Supervisor, Mother, Exhibits B-126, B-128]
26. The IICAPS report was not useful for educational planning, as it was essentially a review of his history with input from family members. IICAPS didn't contact the Board staff about educational recommendations and there was no educator on this assessment team. [Testimony Board Supervisor]
27. The Student's behavior declined further in November 2008 at CES. [Exhibit B-130, B-132] On November 21, 2008, the PPT reconvened to discuss the Student's current progress at CES which was characterized as "rocky" in the last couple of weeks. Based on the assessment form received from IICAPS, the PPT planned an evaluation to determine if the primary disability should be changed to autism. The PPT agreed to reconvene on December 22, 2008 to review the evaluation results, and consider the possibility of having the Student attend the high school for at least a small portion of the day. [Exhibit B-138]
28. In December 2008, the Parent and the Student met with the director of the CES program, and the Student stated that CES had crossed the line, that he was done here and that he wanted to go home. The director of the CES program said that they would contact the district to get the PPT to remove him from the program. [Exhibit B-142]
29. On December 17, 2008, the CES Director of the Emotional Disabilities unit sent a correspondence to the mother that the Student was suspended from school for four days in response to the Student engaging in a prolonged episode of highly disruptive behavior that included numerous refusals to comply with staff directions to remain in an assigned area, verbal threats to harm staff members, repeated use of racial slurs and loud and disruptive behavior in the office area. As a result of this incident, as well as other similar incidents, the director informed the Parent that the Student would be dismissed from the CES Therapeutic Day Program at the PPT meeting scheduled on December 22. [Exhibit B-156]
30. The CES placement was another placement that was unsuccessful for the Student. During the time that the Student was at CES he was highly unresponsive to their attempts to work with him a vast majority of the time. At CES the Student was very resistant to work. The CES director opined that the Student would not be successful in a large public school environment, based on the Student's presentation at CES. The CES director recommended that the Student needs a program that offers very high rates of positive reinforcement so that the staff at the placement could build a relationship with him. The CES director also recommended that the Student needs structure, limits and social skills training, as the Student is clinging to maladaptive behaviors very tightly. Compared to hundreds of students that the CES director has worked with, the

director believes that the Student's resistance to the placement was pretty extreme. [Testimony Dr. French]

31. The PPT reconvened on December 22. At the PPT meeting it was noted that the Student was disenrolled from CES. The Board planned for homebound instruction until a PPT is convened after an evaluation could be completed to reconsider the question of whether the Student had a disability on the autism spectrum. The PPT planned that the Director and the Parents would explore other day treatment plans. [Testimony Board Supervisor, Exhibit B-158]
32. On December 23, the Parent agreed to have the CES employee complete the autism spectrum disorder evaluation. [Exhibit B-160]
33. The Parents and Board attempted to find possible placements for the Student. These included Hope Academy, Woodhouse Academy, Options, Wheeler Clinic, Devereux Glenholme, High Road Learning Center and Cedarhurst [Testimony Board Supervisor; Exhibits B-161, B-162, B-166, B-167, B-170, B-171, B-172, B-177] The search for the placement was extensive and disheartening. [Testimony Board Supervisor, Mother] For example, the Student was rejected from Devereux Glenholme due to his physical aggression, his psychiatric fragility, his need for more intensive services and the severity of his behavioral functioning. [Exhibit B-180]
34. During this time, the Parent emailed the Supervisor that she was frustrated that the Student was "wasting away in his room on the computer and sleeping while he was at work." [Exhibit B-168]
35. The CES school psychologist completed her assessment in February 2009, on the referral question of whether the Student could be classified as having an autism spectrum disorder. The evaluator concluded that the Student's scores were not above the cutoff necessary for a diagnosis along the autism spectrum of disorders, and when utilizing the DSM-IV definitions, the Student did not meet criteria for Asperger's Disorder. This evaluator recommended that the Student be referred for a comprehensive psychiatric evaluation. [Exhibit B-186] While the Board has continued to secure consent for this recommended psychiatric evaluation, the Parents have not consented to this evaluation.
36. On February 11, 2009, the PPT reconvened. The evaluator reviewed the results of the autism assessment. The PPT recommended that the Student undergo a psychiatric evaluation, an assistive technology evaluation, an academic evaluation and a diagnostic placement at Cedarhurst pending a successful intake meeting there. [Exhibit B-191] The Parent signed the consent for a psychiatric, academic achievement and assistive technology assessment. [Exhibit B-192] Subsequently the Parent revoked this consent. [Testimony Board Supervisor]
37. On March 24, the Student was involved in a severe behavioral incident with the Mother. During this incident, the Student hit the Mother while she was driving, grabbed her sunglasses and attempted to beep the horn. The Mother was concerned about her safety and her son's safety, and she drove home. When she got home, she left the student in the car, and when she tried to leave the house to go to work, he wouldn't let her out the door as he blocked it. The Mother went into the bathroom, and the Student threatened her with harm, that he would blow up the house or burn the house down. The Parent contacted the police. Student was admitted to St.

Vincent's Medical Center/Hall-Brooke due to this incident, and he was arrested. [Testimony Mother; Exhibits B-200, B-201, B-203, B-204, B-205]

38. At this time, the Parent contacted the school to discuss whether any residential programs would accept the Student. [Exhibit B-206]
39. The Student was released from St. Vincent's/Hall-Brooke, and when he returned home he apparently took a number of Tylenol or Advil in an apparent attempt to overdose. [Exhibit B-212] The Student was then hospitalized at Four Winds Hospital. [Exhibit B-213]
40. On April 21, the PPT reconvened. The team discussed the Student's recent hospitalizations at Hall-Brooke and Four Winds, and discussed that the Student was undergoing an extensive evaluation through the juvenile court system [the "JJIE"]. The PPT agreed to continue homebound tutoring until the JJIE evaluation was completed. [Exhibit B-215, B-216] The Parent had communicated to the Board that the court wanted the Board to hold off placement decisions until the JJIE is completed. [Exhibits B-216, B-218]
41. On May 21, 2009 the Board learned that the JJIE was already reviewed without representation from the school district. [Exhibit B-225]
42. In June 2009, the Board received a copy of the JJIE report. The JJIE noted that the Student's diagnoses were mood disorder and Asperger's disorder. The JJIE recommended that the Student be placed in a therapeutic day school setting. [Exhibit B-233] The director of CES agreed in part with the JJIE report, as he thought the Student's presentation was much more consistent with a mood disorder, although a mood disorder is generally not diagnosed until the patient is 18 years old. [Testimony Dr. French]
43. The PPT reconvened on June 18, 2009. The Board members of the PPT recommended that the Student continue to be identified as emotionally disturbed. The Board members recommended a psychiatric evaluation by Dr. Stubbe, as well as an assistive technology, an occupational therapy and an academic evaluation. While the Parents requested that the student to return to the Board high school, the Board was recommending a day treatment program for an eight week diagnostic placement. [Exhibit B-238] The Parent did not consent to the evaluations. [Exhibit B-239]
44. During the summer, the Board and Parents explored possible outplacements for the Student, including Connecticut Junior Republic (CJR). [Exhibits B-246, B-250, B-251]
45. After the exhaustive search by the Board Supervisor for a therapeutic day placement for the Student, the only places available for the Student were Cedarhurst which no longer has a spot and CJR. [Testimony Mother]
46. CJR is an approved special education program with students with emotional disturbance, ADHD, intellectual disabilities and students on the autism spectrum. CJR was previously a residential program that received referrals from DCF. CJR terminated its relationship with DCF and it is now accepting day students with an Individualized Education Plan [IEP] or a 504 plan. [Testimony Mr. Obst]

47. The CJR staff has drafted primary goals for the Student which would include: development of confidence and self esteem, learning of appropriate social skills in classroom settings, becoming empowered in making decisions for himself, development of employability skills, learning respect for himself and his environment, learning to deal with stress and development of skills to return to the Board high school. CJR has drafted three possible phase in plans to transition the Student into its program. CJR is able to offer a space to the Student, and is able to deal with the Student's concerns and needs regardless of his diagnosis. At CJR, all parts of its program are therapeutic. CJR has a therapeutic environment, in a culture that students feels respected and would get both academic and emotional needs met in the classroom. [Testimony Mr. Obst] This placement includes the critical components of a program for the Student as identified by the director at CES, the last program the Student had attended.
48. The Board Supervisor observed the program at CJR and was very impressed, as it was flexible and used positive reinforcement. She noticed that the current students were engaged in the learning process and happy. The small size of the program would enable the Student to have a very individualized program that would be appropriate for him. [Testimony Board Supervisor] An evaluation of the Student in the program would be an appropriate way to determine whether this program would indeed meet the needs of this Student, given his complex presentation.
49. On September 1, 2009, the PPT convened. The Board recommended a completion of the intake process at CJR, as well as an eight week diagnostic placement at CJR. The Parents refused these recommendations. [Exhibit B-260]
50. The Parent reports that the Student is afraid to attend any school for fear of arrest, and wants to continue to receive private tutoring. [Testimony Mother]

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

The Board brought this action in accordance with the Individuals with Disabilities Education Act which provides for special education and related services to children with disabilities, from birth through age 21.

The Board is seeking to complete an evaluation of the Student including a diagnostic placement at a therapeutic day school, a psychiatric evaluation, an occupational therapy evaluation and an assistive technology evaluation. The Board is seeking to override the lack of parental consent to these evaluations in accordance with 34 CFR Sec. 300.300(c)(1)(ii).

The Board is seeking these evaluations as part of a reevaluation of the Student. As part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing data



on the child and determine “[w]hether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child, and to participate, as appropriate in the general education curriculum.” 34 CFR Sec.

300.305(a)(2)(B) The Board must ensure that the Student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 CFR Sec.

300.304(c)(4)

In this case, the Student’s history of problems with various placements, his presentation, demeanor, severe behavioral problems and lack of any programming beyond a tutoring program for the past 10 months have created serious challenges for the members of the PPT to create an appropriate program for the Student. Additional assessment information is necessary to make this determination.

The Parents have refused to consent to these assessments. The Board is entitled to these requested evaluations in order to fulfill its need to have current assessment data to ascertain the child’s disability and level of functioning and what additions or modifications to the special education and related services are needed to enable this student to meet measurable and appropriate goals set out in the IEP. 34 CFR 300.304, 300.305

During the course of the hearing, the Board also expressed an interest in conducting an academic assessment of the Student, which was not in the initial presenting issues in this hearing. At the hearing, the Mother noted that she would not object to the academic assessment. While not set forth in the original issues, this academic assessment is important for determining the comprehensive needs of the Student, and shall be completed.

In the absence of parental consent for evaluations, hearing officers may order special education evaluations without the consent of the parent. 34 CFR Sec. 300.300(c)(1)(ii), Conn. General Statutes

Sec. 10-76(h)(d)(1) The Board is seeking a psychiatric, assistive technology, occupational therapy and academic assessments, all which would provide essential and important information regarding the Student's complex educational needs and concerns. The Board has appropriately brought such a request, and evidence overwhelmingly supports the critical needs for all of the evaluations requested by the Board.

The Board is also seeking a diagnostic placement of the Student in accordance with Conn. Agencies Regs. Sec. 10-76d-14(b). The Parents have refused consent to the diagnostic placement. The purpose of the diagnostic placement is to assess the needs of child when the evaluation is either inconclusive or the data insufficient to determine the child's individualized education program. Conn. Agencies Regs. Sec. 10-76h-14(b) The diagnostic placement is a method of evaluation, not educational placement. *See, e.g., West Hartford Board of Education, OCR 01-86-1016, 352 IDELR 300 (1986)* Given the history of severe problems over these several school years for this Student, it is imperative for the Board to be able to evaluate the Student in a diagnostic placement. As it is a method of evaluation, lack of parental consent to the diagnostic placement can be overridden by order of the hearing officer

The strong and compelling evidence presented indicate that there are genuine concerns regarding the emotional status of the Student, which have resulted in hospitalizations, arrests, juvenile court involvement and suspensions. This is a critical juncture for the Student, who has not had the benefit of any educational program beyond tutoring since December 2008, more than 10 months ago. This time of homebound tutoring and private tutoring has been characterized by the Mother as a time when the Student has been wasting away doing little in terms of academic work. While the Student may prefer one to one tutoring to complete his educational program with the Board, this is not an appropriate educational program as it is far too restrictive, academically and socially limited and with no contact with peers, disabled or nondisabled. And, due to the overwhelming problems in the various settings for

the Student over the last school years, the Board has provided substantial reason to further evaluate the Student who has complex and severe disabilities. The weight of the evidence is overwhelming that the Student needs to be assessed in a small intensive instructional setting in a therapeutic environment where he would get both academic and emotional needs met. The PPT cannot fully evaluate and prepare an IEP for the Student without the evaluations including the diagnostic placement of the Student.

**FINAL DECISION AND ORDER:**

1. The Board shall be permitted to complete an evaluation of the Student which shall include an eight week diagnostic placement at Connecticut Junior Republic or a similar therapeutic day school if there is no place available for the Student at CJR. If CJR is not available the similar therapeutic day school must be a small therapeutic program, with individualized attention and high rates of positive reinforcement that can meet the Student's academic and emotional needs, including appropriate social skills training.
2. The Parents and Student shall cooperate fully in the intake process required for the diagnostic placement at CJR or a similar therapeutic day school if CJR does not have a placement available for the Student.
3. The Board shall be permitted to complete a comprehensive evaluation of the Student which shall include a psychiatric evaluation, an academic assessment, an occupational therapy evaluation, an assistive technology evaluation and an eight week diagnostic placement. These evaluations shall be completed during this eight week diagnostic placement, so that the Board has comprehensive evaluation information for this Student in that timeframe.
4. The lack of parental consent to these evaluations, including the diagnostic placement, is hereby overridden.