

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Canton Board of Education

Appearing on behalf of the Parents: The Parents proceeded *pro se*<sup>1</sup>.

Appearing on behalf of the Board: Attorney Michael P. McKeon  
Sullivan, Schoen, Campana & Connon, LLC  
646 Prospect Avenue  
Hartford, CT 06105-4286

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

Whether the Student is eligible for special education and related services.

If so, what is the appropriate program for the Student?

**SUMMARY:**

The 15-year-old tenth grade student who has consistently been achieving B average grades has been diagnosed by his private psychiatrist with depressive disorder – NOS and ADHD Disorder – NOS. At the Parents' request, the Student was evaluated to determine whether he was eligible for special education and related services. The Planning and Placement Team determined that the Student was not eligible for special education and related services. The Parents brought this request for hearing to challenge that determination.

**PROCEDURAL HISTORY:**

The Parents requested this hearing on February 25, 2005, and a prehearing conference was held on March 3. The hearing was held on four days in April and May, 2005. The parties requested an extension of the mailing date of the decision to schedule hearing dates, and requested an extension to submit briefs, which were granted. After the close of evidence, and prior to the brief filing date, the Parents submitted a Motion to Reopen the hearing so that they could present additional evidence. That Motion was denied.

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<sup>1</sup> While it is indicated that the parents are proceeding *pro se*, the Father is an attorney.

The Board submitted a brief on June 17, the deadline for submission of briefs. The Parents submitted a brief which was mailed on June 18, and received on June 20. While the filing was untimely, the Parents' brief was given its due consideration.

The Parents' witnesses were Eric Bruce Cohen, MD., a psychiatrist; Mitchell Danitz, a psychologist; the Mother, the Father and the Student.

The Board's witnesses were Elaine Morisano, Board school psychologist; Mary-Louise Dorpalen, Board director of pupil personnel services; Jeffrey Aureli, Board math teacher; Jordan Grossman, Board assistant principal; and the Father.

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)

### **FINDINGS OF FACT:**

1. The Student is 15 years old, and was in 10<sup>th</sup> grade at the Board high school during the 2004-2005 school year. [Exhibit B-13]
2. In fall 2003, when the Student was in 9<sup>th</sup> grade, the Parent contacted the Board, requesting that the Student be evaluated for special education and related services. The parental concerns at that time were that the Student could not complete homework without daily supervision, and had a lack of focus. The Parents reported that the Student complained that the school can be a hostile, unstimulating environment. The Parents were concerned that the Student was performing well below his IQ level due to the Student's inability to complete homework, follow test directions in class and budget time in and out of class as needed. [Exhibit B-2]
3. The Planning and Placement Team [PPT] met on November 20, 2003, and agreed to conduct an evaluation in light of the ADHD concerns and other concerns shared by the Parents. At the meeting the Parents shared that the Student had consistent difficulties with focus, attention and organization at home. The Parents also noted that the Student had problems with peers making fun of him, and that the Student reports that he feels depressed and alone. At that time, the Student's grades after the first quarter of his ninth grade year were: Geometry: B-; English 9: B+; Concert Choir: B; Art 9: B; Biology Honors: B-; Western World: C; French 2: C-. [Exhibit B-3]
4. The Father submitted an amendment to the minutes of the November 20, 2003 PPT meeting. In that correspondence the Father expressed concern that as a child the Student had been a parent's dream – bright eyed, cheerful, loving, curious, sweet, playful, and often precocious. According to the Father, his view of the

- Student changed at about age 10 when traits of strong resentment toward the Parents and the Student's sister, frustration, fear about school, and a sense of dark, brooding isolation began to surface. [Exhibit B-3]
5. The school psychologist conducted an evaluation of the Student, and reported her findings in her report of January 22, 2004. In her evaluation, the psychologist found that the Student's general cognitive ability as measured by the WISC-IV is at the upper end of the High Average range. The Student's verbal comprehension and perceptual reasoning abilities were both in the superior range. The Student demonstrated strength in reading comprehension on the WIAT-II, and demonstrated relatively weak skills in math reasoning on the WIAT-II. His math reasoning skills, however, are still within the range expected for his age. The diagnosis of ADHD, primarily inattentive type, is not confirmed by classroom teachers, but is supported by the Student and his parents in the assessment. The psychologist noted concerns regarding the diagnoses of anxiety disorder and mild to moderate depression. [Exhibit B-4]
  6. In her recommendations, the school psychologist noted that the issue of ADHD is unclear, as there is clear support for the diagnosis reported in the behavioral form of the Parents and the Student, but the behaviors are not seen in the classroom. The school psychologist recommended counseling to address the significant anxiety/depression concerns, and suggested that the Student engage in physical exercise for a minimum of 20 to 30 minutes per day. The school psychologist opined that the PPT may wish to discuss a possible 504 placement based on the Student's diagnosis of anxiety/depression and probable ADHD. The school psychologist deferred any discussion regarding programming recommendations until the PPT convened. [Exhibit B-4] The Student's anxiety/depression did not rise to the level of emotional disturbance, as it wasn't to a significant extent that it was impacting his academic work. In the Student's testing, he was well attended, and had a pleasant sense of humor. During the evaluation, the Student described himself to Dr. Morisano as a B student, and also reported that he was on the ski team at Ski Sundown, likes to snowboard and enjoyed playing his electric guitar. His presentation was not one of a severe emotional disorder. [Testimony Dr. Morisano, Exhibit B-4]
  7. The school psychologist's conclusions are found valid and credible. The school psychologist is a licensed psychologist as well as a certified school psychologist; holds a Ph.D. from Syracuse University in school psychology, child clinical; and has worked for 24 years as a school psychologist in the Board schools. [Testimony Ms. Morisano, Exhibit B-4]
  8. The Student's educational testing conclusions were that his performance is superior in written expression; high average in reading comprehension, math reasoning and basic writing skills; and average in basic reading skills and math calculation skills. [Exhibit B-5] The occupational therapy evaluation concluded that the Student demonstrates difficulties adequately processing sensory

- information in the tactile, proprioception and auditory systems, and included suggestions such as weight training, back exercises and other recommendations for the Student. [Exhibit B-6]
9. The PPT convened on January 26, 2004 to review the evaluations and determine whether the Student was eligible for special education and related services. The team determined that the Student did not have a specific learning disability as there was no significant discrepancy between ability and achievement and only a relative processing speed weakness. The school psychologist noted that many bright students who present with a lower processing speed do so because there are processing the information at such a complex level. The behavior ratings scales from the Student, the Parents and the teachers were reviewed by the school psychologist, who reported that the diagnosis of ADHD was not confirmed by the teachers, but was supported by the Student's self report and by the Parents. The school psychologist also shared her clear concerns regarding the anxiety disorder and mild to moderate depression. [Exhibit B-7] The team believed that the anxiety and depression were not so pronounced that they were having an impact on his education. [Testimony Ms. Dorpalen, Dr. Morisano]
  10. At the PPT meeting, the team completed the worksheet to determine whether the Student is eligible for special education due to serious emotional disturbance, and concluded that the Student's general pervasive mood of unhappiness or depression did not have an adverse effect on his educational performance. Therefore, it was concluded that the Student was not eligible for special education under the designation of emotional disturbance. The team recommended referral of the Student to the 504 Committee for consideration of a 504 accommodation plan for issues relating to the Student's anxiety/depression and probable ADHD. [Exhibit B-7] At that PPT meeting, the Father thanked the rest of the PPT for the thorough evaluations. [Exhibit B-7]
  11. In March 2004, the Student began to treat with a psychologist, who saw the Student every two weeks through the end of August 2004. As of the time of his testimony at the hearing, the psychologist had not treated the Student for the entire school year 2004-2005. At the time of his testimony, Dr. Danitz noted that the Father had contacted him the previous week about seeing the Student in therapy again. [Testimony Dr. Danitz]
  12. In April 2004, the assistant principal became aware of an extremely offensive website which was posted by Board students which characterized the Student in a humiliating, demeaning and offensive manner. The assistant principal contacted the Parents regarding the website. The assistant principal reviewed the substance and the content of the website initially with the Mother, and eventually spoke with the Father about the website. [Testimony Mr. Grossman, Exhibit P-2]
  13. While the Father now claims he never received a facsimile of the website, the assistant principal did fax the website information to the Parent. Neither Parent

- notified the assistant principal that they did not receive the website information via facsimile. [Testimony Mr. Grossman] While there may have been some error in the Parents' receipt of the facsimile, as there was no "printing ribbon" and paper in the facsimile machine [Testimony Father], the Board is not faulted as it appropriately attempted to fax the website to the Father.
14. The Father claims he never received a copy of the offensive website until the receipt of the documents for this case in January 2005. That claim is not credible. The record is clear that the Parents were provided the website prior to the convening of this hearing. In fact, the record is clear that the Parents were provided another copy of the offensive website on December 24, 2004, when the Mother signed for receipt of a certified mailing sent to the Parents regarding the website. [Testimony Father]
  15. On April 29, 2004, the Father contacted the Board, requesting that the Board not discipline the students who were responsible for the offensive website, as it was out of school conduct. In that correspondence the Father also directed that only the Father, and not the Mother, had authority to give parental consent regarding any acts that the school intends to take for the Student. [Exhibit P-4]
  16. Despite the Father's request for leniency for the students who were responsible for the offensive website, the Board did not reconsider the suspensions of the other students. [Testimony Mr. Grossman]
  17. On November 10, 2004, the Student's psychiatrist noted in a correspondence that he had been seeing the Student in treatment since January 29, 2004 for medication management. He noted that the Student has been diagnosed with Depressive Disorder Not Otherwise Specified, Attention Deficit Hyperactivity Disorder Not Otherwise Specified and Rule Out Tourette's Disorder. The psychiatrist indicated that the Student was being treated in psychotherapy with another provider. [Exhibits P-5, B-13] The psychologist concurred with the psychiatrist's diagnoses. [Testimony Dr. Danitz]
  18. Since the initial impression, the Student's diagnosis has changed. The psychiatrist testified that the Student has ADD, marked by inattention, "spaciness" and forgetfulness. He also has depressed mood, poor self esteem, negative thinking and perception, and a great deal of anxiety symptoms. The psychiatrist also noted that he has "passive suicidal" thinking, which is noted as passive thoughts, with no specific intent or plan. Although Dr. Cohen testified that the Student had these "passive" suicidal thoughts, he admitted that he had not needed to see the Student more frequently than every month or maybe a little less than a month, and even those visits were related to medication adjustments. [Testimony Dr. Cohen] Dr. Morisano testified that if a student were seriously expressing suicidal ideation, it would be appropriate to see him at least weekly, not just once per month. [Testimony Dr. Morisano] Thus, Dr. Cohen's conclusion about the "passive" suicidal thinking is not evidence of serious emotional problems, as Dr.

- Cohen himself has not seen a need to increase the frequency of sessions in light of the presentation of such “passive” thoughts.
19. The PPT met on February 4, 2005, at the Parents’ request, to again review whether the Student was eligible for special education and related services, in light of the psychiatrist’s diagnosis of the Student in November 2004 with depressive disorder NOS and ADHD Disorder NOS, with a rule out of Tourette’s Disorder. The Student’s past achievement information was reviewed by the team. The school-based members of the PPT noted that current grades and progress did not indicate a current significant educational impact, but offered to update achievement testing to assess current functioning. [Exhibit B-10]
  20. The cognitive and educational evaluation of March 2005 confirmed that the Student’s processing speed is low average. His oral language skills are superior, as is his ability to apply academic skills. His fluency with academic tasks is average, and his academic knowledge and skills were both found to be within the high average range. When compared to others at his age level, the Student’s performance was very superior in written expression; high average in reading comprehension, math reasoning, and basic writing skills; and average in broad reading, basic reading skills and math calculation skills. His knowledge of phoneme-grapheme relationships was high average. [Exhibit B-11]
  21. The PPT met on March 24, 2005, and determined that the Student was not eligible for special education services. At the PPT, the Student’s current status in classes was discussed. At that time his grades in his classes included: Government: B+, Chemistry: B-; Honors English 10: C+, French II: the current grades was 70 percent, but the lowest grade had not been dropped as of the date of the PPT; Algebra II: B+. The Student was continuing to use the student study center, a regular education homework support center, to work on his homework. The Student’s psychoeducational testing of January 2004 was reviewed, as well as the updated written expression skills using the WIAT, and his updated achievement testing. The Student had demonstrated gains in all areas of his achievement testing. The team ruled out a specific learning disability, given the lack of discrepancy between ability and achievement and only one area of relative processing weakness. The team addressed the issue of whether Dr. Cohen’s diagnosis of ADHD with anxiety/depression resulted in a significant educational impact. After consideration of all the information and data presented, the school based members of the PPT did not determine there was evidence of significant educational impact. Therefore, the Student was determined to not be eligible for special education and related services under the categories of Other Health Impaired – ADHD or Emotional Disturbance. [Exhibit B-13]
  22. The Father did not attend the March 2005 PPT, which was attended by the Mother. When asked for her input at the PPT, the Mother said she was not necessarily looking for direct special education services or designation for the Student, but that she wanted the Student’s teachers to be aware of his

- ADHD/organizational issues. She indicated that her preference would be for a 504 plan, but would accept special education eligibility if this was the only way to ensure that he would be given consideration on these organizational issues. She chose to “plead the fifth” relative to the team’s decision. [Exhibit B-13]
23. The Student was doing well in his class work in the spring 2005. In Math, his grades were B to B+, and he has shown average to above average ability to understand the concepts in Math, and participates in class. The Student has very good homework completion in math. Of 35 to 40 assignments in the third quarter, the Student had only 4 missing, which were submitted and accepted in accordance with the teacher’s late policy. The 4 late homework assignments, out of 38, is not alarming, nor anything out of the ordinary in the math class, and would not affect the Student’s grade, according to the math teacher. The Student has not failed to follow a written or verbal instruction in math class, and has never failed to complete an exam or quiz. [Testimony Mr. Aureli]
24. The Student attends the student center, which is a regular education service available to any student who wants to study in a quieter area with a tutor who is available. [Testimony Ms. Dorpalen] This is an appropriate regular education intervention.
25. The Parents testified that they believe they spend on inordinate amount of time monitoring the Student’s homework progress at home. [Testimony Mother, Father] The Parents are concerned about the Student’s inconsistent performance, and lack of working to potential. [Testimony Father] The Father noted that he never got a C in high school, later noting that he received a C in math once; it was frustrating for the Father to see that his son received Cs. [Testimony Father] The Father was also frustrated as he himself had never missed any assignments in high school. He felt that he wasn’t pressing the Student too much, but he has tried to monitor the Student’s disability. He noted that the Student has a pattern of underachievement, and that he should be achieving better than Cs. [Testimony Father] The Father noted his frustration that the Student is at risk for not performing up to his potential. The Father noted that the Student is cranky at times, which is part of his disability. The Father noted that even if the Student received a B average in school, consistently, that the Student should do much better than that. He should get special education assistance, according to the Father, so that he could get better than a B average. Noting that the Student is “a genius in some things” based on knowing him a lifetime, the Father lamented that the teachers aren’t seeing this potential. He noted that he loved his son and wants the best for him, and is concerned that the grades he is receiving would prohibit him from attending the college of his choice. [Testimony Father]
26. In the Mother’s testimony, her frustration was evident, bordering on alarming. She noted that one can not expect the Student to continue to absorb the bullying and punishment, and expect that he is never going to act out and express his rage.

She also noted that the Student is in danger of being a target, referencing the Red Lake tragedy. [Testimony Mother]

27. The Student's grades have been consistent over the last few years. The Student describes himself as a B Student, and his grades have been in the A/B range with occasional Cs. [Exhibits B-4, B-8, B-9, P-7]
28. Even if the Student were receiving straight As in his grades, the Father would still be asking for special education to assist in the Student's struggling with homework. [Testimony Father]

### **CONCLUSIONS OF LAW:**

The initial issue in this hearing is whether the Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq. To determine if a Student is eligible for services under the Individuals with Disabilities Education Act (IDEA), the Board must conduct a full and individual initial evaluation. 34 C.F.R. Sec. 300.531, 20 U.S.C. 1414(a)(1)

The Student was evaluated on more than one occasion to determine whether he is eligible for special education. These evaluations were conducted in accordance with 34 C.F.R. Sec. 300.530, et seq., which sets forth the appropriate evaluation procedures.

In conducting its evaluation, the Board shall ensure that a complete evaluation study is conducted for each child referred. Conn. Agencies Regs. Sec. 10-76d-9(a) The evaluation study shall include reports concerning the child's educational progress, structured observation, and such psychological, medical, developmental and social evaluations as may be 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 must utilize 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 Student should be assessed in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 C.F.R. Sec. 300.532(g) The evaluation must be 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 Parents apparently agree that the Board's evaluation was appropriate. The Father commended the Board on completing such a thorough evaluation, had no quarrel as to the methodology of the evaluation and did not challenge the appropriateness of evaluation. But, even with this apparent agreement, it is also concluded that the Board completed an appropriate and carefully considered evaluation of the Student.

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. 30017(a)(1) The Board evaluated the Student and considered whether he was eligible for special education and related services under the categories for a Specific Learning Disability, Serious Emotional Disturbance, and as Other Health Impaired (ADD/ADHD).

The Student was found not to be eligible as having a specific learning disability by the school-based members of the team. 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 [Emphasis added] The team appropriately determined that the Student did not have a specific learning disability as there was no significant discrepancy between ability and achievement and only a relative processing speed weakness.

The team also determined that the Student was not eligible under the category of serious emotional disturbance. In reviewing the Student for eligibility, the team did find that the Student exhibited one of the characteristics of emotional disturbance, in that he had a general pervasive mood of unhappiness or depression. That in itself, however, is not sufficient to find the Student eligible for special education and related services. Emotional disturbance is defined as having one of the listed conditions *over a long period of time and to a marked degree that adversely affects a child's educational performance.* 34 C.F.R. 300.7(c)(4)(i) While the team found that the Student had the characteristic of a general pervasive mood of unhappiness or depression over a long time, and on one occasion found that it was to a marked degree, the school based members of the team found that it did not have an adverse effect on the Student's educational performance. Moreover, while initially the team found that the Student's mood of unhappiness was to a marked degree in January 2004, it no longer found that it was to that degree in March 2005.

Nothing in the record supports the conclusion that the Student's mood of unhappiness or depression has impeded the Student's ability to maintain relationships with peers and teachers, even in light of the vituperative website. This isolated website incident, which was addressed promptly and appropriately by the Board, does not support the conclusion that the Student's emotional state has resulted in an inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

It is telling that the Student was not undergoing any psychological counseling during the 2004-2005 school year, as that counseling had ceased after August 2004. While the Student continued to treat with the psychiatrist, that treatment was for medication management only. The Parents did not begin to take action to resume counseling until almost the eve of the hearing. That action appears to be resumption of counseling to bolster the case, rather than in response to the Student's needs. This is further evidence that the Student's pervasive mood of unhappiness was not to a marked degree, even in the Parents' opinion.

The Student's reports cards and educational testing report support the school based members of the team's conclusion that the Student is not eligible under the category of emotional disturbance, as he continues to progress appropriately in his academic work. The Board appropriately determined that the Student was not eligible for special education and related services as emotionally disturbed.

The team also appropriately determined that the Student was not eligible under the category of Other Health Impaired – ADD/ADHD. The Student's diagnosed ADD/ADHD does not adversely impact the Student's academic performance to a degree that would merit eligibility under special education and related services. The Student's teachers do not concur with the Parents' conclusions about his attention difficulties. The rating scales did not support the Parents' conclusions, nor did the teacher's testimony support their claims that the Student organization is as disordered as the Parents claim. And, even if the Student were as disorganized at home as the Parents state, his home behavior which differs from his school behavior, would not be sufficient for a determination of eligibility. Assuming no adverse impact in educational performance, a student's out-of-school behavior is not a basis for eligibility, no matter how disordered. *See, e.g., Letter to McNulty*, 213 IDELR 108 (OSEP 1987) The Student is not eligible under the category of Other Health Impaired – ADD/ADHD.<sup>2</sup>

The Parents have hopes and dreams for the Student, and aspirations that the Student will excel academically, at least to the degree that the Father has done himself. Under IDEA, however, the Student is not entitled to 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 loving parents could create a special education program aimed at maximizing their child's potential, that is not the legal standard. *Banks v. Danbury Board of Education*, 238 F. Supp 2<sup>nd</sup> 428 (D.Conn. 2003)

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<sup>2</sup> No determination is made in this matter as to whether the Student may be covered under Section 504 if the disorder substantially interferes with a major life activity such as learning or effectively participating in school activities. This hearing was solely determining whether the Student is eligible under IDEA.

The Parents are frustrated that with a diagnosis from the psychiatrist with the concurrence of the psychologist, they are unable to obtain eligibility for special education. But, diagnosis in hand does not equal eligibility. To be eligible for special education and related services under the IDEA, Student must first be found to be a “child with a disability” in accordance with 34 C.F.R. 300.7. If a student is found to have one of these disabilities in accordance with the regulations, a student is eligible if by reason thereof, they need special education and related services. 34 C.F. R. Sec. 300.7. The Student is not a child with a disability and is not in need of special education and related services. Therefore, his regular education program is his proper placement.

**FINAL DECISION AND ORDER:**

The Board appropriately found that the Student is not eligible for special education and related services.