

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Regional School District 12

Appearing on behalf of the Parents: Attorney Howard Klebanoff
Klebanoff & Phelan, P.C.
Corporate Center West
433 South Main Street – Suite 102
West Hartford, Connecticut 06110

Appearing of behalf of the Board: Attorney Frederick Dorsey
Siegel, O'Connor, Schiff & Zangari
171 Orange Street – Drawer 906
New Haven, Connecticut 06504

Appearing before: Attorney Margaret J. Slez, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

Did the Board offer the student an appropriate IEP for the 2000-2001 school year?
If not, is the Forman School an appropriate placement for the student?

SUMMARY:

The student has been identified as having ADHD, a learning disability in the area of written language, and known math weaknesses. The student's last year in a Board school was for seventh grade in 1997-98. The student spent a second seventh grade year and eighth grade at Rumsey Hall at Board expense. At an IEP meeting on May 17, 2000, the Board denied the parents' request for placement of the student at the Forman School. The student, a 15 year-old ninth grader, has been unilaterally placed by the parents at the Forman School for the 2000-2001 school year.

FINDINGS OF FACT:

1. In second grade, when the student was 7 years-old, the Board child study team recommended a psychoeducational evaluation. In January 1993, B. scored in the average range of intellectual functioning on the WISC-III and significantly below grade expectancy in reading recognition (decoding), reading comprehension, spelling

and written expression, representing a significant discrepancy between B.'s measured level of general ability and B.'s level of academic achievement. (Exhibit B-27)

2. In February 1993, the PPT agreed to a diagnostic placement in the resource room, for 5 hours per week, for 6 to 8 weeks. The IEP document clearly states B.'s the-current levels of performance and academic achievement as well as testing results. There is nothing in the record which sets forth any goals or objectives as to how B.'s learning problems were to be addressed or methods to be used by Board personnel. (Exhibit B-29)
3. In October 1993, near the beginning of B.'s third grade year, the Board resource room teacher stated that the "individualized reading program continues to be critical to [B.'s] skill achievement." (Exhibit B-26, p.1) In April 1994, near the third grade year, the student was reported to be making "slow, steady progress," getting "some" phonetically-based reading instruction, reading at a 1.6 grade level, and finding math word problems "hard." (Exhibit B-23, p. 1) The Board resource room teacher reported that B. was benefiting from small group and individualized instruction in the "resource room program;" sight word vocabulary mastery continues to strengthen;" and "spelling application remains low." (Exhibit B-23, p. 3-4)
4. For the 1994-95 school year, B.'s IEP called for 7 ½ hour per week in the resource room. (Exhibit B-23, p.6) In April 1995, near the end of B.'s fourth grade year, the student was reported to be continuing "to progress nicely in the Resource-Inclusion program" and that B. was continuing "to make slow steady improvement in . . . reading skills." (Exhibit B-21, p.1) In May 1995, B.'s total reading ability grade equivalent was 2.8 and spelling ability grade equivalent was 1.8. B.'s math ability grade equivalent was reported to be 4.6. (Exhibit B-20, p.1-4)
5. For the 1995-96 school year, B.'s IEP called for 10 hours per week in the resource room with modifications in the regular education classroom to include untimed tests, the rereading of instructions, pre-teaching, and "study guides." (Exhibit B-19, p. 19-20) In April 1996, near the end of B.'s fifth grade year, the Board resource room teacher reported that B. was continuing to show progress with his IEP goals. (Exhibit B-18, p.3) At the PPT meeting on May 20, 1996, it was reported that B.'s total reading ability grade equivalent was 4.4 and spelling ability grade equivalent was 2.7, B.'s regular classroom teacher reported that B. had "been working well," but needed special education "support" in reading assignments, reading directions, orally reading tests, math word problems and writing. B.'s math ability grade equivalent was reported to be 5.9. (Exhibit B-1, p.1)
6. For the 1996-97 school year, B.'s first year in middle school, sixth grade, the IEP called for only 7/12 hours per week in the resource room. (Exhibit B-17, p.3) B.'s parents testified that during sixth and seventh grade (school years 1996-1997 and 1997-1998) B. was struggling to hide his disability from peers, was struggling to do the work asked of him, was becoming more and more frustrated, and, by the end of

seventh grade, reportedly asked his parents if he could attend a different school. (Testimony September 26, 2000)

7. Minutes of a PPT meeting held on May 21, 1998, state that B. was performing “at an A to B level,” that the reading teacher reported that B. “had not made the progress this [seventh grade] year that [B.] made last year,” that the student’s “homework is done well and in on time,” and that B.’s instructional levels “are on the third to fourth grade level depending on the type of material read.” (Exhibit B-15, p.2) By letter dated July 20, 1998, to the Board of Director of Pupil Personnel Services, B.’s father pointed out what he believed to be misleading and inaccurate about the May 21, 1998, PPT minutes, including specifically, that the reading teacher’s statement was that B. had made no progress during the year, that B.’s parents were doing the homework because B. was unable to read a seventh grade text, that B. had met none of the IEP goals and objectives, and that the student’s “A to B level” performance was based on “strongly modified” classroom work and testing.” (Exhibit B-16) At the May 21, 1998, PPT meeting, the parents requested that the Board pay tuition for the student’s private day placement at Rumsey Hall for the 1998-99 school year. The Board denied the request for placement at Rumsey Hall but agreed to pay for a summer program, an independent evaluation, and an assistive technology assessment. (Exhibit B-15, p. 2-3)
8. The parents requested a due process hearing but the issues were resolved by mediation on August 21, 1998. Among other things, the Board agreed to reimburse the parents for Rumsey Hall tuition for the 1998-99 school year. (Exhibit B-6)
9. On July 13, 1998, Dr. Miriam Cherkes-Julkowski, the parents’ expert witness for this hearing, undertook a diagnostic cognitive processing and academic achievement evaluation. The testing and the report of the testing were extremely thorough. The recommendations, which were extensive and detailed, specifically addressed remedial measures for the student’s math weaknesses and the need for a highly systematic reading skills program that addressed the student’s need to refine phonological awareness; become automatic with lower level, one-syllable constructions; and build orthographic awareness. Dr. Cheskes-Julkowski also recommended an assistive technology evaluation and reported that a speech and language evaluation was indicated as well as the possible need for a central auditory processing evaluation. In conclusion, Dr. Cherkes-Julkowski stated, “[I]t is unlikely that [B.] will be able to formulate the most important questions on his own until he is better at transforming experience into his own words. Until then it will be important for teachers to check in with [B.] periodically to ensure that he has understood and to fill in what is missing.” (Exhibit B-8)
10. The student attended Rumsey Hall for the 1998-99 school year (a second year of seventh grade) and the 1999-2000 school year (eight grade). The Board Director of Pupil Personnel Services testified that the Board reimbursed the parents for 1999-2000 school tuition at Rumsey Hall. (Testimony, November 13, 2000)

11. The Board Director of Pupil Personnel Services testified that the father had informed him in February 2000 that the parents were considering sending B. to the Forman School for the 2000-2001 school year. (Testimony, November 13, 2000)
12. On or about April 7, 2000, a Board special education teacher and a Board consultant went to Rumsey Hall to interview and observe the student. While at Rumsey Hall, they administered the Kaufman Test of Individual Achievement – Brief Form and the Gallistel Ellis Test of coding skills. During the hearing, the parents raised the issue of no written consent for testing having been given. The Board Director of Pupil Personnel Services testified that no written consent for testing had been obtained from the parents. (Testimony, November 13, 2000) However, the issue of consent for testing was not raised at the IEP meeting on May 17, 2000, and, therefore, will not be addressed in this decision as a procedural error on the part of the Board. (Exhibits P-2, B-1b; Audio Tape May 17, 2000)
13. A written report of the interview, testing, and observation (“Psychoeducational Consultation Summary”) was submitted by the Board consultant and discussed at the May 17, 2000, IEP meeting. The Board special education teacher had observed the student in an English class at Rumsey Hall and the Board consultant had observed the student in the Language Skills tutorial. The student “displayed difficulty with attention and executive functions as well as frustration with the language level of the tasks Articulation, fine motor coordination, memory and processing issues were apparent.” (Exhibit B-2) The report further states that the student “displays significant weaknesses with phonological awareness and sound-symbol correspondence,” that the student “displays no system of understanding the structure of English and how language occurs along a continuum,” and that the student needs individualized, intensive, daily, explicit, multisensory, direct code instruction based on the philosophy of the Orton-Gillingham Approach.” (Exhibit B-2, Audio Tape May 17, 2000) The Board consultant has been an Orton-Gillingham Academy of Practitioners and Educators Fellow since 1995. (Exhibit B-40, p.2, Testimony, November 3, 2000)
14. By the time of the IEP meeting on May 17, 2000, the student had been at Rumsey Hall for two years and the Board knew that the parents were considering placement at the Forman School. No representatives from Rumsey Hall or the Forman School were invited to the IEP meeting by the Board or by the parents. In addition to the Board consultant and the Board special education teacher, the Board Director of Pupil Personnel Services, a Board regular education teacher, the student’s parents, and the parent’s advocate, a school psychologist, were present at the May 17, 2000, IEP meeting. (Exhibit B-1b; Audio Tape May 17, 2000. All parties had fair opportunity to make statements, ask questions, and participate fully in the proceedings of the IEP meeting, including discussion of the proposed IEP goals and objectives. The program at the Forman School was not discussed. (Audio Tape May 17, 2000)
15. The proposed IEP contains no baseline data and was drafted before the results of a second evaluation undertaken by Dr. Cherkas-Julkowski were available for consideration in drafting the proposed IEP. (Exhibit B-1b; Testimony November 3,

2000) The Board special education teacher reviewed the proposed IEP goals and objectives at the May 17, 2000, IEP meeting. (Audio Tape May 17, 2000) The proposed program would be delivered, primarily, in the context of the school's "block scheduling," that is, in four 84-minute periods per day, with 38 to 40 students in a class, of which 6 or 7 students are identified as special education students with varying disabilities. (Testimony October 26, 2000) Ordinarily, within each block, focus and/or activity is changed after 30-35 minutes. Typically, in addition to the presence of the special education teacher, the classes are "co-taught" and, frequently, the classroom itself is divided into two smaller sections. In some cases there is also a paraprofessional present. Two times a week there is an "E period" at the end of the day when students can go to the teachers for extra help. This 2000-2001 school year is the special education teacher's second year of experience with block scheduling. (Testimony October 13, 26, 2000; Audio Tape May 17, 2000) To support B.'s participation in the regular education curriculum, the special education teacher would deliver 3.75 hours per week direct reading instruction in a self-contained classroom and 3.75 hours per week with the student in the resource room, for a total of 7.5 hours per week of special education services. (Exhibit B-1b; p. 13)

16. On May 24, 2000, the student was again tested by Dr. Cherkes-Julkowski. (Exhibit B-1) Dr. Cherkes-Julkowski testified that the difference between the results of the 1998 testing and the results of the May 24, 2000, testing was that B.'s "strengths and weaknesses had polarized." (Testimony October 26, 2000) Despite his intelligence and motivation, the student's reading disability "is severe – you can get a little lower, but not much." (Testimony October 13, 2000) Dr. Cherkes-Julkowski, in discussing the proposed IEP as well as the results of her most recent testing, compelling pointed out specific difficulties: the typical 9th grade curriculum, so reliant on print, is not accessible to the student; the amount of language "flying around" a typical classroom would be difficult for the student, who needs a slow rate of speech and a lot of repetition where all other students are "getting it," the 15 year-old student's frustration would grow and self-esteem suffer; note-taking in class is impossible since the student cannot "hear and write and understand all at the same time;" the student "can only hang-in in the spoken language environment for a certain amount of time and then he is spent;" the student could not "self-monitor information overload" (Exhibit B-1b, p.7) since he is overloaded all of the time; the student "could be a competent math learner" but he had been "locked out of standard instruction because of his language difficulties," with "authentic peers" it would be easier for the student to ask questions;" the student needs small class size so that he can have more opportunity to respond. (Testimony October 13, 26, 2000) Dr. Cherkes-Julkowski concluded that the Forman School is preferable to the Board program because the Forman School curriculum and instruction are designed for the student rather than being a modification of the ninth grade regular education curriculum and instruction. (Testimony October 26, 2000)
17. On May 17, 2000, the parents rejected the program offered by the Board and the Board rejected the parents request for placement at the Forman School. (Exhibit B-

1b; Audio Tape May 17, 2000) The parent requested due process hearing on June 26, 2000. (Exhibit P-5)

18. Although the Board had not yet received the report of an anticipated speech/language evaluation or the report of an occupational therapy evaluation undertaken on July 20, 2000, the Board Director of Pupil Personnel Services wrote to the parents on August 17, 2000, regarding the scheduling of another IEP meeting. (Exhibit B-1a) Newly-proposed math goals and objectives, which had not been included in the May IEP, were attached to the letter. (Exhibit 1a, p. 2-5) The letter also stated that the Board “would adjust special education services by increasing time with the special education teacher by two hours per week” for individual tutoring after the end of the school day. (Exhibit B-1a) There is no indication that the parents responded to the August 17, 2000 letter.
19. The student is attending, as a day student, the Forman School, a “college-prep boarding school,” at which all student have some kind of learning disability. According to testimony of the Forman School Dean of Academic Affairs, 60% of the student body have language disabilities with some attentional problems and 40% of the student body have attentional problems with language difficulties. There is one teacher in each class and there are 8 students in B.’s algebra class, 6 in his computer concepts class, 11 in his history class, 11 in his English class, and 9 students in B.’s introduction to science class. The learning center/strategies class, where specific attention is given to methods of focusing is one-on-one and meets five days a week. Each class is 45 minutes long. Classes meet on Monday through Saturday. Wednesdays and Saturdays are half days. All teachers use the phonics-based Orton-Gillingham method. B.’s learning center/strategies teacher has been at the Forman School for 11 years has had 4-5 years of Orton-Gillingham training. (Testimony November 13, 2000) The Forman School is not approved by the State of Connecticut.

CONCLUSIONS OF LAW:

1. B. is entitled to special education and related services pursuant to 20 U.S.C. Section 1400 et. seq., the Individuals with Disabilities Education Act (IDEA).
2. In Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, (1982), the Supreme Court explained that review of a placement decision under IDEA requires a two-step inquiry: first, it must be determined whether there has been compliance with the Act’s procedural requirements; second, it must be determined whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-07, 102S.Ct. at 3051.
3. Section 300.505 of the IDEA regulations that “informed the parent consent” must be obtained before the Board conducts an initial evaluation or reevaluation. During the hearing, the parents raised the issue of the Board’s failure to obtain “written consent” prior to the Rumsey Hall observation and testing by the Board consultant and special education teacher, which failure was, in fact, admitted in Board testimony. However,

C.G.S. Section 10-76h(a)(1) and R.C.S.A. Section 10-76h-3(g) state that no issue of consent was not raised at the IEP meeting on May 17, 2000. (Audio Tape May 17, 2000) Moreover, parent and Board testimony made it clear that the parents knew when the observation was going to take place at Rumsey Hall and had an opportunity to both challenge the Board, which they did not do, and to prepare their child for the observation, which they did. Addressing the first prong of the Rowley inquiry, the Hearing Officer finds no violation of procedural requirements by the Board.

4. Addressing the second prong of the Rowley inquiry, It must be determined whether the educational program offered for B. was reasonably calculated to allow B. to receive “educational benefits.” See Rowley, *supra*, 458 U.S. at 206-07. The IEP developed for B. must be reasonably calculated to provide some “meaningful benefit.” *Id.* at 192, 102 S. Ct. at 3043-44. While Rowley did not establish one standard for determining what constitutes meaningful educational benefit, this standard contemplates more than “mere trivial advancement.” Mrs. B. v. Milford Board of Education, 1997 WL 7572 (2d Cir. Conn.), citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3d Cir. 1988); Hall v. Vance County Board of Education, 774 F.2d. 629, 636 (Cir. 1985).
5. The severity of the student’s reading and writing difficulties, his attention problems, and his inability to self-monitor at this time demand highly individualized programming in a one-to-one or small group setting with those Dr. Cherkes-Julkowski referred to as “authentic peers.” These are not the hallmarks of the program offered by the Board. Furthermore, the program offered by the Board would, perforce, expose the student, at 15 year-old who is already very self-conscious about his academic shortcomings, to regularly display his difficulties to between twenty and forty age-peers who are not similarly disabled. In the mainstream program offered by the Board it would be difficult to tell if non-response by the student was the result of his inability to recognize his own problems, dread of revealing his learning deficiencies, or total shut-down in the face of the overwhelming standard ninth grade curriculum. In light of the student’s learning disability and age, placement in the mainstream at the Board high school with an IEP which is insufficiently aggressive and individualized is not calculated to provide meaningful educational benefit to the student.
6. Federal regulations require that to the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled. 34 C.F.R. Section 300.550. While this is not a mandate, the law expresses a strong preference for education in the least restrictive environment (LRE). The LRE is defined by the Regulations of Connecticut State Agencies Section 10-76a-1(1) as,

[A]n educational environment which meets the needs of a child requiring special education and related services as set forth in the child’s individualized education program and which, to the maximum extent appropriate to the child’s needs, ensures that the child will be educated with children not requiring special education and related services.

However, there is no requirement that a student fail in a less restrictive environment before moving to a more restrictive one. The general requirement of the IDEA that students with disabilities be educated with nondisabled students is subordinate to the Act's requirement that a child's placement be determined on the basis of his individual needs. Accordingly, it is recognized that there may be student for whom segregated setting is the most appropriate and least restrictive environment. DeVries v. Fairfax County School Board, 882 F.2d 876 (Cir. 1989)

7. Based upon the expert testimony of Dr. Cherkes-Julkowski regarding the student's deficiencies and educational needs and the testimony of Helen Waldron, Dean of Academic Affairs at the Forman School, the student's program at the Forman School is clearly designed for the student to achieve more than "trivial advancement." For this student, the shorter length of class periods, the opportunities for one-to-one instruction, the small number of students in each class, the similarly-disabled student body, the constant emphasis on addressing focusing and attention problems, and the specially designed curriculum make the Forman School program superior to the Board program even though it is, in fact, a more restrictive setting.
8. In order to be entitled to reimbursement, parents need only to demonstrate that the public school placement is improper under the IDEA and that the private school placement complies with the IDEA minimum standard of appropriateness, namely, that it is reasonably calculated to provide an educational benefit. Florence County School District v. Shannon Carter, 114 S. Ct. 361 (1993). Carter also stands for the proposition that parents cannot be denied reimbursement simply because the private school is not state-approved. See also 34 C.F.R. Sec. 300.403(c)
9. The parents here have satisfied their burden, as set forth in Carter, in demonstrating that placement at the Board high school at this time does not constitute a free, appropriate education and that B.'s placement at the Forman School complies with the IDEA's minimum standard of appropriateness, namely, that the program that has been developed for the student by the Forman School is reasonably calculated to provide educational benefit.

FINAL DECISION AND ORDER:

1. The Board had not made a free, appropriate education available to the student and placement at the Forman School is appropriate.
2. The Board shall reimburse the parents for B.'s placement at the Forman School for the 2000-2001 school year.