STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. New Milford Board of Education

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 on behalf of the Board:	Attorney Lawrence J. Campane Sullivan, Schoen, Campane & Connon 646 Prospect Avenue Hartford, Connecticut 06105
Appearing before:	Attorney Stacey M. Owens, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board can provide the student with a free and appropriate public education.

2. Whether the student is entitled to remain in out-of-district placement.

SUMMARY:

1. The student, L., is a resident in the Board's district. The Board has been responsible for providing special education to L. for as long as she has attended grade school. Throughout her years receiving education in the Board's district, the student has suffered from a condition known as Cornelia DeLange Syndrome and has moderate learning abilities with some social concerns.

2. On a few occasions, L. was confronted by peers who teased her, crank called her home and while attending an Industrial Arts mainstream class, L. was physically abused by classmates.

3. In school year 1999-2000, the year L. was to commence her high school studies, the local high school was undergoing renovations. It was determined at the June 21, 1999 PPT meeting for L. that the renovations could have possible ramifications on her ability to concentrate and learn. As such, the planning and placement team decided to

transfer L. to an out-of district school until renovations were completed so as to not impede upon her learning environment.

4. At the PPT meeting held on June 21, 2000 it was determined that renovations would be completed for the 2000-2001 school year and that L. would be able to return to the Board's high school to continue her studies. The Parent opposed this decision and wanted L. to continue to receive her special education services from the out-of-district school.

5. The Parent filed a request for a hearing alleging the Board has failed to provide a free and appropriate public education and ensure a safe environment for L. The Parent alleges that L.'s out-of-district school is providing her the special education services required to adequately meet her needs.

FINDINGS OF FACT:

1. L. is enrolled in the S.A.I.L. (Selective, Adaptive, Individual, Lifestyles) program at the out-of-district school she attends. L. commenced her participation in the program during the summer of 1999. Under this program, the strengths and weaknesses of each student is reviewed and classes are assigned based on their appropriate needs. (Exhibits P-27, P-72, B-25, B-28)

2. L. spends two full periods in the S.A.I.L. classroom program working on lifeskills and vocational issues, organization and planning skills, homework completion and social skills. She attends art and marketing classes with an aide, and the curriculum and grading are modified. (Exhibit P-72)

3. L.'s other classes are academic in nature and are administered in a "Team Teaching" method while addressing the goals and objectives identified in L.'s IEP. She is enrolled in Topics I Math, Introduction to Biological Science, and English II. These classes are taught in an inclusive setting by both a special education teacher and a regular education teacher and there are other special education students in the classroom. A special education aide is available for the S.A.I.L. students. The curriculum and grading is modified, and students may return to the S.A.I.L. classroom with the special education teacher for separate instruction in more practical academic areas. (Exhibits P-68, P-72)

4. The Board has devised a program in accordance with L.'s IEP in which L. would be enrolled in regular education classes for English 1, Global Studies and Physical Education. These classes would be staffed with a regular education teacher and a special education teacher. L. would be enrolled in Life Skills General Science, Life Skills Fundamental Math and Individual Learning Center which are special education classes and programs that would be staffed with a special education teacher and one or more student care workers. A speech and language pathologist would assist L. with her speech and a food service supervisor and special education teacher would assist L. in the Work Exploratory program. (Exhibit B-51)

5. The Parent has testified that she is concerned for L.'s participation in more self-contained classes. She has stated that the out-of-district school has provided L. instruction in a more mainstream environment which has resulted in a significant development in L.'s learning and social skills. (Exhibit P-73)

6. The facts, however, show that not only has the Board devised a program in accordance with L.'s IEP that adequately meet L.'s special education needs, but also that the out-of-district school provided L. with a *less* mainstream, and more self-contained curriculum during her 1999-2000 school year. In fact, in a statement made by Lois Pernice, Supervisor of Special Education, at the out-of-district school, the "team teaching" approach utilized by the school was not in effect during the 1999-2000 and is actually a pilot program for S.A.I.L. students. As such, the mainstream program at the out-of-district school the Parent credits for L.'s educational and social growth was not even implemented during the relevant timeframe. (This is not to say, however, that L.'s special education program was insufficient or outside the scope of her last prescribed IEP.) (Exhibits P-27, P-38, P-70-71, B-25, B-42, B-47, B-48-49)

7. The Parent has testified that she is concerned for the inclusion of SED students in L.'s classes at the Board's high school because such students are more likely to engage in behavior that will distract L. This position was further supported with testimony from Dr. Michael Johnson, who was responsible for conducting a psychological evaluation on L. in March 1999. (Exhibits P-73, P-43)

8. Testimony from Emily Andrews, Special Education Teacher at the out-of-district school, revealed that, although L. presently does not have any SED students in her classes, she was once placed in classes with an SED student for half the school year. This is proof that there is a chance that L. may be enrolled is classes with an SED student whether she is attending classes in the Board's district or in the out-of-district school.

9. In response to observations made by Dr. Jean Ann Paddyfote, the Board's Director of Pupil Personnel and Special Education, Ms. Andrews testified that when a student becomes "distractible" they may be taken immediately out of the classroom. During half of L.'s 1999-2000 school year, L. attended class with an SED student. There has been no reported lapse in learning on the part of L. as a result of an SED student's existence in her class or their behavior. In fact, action taken on the part of the out-of-district school in addressing the potential for distracting incidents clearly demonstrates that reasonable measures can be engaged to quickly respond to distracting behavior by an SED student at the Board's high school.

10. An independent psychological evaluation of L. has revealed that L. is socially immature and has the inclination to inappropriately follow people and become emotionally attached to them with even a small amount of attention. The Parent has expressed concern for L.'s safety because L. has had difficulty distinguishing whether treatment towards her is nice or ill-spirited, and whether a person is a good or a bad friend. L. has been subjected to physical and psychological abuse by students that

presently attend the Board's high school, and the Parent believes there is a lack of supervision in the high school's large setting to ensure L. remains safe. (Exhibit P-43)

11. L., while attending school in the Board's district, socialized with two students who were known to tease L. The teasing escalated and the Parent testified that the two students began to crank call her home and on one occasion L. was kicked and physically abused by one of the students. The Board engaged its normal practice of imposing detention upon the perpetrating students and Adele Johnson, L.'s Speech and Language Pathologist in Middle School, testified that she never witnessed a regression in L.'s learning and development after the incident.

12. In a similar vain, Emily Andrews has testified that the out-of-district school was once faced with an incident in which a student was suffering from PMS and it was decided to place L. and her friends in a separate room for lunch. Again, there was no regression in L.'s development reported. This incident supports the premise that regardless of what school L. attends, she faces the potential of encountering unsavory behavior by other students. No student, regardless of their educational classification, can be completely shielded. In both cases, school officials appear to have adequately addressed the matters.

13. Testimony by the Parent revealed that in 7th and 8th grade, L. had "friends" from the Board's district that she spoke to on the phone, went out with occasionally and invited to her home for sleepovers. The two students in the Board's district that subjected L. to the physical and verbal abuse were part of L.'s circle of friends. At some point they began to subject L. to adverse treatment, yet, naively, L. continued to consider them as "friends." Subsequent to the crank calls, the Parent, spoke to school officials and was directed to call the police because the calls were made to her home. Rather than calling the police, the Parent spoke with the students' parents. The Parent has testified that following her communications with the students' parents there were no further incidents of abuse against L.

14. Ms. Johnson was an integral part of L.'s learning and development while attending middle school in the Board's district. She has personally observed L's social and educational growth. Ms. Johnson has testified that L. was in mainstream classes in 6th, 7th and 8th grade. She has witnessed L. open up with her communication and become more willing to state an opinion. Ms. Johnson regards middle school as, "a time to practice social skills" and regarded some of L.'s behavior as "typical adolescent behavior." Ms. Johnson further stated that in 6th and 7th grade L. would laugh and giggle. She experimented with social skills. By 8th grade L. took risks in practicing learned social skills.

15. The Parent testified that L. has established healthy friendships in her out-of-district school and fears L. will socially regress if she returns to school in the Board's district. The facts show that L. did not regress when she transferred from the Board's district to her out-of district placement. In fact, it is reasonable to conclude that the transition from the Board's district to the out-of-district placement posed a greater likelihood

for regression in L.'s growth than a transfer from the out-of-district placement to the Board's high school because L. transferred to an entirely new school district. The staffpersons, students and overall environment were completely foreign to L. (Exhibits P-63, P-55, P-66, P-67, B-31, B-34, B-36, B-38, B-47)

16. L. has an improved level of sociability. Her mother and stepfather gleam with satisfaction over the friendships she has developed with students from the out-of-district school and have continuously expressed concern that L. will be negatively affected if she has to return to the Board's district.

17. Despite L.'s mother and stepfather's dissatisfaction with some of the relationships she developed with students in the Board's district, they have identified a girl named "Amy" from the Board's school district with whom L. has retained a good friendship since middle school. L. participates in after-school activities at the YMCA, Special Olympics and bowling. These activities are not school-sponsored programs, but rather, require parental involvement for continued participation.

18. Participation in after-school activities provides a forum for developing social skills and
possible friendships. Many of L.'s friends at the out-of-district school spend time socializing with L. after school, absent any school involvement. Testimony has revealed that L.'s parents drive L. and her friends to various outings, they accommodate L.'s friends for sleepovers, they are fully aware of who is calling L., and continue to enroll L. in after-school activities that she enjoys. It is because of their involvement, that L. has managed to retain a friendship with "Amy" even though L. and "Amy" do not attend the same school. The same would hold true for L. and her friends from the out-of-district school if her parents continue to make arrangements in support of these friendships.

19. As testified by Dr. Paddyfote, L. did not want to transfer to the out-of-district school. Yet, once L. became acclimated to the out-of-district program and its environment, her education and social skills continued to develop. Therefore, as proven by her transfer to the out-of-district school, it is reasonable to conclude that L. may provide some resistance to the idea of transferring to the Board's high school, but she has attained a level of maturity to adapt to, and continue to grow in, a new school environment.

20. Although L. has not attended the Board's high school, she has already participated in a tour of the school. She is familiar with many of the special education staff members and students at the Board's high school. Just as L. has retained a friendship with "Amy" after transferring to her out-of-district placement, L. can likely retain those friendships the Parent deems to be healthy when transferred to the Board's high school.

21. The Parent has expressed concern that she personally observed continuing renovations to

the Board's high school during her visit. She stated that the oven for the culinary arts program was not installed and she heard constant hammering and shoveling from the room next door to one of L.'s scheduled classes. She stated that because the Board's reason for L.'s out-of-district placement was that renovations to the high school could distract L.'s learning process, then the continued renovations would further impede L.'s learning. Testimony from Dr. Paddyfote, revealed that the renovations the Parent observed during her visit were not substantial and were projects that were a little off schedule. In fact, during the hearing following Dr. Paddyfote's testimony most of the unfinished renovations were completed and the rest was expected to be completed within the next few weeks. (Exhibit P-73)

22. Considering the pace at which the renovations that concerned the Parent at the time of hearing were being completed, all renovations are likely completed by the date of the submission of this decision. Thus, the distracting environment that concerned the Board and prompted their placement of L. in an out-of-district school no longer exists.

23. There is no information provided to indicate the Parent expressed any disagreement with the IEP that was devised during the PPT meeting that placed L. in an out-of-district school. In fact, the Parent has not sufficiently expressed that she ever had concerns that were not adequately addressed relating to the special education program provided by the Board throughout L.'s education until it was determined that L. was to return to the Board's district to continue her special education. It seems that once L. was placed out-of-district, and established a more popular social life, the Parent somehow attributed L.'s social growth solely to the special education provided by the out-of-district school. However, the facts show that L.'s socialization and learning was improving during 7th and 8th grade while receiving special education services in the Board's district. (Exhibits P-7, P-11, P14-15, P17-18, P-21, P-27, B-11, B-14, B-20, B-25, B-46)

24. Although L. is receiving her special education out-of-district, she is essentially receiving the individualized education program devised for her through the Board's district. The Parent has failed to provide any information to support her claim that the Board has not provided L. an education in accordance with her IEP while attending classes in the Board's district, nor has she provided sufficient information to show that the Board is unable to provide L. a free and appropriate education. (Exhibits P-27, P-29, B-25, B-30)

25. The Parent's concerns are not unreasonable and are quite justifiable. However, within the parameters of the law, there is nothing to support the argument that the Board is unable to provide L. with a free and appropriate public education to meet her needs. As stated by Lois Pernice, Special Education Chairperson for the out-of-district school, "We would like to note that we are not in competition with the [Board's] District over this student….we have no objection to her returning to [the Board's District] and we would be willing to participate in any transition plans to that effect." The program provided by the out-of-district school may be more desirable to the

Parent, but this is not a legitimate reason to place a child out-of-district for their special education. (Exhibit P-72)

CONCLUSIONS OF LAW:

1. The Parent has made numerous attempts to bring forth issues throughout the hearing and through the submission of briefs that were not provided during the prehearing conference. Of these issues, the Parent has tried, subsequent to the prehearing conference, to bring forth the issue that L. has *never* received a free and appropriate public education from the Board in accordance with the IDEA and thus should be entitled to compensatory damages, and the Board has failed to comply with all IDEA procedure requirements.

2. In accordance with Connecticut General Statutes Section 10-76h(a)(1), "A parent or guardian or a child requiring special education and related services…may request, in writing, a hearing of the local or regional board of education…responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of or the provision of a free appropriate public education to such child or pupil, *provided no issue may be raised at such hearing unless it was raised at a planning and placement team meeting for such child or pupil and provided further, nothing in this subsection shall be construed to limit the right of such parent… to initiate a planning and placement team meeting at any time.*" (emphasis added) It has further been conceded by the United States District Court of Connecticut that "Such requirement is consistent with, and parallel to, the IDEA requirement that available administrative remedies be exhausted before a special education claim is brought to court." Lillbask v. Sergi, et al., 117 F.Supp.2d 182 (Sept, 2000).

3. While this hearing officer has not found any procedural violations in reviewing the evidence presented or through testimony provided, the Parent's claims relating to past IEP's and the procedural requirements are not jurisdictional for review because they were not initiated for consideration at a PPT meeting nor were they issues raised during the prehearing conference.

Concentrating on those issues that were discussed at a PPT meeting and were provided during the prehearing conference, the hearing officer makes the following conclusions of law:

1. Connecticut's statutory scheme requires children to attend school in the district within which they reside. Conn. Gen. Stat. Section 10-184 (2000). Under the Individuals With Disabilities Education Act, state and local educational agencies are required to provide "free appropriate public education for all children with disabilities." 20 U.S.C. Section 1412 (a). In this particular case, L., a child that has been determined to be disabled, resides in the Board's district and is required to attend school within that district. Thus, the Board is responsible for providing L. with a free appropriate public education.

2. The "free appropriate public education" mandated by the IDEA must include special education and related services tailored to meet the unique needs of a particular child, 20 U.S.C. Section 1401(a)(16), and be "reasonably calculated to enable the child to receive educational benefits." Board of Educ. v. Rowley, 458 U.S. at 207, 102 S.Ct. at 3051 (1982). The unique needs of a disabled child and the services required to fulfill them must be set forth at least annually in a written Individualized Education Program (IEP), 20 U.S.C. Section 1414(a)(5). The evidence provided shows that an IEP was written on June 14, 1999 and June 21, 2000.

3. The Supreme Court held in Rowley, that the "free appropriate public education" mandate of the IDEA is satisfied when a student is provided personalized instruction with sufficient support services to permit the student to gain educational benefit. Rowley *supra at 207.*

4. L. has been receiving special education services from the Board for as long as she has been eligible. The record shows that L. has made consistent growth in her social and learning skills. The Supreme Court in Rowley found the District Court's finding that the student in that case received an "adequate" education since she performed better than the average child in her class and was advancing easily from grade to grade was indicative that the student did not need additional services. Rowley *supra at 209.* Similarly, L. has advanced easily from grade to grade and has remained on a consistent path of educational development. Thus, her academic performance is proof that she has received an "adequate" education to meet her special needs.

5. A local board of education may discharge its obligation to provide special education to a child by entering into an agreement with another board. However, under the federal statute a school district remains responsible for disabled children residing within the district who receive free appropriate education in a placement outside the district. Union School District v. Smith, 15 F.3d 15119, 1524 (9th Cir.) (1994). As a result of a PPT meeting on June 21, 1999 it was determined that L. should receive her special education services from an out-of-district school because the Board believed renovations to the high school would impede L.'s learning process. The Board testified that a progressive transfer plan was devised for L. incorporating visits to the out-of-district school with a special education teacher from the Board's district and gradual participation in classes until she was fully acclimated to the new school setting. It is undisputed that the Board has remained responsible for L.'s special education.

6. It is clear from the evidence presented that both the Board's school and the out-of-district school have provided L. with special education in accordance with the IEPs that were developed for her. This hearing officer has identified no procedural violations with respect to the IEP that was written on June 21, 2000 under which L. is required to return to the Board's district. The Board has consistently provided L. the special education required to meet her unique needs as evidenced by her continuous learning and social progression - proof that L. has benefited from the services provided by the Board.

7. The Parent has expressed that she has witnessed a more significant level of growth in L.'s learning and social skills that she did not witness while L. was attending the Board's district. Much like the parents in the Walczak v. Florida Union case, the Parent wishes to maintain her daughter in a school in which she can "reach her true potential." Walczak v. Florida Union Free School District, 142 F.3d 119 (1998). However, in reviewing the legislative intent of the IDEA the Court in Tucker v. Bayshore found that the IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents." Tucker v. Bayshore Union Free School District, 873 F.2d at 567 (2d Cir.1989).

8. The Parent has failed to provide sufficient information to support her position that the June 21, 2000 IEP mandating L.'s return to the Board's district and the program provided by the Board are not "appropriate." The Parent has testified that the out-of-district school provides L. a less restrictive environment in that L. participates in all mainstream classes. Whereas, the Board has provided a schedule in which L. would participate in some self-contained classes and some mainstream classes.

9. In both instances, L. would be provided special education within the parameters of her prescribed IEP. Taking into consideration "the nature or severity" of L.'s disability, 20 U.S.C. Section 1401 (a)(16), L. is capable of gaining an educational benefit from the services provided by the Board. The special education to which L. is entitled to under the IDEA refers to the "general program" and not mere variations in the program itself. Concerned Parents & Citizens for the Continuing Education of Malcolm X et al., v. New York City Board of Education, 629 F. 2d 751, at 754 (1980). The fact the Board has decided to include L. in some self-contained classes is considered a minor discretionary change in accordance with the IEP provided for L. *Id at* 755. In further support of the Board's discretion to make minor changes, the out-of-district school has regarded its mainstream "team teaching" as a pilot program that may not continue.

FINAL DECISION AND ORDER:

1. The Board can provide L. a free and appropriate public education.

2. The student is not entitled to continue receiving special education services out-of-district.

3. The Board must convene another PPT meeting during which time an addendum to the IEP will be created for the remainder of L.'s school year. This IEP must include a written progressive transfer plan for L.'s return to the special education program in the Board's high school. The Parent and the Board must make reasonable efforts to initially provide L. a tour of the Board's high school while classes are not in session.

4. The transfer plan must include, but not be limited to, those steps that were engaged for L.'s transfer to the out-of-district placement.