

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

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Appearing Before: Attorney Justino Rosado, Hearing Officer

FINAL ORDER AND DECISION

ISSUES:

1. Is the program offered by the Board for the 2001-2002 and 2002-2003 school years appropriate?
2. Should the parents be reimbursed for the home ABA program, the one hour of oral motor therapy and the 3-5 hours of ABA supervision provided by the parents for the student?
3. Should the Board provide the student with a home ABA program of 2 hours per day seven days a week for an extended school year, including holidays and a school based ABA Program of 3 hours of one on one ABA instruction with three 45 minute sessions of oral motor therapy per week?
4. Should the student be awarded compensatory education for the 2001-2002 school year?
5. Should the student's classification of Other Health Impaired be changed to Autism?

PROCEDURAL HISTORY:

The Parents request a Due Process hearing for their son on September 9, 2002. The hearing was assigned to an Impartial Hearing officer whom for personal reasons had to reclude herself. On September 20, 2002 the hearing was reassigned to this hearing officer and a pre-hearing conference was held on September 25, 2002.

Hearings were held on November 20 & 21, 2002, December 17 & 18, 2002 at which time the Parents rested and the Board began their case. The hearing continued on January 14 & 22, 2003 and February 4, 26 & 28, 2003.

The Board objected to Parents' Exhibit # 8 as a violation of attorney client privilege. The parties filed briefs on the issue and the hearing officer agreed with the Board and Parents' Exhibit # 8 was excluded as an exhibit. Parents' Exhibits # 55 through 63a are videotapes of occupational and speech therapy, ABA sessions in the home and the student in the home. These videotapes were only partially used and the segments used during the hearing are P-55 from numeric counter 2129-2950 labeled as "ABA class at Milbank School", P-57 from numeric counter 83-218 labeled as "Table Segment", P-62 cued at 11:00 minutes at SP and then runs for 93 seconds labeled as "Puzzle Pieces", P-63 from counter 0-196 labeled as "Session with the home ABA supervisor", from counter 250-463 labeled as "ABA session with supervisor", P-63a from counter 0-310 labeled as "Student at Home" and from numeric counter 936-1192 labeled as "Student as home unstructured."

On or about April 11, 2003, the parties filed simultaneous Post Trial Briefs. The Parents' post trial brief Exhibit "C" was not accepted as an exhibit and any reference to it was ignored. The exhibit is testimony of a witness in this hearing and the Parents' attorney could have solicited any statements stated in a prior hearing during the cross examination of the witness.

The hearing officer obtained extensions to file his decision due to the amount of exhibits and material of the hearing, a death in the immediate family and a jury trial that had been scheduled prior to this hearing.

SUMMARY:

The student is a five year old boy who has been classified as Other Health Impaired (OHI), Neurologically Impaired and eligible to receive special education and related services as required in 20 USC §§1401 et seq. The student has been attending the Board's schools. The Parents requested that the student be classified as autistic and the Board refused. The Parents requested that the student received an ABA Program as recommended in the evaluation of the McCarton Center. The Board also refused this request by the Parents.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. To the extent that the summary and findings of fact actually represent conclusions of law, they should be so considered and vice versa. For reference, see SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn.

1985) and Bonnie Ann F. v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

FINDINGS OF FACTS:

1. The student is a five year old boy who has been classified as Other Health Impaired (OHI) and eligible to receive special education and related services as required in 20 USC §§1401 et seq. The student has been attending the Board's schools. (Testimony of School Psychologist and Parent).

2. The student had been in a birth to three program before he entered the Board's pre-school program in the 2001-2002 school year. Reports from the student's physicians and evaluations received by the Board classified the student at that time as developmental delayed. (Board's Exhibit -9 (B-9), B-1, B-2, B-8 and Parents' Exhibit-7 (P-7).)

3. On 2/28/2000, an initial speech and language evaluation of the student was conducted by the Kennedy Kriegler Institute. The student's skill level for pragmatic communication intent, interaction-attachment, and play and language expression was found to be in the 6-9 month range. In language comprehension the student had solid skills in the 6-9 month range and scattered skills in the 9-12 month range. The student's chronological age at the time of the test was 33 months. (B-11)

4. The birth to three program conducted an occupational therapy and a speech and language summary of the student when he exited their program. The occupational therapist suggested 5 goals for the student's pre-kinder program. (P-22)

5. On June 12, 2000 the Board conducted a PPT meeting in order to create the student's IEP. The student was placed in an integrated program for the 2000-2001 pre-kinder program. The student's classification was developmental delayed. (B-18)

6. On 10/4/2000 in preparation for an IEP meeting, the Parents filled out a form informing the team about their child. The Parents informed the Board that the student:

- a. rolled cars back and forth
- b. made eye contact
- c. threw things, had a hair pulling problem.

Parents wanted their child to:

- a. learn to stand up, sit down
- b. learn to take shoes and socks off.
- c. increase potty awareness
- d. drink from a cup
- e. say no and use pictures to make choices.

(B-22).

7. On November 8, 2000, the student was evaluated by Claudia A. Chiriboga, M.D. and was diagnosed with cerebellar ataxia and profound speech delay. The doctor found that when the student becomes over stimulated quickly he would flap his arms and stiffen his limbs. (B-25).

8. On 3/26/2001, the PPT met and revised the student's IEP. The student was given 6 ½ hours of direct one to one teaching using an ABA methodology. The student was eligible for an extended school year based on his level of needs. The LEA representative would visit the home to discuss behavioral issues of hair pulling and clothes pulling at home with the Parents. There were no evaluations performed to substantiate these changes. The changes were necessitated by educational performance. (B-27 & 28) The PPT met again on 9/17/2001 and revised the student's IEP. There were no evaluations performed to substantiate these changes. (B-34)

9. In the student's 2000-2001 IEP, he mastered 2 goals and 5 objectives of other goals:

- Goal 1 Obj. A- Given appropriate play material the student will complete the appropriate action. (i.e. push a car)
- Goal 3 Obj. A- Given the verbal direction stand up, the student will stand up.
- Goal 3 Obj. B- Given the verbal direction sit down and a gestured prompt, the student will sit down.
- Goal 3 Obj. D- Given the verbal direction do this and a gestured prompt, the student will imitate the action being performed.
- Goal 4a – improve gross motor control to increase safety and independence in the classroom environment.
- Goal 6 – The student will remove shoes 50 % of the time.
- Communication skills Goal 1 Obj. A– The student will imitate the “B” sound.

(P-27).

10. The PPT met on November 5, 2001 to write the student's 2001-2002 IEP. The student's 2001-2002 school year was play based. The class had 16 students, 6 of which were special education students and the balance was regular education students. At the beginning of the program the student could not play with toys; the student now knows how to play with toys and manipulates them appropriately. The student was assisted by a one to one aide. The student's IEP does not require a one to one aide. Even though this was not on the IEP not the purpose the aide was to serve, the aide's time with the student was reduced.

The student was not too distractible in the classroom and his rate of learning was in consistent. There was no functional behavior analysis of student's pinching and hair pulling because this did not affect his program. Hand flapping is not stereotyped for the student because he does it only when excited.

(B- 34, Testimony Jennifer Goldman)

11. During the 2000-2001 and until March of the 2001-2002 school year the Board did not do any baseline testing of the student in order to be able to note the progress the student was making in his program. The changes made during those school years were based on educational performance and not on any evaluation. (B-27, B-28, B-34, P-33 and P-33a)

12. The student's 2001 -2002 IEP utilized ABA methodology, but the mastery criteria for mastery over a five day period was not written into the student's IEP. (Testimony Jennifer Goldman) The student had 37 objectives across 11 goals. Out of these 37 objectives 17 only required a 50% completion rate in order to master the objective. (B-34).

13. The Parents wanted the student's IEP to include toileting. (Testimony of Father). Toileting was not implemented nor included in student's IEP during the student's 2001-2002 school year because his teacher did not think it was a more important skill he needed to learn. The team felt toileting was not a priority. (Testimony Jennifer Goldman)

14. On 6/17/02 the student's 2001-2002 IEP was revised and additional goals were included. The 2001-2002 IEP was again revised on 8/26/02 and 9/25/02. (P-33, P-79 & P-92).

During the 2001-2002 school year the student mastered 23 objectives out of 51 objectives, 6 goals out of 17 were mastered. Goal 1 and 1a were that the student was to learn two new objectives. The ball was used as an object in both goals with a difference in the criteria; these two goals were mastered, Goal 1 on 3/2/02 and Goal 1a on 10/25/02. Out of these 23 objectives mastered 7 only required a 50% completion. (P-33)

15. Applied Behavioral Analysis (ABA) is the science of human behavior as elaborated by B.F. Skinner. In an educational setting, ABA can be incorporated into most teaching methodologies and the effectiveness of its application are not limited to children who are autistic or in the autistic spectrum. The principles of ABA can be used as an effective methodology for children with developmental delay. One-to-one direct teaching can utilize an ABA program. Behavior is not an issue in cerebellum ataxia. The student was observed in the classroom two times in a week for a couple of hours, notices hand flapping but not on a repetitive level. This was not brought up as an issue. The team did not consider the student on the autistic spectrum. The school psychologist recommended that the student's ABA Program be continued. The Board does not have a self-contained classroom with a special education teacher for special education children. He was concerned whether the student was making progress. (Testimony school psychologist)

16. The student during the 2001-2002 school year received one-to-one direct teaching utilizing the principles of ABA for six ½ hours per week. The student's one-to-one aide was reduced to one hour per week. In the March 20, 2002 PPT, the direct teaching was increased to 7 ½ hours per week. (Testimony special education teacher, B-45 pg 3)

17. The student throws toys and waves his arms. Barriers are put in place in the house to keep the student safe. The student at home enjoys the noise made by the vacuum cleaner.

The Board never offered an after school program to the student until the Parents requested it. The student's progress in the first years in the Board's school was slight and the Parents were concerned that his progress was degenerative. (Testimony of Father) The student can sit for a long time and repeatedly press buttons on toys just to hear some kind of noise. He also spends a lot of time banging objects together to make loud noises and to feel the vibrations in his hands. (B-100 pgs. 14-21)

19. On 3/7/2002 the Board's school psychologist did a psychological evaluation of the student. The evaluator could not administer individual standardized measures of cognitive ability because of the student's limited attention span receptive and expressive language and significantly compromised gross and fine motor skills. The school psychologist performed a Vineland Adaptive Behavior Scales with the mother as the informant. The student's communication skills were at an age equivalent of 12 months, his daily living skills were at a 19 month level, his socialization was at 13 month age equivalent, and motor skills were at a 17 month age equivalent. The student at the time of testing was 4 years and 10 months old. (B-44)

20. The physical therapist conducted an evaluation of the student on March 25, 2002. At the time of the evaluation the student had been receiving physical therapy twice a week for 30 minutes each period. The evaluator concluded that educationally based physical therapy was necessary for the student to access his educational environment safely. (B-45).

21. On May 3, 8 & 13, 2002 the special education teacher conducted an educational evaluation of the student. The student's communication competence, receptive and expressive language is low, 12 months, because the student is able to communicate using gestures and he can only use one word to represent many objects. In self-help, the student also fell in the 12 month range because he is not yet able to indicate awareness of being wet or soiled, nor is he toilet trained. In gross motors the student is performing at a 24 month level. The student is not yet independent in the classroom and requires an aide at all times. The student's relationship with adults and other children was at a 36 month level. The student does not engage in play activities as his peers and at times pulls their hair and other times show affection by trying to kiss them. The student at the time of testing was 4 years and 11 months old. (B-51).

The PPT did not believe that it was necessary to have a functional behavior assessment of any hair pulling or pinching because such behavior did not rise to the level where an assessment was needed. (Testimony Katie Mahoney, Jennifer Goldmen)

22. ON 5/31/2002 and 6/7/2002, the Parents had the student evaluated by The McCarton Center. The student was found to be a child in the autistic spectrum disorder. (B-57 pg 6) The evaluator stated that the student lacked basic skills. The student's verbal levels were of a 12-14 month child. The student was functioning 4 years behind in language. The evaluator was of the opinion that the 6-7 hours of one on one discrete trial was insufficient. The student could not benefit of mainstreaming at a 12-14 month level. The student would be aware of peers but does not seek them out. The evaluators

recommended that the student have a seven day year long program with 3 hours of ABA in school and 2 hours of ABA at home each day. If the one on one discreet trial program could not be established at the Board's school, the evaluator recommended that the student should be placed at an ABA school. The evaluator diagnosed the student as in the Autism Spectrum Disorder. (B-57, Testimony DR. Cecelia McCarton)

23. During the evaluation the student was not able to remain seated and roamed around the room and engaged in self-stimulatory behavior. The student did not engage sufficiently in order to achieve a clear estimate of his cognitive ability. The student is easily distractible and does best in an environment that is not overly stimulating to him. (Testimony Jen Goldmen)

24. The student's throwing, pinching and flapping were being addressed by the student's ABA supervisor from the McCarton Center. Having the student in a class with non-disabled peers is not proper at this time. The student lacks language skills, social skills and needs to learn by breaking down instructions. He does not have skills for a mainstream setting but can later be transitioned to a mainstream setting. (Testimony of Stacy Smith, P-37 pg. 15) It is not in the student's best interest to be in a class with non-disabled peers. In order to benefit from an inclusion setting the student needs the ability to imitate others and communicate his wants and needs. He needs to desire to partake in order to socialize and the student needs to be able to follow direction. (Testimony Debra Madison).

25. The ABA supervisor, from the McCarton Center, has worked 10 years with children, testified that the student lacked skills to be in a mainstream setting. The student lacked language, play and pre-requisites for academic skills. The student needs to have the skills broken down to the smallest unit. Once the student has learned language, play and social skills then he might be eligible to move into the mainstream setting. (Testimony Stacy Smith)

26. The Parents on or about August 2002, provided the student with an ABA program at home at their expense. The student received 2 hours with an ABA therapist service 7 days a week, one hour of motor therapy each day and 3 hours of ABA supervision. The therapist focused on the student's IEP. The Parents worked on the skills the student has learned during the day. The Board has not requested to observe the home ABA program. The Board asked the McCarton Center to consult at the student's school program. This occurred one time and the Board stated that they did not need to come again. (Testimony of Mother)

27. On 5/16/02, Dr. Paul Juan, wrote that the student did not have speech and language and required 1-2 hours of speech every day. (P-7) On 9/25/02, Dr. Chiriboga, a neurologist, re-evaluated the student and found that the student's stereotypic self-stimulating behaviors, echolalia and poor symbolic play and poor socialization are consistent with an Autistic Spectrum Disorder. (B-91) On 10/21/02, the student's

pediatrician, Dr. Paul Juan, agreed with the McCarton Center's evaluation of the student and their diagnosis that the student has an Autistic Spectrum Disorder. (B-95).

28. The Board has created a Behavior Plan to address the student's throwing. (B-100 pg 6-8) The Behavior Plan and its data were discussed at a PPT meeting on 5/20/02. (B-54)

CONCLUSIONS OF LAW

1. The parties are in agreement that the student is eligible to receive special education and related services as defined in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401 et al. The parties do not agree as to the classification the student should have. The Board has classified the student as Other Health Impaired (OHI), Neurological Impaired; the student's Parents are of the opinion that the student should be classified as Autistic.

IDEA's definition of Autism is: (i) a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3 that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance...

(ii) A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in paragraph (c)(1)(i) of this section are satisfied. *34 C.F.R. 300.7 (c)(1)*

In the DSM-IV an autistic disorder is defined as: A developmental disorder the diagnostic criteria for which is: "A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)---

(1) qualitative impairment in social interaction, as manifested by at least two of the following: (a) marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction; (b) failure to develop peer relationships appropriate to developmental level; (c) a lack of spontaneous seeking to share enjoyment, interests or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people); (d) lack of social or emotional reciprocity. . .

(2) qualitative impairments in communication as manifested by at least one of the following: (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime); (b) in individuals with adequate speech, marked impairments in the ability to initiate or sustain a conversation with others; (c) stereotyped and repetitive use of language or idiosyncratic language; (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

(3) restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following: (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in

intensity or focus; (b) apparently inflexible adherence to specific, nonfunctional routines or rituals; (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping, or twisting, or complex whole-body movements); (d) persistent preoccupation with parts of objects. B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language used as social communication; (3) symbolic or imaginative play. C. The disturbance is not better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder." (B-106) The student fits this criteria as a child who has autistic disorder as defined in 34 C.F.R. 300.7 (c)(1). (Findings of Facts 17, 19, 21, 24, 25 and 27).

2. The program for the 2001-2002 school year was inappropriate for the student. The student on 2/28/00 was found to have communication skills in the 6-9 month level. Two years later the student is again evaluated and found to be in the 12 month level. (Findings of Facts 3 & 17) The student only mastered 6 goals of 17 in his I.E.P. and 3 of the goals mastered only required a completion rate of 50%. (Findings of Facts 14) The IDEA requires that a state provide a "free appropriate public education" (FAPE) to all handicapped children within its jurisdiction, as a condition for receiving federal funds. While the Supreme Court has held that states are not required to "maximize the potential of handicapped children," *Rowley*, 458 U.S. at 189; accord *Thomas*, 918 F.2d at 626, this Court has held that the educational benefits the state does provide must be more than de minimis in order to be "appropriate." "*Doe By Through Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989). The Act provides no more than a "basic floor of opportunity . . . consist[ing] of access to specialized institutions and related services which are individually designed to provide educational benefit to the handicapped child." "*Rowley*, 458 U.S. at 201; *Doe*, 879 F.2d at 1341. Educational benefits must be "meaningful", *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1119 (2d Cir. 1997) standard contemplates more than "mere trivial advancement." *Polk v. Central Susquehanna Intermediate Unt 16*, 853 F.2d 171, 183 (3rd Cir. 1988); see also *Hall v. Vance County Bd. of Education*, 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.").

A child's academic progress must be viewed in light of the limitations imposed by the child's disability. Whether the student had been classified as Autistic or as he is currently classified OHI, the program provided to the student would not have changed the trivial progress the student made during the 2001-2002 school year. The program for the student required more one on one discrete trial to enable the student to learn. This is not a student who can learn by eclectic methodologies. The educational program provided to the student is immaterial of the designation given to the student. If an ABA program is required in order for the student to receive FAPE, it does not matter whether the student is OHI, Autistic or Learning Disabled. The Board does not have to provide a "Cadillac" of an educational program, a "Chevrolet" program is sufficient as long it has tires to move the student forward in his educational program in more than a trivial manner.

3. The student's program for the 2002-2003 school year is also inappropriate for the student, and not calculated to enable the student to progress in more than a trivial manner.

Even though the record shows that the student is making progress in his educational setting but this progress would not be possible if the Parents had not put in place an ABA program in the home. (Findings of Facts 26) This additional 2 hours daily of ABA program geared around the student's I.E.P. has enabled the student to make the progress he is making. (Findings of Facts # 26)

The Board argues that IDEA requires that the student be mainstreamed in order to benefit from the interaction with his peers. In *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), set out its interpretation of the mainstreaming requirement of the federal Act: The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act. [The] court recognizes that even though the preference for mainstreaming is very strong there are still situations in which some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. *Id.*, at 1063. The student's involvement in a mainstream setting with the use of supplementary aids and services is an ideal goal for the student to reach at a later time. To enable the student to be able to interact appropriately with his peers, the student needs to act appropriately with his peers. (Findings of Facts # 21 & 25)

FINAL ORDER AND DECISION:

1. The student's classification shall be changed from Other Health Impaired to Autism.
2. The program offered by the Board for the 2001-2002 school year was inappropriate.
3. The program offered by the Board for the 2002-2003 school year was inappropriate.
4. The Parents shall be reimbursed for the cost associated with home ABA Program, for the Home oral-motor therapy provided by the Parents and for the ABA home supervisor provided by the Parents since August 2002.
5. The Board shall provide the student with an extended school year educational program, which shall include in-school 3 hours per day of one on one ABA instruction provided by someone with ABA experience. In school oral-motor therapy 135 minutes per week. If the Board wants, 45 minutes of the 135 minutes of oral-motor therapy can be done in the home at the Board's expense.
6. The Board shall continue to fund the home ABA instruction of 2 hours per day 6 days per week (this is one day per week less than the Parents were seeking), and 3-5 hours of ABA supervision by the McCarton Center.
7. The student is not entitled to compensatory education.

8. There shall be monthly team meetings between the home ABA program and the Board to closely coordinate services between the home and school.