

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Orange Board of Education
Orange Board of Education v. Student

Appearing on behalf of the Parent: Jennifer D. Laviano, Esq.
77 Danbury Road, Suite C-6
Ridgefield, CT 06877

Appearing on behalf of the Board: Craig S. Meuser, Esq.
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Appearing before: Mary H.B. Gelfman, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer Student an appropriate individualized education program (IEP) and placement in the least restrictive environment for the school year 2004-2005?
2. If not, is placement at Connecticut Center for Child Development (CCCD) an appropriate placement for Student?
3. If the Board's program and placement are not appropriate, and if CCCD is appropriate, is the Board responsible for funding Student's placement at CCCD for 2004-2005?
4. What is Student's "stay put" placement pending the completion of this hearing?
5. Is the Board responsible for funding an independent evaluation secured by Parents?
6. Has the Board committed procedural errors under the Individuals with Disabilities Education Act (IDEA) and/or under related state law that either interfered with Parents' participation in the IEP process, or substantially prejudiced the IEP and/or placement offered Student by the Board?

PROCEDURAL HISTORY:

This hearing was requested by the Parents on August 11, 2004, and by the Board on August 10, 2004. This hearing officer was appointed on August 13, 2004, and a pre-hearing conference was held on August 24, 2004. The hearing was scheduled for September 30 and October 13, 14, 21, and 22, 2004. The mailing date for the final decision and order was therefore extended from September 27 to October 27, 2004.

By letter dated September 10, 2004, the hearing officer was informed that the Parents had changed representation. Because the Parents' new attorney was not available on October 21 and 22, 2004, those dates were cancelled and November 3, 15 and 16, 2004 were added.

Since Student's "stay put" placement was at issue, the hearing officer agreed to receive briefs on that issue and to hearing testimony on that issue alone on September 30. By a partial final order issued on October 22, 2004, the hearing officer found the Board responsible for continuation of funding for Student at CCCD, pending the outcome of the hearing.

When the hearing re-convened on October 13, the parties requested time for a Planning and Placement Team (PPT) meeting and settlement negotiations. The hearing officer granted another extension of the deadline for decision, from October 27 to November 26 and thence to December 26, 2004, and scheduled additional hearing sessions on December 7, 9 and 10.

The parties requested that hearing session scheduled for November 3 and 15 be cancelled because settlement negotiations were progressing, and that the session scheduled for November 16 start at noon to allow for assistance from a state mediator in the morning. When the hearing re-convened at noon on November 16, 2004, the parties announced that a settlement had been reached in principle, and that when the settlement agreement had been signed both parties would withdraw their requests for hearing. With that statement on the record, the hearing officer closed the hearing and cancelled the subsequent hearing dates.

Having received no further communications, on November 30, 2004, the hearing officer queried both parties as to the resolution of the matter. A member of the Due Process Unit staff contacted both parties and assured the hearing officer that the matter was settled. On December 7, 2004, both parties notified the hearing officer that the settlement agreement had been executed and both parties withdrew their requests for hearing.

All motions and objections not previously ruled upon, if any, are hereby overruled.

FINAL DECISION AND ORDER:

Since an agreement has been reached and executed and both parties have withdrawn their requests for hearing, this matter is DISMISSED.

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Orange Board of Education

Appearing on behalf of the Parent:

Attorney Jennifer D. Laviano
77 Danbury Road, Suite C-6
Ridgefield, CT 06877

Appearing on behalf of the Board:

Attorney Craig S. Meuser
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Appearing before:

Mary H.B. Gelfman, Esq.
Hearing Officer

PARTIAL FINAL DECISION AND ORDER

ISSUE:

What is Student's "Stay Put" placement pending the completion of the hearing?

PROCEDURAL HISTORY:

The hearing was requested on August 13, 2004, and a pre-hearing conference was held on August 24, 2004. Hearing sessions were scheduled for September 30, and October 13, 14, 21 and 22, 2004. The deadline for mailing of the final decision and order was extended from September 27 to October 27, 2004, to accommodate the request for additional hearing dates. On September 10, 2004, the Hearing Officer was informed that Parents had changed their legal representation. Because the new attorney was not available on October 21 and 22, those dates were cancelled on September 28 and November 3, 15 and 16, 2004, were added, and the deadline for the mailing of the final decision and order was extended again, from October 27 to November 26, 2004.

The Parents requested an immediate ruling on Student's "stay put" status, and the Hearing Officer responded on September 20, 2004, that briefs would be accepted, on or before September 27, 2004. After learning that the stay put issue in this case was complex, the Hearing Officer informed the parties on September 28 that the September 30, 2004, hearing session would be used for examination of witnesses relevant to this issue and for oral argument.

The hearing itself concerns whether Student has been offered an appropriate program in-district, and if not, whether a private placement initiated by Parents is an appropriate placement.

To the extent that the procedural history and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F. Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

FINDINGS OF FACT:

From a review of documents entered on the record of the hearing and testimony offered on behalf of the parties addressing the issue of “stay put”, I make the following Findings of Fact.

1. Student was born on January 21, 2000, and is now four years, nine months old. He was diagnosed as autistic at three years of age. He has a twin brother, a younger sister, and another sister born in early June, 2004. (Exhibit B-3; Testimony, Mother)
2. A Preschool IEP for 2003-2004, including an extended year program for 2003, was developed on June 11, 2003, by a prior school district where Student then resided. The present levels of performance listed evaluation results from testing in September, 2002, and January and May, 2003. The narrative portion of the IEP described Student as “lacking cooperation for testing”, “highly distractible”, and “having difficulty complying with and understanding one step directions”. This IEP provided for services to be provided by a special education itinerant teacher, an occupational therapist, a physical therapist, a speech/language therapist, and a teacher assistant. Parent counseling and training was also part of this program. (Exhibit B-8)
3. The goals listed on this June 11, 2003, IEP were:
 - Demonstrate an improvement in language skills necessary to speak and listen for information, understanding, expression and social interaction.
 - Demonstrate an improvement in self-awareness and self-concept.
 - Demonstrate an improvement in activities which require fine motor coordination and manipulation of classroom materials and equipment needed to participate in educational activities.
 - Demonstrate an improvement in activities that require visual-motor coordination and visual-perceptual skills needed to participate in educational activities.
 - Demonstrate improved use of both hands together in a coordinated manner for participation in physical education and classroom manipulative tasks.
 - Demonstrate an improvement in sensory processing skills to successfully participate in educational and classroom activities.
 - Demonstrate an improvement in balance for increased safety while participating in educational activities in the school environment.

- Demonstrate an improvement in basic concepts and cognitive prerequisite skills necessary to learn and progress toward achieving the learning standards. (Exhibit B-8, pages 4, 5, 6, 7)
4. The Parents rejected the 2003-2004 program and placement offered by the prior school district. After a settlement agreement with the prior school district, which is not included in the record for this hearing, Parents enrolled Student at Connecticut Center for Child Development (CCCD) during the 2003-2004 school year. CCCD is a private facility approved for special education by the Connecticut State Department of Education. (Testimony, Mother; Testimony, Principal, CCCD)
 5. The family moved into the Board's school district in January, 2004. Parent and the Board's Director of Special Education discussed Student's special education needs by telephone, starting in April, 2004. The Board secured records from the prior school district and CCCD (with parental consent obtained on April 27, 2004) and observed Student at CCCD. Parent observed the Board's program for children with autism, and requested that her private consultant also be permitted to observe this program. (Exhibits B-10, B-11, B-12, B-14; Testimony, Mother; Testimony, Director of Special Education)
 6. In a CCCD report dated May 4, 2004, Student's progress was summarized:
Out of a total of 35 objectives, [Student] has mastered 3, is making satisfactory progress on 17, unsatisfactory progress on 1, and 3 received the code of other due to insufficient data. The remaining 11 objectives have not been formally implemented.
We are very pleased with the level of progress that [Student] has made throughout this reporting period. He is a very fun and energetic child with an eagerness to learn new skills. (Exhibit B-19, p.33)
 7. On May 25, 2004, the Board proposed a Planning and Placement Team (PPT) meeting for June 9, 2004, to include Board and CCCD staff members. By e-mail dated June 2, 2004, Parents requested a later date for the meeting. They provided two reasons: Mother was scheduled for surgery (Cesarean section) on June 4, and the Parents' private consultant, whom they wanted to bring to the PPT meeting, would be observing the Board's proposed program on June 8 and would provide a report of her observation at a later date. (Exhibits B-15, B-16, B-17; Testimony, Parent; Testimony, Director of Special Education)
 8. The Board's Director of Special Education refused to postpone the June 9, 2004, PPT meeting. After a telephone conversation with Parent, the Director summarized reasons the meeting would go forward on June 9: the need to develop an Individualized Education Program (IEP) and to plan for a summer program for Student. She offered to hold the PPT by telephone conference call and to mail the minutes if Parents were unable to attend the meeting. (Exhibit B-18; Testimony, Director of Special Education; Testimony, Mother)

9. The PPT meeting convened as scheduled on June 9, 2004. Mother was present, although she had been discharged from the hospital on June 8, and was still taking pain medication. Father was unable to attend the meeting due to job commitments. Eight Board staff members and three CCCD staff members attended this meeting. Without initiating any assessments beyond those provided in Student's records from the prior district and CCCD, Student's present levels of educational performance included strengths: receptive skills are a relative strength, pretend skills emerging; and concerns/needs: PICA, aggressiveness, articulation, expressive language. The PPT adopted goals and objectives dated January 26, 2004, from CCCD. The PPT outlined services for a proposed 2004 extended year program: seven weeks, five days a week, five hours a day, to include speech/language therapy (S/L), occupational therapy (OT) and physical therapy (PT); home visits upon request, communication book daily, and parent training as needed, and upon request. The S/L, OT and PT services would be defined in greater detail after each therapist had a chance to evaluate Student's present levels of performance. Another meeting would be held to review Parents' private consultant's report on her observation of the Board's program, and to develop an IEP for 2004-2005. (Exhibit B-19; Testimony of Mother; Testimony, Director of Special Education)
10. The January 26, 2004, CCCD IEP listed goals as :
- In his school environment, [Student] will improve language/communication skills as measured by the following objectives.
 - In his school environment, [Student] will improve vocabulary skills ...
 - In his school environment, [Student] will improve socialization skills ...
 - In his school environment, [Student] will improve pre-reading skills ...
 - In his school environment, [Student] will improve pre-math skills ...
 - In his school environment, [Student] will improve self-help skills ...
 - In his school environment, [Student] will improve Fine Motor skills ...
 - In his school environment, [Student] will improve Gross Motor skills ...
 - In his school environment, [Student] will reduce inappropriate behaviors that impede his learning rate and retention. (Exhibit B-24, pages 8 – 22)
11. A progress report from CCCD dated "1/26/04 to 4/12/04" is included with the record of the June 9, 2004, PPT meeting. Progress is reported on goals identified as:
- Communication skills
 - Vocabulary skills
 - Social skills
 - Pre-reading skills
 - Pre-math skills
 - Self-help skills
 - Fine motor skills
 - Gross motor skills
 - Reduction of problem behaviors. (Exhibit B-19, pages 28 – 33.

12. After Parent objected to the Board's summer program, the PPT offered to fund the CCCD summer program preferred by Parents as a "transition" program. (Exhibit B-19; Testimony of Mother; Testimony, Director of Special Education)
13. The IEP summary of services from June 16, 2004, to June 18, 2005, dated June 9, 2004, and attached to the record of the PPT meeting listed: 30 hours/week "academic; adaptive; sound; motor; language" with an ABA (applied behavior analysis) teacher/therapist; 50 minutes/week "adaptive gross motor" with "gym teacher, ABA staff"; language/speech 1½ hours/week direct [service] with "clinician/ABA teacher" and ½ hour/week indirect [consultation]; gross motor 1½ hours/week with PT/ ABA teacher; fine motor 1½ hours/week with OT/ABA teacher; and "EYS" [extended year services] 7 weeks with ABA staff. (Exhibit B-19, p.21)
14. By letter dated June 11, 2004, the Director of Special Education provided the purposes of a July PPT meeting:

...we will develop a transition plan for [Student's] return to [the Board's school]. This will afford Student a free and appropriate public education in the least restrictive environment. [The Board] is paying for [Student's] current summer program at CCCD in order to facilitate the transition process. (Exhibit B-20)
15. The Board and CCCD executed a contract for Student's summer program dated July 19, 2004. This contract is titled "Letter of Agreement for a Publicly Funded Placement Summer Program 2004". The contract contains many clauses related to regulatory requirements for publicly funded special education placements. It does not include any provisions concerning Student's "stay put" status in case of a dispute between the Parents and the Board, or any other limiting provisions. (Testimony, Director of Special Education; copy of contract attached to Parents' brief)
16. CCCD offers an extended year program that is essentially the same as their school year program. S/L, OT and PT are provided by school staff members with consultation from professional clinicians. (Testimony, Principal, CCCD)
17. The PPT convened on July 23, 2004, to plan Student's transition "effective September, 2004" from CCCD to the Board's program. The PPT record for this date also includes a report that the Parents' private consultant recommended that Student remain at CCCD and that Parents have requested funding for CCCD "through September". Parent had requested a delay in the PPT to provide time for the private consultant's report to be submitted for consideration. The PPT refused that request, refused to extend funding at CCCD, and announced that the Board would be filing for a due process hearing. The IEP attached to this PPT record is, again, the CCCD IEP dated January 26, 2004. (Exhibit B-24, pages 1 – 4, 8 – 22)
18. The July 23, 2004, summary of services to be provided July 30, 2004, through June 18, 2005 in the proposed Board placement included a statement that CCCD goals had been accepted. (Exhibit B-24, page 24)

19. The Transition Plan, listing staff members by title and name, adopted by the PPT on July 23, 2004, was as follows:

September 2004 Transition

- Week One: Special Education Teacher and Paraprofessional observe [Student] at CCCD for 3-5 days. Behavior Consultant observes [Student] at CCCD for 1-2 days.
Speech therapist observes [Student] at CCCD 1 day.
Release form from [Student's] current Speech provider to speak to [Board S/L therapist] and share information.
- Week Two: [Student] comes to [Board school] with CCCD Instructor for 2 hours in the morning on Monday through Friday (5 days). CCCD Instructor and [Board] Paraprofessional work together with [Student] on Maintenance and Current Lessons.
- Week Three: [Student] comes to [Board school] for the morning (8:30 – 12:00) on Monday through Friday (5 days). [Student] works with the [Board Para] on Maintenance and Current Lessons. CCCD Instructor comes to [Board school] for 3-5 days to overlap with [Student] and the [Board Para].
- Week Four: [Student] comes to [Board school] full time – Monday through Friday from 8:30 to 2:30. [Student] works with [Board Para]. CCCD Instructor comes to [Board school] 2 days.
- After this four-week transition period, [Board] will contact CCCD staff as the team feels necessary to request further information about [Student's] program. (Exhibit B-25)

20. Subsequent correspondence between Parents and the Director of Special Education reflected Parents' desire to have the PPT consider a report from their consultant prior to finalizing plans for transition and the Director's insistence that Board funding for CCCD would end on September 1, 2004. Both parties then requested a hearing. (Exhibits B-27, B-28, B-29, HO-1)

21. No evidence was offered as to the status of the implementation of the transition plan.

CONCLUSIONS OF LAW AND DISCUSSION:

1. The parties agree that Student is eligible for special education and related services and is classified as autistic, pursuant to 34 C.F.R. § 300.7(c)(1) and Section 10-76a(5), Connecticut General Statutes (CGS).
2. As provided by 34 C.F.R. § 300.514 and Section 10-76h-17(a), RCSA, during the pendency of a special education hearing, the student remains in his "then-current educational placement", unless the school district and the parents otherwise agree.
3. The Board has adopted the assessments of Student's strengths and needs provided by the prior school district, by CCCD, and by Parents: their only contact with Student

has been observations by school staff. However, such observations are not recorded or reported in the record of the PPT meetings on June 9 and July 23, 2004. The goals written by the prior school district on June 11, 2003, and those provided by CCCD on January 26, 2004, are substantially alike despite the differences in language and style, and have been adopted by the Board's PPT.

4. The reference to a transition in July 23, 2004, IEP minutes is ambiguous: transition is to be "effective September 2004". The "Transition Plan" devised for Student at the July 23, 2004, PPT meeting is ambiguous. The plan is dated "September, 2004" with activities listed as "week one, week two," etc. There is no indication of the specific date for week one or what the target date for complete entry into the Board's school will be. There are no transition goals or objectives for Student to meet. A common sense interpretation of this written plan is that it is intended for the month of September, 2004.
5. The Board offers a statement of policy guidance from the Office of Special Education Programs (OSEP), U.S. Department of Education (24 IDELR 320) in support of its position. This document addresses "interstate transfers" of students requiring special education. While the Board appears to have followed the second option discussed by OSEP when it adopted the prior district's assessments and the CCCD IEP, that is not the issue currently in dispute. Furthermore, while there is an interstate move involved, Student's 2003-2004 special education placement was unilaterally made by his Parents.
6. A Minnesota federal district court discussed "stay put" and found:

The purpose of this "stay put" provision is to "preserve the status quo pending resolution of judicial or administrative proceedings" in which the parties dispute the appropriate placement for the child. (*Monahan v. Nebraska*, 491 F.Supp. 1074, 1088 (D.Neb. 1980), cited at *Pachl v. School Board of Independent School District No. 11*, 02-4065 ADM/AJB, 39 IDELR 93 (D. Minn. 2003))

At issue here is the identity of the "then-current placement". After rejecting the prior district's program and placement, Parents made a unilateral placement at CCCD. However, the Board's action in contracting for the CCCD extended year program, using a CCCD IEP and providing no limiting contract language, brings the status of the summer program into question. The holding in *Pachl* is based on different facts: in that case, there had been a prior public school placement.
7. The Board also cites *Zvi D. v. Gordon Ambach et al.*, 694 F.2d 904, EHLR 554:226 (2d Cir. 1982). In this case, the court upheld a ruling that a board of education was not liable for funding as "stay put" a placement in a private school that had been initiated by parents. When the initial evaluation was delayed, the New York City school district was compelled by state regulation to fund the unilateral placement. The court points out that the school district neither "agreed to or was ordered to" participate in this placement. In funding the placement, there was a stipulation that the placement was limited to one year and that the case would be reviewed and a public school placement would be provided for the next year. No such limiting

language appears in the contract between CCCD and the Board. In *Peter G., Gregory G. and Inez G., v. Chicago Public School District No. 299*, No. 02 C 0687, 37 IDELR 215 (N.D. Ill. 2002), the court found the “then current placement” to be the IEP and placement proposed by the Board for the Student’s initial entry into school, rather than the private school placement initiated by the Parents. When the issue concerns an initial placement, the federal regulation provides that stay put placement be in public school (34 C.F.R. §300.514(b)). In questioning the application of the “stay put” statutory and regulatory language in cases where students transfer from a public school to a public school in another state, *Michael C. v. Radnor Township School District*, 202 F.3d 642, 31 IDELR ¶ 184 (3rd Cir. 2000), cites the above OSEP memorandum and comments that “where a *parent* unilaterally removes a child from an existing placement ...”: however, in this case Student was not removed from the placement proposed by the Board: he was never enrolled. In *Mayo v. Baltimore City Public Schools*, 40 F.Supp.2d 331, 30 IDELR 861 (D.C. Md. 1999), parents argued that a private school placement ordered by a prior hearing officer and continued under settlement agreements in subsequent years was “stay put”: the court disagreed, because several school years had passed since the hearing officer’s order. *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 31 IDELR ¶ 51 (1st Cir. 1999) found that extension of a “temporary placement” was not required by “stay put”.

8. The problem for the Board is that the contract between CCCD and the Board has no limiting language; the extended year program is identical to the school year program; and the language of the Transition Plan is ambiguous as to date of implementation. These facts distinguish this case from the many cases cited by the Board.

PARTIAL FINAL DECISION AND ORDER:

Given the language of the contract between the Board and CCCD and the ambiguity of the Board’s transition plan, Student’s “stay put” placement pending the outcome of this proceeding is his current placement at CCCD.

The Board is responsible for funding that placement, upon presentation of appropriate documentation, and for providing transportation.