

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Region 9 Board of Education and Student

Appearing on behalf of the Board:

Attorney Michelle Laubin
Berchem, Moses & Devlin PC
75 Broad Street
Milford, CT 06460

Appearing on behalf of the Student:

Attorney Jennifer Laviano
The Law Offices of Jennifer Laviano,
LLC
76 Route 37 South
Sherman, CT 06784

Appearing before:

Attorney Uswah A. Khan
Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

1. Should the Student be evaluated by the Fairfield Board of Education as it proposed at the January 10, 2017 meeting or otherwise, despite lack of parental consent?

PROCEDURAL HISTORY:

The Fairfield Board of Education (“Board”) initiated this special education due process matter, Case No. 17-0388, on about March 13, 2017. This Impartial Hearing Officer was assigned to the case on March 21, 2017.

A Prehearing Conference was convened on May 8, 2017. The Student’s mother appeared on behalf of the Student and Attorney Michelle Laubin appeared on behalf of the Board of Education. During the conference, the initial deadline for filing the final decision in this case was established to be May 26, 2017. An evidentiary hearing was scheduled for June 21, 2017.

On April 4, 2017, the Board of Education filed a Motion to Consolidate Case No. 17-0388 with another special education due process case that was initiated by the Student and assigned for hearing before Impartial Hearing Officer Justino Rosado, Case No. 17-0404. The Motion to Consolidate was granted on April 6, 2017, consolidating both Case No. 17-0388 and Case No. 17-0404 together to be heard before this Impartial Hearing Officer.

Subsequently, the Board filed a sufficiency challenge to Case No 17-0404. This challenge was granted and the Student was afforded an opportunity to amend her request for due

process. The Student did submit an amended request for due process, which the Board also challenged as insufficient in a Motion to Dismiss on May 4, 2017. The Parent was allowed until May 15, 2017 to submit a further amended request for due process.

On May 15, 2017, the Parent filed a Second Amended Request for Due Process in Case No. 17-0404 (“Second Amended Request”). In the Second Amended Request, the Parent acknowledged that the Parent withheld consent for evaluation of the Student for many years. The Parent then alleged, essentially, that the program provided to the Student by the Board is inappropriate because the Student is not being instructed at the same level as her nondisabled peers with regard to homework.

Although the Second Amended Request in Case No. 17-0404 was deemed sufficient, the Second Amended Request was dismissed on May 23, 2017 without prejudice as not yet ripe for adjudication.

The Student submitted another request for a special education due process hearing in Case No. 17-0450 on or about April 13, 2017. The matter was consolidated before this Impartial Hearing Officer with Case No. 17-0388 and Case No. 17-0404 as matters involving the same parties. The Board submitted a challenge to the sufficiency of the due process request for Case No. 17-0450 on May 17, 2017. On June 1, 2017, the Board’s sufficiency challenge was granted and Case No. 17-0450 was dismissed with prejudice.

On April 26, 2017, the Board submitted a written request for a thirty-day postponement and extension of the timelines to conduct the hearing and to file the final decision in this case to May 26, 2017. The request was unopposed and it was granted.

On May 26, 2017, the Board submitted a second written request for a thirty-day postponement and extension of the timelines to conduct the hearing and to file the final decision in this case to June 23, 2017. Again, the request was granted.

On June 21, 2017, the scheduled evidentiary hearing was convened. The Student’s parents did not appear at the outset of the hearing. A telephone call was made to the Student’s mother who indicated that she might come to the hearing later in the day. The Student’s mother did appear several hours later, after the hearing was under way. Her request to postpone the hearing was denied. The Student did not submit a list of proposed witnesses or offer any proposed exhibits in accordance with the Memorandum And Orders issued in this case.

During the evidentiary hearing on June 21, 2017, the Board requested an additional extension of the deadline for filing the final decision in the case to July 21, 2017 in order to allow time to conduct the hearing and draft the final decision. The request was granted. On July 18, 2017, the Board requested a final extension of the deadline for filing the final decision in the case to July 28, 2017. The request was granted.

The following witnesses testified at the evidentiary hearing on June 21, 2017:

Patricia Morrow, Speech Language Pathologist
Jill Jarvis, Special Education Teacher
Audra Lins, School Psychologist
Kimberly Flynn, Occupational Therapist
Lindajeane Schwartz, Special Education Coordinator

Hearing Officer Exhibits HO 1 through HO 3 were entered as full exhibits. Board Exhibits B 1 through B 105 were entered as full exhibits.

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

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985).

SUMMARY:

The Board sought to conduct a comprehensive initial evaluation of the Student, who has been receiving special education and related services for over five years, despite the parents' refusal to consent. The Board demonstrated that there is ample evidence that the Student qualifies for special education and related services under federal and state law and that a comprehensive evaluation of her strengths and weaknesses is necessary. The Board also proved that it has made every reasonable effort to secure consent for the evaluation from the Student's parents.

The evaluation proposed by the Board is necessary and should be implemented.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.* and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student was born on May 18, 2009. She recently completed the second grade at one of the Board's elementary schools. (Exhibit B 95; Testimony of Lindajeane Schwartz (Hereafter "T Schwartz"))

2. The Student began receiving early intervention services at age 32 months through the State of Connecticut's Birth to Three Program due to communication and social concerns identified by her parents and confirmed through administration of the Battelle Developmental Inventory, Second Edition. (Exhibit B-2; Exhibit B-12)
3. The Student then moved to the Board's pre-school program in its Early Childhood Center ("ECC") as a three year old. The ECC recommended a speech language assessment, to which the parents consented. Unfortunately, the assessment was not successful because the Student did not speak for the assessor. (T Schwartz; T Morrow; Exhibit B-10; Exhibit B-12)
4. The ECC also performed an occupational therapy observation and functional assessment with parental consent in 2012. Occupational therapy services were added to the Student's program as a result. (T Flynn; Exhibit B-29; Exhibit B-31; Exhibit B-33)
5. With only these early investigations, the Board has educated the Student without the benefit of a comprehensive or even a limited evaluation or standardized assessment of her strengths, weaknesses and educational needs from the time of her entry in its program. This is because the Student's parents have repeatedly failed to consent to proposed evaluations without articulating any specific concerns or objections. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)
6. The Student's pre-kindergarten program at the ECC included a half-day of specialized instruction in an integrated classroom as well as speech language therapy, occupational therapy and social skills development in small group and individual settings. (Exhibit B-18; Exhibit B-32; Exhibit B-39)
7. For Kindergarten, she was placed in a mainstream classroom with specialized instruction in reading, writing and mathematics in the resource room as well as speech language therapy, occupational therapy, social skills development and adaptive physical education in small group and individual settings. (Exhibit B-47; Exhibit B-50)
8. In first and second grades, the Student's program was also delivered in a mainstream classroom with specialized instruction in reading, writing, mathematics and language arts in the resource room, as well as speech language therapy, occupational therapy, social skills development and adaptive physical education in small group and individual settings. (Exhibit B-66; Exhibit B-76; Exhibit B-82)
9. The Student also received extended year services during these years. (Exhibit B-18; Exhibit B-32; and Exhibit B-39; Exhibit B-47; Exhibit B-50; Exhibit B-66; Exhibit B-76; Exhibit B-82)
10. Throughout her years in the Board's program, the Student has exhibited and continues to exhibit significant deficits in several key functional areas, including most prominently, speech and language development, reading, writing, mathematics and gross and fine motor development. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

11. Significantly, the Student does not speak in school. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

12. The Student's Planning and Placement Team ("PPT") has repeatedly proposed comprehensive evaluations of the Student from the time of preschool through the present, but the Student's parents have repeatedly refused or failed to provide the necessary consent for evaluation. (Exhibit B-26; Exhibit B-34; Exhibit B-35; Exhibit B-38; Exhibit B-47; Exhibit B-55; Exhibit B-62; Exhibit B-88). Indeed, although the Student has now completed the second grade and has been receiving special education and related services since pre school, she has never had a comprehensive initial evaluation or any standardized assessments at all. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

13. Most recently, at a meeting on January 10, 2017, the PPT proposed a comprehensive evaluation including a variety of standardized assessments of the Student (Exhibit B-87) as follows:

<u>Assessment Area</u>	<u>Proposed Evaluator</u>
Developmental History	School Psychologist
Cognitive, including nonverbal and verbal areas	School Psychologist
Behavior, Social, Emotional, Anxiety, Social Skills, Attention	School Psychologist
Academic Achievement in Reading, Writing and Mathematics	Special Educator
Classroom function	Special Educator
Fine Motor, Visual Motor, Visual Perceptual	Occupational Therapist
Receptive, Expressive and Pragmatic Speech and Language	Speech Language Pathologist
Assistive Technology	Assistive Technology Staff
Psychiatric	Psychiatrist
Autism	Psychiatrist

(Exhibit B-88)

14. The proposed evaluation is necessary to gain an understanding of at least the most prominent of the Student's deficits exhibited at school in order to identify her as eligible for special education and related services and to guide her special education program. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

15. Perhaps most significant among the Student's deficits is her mutism. Although the Student occasionally verbalized one or two words in her earlier school years, she has not spoken at all at school in the last year. She uses a flipbook or dry erase board, along with gestures, to communicate her needs in very basic, rudimentary form, but these expressions are significantly delayed. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

16. The Student's mother reports that she speaks fluidly at home, but these reports have not been verified. (T Morrow; Exhibit B-47; Exhibit B-82)

17. The nature and source of the Student's mutism at school is a mystery. One theory, that the Student is too anxious to speak at school, might explain the selective nature of the problem if indeed it is selective¹. On the other hand or in addition, the Student's weak oral motor function, delayed cognitive development and/or delayed language development may be a culprit. Although the PPT has attempted to address many possible causes of the mutism², without the proposed evaluation, it lacks the necessary tools to do so effectively. (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz)

18. The proposed psychiatric, speech and language, psychological and occupational therapy assessments are all necessary to elucidate the source and nature of the Student's mutism and provide the PPT with the information needed to develop an appropriate program to address her needs in this area. (T Morrow; T Lins; T Flynn; T Schwartz)

19. The proposed autism assessment to be performed by a psychiatrist is also appropriate to rule out or identify an autism spectrum disorder as a possible source of the Student's communication deficits. (T Morrow; T Jarvis; T Lins; T Schwartz)

20. The Student also exhibits various gross and fine motor deficits, including significant oral motor planning weaknesses, poor handwriting, poor letter formation and weak cutting skills. (T Morrow; T Flynn) The proposed Fine Motor, Visual Motor, Visual Perceptual assessment is necessary and appropriate to investigate the Student's needs regarding word formation, handwriting skills, letter formation, cutting skills and other gross and fine motor and visual perceptual skills. Although the Student has made some progress in fine motor development, other areas lag behind and assessment is necessary to guide her services and measure progress. (T Morrow; T Flynn; Exhibit B-94)

21. The proposed assessment in the areas of receptive, expressive and pragmatic speech and language is necessary and appropriate to investigate the Student's mutism as well as her other observed deficits in language development and measure progress. (T Morrow)

22. The proposed assessments of developmental history and cognitive function to be performed by the school psychologist are also necessary and appropriate to identify the Student's cognitive strengths and weaknesses for learning and skill acquisition as a foundation for development of all of her instructional services. (T Morrow; T Lins)

23. The proposed assessment by the school psychologist of the Student's behavioral, social, emotional and social skill functioning as well as her anxiety and attention are also

¹ Selective mutism is a psychiatric disorder. (T Lins; T Schwartz)

² The PPT has provided services and accommodations to address possible school anxiety, language delay and oral motor delay, without success. In fact, the Student has regressed in the use of oral language. (T Morrow; T Jarvis; T Lins; Exhibit B-39; Exhibit B-40; Exhibit B-43)

required to better understand and address her mutism and other possible behavioral concerns, such as anxiety. (T Morrow; T Lins)

24. The proposed academic achievement assessment Student's work in reading, writing and mathematics is also appropriate and necessary to guide instruction and measure progress. She currently functions in the Kindergarten range in all of these areas, well below that of her peers. Although she has been receiving specialized instruction in small group and individual settings for reading, writing and mathematics for some time, she made no progress in reading or mathematics last school year. (T Jarvis; T Lins; Exhibit B-86; Exhibit B-89; Exhibit B-90; Exhibit B-91; Exhibit B-99)

25. Finally, the proposed assessment of assistive technology needs is necessary and appropriate to investigate possible technologies to facilitate the Student's communication and reading. (T Morrow; T Schwartz)

26. Without these evaluations, the Board's staff cannot be confident that the PPT is providing for the Student's educational needs. The information that can be gleaned from observation in the classroom falls far short of what is needed to establish eligibility or to provide an appropriate program.³ (T Morrow; T Jarvis; T Lins; T Flynn; T Schwartz; Exhibit B-62)

27. The PPT and the Board staff have attempted to explain the need for the proposed evaluation to the Student's parents and to allay any concerns they may have had on several occasions, to no avail. (T Schwartz; Exhibit B-62; Exhibit B-82)

28. Although the Student's parents repeatedly rejected the PPT's request for consent for the proposed evaluation in one form or another⁴, they have not expressed specific objections to the evaluation design or even asked questions about it. They simply fail to provide the consent requested. (T Morrow; T Jarvis; T Flynn) When asked why she does not consent to the proposed evaluation at the hearing, the Student's mother said that the Board is only interested in investigating the Student's performance in school. (Mother)

CONCLUSIONS OF LAW AND DISCUSSION:

1. IDEA is a sweeping federal act designed to open the door of public education to students with disabilities by requiring school systems to offer disabled students a free appropriate public education ("FAPE") that emphasizes special education and related

³ Although the Board also mentioned its interest in sharing evaluation information and consulting with an organization known as the Child Mind Institute, this request was not raised in the request for due process and also seems premature at this point. The proposed evaluation, once completed, may adequately guide development of the individualized education program and/or may reveal a source of the mutism that is not psychiatric, rendering involvement of the Child Mind Institute unnecessary.

⁴ The PPT has modified various aspects of the proposed evaluation in an attempt to make it more palatable to the Student's parents. (T Morrow)

services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1); C.G.S. § 10-76h; *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982).

2. IDEA demands that public school systems actively and systematically seek out, identify, locate, and evaluate children suspected of having disabilities who may be in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; Regulations of Connecticut State Agencies (“RCSA”) § 10-76d-6(a).

3. When a student is identified as potentially needing special education and related services, the school system must conduct an initial evaluation to confirm the child's eligibility for special education as well as to provide the information necessary to develop and implement an appropriate individual program of instruction and services for the Student, or Individualized Education Program (“IEP”). 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301; RCSA § 76d-9(a).

4. An evaluation under the IDEA serves the twin purposes of identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and helping PPT teams identify the special education and related services the student requires. 34 C.F.R. § 300.301(c)(2); RCSA § 10-76a-1(6).

5. The Board must make reasonable efforts to obtain informed consent from the parent before conducting an initial evaluation. 20 U.S.C. § 1414(a)(1)(D); 34 CFR § 300.300(a)(1).

6. If the parent does not consent or fails to respond to a request for consent, the district may (but is not required to) use the IDEA's mediation or due process procedures to demonstrate the need for an evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 CFR § 300.300(a)(3)(i); *Schaffer v. Weast*, 546 U.S. 49, 52-53 (2005)(school districts may seek a due process hearing "if parents refuse to allow their child to be evaluated"); *Monterey Peninsula Unified Sch. Dist.*, 114 LRP 53229 (SEA CA 11/06/14)(evaluation may be ordered despite lack of parental consent where necessary to confirm eligibility and/or develop program).

7. At the hearing, the party filing the request for due process has the burden of persuasion by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 56-62 (2005). Here, the Board of Education, as the complaining party, bears the burden to prove that its proposed evaluation is needed.

8. In this case, the Student entered the Board's public school system having already been identified as requiring special services through Connecticut's Birth to Three Program. Once the Student entered the Board's pre-school and then elementary school program, the PPT repeatedly requested that the Student's parents consent to an initial evaluation of the Student as required by IDEA. The Student's parents never expressed a cogent objection to the requested evaluation but also never provided consent. The PPT attempted to explain the need for the evaluation and mollify objections it could only guess at, to no avail.

9. Although it has attempted to provide an appropriate education for the Student without adequate information, the Board's efforts have been shackled by the parents' refusal to consent to a comprehensive evaluation over a long period of time. The PPT lacks the knowledge it needs to inform and monitor an appropriate program for the Student as well as to confirm her eligibility for special education and related services.

10. The Board fully demonstrated that the evaluation it proposes is necessary and appropriate to confirm that the Student requires special education and related services, as well as to develop and monitor an appropriate program of instruction and services for her. The parents have not presented any cogent objection to the proposed evaluation or reason that it should not take place.

FINAL DECISION AND ORDER:

The Board shall proceed with the evaluation as proposed at the January 10, 2017 PPT meeting despite the absence of parental consent.