

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Southington Board of Education

Appearing on behalf of the Parents: Courtney Spencer, Esq.
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Appearing on behalf of the Board: Craig Meuser, Esq.
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Appearing before: Patrick L. Kennedy, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board offer an appropriate program for the 2015-16, 2016-17, 2017-18 school years?
2. If not, is the Forman School program the appropriate program for the Student for the 2017-18 school year?
3. If so, should the Parents be reimbursed for tuition and other expenses for the placement at Forman School?
4. Is the Student entitled to compensatory education?

PROCEDURAL HISTORY:

Case 17-0610 was commenced by the Parents by request received by the Board on July 3, 2017. A prehearing conference was held on July 21, 2017. At the prehearing conference, an initial hearing date was set for September 11, 2017 (which was subsequently cancelled) and the decision date was determined to be September 15, 2017.

Hearings were held on November 2, 2017; November 21, 2017; December 8, 2017; January 9, 2018; January 19, 2018; February 8, 2018; February 13, 2018; February 28, 2018 and March 20, 2018. Following the hearing, the parties submitted briefs on

April 10, 2018. The parties made several requests, none of which were objected to, to extend the decision date, which were granted after consideration of the factors provided in Connecticut State Regulations §10-76h-9(d). The current decision date is therefore May 14, 2018.

The following witnesses testified on behalf of the Parents:

The Mother of the Student.

Margaret Walsh, Pupil Personnel Services Director, Southington Public Schools
Melissa Boyer, Director of Town Funding and Science Teacher, Forman Schools
Elizabeth Goodell, Ph.D., Independent Evaluator

The following witnesses testified on behalf of the District:

Kara Sievel, Literary Specialist, Kennedy Middle School
Susan Lamontagne, Language Arts and Science Teacher, Kennedy Middle School
Emily Dixon, School Counselor, Kennedy Middle School
Jamie Slotnick, Special Education Teacher, Kennedy Middle School
Mike Kowalchick, Assistant Head of Forman School
Susan DeSimone, Language Arts Teacher, Kennedy Middle School
Amy Fontaine, Social Studies Teacher, Kennedy Middle School
Glenn Dunham, Science Teacher, Kennedy Middle School
Tara Sullivan, Language Arts Teacher, Kennedy Middle School
Anne Chubet-Mangiopra, History Teacher, Kennedy Middle School
Christine Connolly, Special Education Teacher, Southington High School
Sonya Kunkel, Special Education Coordinator, Southington Public Schools
Margaret Walsh, Pupil Personnel Services Director, Southington Public Schools

The following witness testified as a rebuttal witness on behalf of the Parents;

Patricia Anderson, Educational Consultant, State of Connecticut (Retired)

Hearing officer Exhibit HO-1 was entered as a full exhibit.

Parent exhibits P-1 through P-24 and P-26 through P-33 were entered as full exhibits.

Board exhibits B-1 through B-57 were entered as full exhibits.

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

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law set forth herein, which reference certain exhibits and witness testimony, and are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. *SAS Institute Inc. v. S&H Computer Systems, Inc.*, 605 F.Supp. 816 (M.D.Tenn. 1985); *Bonnie Ann F. v. Calallen Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

SUMMARY:

The Student has been a student in the School District and is currently in ninth grade. She has received Section 504 accommodations for several years. In eighth grade, the Parents requested an Independent Education Evaluation (IEE) for the Student which was provided. In May of that year, a Planning and Placement Team (PPT) meeting was held to discuss the results of that evaluation; the Parents rejected the recommendations of the PPT and subsequently enrolled the Student at Forman School.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACT:

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

1. The Student is a fourteen-year old girl who is in ninth grade and who resides in Southington and was unilaterally placed by her Parents at Forman School on August 14, 2017. The Student was found eligible for special education on April 17, 2017 under the primary disability of Specific Learning Disability/Dyslexia. The Student is an honor roll student who has been described as “very smart”, “very bright”, “very motivated”, “a leader with her peers” and “very well organized”. (Sievel, 1/9/18.)
2. In 2012, the Student was provided with accommodations under Section 504 for a diagnosis of Convergence Insufficiency and Accommodative Dysfunction, which was described as a sensorimotor anomaly of the binocular visual system. The accommodations consisted of .5 hours per week of occupational therapy support, extra time for classroom assignments and district assessment and preferential seating. (B-12.) Additional accommodations were later added including push in support for literacy. (B-13.)
3. In sixth grade, the Student received Tier II Scientific Research Based Intervention (SRBI) for decoding skills with the “Rewards” program. In seventh grade, the Student was given Tier III intervention consisting of small group instruction through the “Wilson” program to address decoding and encoding skills. (B-42.)

4. From sixth grade through eighth grade, the Student received second honors in every marking period except for two trimesters in which she received first honors. (B-39, p.3.)
5. In Fall of 2015, the Student's scores in the Wilson Assessment of Decoding and Encoding (WADE) were 91% for Real Words, 27% for Nonsense Words and 38% for Spelling. In Spring of 2016, those respective scores were 96%, 57% and 56%. (B-20, B-50.)
6. The Literacy Specialist who taught the Student in middle school observed that "...when I was in the classroom observing her she was doing really well in the classroom. She excelled." (Sievel, 1/9/18.)
7. The sixth grade Language Arts and Science teacher observed that the Student was "Somebody who was excited to learn. Somebody who participated. Somebody who liked to work with other kids." (Lamontagne, 1/9/18.)
8. The Student won the school Student of the Month Award at one point. (*Id.*)
9. The School Counselor for the middle school reported that the Student was "a well-rounded student with successful grades, always making the honor roll." (Dixon, 1/9/18.)
10. The Special Education Teacher for the middle school, who provided the push in support for literacy provided in the Section 504 plan, stated of the Student, "She was always a very hard working student. She was engaged in the lesson. She took a leadership role often in the classroom and would help other students when they needed help with completing work that they might have been having difficulty with in the classroom. She always seemed happy to be there, very easy to engage in conversation." (Slotnick, 1/19/18.)
11. The Special Education Teacher further testified that the Student did not display anxiety or have any difficulty with her peers. (*Id.*)
12. The seventh grade Language Arts teacher testified, "I thought she was delightful and she was happy and I thought she did well...I don't think she had any issues with kids in the class either. She seemed well adjusted. She was polite." (DeSimone, 2/8/18.)
13. The seventh grade Social Studies Teacher testified, "She always was willing to participate in everything...[S]he...always stuck out as someone who would embrace what we were doing." (Fontaine, 2/8/18.)
14. The seventh grade Science Teacher testified, "...she fit right in. She never—there was never a complaint. I don't remember any complaint that [Student] ever said to me." (Dunham, 2/8/18.)

15. On December 12, 2016, when the Student was in eighth grade, the District convened a PPT in response to a parent notice of referral to determine eligibility for special education and related services. (P-18, B-24.)
16. At the PPT, in response to the Parents' request for an independent neuropsychological evaluation, the District agreed to provide a neuropsychological evaluation of the Student to be conducted by Dr. Elizabeth Goodell. (B-26.)
17. Dr. Goodell administered a number of tests including the Wechsler Intelligence Scale for Children V (WISC-V), Test of Word Reading Efficiency, 2d Ed. (TOWRE-2), Woodcock-Johnson Psycho-Educational Battery-IV-subtests and the Gray Oral Reading Test, 5th ed. (GORT-5). (P-20.)
18. The evaluation concluded that the Student had a specific learning disorder in reading and writing, reduced working memory and processing speed resulting in executive dysfunction and compromised spelling skills. (P-20.)
19. The evaluation further stated, "Relative weaknesses had to do with Visual Spatial, Working Memory, and Processing Speed. It is noteworthy that these indices in 2012 were in the Average range, but are now below peers." (P-20.)
20. On the GORT, the Student dropped from the 63rd percentile in Rate in 2012 to 16th in 2017, from the 25th percentile in Accuracy to 9th and from the 37th in Fluency to 9th, although the student did improve in Comprehension. (P-20.)
21. On the TOWRE, the Student was in the 21st percentile in Phonemic Decoding Efficiency although she did score in the 70th percentile in Sight Word Efficiency. (P-20.)
22. On the Woodcock-Johnson tests, the Student scored at the 14th percentile and at a third-grade level in Word Attack, at the 22nd percentile and at a fifth-grade level in Letter Word Identification and at the 17th percentile and at a fourth-grade level in Reading Skills. (P-20.)
23. The evaluator's interpretation of the test data was that "basically she's reading five grade levels below peers". (Goodell, 12/8/17.)
24. The evaluator stated in her evaluation, "As stated in Overcoming Dyslexia by Dr. Sally Shaywitz (p. 135), the typical profile for a dyslexic student is a combination of significantly reduced phonological processing skills (including decoding), with reading comprehension often average or above. In [the Student]'s case she is a good guesser and uses other cognitive skills to derive the meaning. *Stronger scores for reading comprehension do not minimize her need for direct instruction*

- in remedial reading (for lower level phonological skills—such as decoding) at the high school level.” (P-20, emphasis in the original.)*
25. Dr. Goodell made 17 specific recommendations at the conclusion of her evaluation. (P-20.)
26. The first of the recommendations was: “The TEAM should convene and strongly consider an IEP for [the Student]. She has had a 504 grades 2-8, but today’s testing demonstrates the need for direct services and more support. She needs to be in a language-based program for high functioning dyslexics [sic] with small classes (6-8 students). The small class size (with fewer distractions) is important for helping her with build strategies for coping with memory deficits. Direct instruction for reading (decoding and fluency) and writing needs to be part of her curriculum as plans are made for 9th grade. This is very important since high school is the last ‘window of opportunity’ to remediate reading and writing before she goes off to college. [The Student]’s schedule should be reviewed and she should be placed in classes without heavy reading assignments. *If Southington High School does not have a language-based program for high functioning dyslexics, and if [the Student] continues to have difficulties with self-esteem and struggle to make meaningful/effective progress, a separate, language-based program should be considered.*” (P-20, emphasis in the original.)
27. Under the heading of “READING”, the evaluator stated: “[The Student] will need a daily 1:1, 50-minute pull-out in remedial reading. A structured, multisensory approach should be used such as Orton Gillingham, Read Naturally, Project Read, or Lindamood-Bell. The teacher should be certified in the approach used and have experience working with adolescents using high interest reading materials. The focus should be on improving decoding skills, phonological processing, and fluency.” (P-20.)
28. A PPT was held on April 17, 2017 and the Student was found eligible for special education under the primary disability of Specific Learning Disability/Dyslexia. (B-31.)
29. The team developed an IEP which provided that “[Student] will continue receiving decoding and encoding support in the Wilson Language Program for the remainder of the 2016-17 school year.” The plan further provided, “[Student] will receive ESY services for the summer of 2017. 2 days per week will be 1 hour per day, code-based literacy, 2 days per week will be 1½ hours per day, 1 hour of code-based literacy and ½ hour of academic support in preparation for high school.” (B-31.)
30. The IEP further provided that the Student would receive 30 minutes of counseling per week. (B-31.)

31. The Counselor met with the Student for the remainder of the school year as called for in the IEP. (Dixon, 1/9/18.)
32. Subsequent to the PPT, the Mother was given a tour of the high school. (Mother, 11/2/17.)
33. On May 12, 2017, a PPT was convened for the purpose of planning the transition to high school in the 2017-18 school year. (B-34.)
34. The PPT recommended placement at the high school with academic support 2/6 days for 45 minutes, daily code-based literacy support for 45 minutes and school-based counseling support for thirty minutes per week. (B-34.)
35. The academic support to be provided would have been continued instruction in the Wilson program. (Walsh, 11/21/17.)
36. The Parents requested placement at Forman School and two years of compensatory education, both of which were rejected by the district. (B-34.)
37. The Parents did not accept the IEP and enrolled the student at Forman School on August 14, 2017. (Kowalchick, 1/19/18.)
38. Forman is specifically geared toward students with learning disabilities, including dyslexia and executive functioning problems, and provides training to its staff in teaching children with such disabilities. (Boyer, 11/21/17.)
39. At Forman School, the Student receives one-to-one Orton-Gillingham instruction in seventy-five minute periods two or three days per week from a teacher who has received 200 hours of Orton-Gillingham training. (*Id.*)
40. The Student's classes at Forman School have seven to eleven students and those class sizes allow the teacher to keep the Student from falling behind. (*Id.*)
41. The Student appears to be happy and successful at Forman. (*Id.*; Mother, 11/2/17.)
42. Forman's tuition is comparable to that of similar schools. (Kowalchick, 1/19/18.)

CONCLUSIONS OF LAW AND DISCUSSION:

1. Denial of FAPE

The Parents allege denials of both procedural and substantive FAPE. The primary allegation of denial of procedural FAPE concerns the Child Find aspect of IDEA law, i.e. that the Student should have been evaluated for special education based on a reasonable suspicion that she required it.

In this case, the undersigned finds that there was no violation of Child Find on the part of the Board because, based on the information that the District had prior to receiving the results of the IEE, the Student appeared to be having success. “To hold a school district liable for failing to identify a student who should be evaluated for purposes of receiving special education, a ‘claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate’”. *M.P. vs. West Hartford Board of Education*, 118 LRP 11253, 31-32 (2d Cir., 2018).

The Student was an honor roll student who had shown progress in her Gates McGintie testing and, based on extensive testimony by her teachers, was an active participant in class who was observed to be doing well in all aspects of her school experience. (Findings of Fact 6-14.) While there was an isolated example of her showing frustration in school and some indication in emails from the Mother that the Student was having trouble, the overall reasonable impression that the school system had was that the Student was successful. Accordingly, the undersigned finds no violation of Child Find for the 2015-16 through 2017-18 school years.

The Parents also argue that they were deprived of the right to meaningful participation in the PPT. (The Parents’ brief does not specifically identify which PPT is being referenced, but the argument appears to be directed to the May 2017 PPT.) Having accepted the finding of dyslexia at the prior PPT, the District drafted an IEP that did take into account the recommendations of the IEE in providing for counseling and additional SRBI instruction. (Finding of Fact 34.) While the Parents rejected the recommendations of the PPT because their position was that the Student should be provided with placement at Forman and two years of compensatory education (Findings of Fact 36-37), a good-faith disagreement does not constitute deprivation of the right to meaningfully participate in the PPT. Accordingly, the undersigned finds no procedural violation with respect to the PPT.

The final procedural argument made by the Parents is that the District failed to implement the Student’s IEP in that the School Counselor did not meet with the Student regularly as called for in the document. The undersigned has reviewed the transcript of the Counselor’s testimony, particularly the page cited by the Parents, and finds no basis for that contention—the Counselor testified that she did meet regularly with the Student. (Finding of Fact 31.)

We then turn to the question of whether the IEP drafted for the 2017-18 school year was sufficient to provide substantive FAPE. For an IEP to comply with FAPE, it must provide “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”. *Andrew F. vs. Douglas County School District*, 137 S.Ct. 988, 1001 (2017).

In light of the findings and recommendations of the independent evaluation, the undersigned finds that the recommendations in the IEP were not sufficient to meet the

Andrew F. standard. The evaluator conducted tests beyond those normally administered by the school and found significant deficiencies in the Student's phonetic skills. In particular, the Student's scores on the GORT test, which had been in the average range in 2012, had dropped to low levels in 2017 and the evaluator had concluded that "basically she's reading five grade levels below peers". (Findings of Fact 18-23.)

The undersigned thus finds that the Student was achieving good grades despite her problems with phonological skills because she was able to compensate through her abilities in other areas but that she was reaching the limits of that approach as she moved on to higher grade levels. (Finding of Fact 24.) The Parents are correct in noting that the Student had spent a great deal of time in Rewards and Wilson instruction and that continuation of such programs was not likely to yield reasonable educational benefits for a person in the Student's situation. While the state's recommendations as to SRBI timeframes are guidelines, not hard-and-fast rules, a different approach is indicated where students are spending far more time in the SRBI tiers than the suggested eight to twenty week period. (Anderson, 3/20/18.)

Therefore, the undersigned finds that the provision of continued, even if increased, Wilson instruction under the IEP was not a program reasonably calculated to enable the Student to make progress appropriate in light of her circumstances and thus that the Student was denied FAPE for the 2017-18 school year.

2. Appropriateness of Forman

Even if the Student was denied FAPE for the school year, the District would not be responsible to provide reimbursement for a placement which itself would not be appropriate. The evidence in this case shows that Forman is in fact an appropriate placement for the Student. The school is specifically geared toward students with learning disabilities, including dyslexia and executive functioning problems, and provides training to its staff in teaching children with such disabilities. (Finding of Fact 38.) The Student receives one-to-one instruction in Orton-Gillingham. (Finding of Fact 39.) Other classes are small and provide for personal instruction of students who seem to need extra help in mastering material in a class. (Finding of Fact 40.) The Student has been happy and successful at Forman. (Finding of Fact 41.)

Therefore, the undersigned finds Forman to be an appropriate placement for the Student.

3. Reimbursement of tuition

Even if the Student was denied FAPE and the private placement is appropriate, a hearing officer would still have discretion to not award tuition reimbursement or award it in a reduced amount if the same were warranted by equitable considerations.

In this case, the undersigned finds that the Parents were cooperative with the District throughout the entire process. *M.H. v. New York City Department of Education*, 685 F.3d 217 (2d. Cir., 2009). The Mother attended two PPTs and went on a tour of the proposed public placement, Southington High School. Further, the Parents requested the private placement at the May 2017 PPT but did not enroll the Student at Forman until August. (Findings of Fact 28, 32-33.) Just as the good-faith disagreement between the parties did not constitute predetermination on the part of the District, it also did not constitute a bad-faith refusal on the part of the Parents to give due consideration to placement at the public high school.

Finally, the evidence showed that Forman was not unreasonably expensive compared with similar schools, so the undersigned declines to deny tuition reimbursement on those grounds. (Finding of Fact 42.)

Accordingly, the undersigned finds that the District must reimburse the tuition costs for the Student's placement at Forman for the 2017-18 school year.

4. Compensatory education

As the undersigned has found no deprivation of FAPE for the 2015-16 and 2016-17 school years and orders tuition reimbursement as the remedy for the denial of FAPE for the 2017-18 school year, an award of compensatory education is not warranted.

FINAL DECISION AND ORDER:

1. The undersigned finds that the Student was not denied FAPE for the 2015-16 and 2016-17 school years.
2. The undersigned finds that the Student was denied FAPE for the 2017-18 school year and therefore orders that the Parents be reimbursed for tuition at Forman School for that school year.

May 14, 2018

Final Decision and Order 17-0610