

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF EDUCATION

DUE PROCESS HEARING

Mother

On behalf of her daughter

v.

CASE NO. 11-05

WEST WARWICK PUBLIC SCHOOLS

DECISION

Held: For the School District. The school's proposed placement of the student in the substantially separate therapeutic classroom at the Greenbush School will provide the student with a free, appropriate public education in the least restrictive environment. The school's choice of tutors for the student is appropriate.

### Procedural History

The parent filed this request for a due process hearing on February 28, 2011. A pre-hearing conference was held on March 29, 2011. The parties met for a resolution session on March 28, 2011. The hearing was held on April 20, 2011.

### Issues

The parent contests the educational placement proposed by the school for the student. The parent also objects to the tutor chosen by the school for home-based educational services. She further alleges violations of the Freedom of Information Act regarding her advocate's access to her daughter's school records.

### Positions of the Parties

The parent asserts that her child can be appropriately educated in a collaborative classroom at a different West Warwick elementary school. She believes that her daughter would not have needed to be restrained on the first day of school in 2010 if all the specialist teachers had been timely given copies of her IEP accommodations. She posits that the student should not return to the setting in which she was restrained or work with any staff members who were involved in her restraints, as restraints caused her to regress and further contact will retraumatize her. She thinks that her child will not need to be restrained for unsafe behavior in the future if she is appropriately accommodated in a different collaborative class in a different school building. She objects to the use of restraints on her child. Until the placement advanced by the mother occurs, she requests that a tutor who was not involved in restraining the student be assigned to provide home-based tutoring.

The school district states that the student should be placed in a smaller, self-contained therapeutic classroom for students with emotional disabilities and behavioral challenges. The district asserts that it must be permitted to restrain students whose behavior creates a danger to the student herself or others, and that its choice of tutor was appropriate.

### Witnesses

Dr. Kevin Plummer, for the school district

Mr. Michael Rock, for the parent

Mr. Paul Vigeant, West Warwick director of special education, for the school

Mother of the student

## Findings of Fact and Conclusions of Law

The student was placed with the mother for specialized foster care when the child was about three years old. The parent adopted the student from the custody of the Department of Children, Youth, and Families when the child was five years old. There is no dispute about the fact that the student was subjected to neglect and abuse in her birth home. She manifested significant behavioral problems when she was first placed with the parent. By all reports, the mother has done an excellent job raising this child, and has worked very hard to improve her social and emotional adjustment.

The student has just turned ten years old. She has been evaluated a number of times, and carries mental health diagnoses including post-traumatic stress disorder, adjustment disorder, emotional disturbance of childhood, and communication disorder. She is thought to be affected by the sequelae of reactive attachment disorder. Recent cognitive testing reveals borderline to impaired intellectual functioning, with full-scale intelligence quotient scores of 66 to 68. Although currently placed in third grade, her social and emotional functioning is lower, more akin to first grade. (Tr. pp. 10-18, School's Exhibit 6) The student's trauma history and disrupted early attachment to her primary caregivers cause her to experience heightened anxiety and difficulty accurately understanding and responding appropriately to social situations. (Tr. p. 24)

The student has attended West Warwick Public Schools since preschool. (School's Exhibit 14) She has been placed in collaborative classes to date. In late August 2010, she started third grade in a collaborative class at the Greenbush School. Both a regular education teacher and a special education teacher staffed the class. Her first day did not go well. After twice being escorted from classes due to inappropriate behavior, she was asked to put away items in her collaborative class. She began throwing things and sobbing at her desk. She hit two other students with her hand and her stuffed animal as they walked by, then began hitting and kicking the teacher. The teacher held the student's hands from behind, walked her into the hallway, kept her from running away, and restrained her by holding her seated on the floor for about two minutes until she calmed down. (Parent's exhibits 5 and 47.)

The district admits that copies of the student's IEP accommodations were not provided to her specialist teachers in advance of the first day of school, as should have occurred. Mr. Vigeant testified that the school remedied this problem shortly after the omission was brought to its attention. (Tr. p. 153) This assertion is supported by parent's exhibit 5, a behavior incident report from August 31, 2010, dated September 2, stating "Picture schedule and areas for space reintroduced to (student)."

Unfortunately, the student's inappropriate behavior did not end after her first day. She had ongoing difficulty complying with classroom expectations. The mother supplied 17 additional incident reports. These records show that the child refused to follow the rules, such as coming in after recess, cleaning up after snack or gym, or completing class work. When frustrated, she was given opportunities to take space or use her feeling book

to calm down, for example. She often refused the intervention and her behavior escalated. Reports show that she became physically aggressive, continuing to hit, kick and even bite other students and staff. She was restrained a total of six times, including the initial restraint on August 31, through October 27, 2010. (Parent's Exhibits. 5, 47, 49, 50, 7, 54, 53, 56, 57, 10, 55, 62, 66, 65, 68, 69, 70, 72, 71, 73) Analysis of these exhibits reveals that the student often seemed to be avoiding her schoolwork.

The parent stopped sending the student to school on or about October 27, 2010, due to the use of restraints and the impact she believed the restraints were having on her daughter. The student has been out of school since that time, receiving no educational services. (Tr. pp. 115-118)

West Warwick's IEP Team members propose placing the student in a small, therapeutic classroom at the Greenbush School. Dr. Plummer, a licensed psychologist and school program consultant, supported this placement. He observed the student and also observed the therapeutic class. He noted that the class was quiet, calm, orderly and predictable. He testified that this environment is calming to the brain, and would help the student reduce her anxiety and pay attention to the lessons. The staff members positively reinforced the children. Dr. Plummer testified that it would not be possible to make a collaborative class work like a therapeutic class due to the greater number of children in the collaborative setting and the inevitable disruptions to routine caused by the larger class size. The student-teacher ratio is higher in the therapeutic class than in than in any collaborative classrooms. The therapeutic class is staffed with a full-time special educator, one full-time and two part-time teacher assistants. The student would have the opportunity to attend mainstream classes when appropriate. (Tr. pp. 25-30; 132)

The parent disagrees with removing her daughter from a collaborative class. It is her belief that her daughter was successful in collaborative classes before, and could be successful in this type of class at a different school building. She opines that if the IEP had been followed on the first day of school and the student hadn't been restrained, the year would have been different. She thinks that the school should have tried harder to accommodate the student's needs in the larger class setting, using principles of applied behavior analysis to chart and respond to her behavior. Mother also thinks that the student will do better now that she takes medicine for attention deficit disorder. (Tr. pp. 98, 202-210)

The evidence shows that the student struggled in her collaborative class placements prior to the 2010 academic year. In March 2010, the parent took her for an evaluation at Hasbro Children's Hospital. The mother sought the evaluation due to behavioral concerns at school, specifically being aggressive towards her peers and refusing to do school work. Her teacher reported that although the student had made "great progress behaviorally" during the year, her behavior was still her biggest issue. She reported aggression to her peers at school and stated that her behavior was interfering with her learning. (Parent's Exhibit 44) Mother also said that the student was "noncompliant only around school work and school demands but not in other settings or at home.... Mother is not sure if (the student's) negative behaviors are secondary to her

unhappiness with current school placement and, in particular, increasing task demands.... She does not want to go to school this year, which has become a big issue. (The student) also presents with developmental delays.” (Parent’s Exhibit 44, psychological evaluation.)

The August 18, 2010 update to the Hasbro evaluation states that mother reported the child was refusing to do school-based work at home, even though she was able to do the work. The student’s report cards for grades one and two also refer to behavior interfering with her progress. Her second grade teacher noted she did better in small groups or with one-to-one assistance. (Parent’s Exhibits 1 & 2)

The Hasbro evaluation recommended an integrated classroom setting with resource support for academics, noting the student will benefit from access to typically developing peers. Dr. Lubiner, who evaluated the student in August of 2010, also recommended an inclusion setting based upon the parent’s report that the child had done well in that setting. Neither set of evaluators read the school file, observed the child at school, or were aware of the developments in the fall of 2010. (Parent’s Exhibit 44; Tr. p. 121)

The mother also took the student for a psychiatric assessment at the Kent Center in October 2009, due to concerns about daily episodes of anger and aggression to family members. The parent reported that the child was having problems in school and home with tantrums, anger and physical aggression. She stated that the problems began at school, especially when the number of students in her collaborative class increased, then spilled over to home. The doctor at the Kent Center thought the student might need a smaller classroom due to the problems she was having interacting with peers. She believed the current classroom might be overwhelming to her. (Parent’s Exhibit 34).

The parent called Mr. Michael Rock as a witness. Mr. Rock is a retired Rhode Island special education director. He recommended that the student be placed in a smaller class setting with opportunities for inclusion in the mainstream as her adjustment improved. (Tr. p. 105)

The mother believes that her child was a victim of physical and possibly sexual abuse. (See report of Dr. Lubiner, School’s Exhibit 7, on page one.) She is of the opinion that as being restrained retraumatized her, triggered old memories and led to severe behavioral dysregulation at home, including verbal and physical outbursts, nightmares, anxiety, school refusal and toileting accidents. She objects to the child’s placement in the therapeutic class because the teacher in that class was involved in at least a physical escort of the student, and possibly in a restraint during which the student’s arm received a bruise about the size of a nickel, although the record is unclear. She further asserts that sending the child back to the Greenbush School will be traumatic for her. (Parent’s Exhibits 79 & 22; Tr. pp. 202-210)

Mr. Rock testified that he did not support placing the student in the proposed therapeutic class at the Greenbush School for the reasons advanced by the parent. Mr. Rock has no education or experience in psychology. (Tr. pp. 105, 108)

Dr. Plummer did not object to the student's return to the Greenbush School or to having the teacher involved in physical control of the child being assigned as her teacher. Mr. Vigeant, the West Warwick special education director, has a Master's degree in social work. He also supported the school's proposed placement. He believes a careful transition plan must be developed to gradually reintegrate the student to school and the therapeutic classroom. (Tr. pp. 114, 126-127) As her functioning improves, she can begin to spend time in general education settings. (Tr. p. 132)

The parent objects to restraining her child. She proffered several exhibits about reducing the use of restraints in schools, particularly with students who suffered sexual abuse in the past. (Parent's Exhibits 45, 78, 42, 46) As discussed above, she believes that exposing the child to individuals who restrained her, or seeing other students being restrained, will continue to harm her mental health.

The parent placed a great deal of emphasis on an article entitled "The Impact of Restraint on Sexually Abused Children and Youth" by a Dr. Lorraine Fox from the Residential Group Care Newsletter, Vol. 4, January 2004. (Parent's Exhibit 45.) She emphasizes a statement in the article that "(w)hen we "force" compliance with restraint, we ultimately reinforce the unfortunate view that one gets what one wants by using control, intimidation and physical strength- exactly the lesson the child/youth learned while being sexually abused."<sup>1</sup>

The school witnesses agreed that restraint should not be used to force compliance with a demand. No one testified that restraints are a therapeutic intervention, and no one asserted that the student benefited psychologically from being restrained. The school witnesses were clear that restraint is only used to ensure the safety of the student or other students or staff. The parent apparently believes that a rubric used to send home daily reports about the student's behavior, including whether she had to be restrained, actually authorized use of restraints for reasons other than protection of the student or others from imminent harm from the student. Review of the rubric shows that the mother's interpretation is incorrect. (Tr. 171-176; Parent's Exhibit 58)

Dr. Fox proposes reducing the need for restraints by using alternatives of negotiation, therapeutic assistance, and "self-control." The school's behavior incident reports show that school staff did attempt to implement the child's IEP accommodations and help her make better choices when she was upset, but were not always successful. (Parent's Exhibits. 5, 47, 49, 50, 7, 54, 53, 56, 57, 10, 55, 62, 66, 65, 68, 69, 70, 72, 71, 73) The parent presented no evidence of other approaches, not tried by the school, to

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<sup>1</sup> For the purposes of this proceeding, the hearing officer assumes, without deciding, that the child was sexually abused.

eliminate her daughter's aggressive reactions to routine situations in the collaborative classroom.

In her article, Dr. Fox states that she understands there are situations in which a child may need to be restrained to keep him or her safe. She also states "It is not "therapeutic" to allow a child/youth to harm themselves (sic) or anyone else."

The mother is of the opinion that her daughter should never be restrained. When questioned about what the school staff should do if her daughter tried to harm herself or others, the parent stated that she should be called to the school to pick her up. She had no suggestions for what the school personnel should do to protect the student or others while waiting for her arrival. (Tr. p. 210) This is unrealistic. The school has a duty to protect its students and staff, and must react immediately to an emergency.

The parent seems to believe that the child's aggressive behavior will disappear if she moves to a collaborative class in a different school building, with different staff, and with unspecified changes to the student's educational accommodations. (Tr. pp. 210, 211, 247) However, she presented no evidence, either through witness testimony or documents, to support this contention. She also presented no competent evidence that the child's new medication for attention deficit disorder would eliminate her aggressive behavior at school.

As noted above, the student has been out of school since the end of October 2010. The school offered tutoring by Ms. Barbosa, the special educator assigned to the substantially separate class proposed as the student's new placement. The parent objected to this individual, due to her involvement in physical escort or restraint of her daughter. In a letter to Mr. Vigeant dated December 15, 2010, the mother stated that children who have been traumatized should not be exposed to people or places that have been involved in the trauma. Therefore, she requested a different tutor. (Parent's Exhibit 22)

Mr. Vigeant explained that he recommended Ms. Barbosa as the student's tutor because of her background working with children with behavior and emotional difficulties. He also thought that having Ms. Barbosa work with the student would help develop a positive relationship with her and help her adjust to the therapeutic classroom if she were placed there. (Tr. pp. 114, 150-151)

Mr. Rock objected to having Ms. Barbosa tutor the student, based upon his reading of Dr. Fox's article. (Tr. p. 104-105) However, Dr. Fox's article never states that a person who has restrained a previously traumatized child should have no further contact with that child. (Parent's Exhibit 45) A school cannot be expected to change its staff members every time a student needs to be restrained.

The school's rationale for its choice of tutor is reasonable. Dr. Plummer, the expert witness presented by the school, did not object to the student being educated by a teacher involved in a past restraint. Although Mr. Rock disagreed, he is not a mental

health professional, and seems to rely heavily on an article that does not directly support his position. School administrators have broad discretion in making teaching assignments. The parent presented insufficient evidence to show that the school district abused its discretion in this regard.

As a result of truancy court proceedings, the school was ordered to and did offer to provide a tutor who had not been involved in any restraints. This addressed the mother's concerns. The parent then refused the new tutor because she was worried that the school would use this person to testify against her in this hearing. (Tr. pp. 189-191) Speculative tactical considerations do not support the mother's choice to deny educational services for her child.

The parent's hearing request letter claims that the school violated the Freedom of Information Act by not allowing her advocate, Mr. Rock, access to the student's file on February 16, 2011. She states Mr. Rock was given the file on February 18, 2011, at an IEP meeting. This hearing officer's jurisdiction is limited to matters pertaining to the student's special education. Violations of the Freedom of Information Act do not fall within this jurisdiction. Parents are entitled to access to special education records regarding their children, but Mr. Rock did not testify about any denial of access to the student's records.

The parent strongly believes that her daughter can be successfully educated in a different collaborative classroom and that she will not need to be restrained. However, this case must be decided upon the strength of the evidence, not on the strength of a party's convictions.

The parent has the burden of proof in this proceeding. Schaffer v. Weast, 546 U.S. 49 (2005). She has failed to meet this burden. The evidence shows that the student has been struggling in school for several years. Her behavior has been a problem since at least first grade. The causes for her struggles include her emotional vulnerabilities due to her past experiences of abuse and neglect and her cognitive profile. The fact she was restrained this past year is clearly not the sole cause of her distress in school. Perhaps the student would have had a better start to the year had her IEP accommodations been sent to all staff before the start of school. However, the student continued to have serious, aggressive outbursts after the accommodations were implemented. The child is not to blame for her history of difficulties in school. She is overwhelmed in large classes. Her emotional problems and resulting behavioral outbursts are hampering her learning and her peer interactions, as well as interfering with the learning of other students. It is time to try a new approach.

Dr. Plummer and Mr. Vigeant testified persuasively that the student can no longer be appropriately educated in a collaborative classroom. The testimony of the parent's witness, Mr. Rock, is given less weight as he never observed either class at the Greenbush School. Further, he lacks the professional credentials in psychology and social work possessed by the school's witnesses. Such expertise is important in cases involving children with emotional disturbances.

The evidence is clear that the student's best chance of succeeding in a public school setting will be through placement in the substantially separate therapeutic classroom at the Greenbush School. She will benefit from the smaller class size and more consistent structure. At this point, it is the least restrictive appropriate option. The parent did not present sufficient evidence to show that placing her child in this class, taught by a person who previously escorted or restrained her, would cause her harm. Although the success of the therapeutic class placement cannot be guaranteed, it is best suited to provide this student with the free, appropriate public education she deserves.

I understand the mother will disagree with this decision. I encourage her to do her best to support this placement, as her positive attitude will help her child adjust to returning to school. Hopefully the student will be successful and will not need to be placed in a more restrictive day school setting, in which she will not have the opportunity for contact with typically developing peers. I further encourage the parent to cooperate with tutoring, if needed, as the student is reintegrated into school after her long absence.

With respect to the issues in this case:

1. West Warwick's proposed placement in the therapeutic class at the Greenbush School offers the student a free, appropriate public education in the least restrictive environment.
2. Both tutors chosen by West Warwick are appropriate.
3. The Hearing Officer has no jurisdiction to rule on the parent's claims under the Freedom of Information Act. The parent presented no evidence of any procedural violations of state or federal special education law with respect to access to student records.

It is so ordered.

May 12, 2011

By the Hearing Officer

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Carol J. King