

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. New Haven Board of Education

Appearing for the Student: The Student's Mother (the "Parent")

Appearing for the Board: Marsha Moses, Esq.  
Berchem, Moses & Devlin, P.C.  
75 Broad Street  
Milford, CT 06460

Appearing Before: Scott P. Myers, Esq., Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

The issues set for Hearing, as framed by the Hearing Officer based on the discussion at the Pre-Hearing Conference, were:

1. Whether the Student's current IEP provides him with FAPE in the LRE.
2. Whether the Student's current IEP is being properly implemented.
3. If the Student's current IEP does not provide him with FAPE and/or is not being properly implemented, what relief is the Parent entitled to receive.

**PROCEDURAL HISTORY/SUMMARY:**

The Parent commenced this proceeding by request directed to the Due Process Unit of the Department's Bureau of Special Education and Pupil Services dated March 5, 2003. That request was marked as Exhibit HO 1. Howard Klebanoff and his legal assistant were identified as "cc" recipients of the request, but during a telephone conversation with the Parent to arrange a date and time for the Pre-Hearing Conference, the Parent confirmed that she was not represented by Mr. Klebanoff in this proceeding and did not have counsel.

By agreement of the parties, a Pre-Hearing Conference was convened on March 11, 2003, at which time a hearing schedule was established and a scheduling order entered. At the Pre-Hearing Conference the Parent indicated that she had raised the issues she was submitting for Hearing at a PPT convened prior to January 2003.

On March 17, 2003, the Board submitted a motion to dismiss on the ground that the Parent had failed to comply with the requirements of Conn. Gen. Stat. Sec. 10-76h(a)(1) and Section 10-76h-3(5)(g)-(h) of the Regulations of Connecticut State Agencies (the "Regulations") that prior

to requesting due process she present at a Planning and Placement Team (“PPT”) meeting convened by the respondent New Haven Board of Education (the “Board”) the issues that are being submitted for resolution in this due process proceeding. On March 17, 2003, the Hearing Officer issued an order regarding the Board’s motion to dismiss, advising the parties that the Hearing Officer would reserve ruling on the motion pending receipt of testimonial evidence as to whether the disputed issues had been properly raised at a PPT and directing the parties to appear for hearing in accordance with the March 11, 2003 Scheduling Order.

On March 18, 2003 the Board timely submitted its record and a witness list. The Parent at Hearing claimed that she did not receive a copy of the Board’s witness list, and was provided with a copy.

Although the Parent at Hearing confirmed that she had received the March 11, 2003 Scheduling Order, she did not submit a witness list as directed in the Order, or submit any documentary record of her own. She confirmed at Hearing that she was not submitting a witness list and also stated that she had no documents of her own to offer as evidence. The Parent did not submit a written opposition to the Board’s motion to dismiss.

As indicated in the March 11, 2003 Scheduling Order, the Hearing Officer had been called for jury duty on March 24, 2003 and had stated that he would contact each party on March 24, 2003 to confirm whether he was available for Hearing on March 25, 2003. In a telephone call with the Parent on March 24, 2003 to confirm that Hearing was going forward on March 25, 2003, the Hearing Officer attempted to explain the jurisdictional issues raised by the Board’s motion and the Parent’s options, including the option of withdrawing and refile her request after presenting the issue to a PPT if she had in fact not presented the issue to a PPT as alleged by the Board. The Parent stated that she wished to proceed with Hearing.

Absent objection of the Parent at Hearing, the Board’s exhibits, marked B-1 through B-42, were admitted into the record as business records for evidentiary purposes.

Hearing convened on March 25, 2003 at 9:30 a.m. at the Board’s offices. The Parent appeared, accompanied by Coleen Proctor, a non-lawyer special education advocate, and by Susan Santora, an “Education Therapist” with the Learning House of Guilford, Connecticut. Ms. Santora authenticated Exhibits B-28, B-31, B-32 and B-35 as reports of evaluations and/or observations of the Student prepared by The Learning House.

The Board appeared at hearing on March 25, 2003 through Mr. Highsmith, principal of the school the Student currently attends, and through Ms. Chalmers, the Board’s Director of Pupil Personnel Services.

### **FINDINGS OF FACT:**

To the extent that the procedural summary includes findings of fact or conclusions of law, that the findings of fact are conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels. *See, e.g., Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993). Citations to testimony

or documentary exhibits are for illustrative purposes and not meant to exclude other admissible evidence in the record supporting that finding.

1. The Student is an 11 year old male, who is currently in the 5<sup>th</sup> grade attending a Board elementary school. (B-42) There is no dispute raised in this proceeding that the Student is eligible to receive special education and related services under the applicable Federal and state laws, and no dispute over the classification of the Student's exceptionality.
2. The Student began attending the Board's schools in January 2003. (B-42) At all times prior to January 2003, the Student attended the public schools in Town X. While at Town X, problems with reading, attention and achievement level were identified early in and consistently over the Student's academic career, and he received Title 1 services and other interventions implemented to address these problems. The Student was described generally as highly motivated, cooperative, pleasant to have in class and enthusiastic throughout his academic year, with no reported behavioral problems or other behavioral concerns. (*See generally* B-1 – B-33)
3. Between November 30, 2000 and September 20, 2002, 7 PPTs were convened, mostly at the request of the Parent due to Parental concerns with the Student's reading problems and overall academic achievement. (B-13; B-16; B-17; B-26; B-27; B-29; B-33) In the period between October 2000 through approximately June 2002, the Student was administered psychological, educational and intellectual assessments on a number of occasions. (B-14; B-15; B-18; B-25; B-28; B-31; B-32) Some of those evaluations were performed by The Learning House. The records suggest that at least one due process proceeding was commenced against Town X, which was resolved through a mediation agreement. One term of that agreement was that Ms. Santora was retained as a consultant to Town X with respect to the Student's special education program. (B-28)
4. The Student was first identified as eligible to receive special education and related services in September 2002 on the basis of a specific learning disability. An initial IEP was prepared and implemented by Town X in September 2002. (B-33)
5. At the time the Student transferred into the Board's school from Town X, his then-current IEP, which had been implemented on September 20, 2002, provided for a total of 12 hours and 40 minutes per week of special education services as follows: 9 hours and 10 minutes/week of reading instruction provided in a resource room and through Title 1 services; 1 hour/week of written language instruction provided in the regular classroom; 2.5 hours/week of math instruction provided in the regular classroom; and 30 minutes/week of speech and language services to be provided in a resource room setting. Under this program, the Student spent 21.5 hours/week of time with non-disabled peers. (B-33)
6. The September 20, 2002 Town X IEP (B-33) identified the following goals, each of which had a variety of specific objectives:
  - a. Goal # 1: The Student will master within one year's time instruction word analysis, sight vocabulary and fluency level using various materials and methods, including specifically defined readers and texts.

- b. Goal # 2: The Student will be able to use specific comprehension skills that are commensurate with instructional level and reading material with 80% accuracy.
  - c. Goal # 3: When given a writing curriculum, the Student will be able to use correct grammar, punctuation and spelling on a 3 paragraph story within one year's growth.
  - d. Goal # 4: When given Saxon Math curriculum, the Student will demonstrate the ability to use correct sequencing, number patterns and general organization with 80% accuracy.
  - e. Goal # 5: The Student will demonstrate improved phonological skills.
7. The September 20, 2002 IEP also provided for specific classroom accommodations, including use of alternative text, tape recorder, modified worksheets, manipulatives, prior notice of tests, extra time to take tests, alternative test, preview of test procedures, shortening tasks, simplify test wording, study outlines, daily homework lists, list sequential steps, modified contents, monitored oral reading and mnemonics. (B-33)
  8. At the final PPT held in Town X, held on December 9, 2002, the Parent reported her belief that she Student had made "good progress" under the September 20, 2002 IEP and requested that he be permitted to remain in Town X's schools notwithstanding that he would be moving to New Haven in January 2003. (B-37) That request was not accommodated and the Student began attending the Board's schools in January 2003.
  9. On January 27, 2003, the first PPT for the Student held by the Board was convened. (B-42)
  10. The January 27, 2003 PPT is the only PPT held to date by the Board for the Student. At no point since January 27, 2003 has the Parent requested another PPT be convened by the Board. (Parent Statement at Hearing)
  11. Attendees at the January 27, 2003 PPT included Mr. Highsmith, the Parent and Mr. Klebanoff's Legal Assistant. (B-42)
  12. Prior to January 27, 2003, Town X provided the Board with the Student's educational records. (B-39)
  13. At the January 27, 2003 PPT, the Board identified the Student's exceptionality as a specific learning disability (consistent with Town X's classification) and implemented an IEP which provided for placement at a Board elementary school and delivery of services as follows: 5 hours per week of reading instruction to be provided in a resource room, 4 hours/week of written language services to be provided in the regular classroom, 3 hours/week of math services to be provided in the regular classroom and 30 minutes/week of speech and language services in a resource room. Overall, the Board's IEP provided that the Student would spend 24.5 hours with non-disabled peers. (B-42)

14. The January 27, 2003 IEP (B-42) identified goals and objectives consistent with those identified by Town X in the September 20, 2002 IEP. The goals were as follows:
  - a. Goal # 1: The Student will master within 1 year's instruction word analyses, sight vocabulary and fluency level using various materials and methods.
  - b. Goal # 2: The Student will be able to use specific comprehension skills that are commensurate with instructional level and reading materials with 80% accuracy.
  - c. Goal # 3: When given the writing curriculum, the Student will be able to use correct grammar, punctuation and spelling in a 3 paragraph story within one year's instruction.
  - d. Goal # 4: When given the Addison-Wesley math curriculum, the Student will demonstrate the ability to use correct organization with 80% accuracy.
  - e. Goal # 5: The Student will improve phonological awareness skills.
15. The January 27, 2003 IEP also provided for specific accommodations with respect to the 6<sup>th</sup> grade CMT/CAPT testing, and specific classroom accommodations including: use of a tape recorder, modified worksheets, alternative texts, prior notice of tests, extended time to complete tests, shortened tasks, simplification of test wording, provision of study outlines, folders, sequential steps for completing assignments, preferential seating, a multi-sensory approach and pre-teaching. (B-42) These accommodations are similar in nature and scope to the accommodations identified by Town X in the September 20, 2002 IEP.
16. The January 27, 2003 PPT was noticed on January 9, 2003 (B-40). The Parent was provided with a copy of the procedural safeguards at the January 27, 2003 PPT and signed the PPT minutes indicating assent to the proposed IEP and placement. (B-42) The PPT minutes also note that the "team was in agreement" with the proposed IEP and placement. There is no indication in the PPT minutes that the Parent requested an out-of-district placement, or that the Parent requested a particular service that was refused by the PPT.
17. The March 5, 2003 request for hearing submitted by the Parent, provided in its entirety as follows: "I, [the Parent], am requesting a Due Process Hearing as soon as possible. I do not need an Advisory Opinion or a Mediation Hearing. I need a Due Process Hearing. My child is a Special Education student and he is not receiving a Free Appropriate Education that is Appropriate for his special needs. Thank you." (HO 1)
18. At the Pre-Hearing Conference, a question arose as to whether the Parent had presented the concerns prompting her to request due process to a PPT convened by the Board prior to the March 5, 2003 request for due process.
19. At Hearing, the Parent stated that she received some communications or materials from the Hearing Officer by e-mail. However, the Parent advised the Hearing Officer that she had no e-mail address and did not provide any e-mail address to the Hearing Officer. The Parent also did not provide a facsimile number to the Hearing Officer. Accordingly, all

written materials sent by the Hearing Officer to the Parent were sent by U.S. mail.

20. At Hearing, the Hearing Officer explained to the Parent that prior to addressing the Parent's claims on the merits, it was necessary to address the Board's motion to dismiss. The Parent did not submit a written opposition to that motion.
21. At Hearing, the Hearing Officer also requested that the Parent identify the specific issues she was presenting to resolution in this hearing. The Parent ultimately identified her issues as follows:
  - a. The school the Student is presently attending is "not equipped" to provide the Student's needs and the Student should be placed at the Ben Bronz Academy.
  - b. The IEP is defective because it does not provide the "phonetic program" recommended by Ms. Santora.
  - c. The Board has not implemented any aspect of the January 27, 2003 IEP.
22. After the Parent identified these issues and just prior to taking testimony from Board witnesses in support of the Board's motion to dismiss, Ms. Proctor requested a break. Neither Ms. Proctor nor Ms. Santora returned after the break. The Parent returned and stated that she did not have any testimony to offer. When asked whether she was withdrawing her request for due process, she stated that she was not withdrawing the request for due process, but rather had no testimony to offer and wished to leave. The Parent then abruptly left the hearing.
23. After the Parent left the hearing, the Board made an oral motion that this matter be dismissed with prejudice for failure of the Parent to prosecute her claim.

#### **CONCLUSIONS OF LAW:**

1. The Hearing Officer reaches no conclusion as to whether the January 27, 2003 IEP provides the Student with FAPE in the LRE or whether the IEP is being properly implemented or whether the Parent is entitled to any relief and if so the nature of that relief.
2. The Parent's March 5, 2003 request for a due process hearing fails to comply with the requirements of Section 10-76h-3(d)(4)-(5) of the Department's Regulations.
3. The Parent failed to raise issues (a) and (b) identified in Finding of Fact 21 above at a PPT convened by the Board prior to requesting due process, in violation of the requirements of Conn. Gen. Stat. Sec. 10-76h(a)(1) and Section 10-76h-3(5)(g)-(h) of the Regulations. The Parent could not have raised issue (c) identified in Finding of Fact 21 above at the only PPT convened to date by the Board with respect to the Student.
4. The Board did not deny the Parent an opportunity to present these issues at a PPT prior to the commencement of this hearing.

5. The failure to present an issue to a PPT prior to requesting a due process hearing deprives the Hearing Officer of subject matter jurisdiction and requires dismissal as to that issue.
6. The office of the Board's counsel in this matter has previously represented Town X with respect to the Student's education when he resided in Town X. Based on that prior experience with the Parent and in support of the Board's oral motion to dismiss this matter with prejudice, counsel for the Board suggests here that the Parent is well aware of her due process rights and that the Parent's conduct in this proceeding, when considered in the overall context of her relationship with Town X, reflects an abuse of the process rather than lack of knowledge regarding hearing procedures and requirements. The Board's counsel contends further that a dismissal with prejudice is warranted because it is fundamentally unfair to the Board to compel the Board to go to the expense and trouble of defending (and preparing to defend) a due process hearing in these circumstances. As a matter of principle, the Hearing Officer agrees: (a) that these arguments have merit, inasmuch as all parties to a due process hearing are entitled to a process that is fundamentally fair; and (b) that dismissal with prejudice is a potential sanction for conduct reflecting an abuse of the process. However, the Hearing Officer must also consider that the educational interests of the Student are not jeopardized by conduct of a parent representing the Student at hearing where that conduct *could* reflect either a lack of understanding of the rules of procedure and requirements for a hearing or difficulties in complying with those requirements. There is no evidence in the record regarding the conduct of past due process proceedings involving the Parent, and the record in this case, in and of itself and isolated from the context of those past proceedings, does not support a finding that the Parent here was abusing the process with the goal or intention of harassing or unreasonably burdening the Board.

#### **FINAL DECISION AND ORDER:**

1. The Board's March 18, 2003 motion to dismiss for failure of the Parent to comply with Conn. Gen. Stat. Sec. 10-76h(a)(1) and Sections 10-76h-3(g)-(h) of the Regulations, is granted. Dismissal is without prejudice to the Parent to refile.
2. The Board's oral motion to dismiss this matter with prejudice to refile due to the failure of the Parent to prosecute this proceeding is denied.
3. The interests of the Student and the Board will be protected in the future by Parental compliance with the requirements for prosecuting a due process proceeding. Accordingly, to assure that the Parent is fully apprised of the procedures she must follow with respect to a due process proceeding, the Hearing Officer directs that the Department provide the Parent, when it sends this Final Decision and Order to her, with a copy of Section 10-76h of the Regulations, with the pamphlet entitled "Steps to Protect a Child's Rights to Special Education: Procedural Safeguards," and with a copy of the 2001 "A Parent's Guide to Special Education in Connecticut."