STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. District Board of Education

Appearing on Behalf of the Parents: Pro Se

Appearing on Behalf of the Board: Attorney Marsha B. Moses
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, Ct 06460

Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUE:

Was the reduction of services, to the Student, an act of retaliation by the Board in response to a complaint filed by the parent with the State Department of Education?

SUMMARY and PROCEDURAL HISTORY:

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

The Student is a 8 years and 9 months old boy who has been identified with Autism and is entitled to receive a free and appropriate public education ("FAPE") as defined in the Individuals with Disabilities Educational Improvement Act (IDEIA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a.

On or about June 19, 2009 the Parent filed a due process complaint alleging retaliation by the Board for a complaint filed by the Parent in regard to the Student's program as presented at a PPT meeting on or about June 20, 2007. The Board denies the Parent's allegation. On June 24, 2009, the Board received notice of the due process complaint. On June 24, 2009, a hearing officer was appointed to hear the matter. A pre-hearing conference was held on July 20, 2009 and the Board requested that the matter be dismissed for lack of subject matter jurisdiction. A briefing schedule on the Motion to Dismiss was agreed to by the parties. The Motion to Dismiss and the Objection were timely filed.

The Board sent the Parent a letter advising the Parent of a July 8, 2009 resolution meeting date. The day prior to the scheduled resolution date, the parent e mailed the Board asking for information about the purpose of the resolution meeting. The Board advised the Parent of the purpose and the Parent did not

attend or request a new resolution meeting date. (Parent's Memorandum of Law 2[1], Board's Memorandum of Law 11[2])
A hearing date was not set until the Motion to Dismiss was ruled upon.

FINDINGS OF FACTS:

1. The student is a 8 years and 9 months old boy who has been identified with Autism and is entitled to receive a free and appropriate public education ("FAPE") as defined in the Individuals with Disabilities Educational Improvement Act (IDEIA) 20 U.S.C. §1401 et seg. And Connecticut General Statute §10-76a.

2. The Parent filed a prior due process complaint with the Connecticut State Board of Education, Due Process Unit in which the Parent alleged a denial of a FAPE to the Student for the 2007-2008 and 2008-2009 school years. A Final Decision and Order was issued and the matter was dismissed with prejudice. (Final Decision and Order Case # 07-562).

3. A few months after the rendering of the Decision in Case # 07-562, the Parent filed another due process request which was assigned to another hearing officer alleging among other issues denial of FAPE for the 2008-2009 school year. The issue was dismissed as res judicata and the due process request was dismissed with prejudice. (Final Decision and Order Case # 09-304)

CONCLUSIONS OF LAW:

In response to the Parent's allegation of retaliation by the Board, the Board, among other defenses in their Motion to Dismiss, raised the issue of the hearing officer's subject matter jurisdiction. The lack of subject matter jurisdiction may be raised at any time in the judicial process. *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976). If and when a court observes that it is without subject matter jurisdiction, it must dismiss the action. *See Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 250 (2d Cir. 2008). "Generally, litigants cannot waive subject matter jurisdiction by express consent, conduct, or estoppel." *Doe v. West Hartford Bd. of Educ.,* 2000 U.S. Dist. LEXIS 6521 (D. Conn. Mar. 3, 2000) (citing 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3522 at 66-67).

A hearing officer's authority is clearly stated in Connecticut General Statutes Section 10-76h (d) (1), "The hearing officer or board shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education or the pupil if such pupil is an emancipated minor or eighteen years of age or older, has placed the child or pupil in a program other than that prescribed by the planning and placement team, or to prescribe alternate special educational programs for the child or pupil. In the case where a parent or guardian, or pupil if such pupil is an emancipated minor or is

[1] Hearinafter Parent's Memorandum of Law will be referred to as "PM" followed by a page number as reference to the location of the noted information.
[2] Hearinafter Board's Memorandum of Law will be referred to as "BM" followed by a page number as reference to the location of the noted information.

eighteen years of age or older, or a surrogate parent appointed pursuant to section 10-94g, has refused consent for initial evaluation or reevaluation, the hearing officer or board may order an initial evaluation or reevaluation without the consent of such parent, guardian, pupil or surrogate parent except that if the parent, guardian, pupil or surrogate parent appeals such decision pursuant to subdivision (4) of this subsection, the child or pupil may not be evaluated or placed pending the disposition of the appeal." This is consistent with The Individuals With Disability Education Improvement Act (IDEIA) 20 U.S.C. § 1415(b)(6).

The Parent alleges retaliatory actions by the Board in response to their complaint to the State Board of Education (PM 1). IDEIA does not have a provision to deal with allegations of retaliation. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006)

Acts of retaliation fall under the purview of Section 504 of the Rehabilitation Act, which prohibits schools from intimidating, coercing, threatening, or discriminating against any person for the purpose of interfering with their rights, or because of their filing of a complaint or participation in an investigation. *See 34 C.F.R. §100.7(e).*

As set forth in a Circular Letter, C-9, Series 2000-2001, Reissued, by then, Commissioner of Education Thomas Sergi, hearing officers will not hear what is commonly referred to as "Section 504 only cases", but will do a review of Section 504 claims if the *Mrs. L v. Tirozzi* (Consent Decree, C.A. # H-89-209(PCD) Conn. 1991) requirements are met, i.e., that a determination of a Section 504 claim is necessary to the resolution of the issues to ensure that the particular rights of the particular child or parent or guardian who initiated due process are being complied with and /or will be complied with in the future. *Id at 3.*The Parent failed to raise an issue that would relate to a denial or deficiency of FAPE or procedural violations of the Student's special education program or related services as defined in IDEIA.

The Parent attempted to modify the request for due process by adding the issues that the program offered by the Board for the 2007-2008 and 2008-2009 were not appropriate and did not provide the Student with FAPE. These issues were not part of the request for due process dated July 19, 2009. The Board did not agree to the addition of new issues. Even if the Board had agreed to allow the issues to be added to this due process hearing, these issue had been previously presented to another hearing officer in Case No. 07-562 and on or about October 3, 2008 had been dismissed with prejudice.

The doctrine of res judicata applies to final administrative decisions of a special education due process hearing officer. Letter to Breecher, 16 IDELR 1401, 1402 (OSEP 1990). Three elements must be satisfied to invoke the doctrine: a final judgment on the merits of the prior complaint, a subsequent complaint involving the same parties, and a subsequent complaint based on the same claims. D.R. by M.R. and B.R. v. East Brunswick Board of Education, 20 IDELR 957, 962 (D.N.J. 1993). These three elements are satisfied in the present matter. Therefore the doctrine of res judicata would have applied to the issues the Parent attempted to raise concerning the 2007-2008 and 2008-2009 school years.

The Parent cites *Whitehead v. School Board of Hillsborough County, Florida*, 24 IDLER 21 (M.D. Fla. 1996) as allowing a hearing officer to hear an allegation of retaliation under IDEA. The parent is correct in stating that in *Whitehead* there was a retaliation issue that was brought under Section 504 of the Rehabilitation Act and heard by a hearing officer under the umbrella of IDEA, but the Parent fails to notice that there was a nexus of the retaliation claim and the Student due process claim under IDEA. In

Whitehead, a dispute arose between Student and Board over the Board's provision of special education services to Student; in the current matter there is no claim of a violation of IDEIA.

Therefore this hearing officer does not have subject matter jurisdiction over the Parent's due process request.

The Parent also alleges that certain violations occurred in Case No. 07-562, however hearing officers are not authorized to review prior decisions. C.G.S. § 4-183, and 20 U.S.C. § 1415(i)(2)(A) clearly state the appeal process. The Parent was aware that an appeal was the means to attempt to overturn decisions that they do not agree with but they decided not to appeal. (PM 3) The decision, therefore, became final after the expiration of the appeal period.

.**FINAL DECISION AND ORDER**

PURSUANT TO CONNECTICUT STATE REGULATION SECTION 10-76h-18(a)(5), THE MATTER IS DISMISSED WITH PREJUDICE.