

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Board of Education

Appearing for the Student: The Student's Father

Appearing for the Board: Attorney Michelle Laubin
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing Before: Attorney Scott Myers, J.D., M.A. (Clinical Psychology),
Hearing Officer

FINAL DECISION AND ORDER

CONFIDENTIALITY NOTE

The Student's father is an attorney and prosecuted this matter on behalf of his son. Given that, the Hearing Officer has determined that compliance with the confidentiality requirements of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g and related regulations at 34 C.F.R. § 99, it is appropriate to withhold from this decision the identity not only of the Student and the Father, but of the Board as well.

This Final Decision and Order dismisses this matter with prejudice as settled.

BACKGROUND AND PROCEDURAL HISTORY

A. Commencement of this Matter and Related Background

This matter was commenced by request for due process (the "Request") dated June 19, 2009 and sent on that date by overnight delivery to the State of Connecticut Department of Education ("CTDOE") Bureau of Special Education, Due Process Unit, the District (through its Director, Special Education) and counsel for the Board. The undersigned was appointed as Hearing Officer by notice dated June 29, 2009. By agreement of the parties, a telephonic pre-hearing conference ("PHC") convened on July 14, 2009. Both parties participated.

The Parents allege: (1) that the Student was denied a FAPE in the 2006/2007, 2007/2008, and 2008/2009 school years, as well as the summer of 2008, (2) that the District has "improperly denied" their request for reimbursement for the costs of "private tutoring with a Speech and Language Specialist, neuropsychological testing and evaluation, psychological counseling, and psychiatric review;" and (3) that the IEP proposed for the Student for the 2009/2010 school year denies him FAPE. The Parents seek the following relief: (A) an order of compensatory education to remedy past denials of FAPE; (B) reimbursement for the costs of the "private tutoring with a Speech and Language Specialist, neuropsychological testing and evaluation, psychological counseling, and psychiatric review" outlined in the Request; (C) reimbursement by the District for the costs of the Student's

placement at the Eagle Hill School for the summer of 2008; (D) reimbursement by the District for the costs of the Student's placement at Eagle Hill School for the 2008/2009 school year; and (E) a placement at District expense at Eagle Hill School for the 2009/2010 school year.

A resolution meeting was convened on July 2, 2009 but was not successful. The Request was in the form of a 49 page document in the format of a court complaint, and containing 87 numbered paragraphs of allegations. At the PHC, the Board's counsel expressed concerns regarding the propriety of the Request, but advised that the Board was not going to file a sufficiency or any other challenge to the Request. The Board's counsel did advise, however, (1) that it is the Board's position that issues regarding the 2006/2007 school year are barred by the statute of limitations ("SOL"), (2) that the Board does not read the Request to put the 2009/2010 school year at issue (or at least to provide the factual basis for any claims regarding the 2009/2010 school year), and (3) that at an IEP team meeting in May 2009, the District requested an opportunity to perform an evaluation of the Student at its expense to provide additional information deemed necessary to make a determination regarding the Student's educational programming for the 2009/2010 school year, but that the Parents declined to consent to that request. Counsel for the Board reported that the Board would defer to the Hearing Officer as to whether that issue could simply be joined in this proceeding or whether the Board should commence its own due process request and request consolidation of the two proceedings.

The parties advised that they were interested in pursuing a CTDOE-facilitated mediation to resolve their disagreement. The Board did not file an answer to the Request.

B. Issues Set for Hearing

Based on the discussion at the PHC, the Hearing Officer in a scheduling order dated July 16, 2009 (the "July 16 Order") framed the issues set for hearing as follows:

1. Whether claims regarding the 2006/2007 school year are barred by the SOL.
2. If the claims regarding the 2006/2007 school year are not barred by the SOL, whether the IEP(s) developed for the 2006/2007 school year were reasonably calculated to provide the Student with a FAPE in the LRE and, if not, to what relief are the Parents entitled for the 2006/2007 school year.
3. Whether the IEP(s) developed for the 2007/2008 school year were reasonably calculated to provide the Student with a FAPE in the LRE and, if not, to what relief are the Parents entitled for the 2007/2008 school year.
4. Whether the Parents are entitled to reimbursement by the District for the Student's placement at Eagle Hill School in the 2008/2009 school year and, if so, to what extent.
5. Whether the Parents are entitled to reimbursement by the District for the Student's placement at Eagle Hill School for the summer of 2008 and, if so, to what extent.
6. Whether the Parents are entitled to funding by the District for the Student's placement at Eagle Hill School for the 2009/2010 school year and, if so, to what extent.

7. To the extent not otherwise addressed in the issues stated above, whether the Parents are entitled to reimbursement for some or all of the following items identified in the Request and, if so, which items and to what extent:

- a. the private tutoring with a Speech and Language Specialist;
- b. the neuropsychological testing and evaluation;
- c. the psychological counseling;
- d. the psychiatric review.

Based on the discussion at the PHC, it was the Hearing Officer's understanding that the Parents did not object in concept to including within this proceeding the Board's issue regarding evaluation. Accordingly, the July 16 Order directed that should the Board commence due process and move for consolidation of the two proceedings, the statement of the issues set for hearing would be amended to include the issues raised by the Board in its due process request.

C. The July 16 Order

By agreement, the pre-hearing timetable and hearing dates defined in the July 16 Order reflected uncertainty as to the timing of a CTDOE-facilitated mediation, a desire of the Parents for as-expedited-a-resolution-of-this-matter-as-possible and the desire of both parties to avoid being burdened by the need to prepare for hearing while simultaneously pursuing a mediated outcome. Among other things, the July 16 Order provided that:

1. Hearing was scheduled for September 9, 11, 16, 21, 23, and 30, 2009.¹
2. By agreement of the parties, the Board was directed to file its motion regarding SOL issues by or before August 7, 2009 and the Parents were directed to file their response by or before August 28, 2009. The Board filed its motion on August 10, 2009 but because the requirements of the July 16 Order were suspended to permit the parties to pursue settlement discussions, the Parents did not file a response and the motion was not acted on.
3. Assuming a June 22, 2009 receipt date for the Request (which is the next business day after June 19, 2009), the date for mailing of the Final Decision and Order in this matter would have been September 8, 2009. As discussed at the PHC, given the agreement of the parties to pursue a CTDOE-facilitated mediation and given the potential number of hearing dates identified by the parties as necessary to present their respective cases, the date for mailing of the Final Decision and Order was extended to and including October 8, 2009, subject to further adjustment.

The parties exchanged witness lists as directed. The requirements of the July 16 Order with respect to submission of records were ultimately suspended to permit the parties to pursue settlement discussions, and neither party submitted a record.

¹ At the PHC, the Parents indicated that they might call approximately 15 witnesses (approximately 10 of which are also Board employees) and that direct examination of each witness may last 3 hours, for a potential of 45 hours of direct examination, which would translate to at least 9 days of hearing for the Parents' case-in-chief. Counsel for the Board advised that the Board intended to call 5-6 witnesses.

D. Settlement Efforts

On August 5, 2009, the parties reported that the CTDOE-facilitated mediation was scheduled for August 28, 2009. By notice dated August 5, 2009, and consistent with the expressed desires of the parties, the Hearing Officer adjusted various dates for pre-hearing submissions due in August that were stated in the July 16 Order.

Each party appeared highly motivated to want to resolve this matter by settlement rather than by litigation and issuance of a Final Decision and Order. It appeared to the Hearing Officer based on communications over the course of September 2009 between the Hearing Officer and the parties that the parties had reached agreement on the conceptual framework but that miscommunications between the parties regarding details of the settlement and the mechanics of documenting their arrangements were interfering with their ability to finalize the settlement they appeared to have agreed upon in concept.

Over the course of September the parties continued their effort to complete those mechanical steps and by agreement various dates established in the July 16 Order were suspended and cancelled until finally all of the dates set in that order for pre-hearing and hearing events had or would shortly be passed. On September 24, 2009, the Hearing Officer scheduled a second telephonic PHC for September 30, 2009 for the purpose of determining how this matter would proceed to be resolved.

On September 24, 2009, the Parents submitted to the Hearing Officer a pleading entitled "Motion to Enforce Acceptance of Offer of Compromise" (the "Motion") through which the Parents, pursuant to Conn. Gen. Stat. Sec. 52-194 sought to have the Hearing Officer enter an order that effectively compelled the Board to settle this matter on specific terms contained in a letter dated September 21, 2009 from the Board's counsel to the Parents. The specific terms proposed by the Board that the Parents were seeking to "enforce" were stated in the body of the Motion and a copy of the Board's letter was included as an attachment to the Motion. The letter was clearly a communication subject to the privilege that attaches to communications between party litigants concerning settlement. In addition to the terms of a specific settlement proposal being considered by the parties at one point that should not have been disclosed to the Hearing Officer, the Motion also contained other details regarding confidential settlement communications between the parties that should also not have been disclosed to the Hearing Officer. Among other things, the information in the Motion made clear that there was a disagreement between the parties as to whether the proposal as outlined in the September 21 letter had been timely accepted by the Parents and whether by the time the Parents accepted that offer it was still "on the table."

The Board's response to that submittal indicated to the Hearing Officer that the Board was still interested in settling this matter provided the Parents executed a written settlement agreement that the Board had sent to the Parents (but, appropriately, not forwarded to the Hearing Officer). It was clear from both the Motion, the Board's response and from other communications between the Hearing Officer and the parties in this period regarding compliance with the requirements of the July 16 Order, that the parties strongly desired to settle this matter and had reached an impasse over the mechanics of finalizing the settlement rather than over the terms of a settlement.

The Hearing Officer denied the Motion on the basis that Conn. Gen. Stat. Sec.52-194 was on its face inapplicable to this proceeding and between September 25 and September 28, 2009 advised the parties as follows:

1. The Hearing Officer advised the parties that based on all of the relevant communications from the parties to the Hearing Officer, it appeared that this matter had not yet settled despite the desire and efforts of the parties. The Hearing Officer further advised that the Parents now had the following three options for proceeding:

Option 1: Termination of this matter as *unsettled* without prejudice to refileing.

Option 2: Termination of this matter through litigation and issuance of a Final Decision and Order, which would necessitate re-establishing the schedule defined in the July 16 Order, including all of the hearing dates.

Option 3: Termination of this matter with prejudice as settled, which the Hearing Officer defined to require execution of the final agreed upon settlement documentation reflecting a final agreed upon settlement.

2. The Hearing Officer advised that the purpose of the September 30, 2009 PHC was to determine which of these three Options this matter would follow.

3. The Hearing Officer advised the parties that he was retaining jurisdiction over this matter solely for purposes of the convening of the September 30, 2009 PHC as follows: (a) Should Option 1 or Option 3 be implemented, the Hearing Officer would enter orders terminating this matter accordingly. (b) Should Option 2 be implemented, the Hearing Officer would enter a second scheduling order establishing hearing dates, a new date for the mailing of the Final Decision and Order, and dates for completing the filing of pre-hearing submissions, and then recuse himself and would not preside as hearing officer for the purpose of taking evidence and issuing a decision on the merits.

4. As to Option 2, the Hearing Officer advised the parties: (a) That the Hearing Officer's ability to preside over the evidentiary portions of the hearing and determining the merits had been compromised by the action of the Parents in disclosing to him the substantive terms of a proposed settlement and of aspects of the conduct of the parties in their settlement efforts. (b) That should Option 2 be implemented, nothing precluded the parties from continuing their effort to settle this matter.

5. To assist the parties in determining whether they could settle this matter and given indications of miscommunications between the parties regarding their settlement: (a) The Hearing Officer directed the Board by a date and time certain to send to the Hearing Officer a copy of the settlement document it was asking the Parents to execute. The purpose of that transmittal was to clarify for the Parents the precise settlement offer the Board was making and that was "on the table." (b) The Hearing Officer directed the Parents by a date and time certain to send to the Hearing Officer and the Board any edits to that settlement document they were asking the Board to make. The purpose of that transmittal was to clarify to the Board what terms of the Board's draft settlement document the Parents found objectionable and provide language that would be acceptable to the Parents. (c) The parties

were directed to resolve before the September 30, 2009 PHC between themselves and without involving the Hearing Officer in any disagreement over the actual language of the settlement document. (d) The Hearing Officer advised that he was entering these orders to assist the parties in determining whether they could achieve a settlement and to achieve a settlement, but that he would not become involved in negotiation of the specific terms of the settlement.

6. The Hearing Officer concluded that in order to facilitate a settlement between the parties in these unique circumstances, and given allegations made in the Motion and other communications by each party regarding the conduct of the other, it was necessary to copy the Hearing Officer on the exchange of these settlement documents to assure the Hearing Officer that each party was making a good faith effort to settle this matter.

7. As reflected in e-mail communications between the parties, it was agreed expressly or implicitly that the exchange of the draft settlement agreements in compliance with the Hearing Officer's directives would be treated as privileged confidential settlement communications. In the procedural posture of this case, the evidentiary record had not been opened, no evidence on the merits had been submitted and the exchange of the draft settlement agreements was part of a pre-hearing conference ("PHC") process, which is off the record and as to which Hearing Officers may discuss settlement possibilities with the parties as provided in the CTDOE regulations. Prior to issuing this Final Decision and Order, the Hearing Officer had received but not reviewed in any way the actual settlement agreement documentation submitted in accordance with his directives.

8. Both parties participated in the September 30, 2009 PHC. The Parents at that PHC reported that they had executed the settlement document sent by the Board, but also made statements indicating that they had felt coerced into doing so and that they had potentially substantial concerns about certain terms in the Board's draft settlement that they wanted clarified. The Hearing Officer concluded in the circumstances that terminating this matter would not serve the interests of either party. Accordingly, the Hearing Officer extended the September 30, 2009 PHC deadline for the Parents to make their election until 5:00 p.m. on October 2, 2009. There was no discussion at the September 30, 2009 PHC of the substantive terms of the settlement the parties were attempting to negotiate.

9. On October 2, 2009, each party advised the Hearing Officer that they had executed a settlement document and considered this matter terminated.

FINDINGS OF FACT

Findings of Fact 1-3 inclusive are based solely on the statements made by the parties to the Hearing Officer at the July 14, 2009 PHC:

1. There is no dispute that the Student is eligible to receive special education and related services under the IDEIA and related Connecticut special education law.

2. There is no dispute that the Student resides within the Board's jurisdiction and accordingly that the Board is the local educational agency under the applicable Federal and state law responsible for providing the Student with special education and related services during the relevant time periods.

3. There is no dispute that the Hearing Officer has the jurisdiction to adjudicate the disagreement between the parties outlined in the Request and, subject to resolution of issues regarding the applicability of the statute of limitations, subject to that grant of jurisdiction and to the extent provided by statute, regulation or case law, the Hearing Officer has the authority to grant the Parents relief on their claims if the Hearing Officer finds that they have met their burden of proof.

Findings of Fact 4-6 inclusive are based solely on communications between the Hearing Officer and the parties in the period between the July 14, 2009 PHC and the submittal by the Parents of their September 24, 2009 Motion to Compel Acceptance of Offer of Compromise (the "Motion"):

4. The parties have expressed continuously a desire to resolve their dispute by settlement rather than through litigation and issuance of a final decision and order on the merits.

5. The parties have attempted to resolve their disagreement through a CTDOE-facilitated mediation.

6. That CTDOE-facilitated mediation occurred on August 28, 2009. Although by the end of that mediation the parties had reached agreement on the conceptual framework for a settlement, they were unable to reach agreement on the mechanics of documenting their settlement.

7. The Parents in their Motion disclosed to the Hearing Officer the substantive terms of a proposed settlement and details regarding the conduct of the parties during the course of the settlement discussions.

Findings of Fact 8-10 inclusive are based solely on communications between the Hearing Officer and the parties in the period following the submission of the Motion and through the end of the September 30, 2009 PHC:

8. The Hearing Officer notified the parties that in light of the submission of the Motion, the Hearing Officer would recuse himself from presiding over any aspect of this case that involved the receipt of evidence on the merits of the substantive dispute between the parties and the determination of such matters.

9. The parties agreed to enlist the aid of the Hearing Officer to assist them in finalizing their settlement and submitted to the Hearing Officer draft settlement documentation for that purpose subject to the privilege that attaches to confidential settlement negotiations to the same extent as if the Hearing Officer was functioning as a CTDOE mediator with respect to those submissions.

10. Between September 25, 2009 and September 29, 2009, the parties submitted documents to the Hearing Officer consistent with that understanding and agreement and for the purposes of settling this matter.

Findings of Fact 11-12 inclusive below are based solely on the discussion at the September 30, 2009 PHC:

11. The Board submitted to the Parents on September 25, 2009 in accordance with the Hearing Officer's directive its proposed settlement document. The Parents submitted to the Board on September 28, 2009 in accordance with the Hearing Officer's directive a mark-up of the Board's draft document reflecting terms acceptable to them.

12. The Parents reported at the September 30, 2009 PHC that they had executed the settlement document sent to the Board because they had not received any response from the Board regarding their marked-up document, and that they still had substantial concerns about language in the document they executed as to which they wanted clarification.

13. Based on the Parents statements at the September 30, 2009, the Hearing Officer concluded that notwithstanding that they had executed a settlement document acceptable to the Board, the potential remained for a settlement to unravel in the circumstances.

14. The Hearing Officer issued orders which, as explained elsewhere herein, extended until October 2, 2009 at 5:00 pm the period of time for the Parents to make their election as to how to proceed.

15. Each party reported before 5:00 p.m. on October 2, 2009 by e-mail copied to the other party that they had reached an agreement settling this matter, finalized the execution of the documentation of their settlement and that this matter may be terminated.

CONCLUSIONS OF LAW

1. CTDOE regulations require as a first step in the hearing process of a litigated proceeding under the IDEIA and related Connecticut special education law that a pre-hearing conference ("PHC") be convened. The regulations require that at least one PHC be convened, but do not limit a CTDOE special education hearing officer's authority to convene more than one PHC as the hearing officer determines necessary to assure the orderly resolution of a proceeding. The regulations provide that the PHC is "off the record" and further provide that settlement possibilities are among the topics that may be discussed at a PHC.

2. The CTDOE regulations require that a hearing officer establish a schedule for resolving the case consistent with the requirements of applicable statutes and regulations.

3. The CTDOE regulations provide for adjustments to the timetable for hearing by the hearing officer to reflect settlement efforts of the parties. In order to make those adjustments, the parties must necessarily make the hearing officer aware of certain facts regarding their settlement efforts.

4. The CTDOE regulations define an advisory opinion hearing process as a form of dispute resolution that is an alternative to CTDOE-facilitated mediation and adjudication of a due process dispute through hearing and issuance of a final decision and order on the merits. CTDOE due process hearing officers are assigned to preside over advisory opinion hearings and may function as settlement mediators following the issuance of their advisory opinion. A hearing officer assigned to preside over

an advisory opinion hearing may not serve as the hearing officer adjudicating that proceeding. The advisory hearing process is confidential.

5. While it would not be appropriate for a hearing officer to both adjudicate the merits of a due process proceeding before him/her and become involved directly with the parties in their settlement efforts, nothing in the CTDOE regulations precludes the parties from requesting assistance from the hearing officer with respect to settlement. Nothing in the CTDOE regulations, the IDEIA or its regulations, Connecticut special education law, or any other applicable code of conduct precludes the hearing officer in a particular case from acting in that capacity, provided: (a) that the parties understand and agree that if the hearing officer-facilitated settlement effort is not successful the hearing officer will recuse himself/herself from adjudicating the merits of the dispute; and (b) the hearing officer recuses himself/herself from adjudicating the merits of the dispute if the hearing officer-facilitated settlement effort is not successful.

6. Submission by the Parents of their Motion, which included the terms of a substantive confidential settlement proposal by one party to the proceeding and provided details of the conduct of the parties in the settlement effort, compromised the Hearing Officer's ability to adjudicate this case on the merits and required that the Hearing Officer recuse himself.

7. The draft settlement agreements exchanged by the parties in the period September 25 through September 28 in accordance with the Hearing Officer's directives were submitted as part of the off-the-record September 30, 2009 PHC with the understanding and agreement that they were confidential settlement agreement-related documents and would be treated as such.

8. The draft settlement agreements exchanged by the parties in the period September 25 through September 28 in accordance with the Hearing Officer's directives are confidential documents subject to the evidentiary privilege that attaches under the applicable law to settlement negotiations.

FINAL DECISION AND ORDERS

1. The Hearing Officer herein makes no Findings of Fact and reaches no Conclusion of Law whatsoever regarding:

a. The merits of the substantive issues that were presented for hearing, including but not limited to whether the Student was denied a FAPE based on the alleged procedural and substantive violations stated in the Request.

b. The terms of the settlement agreement reached by the parties, other than the fact that they reached a settlement which in turn permitted this matter to be terminated without an adjudication on the merits of the dispute.

c. The conduct of either party with respect to settlement efforts.

2. Each page of the draft settlement documentation submitted by the Board on September 25, 2009 and the Parents on September 28, 2009 is being marked by the Hearing Officer with the

legend “Confidential and Privileged Settlement Document” and returned to the CTDOE with the remainder of the Hearing Officer’s file in this matter in a sealed envelope marked with the same legend.

3. This matter is **DISMISSED** with prejudice as settled.