

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on behalf of the Parents: *The Attorney-Father represented the Parents in this matter. The Father's name and the law firm are omitted to preserve the Student's privacy rights pursuant to FERPA, the Family Educational Rights and Privacy Act.*

Appearing on behalf of the Board: Attorney Marsha Belman Moses
Berchem, Moses & Devlin, P.C.,
75 Broad Street
Milford, CT 06460

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board's failure to propose a program for the Student for the 2010-11 school year by the date of the filing of the request for hearing [March 25, 2010] is appropriate.
2. Whether the Parents are entitled to reimbursement for their proposed placement of the Student at Eagle Hill School in Southport for the 2010-11 school year.

PROCEDURAL BACKGROUND:

The Board received this request for hearing [Exhibit H.O.-1] on March 25 and a prehearing conference was convened on April 8, 2010.

Prior to the prehearing conference, the Board filed a Motion to Dismiss on the basis that the claim of denial of a free appropriate public education [FAPE] for the Student for the 2010-11 school year was not ripe for adjudication and should be dismissed. The Parents' attorney submitted a Memorandum in Opposition to the Motion to Dismiss with exhibits on April 12.

It was undisputed that the Board had not, as of the filing of the request for hearing, proposed a program for the Student for the 2010-11 school year. Without such a filing, it would be premature for the Parents to challenge the appropriateness of a program that has not yet been proposed by the Board. In the request for hearing, during the prehearing conference and in the Parents' Memorandum in Opposition and the accompanying exhibits, the Parents asserted that their challenge was a procedural claim, not a claim challenging a proposed program. The alleged violations included the Parents' claim that the Board failed to convene a PPT meeting at the Parents' request[s] and the alleged delay in proposing an IEP for the Student for the 2010-11 school year as of the time of the filing of this request for hearing. The Motion to Dismiss was

granted in part and denied in part, and the hearing continued on the very narrow scope to determine if such procedural allegations resulted in a denial of FAPE to the Student, and whether the Parents are entitled to reimbursement for the private placement of the Student for the 2010-11 school year as a result of this alleged denial of FAPE.

On May 4, the Board's attorney submitted notification that substitute counsel was now appearing on behalf of the Board as the Parent-Attorney had filed a grievance against the prior Board attorney.

On May 18, the Board's attorney submitted a second Motion to Dismiss the case on the basis that the issues in this hearing were subject to a prior settlement agreement. On May 25 the Parent-Attorney submitted a Memorandum in Opposition to the second Motion to Dismiss, and a Motion to Reschedule the Hearing date of June 2 to permit the Hearing Officer time to rule on the pending Motion to Dismiss. The Motion to Reschedule the June 2 hearing date was denied as the hearing officer did not require nor requested additional time to rule on the pending Motion to Dismiss, and the Motion to Dismiss was scheduled to be heard as a preliminary matter at the June 2 hearing date.

On May 27 the Parent-Attorney submitted notification that the Parents were withdrawing the due process hearing request **without prejudice to renew**. [Emphasis added] On the same day of the Parent's notice, the Board submitted notification that it intended to file an objection to the withdrawal of the due process without prejudice. The Board's objection and its third Motion to Dismiss was filed over the Memorial Day weekend, and was received on Tuesday, June 1, the first business day after the Memorial Day weekend. On June 1, the hearing officer sent Notice to both counsel that the hearing would convene on June 2 as previously scheduled to consider the Parents' withdrawal, the Board's objection thereto and, if necessary the pending Motions to Dismiss and any necessary testimony concerning these pending filings.

The hearing convened on June 2. Extensive oral argument was presented on all issues pending, and the Board's exhibits 1-19 were entered into evidence. As of the June 2 hearing date, the Parent had not submitted a list of witnesses and exhibits. The deadline for filing of the witness list and exhibits was May 25.

DISCUSSION/CONCLUSIONS OF LAW:

The first issue to consider is the Board's objection to the Parents' Notice of Withdrawal without prejudice to renew. Oftentimes the parties in due process hearings agree that the parents can withdraw their case without prejudice when they are engaged in settlement discussions and need additional time to resolve the matter. That is not the case here. Instead, the Parents are attempting to withdraw without prejudice to renew, with a conceivable result that the Parents could refile that same day that they submit the Notice of Withdrawal of the case. The Parents

have failed to articulate a reason for this withdrawal, so there can be no finding that proceeding with this hearing would result in some type of hardship for the Parents. Moreover, the only reason proffered in the Motion to Continue the June 2 hearing date was to provide the hearing officer additional time to rule on the pending Motion to Dismiss; such additional time was not requested or necessary for the undersigned hearing officer.

This Notice of Withdrawal was brought in an attempt to circumvent the hearing officer ruling on the pending Motion to Dismiss. The Federal Rules of Civil Procedure, Rule 41(a) addresses the filing of a notice of dismissal by the party, which is akin to the Parents' submitted Notice of Withdrawal. Since this action is brought in accordance with federal law, this procedural rule outlines the appropriate procedure to withdraw a case in this tribunal. The reasoning which underlies the procedural rule is persuasive. The rule provides that the plaintiff may dismiss an action without any court order under certain circumstances, which are inapplicable to this hearing where a Motion to Dismiss was pending and the hearing was scheduled to convene in two business days from the filing of the Notice by the Parents. The rule also illustrates that at some point, those who seek a voluntary dismissal or a withdrawal of the case, must seek the court's permission to do so. Rule 41 provides that an action may be dismissed *at plaintiff's request only by court order, on terms the court considers proper.* F.R.C.P. Sec. 41(1)(2) It is improper for the Parents to file the Notice of Withdrawal without prejudice to renew at the eleventh hour when the Motion to Dismiss is pending, two business days prior to the hearing date. The Parents' submission has been considered and it is found that it is inappropriate for the Parents to file the withdrawal, and the withdrawal without prejudice to renew is not accepted by this tribunal. It is concluded that this case cannot be withdrawn without prejudice to renew. The Board's objection to the Notice of Withdrawal is sustained.

Connecticut special education regulations provide that a due process hearing officer may dismiss a complaint where the party requesting the hearing has not prosecuted the complaint. The regulation provides that “Any party may move for, or the hearing officer may order, *sua sponte*, an entry of default in or dismissal of a hearing for failure of any party to prosecute a hearing. . .” R.C.S.A. Sec. 10-76h-18(a)(1) Based on the Parents’ failure to file the witness list and exhibits within the appropriate timeline there would be sufficient grounds to dismiss this case with prejudice pursuant to this regulation. Nevertheless, as the second Motion to Dismiss was thoroughly briefed and argued at the hearing and is persuasive, it provides further reason to dismiss this case with prejudice. Therefore, the Motion to Dismiss will be considered.

The Board’s second Motion to Dismiss asserts that this case should be dismissed as the claims contained therein were waived in a settlement agreement dated September 29, 2009. In the memorandum in opposition to the Motion to Dismiss, the Parents do not deny that they signed the settlement agreement which is referenced in the Second Motion to Dismiss. The relevant provisions of the settlement agreement provide the following:

*“Furthermore, for good and valid consideration, including, without limitation, the Payment and the covenants and agreements set forth herein, the PARENTS hereby remise, release and forever discharge, and by these presents do for themselves, for the STUDENT and for their heirs and assigns, remise, release and forever discharge the BOARD, its agents and employees, of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, costs, expenses, and demands whatsoever in law or in equity, against the BOARD, its agents and employees, which the PARENTS and/or the STUDENT ever had, now has or have or which they, on behalf of themselves or the STUDENT, their heirs and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of this agreement **and through August 31, 2010** arising out of or related to the provision of educational services by the BOARD to or for the STUDENT, and/or the STUDENT’S educational needs, including without limitation, the issues set forth, or which could have been set forth in the Due Process Proceeding.”* [Emphasis added] [Exhibit 1, Board’s Memorandum in Support of Board’s Motion to Dismiss, May 18, 2010]

The settlement agreement further provided that:

*“The PARENTS acknowledge that they have at all times pertinent hereto had the opportunity to be represented by counsel. The PARENTS represent and warrant that they have read each and every provision of this Agreement and understand all of the terms and conditions set forth herein. This Agreement has been fully explained to them and they have had full opportunity to discuss this Agreement and the contents hereof with any persons they deem appropriate. The PARENTS represent and warrant that they are entering into this Agreement voluntarily and knowingly, and with a full and complete understanding of all of the terms and conditions of this Agreement. Without by way of limiting the above, **the PARENTS understand that they are waiving certain rights and remedies by executing this Agreement, including certain rights which they have with respect to the future.** They are willing to waive such rights in consideration *inter alia*, of the BOARD’S Payment and the settlement of the Due Process Proceeding and are entering into such waivers knowingly and of their own volition.”* [Emphasis added] [Exhibit 1, Board’s Memorandum in Support of Board’s Motion to Dismiss, May 18, 2010]

The Board agreed to pay the Student the amount of sixty thousand dollars in full and final settlement of all claims through August 31, 2010, in accordance with the settlement agreement.

In the Parents’ Memorandum in Opposition to the Second Motion to Dismiss, the Parents assert their claim that the waiver of future claims is contrary to public policy. That argument fails.

The matter of *Mr. J. v. Board of Education*, 98 F. Supp. 2d 226, 32 IDELR 202 (D.Conn. 2000) is on point, and clearly illustrates why this matter must be dismissed. In *Mr. J.*, as in the current case, the parent was an attorney who signed an agreement to settle a claim under the Individuals with Disabilities in Education Act [IDEA]. The agreement language excerpted in *Mr. J.* was similar to the case at bar, and the agreement was signed in January 1997 and covered any and all claims for the 1996-97 school year. The Parent subsequently attempted to bring a due process action for claims that arose during the 1996-97 school year.

The court in *Mr. J.* addressed the public policy issue, and its decision was diametrically opposed to the Parents’ claim that settlement agreements with waiver of future claims should be

found void. Directly contrary to the Parents' claims that the enforcement of settlement agreements is against public policy, the *Mr. J.* court was concerned that "a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements." *Id.* Noting that public policy wisely encourages settlements the court noted that the agreements are "encouraged as a matter of public policy because they promote amicable resolution of disputes and lighten the increasing load of litigation faced by the courts." *Id.* Settlement agreements are favored and shall be enforced.

Public policy dictates that settlement agreements must be enforced, and that hearing officers may enforce the terms of the agreement. *Id.* The clear and unambiguous language of the Settlement Agreement states that all claims prior to August 31, 2010 are released and that the Parents acknowledged that they were releasing "rights they may have with respect to the future."

Since the Parents have released any and all claims through August 31, 2010, in exchange for the benefit received from the Settlement Agreement, the Parent cannot now litigate a procedural claim arising during the 2009-10 school year and prior to August 31, 2010. This case shall be dismissed with prejudice.

Notwithstanding the foregoing, the Parents' case would also fail on the merits of their alleged claims of procedural violations. The narrow scope of the hearing was a procedural claim, not a claim challenging a proposed program. The alleged violations included the Parents' claim that the Board failed to convene a PPT meeting at the Parents' request[s] and the alleged delay in proposing an IEP for the Student for the 2010-11 school year as of the time of the filing of this request for hearing. The Parents submitted a request to the Board in January 2010 that they wanted the Board to schedule an immediate Planning and Placement Meeting to be held

within one week. [Exhibit B-6] The Parents informed the Board that the agenda for the PPT meeting was so that they could formally notify the Board that it objected to any placement of their son in the Board schools for the 2010-11 school year, with a request that the Board pay for private placement of the Student for the 2010-11 school year. [Exhibit B-6] The Parents continued to request a PPT meeting in late January 2010. [Exhibit B-8] The Board sent out a notice of a PPT meeting in March 2010 prior to the Parents' filing this request for hearing, which scheduled the annual review PPT meeting for April 30, 2010. [Exhibit B-11] Reviewing these claims in the light most favorable to the Parents, it is inconceivable that these actions constitute procedural violations that would result in a denial of a free appropriate public education to the Student. While the Parents may have been eager or impatient to have a PPT meeting convened, the uncontroverted timeline reveals that the Board's actions did not constitute procedural violations. The Board appropriately scheduled a PPT meeting after receipt of all relevant evaluations, and in a timely manner which would allow the team to offer a program for the 2010-11 school year.

The alleged procedural violations would fail to support a claim of denial of FAPE, and, furthermore, are waived as they are subject to the settlement agreement of September 29, 2009. This case shall be dismissed with prejudice.

FINAL DECISION AND ORDER:

The matter is **DISMISSED, with prejudice.**