STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Voluntown Board of Education

Appearing on behalf of the Parent:	Pro Se
Appearing on behalf of the Board	Attorney Frederick L. Dorsey Kainen, Escalera and McHale, P.C. 21 Oak Street Hartford, CT 06106
Appearing before:	Robert L. Skelley, Esq., Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

Parents' Issues:

1. Where is the stay-put placement for this Student?
2. Did the New London Board of Education ("Board") deny the Student a free and appropriate public education ("FAPE") by failing to timely identify and evaluate the Student for the academic year 2013-2014 in violation of the Board's Child-Find obligations?

Board Issue:

3. Does this complaint satisfy the State and Federal requirements for a properly drafted complaint as it does not offer a proposed resolution?

PROCEDURAL HISTORY:

The complaint was filed by the Parents on November 26, 2013. On December 11, 2013 the Board filed a Status Report, Counterclaims and Request for Interim Order, in response to the complaint. A prehearing conference was held on December 20, 2013. At the prehearing conference, the issues in this matter were identified. The Parents made an oral request for a thirty (30) day extension to the resolution period for settlement purposes, there was no objection from the Board and the request was granted. The Parents raised a concern that the Board would not allow the Student to remain in her current placement during the pendency of this matter. A hearing on this issue was requested by the Parent, despite assurances from the Board that the Board was not going to move the Student. Initially, the earliest hearing date that the Parties could agree upon was January 30, 2014, as the Parents were not going to be available before then. The Parties were instructed to provide the Hearing Officer with information regarding the current classroom placement of the Student and the identification of any services that the Student was being provided with. On December 23, 2013, the Board filed a Memorandum in Support of Challenge to the Sufficiency of the Complaint, stating that the Parents' complaint was

insufficient in that it failed to state a specific proposed resolution to the dispute as required under the Regulations of Connecticut State Agencies, §10-76h-3(d)(5). On December 26, 2013 the Hearing Officer issued a ruling on the Board's sufficiency challenge, finding that the complaint filed by the Parent met the requirement for providing "a proposed resolution of the dispute *to the extent known and available* to the parent at the time". (Emphasis added) In regards to the issue of stay-put, the Parents provided a class location, the name of a teacher and the services that the Parent believed were being provided. The Board did not provide a response, due to a malfunction in the email notification process for the request. A decision was issued on January 5, 2014, detailing the placement and continued services that the Student was to receive during the pendency of this matter. The Board has complied with that order, and has been providing the same placement and services for the academic year. The Parties were unable to reach agreement through the resolution period and proceeded to a due process hearing. The Due Process hearing subsequently convened on February 19 and March 6, 2014.

SUMMARY:

The Parents brought this complaint following an initial PPT from which the Board was recommending evaluations of the Student as well as changing the teacher and school building in which the Student was initially enrolled. The Parents did not want the Student to be moved from the class she was enrolled in, nor did they want a change in the services that the class was currently getting. The consent to allow evaluations was signed, and then partially rescinded by the Parents. The Parents were dismayed that the consent form called for a diagnostic placement, which they would not consent to. The Board, at the prehearing conference, stated that they would remove the term diagnostic placement from the form; the Parent pointed out that it was contained in other documents and that they were being told that the evaluations would be done in a diagnostic placement. The Parties could not come to an agreement on how the consent form for evaluation should be worded, despite several PPT meetings and several different iterations of the consent form. The Parents sought advice from third parties, some of which made the situation more confusing for all the Parties, and eventually prevented any agreement from being reached. Both Parties agree that the Student has a disability, most likely Autism; both Parties agree that evaluations are necessary; both Parties agree that services are needed.

The Complaint alleges that the Board was attempting to move the Student from the class that the Student was assigned to, and thus stop the services that the Student received in that class, as a result of the Parents requesting a due process hearing. While not clearly articulated, the complaint written by the Parents essentially alleges a violation of stay-put under 20 U.S.C. §1415(j) and 34 CFR §300.518. Through the prehearing conference, the Parents further articulated a denial of FAPE by the Board by failing to promptly identify and evaluate the Student for special education and related services under the Individuals with Disabilities Education Act ("IDEA"). 34 CFR §300.111; 20 U.S.C. §1401(3).

The Board moved to 1) either dismiss the Complaint because the Parent failed to properly articulate a resolution to the dispute; or 2) require the Parent to amend the complaint with a more fully articulated resolution proposal, citing Regulations of Connecticut State Agencies §10-76h-3(d)(5).

The Board presented 30 exhibits, marked B-1-B-30 respectively; the Parents presented 1 exhibit marked P-1. One joint exhibit was entered with the agreement of the Board, marked B-22. There were two Hearing Officer exhibits (HO-1; HO-2).

The Board called one witness (Supervisor of Special Education); the Parent called two witnesses (Parent and the Director of Student Services).

The findings of fact and conclusions set forth herein, which reference certain exhibits and witness testimony are not meant to exclude other supporting evidence in the record. All evidence presented was considered in deciding this matter.

All motions and objections not previously ruled upon, if any, are hereby overruled. To the extent a procedural claim raised by the Board of Education or the Student is not specifically addressed herein, this Hearing Officer has concluded that the claim lacked merit.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, *see SAS Institute, Inc. v. S&H Computer Systems, Inc.* 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District,* 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes ("C.G.S.") §10-76h and related regulations; 20 United States Code ("U.S.C.") §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. §§4-176e to 4-178, inclusive, §§4-181 and 4-186.

FINDINGS OF FACT:

The following facts are undisputed and are material to the Hearing Officer's decision.

1. Student is a five years and eight months old child, enrolled in a kindergarten class at the Nathan Hale School in the New London Public School system.

2. The Student was new to the Board and had never been evaluated or identified as a child eligible for special education services.

3. The enrollment questionnaire completed by the Parents, dated July 23, 2013, described the Student (in part) as "having speech delays; wears diapers and drinks bottles, autistic stimming, ... trouble catching ball, needs toilet training-hourly program, needs pt, ot, st..". (B-1).

4. A referral to determine eligibility for special education and related services was completed by the Parents on August 6, 2013. (B-2) The referral described specific

concerns in the areas of motor skills, speech delays, social skills, fine motor skills, activities of daily living, self-stimulating behavior and visual issues. (*Id.*)

5. A Planning and Placement Team ("PPT") meeting was held on August 23, 2013. (B-4). The individualized education program ("IEP") developed at that meeting recommended conducting evaluations to determine eligibility; and also recommended a diagnostic placement. (*Id.* Pg.2)

6. A Notice and Consent to Conduct an Initial Evaluation, outlining testing and evaluation procedures, areas of assessment and evaluators was completed, however specific tests or specific personnel were not indicated, but rather generalized areas to be tested and titles of proposed evaluators were used. The form was signed by the Parent on August 23, 2013. (B-5)

7. On the same date, August 23, 2013, the Parent then revoked consent for a diagnostic placement at the Winthrop School but specifically stated in the revocation that the consent to evaluate the child was not being revoked. (B-6) The remainder of that specific consent has not been revoked as yet. (Record)

8. Based on the enrollment questionnaire and the referral to determine eligibility for special education and related services completed by the Parent, the Board placed the child in a special education class at the Nathan Hale School that was comprised of students with the diagnosis of autism, where the Student remains. (Stipulation of the Board, 2/19/14, pg. 117, No. 4)

9. On August 29, 2013, the Parent clarified their previous revocation, stating that the revocations signed were not to be transferred to the Nathan Hale School, but were effective only for the Winthrop School. The revocation specifically stated that the Referral for Eligibility was not being revoked. (B-7)

10. On August 30, 2013, the Parents submitted a Referral to Determine Eligibility for Special Education and Related Services to the Board. The referral was very specific in identifying specific areas of concern in the areas of motor skills; speech delays; social skill deficits; self-stimulating behaviors; emotional difficulties; fine motor skill deficits and activities of daily living skill deficits. (B-10)

11. On September 30, 2013 a PPT meeting was convened, at which the Parents were present. The resulting IEP, identifying Nathan Hale as the currently enrolled school, stated, in part, to "plan and design evaluations to determine eligibility to include: classroom observations, parent/teacher interview, developmental history, rating scales for autism, behavior/social/emotional and standardized tests in the areas of cognitive processing, academic achievement assessments, language assessments, assessments for fine motor/sensory processing and assessments for gross motor skills". (B-13)

12. In the PPT meeting held on September 30, 2013, the Parents also expressed concern about the Board's use of the term "assessments as deemed appropriate" on the initial evaluation consent form. The PPT offered to name the array of tests. (*Id.*, pg. 2)

13. On October 3, 2013 the Parents denied consent to conduct the evaluations recommended at the September 30, 2013 PPT. (B-14)

14. The Board made repeated attempts in October to schedule a meeting with the Parents to discuss the current placement of the Student in the Autism program; the Parent responded by requesting time to obtain an advocate to assist them with the meeting. (B-20)

15. A meeting was scheduled for November 18, 2013, confirmed with the parent advocate, who sent an email of the meeting date and time to the Parents. (B-17) The meeting was not convened because the Parents did not appear for the meeting. There was no response to either text or phone calls made by the Board to the Parents. The Parents later stated that there was no confirmation of the meeting date. (B-20)

16. The Parents filed a Due Process Complaint on November 22, 2013.

17. In response to a direction from the Hearing Officer at the initial day of due process hearing on February 19, 2013, the Board provided a Notice of Consent to Conduct An Initial Evaluation listing specific evaluations, for specific areas of assessment and listing the specific evaluator for each evaluation. (B-30)

18. The Board, through its witness, the Supervisor of Special Education Services for the New London Public Schools, acknowledged that the Student had a disability, most likely autism, that the Student would most likely be eligible for special education and related services, and that the Student would most likely be in an autism specific classroom. (Testimony, Supervisor of Special Education Services; pg. 184, No. 15 through pg. 185, No. 4)

19. The Board, through Counsel at the close of the due process hearing, requested an order specifying the evaluations to be completed for the Student and agreed to a request by the Parent to specify a specific school psychologist to conduct all portions of the comprehensive evaluation that would be completed by a school psychologist.

CONCLUSIONS OF LAW AND DISCUSSION:

1. This administrative hearing was commenced pursuant to the IDEA and applicable Connecticut special education law. Pursuant to the IDEA, a local educational agency ("LEA") is responsible for providing disabled children within its jurisdiction with a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE"). See 20 U.S.C. §§ 1412(a)(1); 1412(a)(5)(A). When there is a disagreement between the parents of such a child and the LEA over whether the LEA has satisfied its obligations under the IDEA, the parents may commence a special education due process hearing and

thereafter seek review of the hearing officer's decision by a court if they are aggrieved by that decision.

2. Under the IDEA, when the parents of a child challenge a special education program proposed by an LEA, the issue to be resolved is whether the LEA's proposed program provides the child with a FAPE as determined by applying the two prong test stated in *Board of Education of Hendrick Hudson School District v. Rowley,* 458 U.S. 176, 206-207 (1982).

3. Under *Rowley*, the Board's program would provide the Student with a FAPE if the proposed individualized education program ("IEP"): (1) was developed in compliance with the IDEA's procedural requirements; and (2) was "reasonably calculated to enable [the Student] to receive educational benefits," or, in other words, "likely" to produce more than a trivial or *de minimis* progress. *Id.* The IDEA does not require that the Board provide the best program money can buy or provide a program that has all of the features that the Parents desire.

4. The subject matter jurisdiction of IDEA due process hearings and impartial hearing officers is defined under state and federal law. The IDEA states that impartial hearing officers and due process hearings are to decide issues outlined in 20 U.S.C. §1415(b)(6)(A) or (k)[1]. 20 U.S.C. § 1415(b)(6)(A) defines the subject matter as "*matter[s] relating to the identification, evaluation, or educational placement of the child, or the provision of a free and appropriate public education to such child*". *20 U.S. C. §1415(b)(6)(A) and see also, 20 U.S.C. § 1415(f)(1)(A).* The hearings are a means of resolving complaints when an LEA either "*(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.*" 20 U.S.C. § 1415(b)(7)(A)(III).

5. The IDEA requires parental consent for certain activities by the LEA. Pursuant to 34 CFR §300.300, the LEA must obtain parental consent in order to conduct an initial evaluation to determine if a child qualifies as a child with a disability under §300.8. The Board made an immediate attempt to obtain parental consent upon the initial referral by the Parent on August 6, 2013, scheduling a PPT meeting for August 16, 2013. (B-2, B-3) On August 23, 2013, the Parent signed the notice and consent form provided by the Board, to allow the Board to conduct the initial evaluation, which the Parent then partially revoked. (Finding of Fact No. 6) The Board then scheduled another PPT meeting for September 30, 2013, which the Parents attended, and at which another consent form for initial evaluation was provided. (B-13) The September 30, 2013 Notice and Consent form again provided generalized information regarding the types of evaluations to be completed and the evaluator who would do the evaluations. (B-14, Finding of Fact No. 13) The Parents declined to give consent to the Board to conduct an initial evaluation. (*Id.*)

[1] Due Process Hearing Officers also have jurisdiction to decide issues involving alternative educational settings under 20 U.S.C. §1415(k). The present Due Process Complaint does not raise any issues relating to alternative educational settings and thus, no discussion is required.

6. A Connecticut Hearing Officer, acting pursuant to Connecticut General Statutes §10-76h (d)(1), has the authority to order an evaluation of a student. §10-76h(d)(1) states, in pertinent part, "In the case where a parent or guardian, or pupil if such pupil is an emancipated minor or is 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...." .

7. The Board, in the proposed IEP developed on August 23, 2013, recommended initial evaluations of the Student for identification and eligibility for special education and related services, and identified the current placement of the Student at Nathan Hale School. (B-4) The Board provided a Notice of Consent to evaluate the Student, dated August 23, 2013 and signed by the Parent, in which the evaluation procedures were identified in generalized terms (observation, rating scales, tests deemed appropriate); and the proposed evaluator was identified by area of specialty, not by name. (B-5) The Board also provided to the Parents, on August 23, 2013, consent for Special Education Placement, which was signed by the Parent, for a "diagnostic placement" at Winthrop School. The diagnostic placement would be a change of placement as Winthrop School was not the current placement of the Student at the time that the due process complaint was filed. (Finding of Fact No. 1)

8. The Parties are involved in an administrative proceeding whereby a due process hearing has been requested under §300.507. Typically the pendency placement requires the Board to maintain the placement and services that the Student has been receiving pursuant to the last valid, accepted IEP. This Student has never had an IEP at this point. (Finding of Fact No. 2) However, the Student does have a placement and services that were tacitly agreed upon by the Board and the Parents, with the placement and services being provided for at least the previous two quarters of the academic year. The results of an evaluation may lead to a determination regarding the appropriateness of that placement and services, but for the purposes of the pendency placement, the placement and services were established, accepted and being provided to this Student. The Parents identified the program and placement as the Nathan Hale School, in a small classroom of eight students, instructed by Mrs. Eskra, apparently with additional services being provided by a Board contractor, Creative Interventions, LLC. The services were identified as "autism specialty services, 3x per week, ABA consultative services, functional training and supervisory services, ABA therapy (language, social, and self-help skills), in addition to cognitive and motor skills." The Board did not refute the Parents' description of the placement or the services being offered, other than to state that it was not a special education placement and the services provided were not pursuant to an IEP. (Stipulation of the Board, 2/19/14, pg. 117, No. 4)

9. The pendency placement issue was resolved with the Hearing Officer's order, issued on January 5, 2014, ordering the Board to maintain the Student in the classroom placement

the Student was originally placed in by the Board at the beginning of the school year, and to continue providing all services that the Student was receiving during the school year leading up to the filing of the complaint for due process. (Hearing Officer Motion Decision, dated January 5, 2014) The Board has continued to maintain that placement and services throughout the pendency of this matter and stated through counsel that they would continue that placement and services through the completion of the evaluation and identification process.

10. The Due Process Complaint further alleges that the Board denied the Student a FAPE by failing to promptly evaluate and identify the Student for special education and related services in violation of the Board's Child Find obligations. Child Find, as promulgated by 34 CFR §300.311, places an obligation on the part of a Local Educational Agency ("LEA") to locate, identify and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities. Children who are identified as having a disability under 34 CFR §300.8 and in need of special education are also subject to the Child Find obligations. Autism is a disability defined under §300.8 as " a developmental disability significantly affecting verbal and non-verbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."

11. The Board was aware of the difficulties presented by the Student and identified by the Parent in both the initial enrollment questionnaire for kindergarten, as well as the referral for special education and related services form. (B-1, B-2, and B-10) Indeed, the Board agreed with the Parents that the Student was disabled, most likely with the disability of autism, and would most likely need special education and related services. The Parties do not disagree on the informal identification of the Student.

12. The Board then scheduled a PPT meeting for November 18, 2013 in agreement with a parent advocate, who then emailed the date and time of the PPT to the Parents. (B-17) The meeting was not held as the Parents did not attend the meeting, claiming that they were unaware that it had been confirmed. The meeting was re-scheduled for November 22, 2013, in which the Parents did appear, without a parent advocate. It was at this meeting that the Board informed the Parents that the Student would be moved from the Student's current class as the Student was not identified as a special education student, nor was the Student identified as having the disability of autism. (HO-1)

13. On November 22, 2013, the Parents filed the complaint for a due process hearing.

14. I find that the Board has not violated its affirmative obligation under Child Find, to locate the Student, nor has it failed to {attempt to} identify or evaluate the Student for lack of making a "reasonable effort to obtain the informed consent of the parent.." in this matter. 34 C.F.R. §300.300(a)(iii) The Parents have been unable to provide a format under which the Notice and Consent to Conduct an Initial Evaluation form would be acceptable

to them and to the Board. Indeed, even during the due process hearing the Board would attempt to ascertain just how the Parents wanted the language on the form to read, only to find that each of the iterations asked for by the Parents had already been rejected by the Parents.

15. I find that the Board did not deny the Student a free and appropriate public education for the 2013-2014 academic years.

FINAL DECISION AND ORDER:

The issue of the pendency placement has been resolved through the Hearing Officer Motion Decision dated January 5, 2014, for the purposes of the Final Decision and Order; the pendency placement shall remain consistent with that order for the duration of the evaluation and identification process. There was no detrimental effect to the Student from the attempt to move the Student prior to that order, so there is no need to address any further remedy for the pendency placement issue.

The Board is ordered to conduct an initial evaluation of the Student utilizing the following evaluations and personnel, all of which were identified by the Board as being the evaluations that they would utilize:

1. Gilliam Autism Rating Scale; BASC-2, Social Skills Improvement System, Adaptive Behavior Assessment System for Children, Observations and Developmental History – to be evaluated by Heather Parsons, School Psychologist.

2. PPVT, EVT, language sample, Observation – evaluated by Laurie Wright, Speech Pathologist.

3. TERA, TEMA – evaluated by Debbie Eskra, Special Education teacher.

4. Sensory Profile, Peabody Dev. Motor Scales, observation – evaluated by Tracey Oltavera, OT.

5. School Function Assessment, Brigance Diagnostic Inventory, Observation – evaluated by Mary Kilcommons, PT.

The evaluations should commence as quickly as the Board can arrange for them to occur, and the Student is to remain in the current placement until the evaluations and subsequent identification, if so found, is completed.

As an aside to the final order, it was clear through the testimony of the Parents that they were acting in what they believed to be the best interests of the Student and that however misinformed their information may have been, their goal was to provide the Student with the best situation they, as parents, could obtain. It was an arduous task for all of the Parties to get to the point of hearing; it would behoove the Parties to set aside the hardships of the journey and collaboratively work towards forging a working relationship for the benefit of the Student.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).

Robert L. Skelley

Hearing Officer Signature

Robert L. Skelley, Esq.

Hearing Officer Name in Print

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