STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. New Haven Board of Education

Appearing on behalf of the Student: *Pro Se* Parent

Appearing on behalf of the Board: Michelle Laubin, Esq.
Berchem and Moses, P.C.
75 Broad Street
Milford, CT 06460

Appearing before: Sylvia Ho, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board fail to promptly identify the Student as a Student with a Disability under the IDEA who is eligible for special education services?

2. If so, do the circumstances warrant an award of compensatory education?

PROCEDURAL HISTORY/SUMMARY:

The Parent filed a Due Process Complaint and Hearing Request on June 10, 2017. The Hearing Officer was appointed on June 22, 2017 and conducted a Prehearing Conference on July 20, 2017. The Hearing Request alleged no facts that were the subject of the nature of dispute. During the Prehearing Conference, the Board raised two issues: 1) The Board challenged the sufficiency of the Complaint and 2) The Board challenged the Parent's authority to bring the Complaint since the Student was over eighteen years of age. The Board's sufficiency challenge was granted. On July 20, 2018, the Hearing Officer issued a Scheduling Order Memorandum to Parties directing the Parent to amend the Complaint by July 27, 2017 and for the Board to file a Motion to Dismiss on the issue of Parent's authority to request a hearing on behalf of the Student. The Parent did not comply with the order to amend the complaint by July 27, 2017. Instead, the Parent filed an amended complaint (also referred in the record as "revised complaint") on August 15, 2017.

On August 10, 2017, the Board had filed a Motion to Dismiss the Amended Complaint for Parent's lack of compliance with the Hearing Officer's order to amend the complaint by July 27, 2017. The Hearing Officer declined to rule on the Motion to Dismiss at that time.

A second Prehearing Conference was held on September 6, 2017 to address the claims contained in the amended complaint. At that conference, the Hearing Officer notified the parties that she had no jurisdiction to determine the Parent's claims for educational records under the Family Educational Rights and Privacy Act ("FERPA") or under Section 504 of the Rehabilitation Act of 1973 ("Section 504") or claims of discrimination. She further told the parties that she had no authority to award prospective relief or damages and that the Parent's claims of prospective relief for college education expenses, along with the Section 504 and FERPA claims, would be dismissed in the Final Decision and Order. This reset the time lines for the mailing date of the Final Decision to October 27, 2018.

The hearing convened on the following days: October 25, 2017, December 14, 2017, January 11, 2018, January 30, 2018, February 22, 2018, February 26, 2018, March 5, 2018, March 14, 2018, May 1, 2018, May 3, 2018, May 10, 2018 and May 22, 2018.

At the request of the parties, evidence was not received at the commencement of the hearing so that the parties could mediate the issues in dispute with a state appointed mediator. The Parent asked for and was given leeway so that she could to seek legal representation in the matter. The Parent reported she consulted with two different attorneys who reviewed and helped to negotiate a proposed mediation agreement. In the end, the Parent refused to sign the proposed mediation agreement that had been negotiated.

On January 30, 2018, the Board placed a formal offer of judgment into the record in which the Board offered to financially support a year of a private precollege academic program as a final resolution. The Parent declined the offer and proceeded to hearing. (See hearing transcripts from October 25, 2017 to January 30, 2018.)

The Board also renewed its Motion to Dismiss on several grounds, including the Hearing Officer's jurisdiction to decide legal issues under Section 504 and FERPA in the Amended Complaint. The Board also argued that the case should be dismissed because the Amended Complaint was filed outside the two-year statute of limitations for Individual with Disabilities Education Act ("IDEA") under Connecticut law. The Hearing Officer declined to act on the Board's motion at that time and opted to receive evidence about the nature of the Parent's claims.

Parent presented the following witnesses: Parent; Kevin Daly, Parent Advocate; Derrick L. Powell, Sr., New Haven Special Police Officer; and Michelle Sepuleda, New Haven Schools Dropout Prevention Specialist. Both Board and Parent presented the testimony of the following witnesses: Nilsa Mattos, Hillhouse High School Counselor/Social Worker; Patricia Moore, Hillhouse High School Supervisor of Special Education; Delores Linnen, former Hillhouse High School Social Worker; Shanette Robinson, Hillhouse High School Special Education Teacher and PPT Chair; Heriberto Cordero, former Administrator of Hillhouse High School; Dr. Chaka Felder-McEntire, District Lead School Counselor and Section 504 Coordinator; Kermit Carolina, former Hillhouse

High School Principal; and Dr. Dolores Garcia Blocker, Director of College and Career Pathways.

At the request of the Parent, the Hearing Officer subpoenaed the following witnesses: Delores Linnen, retired Social Worker; Nijija Ife Waters Towe, Parent's half sister; and Marie Doyle, retired School Psychologist. Ms. Linnen testified at the hearing. Ms. Doyle could not be subpoenaed because she was out of state. Ms. Waters Towe was excused from appearing. After receiving the subpoena she called the Hearing Officer and told the Hearing Officer that she had nothing helpful to add to the Parent's case. The Hearing Officer confronted the Parent with this statement at the next day of hearing and asked the Parent to state why she thought that the witness's testimony was necessary. The Parent failed to provide any reason why Ms. Waters Towe testimony would be supportive of the Parent's claims.

The original and Amended Due Process Complaints were marked as Hearing Officer exhibit H.O.-1. The Parent's exhibits P-1 to P-50 were admitted as full exhibits. The Board's exhibits B-1 to B-96 were admitted as full exhibits.

At the conclusion of the hearing, the Hearing Officer offered the parties the opportunity to submit a summary memorandum highlighting factual support for their respective legal position by May 31, 2018. The Parent did not submit any memorandum. The Board submitted a memorandum on May 31, 2018.

The Hearing Officer granted the parties' request to extend the mailing date of the Final Decision to February 2, 2018, March 20, 2018, May 10, 2018 and June 8, 2018.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent the summary, procedural history and findings of facts actually represent conclusions of law, they should so be considered and vice versa. *SAS Institute Inc. v. S & H Computer Systems, Inc.,* 605 F. Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. Callallen Independent School Board,* 835 F. Supp. 340 (S.D. Tex. 1993).

SUMMARY:

The Parent of a 20 year old high school graduate brought a Due Process Complaint approximately two years after the Student's graduation alleging that the Board failed to promptly identify Student as being eligible for Special Education and Related Services and seeking, among other things, payment of college tuition and damages.

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 §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, §§4-181a and 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following facts:

1. Student was born on April 27, 1997. At the time of the hearing, he was over twenty years of age. He was eighteen (18) years of age when he graduated from the Board's James Hillhouse Comprehensive High School on June 18, 2015 with a regular education diploma. While in high school, he was identified as a student eligible for a Section 504 accommodations plan in the 11th grade after the Parent made a referral to for evaluation for eligibility for special education. The Parent presented the PPT with a letter from a private doctor who diagnosed Student with behaviors consistent with Aspergers, and stated that Student would benefit from a Section 504 accommodation plan. The Student was deemed ineligible for special education but eligible for Section 504 accommodations. (B-25; B-26; B-35; B-37; B-44; B-87; Testimony Felder-McIntire)

2. The educational record reveals that throughout the Student's career, the Student was progressed from basic to proficient and advanced levels in statewide standardized testing by the state of Connecticut without assistance of accommodations and special education. Teachers reported throughout elementary and middle school that Student was also an active participant in school and showed appropriate behaviors. (P-3; B-1).
3. His high school attendance was as follows: 9th grade: 6 absences; 17 tardies. 10th grade: 12 absences; 55 tardies; 11th grade: 9 absences. 55 tardies; 12th grade 12 absences, 6 tardies. (P-3) During high school, his family was displaced and homeless due to a fire that had destroyed his home. His family was relocated to a hotel as a shelter. He received bus transportation services from the hotel which was out of district to the high school. (Testimony, Parent)
4. The Parent referred the Student to determine whether he was eligible for special education services in Student's freshman year because she felt that he was not working up to his intellectual abilities. The PPT met and recommended that an evaluation be conducted to determine if he was eligible for special education. The psychoeducational evaluation revealed no cognitive deficits. Student was functioning in the average to high average range in all areas. The evaluation also showed no significant problems in adaptive functioning. Student was deemed ineligible for Special Education services. (P-9)
5. Student took a History Honors I course in his Sophomore year and received a failing grade. He retook the course and received a B in the fall semester. In the same semester, he took the next sequence class History 2 Honors level and received an A+. Student took Honors level classes throughout his high school career. (B-87)

6. He took SATs in the 11th and 12th grade. In June of the 11th grade, he took the SATs before being identified as being eligible for Section 504 accommodations by the College Board. He scored 510 in reading; 520 in math and 400 in writing. In January of 12th grade, he took the SATs with accommodations. He scored 560 in reading, 530 in math and 510 in writing. (B-80; B-83)
7. He took Advanced Placement ("AP") level courses in the 12th grade. In addition to two high school courses, he took three AP courses and a college course at Gateway Community College. Against the advice of teachers, the Parent chose to have Student enroll in AP Literature and Composition, for which he had no foundational coursework. He struggled in this course. This was a point of conflict between the Parent and teachers. The Parent blamed the AP Literature and Composition teacher for her son's poor performance and demanded that he change teachers. One reason for the Student's low grade was that he had not had not handed in a large assignment. Sometimes he played games on his lap top computer and did not pay attention to class assignments. (P-25, p.8; Testimony, Felder-McIntire; Testimony, Carolina)
8. Student received a passing grade in the college course and was eligible to receive full college credit. He received recognition from Gateway Community College. He was honored at a senior awards banquet in which he was recognized for academic achievement. (P-28)
9. He applied for scholarships. He applied to a number of colleges and was accepted for enrollment as a freshman in at least two colleges, including the University of Hartford and Southern Connecticut State University. He had indicated on one of his scholarship applications that Southern Connecticut State University was a college he wanted to attend. (HO-1; P-28; Testimony, Felder-McIntire; B-87)
10. Student turned eighteen (18) years of age in April of his senior year and graduated from high school two months later.
11. The testimony and documentary evidence reveals that the Parent ("Parent" or "Mother") was very involved with the Student's educational career. She was frequently on school grounds and advocated aggressively on behalf of the Student. She frequently sent e-mails to school staff and administrators. (P-20-22; Testimony, Powell; Testimony, Carolina; Testimony, Parent)
12. The Mother presents with a challenging personality. This was demonstrated both in the educational record, in testimony and in her conduct during the course of the hearing. The educational record and testimony also reveals that the Mother would make demands of school staff and in doing, make accusations against staff in an attempt to secure whatever services she deemed necessary for her son. (See Parent e-mails reference in exhibits below; Testimony, Felder-McIntire; Testimony, Carolina, Testimony, Matos, Testimony, Parent, P-14).
13. The Parent's original complaint is dated June 10, 2017 and the amended complaint is dated August 14, 2017. The Parent did not comply with the Hearing Officer's order to amend the complaint by July 27, 2017.
14. The original complaint was filed after the Student's graduation and eight days short of the two years of the graduation date. The complaint alleges violations of IDEA,

Section 504 and discrimination against the Student based on his disabilities, "eligibility and education needs" and "lack of appropriate instruction". The proposed resolution requested was "eligibility according to IDEA 2004"; "Section 504 Rehabilitation Education plan"; "Independent Educational Evaluation"; "Amended Student Profile (Education) providing training on soft skills and life skills. Transition Services."

15. As of the filing of the original complaint, the Student was over eighteen years of age. Parent did not have authority to bring the original complaint on behalf of the Student. Parent was appointed temporary plenary guardian by the New Haven Probate Court (Keyes, J.) on July 27, 2017, which is more than a month after the original complaint was filed.

16. The amended complaint is dated August 14, 2017, while the Parent was appointed temporary guardian. The amended complaint was filed more than two (2) years after the Student had graduated from high school. (H.O.-1; B-87 and B-88)

17. The alleged violations in the amended complaint concerned independent educational evaluations from March to November of 2012 and on April 8, 2015, which occurred more than two years before the filing of the amended complaint. The amended complaint alleges that the school district violated a number of the Parent's rights, including failing to provide the Student with a high school guidance counselor, which is blatantly contrary to the exhibits and testimony at the hearing. The relief the Parent asks for in the amended complaint includes the following: 1) an independent educational evaluation; 2) the ability to retake high school courses and change the high school transcript; 3) one on one assistance to help Student successfully complete college; 4) correction of the entire education file; 5) paid tuition for four years to programs at Southern Connecticut State University; 6) a letter from the District "accepting responsibility" for not meeting the Student's educational needs; 7) all District personnel to receive training on Asperger's from the Yale Child Study Center; 8) A fund of $28,500.00 for the parent to train herself in autism. (Hearing Officer Exhibit H.O-1)

18. The Parent received guardianship of Student when he was twenty years old. The Parent applied for plenary guardianship on the grounds that the Student has an "intellectual disability" under C.G.S. Section 1-1g which requires evidence of " a significant limitation in intellectual functioning existing concurrently with deficits in adaptive behavior that originated during the developmental period before eighteen years of age." A "significant limitation in intellectual functioning" is defined as an intelligence quotient ("IQ") of more than two standard deviations below the mean, as measured by standard tests of intellectual functioning. This means an IQ of 69 or less." During the hearing, the Parent stated she was able to receive guardianship because of a special program for people with autism by the Department of Developmental Disabilities (DDS) and was advised this. This is blatantly false and contradicted by the Parent's exhibits. Exhibit P-34 is a letter from a DDS psychologist stating that the Student's IQ of 111 and not a person who meets the criteria of a person with Intellectual Disabilities under C.G.S Section 1-1. Board Exhibit B-88 is the record of the Probate proceeding appointing the Parent to be guardian. Exhibit B-88 p. 5 of 5 shows that the Parent was appointed as a guardian

without objection of the court appointed attorney for the Student after the court appointed attorney spoke to the Student. While this Hearing Officer has no jurisdiction over the probate matter, this evidence bears upon the Parent's credibility in bringing this action and in her lack of observing the appropriate boundaries in bringing claims before legal tribunals. For instance, while the Parent claimed that the Student is intellectually disabled in the application for guardianship, Parent had also asked high school staff to accompany her son in a tour of Yale University when he was in high school. (P-34; B-88; Parent remarks record in transcript of hearing).

19. It is significant to note that the Parent filed a Due Process Complaint 17-0421, which was within the two-year period. The Hearing Officer dismissed the case on June 9, 2017 because the Parent did not amend the complaint. (B-75)

20. It is also significant to note that the Parent has consulted with a number of different agencies and attorneys in the course of her dispute, including The Center for Children's Advocacy and two attorneys the Parent referenced on the record. It is this Hearing Officer's observation that the Parent was not uninformed about her legal rights. (B-39; see Transcript of hearings).

CONCLUSIONS OF LAW AND DISCUSSION:

1. The purpose of the Individuals with Disabilities Education Act ("IDEA") is to ensure that all children with disabilities have available to them FAPE that emphasizes "special education and related services designed to meet their unique needs" and "prepare them for further education, employment and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected…" 20 U.S.C. §1400(d)(1).
2. In order to qualify as a "student with a disability" under the IDEA, the student must meet two conditions: First, the child's disability must meet the definition of one or more of the categories of disabilities which include: intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities. Second, the child must need special education and related services as a result of his disability or disabilities. See 34 CFR 300.8(a)(1)(a) and (b).
3. If a child has one of the disabilities identified at 34 CFR 300.8(a)(1), but only needs related services and not special education, the child is not a child with a disability under the IDEA. 34 CFR 300.8(a)(2)(i).
4. The IDEA defines autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance." 34 CFR 300.8(c)(1)(i).
5. A medical diagnosis of autism will not, standing alone, entitle a student to receive special education and related services. In order to meet the IDEA's definition of autism, the diagnosed "developmental disability affecting verbal and nonverbal

communication and social interaction" must have an adverse effect on the child's educational performance. 34 CFR 300.8.

6. The Second Circuit Court has held that the term "educational performance" refers to academic performance unless state law provides otherwise. *See Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149 (2d Cir. 2008, *unpublished*); and *C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, *unpublished*).
7. In this circuit, educational performance is considered adversely affected when the disability significantly impedes the Student's educational performance. *Board of Educ. of New York City*, 47 IDELR 120 (SEA NY 2007). There is no evidence that the Student's educational performance was adversely affected by any disability. *Findings of Fact* No. 1, 4, 5, 6, 7, 8, 9 and 10.
8. The IDEA's statute of limitations states: "A parent or agency shall request an impartial due process hearing within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or if the state has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows." 20 U.S.C. §1415(d)(3)(c). IDEA's implementing regulation at 34 CFR §300.51(e) states that the requesting party must bring the hearing within two years of the date that party "knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process complaint under this part, in the time allowed by State law. Connecticut's IDEA implementing regulations at R.S.C.A. Sec. 10-76h-4 states that a party shall have two years to request a hearing from the time the party knew or should have known about the public agency proposal, refusal to initiate or change the identification, evaluation or educational placement of, or the provision of a free appropriate public education to the child. "[A]ccrual of the statute of limitations does not depend on [a party's] knowledge of the law, but rather on the plaintiff's knowledge of the injury." *Keitt v. New York City,* No. 09-8505, 2011 WL 4526369 at 10 (S.D.N.Y. August 26, 2011). Exceptions to the statute of limitations are only made in cases wherein the public agency has made specific misrepresentations that the problem that was the subject of the complaint was resolved or by the public agency's withholding of information that prevented the Parent from bringing a due process complaint within the statute of limitations. R.S.C.A. Sec. 10-76h-4.
9. The Board has moved for dismissal of the Due Process Complaint in this case on the grounds that it was untimely.
10. R.C.S.A. Sec. 10-76d-12(b) provides that when a child with a disability reaches the age of eighteen all rights accorded to the parents of such child under the IDEA, sections 10-76a to 10-76ii, inclusive, of the Connecticut General Statutes and, section 10-76b-9 and sections 10-76d-1 to 10-76h-19, inclusive, of the Regulations of Connecticut State Agencies shall transfer to such child. The Parent did not have legal authority to file the original due process complaint. *Findings of Fact* No. 15.
11. Although the Parent had authority to bring a claim on behalf of the Student by virtue of being appointed guardian, the amended complaint was filed well over two years

after Student graduated from high school or the date of any alleged violation. Any claim under the IDEA, including claims concerning the Student's eligibility for Special Education services are time barred. *Findings of Fact* No. 16, 17 and 18.

12. None of the exceptions to the statute of limitations apply. The evidence in the hearing reveals that the Parent disagreed with the Board's determination that the Student was not eligible for Special Education from the time the Parent first made a referral to determine eligibility for Special Education and Related Service until the date of graduation. The Board made no representations that would have prevented the Parent from filing a Due Process Complaint and in fact, the Parent has filed a number of complaints, including a previous Due Process Complaint against the Board over the same issues. *Findings of Fact* No. 19, 20.
13. Finally, original and amended complaints allege claims arising from violations of a number of other non-IDEA-related laws, including laws concerning student records, disability discrimination and Section 504 only claims. §10-76h of the Connecticut General Statutes confines the jurisdiction of Hearing Officers to confirming, modifying or rejecting the identification, evaluation or educational placement of or the provision of FAPE to a child, to determining the appropriateness of a unilateral placement of a child or to prescribing alternative special education programs for a child. The Hearing Officer has no authority or jurisdiction to examine these other claims. *Findings of Fact* No. 17.

FINAL DECISION AND ORDER:

The original and amended complaints are dismissed with prejudice.

COMMENTS ON THE CONDUCT OF THE HEARING, PURSUANT TO R.C.S.A. §10-76h-16(b)

The Parent's conduct in the hearing is noteworthy in her disregard of the orders of the Hearing Officer and lack of comportment during the proceeding. The Hearing Officer had to warn the Parent on several occasions that the hearing would be dismiss because she was being disruptive. Additionally, the Parent had the Hearing Officer subpoena her own sister. The sister called the Hearing Officer stating that she had already told the Parent that she had nothing helpful to add to the Parent's case and Parent then became aggressive and got into a physical altercation with her. The sister stated that she viewed the Parent's request that the Hearing Officer subpoena to her as further bullying over the incident. When confronted with this statement and asked for an offer of proof, the Parent provided no explanation and became disrespectful and disruptive of the hearing. The Parent's behavior prolonged the hearing unnecessarily.