

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Trumbull Board of Education v. [Student]

Appearing on behalf of the Board: Attorney Michelle Laubin  
Berchem, Moses & Devlin  
75 Broad Street  
Milford, CT 06460

Appearing on behalf of the Parents: The Parents proceeded *pro se* after  
Attorney Jennifer Laviano withdrew  
her appearance for the parents on the  
second hearing date.

Appearing before: Attorney Mary Elizabeth Oppenheim  
Hearing Officer

**ISSUES:**

**Boards Issues:**

1. To the extent that the Parents continue to seek homebound instruction for the Student as requested at the October 12, 2001 Planning and Placement Team ["PPT"] meeting, whether the Board is entitled to documentation meeting the requirements of Conn. Agencies Regs. Sec. 10-76h-15 regarding homebound instruction, stating that the Student has a specific medical condition such that she is medically unable to attend school at this time, how long the condition is likely to last, and when she may return to school.
2. Whether the Board is entitled to a psychiatric evaluation of the Student by a psychiatrist chosen by the Board, as requested at the October 12, 2001 PPT meeting.
3. Whether the Board is entitled to a medical evaluation of the Student by a doctor chosen by the Board, as requested at the October 12, 2001 PPT meeting.

**Parents' Issues:**

May 21, 2002 -2- Final Decision and Order 02-080

Whether the Board has offered the Student an appropriate program for the 2001-2002 school year and, if not, whether the Parents' program of homebound tutoring is appropriate and should be reimbursed.1

**PROCEDURAL HISTORY:**

The Board requested this hearing on March 26, 2002. The prehearing conference was held on April 3. On April 5, the Parents' counsel filed an additional issue on behalf of the

Parents, to be decided in this hearing. [Exhibit HO-2, see Parents' Issues, *supra*]  
The hearing was held on April 23, 24, 25 and 30. The Board's witnesses included: School Psychologist Susan Cohen, the Board Chair of Alternative Education Deborah McGrath, Assistant Superintendent of Schools for Pupil and Special Services Anthony Minotti, School Nurse Dawn Tichy, Board A-House Principal Valerie Forshaw and Board administrative assistant Shirley Mayo. The Parents did not call any witnesses. The Board submitted a brief on May 13.

The Parents appeared only once at a scheduled hearing date. At the first hearing date, the Parents' counsel was present, but the Parents did not attend the hearing. At the second hearing date, the Parents and Parents' counsel were present, however, the Parents' counsel notified the parties and the hearing officer that she was withdrawing her appearance as counsel of record as after the conclusion of the cross examination which was begun on the first hearing date. The Parents indicated on the record that they agreed to this withdrawal of their attorney, and represented themselves at the second hearing date when their attorney withdrew.

The Parents did not attend the third and fourth hearing dates.

To the extent that the summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

### **SUMMARY:**

This sixteen-year-old Student has had serious and long-standing school attendance problems for years, dating back to her sixth grade year. The Student's educational program has been revised a number of times through the years in an attempt to address the school attendance problems and to accede to the Parents' requests for particular placement. The background of the educational programming and placement is particularly important to note in this case, as it indicates that the Board has made many efforts to offer the Student a free appropriate public education. And, the testimony presented also indicates that the Student's education has been fragmented and thwarted by parental action. It is extremely troubling that the Parents condone the child's lack of attendance. The Parents have repeatedly claimed that the Students' many absences are due to some medical condition, but have failed to substantiate these claims. The Board has attempted to

<sup>1</sup> The Parents' issues were submitted on April 5, subsequent to the Board's request for hearing. [Hearing Officer Exhibit 2 obtain documentation of these medical conditions, to no avail. The Board also has sought to obtain appropriate medical and psychiatric evaluations, but the Parents have not consented to the evaluations.

The Student currently is not attending the Board schools, as the Parents claim that they are providing her with homebound instruction. Neither the Parents nor their counsel provided any evidence of such homebound instruction during the hearing. According to Board records, the Student has not attended school since October 2001, more than six months ago.

**FINDINGS OF FACT:**

1. The Student is 16 years old, and has been identified as eligible for special education services since January 1997, when she was in sixth grade. [Exhibit B-10]
2. The Student was initially identified as a student with a Learning Disability, and with a secondary classification as Seriously Emotionally Disturbed. [Exhibit B-10]
3. The Student's attendance problems date back to her 1996-97 school year, when the Student's mother apparently was in an accident. At that time, the Student stayed home from school and would leave school grounds prior to dismissal purportedly to care for her mother. As a result of these attendance problems, the Student was referred for truancy in November 1996. [Testimony Dr. Minotti; Exhibits B-2, B-3, B-4, B-5, B-7, B-27]
4. The Parents formally removed the Student from the Board schools two times: for home- schooling in seventh grade, and parochial school attendance in eighth grade. [Exhibits B-45, B-49] Neither of these programs were a success.
5. In the Student's seventh grade year, the Parents indicated that they intended to home-school the Student, and eventually, after much follow-up by Board representatives, submitted the requisite forms for home schooling in January 1998. In August 1998, when the Student was to begin eighth grade, the Board conducted a home school review, and found that the Student had an extremely poor portfolio that did not meet any of the Board's standards. [Testimony Dr. Minotti, Exhibit B-45]
6. The Board developed an Individualized Educational Program [hereinafter "IEP"] for the Student's eighth grade year in September 1998, recommending that the Student attend the Board Middle School for eighth grade, with special education support. [Exhibit B-47, B-48] The Board contacted the Parents September 16, to determine whether the Student would attend the Board Middle School pursuant to the proposed IEP. At that time, the Parent informed the Board that the Student was attending a parochial school in Stratford. Subsequently, the Board followed up with the Parent on September 23 regarding the Student's school attendance. The Board was concerned that the Student was not attending the Board school, and she was not attending the parochial school per information obtained by the Board directly from the parochial school. In the September 23 correspondence, the Board indicated that the Student must attend school, or a truancy report would be submitted to the Juvenile Court system. The Parent subsequently confirmed that the Student enrolled in the parochial school on or about September 24. [Testimony Dr. Minotti; Exhibit B-49]
7. In December 1998, the Student transferred back to the Board schools from the parochial school, reportedly due to an incident involving leaving the parochial school grounds without permission. [Exhibits B-49, B-50] At a PPT meeting, the Board recommended that the Student attend Project REACH (Regional Education and Counseling Help) for the remainder of the school year to help her with both academic and behavioral needs. This program was recommended at this time because the

Student's education was fragmented and inappropriate and the assistance at Project REACH could help her get on track. The Student attended the REACH program for the remainder of the 1998-99 school year, and the Board worked to accommodate the Parents' request that the Student follow the curriculum of the middle school rather than participating fully in the REACH program. [Testimony Dr. Minotti; Exhibits B-50, B-51, B-52, B-53, B-54, B-55, B-56, B-57]

8. After completion of the eighth grade at Project REACH, the PPT recommended that the Student attend the Board High School for ninth grade, with a special education program of resource support and English. [Exhibits B-57, B-58] Almost immediately in ninth grade, the Student began experiencing the same problems with attendance that had plagued her middle school years. [Exhibit B-60]
9. In September 1999, the school psychologist monitored the Student's program. The school psychologist noted that the Student was not attending school regularly. The Student spoke to the school psychologist, and requested that she be exited from special education services. The school psychologist offered to convene a PPT to discuss this request. [Testimony Ms. Cohen; Exhibit B-61]
10. The Student's program was reviewed at a PPT meeting on September 21, 1999, at which time the Board recommended that the Student be reevaluated to determine whether she continued to qualify for special education services. The Parent refused to allow the Board to conduct an evaluation, stating that Dr. Losen, a psychologist, would privately evaluate the Student. The PPT recommended weekly progress reports and a behavioral contract. [Exhibit B-63] The weekly progress report was instituted, but the Student and her Parents did not cooperate in having the form completed, signed and returned to the school psychologist. [Testimony Ms. Cohen, Exhibits B-64, B-65] The Student expressed a desire to go to Project REACH, the Alternate High School, or Long Hill Tutorial rather than the Board High School. [Testimony Ms. Cohen, Exhibit B-65]
11. When the Student's attendance problems continued, she was suspended from school for three days and asked to sign a behavioral contract with the school. [Exhibits B-66, B-67, B-68]

The Student and her Parents refused to sign the contract. [Testimony Ms. Cohen]

12. The PPT was reconvened November 1, 1999 to review the Student's program. The PPT recommended placement at Project REACH, with lunch and two afternoon classes at the Board High School, as the Student was not experiencing success in a full-time placement at the Board High School. Although the Parents continued to request a full-time placement at the Board High School, they agreed to this plan at the PPT. The PPT continued to recommend a re-evaluation of the Student, and agreed to fund a private evaluation by outside psychologist Dr. Mark Gang. [Exhibits B-69, B-71, B-72, B-76, B-83] Subsequently, the PPT decided that the Student would also receive 90 minutes of tutoring at REACH to keep her current in her high school

Global Civilizations class, in the event that she returned to the high school full-time later in the year. [Exhibit B-70]

13. The Student received an unsatisfactory report card for the first quarter of the 1999-00 school year and did not consistently attend her afternoon classes at the Board High School. [Exhibits B-73, B-75, B-77] Another PPT was convened on November 23, 1999 and full-time placement at Project REACH was recommended. This placement was not implemented, however, since the Parents failed to attend the meeting. Therefore, the Student continued to attend her split program at Project REACH and the Board High School, with the provision that if the Student continued to skip her afternoon classes at Board high school, she would be suspended to the tutorial program for the afternoon. [Exhibits B-78, B-79] Because the Parents refused permission for the Student to attend the tutorial program, when the Student was suspended for cutting classes at the high school, she was transported home rather than to the tutorial program. [Exhibits B-82, B-87]
14. On November 29, 1999, the Parents requested a due process hearing and revoked permission for the Board to conduct all evaluations on the Student, including an occupational therapy (OT) evaluation they had previously requested. [Exhibit B-80] The OT evaluation was accordingly cancelled, and the State Department of Education assigned a hearing officer. [Exhibits B-81, B-88]
15. Another PPT meeting was held on December 6, 1999 to discuss the Student's program. Once again, the Parents were not in attendance. The PPT again recommended full-time placement at Project REACH. [Exhibits B-84, B-85, B-86, B-87] At this time, the Student continued to attend a partial day program at Project REACH, although the Student asked the staff if she could stay for the full day at Project REACH. [Exhibits B-89, B-91, B-98]
16. In an attempt to reach an agreement with the family, the Board offered to allow the Student to attend her afternoon classes at the Board High School if the Parent would agree: (1) that the Student would have a paraprofessional escort to ensure that the Student not engage in excessive class cutting, and (2) that the Parent and the Student would execute a behavior contract. [Exhibits B-93, B-94] This plan was shared with and approved by Dr. Gang, who was in the process of conducting his evaluation and reviewing the available programs. [Testimony Ms. Cohen; Exhibit B-92] While the behavioral contract was revised at the request of the Parents, neither the Student nor the Parents ever signed the contract. [Exhibit B-97]
17. Dr. Mark Gang completed his psychological evaluation of the Student and reported on his results at a PPT meeting on January 11, 2000. [Exhibits B-100, B-101, B-102] Dr. Gang reported that the Student had difficulties with visual-motor and perceptual skills, including handwriting and spelling, which appeared to be developmental in nature and improved over time. According to Dr. Gang, the Student's skills in written expression, organization, and homework completion have also suffered because of her inconsistent school attendance and resulting lack of instruction. [Exhibit B-102]

After observations of the Project REACH and alternative high school programs, Dr. Gang recommended, and the team agreed, to the Student's full-time placement in the Project REACH program. [Exhibits B-96, B-102] The Board also approved payment of the services of Dr. Gang as a case manager one hour per week for the four weeks following the PPT. [Exhibit B-102]

18. The Student was successful in the full-time REACH program in early 2000. [Testimony Ms. McGrath; Exhibits B-104; B-105] A PPT meeting was held March 2, 2000 to review the Student's progress in the program, and the unanimous recommendation was that she should continue in the full-time REACH program. [Exhibit B-106] Based on the written report from Dr. Gang describing attention, learning, and emotional difficulties, the Student was re-classified as a student with Other Health Impairment (OHI). [Testimony Ms. Cohen, Exhibits B-99, B-106] The request for due process was subsequently withdrawn as the Board and the Parents agreed upon an IEP for the Student. [Exhibit B-112]
19. In March 2000, another student accidentally hit or bumped into the Student while she was riding on the bus home from school. The Student sustained a broken nose and sprained finger as a result of the incident, but was permitted to return to school within a few days, and appeared to suffer no long-term injuries as a result. [Exhibits B-107, B-108, B-109, B-110; Testimony Ms. McGrath] The family hired an attorney who filed a notice of claim with the school district in June 2000, and subsequently filed a lawsuit. [Exhibits B-116 and B-182]
20. On June 7, 2000, the PPT convened to review the Student's program and recommend a program for her tenth grade year. The PPT recommended that the Student continue in Project REACH in the morning with elective classes in the afternoon at the Board High School. [Exhibit B-115] The Student continued to experience success in Project REACH, and completed her first semester electives in auto and small engine repair. [Exhibits B-119, B-120; Testimony, Ms. Cohen, Ms. McGrath]
21. On December 18, 2000, the PPT reconvened to review the Student's program. The Parents requested that the Student be permitted to return to the Board High School full-time. It was agreed that if the Student maintained good attendance and behavior and provided a medical excuse for her absences by the next PPT, she would be given an opportunity to attend the high school full time. (Exhibit B-121) When the PPT reconvened on January 16, 2001, the Student was permitted to attend the high school on a diagnostic basis with a sign-in sheet to monitor her attendance. The Parents provided a note from Dr. Edward Lane that stated that the Student experienced periodic sinus infections and when this occurred, she would be absent for a few days at a time. The note provided no explanation for specific absences from school. [Exhibits B-122, B-124]
22. The attempt to send the Student to attend the high school full-time in January 2001 was not successful. The Student's pattern of absences and skipped classes continued. The PPT reconvened on February 13, 2001, and placed the Student at the Long Hill

tutorial program. [Testimony Ms. Cohen, Dr. Minotti; Exhibits B-125, B-126] The Student finished her tenth grade year at the tutorial program. She failed to attend the tutorial for most of the fourth marking period and threatened not to attend school to take her final exams, stating that she would be traveling to Virginia, but eventually took her exams and passed for the year. [Exhibits B-127, B-128, B-129, B-130]

23. The PPT reconvened on April 23, 2001 to develop a program for the Student's eleventh grade year. Although the Board members of the PPT recommended placement at the Alternate School with high school classes in the afternoon, the Parents requested that the Student be placed full time at the Board High School. The Alternate School was recommended, in part, as the Student's attendance would be more closely monitored in that setting. In an attempt to allow the Student a chance to succeed in the least restrictive environment of the high school, the PPT agreed that the Student could try full-time placement at the high school for the first 30 days of the 2001-2002 school year. The Student was provided with a program consisting of resource room time and transition counseling services. [Exhibit B-127]
24. Once again, in September 2001, the Student did not regularly attend her classes at the high school. [Exhibits B-131, B-134, B-135] The school psychologist, acting as case manager for the Student, monitored her attendance and encouraged the Student to complete a contract for regular school attendance. Once again, the Student and her Parents refused to sign the behavioral contract. [Exhibits B-132, B-133] On September 17, 2001, the school nurse sent a letter to the Parents stating that of 13 possible school days, the Student had been absent six days and tardy once. The nurse requested information from the Parents concerning the reasons for the Student's absences from school. [Exhibit B-134; Testimony Ms. Tichy] Instead of providing the requested information, the Parent called the school nurse and expressed outrage that she would be asked to supply this information. [Testimony Ms. Tichy] Despite a follow-up letter from the A-House principal, no medical reason for the absences was ever produced. [Testimony Ms. Tichy, Ms. Forshaw; Exhibit B-136]
25. In late September 2001, a PPT meeting was scheduled for October 12, as the Student was failing all of her classes due to lack of attendance. [Exhibits B-137, B-138, B-140] This lack of attendance was allegedly due to some medical condition, but no information had been supplied by the Parent to document the reason for the absences. Prior to the PPT meeting, in conversations with Board staff, the Parent indicated she could not provide the requested medical documentation because of her pending lawsuit against the school system, and did not understand the need for a PPT meeting. [Testimony Ms. Cohen, Exhibit B-139]
26. The Parent did attend the PPT held on October 12, 2001, at which time the Board members of the team recommended that the Student attend the Alternate High School program, with special education and counseling support provided on-site. The Parent did not agree to the placement but agreed to observe the program. The Parent also requested that the Student be provided with homebound instruction for medical reasons. She provided no medical documentation indicating that the Student was

medically unable to attend school in support of her request for homebound instruction. The PPT also recommended that the Student undergo medical and psychiatric evaluations at school district expense to assess the Student's medical and emotional status. The Parent refused to give permission for these evaluations, and also refused to sign a release permitting the Board to speak with Dr. Lane concerning the Student's illness. [Testimony Dr. Minotti; Exhibit B-140]

27. The Student never returned to the Board High School after the October 12, 2001 PPT meeting, and lost credit in all of her classes due to absences. [Exhibits B-141, B-147] The Parents refused to send the Student to the Alternate High School program. [Exhibit B-142] The Board requested a due process hearing to resolve the conflict between the Board and the Parents. [B-143, B-144]
28. Shortly after the October 12 PPT, Attorney Michael Burt contacted the Board on behalf of the Parents. He indicated that while he was unwilling to provide the school district with full access to all of the Student's medical records due to a pending lawsuit, he agreed to provide some medical documentation. [Exhibit B-145] The Board engaged in a lengthy dialogue with Attorney Burt in an attempt to obtain medical documentation relating to the reason and extent of the Student's absences from school. The Board withdrew its October 2001 due process request in reliance on Attorney Burt's promises to provide the requested documentation. [Exhibit B-158]
29. Although Attorney Burt appeared to be trying to cooperate with the Board's request, ultimately only limited documentation was produced, which failed to support the Parents' request for homebound instruction and provided insufficient information concerning the Student's medical condition. [Exhibits B-146, B-148, B-149, B-150, B-153, B-155, B-156, B-159, B-160, B-161]
30. On November 7, 2001, Attorney Burt provided a brief note from neurologist Dr. Diana Lebron, indicating that the Student was experiencing "frequent daily headaches" and that she might occasionally miss days of school due to headaches. On November 30, 2001, Attorney Burt provided a follow-up report from Dr. Lebron dated October 19, 2001 indicating that the Student appeared to have migraine headaches based on family history and was being prescribed pain medication, and that additional testing was needed. Once again, the report failed to indicate that the Student required homebound instruction for medical reasons or provide any excuse for specific absences from school. [Exhibits B-157, B-166; Testimony Ms. Tichy]
31. Also in November 2001, Attorney Burt indicated that the Parents had begun providing the Student with home tutoring services provided by an entity called SCORE. The Parents, however, never provided any information concerning this instruction. Although the Parents were provided with the forms required to withdraw the Student from the Board Public Schools to home-school her, they never returned the completed forms to the school district. Therefore, the Student continues to be enrolled at Board High School and continues to be truant. The Board has filed truancy and educational neglect referrals with the Department of Children and Families and

juvenile courts. [Exhibits B-161, B-162, B-163, B-164, B-167, B-168, B-185, B-186, B-194; Testimony, Dr. Minotti]

32. The Board has made several attempts to encourage the Student to attend school. In the alternative, the Board has also provided the Student with the information she needs to withdraw from school to avoid truancy referrals. On October 26, 2001, the Student came to school on a day she was reported to be home sick and visited the school psychologist and the A-House principal, seeking papers to permit her to withdraw from school and attend night school. The Student indicated to the school staff that she wanted to attend the Alternate High School program but her mother would not permit her to attend, so this was her plan to finish her education. [Testimony Ms. Cohen; Exhibit B-151] The school psychologist and the A-House principal tried to discourage the Student from withdrawing from school, instead encouraging her to attend school, but provided her with the papers she requested to take home to her Parents. [Testimony Ms. Cohen, Ms. Forshaw; Exhibits B-151, B-152] Throughout this period of time, the school continued to request documentation concerning the Student's absences from school from her Parents. [Exhibits B-154; B-169]
33. On January 29, 2002, the Parent contacted the Board Public Schools to request a PPT meeting. The school district again contacted Attorney Burt to request any further documentation he might be able to provide concerning the Student's absences from school. [Exhibit B-170] A PPT meeting was scheduled for February 5, 2002. [Exhibit B-171] Attorney Burt provided no further information and indicated that his office would not attend the requested PPT meeting. [Exhibit B-174] The next day, Attorney Jennifer Laviano requested a due process hearing and requested cancellation of the scheduled PPT meeting, taking the position that the PPT was not necessary and was unlikely to resolve the matter. [Exhibit B-172]
34. The Board continued to attempt to resolve this matter through Attorney Jennifer Laviano. Although the PPT meeting was cancelled at her request, the school district continued to request documentation concerning the Student's medical condition that might justify providing a different program. [Exhibits B-175, B-178] Attorney Laviano continued to take the position that the Parents could not provide any documentation to the Board as a result of their pending lawsuit against the Board. [Exhibits B-177, B-179] Although that pending hearing was withdrawn so that the parties could attempt to resolve this matter through mediation, mediation was also unsuccessful in resolving this matter. [Exhibits B-180, B-183]
35. A complaint dated February 6, 2002 was filed by Attorney Michael Burt in Superior Court, naming as defendants the Superintendent of Schools, Chairperson of the Board, the Board, the Town, and other individual defendants in connection with the bus incident on March 6, 2000. It appears that the case, which has a return date of March 12, 2002, is currently pending in Superior Court, and that the Parent has made personal injury claims against the Board on behalf of the Student in connection with the March 6, 2000 incident. [Exhibit B-182]

36. On March 26, 2002, having attempted to resolve this matter informally through conversations with the family's attorneys for several months, the Board filed this request for due process, seeking documentation and evaluation of the Student's medical condition(s) and a psychiatric evaluation. [Exhibits HO-1, B-187]
37. The Student currently has accumulated sufficient credits through various programs to be a junior in high school. [Exhibit B-188] However, the Student has attended only a few days of her junior year and has accumulated no credits for her junior year of high school. [Exhibits B-191, B-193; Testimony Ms. Forshaw] The Board has not been provided with any information concerning the instruction that the Parents claim to be providing to the Student at home. [Testimony Ms. Forshaw, Dr. Minotti]
38. The Board has not been provided with any information concerning the Student's medical condition, other than the January 2001 letter regarding sinus infections from Dr. Lane and the October 2001 statements concerning the possibility of migraine headaches from Dr. Lebron. [Testimony Ms. Tichy, Dr. Minotti]

### **CONCLUSIONS OF LAW:**

1. The Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq.
2. In order for the Student to receive homebound instruction for medical reasons, as requested by the Parents, Connecticut law provides that medical documentation must be provided to the Board. The applicable provisions states:

A board of education shall provide homebound and hospitalized instruction when recommended by the planning and placement team.

...

(b) Necessary conditions. Homebound and hospitalized instruction shall be provided only when the planning and placement team finds that one or more of the following conditions applies.

(1) A physician has certified in writing that the child is unable to attend school for medical reasons and has stated the expected date the child will be able to return to the school.

(2) The child has a handicap so severe that it prevents the child from learning in a school setting, or the child's presence in school endangers the health, safety or welfare of the child or others.

(3) A special education program recommendation is pending and the child was at home at the time of referral.

(4) The child is pregnant or has given birth and a physician has certified that homebound or hospitalized instruction is in the child's best interest and should continue for a specified period of time.

Conn. Agencies Regs. Sec.10-76d-15(b).

In this case, no evidence supports that the Student and Parents are seeking

homebound instruction under subsections 2, 3 or 4 of the regulations. There has been no claim, nor any evidence proffered that the Student is pregnant, has given birth, or has a handicap so severe that it prevents her from learning in a school setting, her presence in school does not endanger the safety of herself or others. This is also not a situation where a special education program recommendation is pending and the child needs to be on homebound instruction pending the availability of a placement. Thus, those sections of the regulations are inapplicable.

To the extent that the Parents continue to request that the Board provide the Student with homebound instruction, the Board is entitled to receive a physician certification meeting the requirements of this section as a prerequisite. This physician's information must specifically certify in writing that the child is unable to attend school for medical reasons and must state the expected date the child will be able to return to the school. In the absence of such certification meeting the requirements of this section, the Board is under no obligation to provide homebound instruction to the Student.

The Board is seeking medical and psychiatric evaluations of the Student to determine the appropriate program for the Student. In conducting its evaluation, the Board shall ensure that a complete evaluation study is conducted. Conn. Agencies Regs. Sec. 10-76d-9(a) The evaluation study shall include reports concerning the child's educational progress, structured observation and such psychological, medical, developmental and social evaluations as may be appropriate in determining the nature and scope of the child's exceptionality Conn. Agencies Regs. Sec. 10-76-9(a)

It is the obligation of the PPT to review existing assessment data regarding a child and to determine whether additional information is necessary in order to program for the child. Initially the PPT reviews existing evaluation data and identifies:

what additional data, if any, are needed to determine –

- (i) Whether the child has a particular category of disability, as described in Sec. 300.7, or, in the case of a reevaluation of a child, whether the child continues to have such a disability;
- (ii) The present levels of performance and educational needs of the child;
- (iii) Whether the child needs special education and related services, or, in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum. 34 C.F.R. Sec. 300.533(a)

In this case, the Student's attendance problems have created a challenge for the members of the PPT to address successfully through the Student's educational program, as it is unclear whether the attendance problems are related to the Student's disabilities and/or a medical condition. Additional assessment information is needed

to make this determination.

In October 2001, the PPT attempted to address the Student's attendance issues and recommended that she attend an Alternate High School, with special education and counseling support. The Parents refused to allow the Student to attend this program and claimed that she had medical problems requiring that she be provided with homebound instruction. The Parents, however, provided no medical documentation in support of this request, as is required by Connecticut regulations. In order to resolve this issue, the PPT recommended medical and psychiatric evaluations to ascertain the reasons for the Student's absences from school, and to develop an appropriate program for the Student. To date, the Parents have refused to provide consent for the evaluations. The Board is entitled to the requested evaluations in order to fulfill the need to have current assessment data to ascertain the child's disability and level of functioning pursuant to 34 C.F.R. Section 300.533(a)(2).

In the absence of parental consent for evaluations, hearing officers may order special education evaluations without the consent of the parent. Conn. General Statutes Sec. 10-76h(d)(1) The federal regulations specifically indicate that when the parents of a child with a disability refuse consent for initial evaluation or a reevaluation, the Board may continue to pursue the evaluations through the due process procedures. 34 C.F.R. Sec. 300.505(b) The Board has appropriately brought such a request, and the evidence supports that the medical and psychiatric evaluations are necessary so that the evaluation of the Student is sufficiently comprehensive to identify all of the child's special education and related services needs. 34 C.F. R. Sec. 300.532(h) The medical and psychiatric evaluations shall be completed.

Any party to a hearing conducted pursuant to Section 10-76h-1, et seq., of the Regulations of Connecticut State Agencies and Sec. 300.507, et seq., of the Federal Regulations has rights to be represented by counsel; a reasonable opportunity to present evidence and confront, cross-examine and compel attendance of witnesses; and to prosecute their action. Sec. 10-76h-11 of the Regulations of Connecticut State Agencies, Sec. 300.509 of the Federal Regulations. These rights are not without obligations, as the parties must proceed in good faith to prosecute their action. Connecticut Regulations specifically provide that:

- (a) Any party may move for, or the hearing officer may order, sua sponte, an entry of default or dismissal of a hearing for failure of any party:
  - (1) to prosecute the hearing;
  - (2) to participate in the prehearing conference;
  - (3) to comply with sections 10-76h-1 to 10-76h-18 of the Regulations of Connecticut State Agencies; . . .
  - (7) to appear at a properly noticed scheduled hearing. . .

The hearing officer may grant the motion with or without prejudice.  
Conn. Agencies Regs. Sec. 10-76h-18

Counsel for the Parents submitted the Parents' additional issue to be decided in this forum. As the Parents were disputing the appropriateness of the Board's program in their submitted issue, the Board presented substantial evidence in the four hearing days on the issue of the appropriateness of its program. Moreover, on the day when counsel for the Parents withdrew her representation, the issues which are before this hearing were read into the record for a second time to ensure that the Parents were aware of all issues pending, including their submitted issues.

Subsequently, the Parents did not appear for the third and fourth days of hearing claiming, ironically, that there were medical reasons involving the child that somehow prohibited either one of the Parents from attending the hearing. On the third day of hearing, the Parents did not notify the hearing officer in a timely manner regarding their claimed reason for not going forward or appearing on the third day of hearing. And, no specific identification for the medical reason was proffered by the Parents in any filing submitted to the hearing officer. Moreover, on the fourth day of hearing, the Parents indicated to a Board representative that they were aware that the hearing was going forward, but refused to attend. Therefore, the Parents issue should be dismissed for failure to prosecute, and failure to appear at a properly noticed scheduled hearing.

The more weighty issue is whether the case must be dismissed with prejudice, as this action, in its finality, would bar the hearing of the Parents' claims. While not bound by other federal court rules, it is useful to look to them for guidance. These court rules provide that a plaintiff may be subject to a dismissal, including dismissal with prejudice, for failure to prosecute or comply with court orders. *See* Rule 41(b) of the Federal Rules of Civil Procedure. Rule 41(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

(b) Involuntary Dismissal. . . For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant . . . . [A] *dismissal under this subdivision . . . operates as an adjudication of the merits.* [Emphasis added]

Failure to appear at a pretrial conference, failure to prepare for a conference, or failure to comply with pretrial orders can serve as a basis for such a dismissal. *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp*, 542 F.2d 1318 (7<sup>th</sup> Cir., 1976) It is also beyond dispute that a court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial. *Zagano v. Fordham University* 900 F. 2d 12 (2d Cir. 1990)

Dismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or persistent failure to prosecute a complaint. *Givens v. A.H. Robbins Co.*, 751 F. 2d 261, 263 (8<sup>th</sup> Cir. 1984) In dismissing a case with prejudice, the needs of the tribunal in advancing a crowded docket and preserving respect for the integrity of its internal procedures are balanced with the harsh consequences of forever denying a litigant her day in court. *Moore v. St. Louis*

*Music Supply Co., Inc.*, 539 F. 2d 1191, 1193 (8th Circuit 1976)

In considering whether dismissal with prejudice is warranted, the Courts have looked to four factors for guidance: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to such a dismissal; and (4) whether less drastic sanctions were imposed or considered before such a dismissal was ordered. *Stough v. Mayville Community Schools*, 138 F. 3d 612, 615 (6th Cir. 1998)

In this case, it is difficult to discern whether the Parents, in not appearing at the third and fourth days of the hearing, proceeded in bad faith. It is clear, however, that the Board was prejudiced by the party's conduct since it had presented evidence during the hearing as to the appropriateness of its program. It is ironic that the Parents failed to appear at the hearing due to some alleged medical treatment or maladies of the Student. One of the issues to be determined in this hearing is that the Parents have made such claims to the Board, but have not substantiated claims that the Student is medically unable to attend school.

Nevertheless, the Parents are now proceeding *pro se*, and may not have understood the consequences of their actions, specifically spelled out in the regulations: that their failure to appear at the hearing and their failure to prosecute their claims, could result in a dismissal of their claims with prejudice. Another fact that weighs in favor of a dismissal without prejudice, as opposed to one with prejudice, is that the Parents' counsel submitted the additional issue to this already pending hearing brought by the Board. The Parents may not have fully understood the impact of the counsel submitting the issue, and their subsequent failure to prosecute that action. Thus, the less drastic sanction of dismissal without prejudice is appropriate in this action.

Therefore, in light of the circumstances of this case, the Parents' issue must be dismissed without prejudice for the Parents' failure to prosecute the action, appear at the hearing and comply with the Regulations of Connecticut State Agencies.

#### **FINAL DECISION AND ORDER:**

1. The Parents must provide appropriate medical certification meeting the requirements of Conn. Agencies Regs. Sec. 10-76d-15 to the Board. In the absence of such appropriate medical certification, the Board is not required to provide the Student with homebound instruction.
2. The Board shall be permitted to conduct a psychiatric evaluation of the Student by an appropriately licensed psychiatrist in the State of Connecticut chosen by the Board, without parental consent.
3. The Board shall be permitted to conduct a medical evaluation of the Student by an appropriately licensed physician in the State of Connecticut chosen by the Board, without parental consent.

The Parents' issues<sup>2</sup> are hereby dismissed, without prejudice.

<sup>2</sup> Whether the Board has offered the Student an appropriate program for the 2001-2002 school year and, if not, whether the Parents' program of homebound tutoring is appropriate and should be reimbursed.