STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Litchfield Board of Education v. Student

Appearing on behalf of the Parents:	Attorney Rachael M. Baird Stonegate Professional Building 379 Prospect Street Torrington, CT 06790-5239
Appearing on behalf of the Board of Education:	Attorney Craig S. Meuser Shipman & Goodwin LLP One American Row Hartford, CT 06103-2819
Appearing before:	Attorney Deborah R. Kearns Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

I. Whether the issues for hearing were raised at an Individual Education Program Meeting (IEP)?

II. Whether the Parent must provide a copy of the medical evaluation report completed by a mutually appointed evaluator, to the Local Education Agency (LEA)?

III. Whether the student is entitled to receive special education and related services in the future if her parents refuse to cooperate with the Board's efforts to reevaluate the student?

PROCEDURAL HISTORY:

The LEA made a claim for due process on May 1, 2003. The prehearing conference convened on May 9, 2003. The LEA refused the offer of a hearing date of May 16, 2003. One day of hearing convened on May 20, 2003. The parties requested leave to prepare post-hearing briefs which are dated May 28, 2003 which were received May 30, 2003. The record closed May 30, 2003. The hearing officer issued a decision to the State Department of Education on June 17, 2003. The Parent through counsel presented a Motion to Dismiss claiming the issues for hearing

had not been raised at an IEP meeting. The Parent never mentioned the failure to raise the matter at a prehearing conference and made the motion without notice to the LEA on the first day of hearing. The LEA agreed the motion could be heard without delay. The Motion to Dismiss is denied due to a finding that the hearing issues had been raised at an IEP meeting.

SUMMARY:

The LEA which provides homebound instruction to the child, made a claim for due process when the Parent refused to provide it with the results of a recent evaluation. The evaluation was generated with the consent of the Parent by a mutually agreed upon evaluator. The Parent's refusal to provide the LEA with a copy of the report is due to the evaluator's comments made about the Parent contained in the report. The LEA is entitled to the report of the physician's evaluation which contains recommendations for accommodating the child in the school environment. The evaluations are necessary to determine whether the child is eligible to receive special education services or if the services are appropriate and provided in the least restrictive environment. The Board's obligation to provide a program to the child is conditioned on receipt of up-to-date evaluations to determine, what if any specialized instruction or placement the child currently requires.

FINDINGS OF FACT:

1. The student who has chronic fatique syndrome is identified as a child with a disability under the category of other health impaired (OHI). (Exhibit B-1)

2. The student who is sixteen years old is currently receiving homebound instruction, based on a physician's recommendation the child be placed on homebound instruction. From the time the student was in the seventh grade, she has been on homebound instruction for long periods of time. (Exhibit B-1, Testimony, Parent)

3. At an individual education program meeting (IEP), dated May 28, 2002, it was determined, among other decisions, that the child should be reevaluated by May 1, 2003. The LEA requested consent for a school selected nurse or physician to examine the child. The Parent denied consent. (Exhibit B-1)

4. At an IEP meeting, dated January 10, 2003, both parties attended with their respective attorneys. It was decided the child would be evaluated by Dr. Lawrence Zemel of the Connecticut Children's Medical Center (CCMC). Said evaluation was to occur without the presence of the mother. The LEA's letter to Dr. Zemel dated January 27, 2003, identifies the evaluations to be conducted and outlines the specific information the LEA requires to plan a program for the child and to determine the continued need for homebound instruction. The school requires for its records the state mandated physical forms, which the mother has refused to provide in the past. (Exhibit B-7)

5. The Parent signed a Notice and Consent to Conduct a Reevaluation form (Exhibit B-7) at the meeting. The consent provides the Parent received a copy of Procedural Safeguards Special Education. The notice informs the Parent and her attorney of her right to refuse or revoke

consent at any time, the right to be fully informed of the evaluations to be conducted, a copy of the evaluation results, the right to an independent evaluation and the right to utilize due process procedures. The Parent signed the Notice and Consent form which states the evaluation procedures, identifies the physician both parties agreed would conduct the evaluation. As outlined in the IEP recommendations, the evaluator was to consider if a medical chemical sensitivity evaluation was necessary. The parental consent paragraph contained in the Notice and Consent to Conduct a Reevaluation form specifically provides an acknowledgement that the Parent gives consent to the LEA to conduct the evaluation described [in the form] and understands the consent may be revoked at anytime. The Parent executed the document on January 10, 2003, in the presence of her attorney. (Exhibit B-4, B-7, Testimony, Director of Special Education, Testimony Parent)

6. The LEA communicated the IEP decision to the mutually selected physician, Dr. Zemel, by letter dated January 27, 2003, requesting the child be evaluated without the mother present, that the physician recommend a physician to conduct an evaluation of the child for multiple chemical sensitivity as deemed to be necessary; and perform a physical evaluation as necessary to complete the state mandated medical forms. The physician is to address the LEA's concerns and questions about whether the child's condition prevented her from regularly attending school, whether there are additional evaluations necessary, and who should perform the evaluations to determine, what accommodations are necessary to permit the child to regularly attend school. The Parent was sent a copy of the January 27, 2003 letter addressed to Dr. Zemel. There no evidence or testimony the Parent objected to the form of the January 27, 2003 letter. (Exhibit B-8)

7. The Parent testified that she wrote to Dr. Zemel prior to the evaluation and spoke with him on the date of the examination. Her attorney wrote a letter which the physician attached as an exhibit to an affidavit. The Parent never disclosed or copied the LEA about her unilateral communications with the evaluator. (Exhibit B-14, Testimony, Parent)

8. The Parent was asked to sign a release form (which is not an exhibit entered into the record of the hearing) which would permit the physician to communicate directly with the LEA. The Parent claimed the release form was overly broad. She repeatedly communicated directly and through her attorney her intent to provide the LEA with a copy of the evaluation once she received it from the physician. A letter dated March 17, 2003 states that the Parent believes the "release" is not a necessary prerequisite for the LEA to receive a copy of Dr. Zemel's evaluation. (Exhibit B-9, B-10, B-11, Testimony, Parent, Testimony Director of Special Education)

9. The Parent informed the Director of Special Education that she had the report and that she would let the attorneys deal with the details. The Parent refused to provide the LEA with the evaluation. She refused to provide the evaluating physician with a release which would permit communication between the LEA and the evaluating physician. (Exhibit B-14, Testimony, Director of Special Education, Testimony, Parent)

10. The LEA notified the Parent they would call Dr. Zemel as a witness at the hearing by letter addressed to the hearing officer, dated May 13, 2003. The Director of Special Education

testified he received Dr. Zemel's Affidavit dated May 19, 2003. The affidavit, which was admitted to explain the absence of a properly called witness to the hearing, confirms the physician performed an evaluation of the child on February 24, 2003. Dr. Zemel prepared a report, summarizing his medical evaluation which contains recommendations for appropriate accommodations in the school setting. The physician refused to testify or provide the LEA with the evaluation due to applicable law which precludes his discussion of the matter without the Parent's "release". The Director of Special Education testified the Parent refused to permit the physician to communicate with the LEA or testify about his evaluation. (Exhibit B-14, Testimony, Special Education Director)

CONCLUSIONS OF LAW:

1. The Parent moves to dismiss the due process proceedings claiming there is no jurisdiction to hear the matter, because the Parent's refusal to sign a "release" (release), permitting the physician to communicate with the LEA, was not raised at a IEP meeting. Connecticut General Statute § 10-76h-4(g) provides "no issue may be raised at hearing unless it has been raised at a planning and placement team meeting for the child". The issue for hearing, as stated in a letter requesting due process, dated April 30, 2003 is whether the Parent must provide the Board with a copy of a medical evaluation report completed by Dr. Lawrence Zemel.

   Consent to evaluate was properly obtained and never revoked. The parties agreed to the evaluation on May 28, 2002. The parties met on January 10, 2003 and mutually agreed to an evaluator, the type of evaluation to be conducted and the procedure to choose any additional evaluators, if the mutually agreed evaluator believed it to be necessary to have additional evaluations. The parties understood the purpose of the evaluation was to determine the child's medical status, whether that status prevented her from attending school and a proposed date for her return to the regular education setting.

   The Parent in the presence of counsel signed the Notice and Consent to Conduct a Reevaluation. The consent form signed by the Parent provides extensive detail of the procedures outlined for conducting the evaluation. The LEA sent an instruction letter to the physician dated January 27, 2003. The Parent testified the consent was never revoked. The Parent never objected to the form of the letter to the physician and presented the child for evaluation on February 24, 2003.

   After the evaluation was completed but before the Parent saw the content of the physician's evaluation, the Parent refused to sign a release, which permits the physician to communicate with the LEA. The release, which the physician requires prior to communicating with others about the child, is not the same document as the consent. The release relates to the rights and obligations between the physician and the parent. The Notice and Consent to Conduct a Reevaluation relates to the rights and obligations between the parent and the LEA, which includes the LEA's right to obtain a copy of the evaluation report.

   The Parent claims she is entitled to discuss her refusal to sign a medical "release" at an IEP meeting as a prerequisite to the LEA's right to commence due process. The issue of the

evaluation and consent to conduct an evaluation is found to have been discussed at IEP meetings on, May 28, 2002 and January 10, 2003. The issue for hearing is whether the Parent must provide the medical evaluation prepared by Dr. Zemel. It is absurd to argue that a due process hearing claiming the LEA is entitled to a copy of the evaluation report require yet another IEP meeting to negotiate with the Parent to obtain the evaluation report generated by the agreed upon evaluation procedure. The Parent's claim is found to be cause yet another delay in providing the LEA with evaluative information about the child.

In conclusion, Notice of Consent to Conduct a Reevaluation and Prior Written Notice complies with the requirements of IDEA and 34 C.F.R. § 500.503 and C.F.R. § 500.505. The Parent never revoked consent but rather refused to sign a "release" permitting the physician to communicate with the LEA. The Parent never objected to the LEA's letter of January 27, 2003. There is no question the issue of consent to reevaluate the child was discussed extensively at an IEP meeting. The requirements of Connecticut Regulation 10-76h-4(g) are satisfied.

2. The LEA is entitled to receive the evaluation, in fact the law requires the IEP team plan for reevaluation, the Notice of Consent to Conduct the Evaluation and transmittal letter are the documents necessary to satisfy the requirement of 20 U.S. C. 1415 (a) and Regulation 34 C.F.R. § 300. 500-503. It would be absurd for the LEA and Parent to plan for an evaluation over the period of a year and for either party to expect that it is possible to withhold the final report, particularly since the Parent, by her own testimony admitted she did not revoke consent for the evaluation at any point in time before the date of the hearing. Without notice to the LEA the Parent tried to influence the evaluator by writing to the physician prior to the evaluation restricting the physician's communication with the LEA and through communication sent by her attorney seeking deletion of parts of the evaluation report. Her actions are not an inadvertent failure to communicate relevant information to the LEA. She makes outright attempts to thwart the evaluation process. Since the report is known to comment on the Parent's conduct, it is particularly relevant to planning a program and placement for the child.

3. The LEA is required to review and if appropriate revise the content of the IEP in accordance with the provisions of applicable regulations 34 C.F.R. § 300.346(b) and 34 C.F.R. § 347. The child is on homebound instruction. This is an extraordinary removal of the child from the regular education setting. The removal should only occur in circumstances where the IEP team has an opportunity to fully consider the need for such a placement. The reevaluation procedure outlined at the January 10, 2003, IEP meeting is intended to provide relevant up-to-date information for the purpose of making a placement decision. The LEA must develop an appropriate program for the child in the least restrictive environment. IDEA at 20 U.S.C. 1412(a) (5) and Regulation 34 C.F.R. § 300.550 provides to the maximum extent appropriate, children with disabilities are to be educated with their non-disabled peers. Without up-to-date evaluations the LEA has no assurance it complies with these important legal mandates.

Before a school system is liable for the special education services provided to a child, it must first be determined whether they are eligible or remain eligible to receive special education services. The record has little information regarding the child's need for specialized

instruction. According to the testimony and evidence presented, the child's special education needs appear to be largely due to the child's medical reactions to the school setting. The child's program provides for the child to be allowed to participate in certain classes and non-academic, after-school activities. The Parent believes the student has superior performance earning "A's" in her course work. The physician's affidavit states he has recommendations for appropriate accommodations in the school setting. The physician's affidavit states "the parent refuses to permit me to communicate with the [LEA] concerning his evaluation of the child." It is impossible for the LEA to formulate an appropriate program for the child or determine if she continues to be a child in need of specialized instruction. Indeed, the LEA cannot be assured the child even remains eligible to receive special education pursuant to IDEA.

A school system which is liable for the special education of a student is entitled to up-to-date evaluative data and may insist on evaluations by qualified professionals who are satisfactory to school officials. The school district is entitled to evaluative data on the child in order to determine its financial responsibility, if any for providing a program for a student. Dubois v. Connectict State Bd. Of Educ., 727 F. 2d. 44, 49 (2nd Cir. 1984).

Connecticut has long recognized that evaluations and reevaluations are key for determining the appropriate program for a child in need of special education.

FINAL DECISION AND ORDER:

1. The issue for hearing was raised at an IEP meeting and there is jurisdiction to decide the issues presented for hearing.

2. The LEA is entitled to a copy of Dr. Zemel's evaluation report.

3. The current evaluation is required before the LEA can decide what, if any, program and placement provides the child with a free and appropriate public education.