STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Torrington Board of Education

Parent Attorney: Deborah G. Stevenson, Esq.
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Board Attorney: Michelle C. Laubin, Esq.
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Appearing Before: Stacy M. Owens, Hearing Officer

Ruling on the Board's Motion to Dismiss and the Parent's Objection to the Motion

Procedural History:

The Parent in the above-referenced matter filed a request for hearing on April 2, 2008.

On April 11, 2008, a prehearing conference was held, during which, Attorney Stevenson appeared on behalf of the Parent and Attorney Laubin appeared on behalf of the Board. The issues were discussed and the hearing was scheduled for May 29, June 3 and 4, 2008.

By letter dated May 1, 2008, Attorney Laubin submitted a Motion To Dismiss in the above-referenced matter.

On May 14, 2008, Attorney Laubin sought a ruling requesting that the hearing officer grant the Motion To Dismiss, citing the Parent's untimely response and failure to comply with §10-76h-8(c) of the Regulations of Connecticut State Agencies, which provides that objections to a motion are to be filed within seven (7) days following the hearing officer's receipt of the motion.

On May 15, 2008, Attorney Stevenson requested additional time to submit an objection to the Board's Motion to Dismiss. Attorney Stevenson's request for additional time to submit a response in opposition to the Board's Motion to Dismiss was granted with a deadline for submission on May 23, 2008.

On May 23, 2008, Attorney Stevenson filed an Objection to the Board's Motion to Dismiss.

Summary:

The Board moves to dismiss this matter based on a lack of jurisdiction. The Board argues that it is not the school district responsible for providing the Student a free and appropriate public education ("FAPE") in accordance with the Individuals with Disabilities Education Act ("IDEA") because the Student was parentally-placed in a private school outside of the Board's district. The Board claims that it is the responsibility of the district in which the Student is being educated to determine the Student's eligibility to receive special education services.

The Parent contends that the Board is the properly named party in this matter because the Parent has unilaterally placed the Student in a private school as a result of the Board's failure to provide the Student a free and appropriate public education, and identify the Student has eligible to receive special education services and Section 504 accommodations.

Findings of Fact:

1. The Student is sixteen years old and resides in the Board's district.

2. The Student was last enrolled in the Board's district during his 5th grade year, 2002-2003.

3. Prior to the Student's 6th grade enrollment in the Board's district, the Parent referred the Student for a special education and Section 504 eligibility determination, and claimed the Student could not attend the district middle school due to poor air quality in the building, which could trigger the Student's severe respiratory symptoms attributed to chronic moderate to severe allergies and asthma. Parent's Opp., pp. 1, 2; Board's Motion, p.2.

4. During the Student's 6th grade year, 2003-2004, the Student withdrew from the Board's district and enrolled in St. Margaret McTernan Middle School in Waterbury, Connecticut. Board Exhs. 1, 2; Parent's Exhs. B, C.

5. A planning and placement team ("PPT") convened on December 9, 2003. The PPT could not determine the Student's eligibility for special education services because of the lack of a current report of the Student's progress and an observation of the Student at St. Margaret McTiernan Middle School. Board Exh. 3.

6. The Board agreed to accept the Student's first quarter report card, and the Parent signed a Notice and Consent to Conduct an Initial Evaluation form with restrictions, for observations of the Student in St. Margaret McTernan Middle School. Board Exh. 3.

7. A PPT meeting convened on February 20, 2004, at which the PPT determined the Student was not eligible to receive special education services. Board Exh. 4.

8. During the February 20, 2004, PPT the Parent requested a neuropsychological evaluation of the Student, which was granted. Board Exh. 4.

9. On September 17, 2004, the PPT convened and reviewed the independent neuropsychological evaluation and teacher reports from St. Margaret McTernan Middle School, and determined the Student was not eligible to receive special education services. Board Exh. 5.

10. The Student completed middle school at St. Margaret McTernan Middle School and enrolled in high school at the Chase Collegiate School in Waterbury, Connecticut for the 2006-2007 school year. Parent's Opp. p. 3, Board's Motion, p. 3.

11. On March 26, 2007 and March 31, 2007, the Parent requested a Section 504 and PPT meeting for the Student's 2006-2007 school year to identify the Student as Other Health Impaired ("OHI") for special education eligibility and "requiring accommodations for his breathing/respiratory disability under section 504." Board Exh. 6; Parent Exhs. D, E.

12. On April 5, 2007, Judith Babcock, Director of Student Services, referred the Parent to the Waterbury Public Schools for an eligibility determination. Board Exh. 7.

13. On June 8, 2007, the Parent wrote a letter to Ms. Babcock indicating that she had a meeting with the Waterbury Public Schools on May 25, 2007, and that she was instructed to return to the Board for her Section 504 and PPT meeting. Board Exh. 8.

14. By letter dated June 12, 2007, Ms. Babcock informed the Parent that Waterbury is the district responsible for the referral, evaluation and identification of the Student. Board Exh. 9.

15. On April 2, 2008, the Parent requested a due process hearing claiming that the Board: 1) denied her requests to identify the Student as OHI and eligible to receive special education services and Section 504 accommodations for the 2006-2007 school year; 2) denied her request for out-of-district placement for the 2006-2007 school year; 3) denied the Student FAPE for the 2006-2007 school year; and, 4) denied reimbursement for a unilateral placement for the 2006-2007 school year. Hearing Officer Exh. 1.

Discussion and Conclusions of Law:

In accordance with 34 CFR §300.130, parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of. . . secondary school in §300.36.

As correctly cited by the Board's counsel, in accordance with §300.131 of the Code of Federal Regulations, "[e]ach LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools *located in the school district served by the LEA*…" (emphasis added).

However, the question is raised as to whether this is a matter of Child Find as asserted by the Board, or unilateral placement, as asserted by the Parent.

The Parent contends that the Board has continually refused to provide the Student "a free and appropriate public education in a safe school setting without discrimination due to his disabilities . . . during 2003-2004, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 school years, and continue their course of conduct." (*See* Parent's Opposition, page 11).

In accordance with 34 CFR §300.148 (b), "Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§300.504 through 300.520.

34 CFR §300.148(c) further provides that:

> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private preschool, elementary school, or secondary school without the consent or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. (emphasis added).

The Federal Regulations clearly distinguish the responsible LEA/public agency as it relates to matters of Child Find and FAPE. In this particular case, the Student was found by the Board to be ineligible for special education services as late at September 14, 2004. The Parent did not file for due process relating to the Board's finding of ineligibility, but instead, placed the Student in a private school in Waterbury, Connecticut, outside of the Board's district.

Although the Parent argues that she has continually made attempts since 2003 for the Board to identify the Student as Other Health Impaired to qualify the Student as eligible to receive special education services and Section 504 accommodations, one thing is clear. At the time the Parent made her request for due process on April 2, 2008, the Student had not "previously received special education and related services under the authority of [the Board.]" Therefore, the Student is considered "parentally-placed" not "unilaterally placed," as the Student has not been identified, nor has the Student received any special education services. FAPE is not at issue, but rather, the Student's identification and eligibility to receive special education services is, thereby rendering the Board an improperly named party, and nullifying the hearing officer's jurisdiction over this matter.

Final Decision and Order:

Based on the foregoing facts and conclusions of law, this matter is hereby DISMISSED without prejudice, and the previously scheduled hearing is canceled.