

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student¹ v. Portland Board of Education

Appearing on behalf of the Student: Attorney Deborah T. Vilcheck
PO Box 914
Deep River, CT 06417

Appearing on behalf of the Board: Attorney Peter J. Murphy
Shipman & Goodwin, LLP
One Constitution Plaza
Hartford, CT 06103

Appearing before: Attorney Janis C. Jerman, Hearing Officer

FINAL DECISION AND ORDER

A special education hearing in the above-captioned matter was requested by the Student's Surrogate Parent via Request for Impartial Special Education Hearing dated July 21, 2010.² It was received by the Board of Education on that same date. The thirty-day resolution period ran through August 20 and the original deadline for mailing the final decision and order was October 4, 2010.

A telephonic pre-hearing conference was held on August 11. Student's Surrogate Parent appeared on behalf of Student and Attorney Murphy appeared on behalf of the Board of Education. The following issue was identified: Is Student eligible for special education services? The parties agreed to participate in mediation which was held on August 24. A hearing was scheduled for September 16.

On September 3, Attorney Vilcheck filed an appearance on behalf of Student. On September 8, Student's Attorney filed a request for an extension to permit her time to prepare for hearing. After fully considering the positions of the parties, the request was granted. The deadline to mail the final decision and order was extended until November 3, 2010, and the hearing scheduled for September 16 was postponed to October 1.

On September 24, Student's Attorney filed a witness listing identifying Student's Guardian *Ad Litem* as the only witness. Student's Attorney did not file any exhibits. On that same date, the Board of Education's Attorney filed its witness list consisting of the Director of Student Services, a Psychiatrist, the

¹ In order to comply with the confidentiality requirements of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g and related regulations at 34 C.F.R. § 99, the decision uses generic titles in place of names and other personally identifiable information.

² All dates are 2010 unless otherwise indicated.

School Principal, and the Special Education Director of the school Student attends outside of the district. The Board of Education's Attorney filed eleven exhibits.

On September 29, in response to scheduling inquiries from the Hearing Officer, the Board of Education's Attorney indicated its intent to object to the hearing proceeding given that Student's only disclosed witness had no involvement in the case. The Board of Education's Attorney objected to the Guardian *Ad Litem* testifying at all, and, absent any other witness, requested that the case be dismissed.

A telephonic pre-hearing conference was held on the evening of September 29 to discuss scheduling issues and the Board of Education's objection. After a preliminary discussion, the Board of Education indicated its intention to file a motion to preclude the witness' testimony and/or a motion to dismiss for failure to meet the burden of production. A Motion to Preclude Testimony and Evidence from Guardian *Ad Litem* was filed on September 30.

The hearing convened on October 1 with oral argument on the Motion to Preclude. The Board of Education's Attorney argued that the Guardian *Ad Litem* has no relevant evidence, that he was not at any of the Planning and Placement Team ("PPT") meetings, that his input was not considered by the PPT, that his opinion regarding the propriety of the PPT's determination that Student is not eligible for special education and related services amounts to Monday Morning Quarterbacking, that he is not an appropriate person to give expert testimony, and that Student's Surrogate Parent, Foster Parent, and Foster Agency were all present at the PPT that determined Student ineligible for special education and related services.

Student's Attorney's disclosure of the Guardian *Ad Litem* as a witness indicated that he will testify as an expert witness as to "his opinion as to the impairments that interfere with the student's learning. The basis of his opinion is his personal knowledge of the student and the student's experiences while in DCF custody...The grounds for [his] opinion will be his training, education and experience as an attorney and guardian *ad litem* in child protection."

Student's Attorney argued that it was a meaningful oversight to not include the Guardian *Ad Litem* in the process, that he represents Student's best interest, and was representing Student at the time of the PPT. In response to a question from the Hearing Officer, Student's Attorney explained that Student's Surrogate Parent is responsible for representing Student's educational needs.

During his argument, the Board of Education's Attorney referenced an exhibit. The exhibits had not been admitted. During an initial discussion off the record, Student's Attorney indicated her intent to object to Board Exhibit 7. The Hearing Officer inquired as to whether the exhibits needed to be marked and

considered prior to a ruling on the Motion to Preclude in light of the reference to the IEP which was offered as an exhibit.

The Board of Education's Attorney indicated that he objected to admitting any of the Board of Education's exhibits as full exhibits for purposes of Student's Attorney to use in her case in chief and to meet her burden of production. The objection was overruled on the basis that the Hearing Officer's August 11 Order to the parties stated that "[t]he parties will coordinate the submission of evidence in order to eliminate duplicate submissions" and that Student's Attorney previously indicated that she did not have any other exhibits to offer.

Board of Education Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10, and 11 were marked as full exhibits. Board of Education Exhibit 7 was marked for identification only. It was agreed that argument on Student's Attorney's objection to Board Exhibit 7 would be deferred until after resolution of the Motion to Preclude given that the *Guardian Ad Litem* had a short window of availability due to a scheduled court appearance.

After a brief break to give the Hearing Officer an opportunity to review the arguments, the Motion to Preclude was denied on the basis that the *Guardian Ad Litem* was Student's only identified witness, that Student's Attorney represented that his exclusion from the PPT meeting was meaningful oversight. The Hearing Officer instructed Student's Attorney that testimony would be permitted from the *Guardian Ad Litem* on the narrow issue of how he came to be excluded from the PPT process and, if the preclusion was by the Board of Education as to Student's own representatives, what information he would have provided to the PPT if included.

The *Guardian Ad Litem* testified as to his role with Student and how he came to be excluded from the PPT process. Based on that testimony, the Hearing Officer found that he was not excluded by the Board of Education and granted the Motion to Preclude as to what information the *Guardian Ad Litem* would have provided had he been included.

The parties agreed to reserve opening statements until the conclusion of the *Guardian Ad Litem's* testimony, which was expected to be brief, in order to permit him to make his prescheduled court appearance.

Student's Attorney made an opening statement indicating that Student is informally receiving in-school supports that allow him to develop needed skills, that the impact of Student's abuse and neglect was not identified at the PPT, and that the failure to identify the impact goes to the result of failing to identify Student as eligible for special education and related services.

The Board of Education's Attorney made an oral motion to dismiss for failure of Student to meet his burden of production pursuant to Connecticut State Regulations section 10-76h-14(a). He argued that Student's one witness lacked any involvement in the PPT, could have been invited, that no one present at the PPT was identified as a witness, and that there was no substantive evidence from Student's Surrogate Parent, who filed the request for due process.

Student's Attorney asked the Hearing Officer to take into consideration the testimony of the Guardian *Ad Litem* and the opening statement when rendering a decision.

Relevant Findings of Fact

1. Student attends a high school outside of the Board of Education's jurisdiction but the Board of Education is the nexus district responsible for Student's education (Hearing Officer Exhibit 1).
2. At mediation on March 26, 2010, the Board of Education agreed to an independent psychiatric evaluation of Student (Exh. HO-1).
3. The evaluation was reviewed at a July 20, 2010 PPT meeting where the PPT determined that Student was not eligible for special education and related services (Exh. HO-1).
4. Student's Surrogate Parent disagrees with the determination regarding Student's eligibility for special education and related services (Exh. HO-1).
5. Guardian *Ad Litem* was appointed to represent Student in July 2008 as a result of allegations of abuse and neglect (Testimony of Guardian *Ad Litem*).
6. His role is to act as Student's attorney to tell the court what Student wants and to issue an opinion as to Student's best interest. He attends Department of Children and Families ("DCF") administrative case reviews on behalf of Student, met Student face-to-face on about three occasions, talked with Student on the phone on some occasions, and got status updates from Student's social worker and foster parents (Testimony of Guardian *Ad Litem*).
7. Student's social worker made Guardian *Ad Litem* aware of PPT meetings. Student's social worker asked Guardian *Ad Litem* to represent Student in a special education hearing but he declined because he does not handle those types of legal matters (Testimony of Guardian *Ad Litem*).
8. Guardian *Ad Litem* was not invited to attend Student's July 2010 PPT (Testimony of Guardian *Ad Litem*).

9. Guardian *Ad Litem* did not ask to be included in the PPT process (Testimony of Guardian *Ad Litem*).
10. Student's social worker, foster parent, and a DCF representative were present at the July 2010 PPT (Exhibit B-6).

Conclusions of Law

1. Pursuant to Connecticut State Regulations 10-76h-14, Student has the burden of production in a special education due process hearing.

Discussion

Student's Attorney identified one witness who knows Student and represents him in another administrative setting. The witness, Student's Guardian *Ad Litem* in a child protection case, was not invited to the PPT meetings by any of Student's representatives, did not ask to attend the PPT meetings despite being made aware of them, and gets his status updates from individuals who were at the PPT meeting. There was no testimony as to what occurred at the PPT meeting, what the determination was based on, or why Student's Surrogate Parent³ disagrees with the determination.

The motion to dismiss was granted on the record for Student's failure to meet the burden of production.

FINAL DECISION AND ORDER

The above-captioned case is hereby dismissed.

³ Student's Surrogate Parent was present at the hearing but was not identified as a witness.