

April 28, 2011

Final Decision and Order 11-0239

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Board of Education

Appearing on behalf of the Parent:

Surrogate Parent, *Pro se*

Appearing on behalf of the Board:

Attorney Marsha Belman Moses
Berchem, Moses and Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing before:

Mary H.B. Gelfman, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Was there any delay in the provision of special education services for the Student when the Student moved into the Board's school district, for which the Board was responsible, and which delay resulted in a denial of a free appropriate public education (FAPE)?
2. If there was a denial of FAPE, what shall be the remedy?

PROCEDURAL HISTORY:

This hearing was requested by the Student's Surrogate Parent on January 17, 2011 and the Hearing Officer was appointed on February 7, 2011. A resolution meeting was held on February 15, 2011. The date for mailing the decision was April 2, 2011.

A pre-hearing conference was held on March 4, 2011. The hearing was scheduled for April 13, 2011, and the Parties requested an extension of the decision date to accommodate the hearing date. The request was granted, and the decision date was extended to May 2, 2011. The hearing convened and was completed on April 13, 2011.

All motions and objections not previously ruled upon, if any, are hereby overruled.

SUMMARY:

The Student is identified as having multiple disabilities, among which are visual impairment and intellectual impairment. He had been living in a group home and attending school in a program provided by Oak Hill School. In anticipation of his 21st birthday, he was moved to another group home in a different school district, and that school district was notified of his possible arrival.

Although an initial meeting about his move involving several agencies was held, there was a gap of approximately fourteen school days between the Student's move into the school district and his actual enrollment in the School District's program. His Surrogate Parent initiated a hearing, claiming a denial of FAPE due to this delay. The Board responded that they could not enroll him safely until they received a full Individualized Education Program (IEP) from his prior school placement with supporting documentation, held a Planning and Placement Team (PPT) meeting, and revised his IEP.

Although this hearing was limited to the issues concerning Student's delayed enrollment in the Board's program, his 1/25/2010 IEP is described to illustrate details of his prior program. The Board's 12/23/2010 and 2/24/2011 IEPs are described as sources for the award of compensatory education.

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 following decision uses "Student", "School", "Parent" and titles of school staff members and other witnesses in place of names and other personally identifiable information. The name of the school district is also omitted because the Student's unique history, with the name of the town, could reveal his identity.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of fact and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence on the record. To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

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. The Student was born on 1/08/1990 and is now 21 years of age. His entitlement to special education is due to end on 6/30/2011, the end of the 2010-2011 school year. (Ex. B-13, p. 1)
2. The Student has been in the custody of the Department of Children and Families (DCF) and receiving special education services under the auspices of Unified School District #2 (U.S.D. #2). He will be a client of the Department of Developmental Services (DDS) when he "ages out" of special education. (Testimony, Surrogate Parent)

3. The Quarterly Nursing Assessment from Oak Hill School dated 7/1/2010 to 9/30/2010 provides Student's current status:
 - Diagnosis:** Mental retardation, Blind, FAS, Hx of Metabolic nutritional disorder, History of Asthma, History of G-tube & Bowel impaction, s/p Hernia repair, prone to ear infections, ACNE.
 - Allergies:** Penicillin, Cephalosporin, Augmentin; Seasonal allergies.
 - Diet:** Regular diet, moist chopped consistency with approved finger foods. Regular liquids.
 - Current Medications:** Claritin, Triaz 6% gel, Benzaclin 1.5 Gel, Patanol, Tartar Control Toothpaste, Clindamycin, and PRN Senna Liquid and Sudafed. (Ex. P-4)

4. His U.S.D. #2 school program had been provided by Oak Hill School for the Blind and his prior school placement was in an Oak Hill classroom with a related pre-vocational program. His 1/25/2010 PPT meeting was attended by: representatives of U.S.D. #2, DCF, Student's then-current group home, the Board of Education and Services for the Blind (BESB), DDS, Oak Hill School including his then-current teacher, the Student, his then-current Guardian and his Surrogate Parent, a total of sixteen people. (Ex. B-13 p. 26; Testimony, Assistant Director of Oak Hill School)

5. Student's 1/25/2010 IEP included the following goals:
 1. [Student] will improve training and functional academic skills by meeting criteria on 5 out of 7 short-term objectives.
 2. [Student] will improve vocational skills by meeting 3 out of 4 short-term objectives.
 3. [Student] will improve independent living skills, including accessing community services by meeting 5 out of 7 short-term objectives.
 4. [Student] will improve recreation and leisure skills by meeting 2 out of 3 short-term objectives.
 5. [Student] will improve recreation and leisure skills through participation in Music Therapy, and by meeting 1 out of 2 short-term objectives.
 6. Through Adaptive Physical Education, [Student] will improve swim skills and upper body strength by meeting criteria on 1 out of 2 short term objectives.
 7. Student will independently determine safe crossing times at residential intersections on five out of five trials.
 8. [Student] will demonstrate and build on his understanding and practice of breathing and breath support techniques that assist in vocal production and projection. (Ex. B-13 pp. 7-19)

6. Student's Program Accommodations and Modifications for all classes for the duration of this IEP in the 1/25/2010 IEP:
 - Materials/Books/Equipment:** Electric Braille, Braille and tactile books and materials, white cane, talking calculator, talking watch, digital book reader and recorder, Victor Reader, inner lip plate, scoop bowl, JAWS software, Duxbury Translator software and Embosser.
 - Tests/Quizzes/Assessments:** Data collection.
 - Grading:** Progress reporting on IEP goals and objectives through data analysis.

Organization: Individualized instructional plans, Desk drawers Braille labeled and Classroom storage for materials.

Environment: Clear work area; sighted guide assistance in unfamiliar environments as needed.

Behavioral Interventions and Support: Daily feedback, positive reinforcement.

Instructional Strategies: Extra practice, multisensory approach, immediate feedback, modified content, provide models, concrete examples, text to be read slowly and repeated for practicing, manipulatives and tactile materials.

Other: Braille and Transcriptionist/Paraprofessional.

Frequency and duration of supports required for School Personnel to implement this IEP include: Individualized instructional plans and schedules available for school personnel in the classroom: Adaptive Technology Specialist, Behavior Specialist, PT available for consult, integrated OT and SLP. Orientation and Mobility available for consult, BESB Educational Consultant 1 hour/every month consultation. (Ex. B-13 p. 20)

7. Student's special education and related services for the period 2/8/2010 to 1/25/2011 were listed in the 1/25/2010 IEP:

Functional Academics	26.25 hrs./wk.
Adaptive PE	1 hr./wk.
Music Therapy	1 hr./wk
Orientation and Mobility	.75 hrs./wk. to max of 32 hrs. for an ESY
Music Therapy/Voice Projection	60 min. sessions for the ESY for 12 sessions per quarter. (Ex. B-13 p. 23)

8. The Student has a Guardian and a Surrogate Parent. After he left Oak Hill School, his Guardianship was transferred to a Paraprofessional who had been assigned to him at Oak Hill for 14 years. She had provided direct classroom instruction following an IEP and under the supervision of a certified teacher. When she was no longer providing educational services to him, she became eligible to serve as his guardian. In addition, the Student was and is represented by a Surrogate Parent at Planning and Placement Team (PPT) meetings. (Testimony, Surrogate Parent, Current Guardian)

9. The Board received a telephone call from Oak Hill School, on or about 10/6/2010, reporting informally that Student might be moving to a group home located within their school district. (Testimony, Board's Director of Special Education)

10. On or about 10/28/2010, the Board received official notice from DCF that Student would be moving into the school district. (Ex. B-16; Testimony, Board's Coordinator of Special Education)

11. A meeting was held on 11/22/2010, intended to involve all the stakeholders for Student. Representatives of the Board, DCF, DDS, the former group home, the new group home, Student's Oak Hill School Special Education Teacher and the then-current Guardian were present. It is not clear from the hearing record which agency initiated this meeting. Not present, and apparently not invited, were the Surrogate

Parent and someone from the BESB. The Board was represented by the Special Education Teacher at the Board's transition program. At the end of this meeting, the people who would attend a PPT meeting for Student agreed to the date of December 8, 2010. (Ex. B-37; Testimony, Board's Special Education Teacher, Coordinator of Special Education and Director of Special Education)

12. At the 11/22/2010 meeting, the Oak Hill Special Education Teacher gave the Board's Special Education Teacher a copy of Student's current IEP, dated 1/25/2010. The Board's Special Education Teacher noticed that the IEP was incomplete, and the Oak Hill Teacher attempted to get a complete IEP Faxed from Oak Hill to the site of the 11/22/2010 meeting, but was unsuccessful. When the Board's Director of Special Education realized that the IEP that had been provided was incomplete (only approximately half the pages had been copied) he telephoned Oak Hill and requested a complete IEP. (Ex. B-14; Testimony, Board's Special Education Teacher, Board's Director of Special Education)
13. The Surrogate Parent, who had not been present at the 11/22/2010 meeting, was unable to attend a PPT meeting on 12/8/2010, and the PPT was re-scheduled to 12/23/2010. (Ex. B-21)
14. The Board's Special Education Teacher visited the Oak Hill classroom to observe the Student on 12/2/2010. At the time, Student, his Teacher and his Paraprofessional were alone in the classroom. His Paraprofessional told the Board's Special Education Teacher about Student's program and her methods for working with him. She described his special feeding program and she demonstrated an intervention she used when the Student failed to cooperate. The Oak Hill Special Education Teacher also discussed Student's program with the Board's Special Education Teacher. (Testimony, Paraprofessional/Guardian)
15. Student's Paraprofessional had observed some problematic behavior by Student concerning his moves to a different group home and a different school program, and reported this behavior to the Board's Special Education Teacher. (Testimony, Paraprofessional/Guardian)
16. The Assistant Director of Oak Hill School had observed Student's Oak Hill classroom weekly and attended his U.S.D #2 PPT meetings. (Testimony, Assistant Director, Oak Hill School)
17. Student was officially discharged from his former group home to the new group home on 12/3/2010. He was registered in the Board's school district on 12/3/2010. He was ready to attend school on December 6, 2010. (Ex. B-20; Testimony, Surrogate Parent)
18. The Board refused to enroll the Student until a complete IEP was provided, supporting documentation was provided, a PPT meeting was held, and the IEP was revised. The result of this position was that Student was not enrolled until 1/3/2011. (Ex. B-23; Testimony, Board's Director of Special Education)

19. Student's Surrogate Parent filed a complaint with the Connecticut State Department of Education on 12/8/2011. The complaint investigation resulted in a letter dated 12/21/2010, to the Board's Director of Special Education and the Complainant, Student's Surrogate Parent, finding that the delay in enrolling Student was a violation of the IDEA. No corrective action was ordered because the PPT meeting was scheduled and Student would be enrolled very soon. (Ex. B-22, B-24 p. 2, B-26)
20. The Board received a complete IEP for Student and related documentation on 12/22/2010. (Ex. B-13; Testimony, Board's Director of Special Education)
21. The time from the date of Student's residence within the school district to the date of his actual enrollment in school was approximately fourteen school days. The Board did not challenge this figure. (Testimony, Surrogate Parent)
22. The Board's Transition Program is community based and has a staff of five for ten students aged 18-21. (Testimony, Board's Special Education Teacher)
23. The 12/23/2010 PPT included the Board's Coordinator of Special Education, Student, his then-current Guardian and his Surrogate Parent, the Board's Special Education Teacher, Speech/Language Pathologist (S/LP), Occupational Therapist (OT), and Transition Specialist. Also present were Student's Oak Hill Special Education Teacher and representatives of BESB, DDS and his current group home. Student's Present Levels of Academic Achievement and Functional Performance were listed:
 - Academic/Cognitive: Language Arts:** Reads approx. 50 Braille words by memory, writes with prompting; grade equiv. K.8-1.2, reading alphabet and writing tasks on Brigance, pre-primer word level and recognition and oral reading of Braille passages.
 - Strengths:** Auditory learner
 - Concerns/needs:** Limited use of Braille
 - Impact of Student's disability on involvement and progress in the general education curriculum:** [Student's] cognitive disability affects his ability to access the general curriculum and use of Braille.
 - Academic/Cognitive: Math:** Auditory math skills at approximately a 1-3 gr. Level; K.0 level for Braille number recognition.
 - Strengths:** Uses a talking watch to maintain independent time management; uses a talking calculator to add/subtract monetary amounts; recognizes coins and folds bills for recognition with verbal prompting.
 - Concerns/Needs:** Purchasing skills, number recognition.
 - Impact:** [Student's] cognitive impairment restricts his participation in the general education curriculum and the community.
 - Behavioral/Social/Emotional:** follows simple verbal prompts.
 - Strengths:** Motivated by music and Wal-Mart.
 - Concerns/Needs:** May evidence some oppositionality when limits are set.
 - Impact:** Cognitive impairment limits development and employment of appropriate coping strategies.

Communication: Limited speech.

Strengths: Auditory skills, responsive to communicative partner.

Concerns/Needs: Functional communication.

Impact: Cognitive and visual impairments impact the Student's ability to communicate in a functional way across environments.

Vocational/Transition: Clerical work experience at NEAT Market [Oak Hill program]

Strengths: Enjoys work; music is an occupational interest.

Concerns/Needs: Adult agency exploration; transition assessments.

Impact: Cognitive impairment impacts student's ability to transition to the community independently.

Health and Development – including Vision and Hearing: Legally blind. Uses white cane for mobility with prompt and adult supervision; identifies objects and locations in immediate environment via Braille labels.

Strengths: Use of cane; hearing; response to simple verbal prompts.

Concerns/Needs: Safety in the community.

Impact: Visual combined with cognitive impairment impacts independent, safe community/environmental navigation.

Activities of Daily Living: Relies on assistance with activities of daily living.

Strengths: Motivated to dress appropriately.

Concerns/Needs: Assistance with cleanliness in bathroom.

Impact: Cognitive and visual impairment impact independence with activities of daily living. (Ex. B-28 p. 6)

24. The Student's 12/23/2010 IEP included the following goals:

1. Demonstrate an improvement in mathematical concepts, reasoning and computation necessary to develop problem-solving skills and to utilize mathematics to address everyday problems.
2. Demonstrate an improvement in socially acceptable behaviors in the school environment.
3. Demonstrate improvement in functional communication skills across environments.
4. Demonstrate the skills and behaviors necessary to successfully participate in vocational activities.
5. Student will complete a series of activities in order to prepare him/her to transition to supported employment.
6. Demonstrate an improvement in the critical activities required for self help.
7. Student will acquire the necessary daily living skills to allow for independent functioning in a variety of environments (home, vocational and community).
8. Student will acquire the necessary skills to access the community with specified levels of support.
9. Demonstrate specific methods which will assist in compensating for his visual impairment. (Ex. B-28 pp. 8-16)

25. Special education and related services to be provided in the 12/23/2010 IEP:

Vocational/transition instruction	5.25 hr/daily	Group
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Speech/Language Pathology	1.00 hr/monthly	Small group individual instruction
Transition services	0.25 hr/monthly	Small group individual instruction

(Ex. B-28 p.20)

26. The 2/24/2011 PPT meeting, called to revise Student’s IEP, implement his IEP and add a Behavior Plan, was attended by Student and his Surrogate Parent, Special Education Teacher, S/L Pathologist, OT, and Transition Specialist, and representatives of DDS and Student’s group home. IEP revisions were limited to changes in objectives:

Goal 7: 12/23/2010 objective “Locate and purchase appropriate items in a store for meal preparation, clothing purchases, household and personal needs – based on specific teacher criteria” was changed to: “Use voice recorder to remember items needed while shopping.”

Goal 8: An objective was eliminated.

Goal 9: Two objectives were changed to: “Will carry cane, with no more than one verbal prompt per outing, when walking in the community” and “Attend to the staff voice, with no more than one verbal prompt per conversation, to optimize compliance to all community-based instruction”. (Ex. B-28 pp. 14-16; B-33 pp. 14-16)

CONCLUSIONS OF LAW:

Section 10-76h, Connecticut General Statutes (C.G.S.), and related regulations at Section 10-76h, Regulations of Connecticut State Agencies (R.C.S.A.), authorize an impartial hearing officer to conduct a special education hearing and to render a final decision in accordance with Sections 4-176e through 4-180a, inclusive, and Sections 4-181a of the C.G.S. Section 20 U.S.C. § 1415(f) and related regulations at 34 C.F.R. § 300.511 through § 300.520 also authorize special education hearings.

Section 10-76d-1 (a) (7), R.C.S.A., provides that eligibility for special education services ends at the end of the school year in which the student turns twenty-one. The 1986 Commentary published by the Connecticut State Department of Education with the Special Education Regulations advises that when a student eligible for special education becomes 21 during the school year, the entitlement to special education continues to the end of the school year but does not include summer educational services (also called Extended School Year).

Section 10-94g (a) (1), C.G.S., and 34 C.F.R. § 300.519 require the Commissioner of Education to appoint a Surrogate Parent to represent a child who is eligible for special education and whose parents are unknown or unavailable, or a child who is a ward of the State. Specifically, 34 C.F.R. § 300.519 (g) enumerates the responsibilities of a Surrogate Parent:

- The surrogate parent may represent the child in all matters relating to –
- 1) The identification, evaluation, and educational placement of the child; and

2) The provision of FAPE to the child.

Section 34 C.F.R. § 300.323 (e) provides that when a student with a disability who has an IEP transfers from one public agency to another public agency within the same state during the school year, the new public agency:

... must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either –

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

In this case, the prior public agency is Unified School District #2 and the new public agency is the Board of Education within whose jurisdiction the Student had moved.

At 34 C.F.R. § 300.154, the Federal Regulations for special education require states to establish interagency agreements to ensure that students with disabilities receive FAPE when other agencies (such as DCF and DDS) are involved with such students. Evidence of this cooperation is the standard form used by DCF to notify school districts that a student within the care of DCF is moving into a specific school district, as was done for this Student. This cooperation broke down when the Board's Staff discovered that they had received only part of the current IEP: a simple clerical error resulted in a month's delay in transmittal of the basic document needed for providing special education services. The Board had timely notice of Student's arrival in the school district: they should have pursued the missing documentation in a timely manner.

Although neither the Federal District Court nor the Second Circuit Court of Appeals granted compensatory education beyond a student's 21st birthday, in *Wenger v. Canastota Central School District*, 979 F.Supp. 147 (N.D.N.Y. 1997), 26 IDELR 1128, the District Court held that when a "gross violation" has occurred, compensatory education may extend beyond age 21 (*Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990; *Garro v. Connecticut*, 23 F.3d 734, 737 (1994)). In *Unified School District No. 1 v. Connecticut Department of Education*, 780 A.2d 154 (Connecticut Appellate Court, 2001), 35 IDELR 30, the Court held that a telephone call from DCF to the school district was sufficient notice that an IEP existed, and that compensatory education awarded by a hearing officer because of the delay in providing special education services was upheld.

Considering the multi-agency meeting on 11/22/2010, there was notice and sufficient information provided for the Board staff present to identify an existing program suitable for Student. To then claim that additional information is needed prior to any placement is a violation of 34 C.F.R. § 300.323 (e).

A theory that a ten-day lapse in educational services is permissible is found in *Goss v. Lopez*, 419 U.S. 565 (1975), which prescribed minimal due process rights for students facing suspension of up to ten days from school for disciplinary infractions. Another "ten-day standard" is found at Section 10-76d-15 (c), R.C.S.A., which provides that homebound instruction be provided "no later than two weeks from the first day of

absence". Neither of these scenarios applies to a severely multiply disabled youngster whose residence has changed from one Connecticut school district to another.

Another useful comment concerning the award of compensatory education can be found at *Parents of Student W. v. Puyallup School District*, 31 F.3d 1489, 1497 (9th Cir. 1994):
“..Compensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting “appropriate relief.”

DISCUSSION

Student’s special education needs are many and complex, but no Board Staff member expressed doubts about his placement in their Transition Program. The staff to student ratio in that program suggests that an additional student could have been accommodated quickly. Although the loss of fourteen school days might be considered trivial, it is a serious matter for any student with severe disabilities. In this case, the Student is blind and cognitively impaired. The Board representatives knew that the Board’s Transition Program would be appropriate for Student and discussed that placement at the 11/22/2010 meeting. Section 34 C.F.R. § 300.323 (e) is clear: Student should have been enrolled immediately. If there were doubts about Student’s behavior, the Board could easily have assigned a paraprofessional, one-on-one, to assist in his transition and monitor behavior.

The Board owes Student compensatory services. In the midst of transitioning into DDS services which stress acquisition of skills for supported employment, a mere extension of his Board program for fourteen additional days is not necessarily appropriate and may in fact interfere with his DDS placement. Therefore, the award shall be planned by the Board’s PPT to supplement services currently being provided. Student shall receive additional individualized Speech/Language services to help Student communicate more effectively and the addition of Music Therapy to his program, recognizing his enjoyment of music. Since the PPT will have to fit these services around his current program and around the DDS program commencing soon, these additional services shall be scheduled for one hour a day, four days a week, until September 1, 2011.

FINAL DECISION AND ORDER:

The Board’s delay in enrolling Student was a violation of IDEA and a denial of FAPE.

The Student was deprived of FAPE for approximately fourteen school days. The Board is ordered to provide two one-hour Speech/Language sessions and two one-hour Music Therapy sessions each week until September 1, 2011, and to furnish transportation if that is necessary.

The Board’s PPT shall meet with Student, his Surrogate Parent, and a group home representative to work out the details of providing these services.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).

Mary H. B. Gelfman
Hearing Officer Signature

MARY H.B. GELFMAN
Hearing Officer Name in Print