STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Fairfield Board of Education

Appearing on behalf of the Student:	Parent
Appearing on behalf of the Board:	Attorney Michelle Laubin Berchem, Moses & Devlin, P.C. 75 Broad Street Milford, CT 06460
Appearing before:	Attorney Brette H. Fitton Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Is the District obligated to provide Student with an Independent Educational Evaluation ("IEE") at public expense?

PROCEDURAL HISTORY AND SUMMARY:

On August 25, 2016, the Board received a request for a special education due process hearing that was filed by Parent. On August 26, 2016, the Connecticut State Department of Education appointed the undersigned Hearing Officer to preside over the hearing. The Board filed a sufficiency challenge on August 31, 2016. In response to the sufficiency challenge, Parent filed a second revised request for hearing on August 31, 2016 which contained a stay-put request.

A prehearing conference was held on September 2, 2016, during which September 30, 2016 was set as a hearing date and the deadline for mailing the final decision and order was set as November 8, 2016. During the prehearing conference, Parent's stay-put request was addressed. Parent acknowledged that Student had moved out of the town of Fairfield in the prior year, and had been allowed to finish out her year at Stratfield Elementary School despite living in another town. Parent moved back to Fairfield after the school year had ended, but into the neighborhood served by the Holland Hill Elementary School District. The Board and Parents agreed that the special education and related services set forth in her most recent Individualized Education Program ("IEP") were those that were to be implemented without any modifications. Parent's request for the implementation of Student's most recent Individualized Education Program was granted. Parent's request that the District implement the IEP in Student's prior school, Stratfield Elementary School, was denied. On September 11, 2016, Parent sent an email to the Hearing Officer indicating she was withdrawing her request for a stay-put order, but still wished to proceed with the request for an IEE.

On September 16, 2016, the Hearing Officer issued a ruling on the sufficiency challenge in

which the request was deemed insufficient, but found that Parents should be permitted to plead the facts more fully and Parent was given until September 23, 2016 to do so. The Hearing Officer specifically requested the following information be provided by Parent:

1. A list of the specific evaluations that Parent claimed were not appropriate.
2. The dates on which those evaluations were conducted.
3. The dates when those evaluations were provided to Parent, if known.
4. The dates when those evaluations were discussed at a Planning and Placement Team ("PPT") meeting, if known.
5. A list containing the date on which Parent informed the District she did not agree with each evaluation, if any, and a description of how Parent notified the District of Parents' disagreement with the evaluation (whether it was in person, by letter or email or at a meeting).

On September 20, 2016, the Attorney for the Board requested that the first hearing date be postponed because the deadline for filing the amended complaint now fell on the deadline to exchange exhibits. No objection was made to postponing the hearing date by Parent and this request was granted. One September 23, 2016, Parent sent an email to the Hearing Officer which containing additional information as her amendment. Parent's amendment resulted in a revised mailing deadline of December 7, 2016. On September 25, 2016, Attorney for the Board indicated she intended to file a motion to dismiss Parent's amended complaint. On September 25, 2016, the Hearing Officer set October 3, 2016 as the deadline by which the Board was to file its motion to dismiss, and informed Parent that Parent would then have until October 12, 2016 to file a written objection and/or an amended hearing request, which would be considered when ruling on the Board's motion to dismiss. The Board filed a motion to dismiss on October 3, 2016 and on October 12, 2016, Parent sent an email to the Hearing Officer containing facts responsive to the Board's motion to dismiss.

LEGAL ANALYSIS:

When ruling on a motion to dismiss a due process hearing request, the hearing officer must consider the allegations of the request in the most favorable light to the pleader. *Gold v. Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010) Thus, a hearing officer is required to take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. Id. The motion to dismiss must be decided on the facts as pleaded and must be decided upon that alone. *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007). Thus, the facts alleged by Parent, and set forth below, are presumed to be true.

Parent's original request, filed on August 25, 2016, indicated that Student was born on May 18, 2009 and was currently enrolled in the Fairfield Public School system. Student's disability was listed as "Selective Mutism?" The request also contained the following statement under the heading "Description of the nature of the issues in dispute, including related facts:" on the Connecticut State Department of Education Bureau of Special Education Due Process Form: "Request for an Independent Educational Evaluation (IEE) at Public Expense. Previous evaluations does [sic] not accurately describe my child."

An additional document was filed by Parent on August 31, 2016, which contained a revised description of Student's disability to state "Selective Mutism? Anxiety?". The description of issues in dispute was also revised and now stated; "Request for an Independent Educational Evaluation (IEE) at Public Expense. Previous evaluations/Report Card Information does not accurately describe my child. In addition, Parent added a statement under the form's heading "Proposed resolution of the issues (to the extent known and available at this time)". Parent now stated, "I have no problem giving my consent for the "team" at Stratfield Elementary to evaluate my child because they've worked with her for the past two years. I am therefore requesting that [Student] "stay put" at Stratfield until all evaluations are complete and a decision made."

Parent's September 23, 2016 amended hearing request alleged the following facts:

1. The last evaluation of Student was done when Student was at the Early Childhood Center ("ECC").
2. Parent's concerns about Student's well-being and the accuracy of the evaluation began at the time Student was in ECC. Parent included a summary of progress from Student's time at ECC in which the reporter, name and position unknown, indicated Student appeared anxious when demands were placed on her and Student did not spontaneously use language to make her needs or wants known or to interact with peers. It was noted in the summary that Student made no attempts to seek help. It was also reported that Student made limited progress in the classroom program. In order to reduce stress on the Student, Student was only required to respond to demands for verbal responses by her classroom teacher and Speech and Language Pathologist.
3. Parent had a lengthy meeting with Mr. Michael Rafferty in March of 2015, and another meeting with Mr. Michael Cummings, in October of 2015, both employees of the Fairfield Board of Education, and in these meetings Parent expressed concerns about Student.
4. Parent had raised concerns about Student with an employee at the State Department of Education, while Student attended ECC and Stratfield Elementary School.
5. Parent stated in the amended request that the Individualized Education Program done at Stratfield Elementary School was not an accurate representation of Student.
6. Parent had pointed out to the school based members of the PPT that Student behaves differently outside of the school environment and had communicated to team members at the Stratfield Elementary School by sending audio clips of Student reading as well as doing an audio recording of Student for a class presentation.

In Parent's October 12, 2016 response to the Board's motion to dismiss, Parent alleged the following additional facts in response to the Board's motion:

7. Student has always been shy, reserved and observant.
8. Student began ECC as a child who would only use her words with the speech pathologist and a few kids in a low tone. In the classroom setting her tone was inaudible. This continued for a while until the suggestion was made that the school psychologist work with Student to improve her volume and ability to use

her voice in all settings at school. However, punishment (not positive reinforcement) was used in the classroom setting as a method to get her to use her voice. For example, Student was instructed to use her voice to get help opening a container or get permission to use the bathroom. She would either have an accident in school or hold in her urine until she comes home. This behavior continued in the beginning at Stratfield Elementary until members Student's school based team and Parent told her that it was okay to communicate her desires in any way she felt comfortable at school.

9. Student attended ECC from May 2012 to July 2014. During this time Parent had a hard time convincing the school based members of the PPT at ECC that Student's behavior was different outside the school environment. Despite Parent's efforts to show videos of Student playing at the park, playing games with her sister, laughing, talking and reading books, the response from the PPT was that Student has to display those behaviors at school. The only interest shown by the school based members of the PPT during Student's enrollment at ECC was to evaluate Student. Although the District requested consent to conduct further evaluations of Student and Mother initially agreed to consent to additional evaluations, Father objected and no additional evaluations were conducted at ECC, because both Parents subsequently objected to the conducting of any evaluations, because it was obvious that ECC would only consider their information.
10. Parent felt that she had a slightly better response from the Stratfield Elementary School staff because she was able to relate to the resource teacher and the speech pathologist who had both worked with Student's older sibling in the past. Parent used this communication with these staff members to her advantage to show Student's learning capabilities, her strengths and weaknesses as well as share ideas.
11. At the first PPT conducted at Stratfield Elementary School, Parent received information from an occupational therapist about her concerns about Student's visual and spatial abilities. Parent mentioned at the meeting that Student is left handed by nature and began using her right hand after ECC staff used Factor Analysis to determine "something else". Parent expressed concern about the flow of sensory and motor information and how Student's brain processes information.
12. Parent stated that after this PPT, the District did not mention any suspected areas of disabilities to Parents, only the need for an evaluation.
13. The schools would communicate with Student's pediatrician and based on various things the Pediatrician would ask Student to do or questions he would ask, Parent was able to determine what the school and pediatrician were thinking and that selective mutism was not a factor/concern.
14. The pediatrician advised Parent to speak with PPT about her concerns, to which Parent's response was that Student's behaviors and capabilities outside the school environment are not as important as her behaviors and capabilities in School.
15. In August 2016, the Pediatrician inquired as to whether there was a family history of thyroid problems to which Parent responded "not that I am aware of" and Parents were given a questionnaire with questions about Student's social, emotional and physical capabilities. Parents did not answer this questionnaire. The types of questions in the questionnaire focused on Students skeletal, muscular

and central nervous system development.

16. Parent had a meeting with Mr. Michael Rafferty in March 2015 in which she shared concerns about punishment of student and showed videos of Student's reading. During this meeting Parent expressed the need to get someone else who is able to work with her outside the school environment and take Parent concerns and information as well as the school's in order to give Parents and school the answers they needed. Mr. Rafferty indicated he would speak with Parent again but never did.
17. In October 2015, Parent requested a meeting with Mr. Rafferty, and was informed that he no longer worked for Fairfield Public Schools. Parent then had a meeting with Mr. Michael Cummings where she reported an incident where an adult had struck Student. In this meeting, Mr. Cummings asked what Parent was trying to accomplish because he was told she would come to his office with papers with information or convey information that had no merit. Prior to the meeting with Mr. Cummings, Parents and Mr. Cummings had meetings with the school psychologist and principal.
18. At a PPT meeting at Stratfield Elementary, Parent thanked the school based members of the PPT for giving Student the opportunity to use her voice via an audio recording all the Parents sent in. Parent thought that was a good idea because all the other kids recited their lines on stage and at the end the audio recording was used with all Students saying their lines.
19. At the same PPT meeting, Parent then informed the PPT that Parent's sister, a speech pathologist had told Parent that Student used the right amount of words and syllables in the appropriate time frame for a child her age. The school speech pathologist agreed with this statement. Parent then requested her sister assess Student. District staff informed Parent that the Fairfield School District has to follow certain guidelines regarding information from outside sources.
20. At the last PPT at Holland Hill, which occurred after the hearing request was filed, the District informed Parent of need for an evaluation with little emphasis on getting more information about Student's social, emotional or learning capabilities outside the school environment.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." *Walshon v. Ballon Stoll Bader and Nadler, P.C.*, 121 Conn. App. 366 (2010). Such motions are specifically authorized under the R.C.S.A. § 10-76-h-8(f)(2). Pursuant to R.C.S.A. Section § 10-76h-8 (a) and (f)(2), the Board has moved to dismiss Parents' request in its entirety.

In its motion to dismiss, the Board argues Parent's request must be dismissed because the claims are time-barred under the applicable state and federal statutes of limitation and the request for an IEE is moot, thereby depriving the Hearing Officer of jurisdiction. Each of these arguments will be addressed in turn, after legal analysis of Parent's sole requested relief.

Independent Education Evaluations. The only relief sought by Parent is an IEE at public expense. Parent has not claimed that the services and education specified in Student's IEP are inappropriate, but rather claims they don't adequately describe Student. For this reason, Parent believes an IEE is necessary to gain an understanding of the Student, particularly with regards to

understanding the disparity between Student's functioning in the school and home environments.

The right to obtain an IEE is a procedural safeguard afforded special education students under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1415b. Since Parent has not made any claims of any substantive violations, to gain the requested relief of an IEE, Parent's claims must be grounded in a claimed violation of Student's procedural safeguards. Procedural violations alone do not allow a Parent to prevail at a due process hearing. (See *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct 3034, 3051, 73 L. Ed. 2d. 690 (1982), setting forth a 2-part inquiry of compliance with procedural requirements and whether or not the IEP is appropriate). Where only a procedural violation has been alleged, it thus must be determined if the procedural violation has occurred, and if so, did the violation operate in a manner to deny the Student a FAPE. Id.

Procedurally, a Parent may request an IEE after disagreeing with one that has been conducted by the District. "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section". 34 C.F.R. § 300.502(b)(1) Thus, the District must have conducted an evaluation, and the Parent objected, before a Parent's right to request an IEE at public expense is triggered. In this way, the regulations operate to deny the requested relief of an IEE to a Parent who has refused to allow the District to conduct any of its own evaluations and is seeking to limit the District to considering only outside evaluations chosen by Parent.

As discussed in greater detail below, even when the facts alleged in the complaint are assumed to be true, and viewed in the light most favorable to the plaintiff, they are insufficient to support a finding that there were any evaluations within the statutory period with which Parent disagreed, or that Parent informed the District that she disagreed with the evaluation that was conducted at the ECC and requested an IEE because of that disagreement. Even assuming arguendo that Parent's request (made at a PPT meeting held within the statutory period) that her sister, a speech and language pathologist, conduct an evaluation of Student was actually a request for an IEE, this request was not made in response to the reporting of any evaluation that had been conducted by the Board. Rather Parent describes the request being made in the context of a discussion in which the school's speech and language pathologist agreed with Parent's report of her sister's informal assessment of Student's language. Since that PPT occurred within the statutory period and no evaluations had taken place, the request could not have been made on the basis that the speech and language pathologist's evaluation was not appropriate.

Application of the Statute of Limitations. The Board first claims that that the hearing officer lacks jurisdiction to hear Parent's request, because any claims of inadequacies or errors in the Board's evaluation or evaluations involve evaluations conducted more than two years before the request was filed, and as such, the claims are time-barred.

State and federal law provides for a two-year statute of limitations for bringing claims in a special education due process hearing. In Connecticut, a parent has two years in which to request a hearing from the time the Board proposed or refused to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education to a

Student. Conn. Gen. Stat. § 10-76h(a)(4). Under the IDEA, parents have 2 years to request a hearing from the date the parent knew or should have known about the alleged action that forms the basis of the complaint, or if the State has an explicit statute of limitations for filing such claims the duration of time that state allows. 20 U.S.C. § 1415(f)(3)(C)

Assuming all facts alleged by Parent to be true, Parent has not alleged any facts which can support a finding or inference that any evaluation or reevaluation of Student has been conducted and/or reported at a PPT meeting within the statutory period. Contained within Parents various submissions is a single reference to an evaluation which occurred during Student's attendance at ECC. Student attended ECC from May 2012 to July 2014, thus the facts alleged by Parent can only support a finding that any evaluation with which Parent may have disagreed occurred outside the statutory period.

There are two exceptions to the statute of limitations under the IDEA. A parent may defeat the statute of limitations and have a claim about actions occurring more than two years before the filing of the complaint, if they can show that the Parent was prevented from requesting a hearing because they didn't receive a copy of the procedural safeguards or that the District misrepresented that they had resolved the basis for the hearing request thereby preventing the Parents from requesting a due process hearing. 20 U.S.C. § 1415(f)(3)(C)(i) and (ii)

No facts have been alleged which would support a finding or inference that any of the recognized exceptions to application of the statute of limitations are applicable in this case. Parent has not alleged that she was prevented from requesting a due process hearing by misrepresentations by the District that it had resolved the basis for the hearing request, nor has it been alleged that the District failed to provide Parent with a notice of their Procedural Safeguards.

As such, the Hearing Officer lacks jurisdiction over Parent's claims that the evaluation conducted of Student while at ECC was deficient in form or content, because such claims are barred by both the state and federal statutes of limitations.

Mootness Claim. The Board's second argument in favor of dismissal is that the Hearing Officer lacks jurisdiction because the evaluation with which the Parent disagrees is no longer current, the Student is due to be re-evaluated as required under the IDEA, and Parent has not consented to reevaluation, and as a result Parent's claim is moot. While not binding, the Hearing Officer finds the reasoning of the 11th Circuit Case cited by the Board persuasive, especially in light of the facts in that case which closely track those alleged in Parent's request. *T.P.v. Bryan Cnty. Sch. Distr.,* 792 F.3d 1284 (llth Cir. 2015)

In *T.P v. Bryan Cnty. Sch. Dist.*, the Circuit Court held that where the Student had not had an evaluation in over two years and was due for a revaluation, pursuant to 20 U.S.C. §1414(a), an IEE would not redress any claimed procedural injury because the evaluation being challenged was no longer current. Id. An IEE is not meant to be viewed in isolation. It is another source of information to be reviewed at a PPT meeting, along with the other current reports and evaluations conducted by the District, so that the PPT has sufficient information to develop a program that is reasonably calculated to provide Student with a FAPE. In the present case, Parent states that the Student has not been evaluated in over two years and that she has not provided

consent for any evaluations in that time. To ask for an IEE over two years after the last time you permitted the District to evaluate Student is like asking for a grape, and saying you need it so you can compare it to a raisin. The ECC evaluation, conducted when the child was in preschool, is no longer current and an IEE conducted now would not redress any procedural injuries that could be claimed, even if the claim was not already barred by the statute of limitations, because Parent's claim is moot.

Parent continues to have the right to obtain her own evaluation of Student at her own expense and such evaluation *must* be considered the PPT, if it meets agency criteria, with respect to the provision of a FAPE to Student. 34 CFR § 300.502(c)(1)

Parent could have obtained further evaluations of the Student by the District any time that they were offered during the past two years by providing consent. Parent states unequivocally that she chose not to do this. There is nothing barring Parent from providing consent now. If Parent consents to the evaluations or reevaluations presently proposed by the District, and upon review of the evaluation or reevaluation finds them to be inappropriate, she may immediately indicate her disagreement, and ask for an IEE, which would then trigger the Board's obligation to file for due process or provide an IEE at public expense.

FINAL DECISION AND ORDER:

In light of the above facts, the Board's Motion to Dismiss is granted and the case is dismissed.

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).

Brette H. Fitton

Hearing Officer Signature

Brette H. Fitton

Hearing Officer Name in Print