

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Plymouth Board of Education

Appearing on behalf of the Parents: Attorney William Laviano  
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Appearing of behalf of the Board: Attorney Christine Chinni  
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Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Whether the Board failed to schedule 504 or PPT since September 1, 1989 despite constructive notice of disability.
2. Whether the Board failed to advise the parents of their rights.
3. Whether the Board failed to evaluate the students.
4. Whether the Board failed to provide the students with an appropriate program.
5. Whether the parents are entitled to reimbursement for evaluations, unilateral placements and related services.

**SUMMARY/FINDINGS OF FACT:**

1. The matter was assigned on February 15, 2001. In the request for hearing, counsel for the parent indicated that “[W]e must strictly request adherence to the timelines for the hearing since the Board has repeatedly failed to make dates available for mediation.” [Request for Hearing, Hearing Officer Exhibit 1]
2. The prehearing conference was scheduled for Tuesday, February 20, 2001, and notice was sent via facsimile to counsel for parent, and the Board representative. [Notice of Prehearing Conference]

3. The parent's counsel failed to make himself available for the prehearing teleconference, and after several attempts to contact the parent's counsel, the prehearing conference proceeded with the Board's counsel only, in accordance with Section 10-76h-7[c] of the Connecticut Regulations.
4. The matter was scheduled for hearing on March 5, 2001, and notice was sent to counsel for the parent and counsel for the Board. [Notice of Scheduled Hearing Date, February 20, 2001] Parent's counsel and Board's counsel did not submit exhibits prior to the scheduled hearing date.
5. Due to a snowstorm, the hearing scheduled for March 5, 2001 was postponed to March 7, 2001. Notice was sent to both counsel via facsimile. [Notice Regarding Scheduled Hearing Date/Snow Cancellation Procedure for March 5]
6. The parent's counsel and Board's counsel failed to appear at the hearing on March 7. Counsel for the parent did indicate by voice mail message that he was unaware of the hearing until late, due to the snowstorm of March 5 and March 6. Counsel for the parent also noted in his message that counsel for the Board did not receive notice of the rescheduled hearing, due to the snowstorm.
7. The hearing was convened on March 7, and then the matter was continued to March 19, due to the extraordinary circumstances of the two-day snowstorm. Notice of the March 19 hearing date was sent via facsimile to counsel for both parties. [Notice of Scheduled Hearing Date, dated March 7, 2001].
8. A Notice of Mediation was sent from Thomas G. Badway, Due Process Unit, State Department of Education, to counsel for the parent and counsel for the Board on March 7, 2001. A copy of this noticed was forwarded to the hearing officer for the hearing file. The mediation was scheduled for March 20, 2001.
9. On March 13, 2001, counsel for the parent submitted a correspondence, which was construed as a request for postponement of the March 19 hearing date due to a conflict regarding a previously scheduled hearing in federal court, and seeking to postpone the hearing until after the scheduled mediation. [Facsimile correspondence from parent counsel dated March 13, 2001].
10. The request for postponement was granted, and the hearing was scheduled for March 22, 2001. Notice of the granting of the Notice of Postponement, and the scheduling of the hearing date to March 22 was sent via facsimile to counsel for the parent and counsel for the Board.  
[Notice of Postponement/Scheduled Hearing Date, dated March 14, 2001].
11. On March 15, 2001, the counsel for the parent submitted a correspondence via facsimile, which was construed as a request for postponement of the March 22 hearing date. [Facsimile correspondence from parent counsel dated March 15, 2001]

12. That request for postponement was denied as the moving party had failed to present any facts concerning the factors that must be taken into consideration when granted motions for postponement in accordance with Section 10-76h-9 of the Connecticut Regulations. Additional grounds for the denial of the request for postponement was that merely stating that the hearing officer is “rescheduling matters without consulting with [counsel]” is not sufficient grounds for the granting of the request for postponement. Furthermore, the postponement request was denied because the party requesting this postponement did not indicate whether the opposing counsel was contacted, and whether the party agrees or objects to the request in accordance with Sec. 10-76h-9 of the Connecticut Regulations. [Notice Regarding Request for Postponement of Scheduled Hearing Date, March 15, 2001]
13. On March 16, 2001, the parent’s counsel sent a note via facsimile that stated “Note the [parents/students] are out of state on vacation and [I] have a pre-scheduled due process hearing on the 22<sup>nd</sup> and 23<sup>rd</sup>. I have sent many days we are free, with copies to opposing counsel and sdoe.” [Facsimile from parent’s counsel, dated March 16, 2001]. This was not construed as a renewed request for postponement, as parent counsel was on notice as to what must be submitted to constitute a request for postponement. At the hearing on March 22, 2001, counsel for the Board indicated that they had not received a copy of the March 16 facsimile.
14. On March 21, via facsimile and regular mail, this hearing officer was notified by the State Department of Education that the mediation did not convene on March 20, 2001 as the parent counsel did not arrive as scheduled. [Memorandum of March 20, 2001, from Thomas G. Badway, Education Consultant]
15. On March 22, 2001, counsel for the Board appeared at the hearing, counsel for the parent was not present.
16. Counsel for the parent submitted a Motion to Dismiss the Claims of the Parents With Prejudice for Failure to Prosecute the matter.
17. This was the second complaint filed regarding the identical parties and issues. The previous matter [00-273] was dismissed without prejudice for parent’s counsel failure to appear at the hearing.

### **CONCLUSIONS OF LAW:**

Any party to a hearing conducted pursuant to Section 10-76h-1, et seq, of the Regulations of Connecticut State Agencies and Sec. 300.507, et seq, of the Federal Regulations has rights to be represented by counsel; a reasonable opportunity to present evidence and confront, cross-examine and compel attendance of witnesses; and to prosecute their action. Sec. 10-76h-11 of the Regulations of Connecticut State Agencies, Sec. 300.509 of the Federal Regulations. These rights are not without obligations, as the parties must proceed in good faith to prosecute their action. Connecticut Regulations specifically provide that:

(a) Any party may move for, or the hearing officer may order, sua sponte, an entry of default or dismissal of a hearing for failure of any party:

(1) to prosecute the hearing;

(2) to participate in the prehearing conference;

(3) to comply with sections 10-76h-1 to 10-76h-18 of the Regulations of Connecticut State Agencies; . . .

(7) to appear at a properly noticed scheduled hearing. . .

The hearing officer may grant the motion with or without prejudice. Sec. 10-76h-18 of the Regulations of Connecticut State Agencies.

In this matter, counsel for the parent has not merely failed to prosecute this matter in one instance. Rather, there are a series of actions, from the failure to make himself available for the prehearing conference to the failure to appear at two hearing dates, that must result in the dismissal of this case.

The more weighty issue is whether the case must be dismissed with prejudice, as this action, in its finality, would bar the hearing of the parents' claims.

The circumstances of this case indicate a lack of respect towards the tribunal, unreasonableness in the handling of the case, and bad faith in prosecuting the action. Moreover, this is the second matter filed for these identical parties and issues, the first being dismissed without prejudice. Counsel was on notice that the matter would proceed in accordance with the state and federal regulations, and, in fact, counsel for the parent that there be strict adherence to the timelines.

While not bound by other federal court rules, it is useful to look to them for guidance. These court rules provide that a plaintiff may be subject to a dismissal, including dismissal with prejudice, for failure to prosecute or comply with court orders. *See* Rule 41(b) of the Federal Rules of Civil Procedure. Failure to appear at a pretrial conference, failure to prepare for a conference, or failure to comply with pretrial orders can serve as a basis for such a dismissal. *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp*, 542 F2d 1318 (7th Cir, 1976).

It is important to balance the purposes of the Individuals with Disabilities Education Act [U.S.C. Sec. 1401, et seq] with the need to have hearings proceed appropriately and reasonably. The purpose of the Act is to ensure that all children with disabilities have available to them a free appropriate public education . . . and to ensure that the rights of children with disabilities and parents of such children are protected. U.S.C. Sec. 1401(b). Nevertheless, the Connecticut Regulations were promulgated in accordance with this statutory scheme, and expressly provides for dismissal with prejudice. Sec. 10-76h-18(a) of the Regulations of Connecticut State Agencies. Therefore, in light of the circumstances of this case, this matter must be dismissed with prejudice for the parent's counsel's failure to prosecute the action, appear at the hearing and comply with the Regulations of Connecticut State Agencies.

#### **FINAL DECISION AND ORDER:**

The matter is **DISMISSED, with prejudice.**