

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Norwalk Board of Education

Appearing on behalf of the Parents: Attorney Lawrence W. Berliner
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Appearing on behalf of the Board: Attorney Marsha Belman Moses
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Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

PROCEDURAL HISTORY:

This hearing was requested on July 30, 2001. Hearing Officer Exhibit (HO) 1. This hearing officer was assigned to the case on July 30, 2001. A prehearing conference was held on August 9. The Parents' attorney requested that the hearing be delayed because of medical reasons. October 2 and 3 were agreed upon as hearing dates. The Parents' attorney filed a motion to extend the decision deadline from September 13 to October 13, which was granted. The Parents and Board respectively filed hearing exhibits and witness lists with the Hearing Officer five days prior to the first hearing date and additional exhibits throughout the course of the hearing. The Parents present their case on October 2, 3 and 12, November 29 and 30, January 14 and 18. The Board began its case on the afternoon of January 18 and completed the testimony of one witness, Ms Elda Kluth, Director of Pupil Personnel, Speech and Language Services for the Board, on January 22. Two additional hearing dates were scheduled for the Board's case on February 13 and 14. On February 11, the Board filed a Motion to Dismiss the hearing with prejudice. At the hearing on February 13, the Parents' attorney waived the 7-day response time and asked to argue the motion orally. The Hearing Officer heard argument from the attorneys, as well as testimony from the Mother and Ms. Kluth. The Parents' attorney was given one week to brief the question of whether the Board was required to offer a date certain in order to make an educational placement offer. The Board's

attorney was given one week to file a reply brief. The February hearing was cancelled. A date of March 18 was agreed upon to continue the hearing in the event that the Motion to Dismiss was denied. The deadline for decision was extended to March 31.

ISSUES:

1. Does the Hearing Officer have jurisdiction to continue this hearing when the parties have agreed to amend the goals objectives on the 2001-2002 IEP and have agreed to amend the goals and objectives on the 2001-2002 IEP and have agreed on an educational placement at a different facility that the one requested by the Parents in this hearing?
2. If the answer is no, should the case be dismissed with or without prejudice?

SUMMARY:

In this hearing, the Parents are challenging the Board's refusal at the June 4, 2001 PPT of an out-of-state residential placement for the Student at the New England Children's Center (NECC) in Southborough, MA. The June 4 PPT recommended continued placement at the Foundation School, where the student had been placed since January 1997. Several PPT meetings were convened during the course of this hearing. The documents were received in evidence as Parent Exhibit 13 (September 25, 2001 PPT) and Board Exhibits 60 (December 10, 2001 PPT) and 71 January 10, 2002 PPT). As of the close of the hearing on February 13, Parents had in evidence as Exhibits P-1 through P-29. The Board had B-1 through B-74. In the Parents' brief dated February 21, the Parents relied on P-30, which was offered as an exhibit with the brief. On February 26, the Parents' attorney mailed P-31 to the Hearing Officer. In the Board's reply brief dated March 4, its attorney objected to the addition of the exhibits not part of the record. The Parents' attorney then mailed P-32 on March 8 and P-33 through P-35 on March 11. For purposes of this decision on the Motion to Dismiss, P-30 through P-35 are not considered as evidence. The findings of fact are made for purposes of deciding the Motion to Dismiss and are not intended to be dispositive of the substantive issues raised in this hearing, i.e., whether the Foundation School placement in the 2001-2002 school year provided the student with a free and appropriate public education (FAPE) and, if not, whether a residential placement at NECC would provide FAPE. The Board's motion is predicated on the argument that this hearing is moot as of February 8 when the Parents agreed to a placement at Benhaven School, and that there is no further jurisdiction to continue the hearing.

FINDINGS OF FACT:

1. It is undisputed that the Student (date of birth 11/12/91), also referred to herein as D., is eligible to receive special education and related services from the Board.
2. It is further undisputed that the Student is properly classified as having autism and mental retardation. (HO-1)

3. D. was placed at Foundation School in January 1997 after the Parents filed a due process request in 1996. The case was not adjudicated, but was withdrawn after the Board voluntarily agreed to the placement. (Testimony of Parents and Ms. Kluth)
4. The Board did not know the Parents were dissatisfied with the Foundation School placement until the June 4, 2001 PPT meeting, when the Parents asked for and were refused a residential out-of-state placement for D. at NECC. (Testimony of Ms. Kluth)
5. The Board was not aware that the Parents had obtained several evaluations of D. from the Yale Child Study Center in 1995, 1996, 1998, 1999 and 2001 until the Parent Exhibits, specifically P-1, P-2, P-3, P-5 and P-20, were provided to them in this hearing. The reports were not provided to the PPTs held prior to the commencement of the hearing in this case. (Testimony of Ms. Kluth)
6. The Yale Child Study Center reports were done by a team at the Developmental Disabilities Clinic supervised by Fred R. Volkmar, M.D., Professor of Child Psychiatry, Pediatrics and Psychology at Yale. (Testimony of Dr. Volkmar and exhibits referenced in paragraph 5)
7. Dr. Volkmar wrote a letter dated September 21, 2001 at the request of the Parents, in which he recommended a residential placement for D. (Exhibit P-12). The Parents did not provide this letter to the September 24, 2001 PPT meeting.
8. After Dr. Volkmar testified at this hearing on November 30, 2001, the Board requested the Parents' permission to speak with Dr. Volkmar, scheduled a PPT meeting for December 10, 2001 and offered a program at Benhaven School in West Haven in combination with a home program. (Testimony of Ms. Kluth and Exhibit B-60 through B-65)
9. On January 10, 2002, the PPT recommended the same program after consulting with Dr. Volkmar and obtaining his support for trying the program for a year to a year and a half followed by an evaluation. (Exhibit B-71 and Testimony of Ms. Kluth) This was not disputed by Mother's testimony on the motion to dismiss.
10. On January 12, 2002, the Parents gave the Board permission to send the Student's records to Benhaven. Thereafter, Benhaven observed the Student, reviewed the records, spoke with the Parents and Board representatives. (Exhibit B-73 and Testimony of Ms. Kluth and Mother)
11. By letter dated February 8, 2002, Benhaven accepted the Student. Exhibit A to Board's Motion to Dismiss.

12. The Parents agreed to try the Benhaven program is the Student was accepted. (Exhibit P-28). The Parents agreed to try Benhaven for one to one and one half years. (Testimony of Mother and Ms. Kluth)
13. The Parents sought to avoid dismissal of this case on February 13 by arguing that their acceptance was conditional on having a date on which the Student would begin school at Benhaven. The testimony from Ms. Kluth and Mother on February 13 indicated that a space was identified, but that Benhaven was waiting until the student in that slot was moved to another placement by the Department of Children and Families. This had been in progress since December 2001. The Parents agreed that a start date by the end of the current school year would be reasonable and this case would be settled.

CONCLUSIONS OF LAW:

1. The jurisdiction for this hearing is provided by Conn. Gen. Statute Section 10-76h(a)(1), which provides in relevant part:

A parent or guardian of a child requiring special education and related services pursuant to sections 10-76a to 10-76g, inclusive . . . may request, in writing, a hearing of the local or regional board of education or the unified school district responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of or the provision of a free appropriate public education to such child or pupil

By implication, if the parties are in agreement as to a program, there is no issue in dispute for the hearing to adjudicate. See also Section 10-76h(c) (3).

2. If there is no issue in dispute, the case is moot and there is no jurisdiction to proceed further. “[M]ootness is evaluated throughout the pendency of the litigation.” Fetto v. Conn. State Dept. of Education, 181 F. Supp.2d 53 (D. Conn. 2002). See also Board of Education of the Town of Stafford v. State Department of Education, 243 Conn. 772, 777 (1998). “A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists.”
3. Since the Parents agreed to a change of placement from the Foundation School to the Benhaven School in or about February 8, 2002 and further agreed that a start date before the end of the current school year would be reasonable, there is no issue in dispute as to whether placement at NECC for the 2001-2002 school year is required to provide the student with FAPE. Parents’ brief has pointed to no statute, regulation or case law that would require a specific date to be provided for placement to begin. The Board’s reply brief points to Conn. State Regs. Section 10-76d-13(a)(2), which provides for a 60-day implementation period for an out-of-district placement. The

time begins to run after the parental consent is obtained and allows the Board to extend the time with notice to the SDE. The IDEA contains no specific time period for implementation of an IEP. See 34 CFR Section 300.342(b), requiring implementation "as soon as possible."

FINAL DECISION AND ORDER:

The parents have failed to withdraw the case as settled or to reject the Board's proposed change of placement, and, therefore, it is ordered that this case shall be dismissed for the reason that the questions raised in this hearing are moot. This decision and order is without prejudice to the Parents' rights to enforce the implementation of the January 10, 2002 IEP or to seek to reopen this hearing if the Student is not in the program by the close of the current school year.