

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Norwalk Board of Education

Appearing on behalf of the Student: Attorney Howard Klebanoff
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West Hartford, CT 06110

Appearing on behalf of the Board: Attorney Marsha Belmen Moses
Bercham, Moses and Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing before: Attorney Christine B. Spak
Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

1. Whether the Board should reimburse the Parents for an evaluation; and
2. Did the Board offer an appropriate program for the Student for the 2003-2004 school year; and
3. If not, is Eagle Hill Greenwich an appropriate program for the Student for the 2003-2004 school year?

STATEMENT OF FACTS:

1. The original date for mailing of the final decision in this matter was July 11, 2003. The original date for prehearing conference in this matter was June 2, 2003.
2. After the original scheduling there were six (6) pieces of correspondence and more than one voice mail message left for the Hearing Officer

regarding the scheduling of the telephonic prehearing conference alone. These included:

- a. May 29, 2003 letter to the Hearing Officer from the Board counsel advising that the parties had consulted and because the Student's counsel would be out of town on June 2, 2003, the parties were requesting the prehearing be changed to June 6, 2003.
 - b. June 3, 2003 [10:28 a.m.] from the Hearing Officer advising that because another prehearing with the Student's counsel was already scheduled for the parties requested date and time (June 6th at 8:45 a.m.) the instant matter would be conducted on June 5, 2003 instead.
 - c. June 3, 2003 letter to the Hearing Officer from the Student's counsel citing a surgery June 4, 2003 and advising that neither side was available for June 5, 2003 and going on to say "although I would have been able to participate on Friday [June 6, 2003] Thursday [June 5, 2003] is too soon after my surgery for me to be available." The Student's counsel advised that both parties were available for a prehearing on June 9, 2003.
 - d. June 3, 2003 [4:02 p.m.] from the Hearing Officer advising she is not available on June 9, 2003 for the prehearing so the prehearing would be held on the parties' originally requested date (June 6, 2003), immediately following the other scheduled prehearing with the Student's counsel's office.
 - e. June 4, 2003 letter to the Hearing Officer from the Student's counsel advising that the Student's counsel was no longer available for the June 6, 2003 date.
 - f. June 6, 2003 letter to the Hearing Officer from the Student's counsel advising that the parties were available for a prehearing on June 9, 2003.
3. The prehearing was held and it was agreed that the hearing would begin on June 17, 2003 from 1:00 p.m. to 6:00 p.m. The Student's counsel advised that settlement was still a possibility but the nature of the case was such that they would have to convene the hearing to fully explore this possibility. Given the possibility of settling the matter no other hearing date was selected.
 4. On June 12, 2003 the Student's counsel sent the Hearing Officer a letter advising that he would not be able to attend the hearing on June 17, 2003 because he was under doctor's orders not to drive until after June 23, 2003.

- He indicated that he had tried to reach opposing counsel but she was out of the office. He suggested that another prehearing conference be conducted to discuss other hearing dates and asserting that the child's educational interest or well being would not be endangered by the delay.
5. On June 13, 2003 the Student's counsel sent the Hearing Officer a letter advising that the Board's counsel had no objection to the postponement.
 6. On June 17, 2003 the Hearing Officer sent the parties a response to the request for a continuance indicating that while she was sympathetic with the problem, the continuance cannot be granted given all the circumstances, including that the hearing had not yet begun.
 7. On June 17, 2003 upon arriving at the hearing, the Hearing Officer was presented with a letter of withdrawal from the Student's counsel. The Student's counsel did not attend but the Board's counsel did attend and presented the withdrawal letter which had been faxed to her. In the June 17, 2003 letter the Student's counsel expressed shock that his request had been denied and cited his surgery as reason why the hearing should have been continued. He accurately referred to the scheduling discussion during the prehearing in early June in regard to the Hearing Officer's representation that she would be unavailable for several weeks in July. He did not refer to the numerous days in June that the Hearing Officer offered and for which one or other of the parties were not available. Neither party objected to any aspect of the scheduling of this matter or the other's unavailability and it was only in this June 17, 2003 withdrawal letter that the Student's counsel asserted for the first time that this vacation would cause a substantial delay in the case. Had he raised this at the prehearing, other of the June dates could have been scheduled, or evening hearing dates could have been selected. Further, the withdrawal letter did not refer to the fact that during the prehearing conference the Student's counsel agreed that only one date was necessary as resolution through settlement was a reasonable possibility as of that date. It was in this June 17, 2003 withdrawal letter that the Student's counsel for the first time asserted that none of the other six attorneys in his office could step in and handle this matter. In this letter he referred to the five hours of scheduled hearing time (from 1:00 to 6:00) with no lunch or supper break planned as "only...one-half day".

DISCUSSION OF LAW:

1. The Due Process Regulations state "Hearing officers will not entertain requests for postponement or extension unless they are presented as follows: In writing and submitted no later than 5:00 p.m. five business days prior to the scheduled hearing or deadline date." Section 10-76h-9 of the Regulations of Connecticut State Agencies. The regulation is

important because it is a rare week that there is only one matter pending or only one case in which untimely motions are being filed. The five business days provides enough time to thoroughly consider issues that are raised and respond to or rule on the requests in a timely manner. In this matter, the request was received three business days before the hearing. The regulations do not require the Hearing Officer to even respond to the request because it was not filed in a timely manner. But because of the nature of the explanation given (surgery of counsel), the Hearing Officer did respond, denying the request.

2. When deciding a request for postponement or extension the Hearing Officer must give full consideration to the position of the parties regarding this request and to the following factors: (1) the extent or danger to the child's educational interest or well being which might be occasioned by the delay; (2) the need of either party for additional time to prepare their position at the hearing in accordance with the requirements of the process; (3) any financial or other detrimental consequence likely to be suffered by either party in the event of the delay; (4) whether there has already been a delay in the proceeding through the actions of the parties. In this matter the date for mailing of the final decision was July 11, 2003. This matter had been delayed at the Student's request at the prehearing stage. During this prehearing stage the Hearing Officer had received and responded to a large amount of correspondence, both written and oral, made almost exclusively from the Student's counsel. Given that the Student's counsel asserted that a delay would not be detrimental to the Student educationally or financially, and he suggested another prehearing conference to arrange dates, a dismissal without prejudice allows the Student's counsel to refile, if necessary, at a time when he is available to prosecute the claims. This refiling will automatically trigger the new prehearing conference requested by Student's counsel.

FINAL DECISION AND ORDER:

The matter is **DISMISSED** without prejudice.