

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Farmington Board of Education

Appearing on behalf of the Parent: Parent appeared *Pro Se*

Appearing on behalf of the Board of Education: Attorney Craig Meuser, Chinni & Meuser, LLC,
30 Avon Meadow Lane, Avon, CT 06001

Appearing before: Attorney Elisabeth Borrino, Hearing Officer

ISSUES:

1. Whether the Board failed to provide proper Notice of the April 30, 2008 Planning and Placement Team (“PPT”) meeting to the Parent and of the PPT meetings thereafter;
2. Whether the Hearing Officer lacks jurisdiction.

PROCEDURAL HISTORY:

This matter is before the Hearing Officer pursuant to the Parent’s request for a Due Process Hearing on May 20, 2008. A pre-hearing conference was held on June 18, 2008.

By way of letter dated May 30, 2008, the Board filed a Motion to Dismiss the matter asserting lack of jurisdiction. The Hearing Officer denied the motion without prejudice.

By way of letter erroneously dated July 14, 2008, received July 8, 2008, the Parent requested a continuance of the Due Process Hearing in order to obtain the testimony of a witness who was on vacation. The request was denied. The hearing was held on July 11, 2008. The Board renewed its Motion to Dismiss. Ruling on the motion was deferred until after the Parent presented her case. Witnesses called by the Parent included the Parent and Dr. Jane H. Currie. The Parent again requested that the hearing be continued for the testimony of a Board employee. The Hearing Officer requested an offer of proof as to the anticipated testimony of the intended witness in order to determine whether the Parent would be prejudiced by the inability to present such evidence and testimony. Having done so, setting aside that the Parent had not confirmed with the witness that she would so testify as anticipated, the Hearing Officer found that the evidence and testimony, even if produced, would not be dispositive of any issue framed in these proceedings. Accordingly, the Hearing Officer denied the Parent’s request and finds that the Parent is not prejudiced thereby.

At the conclusion of the Parent's case, the Board renewed its Motion to Dismiss. The Hearing Officer orally indicated that the matter would be dismissed with a written decision to follow setting forth the basis for the dismissal.

The date for mailing of the final decision is August 4, 2008.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes ("CGS") §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administration Procedures Act, CGS §§ 4-176e to 4-178, inclusive, and §§4-181a and 4-186.

SUMMARY:

The Student's disability is emotional disturbance. On February 21, 2008, the Board requested a Due Process Hearing when the Parent revoked consent for a psychiatric evaluation; and thereafter refused to consent to the psychiatric evaluation and a therapeutic educational placement at the Farmington Valley Diagnostic Center, as recommended by the PPT. On April 22, 2008, Hearing Officer Gelfman issued a Final Decision and Order in Case No. 07-429 ordering the evaluation and placement as recommended by the PPT. On April 29, 2008, the Board attempted to ascertain the Parent's availability; and provided both written and telephonic notice to the Parent and Student that a PPT would be held on April 30, 2008. The stated purpose of that PPT was to review and revise the Individual Education Program ("IEP"). Neither the Parent nor the Student attended that PPT nor any of the PPT meetings held thereafter. Due to lack of cooperation by the Parent and Student, the psychiatric evaluation has not occurred and the Student has not been the therapeutic educational placement.

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, *see SAS Institute, Inc., v. S & H Computer Systems, Inc.*, 605 F. Supp. 816, (March 6, 1985); and *Bonnie Ann F. v. Callallen Independent School District* 835 F. Supp. 340 (S.D. Tex. 1993).

FINDINGS OF FACT:

1. The Student is seventeen years old and a resident of Farmington, Connecticut.
2. The Board is required to provide FAPE to the Student.
3. The Student is eligible for special education services with an identified disability of emotional disturbance. Testimony of Dr. Currie; Exhs. B-1, B-3, B-6, B-19.
4. On February 21, 2008, the Board filed a Request for a Due Process Hearing when the

Parent revoked prior consent and thereafter refused to consent to a psychiatric evaluation and therapeutic placement of the Student - both of which were recommended by the PPT. Testimony of Dr. Currie; Exh. B-5.

5. On April 22, 2008, Hearing Officer Gelfman issued a Decision in Case No. 07-429 which ordered a therapeutic educational placement and a psychiatric evaluation of the Student in conformity with the recommendations of the PPT. Exh. B-6.

6. In order to implement the Order of the Hearing Officer the Board attempted to contact the Parent, left messages on her voicemail, and provided written notice on April 29, 2008 of its intention to convene a PPT on April 30, 2008 ("the Notice"). The Parent received the Notice but notified the Board that she was unable to attend. The PPT was convened as scheduled and the Parent was notified thereafter. Testimony of Dr. Currie, Testimony of Parent; Exh. P-1.

7. Pursuant to the Notice, the identified purpose of the April 30, 2008 PPT was to "Review or Revise IEP." Testimony of Dr. Currie, Testimony of Parent; Exh. P-1.

8. The Notice failed to provide the Parent and Student with five school days notice of the PPT. The Notice was proper in all other respects. Testimony of Dr. Currie, Testimony of Parent; Exh. P-1.

9. The Board attempted to arrange mutually agreeable times to convene a PPT and provided proper notice of each subsequent PPT. The Board initially issued a notice and scheduled a PPT for May 13, 2008. The mother notified the Board that the Student had a medical appointment and could not meet on May 13, 2008. The Board re-scheduled that PPT for May 15, 2008. Testimony of Dr. Currie, Testimony of Parent.

10. On May 15, 2008, the Parent was in Dr. Currie's office at approximately noon and discussed her objection to the stated purpose for the PPT contained in the notice which was for "Diagnostic Placement Review." The Parent insisted that the purpose should be for "initial" PPT. Dr. Currie agreed to identify the purpose of the PPT as an "initial" PPT at the Parent's insistence in order to convince the Parent to attend and participate. The PPT was scheduled for and convened at 1:30 p.m. The Parent did not appear at the PPT that day and did not advise Dr. Currie or anyone on behalf of the Board that she would not appear. Testimony of Dr. Currie, Testimony of Parent.

11. The Board also scheduled and convened a PPT on May 27, 2008, and June 10, 2008. The PPT notices were proper in all respects. The Parent was promptly provided copies of the PPT Minutes. Testimony of Dr. Currie, Testimony of Parent; Exhs. B-8, B-9, B-10, and B-11.

12. The Board unsuccessfully attempted to convince the Parent that she should attend each PPT. The Board maintained comprehensive records of its attempts to arrange a mutually agreed upon time and place. Testimony of Dr. Currie, Testimony of Parent; Exhs. B-8, B-12, B-14, B-16.

13. Dr. Currie's testimony was credible and reliable. She presented as very concerned for the educational program of the Student and has pursued "extraordinary" efforts for the Student as recognized by Hearing Officer Gelfman in Case No. 07-429 and as has been established in this current case. Testimony of Dr. Currie; Exh. B-6.
14. Neither the Notice nor the convening of the PPT on April 30, 2008, May 15, 2008, May 27, 2008, and June 10, 2008 resulted in denial of FAPE to the Student. Testimony of Dr. Currie, Testimony of Parent.
15. The Board did not significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Parent's child; or cause a deprivation of educational benefits.

CONCLUSIONS OF LAW

1. The Student qualified for and is entitled to receive a free appropriate public education ("FAPE") with special education and related services under the provisions of state and federal laws. CGS §10-76a *et seq.* and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* The Student's disability is emotional disturbance.
2. The Hearing Officer "shall have the authority to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education or the pupil if such pupil is an emancipated minor or eighteen years of age or older, has placed the child or pupil in a program other than that prescribed by the planning and placement team, or to prescribe alternate special education programs for the child or pupil." CGS §10-76(d)(1).
3. The standard for determining whether FAPE has been provided is set forth in *Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 179 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have been met and second is whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id* at 206-207.
4. The Hearing Officer has jurisdiction to order an educational agency to comply with procedural requirements when those procedural inadequacies cause substantial harm to the child or his parents. Specifically, where the individual or cumulative result is the loss of educational opportunity or seriously infringe on a parent's participation in the creation or formulation of the IEP constitutes a denial of a FAPE. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513; *Matrejek v. Brewster Cent. Sch. Dist.* 471 F.Supp. 415, 419 (S.D.N.Y. 2007); *see also "M" v. Ridgefield Bd. of Educ. No. 3:05-CV584* (RNC), 2007 U.S. Dist. LEXIS 24691, at #21n. 8 (D.Conn. Mar. 30, 2007) .

5. In order for a given alleged procedural violation to be considered sufficiently significant to render invalid a proposed IEP, a procedural violation must have resulted in a denial of FAPE to the student. IDEA provides in relevant part as follows:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies.

- (i) impeded the child's right to a free appropriate public education;
 - (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child; or
 - (iii) caused a deprivation of educational benefit.
- (3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§300.500 through 300.536.

20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513. As courts within this circuit have held subsequent to the 2004 amendments, "[p]rocedural flaws do not automatically require a finding of a denial of FAPE" *Matrejek v. Brewster Cent. Sch. Dist.* 471 F.Supp. 415, 419 (S.D.N.Y. 2007); *see also "M" v. Ridgefield Bd. of Educ. No. 3:05-CV584 (RNC)*, 2007 U.S. Dist. LEXIS 24691, at #21n. 8 (D.Conn. Mar. 30, 2007) (citing cases from various circuits that held that a plaintiff must demonstrate that procedural errors by the district resulted in the denial of a FAPE). "Only procedural inadequacies that cause substantial harm to the child or his parents -- meaning that the individual or cumulative result is the loss of educational opportunity or seriously infringe on a parent's participation in the creation or formulation of the IEP - constitute a denial of a FAPE." *Matrejek, supra*, at 419.

6. The Board contends that the Hearing Officer lacks jurisdiction. In filing this request for due process hearing the Parent alleges that the Board failed to comply with procedural requirements. Accordingly, the Hearing Officer has jurisdiction to adjudicate this matter, determine whether there was a procedural violation which resulted in denial of FAPE to the Student, and issue appropriate orders. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513.
7. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place. The notice must indicate the purpose, time, and location of the meeting and who will be in attendance. 20 U.S.C. §1414(d)(1)(B)(i); 34 C.F.R. §300.322.
8. CGS §10-76d(a)(8) requires written notification to the parents of a PPT meeting at least five school days in advance of any proposed change in the provision of a free

appropriate public education to the student. The Board failed to provide the Parent with the requisite notice of the April 30, 2008 PPT even though the PPT was convened to implement the Decision in Case No. 07-429. The Parent was provided and did receive the requisite notice of the PPT meetings convened on May 15, 2008, May 27, 2008, and June 10, 2008. The Board's failure to provide the Parent with the requisite five school days notice of the April 30, 2008 PPT did not result in a denial of FAPE to the Student.

9. The party requesting the hearing has the burden of going forward with the evidence. In all cases, the Board has the burden of proving the appropriateness of a program or placement by a preponderance of the evidence. Regulations of the Connecticut State Agencies ("RCSA") §10-76h-14. The Board met its burden of proof. The Parent, however, failed to meet her burden of proof. There is no dispute concerning the standard of proof.
11. A PPT meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place. 20 U.S.C. §1414(d)(1)(B)(i); 34 C.F.R. §300.322. The Board endeavored to convince the Parent to attend and participate in the PPT. The Board properly documented these attempts.
12. The Parent claims the Board violated her procedural rights when it both failed to consult her prior to scheduling the PPT meetings, in order to ensure she was able to attend; and failed to provide five days written notice of the April 30, 2008 PPT. The Parent also contends that the Board failed to appropriately identify the purpose of the PPT in the notices thereof. Although there was a procedural violation when the Board failed to provide five school days notice of the April 30, 2008 PPT, there were no procedural violations thereafter. In order to prevail on her claim, the Parent has the burden of proof that the procedural violation resulted in a denial of FAPE to the Student, impeded the child's right to a free appropriate public education, significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Parent's child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513. The Parent failed to meet her burden of proof.

FINAL DECISION AND ORDER:

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