

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Westport Board of Education

Appearing on behalf of the Student: Student

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

Appearing before: Attorney Brette H. Fitton
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the District deny Student a free appropriate public education (“FAPE”) when, in October 2015, Student attempted to enroll in Staples High School and a faculty member called the police and had Student removed from the school premises?
2. If Student was denied a FAPE by the District’s actions in October 2015 what is the appropriate remedy?

PROCEDURAL HISTORY: On April 7, 2017, the Westport Board of Education (“Board”) received a request for a special education hearing filed on behalf of Student by Student’s relative. On April 18, 2017, a prehearing conference was held. The Board’s attorney joined the conference. Neither Student, nor his relative, joined the conference. A call was placed to the phone number on the hearing request, but no one answered the phone and the conference was ended. On April 18, 2017, the Board filed a motion to dismiss the hearing request based on a claim that Student’s relative lacked standing to file the complaint. On April 25, 2017, a second prehearing conference was held, which was attended by Student and the relative who had originally filed the complaint on Student’s behalf. On May 2, 2017, Student filed an amended complaint which indicated he was filing the complaint on his own behalf. On May 3, 2017, the hearing officer inquired of the Board whether they were withdrawing their motion to dismiss, so that it could be determined whether an order permitting the amendment was needed or there was an agreement to the amendment. On May 3, 2017, the Board withdrew its motion to dismiss the original complaint, but indicated that it would be filing a sufficiency challenge, which it filed on May 11, 2017 and which was denied. Upon the withdrawal of the original complaint, the amended complaint was deemed filed on May 3, 2017. The deadline for filing a final decision and order was established as July 17, 2017. The parties had indicated that they were going to engage in mediation. Attempts to settle the matter were unsuccessful. On July 11, 2017, Student requested an extension of the mailing deadline. This request was granted and resulted in a new

deadline of August 17, 2017. During a follow-up prehearing conference held on July 13, 2017, a hearing date of September 5, 2017 was set and a request for an extension of the mailing deadline was made in order to accommodate the agreed upon hearing date schedule. This request was granted and resulted in a new mailing deadline of September 17, 2017. Student indicated his intention to obtain an attorney to represent him in this case and Student was informed that his attorney would be able to request a postponement, if he or she desired, upon filing an appearance. No attorney filed an appearance on behalf of the Student. On September 4, 2017, the Student filed a request for a postponement of the hearing. This request was denied on the record when the hearing was opened on September 5, 2017. The parties joined in a request for an extension of the mailing deadline to accommodate additional hearing dates. This request was granted and resulted in a mailing deadline of October 17, 2017. On the first hearing date, Student testified and was cross-examined by the Board. At the conclusion of Student's testimony, the Board orally moved for summary judgment. The Board was given until September 15, 2017 to file its motion with a memorandum of law in support and Student was given until September 26, 2017 to file an objection to the Board's motion. Both the Board's motion and Student's objection were timely filed. On October 17, 2017, the Board requested a three-day extension of the mailing deadline. This request was granted and resulted in a new deadline of October 20, 2017. The original request for a hearing was marked as Hearing Officer's Exhibit 1 (HO-1). Student's amended request for a hearing was marked as Hearing Officer's Exhibit 2 (HO-2). The Board submitted exhibits, B-1 through B-63 which were entered as full exhibits. Student submitted no exhibits. Student testified on the September 5, 2017 hearing date.

FINDINGS OF FACT: After considering all the evidence submitted by the Parties, including documentary evidence and testimony of Student, I find the following undisputed facts:

1. Student was born on April 16, 1996, and turned 21 on April 16, 2017. (HO-2)
2. Student was disenrolled from Staples High School in January of 2014 (Testimony of Student - 9/5/2017)
3. As of the date Student was disenrolled from Westport Public Schools on January 20, 2014, Student was a Student eligible for special education under the eligibility classification of Emotional Disturbance. (B-28, B-29)
4. Student was enrolled in the Fusion Academy in New York, New York from September 30, 2015 through April 4, 2016. (Testimony of Student - 9/5/2017, B-43)
5. In early October 2015, Student and his uncle went to Staples High School and attempted to enroll Student, but were not permitted to do so at that time. At some point during this incident, school staff called the police and Student and his uncle were escorted off the premises. (Testimony of Student - 9/5/2017)
6. On Friday, October 9, 2015, after the police incident occurred, the Westport Director of Pupil Services sent an email to Student offering to assist Student in registering in Westport Public Schools. (B-34)

7. On October 15, 2015, Student sent an email to Staples with a form giving signed consent for Staples to communicate with his uncle. (B-36)
8. On October 16, 2015, the Director of Pupil Services, sent correspondence to Student requesting confirmation that Student wished to enroll in Staples so that he could send the registration paperwork to Student. The Director of Pupil Services also requested transcripts so that Student's credits could be evaluated in this email. (B-36)
9. On February 6, 2017, Student responded to the District's offer to assist Student. (B-38A)
10. On February 10, 2017, the Coordinator of Special Education sent an email to Student to set up a meeting to discuss how Student might obtain a high school diploma. (B-39)
11. Student was enrolled in Westport Public Schools and a PPT meeting was held on March 7, 2017. (B-44)
12. Despite being offered other ways to achieve a diploma or high school equivalency with fewer required credits, Student has made clear he does not want any diploma that is not a Staples High School diploma. (Testimony of Student - 9/5/2017; B-46)
13. Student has taken and received credit for coursework at State University of New York Purchase ("SUNY- Purchase"). (Testimony of student 9/5/2017)

STATEMENT OF JURISDICTION: This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

CONCLUSIONS OF LAW AND DISCUSSION: The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. *Weber v. U.S. Sterling Securities*, 282 Conn. 722, 728, 924 A.2d 816 (2007). "It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact . . . [T]ypically, [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief . . ." (Citations omitted; internal quotation marks omitted.) *Martinez v. Southington Metal Fabricating Co.*, 101 Conn. App. 796, 799, 924 A.2d 150 (2007).

The two interrelated issues presented in this case were refined after discussion in a prehearing conference with the parties and were also set down in writing in a memorandum which was sent to the parties on August 25, 2017.

In Student's amended request, Student claims that the October 2015 incident in which Student and his relative were removed from the school by police denied Student a FAPE. Since the District does not control the actions of the police department, it is the act of school staff calling the police to intercede in the dispute between staff and Student and his relative that is the basis for Student's claim. The school does not dispute that this event occurred. It is also undisputed that the District reached out to Student to facilitate enrollment shortly thereafter on October 9, 2015 and that Student failed to respond to the District's offer until February 6, 2017.

Once Student did reach out to accept the District's offer, over a year later, the District promptly arranged for the Student to meet with school staff and an IEP was developed and implemented. Student has argued that the police incident is a de facto violation of Student's right to a FAPE for the entire statutory period permitted under the IDEA, but even if the facts are construed most favorably to Student, specifically that the District was not justified in calling the police, the police incident delayed enrollment by at most a day or two. Any additional delay was the result of Student's inaction. The District's response when Student did finally contact the school again in 2017 was to take the appropriate steps to enroll Student, determine his eligibility and develop an IEP. The District cannot evaluate a Student and develop and implement an IEP for a Student who has not enrolled in their district. At the time of the police incident and thereafter, Student was enrolled in a private school program in New York, for which he received academic credits. Based on the undisputed facts, the Student cannot demonstrate the District violated Student's right to a FAPE as a result of the October police incident.

Further, even if this Hearing Officer could find that the District denied Student a FAPE, this Hearing Officer lacks the jurisdiction to order the relief requested by Student. The relief requested in Student's amended complaint was an expedited high school degree so that Student could go to college. At the hearing, Student expanded on the relief requested in his written hearing request by indicating that he was requesting that the Hearing Officer enter orders that the Westport Board of Education issue Student a Staples High School diploma through one of two alternative means; either by accepting credit for coursework Student has completed and will take at SUNY-Purchase or by permitting Student to enroll as a high school student in Staples High School classes until his total credit and credit distribution requirements were met. At no time during his testimony or in his hearing request did Student request or state that he needed any special education, nor did he request any related services, nor are either required to receive a diploma under his two proposed alternate resolutions. Rather, Student requested an order that the Student be enrolled in regular education at a specific high school in the district, preferably at an accelerated rate, or that he receive credit for college work. No authority has been presented to support a claim that the hearing officer has the authority to override the credit distribution and total credit requirements set by the Board of Education by ordering that a Student receive credit for college coursework or that a Student be enrolled as a regular education Student in high school in order to finish his degree.

As the undisputed facts in this case cannot support a finding that a violation of the IDEA occurred and this Hearing Officer does not have the authority to grant the relief requested. The Board's motion for summary judgment is granted and the case is dismissed.

FINAL DECISION AND ORDER: In light of the above facts, the case is dismissed.