

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Bloomfield Board of Education

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Appearing for the Board: Christine Chinni, Esq.
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Appearing Before: Hearing Officer Scott P. Myers, M.A. (Clinical
 Psychology), J.D.

FINAL DECISION AND ORDER

There is no dispute that the Student, who is 9 years old, is eligible for special education and related services under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, as amended effective July 1, 2005 by the Individuals with Disabilities Education Improvement Act of 2004 (the “IDEIA”), and its implementing regulations, 34 C.F.R. §§ 300.1 – 300.754 (the “IDEIA Regulations”), and pursuant to Connecticut’s special education laws, Conn. Gen. Stat. §§ 10-76a, *et seq.* and their related regulations, Reg. Conn. State Agencies §§ 10-76a-1 *et seq.*. The Student’s current diagnoses reportedly include: Pervasive Developmental Disorder –Not Otherwise Specified, Generalized Anxiety Disorder, Attention Deficit Hyperactivity Disorder, Post-Traumatic Stress Disorder, Mental Retardation and Fetal Alcohol Syndrome.

ISSUES SET FOR HEARING

1. Whether the educational program and placement developed by the District at the December 14, 2006 PPT, as modified at the March 19, 2007 PPT (the “District Recommended IEP”), is reasonably calculated to provide the Student with a FAPE in the LRE?

2. If the District Recommended IEP is not reasonably calculated to provide the Student with a FAPE in the LRE, is an out-of-district placement in a therapeutic day program required to provide the Student with a FAPE in the LRE at this time?

3. If the District Recommended IEP is not reasonably calculated to provide the Student with a FAPE in the LRE and an out-of-district placement in a therapeutic day program is not required to provide the Student with a FAPE in the LRE, what modifications, if any, must be made to the District Recommended IEP to provide the Student with a FAPE in the LRE in an in-district placement in the District’s Autism Program (“AP”)?

PROCEDURAL SUMMARY

The procedural history of this case is summarized below. Additional detail can be found in the six procedural and scheduling orders that were entered in this case.

This matter was commenced by the Parents by a request dated January 3, 2007 prepared by the Parents and submitted to the State of Connecticut, Department of Education (“CTDOE”). This matter was assigned to the undersigned Hearing Officer on January 8, 2007. On January 11, 2007, Mr. Hudson entered an appearance as counsel for the Parents and filed a motion seeking to enforce the Student’s stay put rights. On January 12, 2007, the Hearing Officer contacted counsel for the parties to schedule a pre-hearing conference (“PHC”) and establish a schedule for resolving the stay-put motion. At that time, counsel reported that they had agreed to participate in a CTDOE-sponsored mediation and had reached an agreement resolving the stay put issue, and requested that the PHC be deferred pending the outcome of the mediation.

The CTDOE-sponsored mediation occurred on February 7, 2007 but was unsuccessful in resolving this matter. A telephonic PHC was convened on February 15, 2007. Parents’ counsel reported that the Student had recently been hospitalized and currently remained hospitalized due to behaviors associated with his disabilities, and that his anticipated discharge date was February 16, 2007. It was proposed that once the Student was discharged a PPT convene to reassess the Student’s educational needs and IEP and the issue raised in this hearing in light of his hospitalization and any pertinent discharge recommendations. An order to that effect was then entered. (February 16, 2007 Order regarding Scheduling and Other Matters.)

Counsel for the Parents advised that the initial request for due process submitted by the Parents had been prepared without the benefit of counsel and that in the course of the mediation, the Parents had refined their issue list. Counsel for the Board noted that the new issues had not previously been the subject of consideration by a PPT and that it was the position of the Board that they were therefore not properly considered in this proceeding. Counsel for the Board nonetheless stated that in the interest of “judicial” economy and efficiency, the Board would not object if the Parents were to file an amended statement of issues for resolution in this matter and would not contest the Hearing Officer’s jurisdiction to consider those issues in this proceeding provided that the “clock” for the hearing be reset to zero with the submission of the amended statement of issues. After an extended discussion, it was agreed that this matter would proceed in that manner. The Hearing Officer concluded that this approach would most efficiently serve the needs of the Student, provided that the PPT was convened for the purpose of reviewing the Student’s educational needs in light of the hospitalizations to determine whether and to what extent his IEP needed to be modified.¹

¹ A final decision and order in this matter will determine the special education and related services that the Student requires to receive a FAPE in the LRE. Since the Parents’ filed their initial request for a due process hearing, the Student has been hospitalized for behavioral concerns and it was unclear whether and to what extent changes in the Student’s circumstances have superseded or mooted the concerns with his programming raised initially by the Parents. The PPT to be convened

By agreement of the parties, February 19, 2007 was identified as the date of the request for due process in this matter for purposes of calculating the timelines for issuance of the final decision and order. Accordingly, May 7, 2007 was the date identified for issuance of the final decision and order. By order dated February 16, 2007,² the parties were directed to convene the PPT as soon as feasible. That order further directed that a second telephonic PHC convene on March 2, 2007, established a schedule for submission of records and witness lists, and established two dates for hearing on the merits (March 30, 2007 and April 4, 2007).

The Parents on February 20, 2007 submitted a pleading restating the issues that they were submitting for hearing (that pleading referred to herein as the “amended due process request”).³ The District objected to the amended due process request and moved that aspects of it be “stricken.” By order dated February 27, 2007 (the Second Order), the Hearing Officer denied the Board’s motion to strike.

On February 28, 2007, the Board challenged the sufficiency of the amended due process request. The Board argued that the amended due process request is not sufficient within the meaning of the IDEIA because it “fails to adequately describe both the nature of the Parents’ concerns and the desired resolution of those concerns;” “does not identify a single action proposed or refused;” “does not clearly state what extended school day and/or extended school year services [the Parents] are seeking, or the nature of the out of district placement they are seeking.” The Hearing Officer rejected the sufficiency challenge, finding that the amended due process request was vague about some issues but sufficient in the circumstances to put the Board on notice as to the nature of the claims and the relief being

pursuant to the Hearing Officer’s order would review the Student’s current circumstances and determine whether modifications of his IEP and placement were warranted. To the extent that the parties agreed on those matters at the PPT, the Hearing Officer anticipated that the need for a hearing would be obviated. To the extent that the parties are unable to reach agreement on those matters at the PPT, the hearing can proceed accordingly on that dispute. In any event, the PPT would be the proper vehicle to consider information regarding the Student’s hospitalizations. The Hearing Officer concluded that convening a PPT for this purpose is an appropriate and reasonable approach to assure that the Student’s educational needs are considered first by a team of educational professionals, with review of the District’s actions by an independent, impartial hearing officer as necessary.

² Order Regarding Scheduling and Other Matters

³ In their pleading the Parents state, among other things, that the Student “presents medical and behavioral challenges that exceed the ability of the [District’s] Public Schools to provide [the Student] with an appropriate education within the existing [in-district] placement . . .” To support that claim, the Parents point, among other things, to the fact that the Student has “experienced two hospitalizations within the last ten days for behavioral concerns.” The Parents state further that “[g]iven the history of previous attempts to put an appropriate program in place for [the Student] and repeated failure at the [District] Public Schools, [the Student] clearly requires an out-of-district placement in an appropriate school program until such time as he would be likely to make progress again within the [District] Public Schools.” The Parents did not identify a specific out-of-district placement, and it was unclear whether the out-of-district placement they seek is at the FOCUS program referenced in the pleading.

sought. The Hearing Officer directed that the Parents clarify at the March 2, 2007 PHC certain aspects of their request for relief stated in the amended due process request. *See* March 1, 2007, Third Order – Ruling on Sufficiency Challenge.

The March 9, 2007 Fourth Order summarized the discussions at the March 2, 2007 PHC, as well as the outcome of a hearing on March 9, 2007 and associated communications among the parties and the Hearing Officer, also on March 9, 2007.

March 2, 2007 PHC. Parents' Counsel reported that the Student had been rehospitalized and it was unclear at the time when he would be discharged. He reported further that although the Parents had executed a release of information authorizing the hospital to release the Student's records, the hospital to date had refused to do so. He clarified that the Parents were seeking an out-of-district placement at a day treatment program in light of the Student's medical and behavioral issues. It was ultimately determined that counsel for the Parents would subpoena the hospital to a keeper-of-records deposition, to be held in the form of a hearing, on March 9, 2007. The PPT discussed previously had not yet been convened due to the Student's continued hospitalization and unavailability of the hospital records. The parties also discussed the framing of the issues set for hearing.

March 9, 2007 Hearing. A hearing convened on March 9, 2007. No testimony was taken under oath. Parents' counsel represented that he had issued a subpoena to the hospital and that the Parents had executed releases permitting the disclosure of the Student's hospital records, but that the hospital has refused to date to comply citing its obligations under the Federal Health Insurance Portability and Accountability Act. A letter dated March 7, 2007 from the hospital to the Parents' counsel to that effect was marked as Exhibit HO2.⁴ The parties agreed to convene another keeper-of-records deposition of the hospital in the form of a hearing on March 16, 2007. Specific orders were then entered to facilitate the securing of those records for the hearing and create an evidentiary record regarding the securing of those records.⁵

At the March 9, 2007 hearing, the parties advised that the Student had been discharged from the hospital and was now back in the agreed-upon stay put placement. The Board advised that it believed that the stay put placement was harming the Student's interests and would seek an order of the Hearing Officer changing that placement to the program offered in the December 2006 IEP and rejected by the Parents. The Hearing Officer advised that the Board should raise this issue by motion. Both parties advised that they would put on evidence on this issue. A briefing schedule was established and a hearing on the motion was scheduled for March 26, 2007.

⁴ Consistent with CTDOE practice, the designation Exhibit HO1 was reserved for the request for due process that commenced this proceeding, to be marked at the hearing on the merits.

⁵ In response to a request from the Board's counsel, and by agreement of the parties, counsel for the Parents submitted a draft of the proposed notice of deposition and subpoena to the Hearing Officer for review and comment. The Hearing Officer suggested a revised form which he sent to counsel for both parties.

On March 14, 2007, the District moved for an order from the Hearing Officer modifying the Student's stay put placement (which provides for a split-day between the AP and the FOCUS program) such that the Student would attend the AP on a full-time basis pending the outcome of this hearing. The Parents submitted a brief in opposition.

The Fifth Order (entered on March 17, 2007), summarized aspects of the March 16, 2007 hearing and addressed other issues. The Student's hospital records were secured at this hearing and made available to the parties. The parties discussed convening of a PPT to review the Student's educational needs as required by prior orders in this matter. Two additional dates (April 12, 2007 and April 25, 2007) were identified for a hearing on the merits.

On March 19, 2007, the PPT discussed in prior orders was convened. The District, after reviewing the records of the Student's hospitalization, concluded that the placement recommended at the December 14, 2006 PPT (full day at the AP) was FAPE in the LRE for the Student. The District and the Parents agreed to modify one aspect of that IEP such that the "cool down room" intervention would no longer be used to address work avoidance issues. The Parents continued to object to the proposed full day placement at the AP.

The March 21, 2007 Sixth Order addressed a myriad of issues raised by the parties. On March 14, 2007, the Parents filed a motion requesting that the Hearing Officer redefine the issues set for hearing as follows (amendment indicated by underlining):

1. Whether the educational program and placement developed by the District at the March [____], 2007 PPT is reasonably calculated to provide the Student with a FAPE in the LRE.

2. If the program and placement defined at that PPT is not reasonably calculated to provide the Student with an FAPE in the LRE, is the District required to fund a placement at the out-of-district placement requested by the Parents and if so to what extent?

3. In the event that the educational program and placement developed by the District at the March [____] 2007 PPT is not reasonably calculated to provide the Student with a FAPE in a LRE but an out-of-district placement is not appropriate in this instance, what changes must be made to the Student's educational program that would provide him with a FAPE in a LRE?

The Board objected to that motion. For the reasons set forth more fully in the Sixth Order, the Hearing Officer defined the issues set for hearing as identified in the first section of this Final Decision and Order. With respect to Issue # 3, the Parents were directed to submit a list of the specific modifications they were seeking to the District Recommended IEP.

On March 20, 2007, the Parents submitted their record in this matter. The record was not formatted in compliance with the requirements of the CTDOE's regulations and the

Hearing Officer granted the Board's request that the deficiencies be corrected to attain compliance with the CTDOE regulations and various directives in prior orders issued in this matter.

The Sixth Order also addressed the procedures that would be followed at the hearing on the stay put motion and stated the standard that the Hearing Officer had concluded would apply to determine whether the Board was entitled to the relief it was seeking.⁶

On March 26, 2007, the parties appeared for hearing and, through counsel, requested an opportunity to state on the record that they had reached an agreement settling all issues raised in this matter, such that the matter could be withdrawn with prejudice. That request was granted. The Hearing Officer made clear in granting that request that he was not entering the terms of the settlement as an order, had made no determinations regarding the merits of the terms of the settlement and was not approving the terms of the settlement.

FINAL DECISION AND ORDER

This matter is DISMISSED.

⁶ The Hearing Officer had not reached any determination as to whether he actually has the authority under either the IDEIA or Connecticut law to modify a stay-put placement.