

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Manchester Board of Education

Appearing on behalf of the Parent:                   The Parent proceeded *pro se*.

Appearing on behalf of the Board:                   Attorney Craig Meuser  
Shipman & Goodwin,  
One American Row  
Hartford, CT 06103

Appearing before Hearing Officer:                   Attorney Mary Elizabeth Oppenheim

**FINAL DECISION AND ORDER**

**ISSUES:**

Parent's Issues:

1. Whether the Board's proposed program for the Student for the 2002-2003 school year is appropriate.
2. If not, whether the Parent's proposed program is appropriate.

Board's Interim Issue:

Whether the Parent's refusal to consent to the Board's transfer of information regarding the Student's regular and special education program to CREC Polaris, CREC Apex, Lorraine D. Foster Day School, The Learning Center and ACES Academy, to allow each facility to determine whether the Student meets their respective admissions criteria, may be overridden by the hearing officer's order.

**BACKGROUND:**

1. The Parent requested this hearing to contest the appropriateness of the Board's proposed program for the Student.
2. The Board subsequently requested that its interim issue be joined in this hearing.

3. The Student had been offered a program of homebound tutoring while the Board investigated alternate placements during the period of expulsion. [Exhibit B-29]
4. The homebound tutoring was not commenced by the first hearing date, so an Interim Ruling was issued to order the commencement of tutoring by July 18. [Interim Ruling of July 8, 2002] Despite the Board's numerous attempts to contact the Parent and the Student to commence the homebound tutoring, no tutoring was commenced as of the second date of the hearing, August 7. [Testimony Jeanne MacDonald, Dr. Martha Hartranft] The testimony presented at the hearing indicates that the Student and Parent have failed to cooperate with the order to commence tutoring, and the Student had not yet participated in homebound tutoring, despite many attempts by the Board to schedule the sessions. [Testimony Ms. MacDonald, Dr. Hartranft; Exhibits B-38, B-39]
5. The Board had attempted to investigate an appropriate placement for the Student for the 2002-2003 school year, as the homebound tutoring was not an appropriate long-term placement. [Testimony Ms. MacDonald, Dr. Hartranft; Exhibit B-29]
6. In reviewing possible placements for the Student, any outside facility must receive documentation regarding the Student to evaluate the Student, and to help the members of the PPT determine if the outside facility can provide a free appropriate public education to the Student. [Testimony Ms. MacDonald]
7. The outside facilities must receive access to the PPT minutes from the last school year, including the annual review prior to the commencement of the school year; the Student's cumulative record and transcript, and all the most recent evaluations, including psychological, psychiatric and social work records, if any. [Testimony Ms. MacDonald, Dr. Hartranft]
8. The Parent refused to consent to the release of these documents to the facilities. [Testimony Ms. MacDonald, Dr. Hartranft] The release of the documents to these facilities was granted by the hearing officer in the Second Interim Ruling of August 8, 2002, so that the Board could fully evaluate the Student, and determine the free and appropriate public education to which the Student is entitled. The Board was entitled to evaluate each of the placements, and forward the appropriate information to the facilities for review and analysis of whether any of the proposed placements can provide the Student with an appropriate public education, one that is "reasonably calculated to enable the child to receive educational benefits." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982); *See, South Brunswick Board of Education*, 37 IDELR 84 (SEA NJ 2002)(an emergency request to override parental consent as to release of records to possible out-of-district placements was granted)
9. The Parent failed to appear at the Hearing on August 7. On August 7, a Notice of additional hearing dates was sent to the Parent, with a notice that the:

**FAILURE TO APPEAR AT THE SCHEDULED HEARING DATES AND FAILURE TO PROSECUTE THE ISSUES IN THIS HEARING COULD RESULT IN A DISMISSAL OF THE PARENT'S CLAIMS, WITH PREJUDICE.**

10. The Parent failed to appear at the third hearing date on August 27. The Board representative spoke with the Parent to determine if she was planning to appear at the hearing. [Testimony Dr. Hartranft] The Parent informed the Board that she was not planning to appear, as there was no issue in dispute. [Testimony Dr. Hartranft] The Parent indicated that the Student was to be enrolled in the Sports Academy in Hartford, and the Parent did not intend to appear at the hearing. [Testimony Dr. Hartranft]

**CONCLUSIONS OF LAW:**

1. Any party to a hearing conducted pursuant to Section 10-76h-1, et seq., of the Regulations of Connecticut State Agencies and Sec. 300.507, et seq., of the Federal Regulations has rights to be represented by counsel; a reasonable opportunity to present evidence and confront, cross-examine and compel attendance of witnesses; and to prosecute their action. Sec. 10-76h-11 of the Regulations of Connecticut State Agencies, Sec. 300.509 of the Federal Regulations. These rights are not without obligations, as the parties must proceed in good faith to prosecute their action. Connecticut Regulations specifically provide that:
  - (a) Any party may move for, or the hearing officer may order, sua sponte, an entry of default or dismissal of a hearing for failure of any party:
    - (1) to prosecute the hearing;
    - (2) to participate in the prehearing conference;
    - (3) to comply with sections 10-76h-1 to 10-76h-18 of the Regulations of Connecticut State Agencies; . . .
    - (7) to appear at a properly noticed scheduled hearing. . .The hearing officer may grant the motion with or without prejudice. (Conn. Agencies Regs. Sec. 10-76h-18)
2. The Parent failed to appear for the second and third hearing dates. After the second hearing date, the Parent was placed on notice that the failure to appear could result in a dismissal of the action. Despite that notice, the Parent failed to appear for the third day of hearing, and confirmed to the Board representative that she was no longer pursuing this case. Therefore, the Parent's issues should be dismissed for failure to prosecute, and failure to appear at a properly noticed scheduled hearing.
3. The more weighty issue is whether the case must be dismissed with prejudice, as this action, in its finality, would bar the hearing of the Parent's claims.
4. While not bound by other federal court rules, it is useful to look to them for guidance. These court rules provide that a plaintiff may be subject to a dismissal, including

dismissal with prejudice, for failure to prosecute or comply with court orders. *See* Rule 41(b) of the Federal Rules of Civil Procedure. Rule 41(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

(b) Involuntary Dismissal . . . For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant . . . . [A] *dismissal under this subdivision . . . operates as an adjudication of the merits.* [Emphasis added]

5. Failure to appear at a pretrial conference, failure to prepare for a conference, or failure to comply with pretrial orders can serve as a basis for such a dismissal. *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp*, 542 F2d 1318 (7<sup>th</sup> Cir., 1976) It is also beyond dispute that a court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial. *Zagano v. Fordham University* 900 F. 2d 12 (2d Cir. 1990)
6. In dismissing a case with prejudice, the needs of the tribunal in advancing a crowded docket and preserving respect for the integrity of its internal procedures are balanced with the harsh consequences of forever denying a litigant her day in court. *Moore v. St. Louis Music Supply Co., Inc.*, 539 F. 2d 1191, 1193 (8<sup>th</sup> Circuit 1976)
7. In considering whether dismissal with prejudice is warranted, the Courts have looked to four factors for guidance: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to such a dismissal; and (4) whether less drastic sanctions were imposed or considered before such a dismissal was ordered. *Stough v. Mayville Community Schools*, 138 F. 3d 612, 615 (6<sup>th</sup> Cir. 1998)
8. In this case, it appears that the Parent was aware of the hearing, but did not attend. Therefore, the Parent's failure to appear at the hearing was done willfully. The Board was prejudiced by the non-appearance, and was required to attend the second and third hearing dates without the Parent present. The Parent was warned that her failure to cooperate in appearing at the hearing could result in a dismissal with prejudice. The Parent was also given an additional opportunity to appear for the hearing on the third hearing day, even though she had not appeared on the second hearing day.
9. In light of the circumstances of this case, the Parent's issues must be dismissed with prejudice for the Parent's failure to prosecute the action, appear at the hearing and comply with the Regulations of Connecticut State Agencies.

**FINAL DECISION AND ORDER:**

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