

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. New Britain Board of Education

Appearing for the Parent: *Pro Se*

Appearing for the Board: Michael P. McKeon, Esq.
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Before: Scott Myers, J.D., M.A. (Clinical Psychology)

STATEMENT OF ISSUE

For the reasons set forth herein, hearing proceeded on only one of the three issues presented for hearing by the Mother – the “Exclusion Claim” – which concerned the Mother’s report that the Board was excluding the Student from her educational program on days when the Student was having her menstrual period as a disciplinary measure.

PROCEDURAL BACKGROUND

The Mother commenced this proceeding by request dated July 27, 2004. (Exhibit HO1). She claimed: (1) that during the summer of 2004, the Student had not been provided the extended school year (“ESY”) programming provided for in her IEP (the “ESY Claim”); and (2) that school personnel had filed a false report with the Department of Children and Families (“DCF”) that the Mother was neglecting the Student’s hygiene needs (the “Referral Claim”).

At the August 11, 2004 telephonic pre-hearing conference (“PHC”), the parties disagreed as to why the Student had not been provided with ESY services during the summer of 2004 but agreed that the Student had not been provided with the mandated ESY services. The Hearing Officer advised that should he find for the Mother on the ESY Claim, he would award compensatory education and direct that a PPT be convened to determine the nature and form of any such compensatory education. Accordingly, the Hearing Officer suggested that the parties continue the hearing to convene a PPT to address the nature and form of compensatory education to be provided to the Student given her lack of summer 2004 ESY programming. The parties agreed to that proposal and an initial order was entered on August 16, 2004. That order directed the parties to convene a PPT and jointly report to the Hearing Officer on or by September 13, 2004 whether and to what the PPT had resolved the ESY Claim. The August 16, 2004 order also provided, in part, as follows:

- (1) If hearing proceeds [on the ESY Claim], it will encompass the PPT contemplated by this order and any issues related to that PPT or the proposed IEP.
- (2) Even if the PPT process successfully addresses [the ESY Claim] raised by the [Mother], she is still entitled to a determination as to responsibility for the lack of summer programming provided to the Student if she desires to have such a determination.

The Mother's right to such a determination was also discussed at the PHC. An October 11, 2004 hearing date was established and the date for issuance of the final decision and order was extended from September 10, 2004 through and including October 20, 2004. The Hearing Officer advised the parties at the PHC that issues concerning the Referral Claim would be addressed if the Mother still desired to proceed with that Claim.

By letter dated September 8, 2004, counsel for the Board advised that the scheduled PPT could not go forward as planned because the Student had been hospitalized for a medical evaluation. A second procedural order was entered on September 14, 2004, which directed the parties to report on the status of this matter by October 1, 2004.

By letter dated October 7, 2004, counsel for the Board reported that the planned PPT had been convened and appeared to have resolved the ESY Claim. Since it was unclear, however, whether the Mother wished to proceed with hearing, another scheduling order was issued on October 10, 2004 convening a second PHC for October 14, 2004. At that PHC, the Mother reported that the PPT had successfully resolved the ESY Claim and that she did not wish to pursue the ESY Claim any further.¹ The Mother advised, however, that she wished to proceed with the Referral Claim.

Based on the discussion between the parties regarding the Referral Claim at the PHC, the Hearing Officer advised the Mother that he had no jurisdiction over that Claim as presented. Notwithstanding that determination, evidence on the Referral Claim was taken at hearing to establish an appropriate record regarding the nature of this Claim. At the conclusion of the Mother's testimony regarding the Referral Claim, the Board moved to dismiss the Referral Claim for lack of subject matter jurisdiction. The Mother's testimony at hearing (described more fully herein) regarding the Referral Claim was consistent with her presentation of this Claim at the October 14, 2004 PHC. The Board's motion was granted on the record at hearing, affirming the determination previously made at the October 14, 2004 PHC.

At the October 14, 2004 PHC, the Mother for the first time identified the Exclusion Issue as an issue she desired to have addressed at hearing. A scheduling order was entered on October 14, 2004, establishing a November 12, 2004 hearing date and extending the date for issuance of the final decision and order from October 20, 2004 to and including November 20, 2004.

¹ The Hearing Officer reaches no determination regarding the reasons why the Student did not receive ESY services during the summer of 2004.

Hearing convened on November 12, 2004 at the Board's offices, 272 Main Street in New Britain. Testimony was offered through the following witnesses: the Mother, Carl Gross (Special Education Coordinator), Lynne Day (the Student's teacher) and Sandie Netupski, RN (an RN assigned to the Student's classroom).

The following exhibits marked at hearing constitute the documentary record:

HO1 July 27, 2004 request for hearing

P1 IEP dated June 8, 2004

P2 DCF Family Treatment Plan for the Mother and Student

P3 September 16, 2004 note to the Mother from Ms. Day

P4 Notes dated September 14 - 15, 2004 between the Mother and Ms. Day²

B1 Minutes of September 17, 2004 PPT

B2 Minutes of October 28, 2004 PPT

FINDINGS OF FACT

1. The Student is a 13 year old female who has been identified as eligible for special education and related services under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. Sec. 1401 *et seq.* with a classification of intellectual disability. The Student has been diagnosed as autistic and mentally retarded. She is also diabetic and weighs more than 200 pounds. She takes respiradol (sp) to manage symptoms of her autism and other medications for management of her diabetes. (Mother Test., Day Test., Netupski Test.) There is no dispute between the parties as to her eligibility under the IDEA, her classification or her IEP.
2. The Student is currently attending a Board middle school. She spends some time in the regular education setting, but spends most her school day in a self-contained classroom for multiply physically handicapped children (the "MPH Class"). There are 11 students in the MPH, including the Student. The Student communicates through vocalizations, gestures and, to a limited extent, sign language. Her program includes components to improve her communication skills through sign language.³ The Student is one of the higher functioning students in this class,

² These documents were submitted by the Mother as part of her record, but she advised at hearing that they were actually not pertinent to any of her Claims. (Mother Test.)

³ For example, the Mother stated that because the Student "doesn't talk," she is unable to verify with the Student the staff's version of the events that occurred on September 16, 2004 described below. (Mother Test.)

which focuses on functional academic instruction. Several children in the MPH are “medically fragile” with compromised immune systems. A few have tracheotomy tubes in place. Several of these students are vulnerable to blood borne pathogens. As with other students in the MPH, the Student has a paraprofessional assigned specifically to support her in the school environment. Ms. Day is the Student’s special education teacher this year (and was her teacher in the 2003/2004 school year). Ms. Netupski is an RN assigned to the MPH starting in the 2004/2005 school year. (Day Test.; Netupski Test.; P1)

3. The Student is not yet toilet trained and wears diapers during the school day. Board staff assists the Student with toileting functions and changing her diapers. The Student is tactile defensive and is sometimes resistant to staff assistance during these activities. (Mother Test.; Day Test.; Netupski Test.; P1)
4. The Student is able to respond to simple commands and has adjusted to in-school routines. She was not described as a behavior problem at school, was reportedly generally compliant with school routines, and reportedly has positive interactions with her peers in the MPH. (Day Test.) The Student requires a significant amount of staff and parental support to function in her program at times, and at times experiences anxiety which makes it difficult for her to come to school or participate in her program. (Day Test.; Mother Test.)
5. During the 2003/2004 school year, the Student manifested a behavior of “digging in her diaper” sometimes associated with bowel movements and other toileting events. As a result of the digging, fecal matter and other biological contaminants would be deposited on the Student’s hands. To address the digging behavior, staff attempts to distract the Student to prevent and stop her from digging. The Student enjoys the sensation of “water play” and had available to her a bucket of water. Staff would put antibacterial soap in this water, so that if as a result of digging or toileting, the Student got fecal matter or other bodily contaminants on her hands, she would effectively wash it off by engaging in water play. This tactic was used because the Student was sometimes resistant to washing her hands due to tactile defensiveness. (Day Test.; Netupski Test.)⁴
6. The Student has not previously been sent home from school or otherwise excluded from her educational program as a result of her digging behavior. (Mother Test.; Day Test.) The Student’s classroom is set up with a kitchen and instruction is sometimes provided in this environment because it has less distractions. The Student’s program has sometimes been delivered in this environment because it has fewer distractions. She is also sometimes provided instruction in this room when she is anxious and having difficulty functioning in the MPH classroom environment. (Day Test.) A change in setting from the MPH classroom to this kitchen environment is also sometimes used as part of the distraction strategy

⁴ The Mother did not dispute this testimony.

when the Student is or has been digging. (Day Test.)

7. On September 16, 2004, the Student was sent home early from school with the following note from Ms. Day to the Mother (P3):

[The Student] has her “period” + due to the fact that she was digging in her diaper even after we changed her she was getting blood on her hands. She will need to stay home until her period is over.
8. This was the Student’s first menstrual period. (Mother Test.; Day Test.) She was excluded from her program on September 16 (a Thursday), remained home on September 17, and returned to school on September 20 (a Monday). (Day Test.; Netupski Test.)
9. The Mother initially testified that the Student was excluded from her program for five to six *school* days associated with this event. She later acknowledged that she was mistaken and does not dispute the timeline presented by Ms. Day and Ms. Netupski. The Mother contended at the PHC and contended at hearing that this exclusion was disciplinary in nature and that her complaint was that the Student was being treated differently from other students in the MPH. (Mother Test.)
10. The Student has not had a menstrual period since September 2004 and has not been excluded from school on this basis subsequent to September 16-17, 2004. (Mother Test.; Day Test.; Netupski Test.)
11. Ms. Day and Ms. Netupski testified at length that on September 16, 2004, the Student was “not herself.” She was, in their opinion, anxious and preoccupied with menstruating and as a result of digging in her diaper repeatedly after arriving at school that morning, had both dried and wet blood on her hands. She was resistant to staff efforts to wash her hands and was touching various objects in the MPH including equipment used by and for other students in the MPH who are medically fragile, and contaminating the equipment as a result. The usual distraction techniques that the staff had applied to prior digging behavior were not successful. Ms. Day and Ms. Netupski concluded that the Student presented a health risk to the other students in the MPH associated with this behavior and, after consulting with the building principal, determined that the Student needed to be sent home. (Day Test.; Netupski Test.)
12. At the September 17, 2004 PPT, the menstrual period digging behavior was discussed and the Board staff proposed addressing the behavior by providing various articles of clothing for the Student to wear during her period that would act as a barrier preventing or limiting her access to her diaper and therefore prevent her from accumulating bodily fluids on her hands. This plan was refined over time and revisited at the October 28, 2004 PPT. In implementing this plan, the Student was provided with a hospital gown on September 20, 2004 which prevented her getting inside her diaper. (She was still menstruating on that day.) The Mother

and the Board have purchased “girdles” and other items of clothing for the Student as a temporary measure until specialized overalls that have been ordered for her arrive. The Board staff anticipates that these steps will effectively address the digging behavior and eliminate the potential need to exclude the Student from her program while she is menstruating. (Day Test.; Netupski Test.) The Mother does not dispute that these steps have been taken. (Mother Test.)

13. Board staff was uncertain whether behavior management techniques would be effective in addressing the menstrual period digging behavior. They acknowledged that the Student is able to understand cause and effect and follow simple directions. However, they were uncertain whether the Student’s anxiety or distress over her menstrual period will render such behavior management efforts unproductive. To further address this digging behavior, the Board is undertaking an occupational therapy evaluation to determine whether and how the toileting and personal hygiene components of the Student’s IEPs can be expanded to address this behavior. (Day Test.; Netupski Test.; B1; B2)
14. In October of 2003, a PPT was convened at which the Student’s Department of Mental Retardation (“DMR”) representative participated. Following that meeting, the Mother asked the Board’s staff not to communicate further with the DMR representative regarding home matters. On November 17, 2003, school staff referred the Mother to the DCF. According to the DCF report, the Board’s staff reported that the Student was coming to school “filthy” and that her diapers were too small. The DCF investigated the report and since that time a DCF worker has been involved with the family and participated in the Student’s PPTs. The Mother contends that the allegations made by the Board’s staff to the DCF were false. She suggests that the report was filed because she asked the Board not to communicate with DMR or complained about the Board’s communications with DMR regarding the Student. She testified further that she was considering filing a lawsuit against the Board for “defamation,” “slander” and “invasion of privacy” over this incident. She testified further that there was no impact whatsoever on the Student’s educational programming as a result of or in connection with this incident. (Mother Test.; P2)
15. The Board offered no specific testimony regarding the events underlying the Referral Claim, but does not deny that a referral to DCF by school personnel was made.

CONCLUSIONS OF LAW

1. The Student was excluded from her program on September 16-17, 2004 as a response to an unusual, exigent circumstance for which the staff was not prepared. A plan to address this menstrual period-related diaper digging behavior was promptly developed and implemented through a PPT process. There is no evidence (notwithstanding the unfortunate choice of wording in P3) that the Board has implemented a plan to address menstrual period-related digging behavior by

excluding the Student from school on the days on which she is menstruating (whether for disciplinary reasons or otherwise).

2. Whether the September 16-17 exclusion was for disciplinary reasons or not, the outcome was the same – the Student was excluded from her program. In this case, the exclusion was for two days. Under the pertinent IDEA regulations and case law, the Board may exclude (*i.e.*, suspend) an IDEA-eligible student from his or her program for a period of less than 10 days without conducting a manifestation determination. The IDEA regulations have been interpreted, however, to provide that manifestation determination obligations and other procedural protections must be undertaken for a series of exclusions where, even though each one totals less than 10 days, the exclusions cumulatively exceed or will exceed 10 days, and certain other factors exist.⁵ These provisions of the IDEA and principles of IDEA case law would potentially be implicated *if* it is the Board's intention or plan to address menstrual period-related digging behavior by excluding the Student from her program on school days on which she is menstruating.⁶ Again, based on the testimony offered at hearing, it is not the Board's intention or plan to address the menstrual-related digging behavior by routinely excluding the Student from her program for that behavior. Even assuming such an approach would pass muster under the substantive standards of the IDEA with respect to the provisions of a FAPE to the Student, the Board may only implement such a plan with prior written notice at a properly convened PPT. No such plan has been discussed at either of the PPTs convened since September 16, 2004.
3. Although the Hearing Officer accepts the testimony of the Board witnesses that the Student was “not herself” and could not be calmed on September 16 in light of her preoccupation with and anxiety over her first menstrual period, the Hearing Officer is troubled by and concerned with the Board's rationale for excluding the Student – that she presented a safety risk to *other* students in the MPH. The testimony was clear that the Student did not understand that her behavior was inappropriate and that she could not control this particular behavior on that day. These circumstances reflect the profound nature of the Student's intellectual disability. Although the Hearing Officer will not second guess the “medical” judgment in this case that the Student had to be excluded because she presented a safety risk to other students in the MPH, the use of that rationale creates the potential for the Student to be denied FAPE. If the Student *continues* to present a safety risk to other students in the MPH (whether related to her menstrual period or not) that cannot adequately be managed in the MPH environment, then her placement in the MPH needs to be re-evaluated.
4. Given the profound nature of the Student's intellectual disability, the nature of her

⁵ See generally, IDEA, 20 U.S.C. Sec. 1415(k); 34 C.F.R. Secs. 300.519 – 300.524; 300.121.

⁶ Although the Student has not had a recurrence of her menstrual period since September, no evidence was offered that she was unlikely to have her period again and as her period recurs, the potential for an improper exclusion exists.

IEP goals and objectives (B1; B2), the limited duration of the exclusion on September 16-17, and the absence of any evidence or claim to the contrary, the Hearing Officer concludes that any harm to the Student's educational interests from the exclusion from her program on September 16-17 (whether proper or not) was *de minimis*. Accordingly, no relief is warranted for that exclusion.

5. This hearing was commenced pursuant to the IDEA. The Referral Claim does not implicate any issue that is subject to resolution under the IDEA. The Hearing Officer reaches no conclusions of fact or law regarding whether the Referral Claim is cognizable under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794(a) (2004) and its related regulations, codified at 34 C.F.R. Part 104 (collectively, "Section 504"). However, regardless of whether the Referral Claim is cognizable under Section 504, it is a claim over which this Hearing Officer has no jurisdiction, whether directly or ancillary to his IDEA jurisdiction. *See* Connecticut Department of Education Circular Letter C-9 (November 3, 2000; Reissue). Accordingly, the Referral Claim is dismissed for lack of subject matter jurisdiction. Nothing in this Final Decision and Order should be construed as any determination of law or fact regarding the Referral Claim, whether under Section 504 or any other legal theory.

FINAL DECISION AND ORDER

1. The Student shall not routinely be excluded from her program in the MPH due to menstrual period-related digging behavior and the Board shall continue to take steps to address this behavior by proactively implementing a behavior management plan and/or modifying her IEP. The Board shall assess the efficacy of any such behavior management plan and IEP modifications as appropriate and necessary in light of subsequent menstrual events. If no solution other than exclusion proves workable, the Board shall re-evaluate the Student's placement in the MPH.
2. As to the Student, the Board shall continue to comply with all other requirements of the IDEA with respect to excluding an IDEA-eligible child from his/her program.