STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Madison Board of Education

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Before: Scott Myers, J.D., M.A. (Clinical Psychology)

FINAL DECISION AND ORDER

STATEMENT OF ISSUE

As provided in Paragraph 5 of the Settlement Agreement, what modifications, if any, are required to be made to the Board's proposed program for the Student for the 2004/2005 school year in order for the Student to receive an appropriate education in the 2004/2005 school year in a Board classroom.

SUMMARY

For the 2004/2005 school year, the Parents placed the Student outside-of-the district at The Foundation School and commenced this action under the Individuals with Disabilities Education Act, 20 U.S.C.§§ 1401, *et seq.* (the "IDEA") and Section 10-76 of the Connecticut General Statutes to obtain Board funding for that placement. In February 2004, the parties had resolved a dispute between them regarding the Student's educational programming (the "Settlement Agreement"). The Settlement Agreement defined the rights and obligations of the parties with respect to the Student's programming for both the 2003/2004 and 2004/2005 school years. Both parties claim that the Settlement Agreement is in full force and effect and seek to have the Hearing Officer enforce the Settlement Agreement. The Hearing Officer has determined: (1) that the Settlement Agreement is in force and is enforceable by its terms and in its entirety; (2) that pursuant to the terms of the Settlement Agreement the only issue before the Hearing Officer with respect to the 2004/2005 school year is as stated in the preceding Section of this Final Decision and Order; and, (3) that to the extent the Parents are seeking funding from the Board for the Student's placement at The Foundation School

for the 2004/2005 school year, their claim is not an action to enforce the terms of the Settlement Agreement but rather an action seeking money damages for the Board's alleged breach of the Settlement Agreement over which this Hearing Officer has no subject matter jurisdiction. The appropriate forum in which to resolve that claim is a Court rather than this special education due process administrative hearing.

PROCEDURAL BACKGROUND

The telephonic Pre-Hearing Conference ("PHC") convened on November 17, 2004. Counsel for the Board (Ms. Coyne) and for the Parents (Ms. Spencer) participated. There was an extensive discussion of the issues to be resolved, procedural matters and the Hearing Officer's jurisdiction with respect to enforcement of the terms of the Settlement Agreement. Based on the discussion at the PHC and his review of the Settlement Agreement, the Hearing Officer in his November 19, 2004 initial scheduling order tentatively framed the issues before him as follows:

(1) Whether and to what extent, if any, the Parents are precluded by the terms of the Settlement Agreement from litigating their dispute regarding the 2004/2005 school year.

(2) If, and to the extent that the Parents are not precluded by the terms of the Settlement Agreement from litigating this dispute and if, and to the extent that the Settlement Agreement does not relieve the Board from an obligation to fund an out-of-district placement for the Student for the 2004/2005 school year, then:

a. Would the educational program proposed by the Board for the Student for the 2004/2005 school year provide the Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE); and, if not

b. Would the placement at The Foundation School provide the Student with FAPE in the LRE for the 2004/2005 school year; and, if so

c. To what extent is the Board obligated under the IDEA to fund the Student's placement at the Foundation School for the 2004/2005 school year.

In addition to establishing a schedule for the submission of exhibits and witness lists and establishing hearing dates, the November 19, 2004 order directed the parties to make additional pre-hearing submissions which were intended to clarify for the Hearing Officer the extent to which the Parents' claims were cognizable in this proceeding.

On November 30, 2004, the Parents' counsel advised that the parties were pursuing "serious" settlement discussions and requested, on behalf of both parties, an extension of time to comply with certain of the submission deadlines set forth in the November 19, 2004 order. That request was granted by order issued on December 1, 2004.

On December 9, 2004, the Parents filed an objection (the "Parents' Motion to Rescind") to those aspects of the November 19, 2004 order which directed that the Parents make any pre-hearing submissions other than their record and a list of their witnesses. The Parents contended that to the extent the November 19, 2004 order required anything else, that order was in excess of the Hearing Officer's authority under the regulations implementing the IDEA and/or under the State of Connecticut Department of Education's ("CTDOE's") regulations for special education due process hearings, Regulations of Connecticut State Agencies, Section 10-76h-1, *et seq*. They requested that the Hearing Officer rescind the offending parts of his November 19, 2004 order. Given the timing of the filing of that Motion and its potential to disrupt the hearing schedule that had been established, the Hearing Officer exercised his authority under CTDOE Regulation 10-76h-8(d) to address the Motion to Rescind on an expedited basis, and denied the Motion by ruling dated December 10, 2004. The Hearing Officer simultaneously extended the deadline for the Parents' to comply with directives in the November 19 and December 1, 2004 orders.

In compliance with the requirements of the November 19 and December 1 orders, the Board made the following submissions:

1. Board's documentary record (exhibits B1-B86).
2. A witness list.
3. A proposed revised statement of issue.
4. A motion to dismiss (the "Board's Motion to Dismiss").
5. A memorandum regarding the Parents' alleged failure to cooperate and comply with the Settlement Agreement (the "Board's Cooperation Memorandum").
6. A reply to the Parents' articulation of claim (the "Board's Reply").

In compliance with the requirements of these orders, the Parents made the following submissions:

1. Parents' documentary record (exhibits P1-P4).
2. A witness list.
3. An articulation of their statement of claim (the "Articulation of Claim").
4. A memorandum in opposition to the Board's Motion to Dismiss (the "Opposition to Board's Motion").
5. A memorandum regarding the duty to cooperate (the "Parents' Cooperation Memorandum").

After reviewing all of these submissions, the Hearing Officer issued on December 23, 2004 an Order Determining Enforceability of Settlement Agreement, Establishing Scope Of Proceeding And Modifying Procedural Schedule. That order, which forms the basis for this Final Decision and Order, reflected the Hearing Officer's conclusions regarding enforceability of the Settlement Agreement and his subject matter jurisdiction to adjudicate the Parents' claim for funding for the 2004/2005 placement of the Student at The Foundation School. The December 23, 2004 Order: (1) narrowed the scope of the

issues set for hearing to the issue as set forth in the Statement of Issue above; (2) directed the Parents to advise on or by January 4, 2005 whether they wished to proceed to hearing on that issue; and (3) advised that should the Parents decide not to proceed, a Final Decision and Order reflecting the determinations in the December 23, 2004 order would be issued. By letter dated January 4, 2005 the Parents advised that they did not wish to proceed to hearing on the issue identified in the December 23, 2004 order.

FINDINGS OF FACT

To the extent that any portion of this Final Decision and Order states a Finding of Fact or a Conclusion of Law, the statement should be so considered without regard to the given label of the section of this Final Decision and Order in which that statement is found. *See, e.g., SAS Institute, Inc. v. S. & H. Computer Systems, Inc.,* 605 F. Supp. 816 (M.D. Tenn. 1985); *Bonnie Ann F. v. Callahen Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

No testimonial evidence was taken. For purposes of this Final Decision and Order, the Findings of Fact are based on factual representations of counsel contained in the pre-hearing submissions identified above, in the Settlement Agreement (B59) and in an August 13, 2004 letter from the Parents' counsel to the Board's counsel (B86). The Hearing Officer also takes note of the existence of B85, minutes of a PPT and an IEP dated September 25, 2004. The Hearing Officer makes no determinations as to the merits of the parties' claims regarding the adequacy of the Board's proposed educational programming for the Student for the 2004/2005 school year or the performance or non-performance of either party under the terms of the Settlement Agreement.

1. When this proceeding was commenced on October 27, 2004, the Student was 7 years old. There is no dispute between the parties that at all relevant times, the Student was a resident of the Town of Madison and eligible to receive special education and related services under the IDEA and applicable Connecticut law. *See* Settlement Agreement, Recitals. There is also no dispute between the parties as to the Student's classification under the IDEA.

2. The parties disagreed over the Student's educational placement for the Student for the 2003/2004 school year. The Parents placed the Student unilaterally at The Foundation School in the 2003/2004 school year and commenced a proceeding (CTDOE 03-240) to obtain a determination that the Board was responsible under the IDEA to fund that placement. *See* Settlement Agreement, Recitals and ¶ 1.

3. CTDOE 03-240 was resolved by the Settlement Agreement, which was executed by the parties in February 2004. In that process, each party was represented by competent legal counsel[1] and voluntarily entered the Settlement Agreement. *See, e.g.*, Settlement Agreement, at ¶8; Parents' Cooperation Memorandum at 1 ("no dispute that a Settlement Agreement was signed and that all parties were represented by counsel").

[1] In particular, counsel for the Parents has extensive experience in special education law.

4. The Settlement Agreement defines the rights and obligations of each party as to both the 2003/2004 and 2004/2005 school years. *See* Settlement Agreement, at ¶¶ 1-8.

5. With respect to the 2003/2004 school year, the Settlement Agreement provides that the Board, without conceding the merits of the Parents' claims as to the 2003/2004 school year, would fund $24,000 of the cost of the Student's placement at The Foundation School for the 2003/2004 school year as well as the costs of transporting the Student to and from The Foundation School for that school year. *See* Settlement Agreement, at ¶¶ 1, 2, 3 and 7.

6. The Board has fully performed all of its obligations under the terms of the Settlement Agreement with respect to the 2003/2004 school year and the Parents are raising no issues in this proceeding regarding the 2003/2004 school year. See Parents' Cooperation Memorandum, at 1 (no dispute that the Board fulfilled [its] obligations [under the Settlement Agreement] as they related to the 2003-2004 school year); Opposition to Motion to Dismiss at 1 and 6 (Parents are not disputing Board's performance as to 2003/2004 school year).

7. The Parents have placed the Student at The Foundation School for the 2004/2005 school year and seek to have the Board fund that placement. *See* Parents' October 27, 2004 request for hearing.

8. As to the 2004/2005 school year, Paragraph 4 of the Settlement Agreement provides as follows:

> (a)[2] The Parents agree to cooperate in transitioning [the Student] back to a Board classroom commencing at the start of the 2004-2005 academic year. (b) Furthermore, the Parents agree to provide Board personnel with their full cooperation in the development of an appropriate educational program for [the Student] for the 2004-2005 school year. The Parents will make themselves available in the spring of 2004 for this purpose. (c) The Parents will also take immediate steps to facilitate a nuero-psychological [sic] evaluation of [the Student] by Dr. Mary Prevey. (d) The Board agrees to pay for the cost of Dr. Prevey's evaluation. (e) Upon completion of her evaluation, Dr. Prevey will make programming recommendations for [the Student] for the 2004-2005 school year. (f) If Dr. Prevey believes that observation of [the Student] at the Foundation School is necessary for her to make program recommendations, or if she believes that observation of the Board's program is necessary to make programming recommendations, the parties agree to allow such observations to take place. (g) In developing its program for [the Student]

[2] These letter designations are not part of the Settlement Agreement, but have been inserted by the Hearing Officer for ease of reference herein to aspects of Paragraphs 4 and 5 of the Settlement Agreement.

> for the 2004-2005 school year, the Board agrees to give due consideration to programming recommendations that Dr. Prevey makes, but in no event will the Board be bound by such recommendations. (h) If Dr. Prevey's programming recommendations are such that she believes that absent changes to the Board's program it would be appropriate to consider placement of [the Student] in an out-of-district program for the 2004-2005 school year, then the Board agrees to call a PPT and invite the Parents, Dr. Prevey, Board staff and Board consultants for the purpose of discussing Dr. Prevey's recommendations and attempting to reach agreement on modifications to the Board's program.

9. As to the 2004/2005 school year, Paragraph 5 of the Settlement Agreement provides as follows:

> (a) This Agreement shall not affect or limit the right of the Parents to initiate a due process hearing in order to obtain relief limited to changes or modifications to the educational program provided by the Board for [the Student] for the 2004-2005 school year. (b) Thus, if a disagreement develops between the Parents and the Board over the extent to which it is necessary to follow Dr. Prevey's programming recommendations in order to ensure that [the Student] receives an appropriate education during the 2004-2005 school year in a Board classroom, the Parents have the right to initiate a due process proceeding limited to the issue of whether modifications are required to the Board's program in order for [the Student] to receive an appropriate education in a Board classroom. (c) In no event, however, shall any disagreement between the Board and the Parents over [the Student's] 2004-2005 educational program obligate the Board to assume any portion of any cost for an out-of-district placement for [the Student] for the 2004-2005 school year. (d) ***By entering into this Agreement, the Parents agree that the Board shall have no obligation to place [the Student] in an out-of-district placement for the 2004-2005 school year or pay for any portion of the cost of a out-of-district placement for the 2004-2005 school year which is unilaterally made by the Parents.***[3] (e) This Agreement is not intended to require that the Parents place [the Student] in a Board classroom; however, ***if the Parents choose to place [the Student] in other than a Board classroom, then they will do so at their own financial cost.***

(Emphasis added.)

10. Each party contends that the Settlement Agreement is in force and is enforceable and each party seeks to have the Hearing Officer enforce it by its terms in this

[3] A "unilateral placement" within the meaning of the IDEA is a placement that is made by the parents of a child and that has not been determined by a PPT to be the placement required to provide the child with FAPE in the least restrictive environment ("LRE").

proceeding. Each party contends that it is in full compliance with the terms of the Settlement Agreement as to the 2004/2005 school but that the other party is not.

11. In their submissions, the Parents allege that they have fully complied with their obligations under the terms of the Settlement Agreement with respect to the 2004/2005 school year but that the Board failed to perform its obligations under Paragraph 4 with respect to developing the in-district program for the 2004/2005 school year.[4]

12. In its submissions, the Board denies that it is in breach of the terms of the Settlement Agreement. The Board contends that the failure of the Parents to cooperate in developing the Student's educational program for the 2004/2005 school year is the cause of any delay in development of the Student's educational program for the 2004/2005 school year and that the program that was developed is in compliance with the terms of the Settlement Agreement.[5]

13. The Student's circumstances have not changed, within the meaning of the *D.R.* case discussed below, since the Settlement Agreement was executed. Opposition to Motion to Dismiss, at 6 ("[P]arents are not claiming that [the Student's] circumstances have changed").

14. On January 4, 2005, the Parents advised that they disagreed with the Hearing Officer's determinations in the December 23, 2004 order and that they do not wish to proceed on the issue set for hearing as identified in that order.

15. Before this hearing was commenced, the Board had proposed an in-district placement for the Student for the 2004/2005 school year in a Board classroom. *See* B85.[6]

ANALYSIS OF THE LEGAL ISSUES

[4] The Parents allege that the Board failed to comply with its obligations under the Settlement Agreement with respect to the 2004/2005 school year by failing to make the necessary arrangements with Dr. Prevey, to timely undertake to complete the various agreed-upon steps to develop the in-district program, improperly scheduling and canceling PPT meetings, to timely schedule PPT meetings, to invite necessary parties to PPT meetings, and to provide information requested by the Parents and needed to complete the process. The Board denies these allegations and attributes any shortcomings in its proposed programming to the conduct of the Parents.

[5] The Board also notes that the Settlement Agreement limits the scope of any challenge to the Student's 2004/2005 educational program and that this action is barred by the terms of the Settlement Agreement. Finally, the Board contends, in any event, that its obligation to fund an out-of-district placement in the 2004/2005 school year is defined by the terms of the Settlement Agreement and that pursuant to the Settlement Agreement it has no obligation to fund an out-of-district placement for the 2004/2005 school year.

[6] The Hearing Officer reaches no determination as to whether the Board had proposed an in-district program in a Board classroom for the Student to the Parents prior to September 25, 2004.

This section of the Final Decision and Order discusses the legal principles underlying the Conclusions of Law reached herein.

A. IDEA Principles Generally

This administrative hearing was commenced pursuant to the IDEA and applicable Connecticut special education law. Pursuant to the IDEA, a local educational agency ("LEA") is responsible for providing disabled children within its jurisdiction with a FAPE in the LRE. S*ee* 20 U.S.C. §§ 1412(a)(1); 1412(a)(5)(A). Where there is a disagreement between the parents of such a child and the LEA over whether the LEA has satisfied its obligations under the IDEA, the parents may commence a special education due process hearing and thereafter seek review of the hearing officer's decision by a court if they are aggrieved by that decision.

Were this case being decided on a "blank slate" (*i.e.*, if there was no Settlement Agreement to consider) the dispute between the parties would be decided by applying well established IDEA case law. Under the IDEA, where the parents of a child challenge a special education program proposed by an LEA, the issue to be resolved is whether the LEA's proposed program provides the child with a FAPE as determined by applying the two prong test stated in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 206-07 (1982). Under *Rowley*, the Board's proposed program for the 2004/2005 school year would provide the Student with a FAPE if the proposed Individualized Education Plan ("IEP"): (1) was developed in compliance with the IDEA's procedural requirements; and (2) was "reasonably calculated to enable [the Student] to receive educational benefits," or, in other words, "likely" to produce more than trivial or *de minimis* progress.

The IDEA does not require that the Board provide the best program money can buy or provide a program that has all of the features that the Parents desire. The IDEA also does not require that the Parents place the Student in the program proposed by the Board. Rather, the Parents are free to place the Student in a program of their choice and seek payment for such placement from the Board. Where the Parents do so, however, and if this case were being decided on a blank slate, the Board would be obligated to pay for that placement only if it is determined that the Board's proposed program was not appropriate under the *Rowley* standard and that the Parents' unilateral placement was appropriate. *See, e.g., Burlington v. Department of Education,* 471 U.S. 359 (1985); *Norton School Committee v. Massachusetts Department of Education*, 768 F. Supp. 900 (D. Mass 1991). Thus, without regard to the existence of the Settlement Agreement, in unilaterally placing the Student at The Foundation School for the 2004/2005 school year before obtaining a determination regarding cost responsibility for that placement from a CTDOE special education due process hearing officer, the Parents faced the risk under the IDEA that they would not be entitled to funding for that placement.

B. The Nature of the Parents' Claim

The filings submitted to date make clear that the Parents are asserting a breach of contract claim and seeking money damages for that alleged breach in the form of Board funding for the Student's placement at The Foundation School for the 2004/2005 school year.

In the August 13, 2004 letter (B86), counsel for the Parents states that because the Board had advised the Parents that no program for the Student for the 2004/2005 school year was in place as of that date and that the Board would not be able to have a program in place for the Fall, the Board is "currently not able to comply with the ***[Settlement A]greement***" with the result that the Board would (in the Parents' view) be obligated to fund a placement at The Foundation School for the 2004/2005 school year. (Emphasis added.)

In their October 27, 2004 letter requesting this hearing, the Parents state that:

> A Settlement Agreement was executed for the 2003-2004 school year and included a provision for the 2004-2005 school year. It is the [P]arent's [sic] contention that the ***Board failed to carry out the provision of the Agreement for the 2004-2005 school year and therefore failed to offer the [Student] an appropriate program.*** Therefore, the parents felt that they had no alternative but to continue the placement at the Foundation School for the 2004-2005 school year.

(Emphasis added.) In their Motion to Rescind (at 1) the Parents state that:

> [t]he issues in this case are whether or not the Board ***breached*** a settlement agreement or failed to comply with the terms of a settlement agreement and ***thereby*** failed to provide the [Student] with an appropriate program.

(Emphasis added.) In their Opposition to Motion to Dismiss (at 6), the Parents state that:

> [T]he [P]arents are not claiming that [the Student's] circumstances have changed, or that services not anticipated in the [Settlement Agreement] are now required. Additionally, the [P]arents are not disputing the [Settlement Agreement] as it relates to the 2003-2004 school year, as the Board complied with the terms of agreement insofar as it related to that school year. The [P]arents are disputing the terms of the [Settlement Agreement] pertaining solely to the 2004-2005 school year ***because the Board breached the terms of the [Settlement Agreement]***.

(Emphasis added.) In their Cooperation Memorandum (at 8), the Parents state that:

> [A]lthough the Settlement Agreement does not expressly state that the Board will have a program by which to transition [the Student] at the beginning of the 2004-2005 school year, it is clearly a necessary implication of the Agreement. [Footnote omitted.] Because of the Board's failure, the Parents were left with no

> reasonable alternative at the commencement of the 2004-2005 school year but to incur the expense of a private placement . . .

They state further at page 13 of their Cooperation Memorandum that:

> ***The Board breached the [Settlement Agreement], violated [the Student's] substantive and procedural rights*** and thereby it should not be allowed to use the provisions of the [Settlement Agreement] to excuse compliance with the terms thereof . . . [The Parents] complied completely with all terms of the Settlement Agreement within their control . . . ***[T]he Board has failed to comply with the terms of the Agreement as it relates to the 2004-2005 school year***, and to the determinant [sic] of the [Student], violated this student's procedural and substantive rights under State and Federal Law.

(Emphasis added.)

C. The Scope of the Hearing Officer's Subject Matter Jurisdiction is Limited

The Hearing Officer's subject matter jurisdiction is limited pursuant to Conn. Gen. Stat. §10-76h to confirming, modifying or rejecting the identification, evaluation or educational placement of or the provision of a FAPE to a child, to determining the appropriateness of a unilateral placement of the child or to prescribing alternate special education programs for a child. Because the Hearing Officer's subject matter jurisdiction is limited, he is obligated to assure that he has subject matter jurisdiction to hear the dispute being presented to him. That the parties agree to present an issue to the Hearing Officer does not confer subject matter jurisdiction on the Hearing Officer to address that issue. Both parties face the risk and burden that the Hearing Officer's Final Decision and Order will be unenforceable if he improperly exercises jurisdiction over a dispute.

Review of all of the filings submitted to date makes clear that this is an action for money damages for breach of contract and that resolution of the Parents' claim for funding for placement at The Foundation School for the 2004/2005 school year is not an IDEA claim and does not require or involve application of an IDEA analysis. Assuming that the Settlement Agreement is enforceable, the pleadings submitted by the parties make clear that resolving the Parents' claims for funding for The Foundation School placement in the 2004/2005 school year will require the Hearing Officer to apply Connecticut ***contract law*** to decide, among other things: (1) whether the Board breached the Settlement Agreement and, if so, whether that breach was "material;" (2) whether the appropriate measure of damages for any such material breach would be funding for the placement at The Foundation School; (3) whether the Parents properly "mitigated" their "damages;" (4) whether the Parents' breached the Settlement Agreement and, if so, whether that breach was "material;" and (5) the effect (if any) on the Board's potential liability for its breach (if any) of the alleged breaches by the Parents (if any). These are not the determinations to be made under the *Rowley* and *Burlington* standards for determining the adequacy of the Board's proposed educational program and whether and

to what extent the Parents are entitled under the IDEA to funding for a placement at The Foundation School for the 2004/2005 school year.

D. Enforceability of the Settlement Agreement

Both parties argue that the Settlement Agreement is in full force and is enforceable. The Hearing Officer agrees. The Settlement Agreement is enforceable in its entirety because: (1) it contains no provisions that produce a result that would be contrary to or contravene the purpose of the IDEA; (2) it was voluntarily entered into by both parties; (3) the Parents at all times were represented by counsel (in this case an attorney with extensive experience and expertise in special education law); and, (4) there has been no change in the Student's circumstances since the Settlement Agreement was executed such that the arrangements agreed upon at that time for the 2004/2005 school year would no longer serve the Student's educational interests.

Enforcing the Settlement Agreement would preclude the Parents from seeking and obtaining ***in this forum*** relief in the form of funding of the Student's placement at The Foundation School for the 2004/2005 school year. To the extent that the Parents are seeking funding for such a placement, they are not seeking to enforce the terms of the Settlement Agreement but rather to avoid its terms.

1. Applicable Case Law Regarding Enforceability of Settlement Agreements by CTDOE Special Education Due Process Hearing Officers

The limited jurisdictional grant of a CTDOE special education due process hearing officer includes jurisdiction to enforce in a subsequent proceeding the terms of a settlement agreement resolving a prior special education dispute between the parties. The parameters of that jurisdiction and the analysis that must be applied is set forth in *Mr. J. v. Board of Education*, 98 F. Supp. 2d 226 (D. Conn. 2000); *D.R., by his parents and guardians, M.R. and B.R., v. East Brunswick Board of Education*, 838 F. Supp. 184 (D. N.J. 1993) ("*D.R. I*"), *reversed in part*, 109 F.3d 896 (3rd Cir. 1997) ("*D.R. II*"), *cert. denied* 1997 U.S. LEXIS 6746; and *Woods v. New Jersey Department of Education,* 796 F. Supp. 767 (D. N.J. 1992) ("*Woods*"). Those cases are discussed in turn below, along with a prior decision of this Hearing Officer issued in CTDOE 03-181, *Student v. New Fairfield Board of Education* (2003).

Mr. J. stands primarily for the proposition that an agreement between the parties fixing the allocation of costs of a placement is enforceable by a CTDOE hearing officer and, further, that where one party has performed the other party cannot "undo" that cost allocation agreement after-the-fact. The *Mr. J.* court, citing *D.R. II* and noting that "[p]ublic policy dictates that settlements agreements should be enforced," held that a CTDOE hearing officer had authority to enforce a settlement agreement and upheld the

hearing officer's decision regarding the effect of the settlement agreement in that case on the claims to be resolved at the hearing. *Mr. J.*, 98 F. Supp.2d at 239.[7]

The *D.R.* and *Woods* cases identify circumstances under which the Settlement Agreement, or specific provisions contained therein, may be found to be unenforceable under the IDEA.

The district court in *D.R. I* found that a settlement agreement executed in year 1 which addressed responsibility for the costs of a child's placement in year 1 and year 2 did not on its face violate the principles of the IDEA and could be enforced. The district court balanced the public policy in favor of encouraging settlement of disputes against the public policy goals of the IDEA. In performing this balancing, the district court concluded that given the LEA's obligations to provide a qualified student with FAPE in the LRE under the IDEA, the LEA cannot "contract around or out of IDEA." However, notwithstanding this conclusion and expressly concerned that its holding would eliminate settlement agreements as a way to resolve special education cases, the district court expressly rejected the arguments of D.R.'s parents that "parents of disabled children . . . have carte blanche in disregarding settlement agreements" given their right under the IDEA "to seek an appropriate education for their child" and the LEA's duty to provide it. *D.R. I*, 838 F. Supp. at 193. The court explained the appropriate analysis as follows:

> [T]he Court presumes that at the time the Agreement was entered, the services and/or program agreed to meet the child's educational needs and, therefore, was in compliance with IDEA. Starting with this presumption, parents do not have such an unabridged right. Parents indeed are barred from trying to change or modify a settlement agreement merely because they find the terms unacceptable. But, parents do have the right to question whether a program delineated in a settlement agreement meets the requirements of IDEA if there has been a change in circumstances, such that the child's educational needs are no longer being met. To avoid reducing settlement agreements in special education cases to a nullity while trying to enforce the statutory requirement, the Court finds that the Agreement between D.R.'s parents and the [LEA] is binding and shall not be set aside, unless it is found that the child's circumstances have changed, whereby enforcing the terms of the settlement would violate IDEA.

D.R. I, 838 F. Supp. at 193-94. The district court ultimately rejected the cost allocation provision because of its factual finding that there was a change in the student's circumstances after the settlement agreement had been executed.

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[7] Given the provisions of the Settlement Agreement regarding cost allocations for the period of the Settlement Agreement (the 2003/2004 and 2004/2005 school years), and the provisions defining the issues regarding the 2004/2005 school year that may be submitted for resolution by due process, the Parents in this case are essentially in the same position as the parents in *Mr. J.* – they may not offer any evidence regarding the propriety under the IDEA of a placement at The Foundation School in the 2004/2005 school year.

The Third Circuit Court of Appeals in *D.R. II* reversed, rejecting the district court's factual findings of changed circumstances for reasons that are not pertinent to the present case. Absent a finding of changed circumstances, the Third Circuit concluded that the terms of the agreement should have been upheld.

> [T]he settlement agreement was voluntarily and willingly entered by the parties. It is therefore a binding contract between the parties and should have been enforced as written. Pursuant to the terms of the agreement, the parents of the child are responsible for all additional services not contemplated by the parties at the time of settlement.

D.R. II, 109 F.3d at 898. The Court went on to state that:

> Once a school board and the parents of a disabled child finalize a settlement agreement and the board agrees to pay a certain portion of the school fees, the parents should not be allowed to void the agreement merely because the total cost of the program subsequently increases. A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes.

D.R. II, 109 F.3d at 901.

As applied in this case, *D.R.* establishes that an LEA bears the risk that cost allocation provisions of a settlement agreement covering two or more school years might be unenforceable as to school year 2 if there is a change in the student's circumstances after the agreement is executed and while there remains obligations to perform under the agreement. The Parents in this case state that there has been no change in the Student's circumstances within the meaning of *D.R* and that the changed circumstances standard of *D.R.* is therefore inapplicable. *See* Opposition to Motion to Dismiss at 6.

The decision in *Woods* stands for the proposition that a settlement agreement may be unenforceable if it produces an outcome which is "inconsistent" with the IDEA. To resolve a dispute between them, the parties to that case entered a stipulation which predetermined the student's placement in school year 2 and precluded the parents from seeking relief from the LEA in the form of funding for another placement. The court in that case did not hold that such an arrangement in and of itself violated the IDEA. Rather, the issue before the court was whether the hearing officer properly determined that the stipulation "disposes of all issues in controversy and was consistent with the law." *Woods*, 796 F.Supp. at 776. There is no subsequently reported decision which addressed those issues on the merits. Accordingly, at best, *Woods* stands for the proposition that a hearing officer must determine whether the provisions of the settlement agreement before him/her in a particular case, on the facts of a particular case before him/her, are consistent with the requirements of the IDEA.

Applying the principles of these cases, this Hearing Officer in CTDOE 03-181 rejected certain provisions of a settlement agreement as unenforceable, but upheld others.[8] The settlement agreement in CTDOE 03-181 was executed in June of 2002 and: (1) provided for an out-of-district placement at Kildonan at LEA expense for the 2002/2003 school year; (2) provided that the student would return to the LEA's schools for the 2003/2004 school year without making any provision for a reassessment of the student prior to the 2003/2004 school year to determine whether an in-district placement would provide the student with FAPE in the LRE based on his then-current circumstances; and, (3) further provided that the parents waived all of their rights to challenge the adequacy of any IEP proposed by the LEA for the 2003/2004 school year regardless of whether the placement offered was in the district or outside of the district.

This Hearing Officer held those provisions unenforceable, concluding that the LEA and parents may not properly enter into an agreement which potentially jeopardizes the educational interests of the child by pre-determining a future placement for the child regardless of the child's educational needs at the time that aspect of the agreement was to be implemented. That the parents in that case, who were also represented by competent counsel experienced in special education law, may have agreed to such terms or expressly waived or surrendered their rights is a factor to consider in determining the enforceability of those provisions, but is not in and of itself dispositive of the enforceability of such provisions.[9]

The settlement agreement in CTDOE 03-181 also clearly limited the LEA's exposure for the costs of a placement at Kildonan for the 2002/2003 and 2003/2004 school years to $19,000.00 all of which was to be applied to the 2002/2003 school year. Notwithstanding his conclusions regarding the enforceability of other provisions of the agreement, the Hearing Officer upheld this allocation of responsibility for costs since an agreement among the parties voluntarily reached as to the extent to which each is responsible for costs of a child's educational program is not violative of or inconsistent with the IDEA. The Hearing Officer also upheld those provisions of the settlement agreement that defined the student's stay-put placement in the event a dispute arose between the parties under the settlement agreement. The IDEA expressly recognizes that the parties are free to reach such an agreement while they are resolving their dispute.[10]

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[8] *See* July 1, 2003 Ruling on Motion to Dismiss; August 8, 2003 Decision and Order Regarding Stay Put. These rulings are not published on the CTDOE website and were made available to the parties shortly after the PHC. Both parties addressed these rulings in their submissions.

[9] As noted in his decision in CTDOE 03-181, that ruling should not be read to mean that provisions pre-determining a subsequent placement are always unenforceable. A case-by-case determination must be made. Important factors to consider in a case in which the parent seeks to avoid an agreement containing such provisions include but are not limited to whether the parent was represented by counsel with respect to the terms of the agreement (including but not limited to the waiver provisions), whether the language of the agreement is ambiguous, whether the LEA has performed its obligations in good faith, and the scope and extent of the waiver that was agreed upon.

[10] The Hearing Officer rejected the agreement reached in that case regarding the stay put placement because it provided that the stay put placement was the specific IEP that was originally challenged by the parents in the proceeding which was resolved by the settlement agreement. At the time of

2. Analysis of Enforceability of Settlement Agreement in This Case

Considering these principles, the Settlement Agreement in the present case is enforceable in its entirety. First, the Parents make no claim that the Student's circumstances have changed since the Settlement Agreement was executed such that enforcing the provisions of the Settlement Agreement concerning the 2004-2005 school year would no longer advance the Student's interests based on a change in his circumstances.

That the Student's circumstances have not changed does not, however, change the fact that when it entered the Settlement Agreement, the Board bore the risk that there might be a change of circumstance such that its obligations under the IDEA could properly be held to supersede the provisions of the Settlement Agreement concerning the 2004/2005 school year. In exchange for undertaking that risk, and for agreeing to waive its right to seek a determination regarding the 2003/2004 school year, to fund the Student's 2003/2004 school year placement at The Foundation School, and to pay for a neuropsychological evaluation of the Student by Dr. Prevey, the Board fixed its liability for the Student's educational programming for the 2004/2005 school year to the costs of an appropriate in-district program and narrowed the scope of due process issues it would face regarding the 2004/2005 school year to a determination regarding whether its proposed in-district program for the 2004/2005 school year was in compliance with Dr. Prevey's recommendations. The Board also bargained for, and received an agreement from the Parents that the Board would not be responsible for funding a placement at The Foundation School for the 2004/2005 school year for any reason.

When the Parents entered the Settlement Agreement, they accepted the risk that the in-district program for the 2004/2005 school year offered by the Board may not have satisfied their requirements or Dr. Prevey's requirements but might still have been found by a hearing officer to satisfy the substantive requirements of the IDEA given the agreement of the parties that the Board did not have to evaluate an out-of-district placement for the Student for the 2004/2005 school year. If that scenario came to pass, and the Parents elected not to place the Student in the in-district program, they were free to place the Student at The Foundation School but not at Board expense. In exchange for undertaking that risk, the Parents avoided the potential for an adverse determination on their claims regarding the 2003/2004 and 2004/2005 school years, maximized the likelihood of securing a satisfactory in-district program for the Student for the 2004/2005 school year and avoided the need to litigate a placement at The Foundation School for the 2004/2005 school year, received $24,000 from the Board plus the cost of transporting the Student to The Foundation School for the 2003/2004 school year, and received a neuropsychological evaluation of the Student by Dr. Prevey at Board expense.

There is nothing in these arrangements which contravene any policy goal of the IDEA. The circumstances in CTDOE 03-181 that led the Hearing Officer to find

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the dispute, that IEP was two years old and was not based on current information regarding the student's functioning.

provisions of the agreement in that case addressing school year 2 to be unenforceable do not exist here: the Settlement Agreement in this case does not require the Parents to place the Student in-district for school year 2 or preclude the Parents from obtaining a determination as to whether the proposed in-district year 2 placement was appropriate to meet the Student's educational needs given the terms of the Settlement Agreement.[11] The Settlement Agreement in fact expressly contemplates that the Parents have the right and opportunity to assure that the proposed in-district placement complies with Dr. Prevey's recommendations regarding such a placement.

To support their claim for funding for the 2004/2005 school year Foundation School placement, the Parents claim that Dr. Prevey in her evaluation "clearly states that the placement at Foundation [for the 2004/2005 school year] seems to be appropriate and that most of the behavioral problems that [the Student] exhibited in the [Board's] preschool have resolved in his current setting." *See* Articulation of Claim at 5. Even assuming that conclusion is valid, pursuant to Paragraph 5 of the Settlement Agreement and for purposes of a due process hearing concerning the 2004/2005 school year, that conclusion is irrelevant while the Settlement Agreement remains in force. Paragraph 5 of the Settlement Agreement, which is in force and enforceable, provides in pertinent part as follows:

> This Agreement shall not affect or limit the right of the Parents to initiate a due process hearing in order to obtain relief limited to changes or modifications to the educational program provided by the Board for [the Student] for the 2004-2005 school year. Thus, if a disagreement develops between the Parents and the Board

[11] In CTDOE 03-181, the Hearing Officer stated that: "Absent evidence that the proposed IEP for [school year 2] reflected anything other than a good faith effort to comply with the provisions of the settlement agreement, enforcing the cost allocation aspects of the settlement agreement would not undermine the policy goals of the IDEA, would be consistent with the pertinent case law and advances the policy goals of encouraging resolution of disputes by settlement." The Parents in this case allege that they are entitled to funding for the placement at The Foundation School for the 2004/2005 school year because the Board did not act in good faith with respect to developing the proposed in-district program and because placement at The Foundation School is required to provide the Student with a FAPE in the LRE. The Hearing Officer's statement in CTDOE 03-181 must be understood in the context of that case. There the LEA did not evaluate the student to determine whether a continued placement at Kildonan in year 2 was required to provide him with FAPE in the LRE, but rather, consistent with the settlement agreement which provided for an in-district placement in year 2, developed an in-district program for him which the LEA concluded in good faith would satisfy his educational needs in the district. Well after-the-fact, those provisions of the settlement agreement were found to be unenforceable because they pre-determined the school year 2 placement and precluded the parents from challenging that placement. By that time, however, the LEA had already performed its obligations under their agreement regarding funding the school year 1 placement. Voiding those provisions of the agreement as the parents requested while allowing the parents to retain the benefit of the LEA's school year 1 performance would have been inherently unfair to the LEA and would not advance the public policy goals behind settling disputes. In attempting to re-strike an equitable balance in the circumstances, the Hearing Officer assessed whether the LEA (given that the in-district year 2 program it was proposing could not be challenged by the parent under their agreement) had performed in good faith its obligation under the settlement agreement to develop an appropriate in-district placement for the student in school year 2 given that that was the agreement of the parties. That circumstance does not exist in this case, since the Settlement Agreement in this case permits the Parents the right to challenge the adequacy of the in-district program offered by the Board for purposes of improving that program.

> over the extent to which it is necessary to follow Dr. Prevey's programming recommendations in order to ensure that [the Student] receives an appropriate education during the 2004-2005 school year in a Board classroom, the Parents have the right to initiate a due process proceeding limited to the issue of whether modifications are required to the Board's program in order for [the Student] to receive an appropriate education in a Board classroom.

The Parents argue that "regardless of whether the Board is found to be in breach of the [Settlement Agreement], the [P]arents are entitled to challenge the 2004-2005 placement proposed for [the Student] as it violates his rights under IDEA." Opposition to Motion to Dismiss at 9. They make a similar argument, more forcefully, in their Cooperation Memorandum. In support of this argument, which essentially provides that the Settlement Agreement should be set aside, the Parents cite cases decided under the IDEA to support the proposition that the failure to have a program in place for an eligible child in a timely manner is sufficient to entitle the parents of that child to funding for a unilateral placement.

The Parents continue to articulate this argument in their January 4, 2005 submission. They state first a proposition that is not disputed.

> The United States Supreme Court held in *Burlington* that where a Board has failed in its obligation to provide an appropriate program for a student, and the parents unilaterally place the child in a private placement, the parents have the right to seek reimbursement from the [LEA] for that placement.

January 4, 2005 letter at 1. The Hearing Officer agrees that ***absent*** the Settlement Agreement, the principles of *Burlington* would frame both the identification and resolution of the issues before him, and agrees further that under those principles the Parents (if they satisfy their evidentiary burdens) would be entitled to funding for the 2004/2005 school year placement at The Foundation School.

Building off of that proposition, the Parents then argue that:

> According to your [December 23, 2004 ruling], even if the Parents were to proceed with the hearing, and you were to find that the Board had violated IDEA, the Parent's [sic] would not be entitled to payment for [the Student's placement at The Foundation School for the 2004/2005 school year.] This amounts to a denial of the Student's rights under the IDEA. Under this reasoning, if those Parents were unable to fund an out of district placement, and you were to find that the Board's program was inappropriate, and could not be made appropriate for this student, you as a Hearing Officer would be requiring that they place their child in an inappropriate program, which would contradict IDEA.

January 4, 2005 letter at 1-2. That argument improperly and completely ignores the terms of the Settlement Agreement the Parents negotiated and voluntarily entered on the advice of their counsel and from which they have benefited.

The consequence in this case about which the Parents now complain flows directly from the decision of the Parents to enter into a settlement agreement – voluntarily and on the advice of their counsel – in which they agreed that should a dispute arise regarding the Board's proposed placement in an in-district program for the 2004/2005 school year: (1) the only issue that can be submitted to due process regarding that placement is what changes need to be made to that proposed in-district placement to implement Dr. Prevey's recommendations; and (2) that in no event would the Board be responsible for funding a placement at The Foundation School. Under the terms of that Settlement Agreement, which they claim is enforceable and they claim they are seeking to enforce, they accepted the risk that the Board's in-district program could not be implemented in a way to address Dr. Prevey's recommendations. This was the bargain they made.

However, *Burlington* and the other cases cited by the Parents to support this argument and the principles they establish are simply not relevant in this particular hearing. This matter is not being decided on a blank slate. The Settlement Agreement defines the rights and obligations of the parties with respect to the 2004/2005 school year, including the issues regarding the 2004/2005 school year that the parties agreed would be the only issues submitted to resolution through a special education due process hearing should a dispute arise regarding the 2004/2005 school year. Neither *Burlington* nor any of the other cases cited by the Parents involved a balancing of the policy goals underlying the IDEA with the policy goals underlying enforceability of Settlement Agreements. *Burlington* is a seminal IDEA case and *Mr. J.*, *D.R. I* and *II* and *Woods* were all decided well after *Burlington* was decided. None of those Courts found that anything in *Burlington* "trumps" the enforceability of a settlement voluntarily entered into.

Under the case law cited herein, the Hearing Officer can interpret the terms of the Settlement Agreement to determine whether it comports with the IDEA and to enforce it. The Parents agree that the Settlement Agreement is enforceable and should be enforced, and the Hearing Officer can find no basis upon which to conclude that the provisions of the Settlement Agreement concerning the 2004/2005 school year should not be enforced. The Hearing Officer does not have the authority to award money damages for a breach of the Settlement Agreement, which is the claim the Parents are asserting and the relief they are seeking.

CONCLUSIONS OF LAW

1. The Settlement Agreement is enforceable in its entirety, including but not limited to those provisions concerning the 2004/2005 school year, and remains in force.

2. The deficiencies and failures alleged by the Parents regarding the Student's 2004/2005 educational programming relate to or arise from their claim that the Board breached its obligations under the Settlement Agreement regarding development of the Student's program for the 2004/2005 school year. To the extent the Parents seek funding at The Foundation School for the 2004/2005 school year as

a remedy for that breach or failure, given the terms of the Settlement Agreement their claim is not an IDEA claim but rather a claim for breach of contract which is not cognizable in this forum.

3. If the Parents want to enforce the terms of the Settlement Agreement by obtaining an in-district program for the Student for the balance of the 2004/2005 school year that appropriately considers and implements Dr. Prevey's recommendations as determined by a CTDOE hearing officer, they are free to pursue that relief in this forum. As provided in Paragraph 5 of the Settlement Agreement, the sole question in any such proceeding will be whether modifications are required to the Board's proposed program in order for the Student to receive an appropriate education in the 2004-2005 school year in a Board classroom.[12] However, given the terms of the Settlement Agreement, even if they were to prevail on their claim that the Board's program was deficient, funding for a placement at The Foundation School would nonetheless not be relief to which they are entitled.

FINAL DECISION AND ORDER

1. In light of the Parents' January 4, 2005 submission, as to the issue set for hearing in the December 23, 2004 order, this matter is dismissed without prejudice to refiling by the Parents should they desire to proceed on that issue.

2. For the reasons set forth above, the Parents are not entitled to an order from a CT DOE special education due process hearing officer that the Board is obligated to fund some or any portion of the costs of the Student's placement at The Foundation School for the 2004/2005 school year. They are free to pursue such relief in another forum and the Hearing Officer has reached no determination herein on the merits of the breach of contract claims asserted by each party in this matter or the Parents' right to such recovery.

[12] The Parents may obtain a determination of whether the Board's proposed in-district program was appropriate with respect to: (1) the amount of time the Student would spend with non-disabled peers; (2) the age of the other children in the program; (3) the amount of speech and language, occupational and physical therapy the Student would receive; (4) the qualifications of the ACES staff who would be providing the Student's program; (5) assistive technology; (6) the plan to transition the Student from The Foundation School to the in-district program; (7) math instruction; (8) reading comprehension instruction; and, (9) dietary issues. *See* Articulation of Claim at 4-5.