

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Cheshire Board of Education

Appearing on behalf of the Parents: Attorney David C. Shaw  
Law Offices of David C. Shaw, LLC  
34 Jerome Avenue, Suite 210  
Bloomfield, CT 06002

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

Appearing before: Attorney Patricia M. Strong  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Did the Board provide the Student with an appropriate IEP for the 2004-2005 school year?
2. Should the Student, who is identified as in need of special education under the classification of intellectual disability, be placed in regular education with supplementary aids and supports and modifications to the curriculum?

**PROCEDURAL HISTORY**

On December 15, 2004 the Parents filed a due process request seeking a hearing to challenge the appropriateness of the IEP and the failure of the Board to comply with the IDEA. The case was assigned to this Hearing Officer on December 17, 2004. By way of relief they request the appointment of a mutually acceptable independent consultant to assist in the development and implementation of an appropriate IEP and regular classroom placement with appropriate supplementary aids and supports and modifications to the curriculum in accordance with the recommendations of the independent evaluator. They also request payment of the fee of the independent evaluator. Hearing Officer ("HO") Exhibit 1. On December 28 a prehearing conference was held. The Parents' attorney stated that the independent consultant requested is someone from the University of Connecticut Center on Excellence, which is part of the medical center. Hearing dates were agreed on for January 14 and February 9, 14, 15 and

18. On December 28, the Parents' attorney filed a request to extend the decision deadline to March 10, 2005. The request was granted. The Parties filed exhibits and witness lists on January 10. The Parents filed Exhibits P1-P77; the Board filed Exhibits B1-B115.

The hearing convened on January 14. Preliminary matters were addressed concerning exhibits. The Board's attorney raised objections to all Parent Exhibits with handwritten comments on educational records. A lengthy discussion occurred concerning which exhibits were objected to. The Hearing Officer suggested going off the record to give the attorney time to compose a list of exhibit numbers. The Parents' attorney objected to this procedure as too time-consuming since Parents had an expert witness present to testify. At that point the Board's attorney asked to raise an issue which would resolve the case. The Parents' attorney objected to any mention of settlement offers or resolutions. The Hearing Officer allowed the Board's attorney to present her argument. She stated that the Board is willing to do everything requested in the due process request, including signing a contract with the educational consultant and convening a PPT meeting. The Parents' attorney refused to make any settlement agreement with the Board and insisted on proceeding with the hearing. The Board's motion to dismiss for mootness was denied without prejudice based on Parents' assertion that they would have no ability to enforce the proffered resolution.

The Parents' attorney then requested that the Hearing Officer recuse herself because of a conflict of interest based on an alleged personal relationship with the Board's Superintendent and a previous decision of the Hearing Officer which "caused his firm a lot of trouble." The Hearing Officer had disclosed to the attorneys prior to convening on the record that she had represented a client in her private practice several years ago in which there was an employment-related lawsuit against the Board. The matter was settled several years ago. The Board's attorney had an opportunity to speak to the Superintendent and stated that there was no objection to the Hearing Officer hearing the case. The Board's attorney stated this prior to the commencement of the hearing and on the record. The Parents' attorney's request for recusal was denied. There was no personal dealing with the Superintendent, who at the time was the Business Manager, because he and all Board personnel were represented by counsel. The attorney was from a different law firm than the firm representing the Board in this due process case. The claim that the Hearing Officer's decision in another case caused him trouble was rejected. There was no showing that a ruling in another case, which was not adequately identified for the record, showed any bias toward the case at hand.

The Board's attorney requested that she be permitted to have Paul Calaluce, Director of Pupil Personnel Services, testify first so that she could prove what the Board is willing to do to resolve the case. The Parents' attorney objected and asked to put on his witness using only five exhibits, to which he believed the Board did not object. The Board's attorney requested a recess to speak to her client, which was granted. The Board's attorney then stated on the record that the Board was prepared to have the Hearing Officer enter an order as set forth in the due process request, HO1, to address the Parents' concern of enforceability. A discussion ensued regarding the period of time in which an order would be in effect. The Hearing Officer questioned her authority to issue an order

without conducting a hearing and making findings of fact and conclusions of law. The parties were given until January 21 in which to file a joint request for an order from the Hearing Officer. On January 21 both attorneys sent letters and filed separate requests. The Parents' attorney's letter stated that the Board's attorney conceded liability. He also stated that the Parents are not waiving any claim to costs and attorneys' fees and to pursue such matters separately. The Board's attorney's January 21 letter states that the Board objects to several items in the Parents' proposed order and attaches its proposed order. On January 24 the Parents' attorney wrote to the Hearing Officer regarding his objection to certain language in the Board's proposed order and concluding with the statement: "As previously mentioned, the parents will not oppose a coercive Order against the Board provided it addresses the issues raised at the hearing and requires the student's placement in regular classes defined as ensuring that [Student] spend 80% or more of the school day with children who are not disabled." On January 28 the Board's attorney wrote to the Hearing Officer stating that her client had met with the Mother to discuss the stipulation and that with the substitution of the word "place" for "support" she agreed with it. The Board's attorney objected to the characterization of the stipulation as a "coercive" order or that the Board had conceded liability. She stated: "As you know, from the time that the parents have commenced due process, the Board's position has been that it has not disagreed with the parents' request and at all times has been prepared to retain a mutually acceptable consultant for the purpose of implementing a program for [Student] in the mainstream." Later that day the Parents' attorney wrote to the Hearing Officer objecting to the contents of the Board's attorney's letter and to her representation of his clients' position. He stated that the Parents do not agree with the Board's proposed order. He reiterated his position in previous letters dated January 17 and 24. There was no letter from January 17. It is assumed that the reference was to the January 21 letter.

### **SUMMARY**

The Hearing Officer heard no testimony in this case. The Board did not contest the hearing because it agreed with the relief sought in the due process request. The Board did not admit that the Student's current IEP was inappropriate. The parties agreed that the Board would retain the services of Katherine Whitbread, Ph.D. as an independent consultant for the remainder of the 2004-05 school year and for the 2005-06 school year. In the event that Dr. Whitbread was not available, the parties agreed to select another mutually acceptable independent consultant. The Board agreed to pay for the independent evaluation performed by Dr. Whitbread dated December 2, 2004. The parties agreed that Dr. Whitbread would consult with the PPT to assist in developing and implementing an IEP, which would provide for regular classroom placement for the Student. Her role would include recommendations for appropriate supplementary aids and services and modifications to the curriculum. The parties did not comply with the Hearing Officer's request to submit a joint order. There are three variations with disputed language in them.

### **CONCLUSIONS OF LAW:**

1. The jurisdiction of this hearing officer is set forth in Conn. Gen. Stats., Section 10-76h(d)(1), which provides in relevant part:

The hearing officer or board shall have the authority to confirm modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil . . . or to prescribe alternate special educational programs for the child or pupil. . . .

2. Section 10-76h(c)(3) provides is relevant part:

The hearing officer or board shall hear testimony relevant to the issues in dispute offered by the party requesting the hearing and any other party directly involved. . . .

3. Conn. State Regs. Section 10-76h-15(g) provides: "The hearing officer may receive stipulations from the parties on any fact, matter or issue."

4. Conn. State Regs. Section 10-76h-16(d) provides:

A settlement agreement shall not constitute a final decision, prescription or order of the hearing officer. The settlement agreement may be read into the record as an agreement between the parties only.

5. A hearing officer has the authority to enforce a settlement agreement. Mr. J. v. Board of Education, 98 F. Supp.2d 237-238 (D. Conn. 2000). "Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the courts." D.R. v. East Brunswick Bd. of Educ., 109 F.3d 896, 901 (3d Cir. 1997).

6. If the parties are in agreement as to the relief requested in the due process hearing, there is no issue in dispute for the hearing to adjudicate. If there is no issue in dispute, the case is moot and there is no jurisdiction to proceed further. "[M]ootness is evaluated throughout the pendency of the litigation." Fetto v. Conn. State Dept. of Education, 181 F.Supp.2d 53 (D. Conn. 2002). See also Board of Education of the Town of Stafford v. State Department of Education, 243 Conn. 772, 777 (1998). "A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists."

### **FINAL DECISION AND ORDER**

Based on the stipulations filed by the parties on January 21 and 28 regarding the issue of relief, it is apparent that there is no issue in dispute to adjudicate at a hearing. The Hearing Officer has no jurisdiction to issue an final order regarding program or placement of the Student where she heard no testimony on the issues and made no findings of fact. Should the parties wish to enter into a formal settlement agreement, it will, upon request, be added to the record in this case. It is ordered that the case be dismissed without prejudice.