STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Regional School District **Z**[1]

Appearing for Mr. & Mrs. X:	Courtney Spencer, Esq. Klebanoff & Alfano PC 433 South Main Street, Suite 102 West Hartford, CT 06110
Appearing for the Board:	Craig S. Meuser, Esq. Chinni & Meuser, LLC 30 Avon Meadow Lane Avon, CT 06001
Appearing Before:	Hearing Officer Scott P. Myers, M.A. (Clinical Psychology), J.D.

This Final Decision and Order was initially issued on October 22, 2007. This case is related to CTDOE Case 07-323, which was commenced in light of this Final Decision and Order. This Hearing Officer is assigned to both cases. In light of certain evidence presented in Case 07-323, the Hearing Officer has determined that to protect the privacy interests of the Student, it is necessary to mask in the Final Decision and Order in both this Case and Case 07-323 the identity of, among other individuals and entities, the District and Board at issue, the names of District and Board employees, and the name of the private school placement at issue. Accordingly, the Hearing Officer has re-issued the October 22, 2007 Final Decision and Order in Case 07-285. This re-issued decision replaces the names of those individuals and entities as referenced in the October 22, 2007 issuance with a new designation that will be used in both decisions. The changes, which appear in bold face type in this re-issued decision, are not substantive.

FINAL DECISION AND ORDER

SUMMARY

The Student turned age 18 years old in May 2007. This proceeding was commenced in September 2007 by Mr. and Mrs. X (who have been referred to as the Student's parents but who are actually her grandparents) to secure relief for the Student under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (the "IDEA"), as amended effective July 1, 2005 by the Individuals with Disabilities Education Improvement Act of 2004 (the "IDEIA"), and its implementing regulations, 34

[1] The **reference to "Student" in the** caption used in this Final Decision and Order reflects the way this matter is identified in the CT Department of Education's (the "Department's") records and is not intended to reflect any determination on the merits of the Board's October 10, 2007 motion to dismiss ("Board's Motion").

C.F.R. §§ 300.1 *et seq*. (the "IDEIA Regulations"), and pursuant to Connecticut's special education laws, Conn. Gen. Stat. §§ 10-76, *et seq.* ("CSEL") and their related regulations, Reg. Conn. State Agencies §§ 10-76-1 *et seq.* ("Conn. Regulations"). The Board moved to dismiss because Mr. and Mrs. X lacked standing to commence this proceeding on behalf of the Student. As explained more fully herein, on and as of October 16, 2007 Mr. and Mrs. X acquired standing to commence an action under the IDEIA and CSEL to obtain the relief sought in their September 2007 request for due process but did not have standing to do so in September 2007. Accordingly, this matter is dismissed.[2]

ISSUES SET FOR HEARING

The issues set for hearing were framed by the Hearing Officer as follows:

1. Whether at the pertinent times the Student was eligible to receive special education and related services within the meaning of the IDEIA and, if so, what is her exceptionality?

2. If the Student was at the pertinent times eligible to receive special education and related services within the meaning of the IDEIA, to what extent (if any) was the Board obligated to fund her placement **at a private school ("K")** in the 2006/2007 school year?

3. If the Student was at the pertinent time eligible to receive special education and related services within the meaning of the IDEIA, to what extent (if any) is the Board obligated to fund her placement at **K** in the 2007/2008 school year?

4. Whether the Board is obligated to pay the costs of the "independent neuropsychological evaluation" referenced in the September 7, 2007 request for due process?

PROCEDURAL BACKGROUND

By letter dated September 7, 2007 (the "Request"), Mr. and Mrs. X commenced this due process proceeding pursuant to the IDEIA and CSEL seeking: (1) a finding that their granddaughter (the Student) is eligible to receive special education and related services under the IDEIA and CSEL; (2) an order directing that the Board pay the costs of the Student's placement at **K** in the 2006/2007 school year and for the 2007/2008 school year; and (3) an order directing that the Board pay for the costs of a neuropsychological evaluation of the Student that they obtained. The undersigned was appointed as the Hearing Officer in this matter on September 11, 2007.

A telephonic pre-hearing conference ("PHC") was held on October 2, 2007. The Board and Mr. and Mrs. X participated through their respective counsel. The parties reported that they had waived the resolution meeting requirement. The Board at the PHC

[2] This Final Decision and Order is also intended to be the formal ruling on the Board's Motion.

raised the issue of the standing of Mr. and Mrs. X to commence this proceeding. A process and schedule for resolving that issue was established in the October 5, 2007 Scheduling Order. That order also established dates for the submission of records and witness lists, identified four hearing dates (November 8, 15, 20 and 30, 2007), and established the date for mailing of the Final Decision and Order as December 4, 2007.[3] Additional facts discussed at the PHC pertinent to the standing of Mr. and Mrs. X are reported below.

The Board did not file a sufficiency challenge or an answer. The Board submitted its Motion and Mr. and Mrs. X submitted their memorandum in opposition (the "Opposition"). As directed in the Scheduling Order, the Board submitted its proposed record consisting of documents labeled B1-B33 inclusive, as well as a statement of the topics it would seek to examine the Student on at hearing and a witness list.

By notice and orders dated October 17, 2007, the Hearing Officer advised the parties of his ruling on the Board's Motion and that all remaining dates, including the hearing dates, established by the October 5, 2007 Scheduling Order were cancelled. No testimonial evidence was taken. No documents were marked as exhibits. In deciding the issues raised by the Board's Motion and the Opposition, the Hearing Officer did not consider or review the documents submitted by the Board as its proposed record.

FINDINGS OF FACT

For purposes of this Final Decision and Order, the evidentiary record consists of factual assertions in the Request, the Board's Motion and the Opposition (including Exhibits A and B thereto), and representations of counsel at the PHC, and facts that can be reasonably inferred from those sources. To the extent that any portion of this Final Decision and Order, including the Procedural Background, 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 Decision in which that statement is found. *See, e.g., Bonnie Ann F. v. Callahen Independent School Board,* 835 F.Supp. 340 (S.D. Tex. 1993).

1. The Student turned 18 years of age in May 2007. (Request)

2. During the 2006/2007 school year, the Student was identified as an 11th grader. During the 2007/2008 school year, the Student was identified as a 12th grader. As of the date of this Final Decision and Order, the Student had not been graduated from high school. (Request; Opposition)

3. As of the date of the Request the Student had not, and at all times since then the Student has not, been identified as eligible to receive special education and related services under the IDEIA. (Request)

[3] The Board at the PHC also advised of its intention to call the Student as a witness. Mr. and Mrs. X objected and a process for resolving that issue was outlined in the October 5, 2007 Scheduling Order.

4. Pursuant to IDEIA Regulation, 34 C.F.R. § 300.520(a)(3), the Board notified the Student and Mr. and Mrs. X of the transfer of rights that would occur on her 18th birthday. (Board's Motion)

5. For at least the 2006/2007 school year the Board was and for the 2007/2008 school year the Board is the local educational agency under CSEL responsible for providing the Student with special education and related services under the IDEIA and CSEL if she is deemed eligible to receive such special education and services under those statutes.

6. For some or all of the 2006/2007 school year, the Student attended **K**. (Request) Since the Student has not been identified as IDEIA-eligible, the placement at **K** was not by decision of an IEP team.

7. At an IEP meeting on August 31, 2007, Mr. and Mrs. X requested that the District identify the Student as IDEIA- and CSEL-eligible, and requested reimbursement for the costs of her attendance at **K** in the 2006/2007 school year and for the costs of an "independent neuropsychological evaluation" of the Student they had obtained, and requested funding of the Student's attendance at **K** for the 2007/2008 school year. The District denied those requests at that IEP meeting. (Request)

8. For the 2007/2008 school year, the Student has been attending **K**. (Request; Opposition)

9. This proceeding was commenced in September 2007 with the filing of the Request. As drafted, the Request indicates that Ms. Spencer was representing Mr. and Mrs. X and that this proceeding was being commenced by Mr. and Mrs. X. Nothing in the Request indicates that Ms. Spencer has been retained by the Student or was appearing as counsel for the Student. At the PHC, Ms. Spencer indicated that she had been retained by Mr. and Mrs. X to prosecute this proceeding on behalf of the Student and to secure relief that would benefit the Student.

10. At the PHC, Ms. Spencer further advised that the Student has not been found to be incompetent to manage her own affairs and that since she has turned 18 years of age no conservator or other guardian has been appointed for her by a court. When asked at the PHC about the Student's classification, Ms. Spencer reported it was OHI. (PHC) Ms. Spencer subsequently represented that the Student was capable of giving informed consent with respect to matters concerning her educational interests. (Opposition)

11. The Board, in its Motion, asserts that Mr. and Mrs. X lacked standing to pursue due process relief "because they lost the right to file a claim when [the Student] turned eighteen;" and further that "[o]nly [the Student] herself may file a due process complaint." (Board Motion at 1)

12. Attached as Exhibit A to the Opposition is a letter (the "Letter") the Opposition represents was sent to **the Board's Pupil Services Director (the "BPSD")** by the Student. The Letter, which is dated on the Student's 18th birthday, states in its entirety as follows:

> Please be advised that I am giving permission to [Mr. and Mrs. X], my legal guardians, and Courtney Spencer, my special education attorney, to make all educational decisions on my behalf. I also give them permission to speak with Dr. Sahani. Please contact them directly with any questions or information about me or my education. I do not wish to be contacted directly.

The Letter was sent over the Student's name, and is signed but the signature is not acknowledged.

13. Exhibit B to the Opposition is a copy of a document labeled "Power of Attorney" that the Opposition represents was executed by the Student. The document, on its face, indicates that the Student executed the document on October 16, 2007. Her signature was acknowledged by a notary. A copy of the Power of Attorney (with identifying information redacted) is attached to this Final Decision and Order as Attachment 1.

14. The Opposition alleges further that the Student "was so emotionally harmed as a result of her attendance in the [Board's] public school system and its failure to address her needs that she does not feel that she is able to be involved in any way in her educational decision making at this point. [The Student in the Letter] has already clearly stated this to the school [which then] completely disregarded [her wishes in this regard]. This further exacerbates her anxiety and distress . . . To fail to honor the power of attorney would be to send a message to [the Student] that her decisions and rights are not respected and would result in further psychological harm." (Opposition at 5)

15. Ms. Spencer was engaged by Mr. and Mrs. X. Although the Request identifies Mr. and Mrs. X as the Student's parents, the Opposition identifies them as the Student's "grandparents and legal guardians."[4]

CONCLUSIONS OF LAW

1. This dispute was asserted pursuant to the IDEIA and CSEL.[5]

[4] The basis for the reference in the Request and Opposition to Mr. and Mrs. X as the Student's "legal guardians" now that she has turned age 18 years of age is unclear. In any event, there is no dispute that no guardian or conservator has been appointed for the Student by a Court.

2. The Board is the local educational agency ("LEA") required by the IDEIA and CSEL to provide each child residing in its jurisdiction who has a disability and by reason thereof needs special education and related services with a "free appropriate public education" ("FAPE") designed to meet her specialized needs and delivered in the least restrictive environment ("LRE").[6] Under the IDEA and CSEL, the Board is required to provide FAPE to the Student (if she is found eligible) potentially through her 21st birthday or until she graduates, whichever comes first. *See, e.g.*, IDEIA, 20 U.S.C. § 1412(a)(1)(A); CSEL at Section 10-76d(b); Conn. Regulation § 10-76d-1.

3. Both the IDEIA and CSEL provide that the parents or legal guardians of a minor child may commence due process to vindicate the child's rights under those respective laws. *See, e.g.*, IDEIA Regulation 34 C.F.R. 300.507; CSEL at Section 10-76h(a)(1).

4. The IDEIA at 20 U.S.C. § 1415(m)(1) provides further that a State "may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) . . . (B) all other rights accorded to parents under this part transfer to the child." The rights accorded under the Part of the IDEIA referred to in IDEIA, 20 U.S.C. § 1415(m)(1) include the right to file for due process under the IDEIA.[7] This provision of the IDEIA is reflected in the corresponding IDEIA Regulation 34 C.F.R. § 300.520a. The comments to that IDEIA Regulation state in pertinent part as follows:

> Whether parents may retain the ability to make educational

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[5] To the extent that case law cited herein that was decided under the IDEA remains undisturbed by the amendments to the IDEA reflected in the IDEIA, references in those cases to the IDEA and its implementing regulations should be interpreted to be citations to the IDEIA and its regulations.

[6] FAPE is "special education" and "related services" provided at public expense, under public supervision and direction, and without charge to the parents of an eligible child, which meet the standards of the State educational agency and are provided in conformity with the student's individual education plan or "IEP." *See, e.g.*, IDEIA, 20 U.S.C. § 1401(9). "Special education" is defined in pertinent part at IDEIA, 20 U.S.C. § 1401(29) to mean: "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." "Related services" are defined in the IDEIA at 20 U.S.C. § 1401(26) to include, among other things, transportation and psychological, social work or counseling services "as may be required to assist a child with a disability to benefit from special education." IDEIA, 20 U.S.C. § 1401(3); IDEIA Regulations, 34 CFR § 300.8(a)(1)-(2).

[7] IDEIA at 20 U.S.C. § 1415(m)(2) provides that if a child with a disability who is not incompetent has reached majority age "but is determined not to have the ability to provide informed consent with respect to [her] educational program … the State shall establish procedures for appointing the parent of the child . . . to represent the educational interests of the child." The Board's citation to this provision in its Opposition (at 4) to support its position is inapposite. There is no evidence or claim that the Student "does not have the ability to provide informed consent with respect to [her] educational program."

> decisions for a child who has reached the age of majority and who can provide informed consent is a matter of State laws regarding competency. That is, the child may be able to grant the parent a power of attorney or similar grant of authority to act on the child's behalf under applicable State law. We believe that the rights accorded individuals at the age of majority, beyond those addressed in the regulation, are properly matters for States to control.

Federal Register, Vol. 71, No. 156 (August 14, 2006) at p 46713.

5. Conn. Regulation § 10-76a-1(13) provides that "[t]he rights of a parent [as that term is defined in the Regulation] shall transfer to a student who has reached the age of eighteen years."

6. Taking these provisions together and applying them to the facts, any rights Mr. and Mrs. X had to act on behalf of the Student for purposes of the IDEIA and CSEL transferred to the Student on her 18th birthday in May 2007. The question raised by the Board's Motion concerns the options available to the Student, as the holder of her own rights under the IDEIA and CSEL, to exercise her rights. Clearly, she can commence an action in her own name to vindicate her rights under those statutes. The Connecticut Statutory Short Form Power of Attorney Act, Conn. Gen. Stat. §§ 1-42 through 1-56 (the "Power of Attorney Act"), empowers the Student (as principal) to appoint Mr. and Mrs. X (as her agent) to commence and litigate a proceeding on her behalf to vindicate her rights under the IDEIA and CSEL. The Power of Attorney Act provides, in pertinent part at Section 1-51, that:

> In a statutory short form power of attorney, the language conferring general authority with respect to claims and litigation shall be construed to mean that the principal authorizes the agent: (1) To assert and proceed before any court, administrative board, department, commissioner or other tribunal any cause of action, claim, counterclaim, offset or defense, which the principal has, or claims to have, against any individual, partnership, association, corporation, limited liability company, government, or other person or instrumentality, including but not limited to, power to sue for the recovery of land or of any other thing of value, for the recovery of damages sustained by the principal in any manner, for the elimination or modification of tax liability, for an injunction, for specific performance, or for any other relief … [and] (4) in connection with any action or proceeding, at law or otherwise, to perform any act which the principal might perform, including, but not limited to . . . generally bind the principal in the conduct of any litigation or controversy as seems desirable to the agent; (5) to submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal . . . (6) … to receive and execute and file and deliver any consent, waiver, release . . . or other instrument [in connection with the settlement of a claim] . . .

The operation of this provision is illustrated by *Clark v. Visiting Nurs. Serv.*, 2001 Conn. Super. LEXIS 434 (Conn. Super. Ct. Feb. 9. 2001). In that case, Gertrude Clark claimed that she was injured by the defendant's negligence. She appointed Alan Clark as her attorney-in-fact by executing a power of attorney in accordance with the Power of Attorney Act. That power of attorney included a "Claims and Litigation" clause as provided by Conn. Gen. Stat. § 1-51. In denying a motion to dismiss, the Court found that by virtue of that power of attorney, Alan Clark had standing to commence litigation on behalf of Gertrude Clark against the defendant.[8]

7. The Power of Attorney form submitted with the Opposition contains the "Claims and Litigation" clause and an "all other matters" clause, among others;[9] appoints Mr. and Mrs. X as agent of the Student for Claims and Litigation, matters related to the Student's education, "relationship matters" and "all other matters;" includes the statutorily required notices, language and acknowledgement of signature; and otherwise complies with Conn. Gen. Stat. § 1-43, which defines the requirements for an instrument to constitute a form of statutory short form power of attorney. Accordingly, by virtue of the Power of Attorney and consistent with *Clark*, Mr. and Mrs. X as of October 16, 2007 have standing to commence and pursue a due process on behalf of the Student as her agent seeking the relief identified in the Request notwithstanding that the Student has turned 18 years of age and that no conservator or guardian has been appointed.[10]

8. That finding and conclusion does not, however, warrant denial of the Board's Motion in the circumstances. The Student's Letter to the Board was not a power of attorney within the meaning of Conn. Gen. Stat. § 1-43. The Power of Attorney

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[8] *See also, e.g., Long v. DeLarosa*, 1995 Conn. Super. LEXIS 314 (Jan. 30, 1995) (litigation was commenced by agent in her own name on behalf of principal as principal's attorney in fact pursuant to the Power of Attorney Act).

[9] *See, e.g., Morenz v. Wilson-Coker*, 321 F. Supp.2d 398 (D. Conn. 2004), *affirmed* 415 F.3d 230 (2d. Cir. 2005) (noting that power of attorney granting attorney-in-fact authority over "all other matters" as provided in Conn. Gen. Stat. § 1-55 "represents a catch-all to permit an agent 'to act as an alter ego of the principal with respect to any matters and affairs not [otherwise] enumerated'" in the statutory scheme).

[10] Other than *Weyric v. New Albany-Floyd County Consolidated School Corp.*,42 IDELR 169 (S.D. Ind. 2004), the cases cited by the Board in its Motion stand for the proposition that where a state, in accordance with IDEIA, 20 U.S.C. § 1415(m), has provided for a transfer of rights at the age of majority, once a child who is not incompetent turns 18 years of age the right to continue the prosecution of an ongoing due process proceeding or to commence a due process proceeding transfers to the child. Those cases do not, however, address the issue presented in this case which is whether a child who has turned 18 years of age in a transfer-of-rights-at-age-of-majority state can authorize a third party to act on her behalf with respect to vindicating her rights under IDEIA and state special education laws. The Opposition correctly observes that the court in *Weyric* found that the student in that case (by then an adult) had executed a power of attorney naming his mother as his agent under the law of that state, and that she was therefore authorized to represent his interests and act on his behalf.

submitted by the Parents with the Opposition was executed on October 16, 2007, which is after this proceeding was commenced. Accordingly, at the time that they commenced this proceeding Mr. and Mrs. X did not have standing to do so. That jurisdictional defect cannot be corrected by the Power of Attorney and is not waivable. Accordingly, the Board's Motion is properly granted.[11]

9. As to the remaining claims stated by Mr. and Mrs. X in their Opposition: (a) The Hearing Officer makes no determination as to whether on the facts of this case the Board had an obligation to advise the Student of its view that the Letter was legally insufficient to authorize Mr. and Mrs. X to act on her behalf with respect to educational matters. (b) The Hearing Officer finds that a sufficiency challenge pursuant to IDEIA Regulation 34 C.F.R. § 300.508 is not an appropriate vehicle by which to assert a lack of standing challenge to a due process complaint. (c) The Hearing Officer finds that the Board was not under any obligation to assert its lack of standing challenge prior to the PHC, but that it would have been more efficient and perhaps better practice if the Board had not waited until the PHC to do so. (d) The Hearing Officer makes no finding as to the issue of whether the Student was harmed by the Board's actions after receiving her Letter. (e) The Hearing Officer considers the assertions identified in Finding of Fact 14 above to be zealous advocacy, did not base his decision in any way on a consideration of that argument and makes no factual determinations regarding that claim.

10. The Hearing Officer has reached no determination on the merits of the claims asserted in the Request, or regarding factual assertions stated in the Motion or the Opposition or by counsel for the parties at the PHC regarding the substantive issues in dispute. Nothing in this Final Decision and Order reflects any determination regarding whether and to what extent (if at all) the Student will be required to testify in this matter.

FINAL DECISION AND ORDER

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[11] The cases cited by Mr. and Mrs. X in their Opposition establish the proposition that the parents of an eligible child (who has reached the age of majority) who have been given a power of attorney can litigate due process claims on behalf of their child. However, those materials do not address the timing issue presented in this case. The Hearing Officer does not find the decision of Hearing Officer Slez in Case No. 02-138, *Student v. Greenwich Board of Education* (cited at Opposition at 3) to be dispositive. That decision reports that the student in that case turned 18 years of age prior to graduating in June of 2000 with a regular high school diploma; that he had not been adjudicated incompetent or been deemed to be unable to provide informed consent; that his parent commenced due process in April 2002; and that on June 2, 2002 the student executed a power of attorney in which the student authorized the parent to act on his behalf with respect to all educational issues. The issue of the parent's standing was apparently not raised by either party, and not decided by Hearing Officer Slez. Rather, the discussion of the transfer of rights and the power of attorney is in the findings of fact section of that decision. Accordingly, it is not clear how Hearing Officer Slez would have ruled on the issue of standing due to the timing of the execution of the power of attorney had that issue been presented to her to decide.

This action was commenced by Mr. and Mrs. X on behalf of the Student who is a legally competent adult capable of giving informed consent regarding educational issues. Mr. and Mrs. X lacked standing to commence this action, which must therefore be dismissed. By virtue of the Power of Attorney, Mr. and Mrs. X have since acquired legal standing to commence an action seeking the relief outlined in the Request. Nothing in this Final Decision and Order is intended to preclude them from commencing an action to secure that relief on behalf of the Student should they decide to do so.