

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Regional School District No. 6

Appearing for the Student: The Student and her Mother, *pro se*

Appearing for the Board: Erin Duques
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Appearing Before: Scott P. Myers, J.D., M.A. (Clinical Psychology),
Hearing Officer

FINAL DECISION AND ORDER
(June 4, 2008)

OVERVIEW

This matter is being dismissed without prejudice and no determinations on the merits of the claims asserted are being made. Given the nature and extent of the disagreements between the parties, the Hearing Officer concludes it would be helpful to summarize herein the proceedings in this matter.

BACKGROUND

A. Request for Due Process

This matter was commenced by request dated April 24, 2008 and concerns an IEP team meeting¹ which scheduled for May 20, 2008. The Student is expected to graduate high school in June 2008 and the IEP team meeting at issue was to have been a final meeting at which she would be exited from eligibility for special education and related services under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400, *et. seq.* (the "IDEIA"). The request for due process states as follows:

Region 6 is currently under investigation [by] the [Office of Civil Rights] for an abusive retaliatory action taken by Dr. Sharon Bremner against me. I would like to have my exit PPT at [out of district placement] with a representative from Region 6 participating by speaker phone. It would be intimidating to have Dr. bremner [sic] in my presence as I feel she deliberately tried to hurt me because I complained about being bullied. Dr. bremner [sic] is refusing to honor this request and insists she must be at my PPT in person to continue her retaliatory actions against me.

¹ Terms used but not defined herein have the same meaning as is ascribed to them in the IDEIA.

The request defines the following proposed resolution: "MY PPT should be held [at out of district placement] with Region 6 participating by speaker phone." The request for due process, on its face, indicates that the Student had signed the request.

B. The May 2, 2008 Pre-Hearing Conference

To obtain further clarification regarding the claims at issue and given the potential need for resolution earlier than the time frame otherwise provided by the IDEIA for a non-expedited hearing process, the Hearing Officer convened a telephonic pre-hearing conference ("PHC") on May 2, 2008. The Student appeared through her mother (the "Mother") and the Board appeared through counsel (Ms. Duques).

Based on the discussion at the May 2 PHC, there is no disagreement among the parties that the Student had turned age 18 years prior to April 24, 2008, that the Student is a legally competent adult under Connecticut law and that neither the Mother nor anybody else has been appointed as her conservator or guardian by a Court. It is also clear that there is an extensive history of disagreements between the parties regarding the Student's educational program. Each party claims further that it is being harassed by the other. The Mother reported that the Student and Mother have asserted a claim of retaliation against the Board under the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504") which is currently pending before the Office of Civil Rights ("OCR"). The Board states that because of the Mother's conduct with respect to District staff members, members of the Board itself and counsel for the Board, they have had to take the step of blocking the delivery of e-mails to them from the Mother. In addition to the OCR complaint, there have been at least two due process proceedings commenced regarding the Student in the past 12 months, including CTDOE 07-247. The parties agreed at this PHC to try to resolve their dispute through mediation.

C. Issues Set for Hearing

At the May 2, 2008 PHC, the issues set for hearing were framed as follows:

1. Whether the Student will be denied a meaningful opportunity to participate in her annual review IEP team meeting at the end of the 2007/2008 school year if Dr. Bremner participates in that IEP team meeting in person and, if so, what relief can she be afforded under the IDEIA or Connecticut special education law to address that issue in advance of that IEP team meeting?

2. Whether the Student will be denied a meaningful opportunity to participate in her annual review IEP team meeting at the end of the 2007/2008 school year if that IEP team meeting is convened at a place other than [out of district placement] and, if so, what relief can she be afforded under the IDEIA or Connecticut special education law to address that issue in advance of the IEP team meeting?

D. Subsequent Submissions

The May 4, 2008 Initial Scheduling Order established July 11, 2008 as the date for the mailing of the Final Decision and Order, as well as hearing dates of May 27 and (subject to confirmation by the Board of its availability) either June 3 or June 5. That Order also established timelines for various pre-hearing submissions. In compliance with that Order:

1. The Student submitted her proposed witness list. Among other witnesses, it is the Hearing Officer's understanding that the Student identified all of the members of the Board of Education for Regional District No. 6 ("BOE") as potential witnesses. Upon review of the description of the proposed testimony of each witness provided by the Student as required by the Initial Scheduling Order, the Hearing Officer concluded that the BOE witnesses were being called to testify about matters more pertinent to an investigation of the alleged retaliatory act itself rather than to the issues that are before the Hearing Officer. Accordingly, the Hearing Officer, exercising his discretion and prerogative under the CTDOE's procedural rules for due process hearings, directed that:

Unless an appropriate showing is made for any witness on the [Student's] witness list identified as "BOE" that each of those witnesses can offer testimony that is pertinent to the issues before the Hearing Officer and not duplicative or redundant of the testimony that can be offered by another witness, witnesses identified as "BOE" will not be required to appear to testify.²

2. The Board submitted a proposed witness list.

3. The Board submitted a motion to dismiss challenging the Hearing Officer's jurisdiction and the Student submitted a reply on May 17, 2008.

4. The Board submitted documents constituting its proposed record.³

5. The Student submitted documents constituting her proposed record.⁴

6. The Board submitted its answer to the due process complaint.

E. Events Prompting The May 16, 2008 PHC/Hearing

Following the May 2 PHC, the Hearing Officer reviewed the Final Decision and Order in CTDOE 07-247 and the Board's May 5, 2008 answer to the due process request. Among other things, the decision in CTDOE 07-247 indicates that the Student has a

² That order was issued in the form of an e-mail to the parties on May 6, 2008 at 5:56 a.m.

³ As of the issuance of this Final Decision and Order, the Board had submitted documents marked as proposed exhibits B1-B13.

⁴ As of the issuance of this Final Decision and Order, the Student had submitted documents marked as proposed exhibits P1-P8.

mood disorder and a reported history of physically self-injurious behavior. The Hearing Officer also considered: (1) an e-mail communication dated May 4, 2008 from the Mother confirming that the Student had received a notice from the District dated May 2, 2008 advising that the IEP team meeting would convene on May 20, 2008, (2) an e-mail communication dated May 8, 2008 from counsel for the Board advising that the Board could not participate in any of the scheduled hearing dates due to scheduling conflicts and proposing hearing dates in late June; (3) a motion submitted by the Board on May 12, 2008 challenging the Hearing Officer's jurisdiction to proceed in this matter;⁵ (4) a May 15, 2008 e-mail communication from the Mother time stamped 13:49 concerning the Student's attendance at the scheduled IEP team meeting; and (5) a notice dated May 15, 2008 issued by the CTDOE advising that a CTDOE-sponsored mediation had been scheduled for May 29, 2008.

On May 16, 2008 a second PHC was convened. That PHC was in the nature of a hearing to resolve the motion to dismiss and other issues, and was on the record.⁶

F. Ruling on the Board's Jurisdictional Challenges

The Board's May 12, 2008 motion to dismiss challenged the Hearing Officer's jurisdiction over this matter on three grounds: (1) At the time of the completion of this case under the current scheduling order, the issues to be resolved at hearing will be moot as the IEP team meeting at issue is scheduled to take place prior to the commencement of hearing (the "Mootness Argument"); (2) The regulations implementing the IDEIA provide at 34.C.F.R. § 300.321(a)(4) that the local educational agency ("LEA") has the discretion to determine which staff members will attend an IEP team meeting, and the matter of Dr. Bremner's participation in the IEP team meeting is therefore beyond the Hearing Officer's jurisdiction (the "LEA Discretion Argument"); and (3) Neither the Student's mother nor her father (collectively the "Parents") have standing to pursue due process on behalf of the Student, who is over age 18 years and is legally competent under Connecticut law (the "Standing Argument").

As explained more fully at the May 16 hearing and in a written ruling dated May 18, the Board's motion to dismiss was denied. That ruling is summarized below.

1. The Standing Argument

For purposes of ruling on the Standing Argument only, based on representations of the Mother and Ms. Duques at the May 16 hearing, the Hearing Officer found that:

1. The Student turned age 18 years in September 2007.

⁵ The Board had indicated at the May 2, 2008 PHC that it would be filing such a motion.

⁶ By agreement of the parties, the May 16, 2008 PHC/hearing was held as a "virtual" hearing – the parties and the Court reporter were provided a dial-in number and participated through teleconference. Ms. Duques participated on behalf of the Board. The Student's Mother and Father participated on behalf of the Student. The parties are commended for their flexibility and willingness to proceed in this format.

2. The Student is a legally competent adult for whom no conservator or guardian has been appointed.
3. The Student signed the request for due process commencing this matter.⁷
4. The Student has not executed a Power of Attorney (“POA”) appointing the Mother to act on her behalf. Rather, the Student has executed a statement dated April 23, 2008 in which she granted her Mother permission to represent her in all matters related to her educational program with the District.⁸

Based on the representations made at the May 16 hearing, the Hearing Officer finds that the Student, rather than the Mother, commenced this due process proceeding and has asked the Mother to assist her in litigating this proceeding by acting as an advocate. The Student has the right to have the assistance of an advocate, including but not limited to a non-attorney advocate, with respect to this due process hearing.

To support its Standing Argument, the Board cited to this Hearing Officer’s recent decision in CTDOE 07-285. The factual circumstances in CTDOE 07-285 are not the same as in this case. The student in CTDOE 07-285 (“Student X”) had turned age 18 years prior to the commencement of CTDOE 07-285. Student X was a legally competent adult and neither of her parents (“Mr. and Mrs. X”) had been appointed as her conservator or guardian. Student X had, prior to the commencement of CTDOE 07-285 sent a letter to the LEA at issue (“RDZ”) advising RDZ that Mr. and Mrs. X were acting on her behalf. CTDOE 07-285 was commenced by Mr. and Mrs. X seeking relief on behalf of Student X. Student X had not initiated CTDOE 07-285. Given that Student X had turned age 18 years, that Student X was a legally competent adult and that neither Mr. nor Mrs. X had been appointed as her conservator or guardian, the Hearing Officer concluded that Mr. and Mrs. X had no standing to commence an action on behalf of Student X and dismissed CTDOE 07-285 for that reason.⁹ In contrast, in this case the Student initiated this due process proceeding herself on her own behalf.

2. The LEA Discretion Argument

⁷ The May 4, 2008 Initial Scheduling Order states, incorrectly, that the request for due process was signed by the Mother on behalf of the Student.

⁸ The Mother was specifically advised at the May 16, 2008 hearing that although her factual assertions were not being taken under oath, should this matter proceed to a hearing she may be subject to cross-examination on her statements at the May 16, 2008 hearing. The parties were specifically advised further that should this matter proceed to a hearing, one thing that would need to be accomplished at the outset of hearing was to take sworn testimony from the Student verifying for purposes of establishing jurisdiction, among other things, the facts asserted above.

⁹ Student X subsequently executed a Power of Attorney appointing Mr. and Mrs. X to act as her attorney-in-fact with respect to all matters concerning her education. Based on that Power of Attorney, the Hearing Officer found that Mr. and Mrs. X had standing to commence a subsequent due process action which then proceeded to a hearing and a litigated decision on the merits.

The IDEIA defines the categories of LEA personnel who must participate in an IEP team meeting, and gives the LEA the discretion to determine which of its staff in each category will attend. The Student sought an order that Dr. Bremner participate in the IEP team meeting by telephone rather than in person. The Student was not seeking to preclude Dr. Bremner from participating at all in the IEP team meeting. The Board sought dismissal of this proceeding on the grounds that as a matter of law the Hearing Officer has no jurisdiction over issues concerning the attendance of District staff at an IEP team meeting.

The Board is correct that the IDEIA vests the LEA with the discretion to determine which of its staff will attend an IEP team meeting. However, the Board's argument that the IDEIA shields its determination regarding staff participation at an IEP team meeting from review by a due process hearing officer lacks merit. In the typical case, a parent (or student) will assert that the composition of the LEA staff members at an IEP team meeting was deficient and a due process hearing officer in an after-the-fact review will determine whether the LEA properly staffed the IEP team meeting. The typical case is by no means the only circumstance in which review of this aspect of the LEA's actions by a hearing officer may be invoked.

In this case, the Student is seeking prospectively and proactively an order of a due process hearing officer that a certain District staff member (Dr. Bremner) attend the IEP team meeting by telephone rather than physically. The Student is not seeking to preclude Dr. Bremner from participating in the IEP team meeting. The Student, through her Mother, claims that because of alleged retaliatory acts by Dr. Bremner, if Dr. Bremner participates in person the Student will be unable to participate directly or fully. The Student (who is over age 18 years and is a legally competent adult) has the right to be at this IEP team meeting. The opportunity for meaningful participation in the IEP team meeting and the IEP development process is a fundamental right of the child that is secured by the IDEIA. Denial of a meaningful opportunity to participate in these processes is a procedural violation subject to the jurisdiction of the Hearing Officer and for which a variety of remedies (both prospective and retroactive) are potentially available. Balanced against that right is the LEA's right and obligation to assure that the IEP team meeting is appropriately staffed and that its staff members have an opportunity to participate appropriately as well. In consideration of the balancing of these competing interests, the Hearing Officer found that the balance in this case (given the nature of the relief requested) tips in favor of the Student, and the Board's motion to dismiss on the basis of the Discretion Argument was denied.¹⁰

3. The Mootness Argument

¹⁰ The Hearing Officer in making that ruling was making no determination on the merits of the issue of Dr. Bremner's physical attendance at the IEP team meeting, or whether the Student will be deprived of a meaningful opportunity to participate should Dr. Bremner participate in person. The Hearing Officer simply determined that the Student has stated a viable claim for relief under the IDEIA, which is the test applied in resolving a motion to dismiss arguing lack of jurisdiction as a matter of law.

The parties at the May 16 hearing each indicated that the purpose of the IEP team meeting at issue is to determine whether the Student is eligible to graduate in June 2008. Both parties anticipate that the Student will graduate in June 2008. Neither party wanted to delay the IEP team meeting because neither party wanted to jeopardize the Student's graduation. The Hearing Officer agrees with the Board that should the IEP team meeting take place prior to completion of hearing, the issues set for hearing would have been rendered moot such that this hearing would then properly be dismissed.¹¹

At the May 16, 2008 hearing, the parties agreed to reschedule the IEP team meeting to shortly after the May 29, 2008 mediation, and further agreed to participate in that mediation. In light of those agreements, the Board's motion to dismiss based on the Mootness Argument was denied as premature.

G. Events Subsequent to the May 16, 2008 Hearing

In light of the scheduled mediation, the Hearing Officer cancelled the May 27, June 3 and June 5, 2008 hearing dates and directed that the parties report on the outcome of the mediation. The date for mailing of the Final Decision and Order was not extended.

On May 22, 2008, the Student (through the Mother) advised that this due process proceeding was being withdrawn.

FINAL DECISION AND ORDER

For the reasons set forth above, this matter is hereby DISMISSED without prejudice to refileing.

¹¹ As explained at the May 16, 2008 hearing, the Student would then have a chance to challenge through a future due process proceeding any determination made at this upcoming IEP team meeting.