

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on behalf of the Parents: Parents, pro se

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 Individualized Education Program (“IEP”) for the 2008-09 school year, which meets his needs for speech and language in the receptive/expressive realm?
2. Was the Planning and Placement Team (“PPT”) correct when it noted problem solving was a “strength” on the Present Levels of Academic Achievement and Functional Performance section of the IEP?
3. Is the Board required to provide math tutoring at the Student’s home rather than at school?
4. Did the IEP address the Student’s needs in the area of narrative skills?
5. Did the IEP provide for three hours per day of paraprofessional support and did the Board unilaterally change the services to two hours per day?
6. Did the Board improperly recommend accommodation and modification for the Connecticut Mastery Test (“CMT”) when the IEP did not have any goals and objectives or accommodations and modifications regarding test-taking skills?
7. Were the minutes of the December 1, 2008 PPT meeting inaccurate with regard to the Parents’ refusal of accommodations and modifications on the CMT?

8. Did the PPT fail to report concerns about the Student's test-taking skills in the Present Levels of Performance section of the December 1, 2008 IEP?
9. Did the Board unilaterally change the dates for the IEP's Measureable Annual Goals to January 11, 2010 from May 15, 2009 at the January 12, 2009 PPT meeting?
10. Did the Board violate the requirements of the Individuals with Disabilities Education Act ("IDEA") by failing to produce the Functional Behavior Assessment ("FBA")?
11. Did the Board deny the nine-year old Student access to a Free Appropriate Public Education ("FAPE") by not providing transitional services and goals and objectives in the current IEP to prepare him for further education, employment and independent living?
12. Did the Board violate the IDEA by failing to note the Parents' concerns regarding the lack of comprehensive, specific and measurable goals in the minutes of the January 12, 2009 PPT meeting or providing prior written notice on this issue?
13. Did the PPT deny the Parents the opportunity to discuss regression in reading skills?

### **PROCEDURAL HISTORY:**

The Parents mailed a form to the State Department of Education ("SDE") on January 26, 2009 requesting a due process hearing. They attached a five-page complaint setting forth 13 issues, which are summarized above. Hearing Officer ("HO") Exhibit 1. The Board received a copy of the request on January 27, 2009. This Hearing Officer was assigned to the case on January 28, 2009. On February 2, 2009, Attorney Laubin filed an appearance for the Board. She stated that if the case was not resolved at a February 13 resolution meeting, she would file a Motion to Dismiss based on a decision by another Hearing Officer dismissing with prejudice a prior case (#07-562) involving the same parties and issues. On February 9, 2009, a prehearing conference was held with Attorney Laubin and the Father. He argued that the issues in this case arose after the dismissal in the previous case. The Board agreed to file its Motion to Dismiss by February 18, 2009. The Parents were allowed until March 9, 2009 to file their objection to the motion. Hearing dates were agreed on for March 24, 2009, March 26, 2009 and March 27, 2009. The Board requested an earlier hearing date on the issue of CMT accommodations for the Student since the tests were to be administered during the week of March 9. A hearing limited to that issue was scheduled for March 6, 2009. The deadline for mailing of the final decision was April 13, 2009 which the parties agreed to extend until April 20, 2009. On February 16, 2009 the Parents filed a request to postpone or cancel the March 6, 2009 hearing date. The Board's attorney replied in a February 17, 2009 letter that the Board had no objection because the CMT was scheduled for the week of March 2, 2009 and she believed the parties had reached a resolution of that and the other issues at the February 13, 2009 resolution meeting. She asked that the filing schedule on the Motion to Dismiss be delayed. The Parents' postponement request was granted, the Board was

given until March 11, 2009 to file its Motion to Dismiss and the Parents were to file their objection by March 18, 2009.

On March 3, 2009, the Parents advised the Hearing Officer that they had rejected the resolution agreement offered by the Board. On March 10, 2009, Attorney Moses filed an appearance along with the Board's Answer to the Complaint and Motion to Dismiss. The papers were received on March 12, 2009. She requested a cancellation of the March 27, 2009 hearing date because she was not available. On March 13, 2009, Attorney Moses filed a corrected Answer. On March 17, 2009, the Parents filed a "Counter Motion" to the Board's Motion to Dismiss. They also filed a witness list and an exhibit list. The Board filed its witness list and exhibits on March 16. On March 18, 2009, the postponement of the March 27, 2009 hearing date was granted without objection by the Parents. On March 19, 2009, the Parents sent a request for the Hearing Officer to subpoena 14 Board employees to appear as witnesses at the March 24, 2009 hearing. The Hearing Officer wrote to the parties advising the Parents of the SDE regulation requiring notice to the Board five school days prior to the scheduled hearing date. The Parents were further advised that if the Board refused to produce the witnesses after appropriate notice and an offer of proof that they had relevant evidence to offer, the SDE could then be asked to issue subpoenas. On March 20, 2009, the Board's attorney sent a letter stating that she had not received the Parents' witness list of March 17, 2009 that the Board had not received the requisite notice, that several witnesses were not Board employees and that the Board had objections to most of the individuals being called as witnesses. She also stated that she did not intend to present any witnesses on the Motion to Dismiss.

On March 23, 2009, the Hearing Officer received the Parents' Motion for Continuance, which was dated March 20, 2009. They asked to postpone the hearing until such time as they could obtain subpoenas for witnesses. They stated that they were prepared to present their Counter Motion to the Board's Motion to Dismiss on March 24, 2009. On March 23, 2009 the Parents filed a Motion to Compel Witness Production. On March 23, 2009 the Board filed a Motion to Strike and Motion in Limine, a Memorandum of Law on those motions, an Objection to Motion for Continuance, and a Response to Counter Motion. On March 24, 2009, the Parents filed a Response to Response of the Board to [Parents'] Counter Motion to Board's Motion to Dismiss and a Counter Motion to Strike and Counter Motion in Limine.

### **PRELIMINARY MOTIONS:**

The hearing convened on March 24, 2009. The Parents' January 26 complaint was entered into the record as Exhibit HO-1. The Board objected to all of the Parent Exhibits. They were marked for identification only. The Parents were advised that each exhibit would have to be offered and specific Board objections would then be ruled on. None of the Parent exhibits were admitted into evidence at the hearing, therefore, they were not considered in this decision. The Parents had no objection to the Board's Exhibits B-1 through B-327, which were all entered into evidence as full exhibits. Argument was heard first on the Board's Motion to Strike and Motion in Limine and the Parents' Counter Motion addressed to those. The Board's Motions were granted. Following argument, the Parents' Request to Subpoena Witnesses; Motion for Continuance; and Motion to Compel Witness Production were denied. The Parents were given the opportunity to show that they needed testimony of the witnesses in question to defend the Motion to Dismiss.

The Parents were permitted to present testimony from Ann Leffert, Elementary Special Education Coordinator, Fairfield public schools. Since Ms. Leffert was in attendance at the hearing, there was no need to grant the Parents a continuance in order to obtain a subpoena. The Parents failed to show that any of the other prospective witnesses on their list had any relevant, non-cumulative evidence to offer on the Motion to Dismiss.

### **SUMMARY AND RULING ON MOTION TO DISMISS:**

The Board presented argument on its Motion to Dismiss and relied on the legal arguments in the March 10, 2009 Memorandum of Law supported by its Exhibits. The Board seeks dismissal of Issues 1, 2, 4 and 12 in whole or in part because they are barred by the dismissal with prejudice of Case #07-562. The Board seeks dismissal of Issues 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 because they are “non-issues” and do not present a dispute between the parties requiring adjudication. The Parents did not testify, but relied on written and oral argument of their position by the Father. Certain portions of the Parents’ Counter Motion to Board Motion to Dismiss dated March 16, 2009 were stricken from the record and were not considered in this decision. Specifically, section II and its referenced Exhibit 1 and section VI, Issue #9, paragraphs two and three on page 12 were stricken. Ms. Leffert’s testimony was also considered in ruling on the Motion to Dismiss.

#### A. RES JUDICATA

The complaint in Case #07-562 was filed on July 8, 2008 and raised numerous issues. Exhibit B-206. Hearing Officer Jerman listed the issues, which as relevant to this case, is Issue 2: “Was the program offered by the Board of Education for the 2008-2009 school year appropriate and did it provide a free appropriate public education according to IDEA?” She noted that: “Parent challenges the appropriateness of the developed annual goals, that they believe the goals fail to meet the specification of the IDEA as written because they are not measurable, particularly with regard to speech and language.” Case #07-562 was dismissed with prejudice because the Parents were not prepared to present their case when the hearing convened and their motions for a continuance or to withdraw the case without prejudice were denied. The Parents did not appeal the decision, which was issued on October 3, 2008. The decision, therefore, became final after the expiration of the appeals period.

The doctrine of res judicata applies to final administrative decisions of a special education due process hearing officer. Letter to Breecher, 16 IDELR 1401, 1402 (OSEP 1990). Three elements must be satisfied to invoke the doctrine: a final judgment on the merits of the prior complaint, a subsequent complaint involving the same parties, and a subsequent complaint based on the same claims. D.R. by M.R. and B.R. v. East Brunswick Board of Education, 20 IDELR 957, 962 (D.N.J. 1993). The Board relies on Rule 41(b) of the Federal Rules of Civil Procedure, which governs involuntary dismissals for failure to prosecute. Federal courts have held that such a dismissal “operates as an adjudication on the merits” for purposes of determining whether a new case can be re-filed on the same cause of action. Pedrina v. Chun, 906 F. Supp. 1377, 1401 (D.Hawaii 1995). The Parents agreed at the hearing that their January 26, 2009 complaint was barred by res judicata on any issues that were dismissed with prejudice on October 3, 2008 in Case #07-562. They argued that the issues raised in the January 26, 2009 complaint are not barred by res judicata because they arose after the earlier case was dismissed. The hearing was continued on

March 26, 2009 to allow the Parents further time to explain their position and to present Ms. Leffert's testimony.

Issue 1 [Did the Board provide the Student with an IEP for the 2008-09 school year, which meets his needs for speech and language in the receptive/expressive realm?] is dismissed because it is barred by res judicata. The Parents' attempt to avoid this result by claiming that they only became aware of the methodology to be used by the Board at the PPT meetings on October 6 and December 1, 2008 is unavailing. They objected to the use of the social skills program at the January 12, 2009 PPT meeting because it was "not designed to address [his speech and language] deficits." The PPT refused the Parents' request to revise the IEP to add a specific goal for expressive and receptive language because the "school team has incorporated objectives in the social communication area." Exhibit B-309 at 12. The Parents claimed that the Board's methodology was not based on a "scientific, research based, peer reviewed program." [Parents'] Counter Motion to Board's Motion to Dismiss at 6. This Hearing Officer does not have jurisdiction to order the Board to use any particular methodology.

Issue 2 [Was the PPT correct when it noted problem solving was a "strength" on the Present Levels of Academic Achievement and Functional Performance section of the IEP?] is dismissed because it is barred by res judicata. The notation of problem solving as a strength was unchanged from the June 13, 2008 IEP, which was the basis for the complaint in Case #07-562.

Issue 4 [Did the IEP address the Student's needs in the area of narrative skills?] is dismissed because it is barred by res judicata. This issue is also moot because on January 12, 2009, the PPT added a goal and two objectives to address the Parents' request. Exhibit B-309 at 28.

Issue 12 [Did the Board violate the IDEA by failing to note the Parents' concerns regarding the lack of comprehensive, specific and measurable goals in the minutes of the January 12, 2009 PPT meeting or providing prior written notice on this issue?] is dismissed because it is barred by res judicata. See Ruling on Case #07-562 at 1. It is also noted that the PPT meetings to develop an IEP for 2008-09 lasted many hours. Exhibit B-309 at 2-10 summarizes the meetings held in May, June, September, October and December 2008 and January 2009. The May 15, 2008 PPT meeting convened at 8:35 a.m. and adjourned at 5:10 p.m.

## B. REMAINING ISSUES

Issue 3 [Is the Board required to provide math tutoring at the Student's home rather than at school?] is dismissed because the Hearing Officer lacks jurisdiction to require the Board to provide services at the Student's home rather than at school. The location of service delivery is within the discretion of the Board. Concerned Citizens for the Continuing Education at Malcolm X School v. New York City Board of Education, 552 IDELR 147, 629 F.2d 751 (2d Cir. 1980), cert. denied, 449 U.S. 1078(1981).

Issue 5 [Did the IEP provide for three hours per day of paraprofessional support and did the Board unilaterally change the services to two hours per day?] is dismissed. Paraprofessional support was added to the IEP on January 12, 2009. Exhibit B-309 at 2. The Parents claim that 15

hours were promised at this PPT meeting and that the Board unilaterally changed it to 10. Ms. Leffert's testimony clarified this issue. At the PPT meeting, the team agreed to provide paraprofessional support during lunch, recess, art, gym and one hour per day in the afternoon in the regular classroom. Id. At the hearing, the Parents agreed that was correct. After the meeting, the staff computed the time based on the locations for support. Testimony of Ms. Leffert. Lunch and recess combined equal 30 minutes daily, for a weekly total of 150 minutes. Art is one hour per week and gym is two 30 minutes periods per week, for a total of 120 minutes per week. The total hours for these activities are 4.5 hours per week. One hour of daily afternoon support adds five hours, for a total of 9.5 hours per week of paraprofessional support. Id. The 10 hours recorded on the IEP document is accurate. There is no evidence to support Parents' claim that three hours per day or 15 hours per week was promised. Further, the Parents requested 10 hours per week at the December 1, 2008 PPT meeting. Exhibit B-275.

Issue 6 [Did the Board improperly recommend accommodation and modification for the CMT when the IEP did not have any goals and objectives or accommodations and modifications regarding test-taking skills?] and Issue 7 [Were the minutes of the December 1, 2008 PPT meeting inaccurate with regard to the Parents' refusal of accommodations and modifications on the CMT?] are dismissed as moot. The CMT was conducted between March 3 and 17, 2009. The Student took the tests without accommodation or modification pursuant to the Parents' request. There is no CMT scheduled for the remainder of the 2008-2009 school year.

Issue 8 [Did the PPT fail to report concerns about the Student's test-taking skills in the Present Levels of Performance section of the December 1, 2008 IEP?] is dismissed as moot. The PPT added "executive functioning," "self-regulation and self-monitoring" as areas of concerns/needs at the January 12, 2009 meeting pursuant to the Parents' December 1, 2008 requests. Exhibits B-279 at 1-5 and B-309 at 14-15. Those terms encompass test-taking skills.

Issue 9 [Did the Board unilaterally change the dates for the IEP's Measureable Annual Goals to January 11, 2010 from May 15, 2009 at the January 12, 2009 PPT meeting?] is dismissed. The 2008-09 IEP was finalized at the January 12, 2009 PPT meeting following a series of PPT meetings on May 15, 2008 June 13, 2008 September 3, 2008 and September 22, 2008 October 6, 2008 and December 1, 2008. Exhibit B-309 at 2-10; and Testimony of Ms. Leffert. At the October 6, 2008 meeting, the Parents gave permission to implement the June 13, 2008 IEP as of October 7, 2008. Exhibit B-309 at 4. The June 13, 2008 IEP was scheduled to end on May 14, 2009. Exhibit B-204 at 31. The next annual review date was scheduled for May 15, 2009. Id. at 1. The PPT continued to discuss additional goals at the PPT meetings following the June 13, 2008 meeting. Exhibit B-309 at 2-7. Three goals were added at the January 12, 2009 PPT meeting all at the Parents' request. They were Goals 1, 5 and 8. Id. at 17-18, 24 and 28. Some changes in wording were also made in other goals and objectives. The service pages indicate that the end date of the IEP is January 11, 2010. Id. at 36-37. The next annual review date is set forth as January 11, 2010. Id. at 1. These dates were generated by the computer. Testimony of Ms. Leffert. The Board will schedule an annual review meeting in the spring 2009 after confirming dates with the Parents. Id. Progress reports on the current IEP are scheduled to be reported on December 12, 2008, March 27, 2009 and June 18, 2009. The PPT will plan an IEP for the summer and the 2009-10 school year. Id.

Issue 10 [Did the Board violate the requirements of the IDEA by failing to produce the FBA?] is dismissed as moot. The Parents signed a consent for this assessment by an outside consultant, Center for Children with Special Needs, on October 6, 2008. Exhibit B-245. The first meeting with the team and the consultant was scheduled on December 3, 2008. Exhibit B-309 at 3. The FBA was recently completed and a PPT meeting was scheduled on March 23, 2009 to discuss it. The Parents asked that the meeting be canceled because of this hearing. The Parents agreed to withdraw this claim at the hearing, but when asked for a withdrawal with prejudice at the Board attorney's request, they declined.

Issue 11 [Did the Board deny the nine-year old Student access to a FAPE by not providing transitional services and goals and objectives in the current IEP to prepare him for further education, employment and independent living?] is dismissed. The IDEA does not require transition planning until the IEP to be implemented after a student's 16<sup>th</sup> birthday. 34 C.F.R. Section 300.320(b). The Student's date of birth is November 10, 1999.

Issue 13 [Did the PPT deny the Parents the opportunity to discuss regression in reading skills?] is dismissed. The Parents withdrew this claim with prejudice at the hearing on March 26, 2009.

The Board requested at the close of the hearing that its Motion to Dismiss be granted with prejudice in the event that the Parents file another complaint regarding the current school year.

**FINAL DECISION AND ORDER:**

It is ordered that this case shall be dismissed with prejudice.