STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. East Haven Board of Education

Appearing on behalf of Student:	Pro se
Appearing on behalf of the Board:	Attorney Leander A. Dolphin Shipman & Goodwin, LLP One Constitution Plaza Hartford, Connecticut 06105-1919
Appearing before:	Attorney Robert L. Skelley, Hearing Officer

Final Decision and Order

Issues:

1. Whether the District had a basis of knowledge that the student was a child with a disability prior to the incident on November 1, 2011;
2. Whether the Hearing Officer has jurisdiction to hear this matter;
3. Should the matter be dismissed for the Parent's failure to attend the resolution meeting.

Procedural History:

This matter is before the Hearing Officer pursuant to the Request for Due Process hearing, filed by the Parent and received by the Board on December 16, 2011.

The initial request for Due Process disagreed that the child's behavior was not a manifestation of his disability, as found by a PPT (Planning and Placement Team) meeting held on December 5, 2011. The Parent was disputing the proposed "full 180" expulsion of her child that was to be determined at an expulsion hearing to be held on December 20, 2011. The

resolution sought by the Parent was for the school to "change my child's IEP [Individualized Education Program], not expel him".

A pre-hearing conference was held on December 21, 2011, which included the Parent and Mary Acquarulo, Director of Student Services, East Haven Public Schools, to discuss the issues for the Due Process Hearing. At that pre-conference hearing it was determined that at the time of the incident on November 1, 2011, the student had neither an IEP nor a §504 plan in place. A §504 plan was put into place pursuant to a meeting held with the Parent and the school on December 5, 2011, finding the student eligible for §504 services. Subsequent to the §504 eligibility meeting and on the same day, a manifestation hearing was held in which it was determined that the behavior in question was not a manifestation of the child's disability (chronic lumbar strain, right/left pes planovalgus food deformities, patello femoral pain syndrome). The District voiced objection to a due process hearing, citing that this hearing officer did not have jurisdiction to hear a §504 due process complaint. The Parent stated that she was claiming an IDEA violation (Individuals with Disabilities Education Improvement Act). Interim orders were issued were the Parent was instructed to file an amended complaint by January 5, 2012 to more accurately reflect her complaint, and the District was instructed that their objection would be treated as a Motion to Dismiss, requiring a formal motion and Memorandum of Law in support of that motion. A due process hearing date was set for January 13, 2012.

On December 22, 2012 the District requested the Parent to attend a resolution meeting scheduled either for that day, or the following day, December 23, 2012. The Parent did not attend although the reasons for that are in dispute between the parties, and the District held the resolution meeting on December 22, 2012 without the Parent.

Due to questions raised by the District's counsel concerning the Interim Orders, on December 27, 2011, the Hearing Officer issued a Clarification of Interim Orders, providing that the District would have until January 10, 2012 to provide the Motion to Dismiss and Memorandum of Law. A motion by the District to delay the due process hearing scheduled for January 13, 2012 was denied.

The Parent filed an Amended Complaint on January 1, 2012, along with over one hundred exhibits. The Amended Complaint set forth a plethora of issues citing violations of state and federal laws and regulations. Key among those issues were violations of Child Find, procedural violations under IDEA, violations of 34 C.F.R. 300.534 with a basis of knowledge by the District and a failure by the District to provide the procedural safeguard notices relevant under both state and federal laws. The complaint further states violations of the East Haven Board of Education policies surrounding procedural issues when expulsion of a student is being sought.

On January 9, 2012, the District requested a second prehearing conference be convened to clarify the issues presented in the Amended Complaint. A second prehearing conference was held on January 11, 2012. The parties agreed that the issues to be discussed at the January 13, 2012 hearing would be restricted to jurisdiction, and pending the resolution of that issue, the resolution meeting. The District renewed its Motion to Dismiss for lack of jurisdiction, and further that the complaint should be dismissed because the Parent did not attend the resolution meeting. It was further agreed by the parties that should jurisdiction be found, the resulting hearing process would proceed along a normal, and not expedited, hearing track. On January 13, 2012 a hearing was convened with witnesses and exhibits presented by both parties.

Summary:

The student is 17 years of age, with an academic standing of a sophomore, but in his third year of high school. The student was involved in the unauthorized transfer of his personal medication to another student, during school hours and on school property, on the afternoon of November 1, 2011. Subsequent to being informed by an uninvolved student that the student had provided another student with his medication that was then ingested, an investigation by the District ensued. The results of that investigation led to a recommendation for expulsion of the student for violating a publicized District policy. The Parent requested a PPT meeting but the District indicated that it would not hold a PPT as the student was not identified as receiving special education at that time; the District was, however, willing to hold an eligibility meeting on December 5, 2011. The District conducted no evaluations of the student but did consider an IEP from May 2007. That IEP exited the student from special education services. The student was found to be a child with a disability with a resulting placement of the student on an accommodation plan in accordance with Section 504 of the Rehabilitation Act 1973 (§504 plan). Immediately following the eligibility meeting the District held a Manifestation Determination hearing to determine if the behavior in question was related to the student's disability. It was determined by the §504 team that the behavior in question was not a manifestation of the disability. The District then scheduled a December 20, 2011 meeting, held an expulsion hearing in accordance with District policy and the student was subsequently expelled from the East Haven High School. Prior to the expulsion hearing, the Parent requested an expedited evaluation of the student. On December 14, 2011 the Parent filed a request for a due process complaint; the complaint was received by the District on December 16, 2011. The District disagreed that the complaint should be an expedited hearing or that it should be heard under IDEA.

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS, Institute, Inc. v. S & H Computer Systems, Inc.* 605 F.Supp. 816, (March 6, 1983); and *Bonnie Ann F. v. Callallen Independent School District*, 835 F. Supp. 340 (S.D. Tex. 1993).

Any motions not previously ruled on are hereby denied.

Statement of Jurisdiction:

This matter was heard as a contested matter pursuant to *Connecticut General Statutes* (CGS) §10-76h and related regulations, 20 *United States Code* (USC) §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedures Act ("UAPA"), CGS §§ 4-176e to 4-178, inclusive, §§ 4-181a and 4-186.

Findings of Fact:

1. On November 1, 2011, the student was not identified as a child with a disability either through IDEA or the Rehabilitation Act, §504. (record)
2. The student had been identified as a child with a disability, under IDEA, in the spring of 2004, as a Student with Emotional Disturbance while he was in the 4th grade at the Carbone School. (exh. B – 1)
3. The Carbone School is part of East Haven Public Schools. (exh. B1, pg 4 of 10)
4. The student had been exited from special education and related services in May, 2007. (exh. B-1, pg. 2 0f 10)
5. The student has been a student of the East Haven Public Schools for more than five years. (record)

6. The East Haven High School administration produces a continuous absentee report that is provided to the guidance department and guidance counselors. (Test. G. Hoeflich)
7. Ms. Hoeflich is a guidance counselor at East Haven High School, with the student as one of her assigned students. (Test. G. Hoeflich)
8. Ms. Hoeflich testified that she read the student's academic file, which contained the 2007 IEP. (Test. G. Hoeflich)
9. Ms. Hoeflich became aware, through the absentee report generated by East Haven High School, that the student had an excessive absentee record for the 2011-2012 academic years. (Test. G.Hoeflich; D. Esteban)
10. Ms. Hoeflich received facsimiles, prior to the November 1st incident, from the student's orthopedic physician that discussed the student's medical situation. (Test. G. Hoeflich, D. Esteban)
11. Ms. Hoeflich made telephonic contact with the student's parent to address the excessive absences on more than one occasion through the months of September and October, 2011. (Test. G. Hoeflich)
12. Ms. Hoeflich, at some point in October, sent a certified letter to the home of the student, which was returned undelivered. (Test. G. Hoeflich)
13. Ms. Hoeflich attempted to arrange a meeting between the student, his parent, herself and the assistant vice principal to address the excessive absences and failing grades. (Test. G. Hoeflich)
14. The November 1, 2011 meeting, scheduled for 11:00am was the final attempt and actual meeting date between the District and the parent and student. (Test. G. Hoeflich, R. Proto, Student)

15. Ms. Hoeflich sought the assistance of a more seasoned guidance counselor, Mr. Esteban, to assist with the filing of a Family with Service Needs Referral. (Test. G. Hoeflich, D. Esteban)
16. Mr. Esteban became aware of the excessive absences of the student while in the process of completing and filing the Family with Service Needs referral. (Test. D. Esteban)
17. Mr. Esteban was aware that the student's physician had notified the school through facsimiles received by Ms. Hoeflich that the student had medical issues dealing with an orthotic impairment and severe headaches. (Test. D.Esteban)
18. The assistant vice-principal, Mr. Proto, through conversations with Ms. Hoeflich, was aware of the excessive absences, the loss of academic credits and that the student had several medical issues. (Test. R. Proto)
19. The student, his mother, Mr. Proto and Ms. Hoeflich met at 11:00 am on November 1, 2011, prior to the incident occurring which resulted in expulsion of the student. (Test. R. Proto, Student)
20. Mr. Proto was aware that during that morning meeting on November 1, 2011, part of the discussion involved the possibility of the student having ADD. (Test. R. Proto)
21. Mr. Proto was aware that a further evaluation by the orthopedic physician was forthcoming for the student in the next week. (Test. R. Proto)
22. Mr. Proto is in a supervising position for guidance counselor Hoeflich.
23. The District did not, and was not in the process of, evaluating the student on November 1, 2011. (Test. Student)

24. The parent and the student did not, and had not, specifically asked in writing for an evaluation pursuant to §§ 300.300 through 300.311, for eligibility for special education or related services on or prior to, November 1, 2011. (Test. Student, record)
25. The District was aware of the excessive absenteeism of the student by way of their own absenteeism reports for the months of September and October. (Testimony, G.Hoeflich; D. Esteban)
26. The Student failed seven of nine classes, received a "D" in one, and failed to participate in the ninth class as evidenced by the First Quarter Report Card (exh. P-33).
27. The class that the student failed to participate in was physical education (exh. P-33)
28. The student was absent for an excessive amount of time during the first quarter of the academic year (20 out of 40 days), amounting to more than twice the allowable limit for an entire year. (Test. G. Hoeflich)
29. The District was aware that the student had previously been identified as a special education student in the district as evidenced by the 2007 IEP and Triennial Evaluation offered into evidence by the District. (exh. B-1) The District, through teachers and supervising personnel, were aware of the student's pattern of behavior and resulting effect on the student's ability to receive a free and appropriate education.
30. The parent has satisfied the third prong of 34 C.F.R. 300.534, in that the District had a basis of knowledge that the student should have been evaluated to determine eligibility to receive special education or related services.
31. The District did not evaluate the student to determine if he was eligible for special education or related services despite having a basis of knowledge that the student may be eligible for special education or related services under IDEA.

32. The student qualified to be afforded the protection under IDEA in accordance with 34 C.F.R. 300.534.
33. On December 16, 2011 the District received the complaint and request for a due process hearing. (exh. H.O. 1)
34. On December 22, 2011 the District held a resolution meeting, the parent declined to attend the meeting. (exh. B-9)

Conclusions of Law:

1. CGS §10-76h and related regulations at RCSA §10-76h (Regulations of Connecticut State Agencies), authorize an impartial hearing officer to conduct a special education hearing and to render a final decision in accordance with §§ 4-176e through 4-180a, inclusive, and § 4-181a of the CGS, 20 U.S.C. § 1415(f) and related regulations at 34 CFR §§300.511 through 300.520 also authorize special education hearings.
2. IDEA opens the door of public education to children with disabilities, *Board of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 192 (1982). Under IDEA, a local education agency (LEA), such as the District, must provide to each qualifying student a free and appropriate public education (FAPE) in the least restrictive environment (LRE) including special education and related services. 20 U.S.C. §1401(18).
3. The purpose of IDEA is to ensure that all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for further education, employment and independent living and to "ensure that the rights of children with disabilities and parents of such children are protected ..." 20 U.S.C. §1400 (d)(1).

4. Under the IDEA, all public education agencies are also required to satisfy their "Child Find" obligation through policies and procedures that ensure that: "All children with disabilities residing in the state, including children who are homeless or wards of the state and children with disabilities attending private schools, *regardless of the severity of their disability*, and who are in need of special education and related services, are identified, *located and evaluated* and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services." [emphasis added] 20 U.S.C. §1412(a)(3)(A). Child Find duty extends to all children suspected of having a disability and in need of special education under 34 C.F.R. §300.8 even though they are advancing from grade to grade. 34 C.F.R. §300.11(c)(1). The duty is triggered when the local education agency has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. *New Paltz Central Sch. Dist. v. St. Pierre*, 307 Supp. 2d 394, 400 (N.D.N.Y. 2004). In relation to this case, no evidence was presented by the District that the student was evaluated within the past four years for identification for special education and related services. The District did offer as an exhibit an IEP (exh. B-1) exiting the student from special education and related services and containing a triennial evaluation dated May 29, 2007. There were no other evaluations submitted by the District in relation to this student for the time period in question.
5. "Special education" means "specifically designed instruction at no cost to parents to meet the unique needs of a child with a disability." 20 U.S.C. §1401(25).
6. "Related services" means: transportation, and such developmental, corrective, and other supportive services (including speech/language pathology and audiology services,

psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, orientation and mobility services, and medical services, except that such medical services can be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, including the early identification and assessment of disabling conditions in children. 20 U.S.C. §1401(22).

7. The standard for determining whether FAPE has been provided involves a two-pronged inquiry: have the procedural requirements of IDEA been reasonably met, and, second, is the IEP "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-7 (1982). The District did not offer any evidence that the educational opportunity afforded the student was appropriate or was conveying educational benefit. There was evidence submitted that there was little to no educational benefit derived by the student in that he was receiving a flunking grade on seven out of nine classes, a "D" in one class, and not participating at all in the ninth class (physical education). However, neither the lack of evidence in support for the educational program provided, nor the evidence of the student's lack of passing is determinative of anything without proper evaluations upon which to gauge the student's performance. One cannot determine if the lack of attaining a passing grade is due to a lack of a proper educational program on the District's part, an undiagnosed special education need, or a lack of motivation and effort on the students' part.

8. RCSA §10-76d-6 provides in relevant part: "Determination of a child's eligibility to receive special education and related services shall be based on documented evidence, as

required by these regulations, that the child requires special education." RCSA §10-76d-7 provides in relevant part: "Before a child is referred to a planning and placement team, alternative procedures and programs in regular education shall be explored and, where appropriate, implemented." There was no evidence presented at the January 13, 2012 hearing that the District had explored or offered any alternative procedure or program in regular education to address the documented evidence that the student had excessive absences and was failing all of his academic classes. The testimony of both guidance counselors showed that the District chose to file a Family with Service Needs ("FWSN") referral to the Juvenile Court prior to having a meeting with the student and Parent. A FWSN is not an alternative procedure or program in regular education.

9. RCSA 10-76d(a)(1) provides in relevant part: "In accordance with the regulations and procedures established by the Commissioner of Education and approved by the State Board of Education, each local or regional board of education shall provide the professional services requisite to identification of children requiring special education, identify each such child within its jurisdiction, determine the eligibility of such children for special education pursuant to sections 10-76a to 10-76h, inclusive...". This regulation is the equivalent state mandate for child find in accordance with IDEA. To fulfill the requirements for §§ 10-76d-6 and 10-76d-7, it is axiomatic that §10-76d(a)(1) must be satisfied. The District offered no evidence, short of a four year old Triennial evaluation, that it had attempted to, or had evaluated the student prior to the filing of the FWSN, despite being aware of the excessive absences, medical issues, and loss of credits for the student.

10. 34 CFR §300.534 Protections for children not yet eligible for special education and related services states:

(a) General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

The student qualified to be afforded the protection under IDEA in accordance with 34 C.F.R. 300.534.The parent has satisfied the third prong of 34 C.F.R. 300.534 in that the District is found to have had a basis of knowledge that a pattern of behavior (the excessive absences, failing grades and loss of credits) demonstrated by the child had been expressed specifically

by the teacher or other personnel of the LEA (guidance counselor Hoeflich) directly to other supervisory personnel of the agency (asst. vice principal Proto) so that the student should have been evaluated to determine eligibility to receive special education or related services.

11. Procedural safeguards are set forth in 20 U.S.C. §1415 and C.F.R. §§ 300.500 *et seq.* Failure by the Board to develop an IEP in accordance with procedures mandated by IDEA, in and of itself, can be deemed a denial of FAPE. *Amanda J. ex rel Annette J. v. Clark County Sch. Dist.* 267 F.3d 877, 9th Cir (2001). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free and appropriate public education only if the procedural inadequacies: (I) impeded the child's right to a free and appropriate public education; (II) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free and appropriate public education to the parent's child; or (III) caused a deprivation of educational benefits. (iii) Rule of construction. Nothing in this subsection shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this subsection. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513. "Only procedural inadequacies that cause substantial harm to the child or his parents – meaning that the individual or cumulative result is the loss of educational opportunity or seriously infringe on a parent's participation in the creation or formulation of the IEP – constitute a denial of FAPE." *Matrejek v. Brewster Cent. Sch. Dist.* 471 F.Supp. 415, 419 (S.D.N.Y. 2007). Given that the District did not attempt to obtain evaluations of the student for either an orthotic impairment necessitating special education or related services, nor evaluations based on the total failure in all classes offered and the excessive absences but instead chose to refer the child for Juvenile Court involvement for truancy despite its knowledge of these issues, it is found that the District

committed procedural inadequacies that caused a loss of educational opportunity for this student. These inadequacies resulted in the denial of FAPE for this student.

12. 34 C.F.R. 300.510(2)(b)(4) allows that if "the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in §300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint." The District is required to hold a resolution meeting within seven (7) days of receipt of the complaint. 34 C.F.R. 300.506. The District notified the Parent on December 22, 2011, the sixth day, of a resolution meeting to be held either that day, or the next day. The Parent stated on the record but not through direct testimony that she was under the belief that the hearing officer had stated that the resolution meeting was not required and for that reason she did not attend, also stating that she was unable to attend regardless. Given that there was less than 24 hours notice for the meeting to be held on December 22, 2011 which is not considered by the hearing officer to be "reasonable", and the mistaken belief of the Parent that the resolution meeting was not required, the hearing officer elects not to dismiss the matter and the request of the District to dismiss the matter for the Parent's failure to attend the resolution meeting is denied.

Final Decision and Order

It is therefore ordered that:

1. The District's Motion to Dismiss is denied.
2. The District will conduct an expedited evaluation(s) of the student to determine the student's eligibility to receive special education or related services in accordance with the procedural requirements of IDEA.

3. Upon completion of the evaluation process and dependent upon a finding of a disability warranting special education services, the District will create an appropriate Individualized Education Program (IEP).
4. Following the creation of an appropriate IEP, if one is so created, the District will convene a manifestation determination hearing to assess if the behavioral incident of November 1, 2011 is a manifestation of the child's disability as outlined in the IEP.
5. During the pendency of the evaluation, and in consideration of the seriousness of the alleged incident, the possible creation of an IEP and resulting manifestation determination hearing, the student will be provided appropriate homebound instruction, for his protection and the protection of other students, in accordance with the provision of a free and appropriate public education.