

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Somers Board of Education

Appearing on behalf of the Parent:	Pro Se
Appearing on behalf of the Norwalk Board:	Attorney Michael P. McKeon Pullman & Comley, LLC 90 State House Square Hartford, CT 06103-3702
Appearing before:	Justino Rosado, Esq. Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Was the program provided by the Board for the 2013-2014 school year appropriate and did it provide the Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?
2. Was the unilateral placement of the Student at White Oaks Academy for the 2013-2014 school year appropriate and did it provide a meaningful education?
3. Is the Student entitled to compensatory education for the denial of FAPE?

JURISDICTION:

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

PROCEDURAL HISTORY:

On May 26, 2015, the Board received notice of the Parent request for due process. An impartial hearing officer was appointed on May 26, 2015; a pre-hearing conference was held on June 4, 2015.

On July 7, 2015, the Board of Education filed a Motion to Dismiss. The motion challenged the hearing officer's subject matter jurisdiction. The Parent filed a timely objection to the motion. On September 17, 2015 a hearing was held on the Motion to Dismiss.

The parties agreed to mediate the matter. The mediation was not successful. Hearing dates of July 27, 28 and September 17, 2015 were chosen by the parties. Only the September 17, 2015 hearing date went forward; the parties canceled the other hearing dates.

The Board of Education presented Exhibits¹ 1 through 4, which are full exhibits of the hearing. Parent presented Exhibits² 1 through 5, which are full exhibits of the hearing.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. *SAS Institute Inc. v. S. & H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D.Tenn. 1985) and *Bonnie Ann F.v. Callallen Independent School Board*, 835 F.Supp. 340 (S.D.Tex. 1993).

The date for the mailing of the Final Decision and Order was extended to accommodate the hearing dates and mediation. The date for mailing the Final Decision and Order is October 31, 2015.

SUMMARY:

The Student has been identified with Specific Learning Disability and is entitled to receive FAPE as defined in the Individuals With Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statutes §10-76a et seq. The Parent rejected the program offered by the Board for the 2012-2013 school year. The Parent requested reimbursement for a placement at White Oaks Academy in Massachusetts. The Board refused the Parent's request. The Board filed a timely Motion to Dismiss challenging the jurisdiction of the hearing officer and/or that the matter was res judicata. The Motion to Dismiss was Granted.

FINDINGS OF FACT:

1. The Student is diagnosed with Specific Learning Disability and eligible to receive special education and related services as defined in the Individuals with Disabilities Education Improvement Act ("IDEA") 20 U.S.C. §1401 et seq. and Connecticut General Statutes §10-76a. (B-3).
2. At the April 2, 2013 planning and placement team (PPT) meeting, the team recommended a diagnostic placement at the Intensive Education Academy (IEA). The Parent agreed to explore IEA but the Student was never placed. (B-3, Testimony of Director of Pupil Services (DPS))

¹ Hereafter Board's Exhibits will be noted as "B" followed by the number of the exhibit.

² Hereafter Parent's Exhibits will be noted as "P" followed by the number of the exhibit.

3. The Parent placed the Student at White Oaks Academy in Massachusetts as a privately funded unilateral placement. White Oaks Academy does not have diagnostic placements for private placements. There was no PPT meeting to place the Student at White Oaks Academy or a review of his individualized educational program with White Oaks personnel. (Testimony of White Oaks Academy Headmaster)
4. The placement at White Oaks Academy was not approved by the PPT. The Student is currently attending the Board's school. (Testimony of Director of Pupil Services)
5. On April 2, 2013, the Parent gave notice of her intended placement of the Student at White Oaks Academy. On May 3, 2013, the Parent informed the district that she had placed the Student at White Oaks Academy. (P-No. 1, Testimony of Parent, P-No. 3)
6. The student was enrolled in White Oaks Academy on May 2, 2013, as a day placement, and remained a Student there for thirty-six school days. The Student's last day of school was June 24, 2013. The Headmaster did not regard the placement as a diagnostic placement. (Hearing Officer Exhibit³ No. 2, Testimony of White Oaks Academy Headmaster)
7. There was a PPT meeting scheduled for June 21, 2013. The PPT was not held because the Board and Parent's attorney decided to confer in an attempt to resolve the issues between the parties. (Testimony of Director of Pupil Services, P-No 4)
8. The Parent had previously filed a request for due process, Student v. Somers Board of Education Case No. 14-0358. She was seeking reimbursement for a unilateral diagnostic placement at White Oaks Academy. (Testimony of Director of Pupil Services, B-2)
9. The hearing officer in the prior request for due process, *Supra*, granted the Board's request to dismiss the hearing. The dismissal was without prejudice. (B-3)
10. On July 7, 2015, the Somers Board of Education filed a Motion to Dismiss. The motion requested dismissal for failure to state a claim on which relief can be granted and challenged the hearing officer's subject matter jurisdiction. (H.O.-4)

CONCLUSIONS OF LAW and ARGUMENT:

1. It is undisputed that the Student is eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 1401, et seq. FAPE is defined as special education and related services that are provided at public expense, meet the standards of the state educational agency, include an appropriate school education, and that are provided in conformity with the IEP. 20 U.S.C. §1401(8).
2. Once a Board has identified a child as eligible for IDEA services, it must create and implement an IEP based on the student's needs and areas of disability. Boards are not,

³ Hereafter Hearing Officer's Exhibits will be noted as "H.O." followed by the number of the exhibit.

however, required to “maximize the potential” of each handicapped student. *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n. 21 (1982)). Instead, to satisfy the IDEA, the Board must offer an IEP that is “reasonably calculated” to enable the child to receive “meaningful” educational benefits in light of the student's intellectual potential. *Id.* at 206-207. Once the Board has designed and administered an IEP that is reasonably calculated to enable the receipt of meaningful educational benefits, it has satisfied its obligation to provide the child with FAPE.

3. If the Parent or the Student is not satisfied that the program will not provide FAPE, they can challenge the educational placement. 34 C.F.R. §300.507(a)(1). It is the Board's responsibility of proving, by a preponderance of the evidence, the appropriateness of the program and placement it has provided to the Student. Conn. Gen. Stat. (CGS) §10-76h-14(a).
4. On May 26, 2013, the Parent challenged the educational placement of the Student, and the Board filed a Motion to Dismiss the matter for failure to state a claim on which relief can be granted and challenged the hearing officer's subject matter jurisdiction. A motion to dismiss tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Atchinson v. District of Columbia*, 73 F.3d 418, 422 (D.C. Cir. 1996). In deciding such a motion, the court must accept all of the complaint's well-pled factual allegations as true and draw all reasonable inferences in the non-movant's favor. See *Scheuer*, 416 U.S. at 236. The court need not accept legal conclusions cast in the form of factual allegations. *Lowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).
5. The Board alleges that the Parent's claim for due process should be dismissed because the same issues had been presented before in *Student v. Somers Board of Education*, Case No. 14-0358, and the Hearing Officer had dismissed the matter without prejudice making the current case before this hearing officer res judicata. (Findings of Fact No. 8 and 9)
6. The Hearing Officer's Decision and Order, in *Supra*, “Dismissed the complaint without prejudice as the Board's Motion to Dismiss had been granted.” (B-3) In the Motion to Dismiss in the prior due process complaint, *Supra*, the issue was reimbursement for the unilateral diagnostic placement by the Parent at White Oaks Academy. The issue in the current matter is the appropriateness of the 2012-2013 program and reimbursement for the unilateral placement at White Oaks Academy. The Parent has clarified in this matter that the placement is a unilateral placement. The Headmaster testified that the Student's placement was a unilateral placement and White Oaks Academy does not have diagnostic placements for private placements. The Headmaster did not regard the Student's placement as a diagnostic placement. (Findings of Fact No. 3) Therefore, the Parent's request for due process is not res judicata.

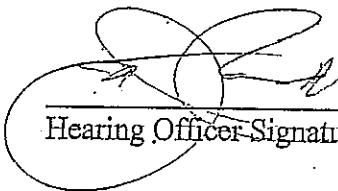
7. The Board also claims that the issues presented in this matter are beyond the Statute of Limitations and should be dismissed. Connecticut General Statute Sec. 10-76h-4(a) states; "A party shall have two years to request a hearing from the time the public agency proposed or refused to initiate or change the identification, evaluation or educational placement of, or the provision of a free appropriate public education to the child. If notice of the procedural safeguards, including notice of the limitations contained in this section, is not given, such two-year limitation shall be calculated from the time notice of the safeguards is properly given."
8. The Parent gave notice of her intent of a unilateral placement at the April 2, 2013 PPT. The Student was unilaterally placed on June 2, 2013. The Parent in her complaint states that there was a PPT meeting held on June 21, 2013 where the unilateral placement was discussed. The PPT had been scheduled but did not go forward as the parties' attorneys decided to try and resolve the issues. (Findings Of Fact No. 7) The resolution meeting held on June 21, 2013 does meet the requirement of the time when the procedural "safeguards is properly given." The Parent now alleges that she was not given procedural safeguards. The Parent at the time of the 2012-2013 school year was represented by competent counsel (P-5) and in her prior due process request, *Student v. Somers Board of Education*, Case No. 14-0358, does not allege a procedural violation stating that she was not provided with procedural safeguards. The due process request in this current matter was not timely filed and does not comply with the Statute of Limitations as defined in Connecticut General Statute Sec. 10-76h-4(a). The request for hearing was received by the Board on May 26, 2015. In order to comply with Connecticut General Statute Sec.10-76h-4, the request for due process should have been filed by April 2, 2015, two years from the PPT where the parent raised the issue. Therefore, the Board's Motion to Dismiss is granted because the due process request was not timely filed and is not within the Statute of Limitations.
9. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL DECISION AND ORDER:

Issues No. 1, 2, and 3 are dismissed with prejudice because they are not within the scope of the two year Statute of Limitations as defined in Connecticut General Statute Sec. 10-76h-4(a).

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

Justino Rosado
Hearing Officer Name in Print