

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

Appearing on behalf of the Parents and the Student: Attorney Jennifer D. Laviano
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Appearing on behalf of the Board: Attorney Michelle C. Laubin
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Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

Whether the Board failed to evaluate the Student.

Whether the Board failed to provide an appropriate program for the Student for the 2000-2001 and 2001-2002 school years.

Whether the Board improperly exited the Student from special education.

Whether the Board violated the Student's procedural safeguards.

Whether the Board is responsible for the reimbursement of the Parents' unilateral placement of the Student.

Whether the Student is entitled to compensatory education.

PROCEDURAL HISTORY:

The Parents requested this hearing on April 25, 2003, and a prehearing conference was held on May 12. An initial 30-day extension of the mailing date of the final decision was requested by the Parents' attorney in accordance with Section 10-76h-9(e) of the Connecticut Regulations, which provides for a 30-day postponement for settlement discussions between the parties.

The hearing convened on July 9, at which time attorneys for both parties requested that the case be continued so that briefs could be submitted regarding preliminary issues. Another extension of the mailing date was granted, at the request of counsel, a briefing deadline was set for July 23, and the hearing was scheduled to continue on August 11. The Board's Motion to Dismiss was filed on July 23. The hearing scheduled for August 11 was postponed at the request of Parents' attorney related to medical reasons, and hearing dates of September 3 and September 4 were scheduled. The Parents' attorney submitted a Reply to the Board's Motion to Dismiss on August 22, and the Board submitted a Reply Brief in Support of its Motion to Dismiss on August 29. The parties included proposed stipulated facts, and responses thereto in the briefs submitted. An Interim Ruling granted the Board's Motion to Dismiss, in part, was granted on September 1.

The remaining issues in the hearing, after the partial granting of the Motion to Dismiss were:

1. Whether the Board failed to evaluate the Student on April 25, 2001, and thereafter.
2. Whether the Board failed to provide an appropriate program for the Student for the 2001-2002 school year.
3. Whether the Board violated the Student's procedural safeguards on April 25, 2001, and thereafter.
4. Whether the Board is responsible for the reimbursement of the Parents' unilateral placement of the Student for the 2001-2002 school year.
5. Whether the Student is entitled to compensatory education for any claims of violations of procedural safeguards by the Board on April 25, 2001, and thereafter.

At the September 3 hearing date, the attorneys for the Parents and the Board jointly requested that the matter be continued so that additional preliminary issues could be briefed. The parties jointly requested a 30 day extension of the mailing date of the final decision, which was granted. The Board submitted a Second Motion to Dismiss, and the Parents' attorney submitted a brief regarding whether the Board had the obligation to evaluate the Student and offer a free appropriate public education for the 2001-2002 school year. These briefs were submitted on September 30.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

SUMMARY:

The Parents unilaterally placed the Student at a series of private placements, and had indicated to the Board that they did not wish to have the Student reevaluated to determine his continuing eligibility for special education services. Subsequently, the parties met at a PPT, and the Board again requested the opportunity to evaluate the Student. Consent for the Board's evaluation was not given until more than four months later, just weeks before the Student's high school graduation. The Parents brought this hearing request to challenge the Board's failure to evaluate the Student, and to seek reimbursement for the unilateral placements.

STIPULATED FACTS:

The following facts were stipulated by the parties, and are hereby adopted as the Findings of Fact for this decision:

1. The Student's date of birth of March 20, 1983 and is currently over the age of eighteen years.
2. In September 1999, the Parents enrolled the Student at the Academy at Swift River for the 1999-2000 school year, a residential therapeutic placement located in Cummington, Massachusetts. [Exhibit B-70] The Parents did not notify the Board prior to making this placement. The Student remained at Swift River for the entire 1999-2000 school year. [Exhibit B-83]
3. The Parents did not attend the Planning and Placement Team [PPT] meeting on June 2, 2000. The Parents did not request that the meeting be postponed to allow for their attendance. [Exhibit B-75]
4. Following the June 2, 2000 PPT meeting, the Parents received a copy of the minutes of that meeting, which included the following statement: "Parents please note: You have protections under the procedural safeguards of the Individuals with Disabilities in Education Act [IDEA]. A copy of Procedural Safeguards in Special Education which explains these protections is enclosed with this document. If you need assistance in understanding the provisions of IDEA, please contact your child's principal or your district's special education director." [Exhibit B-75]
5. Along with the paperwork from the June 2, 2000 PPT meeting, the Parents also received a letter from Special Education Coordinator Linda Strohmeier enclosing a permission form and requesting permission to evaluate the Student for his triennial evaluation. The Permission for Evaluation form included the statement, "Please review the complete packet of due process and procedural safeguards you received with the PPT I Invitation letter. If you need another copy of the complete packet, please request it from your school." [Exhibit B-76]
6. On June 14, 2000, the Parents spoke to the Board's special education coordinator and informed her that they did not wish to have the Student reevaluated by the Fairfield Public Schools to determine his continuing eligibility for special education services. Ms. Strohmeier sent a letter to the Parents on June 20, 2000, which indicated that the Student would be "removed from the rolls" of special education.
7. In August 2000, the Parents arranged for the Student to be evaluated by Dr. Thomas Garbett, a clinical psychologist in Amherst, Massachusetts. This evaluation was not shared with the Board until November 2001. [Exhibit B-95]
8. The Parents enrolled the Student at Swift River again for the 2000-2001 school year. The Parents did not notify the Board before making this placement. The Student remained at Swift River for the fall semester of the 2000-2001 school year. [Exhibit B-83]
9. On October 13, 2000, the Board again sought permission to evaluate the Student, again sending the Parents a copy of the Permission to Evaluate Form with the statement regarding the need to review the procedural safeguards previously provided. Following receipt of this information, the Parents

again telephoned the Board on October 25, 2000 and stated that they did not wish to have the Student evaluated by the Board. [Exhibits B-79, B-80]

10. For the spring semester of the 2000-2001 school year, the Parents enrolled the Student at Oxford Academy, a private college preparatory boarding school located in Westbrook, Connecticut. The Student remained at Oxford Academy for the remainder of the 2000-2001 school year. [Exhibits B-84, B-85, B-87] The Parents did not notify the Board prior to making this placement.
11. On or about August 13, 2001 the Board received notification that the Parents and the Student were represented by counsel specializing in representing parents and students in special education matters. [Exhibit B-89] A PPT meeting was requested on October 30, 2001. [Exhibits B90, B-92] On November 29, 2001, following the selection of a mutually agreeable PPT date, a PPT was scheduled for December 19, 2001. [Exhibit B-97]
12. The Parents again enrolled the Student at Oxford Academy for the 2001-2002 school year. [Exhibit B-91] The Parents did not notify the Board prior to making this placement.
13. On November 29, 2001, the Parents and the Student received a notice of a PPT meeting to be held on December 19, 2001. At the bottom of the notice was the statement, "Enclosed are your Procedural Safeguards". The Parents and the Student were provided with a copy of their procedural safeguards in special education with this notice. Neither the Parents nor the Student contacted the Board after receiving this notice to request another copy of their procedural safeguards, to ask questions, or to dispute the statement that they had received the procedural safeguards. [Exhibit B-97]
14. On December 17, 2001, the PPT meeting was rescheduled at the request of the Parents and the Student to accommodate their schedules and that of their counsel. On December 17, 2001, the Parents and the Student received a notice of a PPT meeting to be held on January 7, 2002. At the bottom of the notice was the statement, "Enclosed are your Procedural Safeguards." The Parents and the Student were provided with a copy of their procedural safeguards in special education with this notice. Neither the Parents nor the Student contacted the Board after receiving this notice to request another copy of their procedural safeguards, to ask questions, or to dispute the statement that they had received the procedural safeguards. [Exhibit B-98]
15. The Parents attended the January 7, 2002 PPT meeting with counsel specializing in representation of parents and students in special education matters. The Student did not attend the PPT meeting, however, counsel represented at the PPT meeting that she was authorized to act on his behalf at the meeting. Counsel further indicated that the Student and Parents were making a claim for compensatory education only, and that the family was not seeking services for the Student at that time. [Exhibit B-100]
16. Following the January 7, 2002 PPT meeting, the Parents and the Student received a copy of the minutes of that meeting, which included the following statement: "Parents please note: You have protections under the procedural safeguards of the Individuals with Disabilities Education Act (IDEA). A copy of Procedural Safeguards in Special Education which explains these protections was made available at the meeting. If you need assistance in understanding the provisions of the IDEA, please contact your child's principal or your district's special education director." The

Parents received a copy of their procedural safeguards in special education with this document. The Parents did not contact the Board following receipt of the PPT minutes to request another copy of the procedural safeguards, ask questions, or dispute the statement made in the minutes that they had received a copy of the procedural safeguards. [Exhibit B-100]

17. Consent for the Board to conduct evaluations of the Student to determine his continued eligibility for special education services and current levels of functioning was provided to the Board on or about May 20, 2002. [Exhibit B-112]
18. The Student graduated from Oxford Academy with a regular high school diploma in June 2002.
19. The Student submitted a request for due process hearing on April 25, 2003.

CONCLUSIONS OF LAW:

1. The claims that arose prior to April 25, 2001, two years from when the request for this due process hearing, are barred by the statute of limitations. The specific statute of limitations for the special education claims provides: “A party shall have two years to request a hearing from the time the board of education proposed or refused to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education to such child or pupil provided, if such parent, guardian, pupil or surrogate parent is not given notice of the procedural safeguards, in accordance with the regulations adopted by the State Board of Education, including notice of the limitations contained in this section, such two-year limitation shall be calculated from the time notice of the safeguards is properly given.” Conn. Gen. Stat. Sec. 10-76h(a)(3) As was noted in the interim ruling of September 1, 2003, the claims that arose prior to April 25, 2001 are barred by this statute of limitations.
2. Based on the stipulated facts, and as a matter of law, the Board did not have an obligation to develop an appropriate program for the Student from April 25, 2001. The Board has no obligation to offer a program to a student, or to reimburse the Parents for a unilateral placement in this situation, where the Board has requested, and has not received permission to conduct a triennial evaluation of the Student to determine future eligibility for services and appropriate programming, if eligibility continues.
3. Under the Individuals with Disabilities in Education Act [IDEA] school districts can be found to have an obligation to reimburse the parents for a unilateral placement if it is determined that the Board’s program is inappropriate, and if the parent’s private school placement is appropriate. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). Reimbursement under IDEA, however, is conditioned on the parties cooperating in the placement process. *Patricia P. v. Board of Education of Oak Park*, 203 F. 3d 462 (7th Cir. 2000) In *Patricia P.*, the parent unilaterally placed the student at Elan School in Maine and in so doing, deprived the school district of the opportunity to evaluate the student to determine an appropriate program. *Id.* The Court discussed this, noting that “Without some minimal cooperation, a school district cannot conduct an evaluation of a disabled child as contemplated under the IDEA. The IDEA requires a school district to convene a conference with the teacher(s) and parent(s) to prepare an IEP that assesses the level of

special services that would be required in light of the child's disability, and 'then review and if appropriate, revise, its provisions periodically, but not less than annually.' 20 U.S.C. Sec. 1401(a)(18)-(20), 1412(4), 1414(a)(5)(1996) Further, a school district is required to reevaluate a child every three years to assess the progress or regress of a child's disability. See Johnson, 92 F. 3d at 558. Indeed, '[I]f a child's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.' Andress v. Cleveland Indep. Sch. Dist., 64 F. 3d 176, 178 (5th Cir. 1995) Practically speaking, a school board needs the cooperation of the parent(s) to properly evaluate a child and convene a case conference to thereby determine what level of services would address the child's disability." *Id.*

4. In this case, the Parents unilaterally placed the Student in a series of private placements without allowing the Board to conduct the evaluation it had requested, and which was required in order to determine ongoing eligibility for special education and appropriate programming. The Board was deprived of the opportunity to conduct the necessary evaluation, and the Parent failed to engage in the cooperative process of planning the Student's education.
5. Parents may, pursuant to Conn. General Statutes Sec. 10-184a, refuse to consent to the Board's attempts to provide special education services, and may provide private programming instead. This choice, however, does not impose upon the Board an obligation to pay for the private programming chosen by the Parents. If the Parents want the Board to be responsible for planning and providing an appropriate educational program for the Student, then the Parents and the Student must allow the Board to evaluate the Student for this purpose and maintain the Board's involvement in the process of planning the Student's educational placements. See, Andress, *supra*.
6. As the Parents and the Student failed to cooperate with the Board, and failed to consent to the Board's evaluation until the waning weeks of the Student's senior year in high school, the Board was not obligated to provide a program for the Board, and is not obligated to reimburse the Parents and Student for the unilateral placement.

FINAL DECISION AND ORDER:

1. The claims that arose before April 25, 2001 are dismissed as barred by the statute of limitation.
2. The Board was unable to evaluate the Student due to the lack of Parental and Student consent for the evaluation.
3. The Board was not obligated to provide an appropriate program for the Student for the 2001-2002 school year, in light of the Parents' and Student's lack of cooperation in planning a program and consenting to the evaluation.
4. The Board is not responsible for the reimbursement of the Parents' unilateral placement of the Student for the 2001-2002 school year.

5. The Board did not violate the Student's procedural safeguards on or after April 25, 2001.
6. The Student is not entitled to compensatory education.
7. The Board's Motion to Dismiss submitted on September 30, 2003, is granted.