STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Torrington Board of Education

Appearing on behalf of the Parent:

Attorney John Hudson
P.O. Box 2026
Torrington, CT 06790

Appearing on behalf of the Board:

Attorney Michelle Laubin
Berchem, Moses & Devlin, P.C
75 Broad Street
Milford, CT 06460

Appearing before:

Attorney Brette H. Fitton
Hearing Officer

FINAL DECISION AND ORDER

Issues:

1. Does the hearing officer lack jurisdiction to hear Parent's request for a due process hearing because the child in question is receiving Section 504 services, and not Special Education services?

2. Does the hearing officer have jurisdiction because the student should have been identified as a special education student and thus is entitled to protections under IDEA?

Procedural History:

Parent mailed a request for a due process hearing on January 12, 2012. The request was received by the Connecticut State Department of Education (hereinafter, "CSDE") on January 17, 2012. The Torrington Board of Education (hereinafter "Board") received Parent's request the following day, January 18, 2012. On January 18, 2012, the CSDE assigned the case to a hearing officer for an expedited hearing. A prehearing conference was held on January 23, 2012, during which the Board's attorney raised the issue of whether the hearing officer had jurisdiction to conduct a hearing, because the student was not a special education student, as suggested by terms used in the Parent's hearing request, but rather a student identified as eligible for and receiving services under Section 504 of the Rehabilitation Act. During the conference, Parent's counsel stated his intent to file an Amended Request for Hearing and the Board's Attorney stated her intent to file a Motion to Dismiss. A hearing date on the Motion to Dismiss was set for January 31, 2012. A hearing date on the substance of the request was scheduled for February 10, 2012 to ensure compliance with the deadlines for expedited hearings set out in 34 C.F.R § 300.532 (c)(2).

Parent's Attorney filed an amended request for hearing on January 23, 2012. A second prehearing conference was held on January 27, 2012 to discuss deadlines for filing of the Board's Motion to Dismiss and Parent's Objection to same. Per agreement of counsel, at the second prehearing conference the Board filed a Motion to Dismiss and Memorandum of Law in Support of The Board's Motion to Dismiss on January 27, 2012 and Parent's attorney filed a Memorandum in Opposition to School Board's Motion to Dismiss on January 30, 2012. A hearing on the Motion to Dismiss was held on January 31, 2012 on the Motion to Dismiss, during which counsel presented oral argument.

Findings of Fact:

1. Prior to February 2011, the student had been identified as a special education student and received services under an IEP developed and implemented by the Torrington Public Schools.

2. A PPT meeting was held on February 17, 2011. At this meeting it was decided that the student was no longer in need of special education services and that the student would be exited from Special Education on February 25, 2011. (Exhibit B-1, Pages 1-2: February 17, 2011 PPT Meeting Notes)

3. On the same day that the PPT met and determined that the student would be exited from the special education program, a Section 504 team meeting was convened and the student was identified as a student in need of services under Section 504 of the Rehabilitation Act. (Exhibit P-2, Pages 1-2: February 17, 2011 Section 504 Meeting Notes) Mother attended this meeting at which an accommodation plan was developed and consented to its implementation. *Id.*

4. It is alleged that on January 5, 2012, the student brought a weapon to school. In response to this incident, the student's 504 team met on January 9, 2012, in order to determine whether or not the student's behavior was a manifestation of the student's disability. (Exhibit B-2, Page 1-2: Manifestation Determination Report) At that meeting the 504 team found that the behavior was neither a manifestation of the child's disability, nor was it the result of the school's failure to properly implement the 504 accommodation plan. *Id.* Mother disagreed with the finding of the 504 team and her disagreement was recorded by the team. *Id.* An expulsion hearing was set for January 20, 2012, but has been postponed pending a resolution of Parent's due process hearing request.

Conclusions of Law:

Hearing Officer Lacks Jurisdiction to Hear Parent's Complaint dated January 12, 2012

1. This hearing officer lacks jurisdiction to hear the Parent's complaint dated January 12, 2012. Section 10-76h, Connecticut General Statutes (C.G.S.), and related regulations at Section 10-76h, Regulations of Connecticut State Agencies, authorize an impartial hearing officer to conduct a hearing on special education issues. Connecticut law provides that while a special education hearing officer has the

authority to hear and decide Section 504 claims, he may do so only as necessary to resolve claims under IDEA. (Mark McQuillan, Circular Letter: C-13, Series 2008-09 Reissue). If the only issues before the special education hearing officer allege violations of Section 504 of the Rehabilitation Act, the special education hearing officer does not have authority and redress must be sought through the available Section 504 due process procedures. In re: Student with a disability, 102 LRP 20082 (SEA CT 2001).

2. The substantive issue raised by Parent in the January 12, 2012 complaint is whether the Section 504 team erred when it determined that the conduct that gave rise to the disciplinary action was *not* a manifestation of student's disability on January 9, 2012. Student is entitled to a review of this substantive claim under the due process procedures for Section 504, under 34 C.F.R § 104.36, because the student is identified under Section 504 with a Section 504 Accommodation Plan, and the manifestation determination at issue was made by student's Section 504 team. (See Exhibits B-2, P-2)

3. The IDEA does not provide authority for a special education hearing officer to review the manifestation determination of a student's Section 504 team, unless the student can assert they are eligible for protection under 34 C.F.R. § 300.534 protections for children not determined eligible for special education and related services.

4. The IDEA protections afforded to special education students subject to discipline are not applicable in the present case, where at the time of the incident the student had been evaluated, deemed ineligible for special education services and formally exited from the school's special education program; he was eligible only for Section 504 services. Under IDEA, where there is a claim that a manifestation determination by a student's PPT was in error, that determination may be appealed and heard in an expedited manner by a special education hearing officer. 34 C.F.R . § 503.33. Under the facts of the present case, no such appeal can be taken because at the time of the incident the student had been formally exited from his special education program (see Exhibit B-2) and transitioned to a 504 Team and accommodation plan (February 17, 2011). No manifestation determination was conducted by a PPT, and thus no appeal under this section can be taken.

5. Parent claims that her references to a PPT and IEP in the January 12, 2012 complaint amount to a claim for relief under IDEA. It is clear that Parent was mistaken in the use of such terms. In the January 12, 2012 complaint Parent stated the "...PPT (held 1/12/12) decided that my child's behavior was not a manifestation of his disability." The record reflects the manifestation determination was conducted not a PPT but a 504 team meeting. The Manifestation Determination Report – Section 504 generated by the 504 team was signed by Parent. (Manifestation Determination Report – Section 4, Exhibit B-1)

6. While Parent states in her request that she believes the school should change her "child's IEP", rather than expel him", the exhibits show that on the same day Parent sent her initial complaint, she participated in the Section 504 Team annual review of the student's program where changes to the child's program were discussed and agreed upon pending the outcome of the anticipated expulsion hearing. (Exhibit B-2 Page 3)

7. The IDEA protections for children not determined eligible for special education are not applicable to student. Under subsection (a) of 34 C.F.R. § 300.534, a student may avail himself of the protections and procedures under 34 C.F.R. § 300.530-532 upon a demonstration that the school board had knowledge that the child was a child with a disability, provided such knowledge existed *before* the behavior that precipitated the disciplinary action occurred. Under subsection (b) of 34 C.F.R. § 300.534, the school board is deemed to have knowledge of the disability if one of the following actions can be shown:

   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.

8. Parent claims that the student is entitled to assert IDEA protections because Parent expressed concern in writing that the child was in need of special education services. In support, Parent points to a hand written note next to Section 8 of the February 17, 2011 Section 504 meeting notes which reads: "Mom was concerned about him falling through the cracks now that he's not receiving special education services. Accommodations were discussed to ensure this wouldn't happen." As this note was written by a member of the Section 504 team, it cannot be considered a formal written notification by Parent. The note documents a discussion of concerns between the Parent and 504 team members regarding the transition of the student to the Section 504 accommodation plan. At the end of this Section 504 team meeting, the Parent signed the accommodation plan giving her written consent to the implementation of this program. (Exhibit P-2). No appeal of the student's accommodation plan was taken and no other writing was produced in support of Parent's claim that Parent submitted a written request for special education services.

9. Parent does not claim that she requested an evaluation of the child pursuant to Section §§300.300 through 300.31 and no documentation of such a request was submitted.

10. Parent also claims but fails to demonstrate that teachers or other personnel of the LEA expressed specific concerns about a pattern of students behavior before the behavior that precipitated the disciplinary action occurred. While the statements of teachers provided by Parent include concerns about the student, these statements were generated and submitted for the 504 manifestation determination which occurred *after* the behavior that precipitated the disciplinary action occurred, and not *before* as required under 34 CFR § 300.534 (a).

11. Further, the Board's actions qualify it for the exception set out in 34 C.F.R. §300.534(c) which states that a school board will not be deemed to have knowledge, where a school board has evaluated the child in accordance with 34 C.F.R. §§300.300 through 300.311 and determined the student not to be a child with a disability. Per the student's February 17, 2011 PPT meeting notes, the student was evaluated, a PPT meeting was held and the PPT determined that the student was no longer eligible for special education services. (February 17, 2011 PPT hearing notes, Exhibit B-1) Therefore the Board cannot be deemed to have knowledge of disabilities that would give rise to protections for student otherwise available under 34 C.F.R. §300.354 (a) and (b).

No Decision Reached on Amended Complaint dated January 13, 2012

12. The parties agreed to an expedited hearing. The scope of expedited hearings are limited. 34 C.F.R. §300.532(c) and RCSA §10-76h-10. The hearing officer acknowledges receipt of Parent's Amended Complaint, dated January 23, 2012. Upon review of the substance of the amended complaint, the hearing officer has determined that the issues raised in the amended complaint do not fall under the categories for which an expedited hearing is permissible. *Id.* This decision is therefore confined to the issues presented in Parent's original request for a due process hearing, which was dated January 12, 2012. The hearing offer explicitly reaches no decision regarding the merits of the claims made in Parent's amended complaint. Should Parent choose to do so she may request a new due process hearing on the issues raised in her amended complaint. *Id.*

Final Decision and Order:

The Board's Motion to Dismiss Parent's Request for a Hearing dated January 12, 2012 is granted. Accordingly, this case is dismissed.