STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. New Haven Board of Education

Appearing on behalf of the Student:	*Pro se*, by the Mother
Appearing on behalf of the Board:	Attorney Michelle Laubin Berchem, Moses & Devlin, P.C. 75 Broad Street Milford, CT 06460
Appearing before:	Attorney Catherine M. Spain Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Did the Board's use of physical restraint on the Student result in a denial of the free, appropriate public education in the least restrictive environment to which he was entitled during the 2011-2012 school year?

SUMMARY:

The Student, a fourteen year-old young man whose primary disability category is emotional disturbance, attended the ACES Mill Road School ("School") in North Haven until June 19, 2012. In the wake of a January 12, 2012 incident in which the Student was physically restrained by School personnel, the Student's mother ("Mother") filed a request for an impartial special education due process hearing. Claiming that School personnel abused her son, the Mother maintains that the alleged abuse rendered the Student's educational placement inappropriate.

PROCEDURAL HISTORY:

The Request for Impartial Special Education Hearing, which was subsequently marked as Hearing Officer's Exhibit-1, was received by the Board on March 21, 2012. It reads as follows:

> Description of the nature of the issues in dispute, included related facts:
>
> Staff members at the school are using physical force and abusing my child. There's a breakdown in communication in speaking with school staff. I don't trust them. I am very uncomfortable with my child being forced to attend this school.

Proposed Resolution:

None on the school's behalf. I proposed using alternative methods to achieve a desired result. I would not consider corporal punishment or abuse ever.

The undersigned impartial special education hearing officer was appointed on March 20, 2012. On March 26, 2012, a prehearing conference took place. The Mother appeared on behalf of the Student. Typhanie Jackson, Director of Student Services, appeared on behalf of the Board. The Mother stated that she objected to the Student's placement at the School. Ms. Jackson replied that the Board had provided and was providing the Student a free appropriate public education in the least restrictive environment. Hearing dates were set for April 25, May 1 and May 10, 2012.

Attorney Michelle Laubin filed an appearance as the Board's legal representative on March 29, 2012. To allow time for mediation, she requested a thirty-day extension and the cancellation of the April 25 and May 1 hearing dates. The request was granted. No resolution was reached through mediation between the parties.

The hearing convened on May 10, 2012. In advance of the hearing, Attorney Laubin submitted exhibits numbered B-1 through B-44, which were entered as full exhibits. The Mother, who testified on behalf of the Student, submitted one exhibit numbered P-1, which was entered as a full exhibit. Attorney Laubin agreed to waive the five-day rule requiring exhibits to be introduced five or more days before a hearing date.

At the May 10 hearing, Attorney Laubin requested a 30-day extension in order to accommodate an additional hearing date. The request for an extension was granted. In advance of the June 7, 2012 hearing date, Attorney Laubin submitted exhibits numbered B-45 through B-49, which were entered as full exhibits. The Mother submitted two additional exhibits. The hearing reconvened and adjourned on June 7, 2012. The final decision deadline is July 3, 2012.

STATEMENT OF JURISDICTION:

In accordance with the Uniform Administrative Procedures Act and Connecticut General Statutes ("C.G.S.") §4-176e through §4-178, this matter was heard as a contested case pursuant to 20 United States Code ("U.S.C.") §1415(f) and its related regulations and pursuant to C.G.S. §10-76h and its related regulations.

FINDINGS OF FACT:

1. The Student is fourteen years old and attended the School during the pendency of the due process hearing.

2. It is undisputed that the Student is eligible for special education and related services under the category of emotional disturbance. The Student has a complicated health history that includes cerebral palsy and intensive physical and occupational therapy. He was formerly categorized as learning disabled. (Exhs. B-14, B-15).

3. The Mother agreed to the categorization of the Student as emotionally disturbed not because she believed him to be emotionally disturbed, but because she was told by Board personnel that such a categorization would provide him access to counseling services. (Testimony of Mother.)

4. The Student has been described by school social workers and psychologists as charming, easily distracted, and impulsive. (Exhs. B-8, B-31)

5. The Student has attended the School since December, 2010. Before that, he attended Jepsen School in New Haven. (Testimony of Mother)

6. On January 12, 2012, a physical altercation occurred between the Student and Chris Smith, a School Behavioral Technician who had given the Student a direction which the Student admits he purposely ignored. (Exh. P-1, Testimony of Student)

7. Mr. Smith stated in a Behavior Incident Report signed by School Principal Erika Forte ("Principal") and dated January 12, 2012 ("Report") that the Student "attempted to push through staff" after ignoring the direction referred to in number 6, above. (Exh. P-1)

8. Mr. Smith stated in the Report that the Student "became aggressive" after he attempted to escort the Student to his destination. (Exh. P-1)

9. The Student was forcibly held against a wall for three minutes by Mr. Smith and another Behavioral Technician and then forcibly held face-down against a wet floor for five minutes by Mr. Smith and two Behavioral Technicians. (Exh. P-1, Testimony of Principal and Student)

10. The Report contains two checklists of allowable protective holds. The three-minute hold is described (checked) as the "2-Person Wall" hold. As for the five-minute floor hold that was used in this case, no box is checked. The manner in which the Student was held – face-down by three people – does not appear on the checklist. The only listed "3-Person Hold" contained in the checklist is "Face Up." (Exh. P-1)

11. The Student's arms were twisted and held behind his back and his leg was bent upward. (Testimony of Student)

12. The Student sought medical attention from the school nurse after the incident. (Exh. P-1, Testimony of Principal)

13. The school nurse treated the Student for upper arm pain. (Exh. P-1, Testimony of Principal)

14. Due to the Mother's concerns about the physical restraint used on the Student on January 12, 2012, the Student did not attend the School for a period of approximately one month after January 12, 2012. (Testimony of Mother)

15. At a February 7, 2012 PPT meeting in which the Mother expressed her disapproval of the physical restraint employed in the January 12 incident, the parties failed to reach an agreement about the Student's educational program. The Principal then advised the Mother that she could request a special education due process hearing. (Exh. B-44, Testimony of Mother and Principal)

16. In February, the Student informed his Mother that he wanted to return to the School in order to graduate from the eighth grade. (Testimony of Mother and Student)

17. The Student returned to the School on or around February 26, 2012. (Testimony of Mother)

18. On March 19, 2012, the Mother submitted to the Connecticut Department of Education a request for impartial special education hearing. (Exh. Hearing Officer-1)

19. The Student wished to be removed from his educational placement at the School and returned to his previous placement as a special education student at Jepsen School because he was unhappy about having been physically restrained on January 12, 2012 and because he had more friends at his previous school. (Testimony of Student)

20. The undersigned hearing officer informed the Student that he would remain in his current placement during the pendency of the hearing, in accordance with 20 United States Code §1415(j) (the "stay put" provision) and the Regulations of Connecticut State Agencies ("RCSA") §10-76h-17(a).[1]

21. After the May 10, 2012 hearing, School personnel met with the Mother to agree on a "contract," which was to be implemented for the remainder of the school year. (Testimony of Principal)

22. On at least one occasion between May 10, 2012 and June 7, 2012, School personnel contacted the Mother, who then traveled to the School, to report a problem with the Student. (Testimony of Principal)

23. On at least one other occasion between May 10, 2012 and June 7, 2012 when there was a problem with the Student, School personnel contacted the Mother, who then spoke with the Student by telephone. (Testimony of Principal)

24. The Student made academic and behavioral progress during the 2011-2012 school year. (Testimony of Mother, Student, Principal, Ms. Jackson, Exhs. B-40, 42, 44, 46, 47.)

DISCUSSION AND CONCLUSIONS OF LAW:

1. The Student qualifies for and is entitled to receive a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE"), with special education and related services under the provisions of state and federal laws. C.G.S. §§10-76 et seq. and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1401, et seq., 34 C.F.R. Section 300.1(a), 34 C.F.R. Section 300.17. The Student's current primary special education category is emotional disturbance. 34 C.F.R. Section 300.8(c)(4).

[1] RCSA §10-76h-17(a). Educational placement during proceedings provides: "Unless the public agency and the parent agree otherwise, the child shall remain in his or her then-current educational placement during the pendency of any administrative or judicial proceedings regarding issues set forth in Section 10-76h-3 of the Regulations."

2. The standard for determining whether FAPE in the LRE has been provided is set forth in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley,* 458 U.S. 176 (1982). The two-pronged inquiry is first, whether the procedural requirements of IDEA have been met. *Id.* at 206. Procedures required by the IDEA include an opportunity for the parents of a student with a disability to examine all records relating to such student and to participate in meetings with respect to the identification, evaluation, and educational placement of the student, and the provision of a free appropriate public education to the student, and to obtain an independent educational evaluation of the student. 20 U.S.C. § 1415(b)(1); *see also Cerra* v. *Pawling Cent. Sch. Dist.,* 427 F.3d 186, 192 (2d Cir. 2005). In this case, it is the delivery of the Student's educational program, not a required procedure, that is at issue.

3. The second, more substantive prong of *Rowley* addresses whether a student's IEP has been "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. 176, 206-207 (1982). The requirement of FAPE is satisfied by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. "[A] school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress, not regression, and if the IEP affords the student an opportunity greater than mere trivial advancement." *Cerra,* 427 F.3d at 195 (internal quotation marks omitted).

4. The requirement of FAPE is determined in light of state statutes and regulations. As the IDEA's definition of a FAPE makes clear, "[t]he Act does not usurp the state's traditional role in setting educational policy." *Taylor* v. *Vt. Dep't of Educ.,* 313 F.3d 768, 777 (2d Cir. 2002); 20 U.S.C. §1402 (9). "The statute incorporates state substantive standards as the governing federal rule if they are consistent with the federal scheme and meet the minimum requirements set forth by the IDEA." *Id.* (Internal quotation marks and citations omitted).

5. The Board has the burden of proving the appropriateness of the child's program or placement, which burden shall be met by a preponderance of evidence. Regulations of Connecticut Agencies ("RCSA") §10-76h-14(a).

6. As the party who requested the due process hearing, the Mother carries the burden of going forward with the evidence. RCSA §10-76h-14(a).

7. C.G.S. §46a-152 (a) provides, in relevant part: "No provider or assistant may use involuntary physical restraint on a person at risk[2] except . . . as an emergency intervention to prevent immediate or imminent injury to the person at risk or to others, provided the restraint is not used for discipline or convenience and is not used as a substitute for a less restrictive alternative."

8. C.G.S. §46a-152 (b) provides, in relevant part: "Each local or regional board of education, institution or facility providing special education for a child shall notify the parent or guardian of each incident in which such child is placed in physical restrain or seclusion."

9. RCSA §10-76b-6 provides: "Use of physical restraint and seclusion in public schools. No provider or assistant shall (1) use involuntary physical restraint on a person at risk or (2) involuntarily place a person

[2]A 'person at risk' includes a child requiring special education. C.G.S. § 46a-150 (3).

at risk in seclusion, unless such use conforms to the requirements of sections 46a-150 to 46a-154, inclusive, of the Connecticut General Statutes, and the requirements of sections 10-76b-5 to 10-76b-11, inclusive, of the Regulations of Connecticut State Agencies."

10. The Student testified credibly that he did not attempt to push anyone, but that he used his arms defensively after Mr. Smith touched him. (Testimony of Student)

11. The Student testified credibly that he was surprised when he was then thrown up against a glass wall, at which point his arms were twisted behind his back, and that he was then restrained against the floor, at which point his leg was bent behind him. (Testimony of Student)

12. The Board presented no evidence that Mr. Smith attempted a less restrictive alternative, as required by C.G.S. §46a-152 (a), to direct the Student to his proper destination after the Student resisted being escorted. Mr. Smith's written statement in the Report that the Student attempted to push through staff and behaved aggressively, even if true, does not evince the requisite emergency or threat of immediate or imminent injury required by statute. Rather, the physical restraint utilized on January 12, 2012 was improperly used as a disciplinary measure, which C.G.S. § 46a-152 (a) explicitly prohibits. Moreover, the manner in which the Student was held face-down by three people does not appear on the School's checklist of permissible holds. Based on the facts as presented, the use of physical restraint on the Student by School personnel on January 12, 2012 was improper. The Board thus failed to conform with RCSA §10-76b-6. (Exh. P-1)

13. The failure of a Board to address the improper physical restraint of a student constitutes a denial of FAPE in the LRE in cases where a preponderance of evidence demonstrates that such physical restraint substantially interfered with the student's ability to obtain meaningful educational benefits. *Houston Indep. Sch. Dist.* v. *Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *T.R. ex rel. N.R.* v. *Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577-78 (3d Cir. 2000); *B.H.* v. *West Clermont Bd. of Educ.*, 788 F.Supp.2d 682 (S.D. Ohio 2011).

14. In *B.H.* v. *West Clermont Bd. of Educ.*, 788 F.Supp.2d 682 (S.D. Ohio 2011), for example, the district court upheld a hearing officer's conclusion that the district denied the student FAPE in the LRE, partly due to the fact that the student was repeatedly physically restrained by school staff. "The Court finds that Defendant failed to meet B's behavioral needs where it neglected to implement appropriate positive behavioral interventions, set increasingly low behavioral expectations, and employed physical restraint, even where shown to be ineffective." *Id.* at 699.

15. This case is distinguishable from *B.H.* v. *West Clermont Bd. of Educ.* in several ways. First, in this case, the complained-of restraint occurred once or twice, not frequently.[3] Second, whereas the student in *West Clermont* regressed during the school year in question, the Student in this case, by all accounts, has made progress throughout the school year. Additionally, the physical restraint at issue was properly documented and reported to the Mother. Finally, School personnel attempted to avoid additional incidents of physical restraint of the Student by twice contacting the Mother when problems arose. (Exh. P-1, Findings of Fact 21, 22, 23, 24, Testimony of Student, Mother, Principal)

[3]During the second day of hearing, the mother stated that the Mr. Smith again "put his hands on my son."

16. The Board in this case demonstrated by a preponderance of evidence, including IEPs and report cards, that it provided the Student with significant educational benefits during the 2011-2012 school year. The Student's grades improved over the course of the year. Additionally, the Student was named Student of the Quarter and made good progress in the School's "Point Sheet System" of motivational management. (Exhs. B-40, 42, 44, 46, 47, Finding of Fact 24, Testimony of Ms. Jackson)

17. In this case, the improper physical restraint did not substantially interfere with the Student's ability to obtain meaningful educational benefits for the 2011-2012 school year. Accordingly, the improper physical restraint did not result in a denial of FAPE in the LRE.

18. A hearing officer's authority to issue orders is confined to instances in which FAPE in the LRE has been denied. "The touchstone of a traditional tort-like remedy is redress for a broad range of harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages. *United States* v. *Burke*, 504 U.S. 229, 239 (1992) . . . By contrast, the touchstone of IDEA is the actual provision of a free appropriate public education." (Internal quotation marks omitted.) *Sellers* v. *School Board of the City of Manassas*, 141 F.3d 524, 527 (4th Cir. 1998).

19. Regarding improper uses of physical restraint, a party may look beyond the realm of the special education due process hearing. "The remedial scheme of the IDEA is not 'so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies,'" *M.H.* v. *Bristol Bd. of Educ.*, 169 F.Supp.2d 21 (D. Conn. 2001), quoting *Mrs W.* v. *Tirozzi,* 832 F.2d 748, 754 (2d Cir. 1987).

FINAL DECISION AND ORDER:

1. The use of physical restraint by School personnel on the Student did not result in a denial of FAPE in the LRE to which the Student was entitled during the 2011-2012 school year.

2. The Board provided the Student a FAPE in the LRE for the 2011-2012 school year.