

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Ridgefield Board of Education

Appearing on behalf of the Parent:

Christopher Avcollie, Esq.  
Maurer & Associates, P.C.  
871 Ethan Allen Hwy, Suite 202  
Ridgefield, CT 06877

Appearing on behalf of the Board:

Marsha Moses, Esq.  
Berchem, Moses & Devlin, P.C.  
75 Broad Street  
Milford, CT 06460

Appearing before:

Sylvia Ho, Esq.  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Are Parents precluded from litigating the issues in their Revised Due Process Complaint by virtue of their settlement agreement with the Board?
2. If the Parents are not precluded, then did the Board offer a free and appropriate educational program to Student for the 2010-2011 and 2011-2012 school years?
3. If the Board did not offer an appropriate program, then is the unilateral placement of Student at Villa Maria School for the 2010-2011 and 2011-2012 school years appropriate and are the Parents entitled to receive reimbursement for tuition and transportation expenses?

**PROCEDURAL HISTORY:**

Parents initiated a Request for Due Process Hearing on June 21, 2012. The Board received the Request on June 21, 2012. The original mailing date of the final decision was September 4, 2012.

A prehearing conference was held on June 29, 2012 and a hearing scheduled for August 9, 2012. The Hearing Officer issued a Notice of Hearing and Prehearing Memorandum to Parties on June 29, 2012.

On July 3, 2012, the Board filed a sufficiency challenge to the Due Process Complaint. The Parents did not file a response. On July 6, 2012, the Hearing Officer issued a Ruling granting the Board's Sufficiency Challenge and ordered that the Due Process Complaint be amended to comply with 34 C.F.R. §300.508(b) within ten days of the date of the Order or dismissed.

On July 11, 2012, the Board filed a Motion to Extend the Hearing Date and Mailing Date of the Final Decision to engage in settlement negotiations. The Board's motion was granted and a new hearing date

was scheduled for August 31, 2012. The Mailing Date of the Final Decision was extended to October 4, 2012.

On July 16, 2012, the Parents filed a Revised Request for Impartial Due Process Hearing: Due Process Complaint with the Hearing Officer. The timelines were revised to reflect the Parents' amendment of their hearing request on July 16, 2012. The Mailing Date of the Final Decision was revised to October 26, 2012.

On July 25, 2012, the Parents requested a postponement of the August 31, 2012 date to engage in the parties' scheduled mediation. The Parents' request for postponement was granted on August 2, 2012 and the hearing date was rescheduled to September 14, 2012.

On September 5, 2012, the Parents requested postponement of the September 14, 2012 hearing date because illness of Parents' counsel prevented Parents from engaging in the parties' scheduled mediation session. The Parents' request was granted and a new hearing date was scheduled for October 22, 2012.

On October 12, 2012 at 12:06 pm, the Board filed a Motion to Dismiss with Memorandum of Law. On October 12, 2012 at 4:42 pm, the Parents filed a Motion for Continuance of the Due Process Hearing. On October 14, 2012, the Hearing Officer issued a Notice of Hearing on the Board's Motion to Dismiss and the Parents' Motion for Continuance on the first day of the hearing on October 22, 2012. The parties were also reminded that any exhibits to be presented on the first day of hearing should comply with the five (5) day rule contained in R.C.S.A. §10-76h-12. Neither party filed witness lists and exhibits with the Hearing Officer by October 15, 2012. On October 15, 2012, the Parents' attorney filed a Renewed Motion for Continuance, and then later withdrew Renewed Motion for Continuance. On October 16, 2012, the Board filed a Response to the Parents' Motion for Continuance objecting to those portions of the Motion that contained references of confidential settlement discussions and the parties' postures in the mediation process under R.S.C.A § 10-76h-5.

On October 18, 2012, the Parents filed an Objection to the Board's Motion to Dismiss with two supporting affidavits of the Parents. On October 19, 2012, the Board filed a Motion to Strike/Objection to Evidence requesting that the Parent affidavits be stricken on the grounds that they contained information about confidential settlement discussions in the mediation process.

On October 22, 2012, the Hearing Officer heard the Parents' Motion for Continuance and Board's Motion to Dismiss and Motion to Strike/Objection to Evidence. The Parents' Motion for Continuance was DENIED. The Board's Motion to Strike/Objection to Evidence was GRANTED. The Exhibits to the Parents' Opposition to Board Motion to Dismiss were STRICKEN. After the parties argued extensively on the Board's Motion to Dismiss, the Hearing Officer took the matter under advisement. An additional hearing date was scheduled for November 21, 2012 and the Mailing Date of the Final Decision was extended to November 26, 2012. On November 2, 2012, the Parents submitted Parent Exhibits P-1 through P-18.

The findings of fact and conclusions of law set forth herein, which reference certain exhibits and offers of proof, are not meant to exclude other supported evidence admitted into the record. All evidence presented was considered in deciding this matter.

All motions and objections not previously ruled upon, if any, are hereby overruled. 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.

To the extent that any portion of this Final Decision and Order states a Finding of Fact or a Conclusion of Law, the statement should be so considered without regard to the given label of the section of this Final Decision and Order in which that statement is found. See, e.g., *SAS Institute, Inc. v. S. & H. Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985); *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

### **SUMMARY:**

The Parents unilaterally placed the Student out of district at Villa Maria School for the 2010-2011 and the 2011-2012 school years and brought this Due Process proceeding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401, et seq. (the "IDEA") and Section 10-76h of the Connecticut General Statutes to seek reimbursement from the Board for that placement. Prior to bringing this action, the Parents had engaged in voluntary mediation with the Board with the assistance of a state appointed mediator pursuant to R.C.S.A. § 10-76h-5. The Parents had been represented by an attorney in the mediation. The parties executed a Settlement Agreement in February of 2012. The Board has filed a Motion to Dismiss on jurisdictional grounds. The Parents oppose the Motion to Dismiss. In their opposition papers and at oral argument, Parents argue that the Settlement Agreement is unenforceable because they did not execute the Settlement "voluntarily." The Parents argue that the Hearing Officer should conduct a hearing to hear testimony regarding their conversations with their attorney and the discussions with the Board previous to the execution of the agreement. The Hearing Officer declined to take parole evidence but accepted the Parents' offers of proof.

### **STATEMENT OF JURISDICTION:**

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

### **FINDINGS OF FACT:**

The parties presented oral argument and no testimonial evidence was offered or taken at the October 22 hearing. For the purpose of this Final Decision and Order, the Findings of Fact are based upon those offers of proof taken in the light most favorable to the Parents who oppose the Board's Motion to Dismiss. The source of the Findings of Fact include (1) the parties' stipulation of facts; (2) the Parents' offer of proof at oral argument; (3) the papers submitted by the parties including the Student's 2011-2012 Individualized Education Plan ("IEP") and other documents in educational record. In addition, these findings include factual representations contained in the Parents' opposition brief to the extent that they are relevant to the issues and do not violate R.C.S.A. § 10-76h-5(b) and 34 C.F.R. §300.506(b)(8).

1. The Student was born on March 23, 2003 and attended kindergarten at Ridgefield Public Schools. (HO-1, Original (6/21/12) and Revised (7/16/12) Due Process Requests)

2. Following the kindergarten school year, the Parents unilaterally placed the Student at Villa Maria School in Stamford, Connecticut during the 2010-2011 school year. Subsequently, the Parents continued the unilateral placement at Villa Maria School for the 2011-2012 school year. (Revised Due Process Request)
3. The Parents and the Board engaged in a voluntary mediation with a state appointed mediator pursuant to R.S.C.A. §10-76h-5 in their dispute regarding issues of the free and appropriate education for the Student. (Stipulated fact)
4. The Parents were represented by Attorney Howard Klebanoff in the mediation and represented the Parents from March 24, 2011 until March 1, 2012. (Stipulated fact)
5. A Settlement Agreement was signed by the parties; the Parents signed on February 21, 2012 and the Board signed on February 29, 2012 (Exhibit B-1) (Stipulated fact)
6. The Settlement Agreement is a four-page document consisting of eleven paragraphs. The language of the Settlement Agreement is written in clear and unambiguous language. (Exhibit B-1)
7. The Settlement Agreement begins with recitals located on the first page of the document. These recitals address issues of the "free and appropriate public education" and the Parents' unilateral placement of Student for the 2010-2011 and 2011-2012 school years. (Exhibit B-1)
8. The school years are clearly visible and easily located on the first page of the document. (Exhibit B-1)
9. Paragraph One of the Settlement Agreement immediately follows the recitals on the top of the second page and states as follows:

*In full and final settlement of all claims through August 31, 2012 the BOARD hereby agrees to pay the PARENTS the amount of [redacted] ("the Payment"), to be paid within thirty (30) days of the PARENTS' delivery to the BOARD of documentation, in form and substance acceptable to the BOARD, reflecting payment made by the PARENTS to the Private Placement for the 2010-2011 school year and for the 2011-2012 school year in an amount of not less than the Payment.*

10. Paragraph Two of the Settlement Agreement states, in pertinent part, that

*[t]he parties agree that the STUDENT'S placement at the Private Placement was made unilaterally by the PARENTS, and the Payment is being made solely for purposes of settling the PARENTS' claims, as an accommodation to the PARENTS and in order to avoid the cost of protracted litigation.*

11. Paragraph Three Settlement Agreement states that:

*Furthermore, for good and valid consideration, including, without limitation, the Payment and the covenants and agreements set forth herein, the PARENTS hereby remise, release and*

*forever discharge, and by these presents do for themselves, for the STUDENT and for their heirs and assigns, remise, release and forever discharge the BOARD, its agents and employees, of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, costs, expenses, attorneys' fees and demands whatsoever in law or in equity, against the BOARD, its agents and employees, which the PARENTS and/or the STUDENT ever had, now has or have for which they, on behalf of themselves or the STUDENT, their heirs and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents and through August 31, 2012 arising out of or related to the provision of educational services by the BOARD to or for the STUDENT, and/or the STUDENTS educational needs, including without limitation, the issues set forth, or which could have been set forth, in the Due Process Proceeding.*

12. The Parents admit that they had the Settlement Agreement in their possession since mid-January 2012. (Parents' Objection at p.5)
13. When the Parents received the proposed Settlement Agreement to sign in mid-January 2012, they also received a copy of an electronic mail from the Board's attorney that explained in the last line that the Board's settlement offer included the both 2010-2011 and 2011-2012 school years. (Parents' Objection at p. 5)
14. The Parents claim that they read the Settlement Agreement in a "cursory fashion" and did not pay attention to what they were reading before signing and returning it to their attorney on February 21, 2012. (Parents' Offer of Proof)
15. The Parents claim that they read the Settlement Agreement with attention on February 27, 2012 after the Parents' attorney asked them to provide evidence of the tuition payments for their unilateral placement for the school year 2011-2012. (Parents' Offer of Proof)
16. The Parents sent an electronic mail to their attorney after reading the Settlement Agreement stating that they did not agree with the Settlement Agreement that they had already executed but made no attempt to contact the Board directly. (Parents' Objection at p. 5)
17. The Parents' then attorney, Howard Klebanoff, informed the Board on March 1, 2012 of the Parents' desire to revoke the agreement and his withdrawal of representation of the Parents. (Representation of Board Counsel at Oral Argument)
18. The Parents claim they retained Attorney Klebanoff after the Board's representative mentioned his name as an attorney who was held in high regard by the Board. (Parents' Objection and Parents' counsel representation at Oral Argument).
19. The Parents admit that they conducted their own due diligence into the experience and reputation of Attorney Klebanoff before retaining him to represent them. (Parents' counsel's representation at Oral Argument).

20. The Parents do not claim that the Board engaged in any misconduct in negotiation the Settlement Agreement. (Parents' counsel's representation at Oral Argument).
21. They blame Attorney Klebanoff, who was acting as their own attorney, for misleading them as to the contents of the Settlement Agreement. (Parents' counsel's representation at Oral Argument). They also admit that they did not carefully read the document they were signing because they felt rushed into signing and returning the document. (Parents' counsel's representation at Oral Argument)

### **CONCLUSIONS OF LAW AND DISCUSSION:**

1. This administrative hearing was commenced pursuant to the IDEA and applicable Connecticut special education law. Pursuant to the IDEA, a local educational agency ("LEA") is responsible for providing disabled children within its jurisdiction with a free and appropriate public education program ("FAPE") in the least restrictive environment ("LRE"). See 20 U.S.C. §§ 1412(a)(1); 1412(a)(5)(A). When there is a disagreement between the parents of such a child and the LEA over whether the LEA has satisfied its obligations under the IDEA, the parents may commence a special education due process hearing and thereafter seek review of the hearing officer's decision by a court if they are aggrieved by that decision.
2. Under the IDEA, where the parents of a child challenge a special education program proposed by an LEA, the issue to be resolved is whether the LEA's proposed program provides the child with a FAPE as determined by applying the two prong test stated in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 206-07 (1982).
3. Under *Rowley*, the Board's proposed programs for the 2010-2011 and 2011-2012 school years would provide the Student with a FAPE if the proposed Individualized Education Plan ("IEP"): (1) was developed in compliance with the IDEA's procedural requirements; and (2) was "reasonably calculated to enable [the Student] to receive educational benefits," or, in other words, "likely" to produce more than trivial or *de minimis* progress. *Id.* The IDEA does not require that the Board provide the best program money can buy or provide a program that has all of the features that the Parents desire.
4. The Board argues that this Hearing Officer lacks jurisdiction to consider the issues of FAPE and unilateral placement because of the parties' duly executed settlement agreement. The Parents argue that the Settlement Agreement should not be enforced.
5. §10-76h of the Connecticut General Statutes confines the jurisdiction of Hearing Officers to confirming, modifying or rejecting the identification, evaluation or educational placement of or the provision of FAPE to a child, to determining the appropriateness of a unilateral placement of a child or to prescribing alternative special education programs for a child.
6. The parties agree that they entered into a Settlement Agreement and that it settles the issues raised by the Parents' Revised Due Process Complaint. The Hearing Officer has reviewed the Settlement Agreement and agrees with the parties that all the issues raised in the July 16, 2012 Revised Due

Process Complaint are settled in the Settlement Agreement.

7. When the parties have entered into an agreement, the Hearing Officer has no jurisdiction to decide its validity. Federal regulations provide that the forum to determine the validity of settlement agreements should be determined by state or federal courts. *See 34 C.F.R. 300.506(b)(7)*.
8. 34 C.F.R. 300.506(b)(7), which was promulgated in 2006, states that “[a] written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.” The regulation confers no jurisdiction on the Hearing Officer to determine the validity or enforceability of the Settlement Agreement.
9. The Parents’ argument that the Settlement Agreement is unenforceable is essentially based upon the law of contract. Further, the Parents’ complaints are essentially with their attorney and not with the Board. Those claims can be adjudicated either against the Board or their attorney in court. In any event, the Parents’ arguments do not involve FAPE or any IDEA-related claims.
10. Although both Board and Parents have relied upon the Connecticut Federal District Court’s holding in *Mr. J. et al v. Board of Education*, 98 F.Supp.2d 226, 237 (D.Conn. 2000), in making their arguments, the Hearing Officer does not feel bound by that decision. *Mr. J* was decided prior to the enactment of 34 C.F.R. 300.506(b)(7). The existence of 34 C.F.R. §300.506(b)(7) clearly obviates any need for the Hearing Officer to consider the enforceability of the Settlement Agreement.
11. Further, since the issues of enforceability are not before the Hearing Officer, there is no need to hold a hearing on the Parents’ evidence regarding enforceability of the Settlement Agreement.
12. The Hearing Officer concludes that she lacks jurisdiction to review the matters in the Parents’ July 16, 2012 Revised Due Process Complaint and accordingly will grant the Board’s Motion to Dismiss.

**FINAL DECISION AND ORDER:**

The Board’s MOTION TO DISMISS is hereby GRANTED and the matter is DISMISSED WITH PREJUDICE.