

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

IDPH-FY-08-08-013 / Middleton School District

DUE PROCESS DECISION

I. INTRODUCTION

This due process proceeding was initiated by [] (“Parent”), on behalf of [] (“Student”) on August 23, 2007. A prehearing conference was held on September 13, 2007, following which a Prehearing Order was issued. After several continuances, the due process hearing was held on October 25 and November 14, 2007. The following witnesses testified: [], Student’s grandparent; Martha Horgan, fourth grade aide; Diane Brandon, fourth grade teacher; [], Parent; Sue Pleau, Director of Pupil Services; Ann Welsh, fourth grade teacher and 2006-2007 case manager; Lynn Olden, nurse at Valley View Community School where Student attended third grade; Anne Bartoloni, school nurse at Henry Wilson Memorial School (“HWMS”) during the 2006-2007 school year; ¹ Joel Chagnon, HWMS principal, grades four through six; and Ms. M., Parent’s neighbor who provides child care for Student. Parent’s Exhibits 1 through 7-5, and District Exhibits 1 through 32 (pages 1 – 386) were received. ² Because most of the witnesses were called by both parties, the rules of cross-examination were relaxed so that witnesses were not required to be present on both days. The parties have filed post-hearing submissions.

The issues for due process were: a) whether Student should have been identified as having a learning disability; b) whether alleged safety issues rendered placement at HWMS for the 2007-2008 school year inappropriate, and, if so, whether Parent is entitled to reimbursement for the costs of a unilateral private school placement that began on September 4, 2007.

II. PROCEDURAL VIOLATIONS

No procedural violations were alleged, and none are found.

III. FACTS

Student is ten years old, and resides with [] Parent and sibling in Middleton, New Hampshire. Student was born with a number of medical issues, and is identified under the Individuals with Disabilities Education Improvement Act (“IDEIA”) as a student with educational disabilities under the coding of Other Health Impaired and Speech/Language. During the 2006-2007 school year, Student attended HWMS as a fourth grader, where [] received special education and related services pursuant to an Individual Education Plan (“IEP”). The IEP for the 2007-2008 school year calls for Student to receive resource room assistance for reading and language, speech therapy, occupational therapy, physical therapy and a shared paraprofessional. The parties agree that this IEP is appropriate; it was signed by the Parent on June 18, 2007. The coding on that IEP is Other Health Impaired and Speech/Language. SD Exhibit 8. In addition to an IEP, Student has an Individual Health Plan (“IHP”) to address [] medical needs. Parent Exh. 1

According to the District, although it has never received medical information confirming that Student has a latex allergy, it has always treated the Student as if a latex allergy did in fact exist. Testimony of Bartoloni, Welsh, Horgan, Pleau. Extensive policies and procedures relative to maintaining a latex-safe environment for the Student are contained in Student’s IHP, and have also been instituted on a school-wide basis. Among other things, the school purchases latex-free supplies, prohibits balloons and other items

¹ Ms. Bartoloni testified telephonically.

² Pages 357-359 had been included in error, and were removed. They are not part of the record in this case.

containing latex, and has sent informational letters home with all middle school students. Exh. 13; Testimony of Welsh, Chagnon, Bartoloni. Student and [] peers are very aware of and hypersensitive to latex allergy issues, and Student knows to avoid latex. Testimony of grandparent, Brandon.

During the 2006-2007 school year, there were a number of incidents which Parent claims jeopardized Student's safety and/or violated Student's right to a free appropriate public education ("FAPE"); some were brought to the school's attention in a letter dated August 13, 2007 from the Parent to school staff. Parent Exh. 6-3. A summary of the incidents follows:

- 1) During the 2006 Christmas holiday season, poinsettia plants were displayed in the hall near the HWMS office. School staff had contacted an expert from the University of New Hampshire and verified that the substance in poinsettias would not cause an allergic reaction to latex-allergic individuals. Student and [] peers stayed away from the plants. Testimony of Welsh, Horgan, Olden
- 2) On March 1, 2007, Student visited the nurse in the morning after vomiting; Parent was notified. Student subsequently felt better, went back to class and remained in school for the rest of the day. Testimony of Parent, Bartoloni It was subsequently learned that a pencil which may have had a latex eraser was inadvertently brought to school by another student; the pencil was never used in class, and was immediately removed. Testimony of Brandon. Parent attributes this incident to latex exposure; however, the evidence does not support this conclusion. Testimony of Bartoloni
- 3) While on a trip, a therapist purchased souvenir pencils for all of the students. Prior to handing out the pencils, she realized that the erasers might contain latex, and gave Student another gift instead.
- 4) Student attended a Book Fair at school, but stayed away from pencils and erasers. Other students put them away in their backpacks, and did not use them. All students washed their hands before returning to the classroom. Testimony of Horgan.
- 5) Latex balloons are prohibited in the school building. Testimony of Pleau, Chagnon. On one occasion, balloons were brought into the eighth grade wing of the school building, a well-ventilated area far from where Student attended. The balloons were confiscated immediately upon discovery, and had not been popped. Student did not have contact with the balloons. Testimony of Bartoloni, Lewis
- 6) During the summer program in 2007, another class located in a different wing of the building made puppets from paper mâché. Student was not near the puppets. Testimony of Horgan
- 7) A newspaper display in the hallway was removed as soon as it was noticed. Student did not touch it, nor were there newspapers in any area where Student might be. At least according to the American Latex Allergy Association, newspapers do not contain latex. SD Exh. 14; Testimony of Welsh, Chagnon
- 8) A guidance counselor was using crutches that did not contain latex. The guidance counselor did not work with Student. Testimony of Welsh
- 9) On one occasion, Student was unable to use the bathroom in the nurse's room. Student's supplies were kept in an unmarked box, and placed in the back of the room; Student used the bathroom at the back and drew no attention to []self. Testimony of Horgan
- 10) At a party on the last day of summer school, Student chose to eat the snack Parent had prepared rather than the food available at the party. Student socialized with [] classmates at the party. Testimony of Horgan
- 11) Student's IEP calls for an adult to meet [] at the bus. This occurred consistently, except for a single occasion when no adult was available. The bus driver watched Student leave the bus; Student was also accompanied by a friend. No injury occurred.

- 12) On one occasion, the bus broke down on the way to school. The wait was so short that the students were not late for school. Student was fine when [] arrived that day. Testimony of Horgan
- 13) Student's IEP calls for Student to wear a seat belt on the bus. On a fourth grade field trip to the State House, the bus had no seat belts. Student sat in the back with other classmates, and the aide did not make [] move [] seat. No injury occurred. The aide was subsequently made aware of the mistake, and did not make it again. Testimony of Horgan

Parent maintains that Student was "exposed" to latex. However, it was established that, in order for exposure to occur, there must be actual physical contact with the allergen, not simply the presence of the allergen in the vicinity of the allergic person. Parent Exh. 4; testimony of Olden, Bartoloni. There was no evidence, expert or otherwise, that Student was exposed to latex at any time, or that Student had any kind of allergic reaction.

Based upon the belief that HWMS could not provide a safe environment for Student, the Parent enrolled Student in Tri-City Christian Academy, a private school in Somersworth, New Hampshire, for the 2007-2008 school year. Student began attending Tri-City on September 4, 2007. Tri-City does not provide special education and related services, and is not the best placement for Student even in the Parent's view. Parent characterizes this as an "interim placement" pending resolution of due process. Although the Parent testified that the private school was safe from latex exposure, there was some evidence to the contrary. For instance, according to Parent, the students were permitted to decide whether they wanted to have balloons inside the school building, and there was some indication that, on at least one occasion, balloons were in fact on the premises. Testimony of Parent.

IV. DISCUSSION

As the party initiating due process, the Parent had the burden of proof on all issues Schaffer v. Weast, 546 U.S. 49, 58 (2005). The evidence must consist of more than just the subjective views of the parent. Mr. G. and Ms. K. v. Timberlane Regional School District, Op. No. 2007 DNH 002 (D.N.H. 2007).

In order to obtain reimbursement, it must be shown that the District has not made FAPE available to the student in a timely manner prior to enrollment in the private placement, and also that the private placement is appropriate. Florence County School District Four v. Carter, 510 U.S. 7 (1993). A failure to implement a student's IEP must be material before it will be found to have violated the IDEIA; there must be more than a minor discrepancy between the service provided and the service required by the IEP. Failure to strictly follow the IEP does not constitute a denial of a FAPE. *See* Van Duyn v. Baker School District 5J, 502 F.3d 811 (9th Cir. 2007).

In this case, concerns regarding latex allergy were effectively and proactively addressed by the HWMS. As noted above, all known substances containing latex were prohibited, and, if there was any question at all as to whether an item brought into the school contained latex, staff consistently erred on the side of caution by removing the item. Further, on a school-wide basis and specifically for the Student, there were protocols and training for responses in the event of actual exposure to latex allergens. Contrary to Parent's assertions, the staff at HWMS were caring professionals that took every reasonable precaution, formal and otherwise, to insure Student's safety and well-being. The isolated instances where an IEP provision was not strictly followed does not give rise to a deprivation of FAPE, particularly since there was no harm alleged or proven.

Assuming, *arguendo*, that District was unable to provide Student with a FAPE at HWMS, there has been no showing that the Parent's private placement is appropriate for this Student. Tri-City neither provides special education services, *see* Mr. I. v. Maine School Administrative District No. 55, 480 F. 3d 1 (1st Cir. 2007) (denial of tuition reimbursement where unilateral placement did not provide recommended special education services),

nor does it constitute the least restrictive placement for this Student. See Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

As to the coding issue, Parent signed the IEP which included the existing identifications of Other Health Impaired and Speech/Language. Whether to add a particular code to a student's IEP is for the team to determine. Ed 1107.01(b). In this case, the issue was raised for the first time during these proceedings.

V. REQUESTS FOR FINDINGS AND RULINGS

Findings of fact – Parent: 1, 2, 4, 6 – 8, 15 are granted; the remaining requests are neither granted nor denied as written, except that, to the extent that they are inconsistent with this Decision, they are deemed denied.

Findings of fact - District: 1 – 11, 13, 16 – 22, 23 – 41, 43 – 55 are granted. The remaining requests are neither granted nor denied as written, except that, to the extent they are inconsistent with this Decision, they are deemed denied.

Rulings of law – Parent: None proposed.

Rulings of law – District: 1 – 11 are granted.

VI. CONCLUSION AND ORDER

For all of the foregoing reasons, I find that the Parent has not met the burden of proof relative to reimbursement for Parent's unilateral placement of Student at Tri-City Christian Academy. HWMS was and is the appropriate and least restrictive placement for Student, and able to provide Student with a FAPE.

With respect to Parent's claim that Student's IEP should include a coding that reflects [] dyslexia, as noted above, the issue of appropriate coding is a team decision. At such time that Student returns to the District, the team should promptly convene a meeting to review available information and make a determination as to the appropriateness of this code.

VII. APPEAL RIGHTS

If either party is aggrieved by this Decision, that party may appeal this Decision to a court of appropriate jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The District shall notify the Commissioner of Education when either the District or the Parent seeks judicial review of this Decision.

VIII. STATEMENT OF COMPLIANCE WITH ED 1128.22(B)

If neither party appeals this Decision to a court, then the District shall, within ninety (90) days provide to the Office of Legislation and Hearings, Department of Education, and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to the Parent. If the Parent does not concur with the District's report, the Parent shall submit Parent's own report through the Commissioner of Education.

Date: December 17, 2007

Amy B. Davidson, Hearing Officer