State of New Hampshire

Department of Education

IDPH-FY-06-01-044 / Wilton-Lyndeborough Cooperative School District

DECISION OF THE HEARING OFFICER

I. Background

A two-day due process hearing was held in this matter on March 13 and March 31, 2006 . At the hearing, the Wilton-Lyndeborough Cooperative School District was represented by Attorney Eric Herlan. Student's mother appeared *pro se* . Prior to the completion of the hearing both parties filed written waivers of the statutory deadline for conducting a hearing and issuing a decision in this matter.

In support of its Complaint, the School District called five witnesses, Occupational Therapist Linda Murphy, Special Education Coordinator/Case Manager Betty Einsidler-Moore, Vocational Coordinator Paula Bliss, Classroom Teacher Jill Twombley, 2004 Case Manager Richard Artiz. The Parent presented her own testimony as well as the testimony of Occupational Therapist Abby LaRock, Psycholinguist Robert Kemper, Ph.D and Speech and Language Therapist Michele Sigmann. Both parties also entered a voluminous and, frankly, excessive amount of documentary exhibits into the record -- a combined 12 volumes and over 4000 pages to be precise.

On April 28, 2006 the Hearing Officer received the parties post-hearing submissions. At issue in this matter are the appropriateness of the School District 's proposed 2005-2006 IEP and proposed placement for Student as well as the Parent's allegations of IEP-related procedural violations by the School District . As noted above, Student was represented by her mother who appeared *pro se* . The Parent is a dedicated, knowledgeable and passionate advocate for her child. As my factual findings indicate, the Parent has proposed an IEP and placement that appears to be reasonable and that, if it could be implemented, would likely be educationally beneficial to her child. The School District 's proposed IEP and placement, however, are also both reasonable and educationally beneficial to Student. As my legal rulings make clear, the School District 's proposed IEP and placement, therefore, meet the legal standard for “appropriateness” set forth by the IDEA as interpreted by the United States Supreme Court and the First Circuit Court of Appeals. Accordingly, a review of all of the evidence and applicable legal authority submitted mandates that judgment be issued in favor of the School District . The basis of this decision is set forth in the following findings of fact and rulings of law.

II. Findings of Fact

A. The Student

Student. is a 19 year-old, educationally disabled, student who will turn 20 on August 8th of this year. Student has been diagnosed with cerebral palsy, left hemi paresis, leg length discrepancy, scoliosis and seizure disorder. Student's full scale IQ is 42, which falls into the low end of the moderate range of mental retardation. According to DSM IV, an individual with moderate retardation can usually profit from vocational training, attend to personal care with moderate supervision, travel independently in familiar places and adapt well to a supervised community setting, but is unlikely to progress beyond the second grade level academically. Student's disabilities cause … to have difficulty seeing objects on her left side. … has visual and spatial perceptual deficits based on damage to the right hemisphere of … brain, which seriously impact … abstract thinking, organizational abilities and problem solving, in addition to the use of … left arm and hand. Student's disability also presents "externalizing" behavioral challenges that require the use of a Behavior Intervention Plan and the occasional use of restraints when … becomes a safety threat to …self or others. Student has been coded multiply handicapped, speech-language impaired, mentally retarded and orthopedically impaired. Student lives in Lyndeborough , New Hampshire and resides with … parents.

B. Recent Case History

From January 1996 through June 2001, Student attended the Lighthouse School . In 2001, Lighthouse School officials determined that the facility would no longer be able to accommodate Student's needs. In July 2001, Student was placed, with the agreement of the IEP team, at the Crotched Mountain Rehabilitation Center in Greenfield , New Hampshire . Student attended school as a day student at Crotched Mountain from July 2001 into December 2005. On December 30, 2005 , Student's parents' attorney informed the School District that she was terminating Student's placement at Crotched Mountain . Since Student was removed as a student at Crotched Mountain , the School District has continued to fund occupational therapy services for Student. The School District has also offered tutoring services to Student during this time period, but Student's parents did not accept the School District 's offer.

On March 22, 2005, after a two-day hearing, a Department of Education hearing officer ruled that the School District's 2004-2005 proposed IEP was legally appropriate and could be implemented by the School District. Because the parties failed to agree on a 2005-2006 IEP, the 2004-2005 IEP remained in effect into December 2005 when Student's parents withdrew … from schooling at Crotched Mountain . The 2004-2005 IEP called for a variety of services for Student including academic instruction, music instruction, physical education, psychological services, prevocational and vocational services, occupational therapy, speech and language therapy and physical therapy. At some point in the Fall of 2005, the School District stopped providing additional services included in a draft 2005-2006 IEP and reverted back to limiting its program to that set forth in the 2004-2005 IEP.

- **The Proposed 2005-2006 IEP**

The IEP team meeting process began in April 2005 and continued for a total of six team meetings through September 15, 2005 . With the recently administratively- approved 2004-2005 IEP as its starting point, the School District presented its first draft IEP at the May 12, 2005 team meeting. After the IEP team discussed some changes at the June team meeting, the School District presented a 77-page redrafted IEP for the teams consideration. On August 25, 2005 , the School District 's Special Education Coordinator, Betty Einsidler-Moore sent out a revised draft IEP to Ms. L and the other team members in advance of the team meeting scheduled for September 15, 2005 . At the September 15 meeting, the IEP team considered this revised draft and the Parent did not consent to the redrafted IEP. The draft IEP for the 2005-2006 school year, as considered by the IEP team on September 15, 2005.

The 2005-2006 draft IEP also included 42 pages of goals and objectives covering communication, education/academics, physical education/health, pre-vocational skills, occupational therapy, physical therapy, and psychology as well as a Transition Plan and a Behavior Program. The Parent did not agree to the proposed IEP or placement. Further resolution efforts failed and, subsequently, the Parent terminated Student's enrollment at Crotched Mountain via a December 30, 2005 letter to the School District .

The Parent objects to the proposed 2005-2006 IEP and placement at Crotched Mountain , asserting that it is “inappropriate to meet [Student's] substantial educational needs” including the specific areas of literacy, occupational therapy, and behavioral and social needs. Although, there is certainly room for disagreement on the complex issue of how to appropriately assist Student's educational development, it is equally clear that Student has made some significant educational gains under the only partially implemented (April-December 2005) 2004-2005 IEP. Moreover, it is reasonable to expect that similar progress could continue if the 2005-2006 IEP is implemented.

As the School District noted in its post-hearing brief, the 2005-2006 IEP offered the same level of therapeutic supports as the earlier program had offered in the areas of occupational therapy, speech and language services and physical therapy. The Parent did present the testimony of Abby LaRock opining that Occupational Therapist Linda Murphy had expectations that were too low and that the various providers at Crotched Mountain were not sufficiently coordinating service delivery. Ms. LaRock's opinions, however, were discredited upon cross examination when it became clear that she had never observed Ms. Murphy working with Student, had not observed Student at all in the recent past at Crotched Mountain , and had no first hand knowledge of how the Crotched Mountain providers currently coordinate service delivery.

The Parent initially objected to the IEP for its failure to include the Lindamood (LiPS) methodology as a tool to address Student's significant and problematic difficulties in reading. The School District responded in good faith to this concern by having an experienced licensed speech pathologist, Jean Rube-Rainier, trained in the LiPS program so that she could work on that methodology with Student. The Parent subsequently refused to permit Ms. Rube-Rainier to deliver the program because she lacked 1 year of hands-on prior experience in LiPS. This issue, however, is not a distinction that is sufficient to invalidate an otherwise valid, “educationally beneficial” reading program. Regardless, by July Mother had reversed her position and, despite Dr. Kemper's prior recommendation of LiPS, decided that the Davis Reading Program was “better,” and requested the use of that multi-sensory reading program instead of the particular multi-sensory reading program used by Crotched Mountain personnel. Once again this appears to be a “maximum” educational benefit issue and not an issue that would invalidate otherwise appropriate reading goals, objectives and service levels.

As to the issue of Student's behavioral and social needs, the Parent asserts that the behavior plan was “inappropriate” and “inconsistently administered”.
The IEP, however, included a behavior plan that, in an earlier incarnation, had been upheld in the March 2005 hearing.
Although changes to the behavior plan should have been made more rapidly and there appear to have been some individual mistakes made in the course of implementing the behavior plan, a good faith effort was made by the School District in this area. Also, appropriate, individualized modifications had been made since the 2004-2005 IEP and the School District has shown a willingness to revise the behavior plan during the school year when necessary to address particularly difficult or problematic situations. For example, Student had a positive reaction, behaviorally, to the change of classrooms in the late Spring of 2005 and to the changes made after the difficulties involving Student's morning bus transportation to Crotched Mountain in the Fall.

In short, the testimonial and documentary evidence in the hearing record indicates that Student has received educational benefits from all of the programs provided in the 2004-2005 IEP. It is reasonable to assume that this progrss would continue in some fashion through the implementation of an enhanced 2005-2006 IEP. Although it is possible that the Parent has a “better idea” regarding delivery of these educational services, that would not change the fact that Student has benefited, and likely would continue to benefit, from the School District 's approach.

- **The Proposed Placement**

The Parent also raises an issue concerning the appropriateness of the placement of Student at Crotched Mountain . The main concern identified here involves the belief that Student would benefit more from receiving prevocational services more often in an “out in the community” setting. To accomplish this, the Parent asserts that Student would be better served by being placed in a program of “home instruction” and “community based” learning through “a local provider and therapists with whom Student had forged productive relationships”.
Initially it should be noted that the 2005-2006 IEP includes a significant increase in services in the area of pre-vocational skills – an area that the Parent was strongly emphasizing in her own programming requests. As noted in the School District 's post-hearing brief, the Parent does not seriously object to the amount of time devoted to pre-vocational services, or to the prevocational goals and objectives in the draft IEP. Instead, the community-based program issue is really a dispute about the methodology for delivery of the prevocational services Student needs to prepare her to eventually function outside of the school environment.

The hearing record contains few details about how a home and community based program would work in such a complex situation and in such a key portion of Student's IEP. Further, regardless of the merits of the home instruction/community-based program, the School District credibly defended its preference for using a placement at Crotched Mountain to deliver these prevocational services. In the opinion of Paula Bliss, Student's prevocational instructor at Crotched Mountain , Student increased her basic work knowledge and career awareness over the past two years by completing a number of prevocational activities. Also, Crotched Mountain was willing to experiment with further community experiences “off the mountain” once they were able to begin implementing the proposed IEP. One key barrier to increasing such community visits in the past has been Student's behaviors during transportation to Crotched Mountain . That issue was subsequently addressed by the District in the Fall of 2005 when, at the Parent's request and with the Parent's input, it developed and implemented a revised bus transportation plan on an emergency basis. Shortly after the resolution of this issue however, the Parent chose to remove Student from the Crotched Mountain placement.

In short, the credible opinions of Crotched Mountain personnel and the 2005-2006 IEP's increase in prevocational services make it clear that it is not necessary to place Student in a “home instruction”/“community based” program to provide “appropriate”, (as opposed to “maximum”) educational benefits in this area. In addition, the primary delivery of educational services at home in conjunction with community-based prevocational program would be a more restrictive alternative than placement at Crotched Mountain as proposed by the School District .

- **The Team Meeting Process**

A significant portion of the hearing evidence involved the Parent's claim that the team meeting process was seriously flawed in the areas of team membership and parent participation. The Parent further asserts that these procedural violations should be remedied through some form of compensatory education. Much of the evidence on these issues was compiled by the Parent in the form of extremely detailed minutes of each team meeting. This evidence indicates that the team meeting process involved a lengthy and detail-oriented review and discussion of the proposed IEP as well as the consideration, and at times adoption, of the concerns and opinions presented by or on behalf of the School District and the Parent. There definitely was, at times, significant friction between the Parent and some of the other team members. In addition, School District representatives did not always run the process smoothly and could most definitely improve their organization and record keeping practices. These problems rose to the level of a procedural violation in two areas when the School District failed to meet the requirements for: 1) properly notifying the Parent of who would be attending the team meeting and, 2) giving written prior notice to the Parent of adverse decisions by the School District . The remaining procedural violation claims have been effectively answered in the School District 's Post-Hearing Brief.

It is important, however, to consider the context of this situation. The School District 's procedural failings occurred in the course of 6 lengthy team meetings involving the School District , the Parent and numerous educators and service providers present as necessary to thoroughly review the particular IEP issues raised by team members. In only one situation is it established that the School District failed to have directly **necessary** personnel present – when the School District 's consulting psychologist was unable to attend the June 14, 2005 team meeting on a possible behavior plan. This situation was promptly remedied, however, by having the psychologist attend the very next team meeting on this issue.

Under the factual circumstances of this case, the School District 's organizational miscues did not “significantly impede” the Parent's right to participate in the team process and did not deprive Student of a “significant educational benefit”. Accordingly, although these procedural violations are not condoned and the School District must create a more organized method for conducting team meetings regarding Student's education, a punitive order that attempts to specifically remedy these procedural violations is not appropriate at this time. Further, the Parent did not specify what particular relief she was looking for from any such procedural violation remedy process.

III. Rulings of Law

There are three primary legal issues to be addressed in this proceeding: the appropriateness of the 2005-2006 IEP, the appropriateness of the Crotched Mountain placement and whether the School District committed procedural violations in the team meeting process.

As the following specific rulings of law indicate, the legal standard to be applied to these issues does not involve a decision as to what is the "best" educational program for Student or whether the School District could have provided more or better educational services to Student. This case, in essence, also does not come down to a question of who here, namely the Parent or the School District , is "right" or "wrong".

The issue when evaluating a proposed IEP and placement is whether the School District 's proposal is "appropriate". The United States Supreme Court has made it quite clear that an IEP and placement are "appropriate" if the IEP is merely "reasonably calculated to enable the child to receive educational benefits". *Board of Education of Hendrick Hudson School Dist. v. Rowley* , 102 S. Ct. 3036, 3048 (1982). The IDEA does not require that the School District provide Student with an IEP or a placement that will "maximize" her educational potential. *See Board of Education of Hendrick Hudson School Dist. v. Rowley* , 102 S. Ct. 3036, 3048 (1982).

As a practical matter, this legal standard makes it exceedingly difficult, in most cases, for a parent to prevail over a school district in an IEP dispute. This conclusion is especially applicable in cases where a school district has committed the time and resources that the Wilton-Lyndeborough Cooperative School District has invested in Student's education. For these reasons, the School District is the prevailing party in this hearing process and both parties are encouraged, in the best interest of Student, to resolve any future disagreements over Student's education plan within the team meeting process or through mediation rather than expending additional time, energy and resources on further litigation. For, though it is clear that both parties approached this matter in a good faith effort to defend their point of view, in the opinion of this individual hearing officer, the time, energy and resources both parties devoted to this litigation would have been far more effectively utilized had they, somehow, been more directly invested in Student's educational development.

The parties each submitted requests for rulings of law. The following specific rulings of law are applicable to the facts set forth in the body of this decision.

A. Legal Background

1. The hearing officer's decision and findings in last year's due process hearing, *IDPH FY 05-02-050 / Wilton-Lyndeborough Cooperative School District*, , issued on March 22, 2005 , have *res judicata* effect in the current case, and cannot be reconsidered in this hearing, even though that earlier ruling is now on appeal. *See University of Tennessee et al. v. Elliott* , 478 U.S. 788, 798 (1986) (courts apply *res judicata* to rulings by state agencies when acting in a judicial capacity); *Restatement (Second) of Judgments* § 83, p. 269 (1982) (same); *Taunton Gardens Company v. Hills, et al.* , 557 F.2d 877, 879 (1 st Cir. 1977) ("the pendency of an appeal does not destroy the *res judicata* effect of a judgment even if it has been stayed"); *Newmarket School District* , 40 IDELR 26 (NH SEA 2003) (hearing request dismissed by NH hearing officer because the same issue had been ruled upon by Commissioner); *In re: Matthew F* ., 30 IDELR 92 (NH SEA 1999) (limiting new hearing to facts that had occurred since earlier hearing, based on *res judicata* effect of earlier ruling)]

- **IEP General Standards**

1. When the appropriateness of an IEP is under review, the district's actions must be reviewed, not in hindsight, but in terms of what was reasonable "at the time the IEP was promulgated." *Roland M. v. Concord School Committee* , 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied* , 111 S. Ct. 1122 (1991); *see also Susan N.* , 70 F.3d at 762 (courts should confine themselves to reviewing the reasonableness of a school district's decision at the time it was made).

2. The IDEA does not require that the School District provide Student with an IEP and placement that will "maximize" her educational potential. *See Board of Education of Hendrick Hudson School Dist. v. Rowley* , 102 S. Ct. 3036, 3048 (1982). Instead, an IEP is "appropriate" if it 1) is "reasonably calculated to enable the child to receive educational benefits"; and 2) was developed in accordance with the procedures required by the Act. *Id.* at 3051.

3. Schools are not required to provide students with an IEP or placement calculated to provide "meaningful" benefit, to the extent that "meaningful" means anything more than "some." *See Rowley* , 102 S. Ct. at 3048 (must provide "some educational benefit"); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1 st Cir. 1993) ("some educational benefits"); *Abrahamson v. Hershman* , 701 F.2d 223, 227 (1 st Cir. 1983); *JSK v. Hendry County School Board* , 941 F.2d 1563, 1572 (11 th Cir. 1991); *Devine v. Indian River County School Board* , 249 F.3d 1289, 1292 (11 th Cir. 2001); *Kerkam v. McKenzie* , 862 F.2d 884, 886 (D.C. Cir. 1988).

4. An IEP can provide a FAPE even if it is not "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice." *G.D. v. Westmoreland Sch. Dist* ., 930 F.2d 942, 948 (1st Cir. 1991).

5. The law does not require that the school district offer Student a program that will enable ... to "catch up" with less disabled peers. *Houston Indep. School Dist. v. Bobby R* ., 200 F.3d 341, 349 (5 th Cir. 2000).

6. As long as the IEP provides a FAPE, the team is not required to include a parent's preferred methodology in the IEP. *CJN v. Minneapolis Pub. Schools* , 323 F.3d 630, 638 (8th Cir. 2003); *O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233* , 144 F.3d 692, 709 (10th cir. 1998); *Tucker v. Calloway County Bd. of Educ* ., 136 F.3d 495, 505-06 (6th Cir. 1998); *see also Lt. T.B. v. Warwick School Committee* , 361 F.3d 80, 83, 86 (1st Cir. 2004).

7. A hearing officer is justified in giving “little credence” to expert opinions on educational programming issues where the expert never visited the program in question, never observed the child in the program, never discussed the student's performance or behavior with school personnel who actually observed it, and was uninformed about the programs or supports in place for the child. *J.W. v. Contoocook Valley School District* , 154 F. Supp. 2d 217, 227, 229 (D.N.H. 2001).

8. In reviewing opposing opinions on educational programming, it is appropriate for a hearing officer to give weight to the observations of teachers, administrators and school psychologists with extensive professional experience in serving educationally disabled children. *J.W.*, 154 F. Supp. 2d at 230;

9. The school district is not required to accept the findings of privately obtained educational evaluators, and need not engage in substantive discussion of such evaluations, so long as their opinions are “considered.” *See G.D.* , 930 F.2d at 947.

- **Least Restrictive Appropriate Placement**

1. The IDEA and federal and state special education regulations require that Student be placed in the least restrictive appropriate environment. *See* 20 U.S.C. § 1412(a)(5)(A).

2. Schools must make available a “continuum” of placement options, ranging from mainstream public school placements, through placement in special day schools, residential schools, home instruction and hospital placement. *See* 34 C.F.R. § 300.551(b)(2), 300.552(c), (e), 300.553; Ed. 1115.04(b).

3. Placement in a “home instruction” program is more restrictive on the continuum than placement in a “full time special day school.” Ed. 1115.04(b) (continuum chart); *see also Bellingham Public Schools* , 41 IDELR 74 (SEA Mass. 2/17/04) (“Providing educational services only within the home, separate from a student's peers at school, is considered the most restrictive educational setting possible

4. If placement in a less restrictive setting can provide an appropriate education, than placement in a more restrictive setting would violate the IDEA's mainstreaming requirements. *See Abrahamson v. Hershman* , 701 F.2d 223, 227 n.7 (1 st Cir. 1983).

D. Student's IEP and Placement

1. The IEP that the School District offered on September 15, 2005 , was reasonably calculated to provide educational benefits.

2. The IEP that the School District offered on September 15, 2005 , was appropriate.

3. The School District 's proposed placement of Student in a “full time special day school” is reasonably calculated to provide educational benefits and is appropriate.

4. The School District 's proposed placement of Student in a “full time special day school” is the least restrictive setting in which she can obtain an appropriate education.

5. The School District 's proposed placement of Student at the Crotched Mountain special day school is reasonably calculated to provide educational benefits and is appropriate.

6. The School District 's proposed placement of Student at Crotched Mountain special day school is the least restrictive setting in which ... can obtain an appropriate education. *See* District's Post Hearing Memo, at 11-13.

E. The Team Meeting Process

1. With respect to parent participation, the district is obliged to "take steps to ensure that one or both [parents] are present at each IEP meeting or are afforded the opportunity to participate." 34 C.F.R. § 300.345(a) ("Parent Participation, Public agency responsibility"). The district's responsibilities for promoting parent participation are described in the regulations as: (1) giving parents advance notice of meetings, (2) scheduling meetings at mutually agreed on times and places. *Id.*

2. "Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content." 34 C.F.R. Part 300, Appendix A, 64 Fed. Reg. at 12478 (Question 32). Educators may prepare a draft IEP in advance of an IEP meeting, so long as they allow parents to "bring questions, concerns, and recommendations to an IEP meeting as part of a full discussion of the child's needs." *Id.*

3. Under the IDEA, not less than one special education teacher, or "where appropriate," not less than one "special education provider" must be in attendance at IEP Team meetings. 20 U.S.C. § 1414(d)(1)(B)(iii). Appendix A of the IDEA's current regulations states, "Although Part B does not expressly require that the IEP team include related services personnel as part of the IEP team …, it is appropriate for those persons to be included if a particular related service is to be discussed as part of the IEP meeting." 34 C.F.R. Part 300, Appendix A, 64 Fed. Reg. at 12478 (Question 30). Related service providers can participate either by attending team meetings or by providing written recommendations or evaluation reports. *Id.*

4. A hearing officer's decision "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i). "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies – (I) impeded their child's right to a free appropriate public education; (II) significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education t the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *see also Roland M. v. Concord School Comm* ., 910 F.2d at 995.

5. The parents have the burden of proof that any alleged procedural violations resulted in substantive harm that renders the IEP legally defective. *Roland M* ., 910 F.2d at 994-95.

6. The school district did not commit any procedural violations of the magnitude described in Paragraph 5.

IV. Order

For the reasons set forth in this Decision, the Hearing Officer issues the following Order in the above-referenced case:

A. The 2005-2006 IEP offered by the School District is a legally appropriate IEP,

B. The placement at Crotched Mountain Rehabilitation Center is a legally appropriate placement, and

C. The School District is the prevailing party.

V. Appeal Rights

If either party is aggrieved by the decision of the hearing officer as stated above, either party may appeal this decision to a court of competent jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The School District shall promptly notify the Commissioner of Education if either party, Parent or School District , seeks judicial review of the hearing officer's decision.

SO ORDERED.

Date: July 17, 2006
Peter T. Foley, Hearing Officer