

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

Decision of the Hearing Officer

IDPH-FY-07-05-064 School District

Procedural Background

The Parents' request for an administrative due process hearing was received at the New Hampshire Department of Education on May 4, 2007. A scheduling notice was sent by the Department on May 10, 2007. A pre-hearing conference was held on June 15, 2007 and a Pre-hearing Conference Report and Order was issued on June 19, 2007. Two days of hearing were held on July 30, 2007 and August 6, 2007. Proceedings were continued and generally delayed to meet the summer schedules of both parties.

Paul Apple, Esq. represented Kathy Skoglund, Special Education Director for _____ School District (District). _____, _____ of the Student, appeared *pro se*. _____ was assisted by _____. Parents' Exhibits, marked Parent Exhibit 1 through 109 (P), were received without objection and _____ went forward on the first day. Witnesses were Renea Sparks, Assistant Director of Student Services; _____, _____; and Dr. Foad Afshar, Student's Psychologist who participated on Student's IEP team until recently. Witness Afshar and the cross-examination of Witness _____ were taken out of order.

The School District submitted Exhibits 1 through 162 and they were accepted without objection. Paul Apple, Esq. presented witnesses on the second day. They were Deborah Martel, Assistant Principal at _____ Middle School; Mary Westwater, reading specialist; Barbara McCormick, who taught the Student Social Studies last year; Nicole LaDoucer, special education teacher; Bonnie Richardson, speech and language therapist and Kathy Skoglund, Special Services Director. More than one witness appeared on both parties witness lists. Both parties were liberal regarding the scope of examination and cross-examination for the sake of efficiency. All proceedings were recorded electronically.

Issues

Parents identified two issues, referred to in pleadings as procedural violations:

Student was denied a free and appropriate public education (FAPE)

1. when the School District failed to carry out a goal of Student's 2006-2007 IEP;
2. when the School District failed to provide a new IEP before the expiration of the prior IEP.

Hearing

The Parents presented witnesses who provided information that Student has received special education services because of the effects of fetal alcohol syndrome (FAS) and reactive attachment disorder (RAD). Student is identified as other health impaired (OHI) and with speech and language deficits. In school year 2005-2006, _____ sixth grade

placement through _____ School District (School District) was at _____, a private academy for students with learning disabilities. In 2006-2007, Parents encouraged the _____ School District to place Student in _____ Middle School and _____ was admitted for an abbreviated day. _____ Mother took the responsibility for teaching _____ math.

Renea Sparks testified that she was the Assistant Director of Special Services and the LEA representative on Student's IEP team. She was Student's case manager beginning in August 2005, when Student moved into the _____ School District and until September 25, 2006, when Student entered the _____ Middle School. She remained on the Student's IEP team. She was Student's case manager when the most recent IEP was developed. It covered the period from April 4, 2006 through April 4 2007 and focused on the functional, academics and on social goals.

The witness did read materials provided by Parents on the subject of Student's disabling conditions and she recalled that Dr. Afshar instructed the team on aspects of FAS and RAD but she never provided special training for faculty members in these disabilities.

She recalled that it was during the development of the April 2006 IEP that Dr. Foad Afshar, Student's psychologist who participated on the IEP team, suggested inclusion in Student's IEP of videotaping Student's interactions with other students to be viewed by Student. This was to be done at least weekly and would provide a "third eye" to help Student with self-perception. Parents' witness, Dr. Foad Afshar testified somewhat later that the Student was having trouble understanding the effects of _____ behavior on others and that videotaping would allow self-reflection without need for faculty assistance.

The behavioral goal was to increase Student's ability to appropriately interact with others and to recognize _____ own behavior. Though videotaping was the first of three objectives associated with the behavioral goal, _____ and _____ Middle School never implemented that process. Testimony from the _____ suggested that _____ learned on August 17, 2006, as Student was about to enter _____ Middle School, that _____ Academy had not carried out the videotaping plan that was included in the IEP. Further, Parent testified that the IEP was never amended to allow alternative methods for reaching the goal in question (SD 82, p478). _____ testified that _____ never agreed to a change eliminating videotaping though _____ was asked on more than one occasion.

Parent believes the goal and objectives are a package and that videotaping is necessary for any part to be implemented. Renea Sparks and others saw the objectives as independent of one another capable of being carried out separately.

Nicole LaDoucer testified that team meeting minutes reflect the decision not to drop the behavioral goal but to change how it was implemented deciding to replace the videotaping objective with a behavioral plan (SD 145, p989, SD 108, p575) and that the minutes of the meeting of October 13 reflect the same. The School District presented witnesses to say that the team amended the goal to allow for an alternative means of teaching self-awareness in the form of positive behavior support plan as introduced by

Dr. Afshar at the December 2006 meeting, then reviewed and completed for review at the January 2007 meeting.

Sparks testified that Student was to join a small lunch group and that _____ would be given written feedback on how _____ interactions with other students were perceived. The lunch bunch change was implemented and no written prior notice was needed for that. Sparks said the question of eliminating the video-taping was raised at the time of the resolution session that brought about the acceptance by the School District of the Student's placement at _____ Middle School as had been urged by Parents.

Sparks testified that the _____ did not agree to an amendment until there was a plan in place. The team agreed to go ahead with Afshar's behavior plan in December or January. Sparks stated that written prior notice was not sent but the team understood in January 2007 that Afshar's behavior plan was to take the place of videotaping in the IEP.

Sparks stated that in the early months of the school year, it was realized that the videotaping piece could not be implemented in the public school setting. Sparks _____ environment but that there would have been unfavorable results to videotaping Student in a public school cafeteria, for instance. _____ would feel singled out. Consent issues would arise. The school would need permission of the parents of all students who happened to be videotaped and that could not be done.

Foad Afshar, Psy. D., (P 4) testified that he had known the Student for four years and had worked with _____ as _____ psychologist. He found _____ experiences the classic effects of fetal alcohol syndrome disorder (FASD), a spectrum disorder (P 5 and 6), such as social immaturity and poor judgment in knowing which peers to follow. _____ craves to be the center of attention and this leads _____ into trouble. He testified that these behaviors will likely follow _____ into adulthood. _____ will need to be cued on a regular basis and attempts to overcome these problems must be attacked in a systematic way at this learning stage. (P 7).

Afshar testified that Student is unable to interpret behavior. _____ has trouble learning from observing behavior and applying to _____ life experiences. Student can't pick up social skills as other people do. According to Afshar, the description of the effects of FASD in the book *Teaching Students with FASD*, (P 1, p36), applies to Student. This book makes reference to videotaping and Dr. Afshar has used videotaping with Student and others as it helps with self-reflection.

Dr. Afshar explained how the goal and objectives in question (SD 82, p478) related explaining that Student was not aware of certain problematic behaviors _____ exhibits and would deny them. Videotaped actions can not be denied but will over time lead step by step to growth. Afshar believes that _____ needs this preparation for high school and to maximize _____ potential beyond high school as should happen with any student.

Dr. Afshar found the _____ to be knowledgeable but stated that _____ involvement lengthened the process and it may have frustrated other participants. He was not aware of

the _____ ever having agreed in writing to amend the IEP to remove videotaping and he understood the positive behavior support plan to be a temporary replacement for videotaping.

He testified that he recalled a discussion and a team agreement to drop and not instantly begin the videotaping at the time the Student was adjusting to the move to the _____ Middle School. It would be replaced with speech and language and guidance assistance with scripting to help _____ deal with novel situations such as _____ might encounter on a trip to Pinkham Notch, for instance. (SD 95, p545). He worked to develop the positive behavior support plan (SD 96, p547) at the first of the calendar year 2007 that emphasized rules/boundary setting, social skills training and scripting. He attended meetings in March and April. He was paid to attend and participate in the IEP meetings by the School District through April 2007.

Bonnie Richardson had worked with Student in observing others' behavior concentrating on one type of behavior at a time. They observed who and how many students were making appropriate eye contact. This was followed by role-play that _____ was willing to engage in by the end of the year. (SD 82, p478, #3). Also, there were lessons on setting and observing boundaries. Teachers Mary Westwater and Barbara McCormick testified that Student was showing progress and doing well in school.

Kathy Skoglund, Director of Special Services, testified that during September and October 2006, that she was minimally involved in this matter but that she attended sessions resolving placement concerns for Student. Renea Sparks usually served as the LEA representative at meetings but the witness attended certain meetings after the turn of the year. She was aware that development of the successor IEP was taking a large amount of time and that there was a sticking point around a functional skills aspect of the IEP at the March 30, 2007 meeting. (SD 72, p365, 369).

She attended the March 30, 2007 meeting at which a draft was presented for consideration. Much clarification was requested by the Parent in several areas and Skoglund recognized that there was a gap between what was presented by the District and Parent's expectations for the IEP. (SD 72, Id.) Parent felt rushed and another meeting was held on April 12, 2007 to allow for the _____ response and further discussion of the yet incomplete draft IEP. The point of the meeting was to provide for Parent's participation. Parent was a strong verbal contributor and provided voluminous emails and lengthy discourse on potential contents of _____ child's IEP. Small break-out groups were begun as suggested by Afshar, each dealing with certain aspects of the IEP. Forms for waivers of written prior notice were sent so that the process could continue. Skoglund testified that these time extensions were refused in emails in which Parent blamed the School District for inexcusable delays (SD 45, p280 and 281).

Several meetings were held in May dealing with ESY and functional goals. An email dated April 30, 2007 from Skoglund lists seven dates offered for meetings. (SD 45, p280-283). More than three meetings occurred but all were not attended by a fully constituted IEP team as some were work sessions suggested by Afshar. Substantially complete IEPs

drafts were presented earlier and a complete IEP was presented on July 9, 2007. Skoglund stated she was surprised when it was rejected.

In addition, Skoglund testified that she has spoken to twenty-two psychologists attempting to find a replacement for Afshar but as yet none has been acceptable to the Parent. Skoglund stated that Afshar did not continue to participate when impasse arose regarding payment arrangements. She testified that the difficulty in finding a replacement for Afshar is sufficient knowledge of FASD and that the search continues with two more candidates now being considered.

Discussion

At the crux of this dispute is the desire of the Parents to maximize their disabled Student's potential in a public school setting, placed against the public school administrators' charge of educating and respecting the privacy of a large numbers of students. The underlying dispute has its origins in the circumstances and ramifications of the change in placement from a small private school with eight to ten students per class to a large public school setting in September 2006. Educating the Student with non-disabled students was the desire of the parents (SD 139) and not favored by the School District.

1. It is unclear how well articulated were the problems associated with videotaping in a public school setting (SD 139, p968) in the months before Student's admission to _____ Middle School but an amendment to eliminate videotaping had been posed and rejected in September 2006. The testimonies of Sparks, _____ and Skoglund suggest there were clashes at Student's entry in _____ with a hearing just avoided. Work on a new IEP was begun during the first weeks of the Student's career at _____ according to testimony of Renea Sparks. There were misperceptions and miscommunication about the adoption of the positive behavior support plan (SD 96, p547) that was intended to address the behavioral goal of the 2006-2007 IEP in a public school setting that occurred in December 2006 and January 2007. However, in the eyes of the Parent, videotaping was a critical piece of achieving the behavioral goal of improving social interaction and self-awareness. She would not give up that objective. To the School District, videotaping random interactions between Student with other students was an impossibility.

The obligation of the School District under IDEA, 20 U.S.C. Section 1400 *et seq.*, is not to maximize a student's potential but to provide a basic floor of opportunity. *Lenn v. Portland School Committee*, 998 F.2d 1083, 1091 (1st Cir.1993) citing *Henrick Hudson School District v. Rowley*, 458 U.S. 158, 201 (1982). The positive behavior support plan (SD 96, p547-550) put in place in the winter of 2007 more than satisfied the *Rowley* standard.

2. The _____ places the blame for the delay in adopting an IEP squarely on the School District. Parent continues to find the IEP unsatisfactory. A review of the documents exchanged and the testimony, especially that of the _____ and Kathy Skoglund, yields the conclusion that significant amounts of District time was spent on correspondence, especially on reviewing, redrafting and responding to pages and pages of comments delivered to the IEP team (SD 78, p424, SD 68, p347). In evidence are dozens of pages of

challenges to what was proposed for the IEP and to the procedures for adopting the IEP and requests for changes in the numerous drafts of the IEP showing a desire for perfect process and a perfect IEP over a workable IEP for the Student, no matter the circumstances in a way not required by IDEA. *Lessard v. Wilton-Lyndeborough Cooperative School District*, 47 IDELR 299, 1454 (April 23, 2007).

The greater part of the blame for delay in producing a completed IEP cannot be placed with the School District. One cannot doubt the positive motives of the _____ but the IEP process under IDEA was thrown off course by this overly conscientious Parent. Although _____ testified that _____ input was not being given the proper weight and that the District's not following proper procedure, especially pointing out that meeting of March 30, 2007 violated _____ rights as a parent because the School District presented a draft version of IEP asking that comments be held until completion of its presentation, Parent did give significant input on the draft at the very next and at apparently every other meeting. It was Dr. Afshar who testified that he never was aware of disrespectful treatment of the _____ although _____ comments were voluminous and delayed the IEP process. The records relating to choice and the setting of meeting dates show deference to Parents' availability. The School District admits there were times when written prior notice was not given by the School District or, if extensions were sought, they were not granted by the Parent. Procedural errors by the School District did not materially affect the IEP process.

The School District cites *Henrick Hudson School District v. Rowley*, 458 U.S. 158, 207 (1982) saying minor failures to comply with the underlying statute are not automatically treated as violations so long as they are not material to the outcome.

It is the Parents' burden, as the challenging party, to show that the actions of the School District regarding Student's IEP have fallen short of the requirements of 20 U.S.C. Section 1400 *et seq.* *Schaffer V. Weast*, 546 U.S. ____ (Nov 14, 2005).

Findings of Fact and Rulings of Law

Both parties proposed Findings of Fact and Rulings of Law.
Parents' requested Findings are as follows:

Granted: 1, 2, 3, 4, 6, 8, 9, 12, 13, 14, 17, 19, 21, 26, 27
Neither granted nor denied: 5, 7, 10, 11, 18, 22, 23, 24, 25,
Denied: 15, 16, 19

Parents' Requested Rulings are as follows:

Granted: 1, 2, 8
Neither granted nor denied: 3, 11
Denied: 4, 5, 6, 7, 9, 10

The School District Requested Findings are as follows:

Granted: 3, 8, 9, 11, 12, 13, 16, 18

Neither granted nor denied: 1, 2, 4, 5, 6, 7, 15, 17

Denied: 14

In the above Findings, attributions to Barbara McKinley were assumed to be those of the witness Barbara McCormick.

School District's Rulings are as follows:

Granted: 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 40, 41

Neither granted nor denied: 30,

Denied:

Conclusion and Order.

Reviewing the testimony and the documentary evidence presented in this matter, it is concluded that the Parents have not met their burden showing that the School District has denied Student FAPE for failing to implement the behavioral goal in Student's 2006-2007 IEP and for failing to have in place a complete and properly developed IEP at expiration of her most recent IEP. The relief requested by the Parents, including compensatory education, is denied. An IEP meeting is necessary and shall be convened as soon as reasonably possible. The Parents do not prevail in this matter.

So Ordered.

Decided this 6thth day of September, 2007

Gail C. Morrison, Hearing Officer

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 District shall notify the Commissioner of Education when either party, Parent or District, seeks a judicial review of the decision.