

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION

In Re: Student/School District  
IDPH FY-08-03-054

Hearing held on May 14 & May 15, 2008 at Concord, New Hampshire

**DECISION AND ORDER**

Before the Department of Education is a request for due process hearing by Parents that Student's placement at the local public middle school was inappropriate and placement at a specified private day school was appropriate. After consideration of all the testimony and evidence presented at the hearing, including all the documents in the record, the following order is issued.

**BACKGROUND INFORMATION**

On March 27, 2008, Parents filed a REQUEST FOR ADMINISTRATIVE DUE PROCESS HEARING. The Request states: "(Student) began attending (X-name deleted for privacy purposes but known to the District) an approved special education school in xxxxx, New Hampshire on January 2, 2008. Parents notified the school district of their intent to place (Student) at X school both at the team meeting on December 6, 2007 and in writing on December 20, 2007. Parents are requesting the costs associated with placement at X school, including but not limited to tuition, transportation, and other related services." Parents' REQUEST at paragraph 6. On April 30, 2008, a prehearing conference was held. Parents and District representatives attended. See Letter Confirming Results of Pre-hearing Conference dated April 30, 2008.

Parent have the burden of proof, by a preponderance of the evidence, as this was Parents' Request. One Parent presented testimony and Exhibits. Both Parents presented Affidavits, and Parents' witnesses presented Affidavits. Parent testified as to certain items. Parents also presented the testimony of (Private Counselor), (Education Director X School), and (Math Teacher X School). A brief summary of the testimony is that Student has struggled with the promotion from a small elementary school to middle school. Student's agreed code is Non-Verbal Learning Disability (hereinafter "NVLD"), ADHD, within the code of Other Health Impaired. The impact of these coded conditions on Student's education is with "motoric skills" (from global developmental delays), visual-spatial organizational difficulties, social deficits (particularly social awareness and social judgment), and anxiety. Student was evaluated at Boston Children's Hospital on 11/7/07. Parents Exhibits pages 45+. Student missed about ten days of school on issuance of a Doctor's order in late October 2007 due to "extreme anxiety." Parents Exhibits page 43. Parents presented evidence that Student was not functioning well in the public school due to overall anxiety and social difficulties with the large changes

from elementary school to middle school. Parents presented evidence that Student was doing well in the new out of district private school with fewer children in a smaller building.

District presented testimony of (Special Education Director), (School Psychologist), (Math Teacher), (Speech Pathologist) and (Outside Consultant) as witnesses. The parties engaged in mediation in August 2007, and agreed to hire an independent consultant to help Student transition to the middle school. The Consultant was also to conduct informational sessions for staff to instruct on the impact of Student's coded conditions on education for the coming year. The parties had a signed IEP and Student attended classes with a full-time 1:1 aide. The IEP included 1:1 reading instruction by the Aide, 45 minutes per day. All other instruction other than reading was mainstream regular educational instruction with the Aide. Student had some accommodations related to the IEP issues. Part of the way into the fall trimester, the Team recommended one Unified Arts program for Student, rather than two, but Parents insisted the extra Unified Arts class would be helpful, as Student reportedly enjoyed both Unified Arts classes. In late September 2007, the Team, with Parental approval, reassigned the Aide to the classroom, helping other children and Student as needed. According to testing from NECAP and testimony of teachers, Student was making progress in class and progress with social difficulties despite the time off from the Doctor's note.

A. Findings of Fact submitted by the District:

1. Granted: 1-22, 24-27, 30-32, 34, 36-40, and 42-50.
2. Denied: None.
3. Neither granted nor denied: 23, 29, 33, 35, and 41 (affidavits and testimony indicated Student had about 60 documented nurse's office visits and could see Dr. Sheridan anytime and did so).

District submitted Findings after # 50 were deemed excessive and not specifically addressed.

B. Findings of Fact submitted by Parents:

1. Granted: 1-7, 9, and 11-15.
2. Denied: 8.
3. Neither granted nor denied: 10.

### **ADDITIONAL FINDINGS OF FACT**

Parents' Case:

1. Student has received services from a private Counselor since July 2006, and counseling is done in the area of social pragmatics. Counselor has experience with children diagnosed with ADHD, autism spectrum disorders and NVLD. At the time of the testimony (5/15/08), Student was being seen biweekly.
2. Student, in September 2007, was overwhelmed by the size, organization and demands of the transfer from elementary school to middle school and Student exhibited signs of "extreme anxiety" according to credible testimony.

3. Counselor listed the various professional reports reviewed. Because the diagnosis/code and treatment is not in issue, the list will not be repeated here, but the reports are in the exhibits. Counselor was a credible witness.
4. Counselor testified about the general impact of NVLD on a child's academic progress, which is also not in dispute, and the difficulties of academic progress from a NVLD are: difficulty mediating and executing nonverbal tasks such as mathematics, understanding higher order or abstract language, understanding other facial expressions of others including teachers and peers, understanding tone of voice and body posture, reading social cues and social pragmatics. NVLD children are often slow to develop and on formal tasks of cognitive functioning verbal tasks are easier than nonverbal tasks.
5. Student has dyspraxia (fine motor deficits), gross motor clumsiness and difficulty with reading, math and understanding abstract language academically and socially and will typically misunderstand social contacts as intended to hurt/harm Student specifically, rather than see children's typical behaviors directed at others in general.
6. Counselor worked with Student in the Spring 2007 on social pragmatics and on Student's ability to find time to "process" social interactions and understand the reality of those situations.
7. When Student started the 2007-08 school year, the Counselor spoke with district staff to smooth Student's transition and consulted with Outside Consultant, an independent consultant agreed to by the parties pursuant to an agreement.
8. Student had available the services of the School Psychologist during school hours to help process anxiety, and Counselor agreed that Student had some success in controlling anxiety. Affidavit at paragraph 17.
9. Counselor would see Student in an office setting one or two times per week and would hear what Student would talk about, while the district witnesses saw Student in the middle school academic/social setting around the academic structure as the main feature of a regular school day.
10. Counselor testified to her impression that the Team was too large, but the parties agreed Student continued to regularly attend school until mid-October 2007, when high levels of anxiety were believed to have produced nightmares, confusion about school expectations, rules, and power struggles at home. Affidavit at paragraph 20.
11. Counselor diagnosed that Student was "overwhelmed with the pace of the day" on or about 10/15/07, and was concerned for Student's mental health for stated reasons (not further described here for privacy reasons).
12. Counselor supported Student attending another smaller school with greater focus on children with academic codes similar to Student to better address ongoing anxiety symptoms.
13. Counselor supported Student changing to the private day school presently attended by Student.
14. Testimony indicated that since Student began attending the new school, the anxiety level has been lessened and social distress is greatly lowered with less pressure at home between Parents and another sibling.

15. Counselor testified the local middle school was inappropriate for Student based on the above observations.
16. Counselor testified that IEP changes recommended would be to emphasize Student's organizational skills and provide more school "breaks."
17. Counselor agreed that one note from a therapy session on 10/6/07 stated "(Student) admits to liking science teacher + class, + benefits from biofeedback.... No major complaints about school this week." District Exhibits page 577.
18. Counselor testified her opinion was that the assignment of a 1:1 Aide in public school means that public school is inappropriate as any child should be able to navigate on their own to make long-term growth.
19. Parent testified Student refused to go to school in October after an incident with the Aide. Affidavit at paragraph 13.
20. Parent went to the School to talk over the situation with the Case Manager, but spoke with the Special Education Director as she was available and Parent spoke of Student's view that the pace of the day was "overwhelming." Affidavit at paragraph 14.
21. The next day Student and Parent went to School to talk over the situation and Student related the fears/anxieties over the Aide incident and Student started crying when pressed to resume classes.
22. A Team meeting was held on 10/23/07, and Parent's perspective was that Parents needed help dealing with Student's behaviors for a "consistent front." Affidavit at paragraph 16.
23. Student resumed classes on 11/1/07 with a new Aide, but Student's behaviors and limit testing was increasing "rapidly."
24. After the Team meeting on 10/23/07 Outside Consultant sent Parent an e-mail that the School was being asked for help "... with an issue the school district was not responsible for (Student's behavior at home)" and a referral was made to Student's private Counselor. Affidavit at paragraph 17.
25. To Parent's observation, Student "... never seemed to get comfortable with the ... school."
26. After giving the School time to be proactive rather than reactive, Parents "... decided (Student's) well being was more important. (Student) needed to feel safe and be in an environment that could be consistent with programs already in place to handle her anxiety and social situations." Affidavit at paragraph 19.
27. Parents felt that Student had "shut down" by Thanksgiving and told the School by letter dated 12/20/07 that Student would attend a different school. Affidavit at paragraph 20 & 22.
28. On cross-examination, Parent agreed that Student's Private Counselor did not hear about the incident with the Aide from Student in a regular therapy session.
29. Parent agreed on cross-examination that the primary purpose of the trip to Student's Pediatrician (10/15/07) was to get immunizations (scheduled the previous year) and Student has a phobia about needles and shots and while Student did receive the immunizations the Pediatrician also issued a two week school absence slip due to "extreme anxiety."

30. Parent asked the Pediatrician for an out of school slip because the School told Parent Student needed a slip to avoid truancy issues if Student was to miss school for a long period.
31. Parent number two expressed the view in an Affidavit that Student is “happier” at the new placement and (Student) states so, and “... is now able to work independently since losing the security of a full time aide.” Affidavit at paragraph 16.
32. (District’s Case) The parties submitted the Affidavit of the “Inclusion Facilitator” by stipulation relative to Student’s educational experience during the 2006-07 school year and the Facilitator Affidavit generally reports successful transitions and performance in the 2006-07 school year. Affidavit at paragraph 12, 18, & 20.
33. Special Education Director testified to her role for the District, as a participant in the negotiation of an agreement with Parents in August 2007, and a district person familiar with Student’s case for some time.
34. Special Education Director testified to the hiring of Outside Consultant, PhD, as a consultant to instruct the School’s staff on general NVLD instructional recommendations, and to consult on specific problems that might arise as the school year progressed.
35. Student’s IEP for the 2007-08 school year called for regular education mainstream classes for everything but reading, and modifications and accommodations for Student were relatively few in number. District Exhibits pages 20-21.
36. Student’s report card grades for the 1<sup>st</sup> trimester were “B’s and A’s” and Student’s grades show “meaningful progress was made” in the time Student attended the local school. District Exhibits page 270.
37. To respond to Parents and Student’s concern about the Aide “hovering” on 9/11/07 the Team agreed to change the Aide’s role to a “shared” aide for all children in Student’s classes. Affidavit at paragraph 13.
38. To assist Student dealing with the crush of classes and middle school experience the Team recommended changing one “Unified Arts” class to a “Guided Study” program, but Parents declined this change because “Student enjoyed both Unified Arts classes.”
39. Based on the NECAP testing in the 5<sup>th</sup> grade, and compared to other previous NECAP tests, Student was making educational progress over a period of years. District Exhibits pages 271-273.
40. (Parents’ Case) The accuracy of the NECAP results was called into question by Student’s report that the Aide helped fill in the circles, but this information was based on Student’s report to a Parent and the accuracy of the reports was not verified. Parents’ Exhibits page 164. Student has been diagnosed with anxiety issues which would generally affect a child’s ability to demonstrate true/accurate academic achievements in a testing environment. Parents’ Exhibits page 158.
41. (District Case) Despite the anxiety that arose around 10/15/07, credible testimony indicated Student was making progress in “social pragmatics.” Testimony of Special Education Director and School Psychologist.

42. Sufficient proof of the cause of Student's anxiety around 10/15/07 was not produced and there are other possible causes that are not necessarily school related, such as phobia about needles/immunizations.
43. The physician that ordered a two week school release did not offer a discussion or finding of the circumstances and/or cause for the prescribed time out of school, and the record contains many entries that Student was "overwhelmed by the pace of school," without information on the academic or instructional levels causing difficulties.
44. The record of Student visiting the Nurse's Office between 8/31/07 and 12/5/07 indicate 65 visits, sometimes multiple visits on a single day among approximately 65 school days. Student attended approximately 55 days due to ten days out of school. Most Nurse's visits are less than five minutes and not asthma related, but generally to address general health issues such as physical contact during gym class, or complaints about foot problems. The visits to the Nurse's office from 11/1/07 to 12/2/07 number 30.
45. Student was in a school play that involved a tryout and extra time at school after a regular school day.
46. Student was being instructed academically "on grade level" in all academic subjects except reading. The IEP listed Student's math level at "... a benchmark score of 2.6 (proficient) on the fourth grade benchmark (June 2007)." District Exhibits page 16.
47. The IEP accommodations and modifications in Student's IEP did not affect the instructional levels in academic subjects except reading.
48. The School Psychologist was able to help Student deal with some anxiety producing situations by employing a breathing technique on an "as needed basis." Credible testimony indicated that by December 2007, (Student) was aware of our routine communication style and could use it (with the School Psychologist)." Credible testimony indicated that Student "... used (biofeedback) to reduce anxiety... a tool (Student) could eventually use independently." Affidavit at paragraph 8.
49. Credible testimony indicated, "(Student) required considerable support around moderating (Student's) need to be in control and to challenge others, especially the educational assistants.... (Student) wanted to be more independent yet needed and wanted the support from the aide." Affidavit at paragraph 10.
50. Credible testimony indicated that Student's outside psychologist indicated, "(Student) will push limits and challenge and must receive consistent messages to understand that a limit is not changing. Once (Student) understands, (Student) will relax, accept it, and appreciate it." Affidavit Id.
51. School Psychologist testified credibly that Student made social progress in overcoming anxiety, organizing the expression of issues and calming (Student's) mental state to deal more effectively with issues. Affidavit Id.
52. Credible testimony was introduced that indicated Student could report incidents accurately and sometimes could misinterpret incidents/issues due to the disability and sometimes would "appear to be manipulating conflict between individuals like between home and school...." Affidavit at paragraph 13.

53. Credible testimony indicated that Student "... appeared happy and was developing friendships with ... peers at (school) ... and (Student's) role in the (school) play ... was going great as of December." Affidavit at paragraph 16.
54. Credible testimony from School Psychologist indicated that she and the Team recommended Student drop one Unified Arts class and use that period as a study period/counseling to lessen the perceived pace of the day, and Parents declined because Student enjoyed the group of Unified Arts classes. District Exhibits page 72.
55. (Parents' Case) Education Director at Student's private school as of 1/2/08 testified credibly. The private school is approved by the State of New Hampshire as a Special Education School to meet the needs of children "... with specific learning disabilities, speech and language impairments and other health impairments." The private school has 20 children in grades 4-12, ages 10-18, with 5-6 children at the middle school level and 3-4 children about Student's age. Each academic class has 6 or fewer children in the class.
56. The private school utilizes "Language-based instruction (which) includes the process of first accessing prior knowledge, previewing vocabulary and concepts, and previewing text; direct instruction in reading, math, and executive functioning strategies; and connecting concepts and vocabulary through a school-wide theme." Affidavit at paragraph 5.
57. "All of (the children at the private school) have been diagnosed with educational handicapping conditions (such as)... dyslexia, dyspraxia, attention deficits, executive function disorders, nonverbal learning disabilities, auditory processing disorders, language processing disorders, and many others recognized by the special education field." Affidavit at paragraph 8.
58. Credible testimony indicated that Student demonstrated "significant anxiety," confusion and social dysfunction at the start of classes on 1/2/08, but, "During the last month (Affidavit dated 5/9/08) (Student) has demonstrated improvement in all these areas." Affidavit at paragraph 15.
59. The private school has a behavior code, a cooperative approach, and a "school economy" where children earn rewards. Student's progress report is found at Parents Exhibits page 74 and Student has made progress since 1/2/08, with a significant reduction in somatic complaints.
60. Private school Math Teacher testified as a special education certified general education teacher, currently teaching Student math and reading (Language Lab). Math Teacher did testing of Student in the reading area which yielded similar results with the District testing. Affidavit at paragraph 8, District Exhibits at page 15. Reading is a deficit area for Student, by agreement. Math Teacher reports Student has made progress in reading at the private school. Affidavit at paragraph 12.
61. (District Case) Public School Math Teacher testified as a New Hampshire certified regular education teacher. Math Teacher has been recognized as "highly qualified" and once as the middle school math teacher of the year. Math Teacher had Student in math class with 22 other children from September to December 2007. Student demonstrated difficulty with the regular education math class and attended math "extra help" sessions on a voluntary basis.

62. Math Teacher testified credibly that Student had a math grade of 69% in mid-October and accepted extra math help during lunch/recess and by the end of the trimester Student's grade was 83%. Affidavit at paragraph 8.
63. Credible testimony from Math Teacher noted Student's extra anxiety at the start of the school year, the missed classes to visit the Nurse, and noted "considerable improvement" in anxiety levels by Student's personal growth by December. Affidavit at paragraph 10.
64. Credible testimony from Math Teacher indicated that Student "... is fully capable of performing in a regular education classroom with accommodations." Math was a specific area of difficulty for Student with the code, NVLD/OHI. Affidavit at paragraph 13.
65. Student received a score of 540, a ranking of "proficient," with support, in the October 2007 NECAP math testing. District Exhibits page 273.
66. Outside Consultant, Ph.D., a certified school psychologist, was hired after a mediation agreement to conduct a District workshop to assist Student's Team to meet the unique needs of NVLD children. NVLD children generally have fine motor system difficulties, social difficulties, executive functioning difficulties, and difficult social interactions.
67. Consultant did an in school observation of Student on 9/24/07, reported at District Exhibits pages 124-126. Parents Exhibits pages 157-159.
68. Credible testimony from Consultant indicated Student was a "hard worker" with an "excellent memory for rote material" and "a strong desire to fit in/be part of the class and to have friends...." After the observation Consultant reported to the Team that Student "... might be carrying too heavy a work load with her two unified arts periods, but with no study hall during which (Student) could get on top of (the) work and the organizational demands of (the) program." Affidavit at paragraphs 7 & 17.
69. Credible testimony indicated that Student needed to develop "power and the ability to self-advocate" for school and self-growth, but this power conflicts with the opportunity to develop power at home and send mixed messages to an anxious child and Consultant encouraged Student's Counselor to have consistency at home. Testimony and Affidavit at paragraph 22 & 28.
70. Credible testimony from Consultant indicated that social and behavioral progress was observed, in part based on the tryout for the school play independent from any District or Aide support. Affidavit paragraph 29, 30 & 31.

## **RULINGS OF LAW**

### **A. District's Proposed Rulings of Law:**

1. Granted: 1-3, 5-8, 10, 12, 14-17, and 20.
2. Denied: 13.
3. Neither granted nor denied: 4, 9, 11, 18, 19 (found as fact), and 22-32.

### **B. Parents Proposed Rulings of Law:**

1. Granted: 2 and 5.
2. Denied: 1 and 6-8.



3. Neither granted nor denied: 3 and 4.

## CONCLUSION AND DISCUSSION

Parents have presented credible evidence that Student's education at the local public school had its difficulties. Credible evidence of visits to the Nurse's Office and visits with the School Psychologist show Student's perception that there were numerous problems requiring immediate attention over the period September to December 2007. Credible evidence also indicates that the vast majority of the Nurse visits were brief and Student returned almost immediately to class. Credible evidence from the School Psychologist indicated that with some work, Student was able to enter counseling sessions, take some breaths, and calm down and accomplish some therapy and return to class. Credible evidence from the Parents, that Student was making no educational progress was lacking. Evidence from Student's new private school indicated that similar reading levels were obtained by both schools and progress had been made relative to past performance in prior years. Parents' evidence did not attempt to show that no educational progress was being made. Parents' evidence was that Student was causing home difficulties that were understood to affect educational performance in the public school. Credible evidence indicated that Parents constantly heard from Student that the public school was moving too fast. Parents made a decision to move Student in December without reasonable discussion of that decision with the Team. Credible evidence showed that Student was in great emotional distress at the 10/15/07 Doctor's visit and received a slip to stay out of school. No credible evidence was presented that the cause of the "great emotional distress" was school based. Student's private counselor did not record contemporaneous accounts of a school cause for that distress, other than general references to Student being "overwhelmed" by the pace of the day. The evidence reasonably shows that Parents were offered the opportunity to lessen Student's daily pace, but that was declined for academic reasons.

Caselaw indicates that parents may make a unilateral placement and seek public school reimbursement if the district does not make a free appropriate public education available to a coded child in a timely manner and the new placement is appropriate. *Florence County School District v Carter*, 510 U.S. 7 (1993). The evidence from Parents fails to meet the preponderance standard that the Student was making insufficient educational progress such that would justify an order for out of district placement.

While it is found proven by a preponderance of the evidence that Student's public school experience had significant disruptions, the evidence from the District proves that Student was making meaningful social/emotional progress in dealing with the typical problems that a coded middle school child would have. Relative to academic progress, the evidence from the District indicated that Student was making academic progress, particularly in math, at least by Student accepting extra help and raising the classroom grade from 69% to 83% at the end of the trimester. The reasonable view of the evidence is that while Student was having emotional/social issues in the mainstream public school, progress was being made. No evidence presented compels the determination that there

was no progress, either academically, socially, or emotionally. The evidence reasonably shows that the new private school is more academically appropriate, with less emotional/social demands on Student as there are only 19-20 other fellow students. This will certainly allow a greater focus on academic subjects and less stress in dealing with social emotional issues, but the law does not compel this opportunity under the facts presented. Parents are permitted to choose a better educational opportunity for their child, but not with public money under the special education law.

THEREFORE IT IS ORDERED THAT Parents, not having prevailed by a preponderance of the evidence on the matter in issue, are not entitled to educational costs for the unilateral placement at the educational institution stated in the REQUEST FOR ADMINISTRATIVE DUE PROCESS HEARING dated 3/27/08.

Any party aggrieved by a final decision of the hearing officer in a hearing held in accordance with RSA 186-C:16-b, IV may appeal that decision to a court of competent jurisdiction. If either party does not appeal the decision of the hearing officer to court, then the LEA shall, within 90 days, provide to the office of legislation and hearings, and the hearing officer, a written report describing the implementation of the hearing officer's decision and provide a copy of this report to the opposing party. If the opposing party does not concur with the LEA's report, he or she shall submit his or her own report to the office of legislation and hearings. ED 1128.22(b).

By:

S/S. David Siff

May 30, 2008

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David Siff, Hearing Officer  
New Hampshire Department of Education

Date