THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

IDPH-FY-08-08-009 / District

HEARING OFFICER DECISION

I. Introduction

This matter was scheduled for due process hearing as a result of a Parent request received at the Department of Education on 8/6/07. The matter was scheduled for prehearing conference on 9/7/07 and hearing dates of September 25 & 26, 2007. A PARTIAL OBJECTION TO SUFFICIENCY OF HEARING REQUEST dated 8/21/07 was received. The Partial Objection was granted and Parent was given five additional days to further state the due process hearing issue and relief requested. The District filed a Motion for Full or Partial Summary Judgment dated 8/21/07 and that Motion was denied by decision dated 8/28/07. Parent responded within the five additional days to further explain the due process hearing issue.

The prehearing conference and hearing dates were rescheduled by agreement of the parties. One stated ground for the continuance request was to further discuss settlement. The rescheduled prehearing conference was held of 12/20/07. Both parties submitted PREHEARING CONFERENCE STATEMENTS which are in the record. Most interestingly the parties submitted a STIPULATION REGARDING HEARING ISSUE, dated 12/20/07. The Stipulated issue was:

> "Whether the team agreed at the June 7, 2007 team meeting that (Student) requires out-of-district placement and then determined, at the same meeting, that she requires placement in a residential school in order to receive a free appropriate public education." Stipulation at paragraph 1.

The parties further stipulated that Parent had NOT raised the issue of residential placement UNLESS there is a finding that the District SHOULD have offered a residential placement in connection with the 3/7/07 IEP. (emphasis added) At the prehearing conference, Parent agreed to present Parent's case first. The District agreed to this order of proof. The District submitted Core Exhibits. Parent submitted exhibits. The parties agreed that the District had exhibits from a prior due process request that probably would not be required because those exhibits relate to education beyond the stipulated issue. The District requested to hold those exhibits in case there was some need for same. There was no need for those records in the case in chief, and at the conclusion of the due process hearing, the District submitted the extra records/exhibits, without objection from Parent.

The due process hearing was held on January 14 & 17, 2008. Parent called three witnesses, including Parent. District called six witnesses. The witnesses were sequestered. The parties agreed to submit post-hearing memoranda and arguments on or before 1/24/08, and both packages were shipped on 1/24/08 and received on 1/25/08.

I. Procedural Matters

Parent alleged one procedural violation: "(The) School District (failed) to implement the team's decision of June 7, 2007" and alleged that failure would violate Ed 1115.02. Because the Decision is that the Team did not agree or reach consensus on the appropriateness of an district placement, or residential placement at the 6/7/08 Team Meeting, this procedural violation is not found proven by a preponderance of the evidence.

II. Discussion

There is no dispute that Student is currently attending the local public high school. Student reached the 16th birthday on 1/3/08, and resides in the local district, with Parent and has received special education services from the Local District since age 3. Student has a rare genetic disorder called Smith-Magenis Syndrome, and that Syndrome has a strong impact on Student's learning and behavior. Neither the diagnosis nor the code is in dispute. Student is coded "OHI" for Smith-Magenis Syndrome (since 1999) and Mental Retardation. Student has been receiving specialized instruction, accommodations, modifications and related services according to her IEP for many years. Student was 15 years old during the time in issue in this due process hearing. Student's academic abilities are not in dispute, the IEP is not in dispute (by Stipulation) and the disputed issue is whether out of district residential or day placement is appropriate or agreed to by the Team on 6/7/07.

Student's history has references to aggressive behaviors and striking other students and staff on an irregular basis. Parent initiated a due process hearing request in November 2005 and in February 2006, the parties reached a confidential settlement agreement. Student was to be provided additional support from the Institute for Professional Practice (hereinafter "IPP"). IPP was providing support services after school hours under that Agreement. One afternoon, May 17, 2007, Student was to be participating in a Special Olympics program after school. Student tried to obtain a bottle of water from a vending machine and was unsuccessful. Student's behavior escalated and there were incidents that the parties agree caused significant concern for Student's welfare. For Student's dignity, further details of the incident will not be related here but there are various incident reports in the exhibits and affidavits of the witnesses. The parties agreed Student required more support. Parent and the Team discussed the incident and Parent believed the Team agreed to place Student in either residential or out of district placement. The Team met on 5/30/07 and 67/07.

Parent's first witness was Dr. Richard Guare, a Board Certified Behavior Analyst, an Education Doctor, and Director of the "Center for Learning and Attention Disorders."

Dr. Guare regularly performs educational evaluations and consultations for both parents and districts and has known Student since age 3. Dr. Guare described his work with Student's Team in development of the 2007-08 IEP. Based on Student's current age, he testified that the emphasis should be on community integration. Student needs to move to a generalized role in society, with emphasis on skills of "average daily living" (hereinafter "ADL"). Dr. Guare stated the IEP as drafted was appropriate for working on those tasks. Dr. Guare testified to various discussions in May and June, 2007, over the 5/17/07 incident, Student's safety, the safety of other children and staff, and discussions as to the best place to work on those issues and ADL skills. Of particular concern was that Student was reported to have been running in traffic without regard for personal safety. Dr. Guare testified the 5/30/07 Team meeting discussed services for FAPE and safety, and he told the Team he thought that residential placement was appropriate at that time. Dr. Guare testified he thought the NE Center for Children was appropriate. He testified he heard no objections to that placement, or any negative or contrary comments on the subject of placement from any Team Members. Dr. Guare testified the most appropriate method to work on Student's behaviors was the instructional method called "Applied Behavior Analysis." (Hereinafter "ABA") Dr. Guare testified he discussed why ABA instruction "could not be appropriately developed in public school."

Dr. Guare testified that appropriate implementation of ABA instruction involves "confronting" a child with supervision, and "challenging" a child with the correct or desired behaviors. There is a need for trained at least two ABA therapists to constantly reinforce the lessons. Additionally, the therapists must have instruction in "Therapeutic Crisis Intervention" skills. Frustrated students will sometimes run away during this training and the staff must be able to keep the child safe. The 5/17/07 incident indicated that the staff at the public school could not keep Student safe during that crisis. Parent's Exhibit A is the outline of a program that would incorporate the recommended aspects of an appropriate ABA program. (The parties stipulated this was just presented within the last month and was not offered for a challenge to the appropriateness of the current IEP.)

Dr. Guare testified he was present at the 6/7/07 Team meeting and he testified the meeting consensus was that the public school was no longer the appropriate place for Student. At the end of that meeting, Dr. Andrews (District LEA Representative at the Team Meeting) asked the persons present to explain their views on why public school was no longer appropriate. The letter at Exhibits page 10168 was the letter he drafted. Dr. Guare testified that there were places in the area that would accept Student with the current profile. On cross-examination the records were reviewed. Dr. Guare had his records present to testify and there were approximately three inches of records from Student's third birthday to the present. The typical behaviors of Smith-Magenis Syndrome were discussed. Dr. Guare testified that a center called ELWYN has specialists in this Syndrome and he agreed the District contacted that Center in August 2007. Dr. Guare reviewed various records of Student's behavior over the years. Dr. Guare testified he recalled the 5/17/07 incident was most dangerous because he heard Student "ran into traffic." Dr. Guare testified he presumed Student was being supervised and ran from that supervision. Dr. Guare testified his clear understanding was that the Team agreed there was no day placement available that could appropriately work on

Student's behaviors with assurance of success. He did agree that for future "community" focus, the school should be located in a/the community where Student will live in the future, so that there is a "seamless" integration among school/home and community. Dr. Guare agreed he was talking about the program that would be "most effective."

Parent's witness number two was Jill Abbott, an employee of Seacoast Mental Health. She is a Child and Family Outreach Specialist and the "Spectrum Program Trainer." Ms. Abbott testified she works with Student and Parent to create behavioral supports for Student and she sees Student about one time per week. Generally, Ms. Abbott works with Student in the community, taking Student to various locations, like the library, Community Teen Center, and food places so that appropriate behaviors can be encouraged and inappropriate behaviors discouraged. Ms. Abbott testified that Student's behaviors were not age appropriate and Student could impulsively call out inappropriate comments in public. There was some learning of inappropriate behaviors from other peers. Ms. Abbott has occasionally witnessed Student lying on the floor screaming and hitting. Testimony indicated these inappropriate behaviors were not always predictable. Ms. Abbott testified that Student has inconsistent ability to handle money in public and that Student can be aggressive when with teenage males. For activities that Student does not like, the aide must be careful, as Student has non-verbal cues that an outburst is about to occur. Ms. Abbott testified that there was little increase in social skills or money handling skills over her four years experience with Student.

Cross-examination of Ms. Abbott reviewed her educational background and employment experiences. Ms. Abbott testified she is supervised two times per month by Dr. Guare in her regular employment. Ms. Abbott has observed Student striking other children a couple of times and she feels that Student "could hurt (self) or others" as Student could not be restrained at times. Ms. Abbott reviewed the IPP proposal (Exhibits page 10259) and agreed that a change was that IPP would work with the District and ADL skills as a part of the regular IEP.

Witness number three was Parent. Parent identified the Settlement Agreement from February 2006. Exhibits page 10027. That Agreement was effective until February 2007, according to her testimony. The development of the 2007-08 IEP was explained. The intent Parent believed was to broaden the IEP to include the functional life skills (ADL) and community based programming. The Settlement Agreement, despite the date of February 2006, did not begin implementation until April 2006 because the difficulty locating a service provider. Parent testified that it was understood for this year's IEP, Student's classes would be less academic and more functional, and not necessarily in a classroom. There were several months between February and May, of negotiations over minor details and copies were not regularly exchanged. Parent signed the IEP on 5/7/07 with the promise of "other changes were coming." Parent's Exhibits "B" was a "draft IEP." Parent, on 5/17/07, informed Carli True that the IPP worker would be "late" and Carli said "Either Carli (True) or Bob (Andrews) will be there." The parking lot incident occurred without supervision, according to the versions Parent understood. The incident report is on District Exhibits page 10134.

There was a Team Meeting on 5/30/07, and according to Parent, this was to discuss concerns over the 5/17/07 incident. Specifically the discussion was the safety of Student and others and transfers between education time and other time. Parent recalled Bob Andrews not being "pleased" over the options available at the public school in this context. Another Team Meeting was held on 6/7/07 to continue the discussions of 5/30/07. That meeting started with discussion of 3 year reevaluations. Parent testified she had a distinct memory that the Team discussed three options for placement out of district. Those three were May Institute, Melmark, and New England Institute for Children and Dr. Andrews specifically asked the other experts at the meeting to provide him with reasons to support the decision. The letters appear at District Exhibits pages 10162, 10168, 10165, and 10173.

On cross-examination, Parent agreed the Settlement Agreement (Parent's Exhibits C) has specific language that the District is "not responsible" if IPP does not provide their services and Parent agreed that IPP was supposed to provide the after school supervision on 5/17/07, at District expense. Parent also testified that the new IEP continued the IPP services were provided under a new assignment of responsibility. Parent agreed that generally Student would take the bus home and the IPP person would meet Student at home. Parent agreed that while there was no technical "supervision" from District staff, Student was always "observed by staff." Parent agreed there was a letter dated 6/20/06, from the Special Education Director, that demanded the IPP person be present to supervise Student immediately after school. Exhibits page 10075. When Parent signed the IEP on 5/7/07, Parent agreed there were places in the IEP that mention the local public school. Parent testified that the aspects of the IEP to be worked on were a Behavior Plan and Tracking Sheets (recommended by Dr. Pierce-Jordan). Parent agreed that the IEP was signed on 5/7/07 with the expectation that the local public school was to be the offered placement, but the 5/17/07 incident caused Parent to rethink the placement issue. There were over a dozen incidents from the prior summer that added to the concern over Student's safety. Parent testified about the impression from each team participant on placement. That ended Parent's case.

District witness number one was Robert Andrews, Special Education Director of the local public high school. His resume and affidavit appears at Exhibits page 30001. Student's case manager for 2006-7 currently works in Colorado and is unavailable to testify. Dr. Andrews testified about Student's 2006-7 school year. Student had some mainstream classes and could interact with non-disabled children during each day, interaction unavailable at a special education school. Dr. Andrews testified about the development of the 2007-8 IEP. The 2006-7 IEP expired on 2/7/07. (The parties stipulated that the IEP for 2007-8 was not being challenged, so further discussion of this testimony is omitted.) The new IEP was offered more community living skill development opportunities. Parent signed the new IEP on 5/7/07 with the notation, "continued support from after school program 10 hrs per week." Dr. Andrews testified that Parent never specifically stated there was no agreement on placement. Dr. Andrews testified that all IEP's have to contain details on how and why a child will not be in the mainstream. The present IEP contains a requirement that Student have a "Rehabilitative Assistant" with Student 30 hours per week. The 5/30/07 meeting was not a placement

meeting because there was no regular education teacher present, and the meeting discussed Student's safety and dignity over the 5/17/07 incident. Dr. Andrews denied that the 6/7/07 Team Meeting was to decide placement, as there was no such notice. Exhibits pages 10153 & 30010. The meeting concluded with his request that the participants provide written reasons for concerns if they thought out of district placement was warranted. See also Exhibits pages 10154 & 10155. Dr. Andrews testified about the contents of the letters recommending out of district placement. After the 6/7/07 meeting, he contacted his supervisor, Patricia Dowey, head of special education for the SAU to request her involvement.

On cross-examination, Dr. Andrews agreed he took the minutes of the meetings and not all comments were taken down verbatim. Dr. Andrews testified he understood the NH Regulations to require a due process hearing request only if a parent were to make a specific request for hearing on placement, not just from silence or time delay. Dr. Andrews agreed that the affidavit at paragraph 36 (Exhibits page 30008) indicated that while Student was making appropriate progress in the high school as discussed in the 5/30/07 meeting, Student's behavior out of school was the greater concern. The noticed item for the 6/7/07 Team Meeting was the 3 year evaluation and the minutes reflect no "decision" on placement. Dr. Andrews agreed that a meeting scheduled for 6/19/07 was postponed to 6/25/07 so that the school people could meet with the principal, discuss the status of the case, and develop a plan. Dr. Andrews agreed that his affidavit at paragraph 13 (Exhibits page 30042-Dr. Andrews adopted the statements of Patricia Dowey as his own after the 6/7/07 meeting) indicated "… some people who attended the meeting were recommending a change in placement…." Dr. Andrews agreed that the affidavit at paragraph 17 (Exhibits page 30043) expresses the least restrictive alternative step being contemplated (public high school to residential out of district placement) would be a big step and needed consideration of other less large steps, and that other steps needed consideration. See affidavit at page 30043, paragraph 18 steps to consider and additional services from IPP. Dr. Andrews sent Parent a letter dated 6/30/07 that outlined the intermediate steps the district was proposing. Exhibits page 10173. Dr. Andrews testified about other steps in the process.

Witness number two for the District was Ronan Donohoe, a recently retired teacher from Student's public school. Mr. Donohoe taught World History and Student was in that class, a mainstream class. Mr. Donohoe testified about the range of children in that class, and Student was the only MR coded child in the class. The curriculum was regular education and Student got modified activities. Mr. Donohoe "Co-taught" the class with Jan Bamberger (Affidavit at Exhibits page 30111). Mr. Donohoe attended the 6/7/07 Team Meeting as the regular education teacher and did not support the transfer of placement to an out of district school, residential or not.

Witness number three for the District was Sarah Warren, a School Psychologist with Student's high school. Dr. Warren's affidavit appears at Exhibits page 30073. Dr. Warren did some of the 3 year evaluation testing and testified to those tests. Dr. Warren testified she was unaware that placement was on the agenda for the 6/7/07 meeting and

did not support an out of district placement, residential or otherwise without more information. See her affidavit at Exhibits page 30073-77 for further details.

Witness number four for the District was Deedra Benson, the Speech Language Pathologist. Ms. Benson worked with Student during the 2006-7 school year and currently works with Student. Ms. Benson's affidavit appears at Exhibits page 30020+. Ms. Benson testified she did not know placement was on the agenda for the 6/7/07 meeting and would not support out of district placement just on the basis of the 5/17/07 incident.

Witness number five for the District was Jan Bamberger, a Special Education Teacher at Student's public high school. Ms. Bamberger Co-taught world history with Mr. Donohoe and Student was in that class. Ms. Bamberger presented an affidavit, Exhibits page 30111. Ms. Bamberger testified about her teaching and class composition. See the affidavit for more details.

Witness number six for the District was Tania Knox, a Biology Teacher for the public school. Her affidavit is at Exhibits page 30129, and she taught Student's biology class with 14 other children. The class composition was described along with Student's participation. Her testimony indicated that the primary purpose of Student's classroom instruction was to help Student with social skills and so Student could observe other children for behavior modeling. Ms. Knox testified that the local public high school was "appropriate" for Student. Cross-examination reviewed the classroom instruction directed to Student. Specific lessons on cell structure were discussed. See affidavit at paragraph 9 for Student's classroom participation. Exhibits page 30130. Ms. Knox testified that Student "… made academic progress in my class." Ms. Knox testified to the classroom modifications provided Student in the IEP.

Witness number seven for the District was Patricia Dowey, the Special Education Administrator for SAU # 16. See Exhibits page 30058A for her affidavit and resume. Ms. Dowey testified to the call from Dr. Andrews after the 6/7/07 Team Meeting. Ms. Dowey testified to the matters in her affidavit. The District contacted ELYWN organization in Pennsylvania after obtaining parental permission, to gain more understanding of Smith-Magenis Syndrome, and the District contracted for a consultation on recommended educational measures for that code. The District hired Brenda Finucane and her report is located at Exhibits page 10413. The recommended behavioral approach is to "distract and redirect" rather than "confront" undesirable behaviors. The District invited Parent to participate in both consultative sessions. Ms. Dowey's testimony covered Team Meetings after the 6/7/07 date and will not be discussed here. A summary of that testimony would be that the District has offered Parent an amended IEP with services reflecting the consultation by ELYWN. That offered IEP included IPP services for up to 50 hours per week at District expense.

On cross-examination, Ms. Dowey reviewed her early contacts with Dr. Andrews on this case. See Affidavit, paragraph 13, Exhibits page 30042, and her early thoughts at paragraph 17, Exhibits page 30043. Ms. Dowey testified that the IEP emphasis seemed

most appropriately on transition services in Student's local community. Other cross-examination testimony covered matters beyond the 6/7/07 Team Meeting and will not be discussed here.

Parent has the burden of proof, proving the affirmative of the proposition that the Team offered an out of district placement at the meeting on 6/7/07. Parent argued in the Post-Hearing Statement, "In May 2007 the school district unilaterally determined it appropriate to add additional paraprofessional support for (Student) while (Student) attended Special Olympics." Document at page 5. This addition is not found relevant to the issue of placement, and the addition of after-school services is not found relevant to an issue in this hearing. Other Parent's argument relates to the unilateral addition of other IPP services to 60 hours per week as a part of an amended IEP in August 2007. Again, relevance is a concern because the due process issue is stipulated as the status which existed on 6/7/07. While Parent makes the reasonable argument that this unilateral offer reflects a District interest in lessening the damages (or correcting a deficient or inadequate IEP), the counter argument exists that the past IEP's have been signed, and Student was making some degree of progress.

The reasonable view of the evidence is that the District, on finding out information about Smith-Magenis Syndrome, made immediate corrections to the offered IEP in August, 2007. The evidence reasonably shows this was "new" information to the Team after consultations with the ELWYN group. The District, on hearing the new information, acted promptly to integrate that information into a new or amended IEP. There was no evidence that this new offered programming was requested or recommended earlier, and denied. The historical evidence reasonably shows that the Team was content to advance Student through the grades without inquiry into the details of Smith-Magenis Syndrome, through the offered 2007-08 IEP. When confronted with Parent's demand at the 6/7/07 Team Meeting, action started. The action the District started was prior to the current due process hearing request. There is no doubt that it is a shocking fact, to find out that specific program improvements could have been offered months or years earlier. That shock notwithstanding, the existence of this fact does not prove an out of district placement was required for a FAPE in the 2006-07 school year.

No Parent or District witness testified to a request for different services related to the Smith-Magenis Syndrome prior to the 6/7/07 Team Meeting. While Parent and Dr. Guare testified to their credible belief that the Team Meetings on 5/30/07 and 6/7/07 discussed placement, the credible evidence is that the paperwork does not provide notice that Placement was a noticed issue. In the absence of paperwork, or District admissions that placement was to be discussed, the Parent has not met that burden of proof. The credible evidence from Parent and Dr. Guare is that there was a Team consensus on placement. While there is no doubt this is a credible belief, the belief is not sufficient to prove, by a preponderance of the evidence, that the Team did decide placement at either meeting. The clear evidence is that Dr. Andrews asked for letters with written reasons for out of district placement, and Parent's experts did provide those letters.

The letters from Parent's experts do not provide a sufficient basis to find that placement out of district, to an unspecified place, was decided by consensus at either meeting. What is troubling in this case is that the 5/17/07 incident had to happen to shake up the Team and cause a refocus on what was happening in Student's overall educational interest. The facts show that the District was treating Student like all other children and one result of the 5/17/07 incident was that Student was suspended for some infraction. The facts show that the Team figured out that Smith-Magenis Syndrome so limited Student's intellectual age, that it is agreed Student has an emotional age of about 2 years. The District discovered in the investigation of Smith-Magenis Syndrome that a suspension for the 5/17/07 incident was not appropriate, and that action should not be repeated. Why would this not have been discovered years earlier? This is a troubling aspect of a difficult case. That trouble notwithstanding, the facts and findings do not permit a finding by a preponderance of the evidence, that the Team reached a consensus at the 6/7/07 meeting on placement of Student out of district.

III. Requests for Findings of Fact

A. Parent's Requests: Granted: 1-5, 7-14, 16, & 17;
Denied: 15 & 21;
Neither granted nor denied: 6, 18, 19, & 20.

B. District's Requests: Granted: 1-10, 12-15, 17-24, 26, 27, 30-33, 36;
Denied: None; and,
Neither granted nor denied: 11, 16, 25, 28, 29, 34 (beyond scope of hearing), 35 (beyond scope of hearing), 37, & 38.

IV. Requests for Rulings of Law

A. Parent's Requests: Granted: None;
Denied: 6 & 7;
Neither granted nor denied: 1-5 (multiple parts).

B. District's Requests: (Combined with Findings of Fact).

V. Order/Conclusion

The Parent has failed to meet the burden of proof, by a preponderance of the evidence, that the Team met of 6/7/07 and agreed or reached a consensus that Student requires an out of district placement, or placement in a residential school.

VI. 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 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 party, Parent or District, seeks a judicial review of the decision.

VIII. Statement of Compliance with Ed 1128.22(b)

If neither party appeals the decision of the hearing officer to a 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 the 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.

So Ordered,

January 31, 2008

S/SDS

S. David Siff, Hearing Officer