

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

In Re: IDPH-08-08-012/Cooperative School District A

DECISION

I. INTRODUCTION.

A Prehearing Conference was held on September 13, 2007. The issues to be determined at the Due Process Hearing that was held on October 9, 2007 and October 11, 2007 were whether the student should be retained ... and placement. Parent requested that student be retained. She also requested if the Hearing Officer orders that the student not be retained, the student would be placed in fourth grade at School B (another school district within SAU) Parent does not want the student placed at school A. The school district has offered placement at School A with a 1:1 instructional aide, potentially incorporating a mainstream placement with some instruction in the functional skills program. As the moving party, the parent presented first.

II. PROCEDURAL VIOLATION.

The parent alleged the school district was aware of her request for due process on July 6, 2007 but the parent did not receive the forms from the district to file for due process until August 10, 2007. The district claims they were not aware of parent's request for due process until August 7, 2007 and mailed out the forms immediately upon their knowledge.

III. DISCUSSION.

...

Student was identified as a student with "an educational disability due to developmental delay and speech and language impairment" on December 23, 2003. Team meeting notes from this initial meeting indicate student's overall cognitive ability was in the low range with scores in working memory very low. Adaptive behavior scores were in the low to below average range with a socialization score in the low range. Academic scores, measured by the Woodcock-Johnson III Tests of Achievement, were in the very low to low average range, with academic applications in the very low to low range. Speech and language were in the low range. Occupational therapy scores were in the average range. Team meeting notes indicated student had clinical significance for attention problems and was borderline for social problems. ... [I]t was noted student was at risk for issues with attention, language development, expressive language problems and working memory. Student spent two years in Kindergarten during the 2002-2003 and 2003-2004 school years. Student received positive progress reports for her second year in Kindergarten.

IEP dated 2/16/04 to 2/15/05 included 2.0 hours weekly of special education and 1.5 hours weekly of related services in speech and language and occupational therapy. (P15e) Parent requested a classroom aide for student during the IEP Team meeting on February 3, 2004. District stated it was too early to determine if student needed an instructional aide for first grade and that the "Team will need to look at makeup of the class and student's needs before that determination is made." (P15b) Student was found to be eligible for extended year services (ESY) for the summer of 2004 to avoid regression of concepts taught... Other questions raised were whether student had

dyspraxia/motor dyspraxia and/or ... (P17a). Team Meeting notes from November 4, 2005 indicate student had difficulty in math and spelling and did not seem to understand or retain concepts. Team Meeting notes from February 1, 2006 indicate student had mastered very few of her IEP goals from the previous year, so many of them would remain the same. Report indicated student was below grade level in all academic areas. (P6a), particularly in math, writing and [reading] comprehension. (P 6c) Parent indicated she had concerns about student going third grade. There was some discussion about providing the student with an instructional aide, but that was tabled until the next meeting, after evaluation updates had been completed. (P6a)

Student's IEP dated 2/16/05 to 2/15/06 included two hours weekly of resource room support for math, one hour weekly of speech and language therapy and .5 hour weekly of Occupational therapy. The student also received 28 hours of "Modified Regular Education" weekly. (SD128-150). The Team meeting notes from 2/16/05, ... Speech and Language Therapist, indicated that many of student's speech goals would remain the same as student had not made sufficient progress. (SD154) ..., Occupational Therapist, indicated student had difficulty with short term working memory and holding information.

Team meeting notes from February 1, 2006 indicate the student had "mastered very few of [IEP] goals, so many of them will remain nearly the same." All members of the Team shared their concerns about student's progress. The notes state: "There was also some discussion regarding an aide for [student] but that was tabled until the next meeting." (SD96A) "The goals/objectives were accepted as written, with concerns as to whether [student] would master them." A consult for student with school guidance counselor was added to IEP, as Team noted student had exhibited some anxiety regarding some issues with her brother. Parent shared concerns about student going to third grade where she had not progressed in second grade. The Team decided to re-evaluate student prior to the three year date in the Fall of 2006. Evaluation results indicated student made minimal progress in all areas and had even regressed in most areas on the speech and language evaluation. Results from the Woodcock Johnson III indicated that student had regressed in many areas when compared to previous testing. At a chronological age of 9.0 student tested between a K.9 and a 2.3 grade level in all subtests with word attack and reading comprehension skills at 1.7. On the Behavioral Assessment Scale for Children (BASC) the student was found to be "at risk" in eight of fourteen categories with two "areas of concern" ... The Adaptive Scales Assessment indicated student lacked self-confidence.

Team meeting notes from the student's annual IEP Team meeting on January 31, 2007 indicate student "was not able to master many of the goals on the current IEP and therefore some would carry into the new IEP." At the June 7, 2007 Team meeting the Team reviewed the Vineland Adaptive Behavior Scale. The results indicated student would benefit from assistance in all areas of the scale – communication, daily living skills and socialization. ..., the Guidance Counselor at Elementary School A, stated that student's social deficits were "tremendous" and that student would be limited by low social and emotional skills in a full classroom. (P21)

Parent was the first witness presenting her case. She stated student had been retained in Kindergarten and that in first grade student was immature. Parent stated she requested a 1:1 aide for student for second grade because student had difficulty grasping new concepts. She stated she wanted student retained in second grade and again requested a 1:1 aide but former principal told

her any child who is retained cannot have a 1:1 aide. Parent stated she was told student would have a 1:1 aide for third grade but student shared an aide with another student. Parent also stated student was placed with a teacher the parent requested she not be placed with for third grade and that this placement was not a positive one for student because of both teacher and aide. Parent stated teacher and aide claimed student refused to do work and had difficulty attending to tasks. Parent claimed student had difficulty completing tasks because student had difficulty grasping and retaining concepts taught. As an example, Parent claimed student memorized multiplication tables but did not understand the concept underlying multiplication. Parent stated she believes student should be retained in third grade with a 1:1 aide. She believes Middle School A ... is too large a school for student and student's mental health will suffer in such a large environment. Parent's concession would be to place student at School B ... where the student-teacher ratio is approximately 8-10 students. Parent referred to the reports by Drs. ..., both dated May 16, 2007 (P18) and a letter by Dr... dated May 29, 2007 (P20-1) in support of student's retention. On cross examination, parent stated she was uncertain whether the doctors had spoken with the Special Education Team at the school but that Dr. ... had spent two hours with student and had interviewed parent. Dr. ... also spent two hours with student and interviewed [...family member].

The second, and final, witness for the parent was [family member]. She stated that student had a dispute with another student in her class who sat next to her and the dispute was physical at one time. She was concerned that as a result of this dispute, student's desk was moved to the back of the room. She does not believe the district has done enough to help the student. She said she was interviewed by Dr. ... as he wanted a clear view of what was happening with student in school. Parent answered on cross examination that Dr. ... reviewed all of the student's records prior to submitting a recommendation.

The first witness for the district was ..., Director of Special Education ("Director") for [School District A]. Director stated that student's cognitive ability was low but that student's academic work met or exceeded student's ability level. Director indicated student had some deficits in the area of social skills. Regarding placement, Director stated student is two years behind... grade level in academic skills but that there are other students in the mainstream classroom who are also two years behind. She also stated if student goes to the middle school, the district would provided a 1:1 aide who could meet the student at the bus in the morning. Director stated she believed retention would not be good for the student because ... and cited a National Association of Psychologist's Report on retention as evidence that retention would not be in student's best interest. (See attached.) She believes the district can provide an appropriate program for the student at School A. Director was questioned [doctors'] .. recommendations that student be retained or attend School B and stated that she believed the primary source of information for the recommendations of the doctors was parent and ... and that the doctors did not observe the student in the classroom.

The second witness for the district was ... Principal of [Elementary School A] ("Principal"). Principal stated student was in a third grade class with 17 children and that she attended student's Team meetings during the 2006-07 school year. Principal stated she was opposed to retaining student because, although student received an inordinate amount of instruction and assistance during student's third grade year, student only made "some" progress. She did not believe another year in third grade would enable student to "catch up" with student's peers. She stated that the

student is two years below grade level and that this deficit is extreme. When asked on cross examination whether the school has been successful teaching students with this level of cognitive ability, Principal stated that it depended on the definition of "successful." Principal stated that she thought parent's concerns with the middle school may have more to do with ... She also stated that the School B would not be vastly different from School A. On direct examination, Principal stated she did not recall complaints from parent that student was not receiving enough time from the instructional aide or that student had had problems with another student in the class, resulting in the relocation of student's desk. On cross examination, Principal stated she believed the doctors' reports and recommendations [i.e. for retention and/or placement at School B] were carefully considered by the district.

The district's next witness was ... student's third grade teacher ("Teacher") at Elementary School A. She stated she attended all of the student's Team meetings during the 2006-07 school year. Teacher stated student was usually quiet and needed to be "drawn out;" student could "get lost;" and student was the "lowest child" in the class. She stated that student had shown some progress in math, especially with multiplication facts. She stated student did not interact much with other students and that student was withdrawn and reserved. She also stated she did not recall why parent wanted student to be retained and that she believes student should be in a vocational setting. Teacher stated student does best in a small group. She also stated she does not recall student having problems with her classroom neighbor but remembers moving student's desk. She also did not recall having a conversation with parent about parent's concerns regarding whether student was receiving enough time from the instructional aide. On cross examination, Teacher stated student worked more with the instructional aide in the classroom than with Teacher and that she doesn't recall student having problems with other students that were "any greater than the ordinary." On redirect, Teacher stated student's progress was inconsistent.

The district's fourth witness was ..., student's special education teacher ("SPED Teacher"). SPED Teacher stated she taught the student during third grade in the resource room and the classroom. She stated she recently evaluated the student using the Woodcock Johnson III Test of Achievement, the Key Math Assessment and classroom observations. She stated the student's cognitive ability is low, with scores in the 69-79 range and that her achievement testing was consistent with her cognitive abilities. SPED Teacher stated she did not believe student should be retained, citing student's age and her belief that the student should remain with children she has spent time with. She stated that School B would be inappropriate for the student because student would not know anyone there. She stated that many students with low cognitive abilities attend School B. She also stated that there may have been some social issues in third grade but that the student met with the guidance counselor. She acknowledged that she thinks student maybe should have had a different instructional aide in third grade.

The district's fifth witness was ..., Superintendent of Schools ("Superintendent"). Superintendent stated he has a background in special education. He stated he has never met student but that he has known parent for many years. Superintendent stated he spoke with Dr. ..., student's primary care physician [who recommended placement at School B] but they did not talk about student specifically. He also stated he met with parent on two occasions where he listened to parent cite reasons she believed student should be retained in third grade. Superintendent has

encouraged parent to give the full time instructional aide a try at School B, stating that the student would be able to participate in small group instruction. Superintendent stated School B has an enrollment of approximately 300 students and there is good discipline there. He stated he believed student's needs would be met at the middle school where student will be offered small group instruction along with a 1:1 instructional aide.

The district's final witness was ..., Principal of School B ("Principal B). Principal B stated he has not met student but has reviewed student's IEP and attended two IEP Team meetings. He stated that the 4th grade at School B is comprised of three mainstream classrooms, a resource room for eligible special education students and the functional skills program where students participate according to their individual needs. He also stated there are many instructional aides in School B, but the number changes each year based on student need. Principal B acknowledged parent's concerns that student not interact with ... and stated he believed School B could accommodate those concerns ...

IV. REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

The district submitted a Request for Findings of Fact and Rulings of Law containing 50 paragraphs. Requests Nos. 1, 2, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 42, 46, 47, 48, 49 are granted. Request Nos. 3, 4, 5, 6, 9, 10, 11, 16, 17, 18, 32, 33, 34, 43, 44, 45 are neither granted or denied as they are speculative, lack foundation or relevancy or are inconsistent with this order. For number 16, it is unclear who "peers" are. Requests Nos. 2, 33, 35, 50 are denied. Number 2 is unsubstantiated as IEP and Team meeting notes state student had "access" to an instructional aide. Number 33 is denied for lack of specificity. It is not unusual to have students working two years below grade level in the mainstream classroom *at the Woodsville Elementary School* would be more specific.

V. RULING ON PROCEDURAL VIOLATION

The parent has failed to establish that the district committed the alleged procedural violation. Hearing Officer acknowledges that the delay in parent's receiving documents for filing a due process hearing request was delayed but it is likely to have been a result of miscommunication.

VI. DECISION

The Hearing Officer is persuaded that retention would not be in the student's best interest. Retention is not supported by current educational authority and the student has already been retained. (See attached article by the National Association of School Psychologists.)

The Hearing Officer is persuaded by the affidavits, exhibits and testimony of the parent that the district's placement proposal for the student at School B is not reasonably calculated to meet the student's needs. "A decision by a hearing officer should be made on substantive grounds based on whether the child received a free appropriate public education." 1415(f)(3)(E)(i). The parent, as the moving party in this case, accepted the district's proposed IEP but rejected the district's proposed placement. When determining whether the proposed placement is appropriate, it is within the hearing officer's purview to assess whether the child has received a free appropriate public

education. This assessment has bearing on the appropriateness of the proposed placement for the student.

The hearing officer is persuaded that the district has failed to provide the student with adequate progress, or FAPE, in the last three years. The district is required, under 34 USC § 300.324(b)(1)(i);(ii)(A) to review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved.; and *revise* the IEP, as appropriate, to address any lack of progress toward the annual goals. (emphasis added) The provision of FAPE includes adapting the content, methodology or delivery of instruction to meet the unique needs of the student that result from the student's disability. 34 CFR § 300.39(a)&(b). The evidence shows that the district met often to review the student's progress and to review the student's evaluations. When lack of progress was noted on the student's IEP goals, however, the district, most often, kept the goals and services the same rather than, as required by 34 USC § 300.324(b)(1)(ii)(A) *revised* the goals and service delivery to ensure the student made adequate progress. (See attached Service Delivery Grids from the school years 2004-2006; 2005-2006; 2006-2002 and 2007-2008.) The hearing officer is persuaded the district adapted the content of the student's curriculum to meet her needs (through curriculum modification), but is not persuaded by the evidence that the district adapted the methodology or delivery of instruction to adequately meet this student's needs.

The student's IEPs have consistently failed to address the student's social and emotional issues. The IEP must target all of the child's special needs, whether they be academic, physical, emotional or social. Lenn v. Portland School Committee, 998 F. 2d 1083, 1086 (1st Cir. 1993). The parent, the [other family member], Dr. ..., the student's second grade teacher and the school guidance counselor, have all raised concerns about the student's emotional health. The student's second grade teacher recommended that the school match the student's IEP with the teaching style in a classroom and the parent specifically requested the student not be placed with the third grade teacher where she was eventually placed. The evidence indicates the student had a difficult year in third grade with both the teacher and the instructional aide. Witness testimony by student's third grade teacher indicated she had little knowledge about the student and could not recall events that were significant for the student, events about which the family and other school personnel had knowledge. SPED Teacher acknowledged student probably should have worked with a different instructional aide. On the Behavioral Assessment Scale for Children (BASC) the teacher's review placed the student "at risk" in eight of fourteen categories with "areas of concern" including hyperactivity and depression.

The hearing officer acknowledges that the district provided the student with an opportunity to attend "lunch bunch" sessions with the guidance counselor, but notes with some concern, that counseling is only provided for the student on a "consult" basis in the student's proposed IEP as the student transitions to a new... school environment. While the hearing officer cannot order that the student's current IEP be changed, as the IEP has not been challenged in this due process hearing, the hearing officer may review the student's records, all exhibits and witness testimony to make a determination as to whether the district has provided the student with FAPE. The evidence in this case supports the view that the student has been denied FAPE and this determination has bearing on the hearing officer's substantive evaluation of the appropriateness of the district's proposed placement.

The Team must consider the least restrictive environment requirements in tandem with the requirements that the student be placed in an appropriate program that can implement the student's IEP appropriately and meet the student's unique needs. Amann v. Stow, 982 F.2d. 644 (1st Cir. 1992); Town of Burlington v. Department of Education, 736 F.2d 773, 789 (1st Cir. 1994). NH ED 1115.04 describes the continuum of services each LEA must provide to meet the needs of special needs students, ranging from a student receiving services in a regular classroom with some resource room assistance (least restrictive) to student placement in a full time special class or in a home or hospital program (most restrictive). In this case, the district has offered placement in a regular classroom with resource room assistance, as well as some time in the district's functional skills program. Two witnesses for the district, however, indicated that this student would be the most cognitively advanced student in the functional skills classroom, with a student population ranging from 4th to 8th grade, where she could be a "model" for other students. The district's proposed IEP, which would provide services to student in the regular education classroom with some resource room help and a 1:1 aide is not reasonably calculated to enable the student to make appropriate educational progress, especially where the student demonstrated regression during her third grade year.

In accordance with the requirements of the least restrictive environment and this student's unique needs, as well as the hearing officer's determination that this student has been denied FAPE, the hearing officer orders that the district's proposed placement is not appropriate for the student and that the student be placed in a small (low student-teacher ratio) special class where she will receive individualized and small group modified instruction to ensure student has retained concepts taught and met her IEP goals. The student would not be appropriately placed in the functional skills classroom, as witness testimony indicates she would be a role model in that placement. Nor would student be appropriately placed in a mainstream classroom with an instructional aide, where she has shown regression and where, as the evidence indicates, she will not function to her potential in a classroom setting with 17-20 students. Principal B stated the continuum of services at School B includes three mainstream classrooms, a resource room and a functional skills program. This student requires instruction in a small separate classroom that is currently not available at the middle school. She would not be appropriately placed in the mainstream classroom or in the functional skills program and the resource room is not likely to provide an appropriate full day program for the student.

The district must provide the student with an appropriate small group setting as outlined herein. This placement might be at School A, School B (with appropriate supports...) or at a special education private school.

VII. APPEAL RIGHTS.

If either party is aggrieved by the Decision of the Hearing Officer set forth 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 Commission of Education when either the District or the Parent seeks judicial review of the Decision.

VIII. STATEMENT OF COMPLIANCE WITH ED-1128.22(B).

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

SO ORDERED.

Joni S. Reynolds
Hearing Officer
October 19, 2007