STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

IDPH-FY-08-11-028 / Dresden School District

DECISION

I INTRODUCTION

This due process proceeding was initiated on November 13, 2007 by [ ] ("Parents"),on behalf of their [ ] ("Student).

A prehearing conference was held on December 10, 2007 at the Department of Education Hearings Office on Regional Drive in Concord. The Prehearing Order of that same date set forth the issues for due process as well as other prehearing matters.

The due process hearing took place on January 4, 7 and 24, 2008. [1] Parents and the Dresden School District ("District") submitted exhibits in the form of documents and cassette tape recordings. [2] The following individuals testified on behalf of the Parents and Student: Parent; John V. Cabibi, Ph.D., clinical psychologist, [3] who evaluated Student in 2004 and conduced three individual therapeutic sessions with Student in December of 2007; Student; Mr. B., Headmaster, [ ] School ("Private school") in [out-of –state]; John Carroll, [4] a family friend and Student's former employer; and Robert Kantar, Educational Consultant, [5] who has assisted the family in an advocacy role for approximately four years. The District presented testimony from the following individuals: Cindy Geilich, Hanover High School ("HHS") Learning Specialist; [6] Rand Lounsbury, Admissions Coordinator, Wediko School in Windsor, New Hampshire; Danielle Paranto, Principal, Granite Hill School in Newport, New Hampshire; John Mendonca, Admissions Director, F.L. Chamberlain School in Middleboro, Massachusetts; [7] Joy Hutchins, HHS Special Education Coordinator; and Joanne Roberts, Assistant Superintendent of Special Services for the District. As a streamlining measure, the District presented affidavits of Ms. Geilich, Ms. Roberts and Dr. Hutchins.

The sole substantive issue for due process was whether the Parents are entitled to tuition reimbursement for the 2007-2008 school year for their unilateral placement of Student at the Private school. The Parents had the burden of proof to show that a) the District failed to make a free appropriate public education ("FAPE") available to Student in a timely manner, and b) Private school was an appropriate placement for Student. Student's Individual Education Plan

[1] The third hearing date was scheduled to accommodate testimony from a District witness who was stricken ill unexpectedly.
[2] [2]References throughout this Decision to documentary exhibits, either the District's (SD) or the Parent's (P) are to page numbers.
[3] Dr. Cabibi's résumé appears at P. Exh. 137.
[4] Mr. Carroll's résumé appears at P. Exh. 136.
[5] Mr. Kantar's résumé appears at P. Exh. 54.
[6] Ms. Geilich's résumé appears at SD Exh. 467.
[7] Mr. Lounsbury, Ms. Paranto and Mr. Mendonca all testified telephonically.

("IEP"), as amended in June of 2007, is not in dispute.

Post-hearing submissions were filed by both parties.

II PROCEDURAL VIOLATIONS

The Parents alleged that the District illegally held a team meeting on July 30, 2007 without the Student or parents in attendance. [8] A discussion and ruling on this allegation is set forth in Section 4B, *infra.*

III FACTUAL AND PROCEDURAL BACKGROUND

[ ]. is an adult student [9] who is currently attending Private school in [ ]. Parents reside in Norwich, Vermont, a town served by the Dresden School District. SD Exh. 461

Student's educational profile has been characterized by a number of challenges due to severe ADHD, identity issues, difficult social interactions, depression, anxiety, low self esteem and self-awareness, and impulsivity. Student's strengths include ambition and desire to succeed; cognitive, motor and self-care skills, personable demeanor, and notable athletic and artistic abilities.

During the 2003-2004 school year, Student attended ninth grade at HHS in Hanover, New Hampshire. P. Exh. 2. That summer, the District offered extended school year services at Wediko in Windsor, New Hampshire; the Parents elected instead to enroll Student at their own expense in the Wolfeboro Camp School in Wolfeboro, New Hampshire.

In the fall of 2004, at the request of the Parents and as recommended by Robert Kantar, the family's educational consultant, Student was placed at the Darrow School ("Darrow"), a private college preparatory school in New York. Darrow is not approved by its host state to provide special education services, and has no therapeutic component. P. Exh. 49; Testimony of Geilich. Student repeated the ninth grade at Darrow, and was there for the better part of the sophomore year. SD Exh. 121, 138; Testimony of Parent.

The first part of Student's second year at Darrow (2005-2006 school year) went well. However, in mid-November of 2005, Student was dismissed for violating Darrow's "open flame" rule and also for smoking marijuana. SD Exh. 121, 136. Following Student's expulsion from Darrow, Student's parents enrolled him on an emergency basis in Second Nature Blue Ridge Wilderness Program ("Second Nature") in Georgia. SD Exh. 141. Student remained at Second Nature until early February of 2006. At that time, Student's primary therapist at Second Nature recommended, among other things, placement in a structured, nurturing environment that provides a therapeutic milieu of individual and group therapy. SD Exh. 142

[8] In their November 4, 2007 due process complaint, Parents also stated their belief that the District had thwarted their attempts to access the process by not responding in a timely manner to Student's May 21, 2007 request for a team meeting. However, a review of the pertinent correspondence between the family and Assistant Superintendent Roberts does not support this contention. *See* P. Exhs. 62 – 77. .

[9] Effective April 10, 2007, Student's eighteenth birthday, all of the parents' rights transferred to Student pursuant to 20 U.S.C. § 1415(m) and Ed 1125.01(b). However, Student granted Parents parents the authority to act on his behalf. SD Exh. 338.

Upon Student's discharge from Second Nature, the District convened a team meeting on February 16, 2006 to determine where to implement Student's IEP. The team agreed that Student required a structured residential program with a strong therapeutic component, as had been consistently recommended. The team considered Wediko School ("Wediko") in Windsor, New Hampshire, and the Grove School ("Grove") in Madison, Connecticut as appropriate to meet Student's needs. The family rejected Wediko in favor of Grove; the team agreed to that placement, and Student began there in mid-April of 2006.. SD Exh. 143.

Although Student made a strong and positive transition to Grove, Student continued to face challenges related to impulsivity and inattention, as well as social interactions. SD Exh. 209. However, improvement in emotional regulation was noted, and academic progress was such that the "LD" (Learning Disability) coding was dropped in January of 2007. The codings of "OHI" (Other Health Impaired, based upon Student's ADHD), and "EH" (Emotional Handicap) were retained. SD Exh. 216.

In the spring of 2007, Grove asked the District to seek another placement for Student, due to Student's inappropriate relationship with a [ ]. Testimony of J. Roberts, Parent., Student.
On April 5, 2007, the District team convened to discuss placement in light of Student's pending discharge from Grove. Affidavit J. Roberts. In advance of and in preparation for that meeting, the Parents advised via e-mail that they would be visiting Private school in [ ]; in response, Ms. Roberts notified the family that Private school was not approved by the host state to provide special education programming. [10] Parent then requested a list of all Special Education-approved Vermont residential schools. SD Exhs. 242, 243.

At the April 5, 2007 meeting, Grove recommended placement in an all-one-gender, residential program with a therapeutic component and even more structure than had been provided by Grove. SD Exh. 249. Student's therapist at Grove opined that it was important for Student to work though issues with [ ]. SD Exh. 251. The team discussed and recommended placement at Bennington School and Wediko. SD Exh. 252. At the time of discharge from Grove in mid-April of 2007, Grove was providing Student with psychological services in the form of up to two hours of individualized psychotherapy per week; one hour group counseling; clinical consultation as needed; weekly group meetings with a dormitory peer group and a residential administrator; and counseling with an advisor as needed. SD Exh. 268.

The parents did visit a number of programs recommended by the District. However, on April 17, 2007, Ms. Roberts learned from Grove that Student's Parents had removed Student from Grove and intended to unilaterally enroll Student, at their own expense, at the Private school School in [ ] on April 16, 2007. SD Exh. 289, 290. The Parents so advised the District on April 19, 2007. P. Exh 57. Mr. Kantar, the family's educational consultant, had contacted Private school the previous year, and recommended this school to the family. Testimony of R. Kantar, Parent. Private school is not a therapeutic program, has no therapist on staff and does not provide individual or group therapy as part of its regular program. Testimony of B.

In early April of 2007, prior to Student's placement at Private school, Ms. Roberts informed the parents that openings were available at Wediko, Bennington and Becket Schools. Ms. Roberts advised

[10] Interestingly, although no testimony was elicted on the subject, the District appears to have made inquiries, in mid-July, into whether Private school had sought the necessary approval from the state of Maine; it also appears that, at least as of that time, Private school had not applied for special purpose private school approval. SD Exh. 370

that these three schools were State-approved, all-one-gender, year-round residential programs with therapeutic components and within driving distance from Student's home community. SD Exh. 257.

Upon learning of Student's unilateral placement at Private school, Ms. Roberts notified the family in writing that Student would be placed on Child Find status. She reminded the family of the four residential special education approved schools already identified, three of which had then-current openings. Ms. Roberts reiterated that the District could not support placement at Private school, because it was not approved by the state of [ ] for special education, and because it could not implement Student's IEP. Ms. Roberts suggested that the family contact her if Student wished to re-enroll in the public school system and be placed by the District. P Exh 62, 63.

On May 21, 2007, Student requested that the IEP team meet the first week in June to review the IEP and discuss placement. Following a series of communications between the District and the family, a team meeting was held on June 21, 2007. Melinda Browne from the Private school attended and provided input. The team agreed with Student's IEP amendment requests, including deletion of an academic goal. The District sent Student a revised IEP which reflected Student's requests and written input; Student signed the revised IEP on July 30, 2007, indicating agreement. Student's IEP, as amended on July 30, 2007, includes seven goal areas, the majority of which target social/emotional and behavioral issues associated with Student's ADHD symptomatology, and which interfere with educational achievement. SD Exhs. 226-241.

During the June 21, 2007 meeting, it appeared to the team that, given Student's gains and performance in settings that provided no special educations services, that Student might no longer require residential services in order to benefit from education; Student's attorney, who also attended the meeting, suggested that an appropriate day program should be pursued, if one existed. Testimony C. Geilich, Dr. Hutchins; P. Exh. SD Exhs. 318-320; 326-327) At that meeting, Dr. Hutchins suggested that HHS should be considered. However, she expressed her reservations at that time about HHS's ability to meet the therapeutic components of Student's IEP. Testimony of Dr. Hutchins.

The team convened again on July 30, 2007 [11] and August 10, 2007. At both of these meetings, team members agreed that Student's IEP could be implemented in HHS, which represented the least restrictive environment, or Granite Hill, a special education approved school, on a day basis. Student himself indicated that HHS was the best alternative; Student's only stated concern was that Student might not get into college. Testimony Student; SD Exh. 416.

Meanwhile, the District did not withdraw its offers of residential programs for Student. On July 6, 2007, Ms. Roberts wrote to Student suggesting a visit to F.L. Chamberlain School in Middleboro, Massachusetts. ("Chamberlain"). Affidavit J. Roberts. In an effort to reach consensus, Ms. Roberts, the Assistant Superintendent of Special Services, serving as the local educational agency representative, offered to implement Student's IEP in a residential school if Student and parents so desired, so long as it was approved to provide special education services by the State of New Hampshire or the State in which the school was located. She specifically recommended Wediko, Granite Hill and Chamberlain. Granite Hill, Wediko and Chamberlain are each approved by their host States to provide special education services. Testimony R. Lounsbury, D. Paranto, J. Mendonca, J. Roberts. All three belong to the National Association of Therapeutic Schools and Programs, all have therapists embedded within their programmatic milieu and, according to testimony of the schools' representatives and District personnel

[11] This is the meeting that is the subject of the Parent's alleged procedural violation.

familiar with those schools, each is capable of implementing Student's IEP. Testimony R. Lounsbury, D. Paranto, J. Mendonca, Dr. Hutchins. Dr. Hutchins, who is certified to provide services to students coded as emotionally handicapped, visited both Granite Hill and Chamberlain Schools. Testimony of Dr. Hutchins. Ultimately, all of the proposed placements were rejected by Student and family, and, when no consensus was reached at the August 10 meeting, the family advised the team that Student would be returning to Private school, for which they would seek reimbursement from the District.

Student spent much of the summer living away from home and school, training to be a camp counselor. (SD Exh. pp. 329-33; Testimony of Student. During the fall semester at Private school School, Student encountered some difficulties that required interventions by school staff, but otherwise appears to be experiencing success.

Student openly acknowledged that, even while exploring other schools, Student was set on returning to Private school in the fall of 2007. Testimony of Student. Student's feeling in this regard is certainly understandable. Although it seems, at least on the surface that Student and family were maintaining open minds, their strong preference for Private school was obvious. The District maintains that the family's rejection of District proffered placements and single-minded focus on Private school was unreasonable. It is not necessary to ascertain whether such a conclusion is supported, in light of the determination, set forth below, that the placements proposed by the District were timely and reasonably calculated to provide Student with a FAPE and appropriately implement the IEP.

IV DISCUSSION

A. The Reimbursement Issue

Reimbursement for the costs of a private, unilateral placement is only available to Parents if they can demonstrate that the school district failed to make a FAPE available in a timely manner, and also that the parental placement was proper. *See* Florence County School District Four v. Carter, 510 U.S. 7, (1993) As noted above, the Parents have the burden of persuasion on both of these factors.

When the appropriateness of a school district's action is under review, the action must be reviewed, not in hindsight, but in terms of what was reasonable at the time. *Cf.* Roland M. v. Concord School Committee , 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied* , 111 S. Ct. 1122 (1991). Thus, the appropriateness of placement proposals made by the District must be viewed in terms of what was reasonable during the spring and summer of 2007. Initially during that time, professionals and others familiar with Student believed that Student needed a structured residential program with small class size, single-gender, with a significant therapeutic component as was called for in the IEP and which had been provided in previous placements. Although parents are free to place their children in private schools which they believe may maximize academic performance, schools are prohibited from doing so when such a placement prevents the school district from addressing the student's social emotional needs. Amann v. Stow School System, 982 F.2d 644, 650 (1st Cir. 1992).

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

required by the Act. *Id.* at 3051. An IEP can provide a FAPE even if it is not "the *only* appropriate choice, or the choice of certain selected experts, or the parents' child's *first* choice, or even the *best* choice." G.D. v. Westmoreland School District, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original).

The IDEA and federal and state special education regulations require that Student be placed in the least restrictive appropriate environment. *See* 20 U.S.C. § 1412(a)(5)(A). Schools must make available a "continuum" of placement options, ranging from mainstream public school placements, through placement in special day schools, residential schools, home instruction and hospital placement. *See* 34 C.F.R. § 300.551(b)(2), 300.552(c), (e), 300.553; Ed. 1115.04(b). If placement in a less restrictive setting can provide an appropriate education, than placement in a more restrictive setting would violate the IDEA's mainstreaming requirements. *See* Abrahamson v. Hershman , 701 F.2d 223, 227 n.7 (1st Cir. 1983).

During the course of the summer of 2007, in light of Student's progress at Private school, a successful summer experience as a camp counselor, and other circumstances, it was reasonable for the District to consider implementing Student's IEP in a lesser restrictive environment such as a day program. Yet the District, concurrently with its proposal for day programs, continued to offer, in a timely manner, residential programs as well. Without exception, the placements proposed by the District over the course of the spring and summer of 2007 were identified based upon whether they could implement Student's IEP and meet Student's unique needs. It was sound educational policy for the District to propose placement in approved programs that could implement the IEP as written and developed by the team, based upon prior evaluations, with its heavy emphasis on therapy and behavioral interventions.

It was likewise reasonable for the District to believe that Student should receive special education services in an environment where students of the opposite sex were present to enable Student to address the issues that led to dismissal from Grove and would facilitate Student's ability to attend college as a co-ed student the next year, a goal Student had expressed during the June 21, 2007 team meeting. Although single-gender schools were initially recommended and proposed by the District, there was no evidence that Student could not have received a FAPE at a co-ed school.

Accordingly, the Parents have not shown that the District failed to make FAPE available to Student in a timely manner.

The question of whether the Parents carried their burden of demonstrating the appropriateness of Private school is less clear. No single factor is necessarily dispositive in determining whether the parents' placement is reasonably calculated to enable the student to receive educational benefit. Student's progress at Private school, in and of itself, does not establish that the private placement is appropriate. *See* Gagliardo v. Arlington Central School District, 489 F.3d 105 (2nd Cir. 2007). It is undisputed that Private school is not implementing Student's IEP as written. Further, a unilateral placement is only appropriate if it provides "education instruction specifically designed to meet the *unique* needs of the handicapped [student]." Gagliardo, *supra* at 115 (emphasis in original). However, Dr. Cabibi testified that the kind of programming Student receives at Private school has therapeutic *value* in addressing the manifestations of Student's ADHD insofar as distractions are minimized, opportunities to act out are limited and there are opportunities to discharge energy. In their memorandum of law, the Parents urge that the term "special education" be construed broadly so as to

conclude that Private school is, for all intents and purposes, addressing the goals and objectives in Student's IEP – essentially a *de facto* implementation of the IEP. It is true that no mention of the IEP is contained in the statutory definition of special education; nonetheless, the IEP is the primary vehicle for delivery of a FAPE to the student, and represents the fruits of the collaborative process central to legal framework of the IDEIA. In this case, the team spent considerable time revising Student's IEP to reflect Student's needs, stated goals and specific requests.

.

Evidence was adduced regarding Student's educational progress and positive experiences at Private school; on the other hand, Student continues to have difficulty in social situations, taking responsibility for [ ] actions, handling [ ]self in appropriate ways and falling behind in academic work. Further, despite professional recommendations, therapeutic interventions regarding Student's issues with the opposite sex have not occurred at Private school.

On balance, the question of the appropriateness of Private school is too close to call, but need not be answered in light of the ruling as to the first prong of the test.

B) The July 30 meeting

In matters alleging a procedural violation, a hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the student, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); *see* also Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990)..

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

The evidence shows that, on July 20, 2007, Ms. Roberts sent a letter to Student and parents via first class mail, certified mail and email scheduling an IEP meeting for either July 30, 2007 or August 1, 2007. On July 25, 2007, Ms. Roberts sent another letter to Student indicating that unless they heard otherwise, the team meeting would be held on July 30, 2007. Affidavit of J. Roberts. After 5:00 p.m. on Friday, July 27, 2007, the family notified the District of their unavailability, and expressed their wish that the team not meet in their absence. One of Student's reasons for requesting a change in date was that Student had yet to visit Chamberlain and would therefore not be able to speak intelligently about it. Given summer vacation and the difficulty in securing team member attendance, the District held the IEP team meeting as scheduled; however, the District offered to have the family participate by telephone, to which the family did not respond. The District also offered to review its decisions in a subsequent team meeting, which it did on August 10, 2007.

Under these circumstances, the District fulfilled its obligation to insure participation in the team meeting. Even if the July 30, 2007 meeting could be considered to have contravened the requirements of the IDEIA, any error was cured by convening another meeting shortly thereafter. There has been no showing that either FAPE or the Parents' opportunity to participate was impeded, or that a deprivation of educational benefits occurred.

V PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

Parents' Proposed Findings of Fact: 1 – 6, 10, 12, 16, 17, 19, 22, 24 – 28, 30, 31, 34, 35 – 39, 41 – 48, 52, 53, 55, 56, 58, 59, 62 – 68, 73, 75, 76, 79, 83 are granted; the remaining proposed findings of fact are neither granted nor denied **as written**, except that to the extent that they conflict with this Decision, they are deemed denied.

Parents' Proposed Rulings of Law: none submitted.

District's Proposed Findings of Fact: 1 – 3, 7 – 11, 13 – 17, 19, 22 – 30, 32, 34 – 36, 38 – 43, 45, 47 – 48, 50, 52 – 64, 66 – 70, 72, 73, 75 – 77, 81 – 85, 88, 89, 91, 92, 94, 95, 97, 99 – 102, 105 are granted; the remaining proposed findings of fact are neither granted nor denied **as written**, except that to the extent that they conflict with this Decision, they are deemed denied.

District's Proposed Rulings of Law: 1, 2, 3 – 5, 7 – 9, 11 – 15, 19, 23 – 27 are granted; the remaining proposed rulings of law are neither granted nor denied, except that, to the extent that they conflict with this Decision, they are deemed denied.

VI CONCLUSION AND ORDER

Student's Parents deserve recognition for the thorough, well-prepared and zealous manner in which they have presented their case and advocated for the Student. Student conducted [ ]self professionally and was a most impressive advocate on [ ] own behalf.

For the reasons set forth above, I find that:

a) The Parents have not met their burden of demonstrating that the District failed to provide Student with a FAPE in a timely manner prior to their unilateral placement;

b) The Parents are not entitled to reimbursement for the costs of the Private school.

VII 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 Parents/Student have the right to obtain a transcription of the proceedings from the Department of Education. The School District shall promptly notify the Commissioner of Education if either party, Parents/Student or School District, seeks judicial review of the hearing officer's decision

So ordered.

Date: February 25, 2008

_____
Amy B. Davidson, Hearing Officer