

New Hampshire Department of Education

Student / Wilton-Lyndeborough School District

IDPH FY 09-10-014

**Due Process Hearing Decision & Order**

This is a difficult case in many respects. It is clear from the hearing that the relationship between the parties has broken apart and that the parents do not trust many of the people that have been involved in making decisions and providing services to their son at the middle school. The parties spent much of the hearing bickering over disagreements that were of little relevance to the issue for the hearing and placing blame on each other for various events. Regardless of the final outcome of this decision and of this stage in the student's services, I recommend that the parties look for ways to build that trust and the relationship that is so critical for the student's team to actually work as intended under the law. One way to do that may be to have the New Hampshire Department of Education facilitate some of the upcoming team meetings.

The school district requested due process in this matter and frames the issue for the hearing as follows:

Whether [the student's] 90-day diagnostic placement at the [proposed placement] is reasonably calculated to benefit [the student], even though the program delivers reading instruction in a small group setting rather than a 1:1 tutorial?

The school district has the burden of establishing that the proposed placement is appropriate under the law. The parents do not object to the proposed placement in general. Their only objection concerns the reading services that the proposed placement will, and will not, provide the student.

Given the issue, and the parents' objection focusing only on the reading component of the proposed placement, my answer to the question posed is that in the context of a diagnostic placement only the placement seems appropriate for a short period of time. The school district did not establish that 90 days of diagnostic placement is required as opposed to a shorter period of time and it seems like an extensive amount of time given the issues I note below. Given the issues I note below, my order provides for a 30 day diagnostic placement with the possibility that it be extended if necessary for another 30 days.

The reasoning behind the decision is as follows: The school district did not establish at the hearing that the proposed placement would meet the student's reading needs as detailed in the student's IEP. Further, the evidence the school district presented that the student no longer needs the current reading provisions in his IEP, or that his needs could be met in some other way, was not persuasive when compared to the evidence the parents' presented demonstrating that the reading provisions were still required.

The school district also did not provide much factual evidence regarding the details of the programming the proposed placement would provide or how the proposed placement would meet the student's needs in other areas. Instead, it primarily provided opinions by people who thought that the placement was appropriate. Two of these opinions aren't of much value in my decision making process. One of them came from a paid expert from Maine who has never met the student and whose only involvement was a file review just for purposes of testifying in this case. The expert also has never visited the proposed placement and his information about the proposed placement is limited to what he could find on Google. The school district also presented some evidence from a paid consultant that works for the school district's attorney's law firm. This evidence included testimony about what people from the proposed placement had told him about the program, his opinions about the appropriateness of the program, and about the student's needs. The testimony about the program was sketchy in critical areas such as how the reading and other services provided by the proposed placement would meet the student's needs and it generally just supported the school district's legal theory in the case that the student's needs were primarily behavioral. Given the witness' relationship with the school district's attorney's law firm and the nature of his involvement in this case, the witnesses' opinion testimony regarding the appropriateness of the program and the student's needs does not carry much value in my decision making process. My findings in this respect are not meant to disparage the witness or his efforts to help the student, only to note that given his role in the case and connections to the law firm, the testimony he provided only goes so far and is viewed in a certain light.

However, a third witness provided by the school district (the second witness called by the school district) did provide some more detail regarding the programming of the proposed placement in terms of addressing the student's behavior or non-reading issues. This witness has performed a functional behavioral assessment on the student, observed the student at school, visited the proposed placement, and spoken to staff from the proposed placement about their programming. He supports it as a 90 day diagnostic placement to help gather information and determine the services necessary to address the student's behavioral issues.

Given the testimony at the hearing, I cannot say that the proposed placement is an appropriate long term or permanent placement for the student. However, the school district is only proposing it as a temporary, diagnostic placement and in that context I find it is appropriate because the idea behind a short term or temporary diagnostic placement is to allow the placement to try different methods and determine what will work and what will not for the student. This information is then used to develop an appropriate long term education program for the student. *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992).

Thus, the same details about the services that the proposed placement will provide in a diagnostic placement are not always known at the outset to the same extent that they would be for a regular placement. Various courts have found that short term diagnostic placements are permitted under the IDEA. *See e.g. Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992). It seems appropriate in this case since the school district is acknowledging that its current programming is not meeting the student's needs and that they need help in determining how to address the student's

needs. The testimony at the hearing did establish that the student has demonstrated some fairly significant behavioral needs that must be addressed by the school district in some way and that those needs were not currently being met by the school district.

By the same token, the student's reading needs appear equally as important and the parents should not be in a position of having to choose which services are most important or having one set of needs met at the expense of another. One important consideration, however, is that the student has been out of school since February 2008 and has not received any services this school year. The public middle school is not able to meet the student's reading needs and the private school that had been providing reading services to the student will no longer do so. Additionally, there was not another available, appropriate placement presented into evidence at the hearing.

As a result, it is important that some form of services begin as soon as possible for the student and that long term options for services for the student are explored at the same time. The parents' main concerns at the hearing seemed to be that the student should not have to go 90 days without receiving appropriate reading services, and that if they agreed to the change in reading services for the diagnostic placement that it would become a permanent change. They ask that instead of the proposed diagnostic placement that the school be ordered to continue to look for other appropriate placements for a 30 day period of time and if one is not found that the student receive services at home. However, under the parents approach, the student would not receive any services from the school during that 30 day period of time which does not seem to me to be appropriate for the student and they did not present any evidence at the hearing about the home placement.

### **Order**

Considering all the above, my ruling is as follows:

1. The proposed placement is appropriate only as a short-term, temporary, diagnostic placement and should begin immediately for 30 days.
2. During the diagnostic placement the school district shall obtain updates and progress reports from the diagnostic placement regarding the services that the proposed placement is providing and provide the information to the parents. This should occur at least weekly.
3. The school district shall conduct the pre-tests and post-tests in reading that it proposed to the parents to determine if any regression in reading occurs during the diagnostic placement. If any regression occurs, the school district shall provide services to the student to remediate his reading levels as soon as possible. The parties should work together to determine the best way and best time to deliver the remediation services.
4. During the 30 days diagnostic placement, the student's team shall work together to investigate other long term placement options for the student so that services can be provided without interruption at the conclusion of the 30 day placement. The parents have noted two placements that they would like to investigate and the team should investigate those options and any others

it believes appropriate for the student. The school district and parents as members of the team need to work together and share information during this process in order for it to work. As noted above, the services of the NHDOE may prove helpful in accomplishing this goal.

5. If an appropriate placement is not found or available in the 30 day time period, the diagnostic placement may be extended for an additional 30 days to give the parties more time to search for appropriate placements with the information they are gathering from the diagnostic placement.
6. The parties are free to agree to a longer placement if they so choose, but the parents are not obligated under my order to do so. Similarly, the parties may agree to a period shorter than 30 days if an appropriate placement is located in that time frame.
7. The parents are not required under this order to agree to change the student's reading services that are in the student's IEP. This order is not meant to be construed in any way to suggest that those provisions are no longer necessary, or do not have to be provided to the student. Rather, my order is simply that for 30 to 60 days, the school district through the proposed placement can try something else and vary from the IEP requirements as part of the diagnostic programming the student receives in order to gather information to help provide the student FAPE. At the end of the 30 to 60 day placement, the say-put or default IEP would be the one that was extended by the parties and includes the student's one-on-one reading services.
8. This order does not in any way address any other claims that the parents may or may not have regarding the services provided or not provided to the student up to this point. As noted in the prehearing order, those issues were not before me as the parents did not file a due process request regarding those issues. This order is not meant in any way to affect the parent's ability to file such claims in the future should they decide to do so.

#### **Findings of Fact**

Both parties submitted proposed findings of fact. My rulings on them are as follows:

#### **School District's Proposed Findings of Fact**

Granted:

# 1, 2 first sentence only, 3-8, 11, 14, 15, 18, 20, 21, 26, 28-31

The following part of request #12 is granted with the following modification:

"It is unclear at this time just what types of interventions are most likely to succeed in addressing these behaviors. A diagnostic placement for a period of time where various interventions can be attempted by skilled professionals will allow them to observe .....s responses in a controlled setting. It may also be that .... will be more likely to accept assistance in such a setting because other students in that setting will also be

receiving similar types of assistance, so John won't be standing out when he receives that help.

#13 is granted with the exception of the word "requires." I cannot say that based on the evidence presented the approach taken by the school district in this case in proposing a diagnostic placement at this particular placement is required. There are certainly other options that the school district could have pursued including continuing to look for placements that would meet all of the student's needs. However, as noted in my decision, given the circumstances the law permits the type of diagnostic placement proposed by the school district in this case.

Denied: None

Neither granted nor denied as beyond the scope of what is relevant to my decision, contain subjective or inaccurate interpretations of the evidence presented, or do not match up to the evidence presented:

#2 beyond the first sentence, 9, 10, 16, 17, 19, 22-25, 27

#### **Parent's Proposed Findings of Fact**

Granted: # 1-24, 26-31, 33, 34, 37-42

Denied: #25 and 32

Neither Granted nor denied: #35 and 36 – The witness did testify to that effect in some respects, but she also said that small group instruction could be appropriate in some situations.

#### **Rulings of Law**

Both parties submitted proposed rulings of law. My rulings on them are as follows:

#### **Rulings of Law**

Granted: # 1, 2, 5 – 9, 14 with the caveats noted throughout my Order and decision including that the placement be 30 to 60 days in length.

Denied # 13

Neither granted nor denied as beyond the scope of my decision or inaccurately stating or describing the law:

# 3, 4, 10, 11, 12

**Parent's Proposed Rulings of Law**

Granted: # 3 - 7  
Denied: None  
Neither granted nor denied: # 1 and 2

So Ordered

12/1/08  
Date

Scott F. Johnson  
PO Box 549  
Warner, NH 03278