New Hampshire Department of Education

Student/Keene School District

IDPH FY 11-02-035 & IDPH FY 11-03-039

Due Process Decision

The school district requested due process on three issues: 1) whether the guardian is entitled to an independent evaluation, 2) whether an IEP amendment in January 2011 is appropriate, and 3) whether the school's proposed IEP in March 2011 is appropriate. The guardian also filed for due process on the independent evaluation issues and alleging unequal treatment of the student.

Independent evaluations

In a prior summary judgment order, I ruled that the prior evaluations at issue were not independent evaluations and that the independent evaluation requirements in 34 CFR § 300.502 applied. The issues for the due process hearing were whether the evaluations performed were appropriate and whether the school district requested a hearing without unnecessary delay. The guardian contends that the evaluations at issue for the guardian are a reading evaluation, a psychological evaluation that includes cognitive, social emotional, and academic assessments (the Zabel evaluation), a speech-language evaluation, and a vocational evaluation.

At the outset, the guardian argues that the school district should not be able to defend their evaluations at this hearing because they have waived the opportunity to do so by not filing for due process in a timely manner. I take this argument to be the "unnecessary delay" component mentioned above. State and federal laws require school districts to either provide the independent evaluation upon request, or file a due process complaint to show that its evaluation is appropriate. The school district must take one action or the other "without unnecessary delay." 34 CFR § 300.502.

Here, the guardian contends that the school district did not meet this obligation because they did not file for due process for 130 days after the request for an independent evaluation. The school district contends that it did meet the requirement because the guardian did not have the right to request an IEE at the time it was requested because he was not yet the guardian, because the original evaluations that were conducted were IEE's, and because the guardian filed a complaint with the New Hampshire Department of Education over the issue.

Factually, the guardian filed a request for an IEE on September 30, 2010. On October 7, 2010, the school issued a written prior notice denying the request and noting that the evaluations that were conducted were already independent evaluations because they were not performed by school district personnel. As a result, the school district did not believe it had an obligation to file for due process because its position was that the independent evaluation requirements in §300.502 did not apply. On October 14, 2010, the guardian filed a complaint on the issue with the New Hampshire Department of Education. On December 7, 2010, the complaint investigator issued a report finding for the guardian on that issue, but on January 25, 2011 the Commissioner of Education issued an order on reconsideration that reversed

the complaint investigator on the issue. The Commissioner found that the original evaluations were independent evaluations. On February 14, 2011, the school district filed for due process on the issue. The guardian also filed a prior due process request on the issue and withdrew it.

These facts distinguish this case from the case and the hearing officer decision that the guardian mentions in his post-hearing submission that reference 30 days being an unreasonable delay. In those cases, there was no dispute that the original evaluations were conducted by the school district. Here, the school district had a good faith belief that they were not obligated to file for due process because they believed that the evaluations at issue were already independent evaluations and that the obligations in 34 CFR § 300.502 did not apply. The Commissioner of Education agreed with the school district on that issue. While I found to the contrary and ruled that the evaluations were not independent in the summary judgment order, it is an issue that reasonable minds could disagree about.

Given all of these circumstances, I cannot agree that the school district should be barred from defending their evaluations in this proceeding, or that they waived the ability to defend the evaluations.

The next question is whether the original evaluations performed were appropriate. If they were not, the guardian is entitled to independent evaluations. To demonstrate appropriateness under the law, the school district must show that its evaluations met the relevant legal requirements which in this case include 34 CFR § 300.303-305 and the corresponding state regulations. These provisions require the school to conduct a full and individual evaluation to determine the educational needs of the student. The regulations provide specific requirements for the evaluation process and the assessments used in the evaluation process as detailed in 34 CFR § 300.304 and 300.305.

The school district presented sufficient evidence to establish that the cognitive, social emotional, and academic assessment (the Zabel evaluation) and the speech-language evaluation meet these requirements. As a result, the guardian is not entitled to independent evaluations for these evaluations.

With the reading evaluation performed by Sally Kelly, I note that the parties agreed that this evaluation was to be an "informal reading assessment." See guardian's exhibits page 131. As the school district points out, the Zabel evaluation also addresses reading along with an evaluation by the Reading Foundation obtained by the guardian. As result, I find that the requirements for the Kelly evaluation would be limited to what the parties agreed to in January 2010 on page 131 of the guardian's exhibits as it was intended to be an informal evaluation to supplement the other evaluations in this area. The evidence established that the evaluation provides what the parties agreed to in the January 2010 evaluation plan.

With the vocational evaluation, the school district contends that is beyond the scope of the independent evaluations requested by the guardian and at issue in this proceeding. After reviewing the parties' due process complaints, I agree. In the guardian's due process complaint, it specifies the Zabel evaluation and the speech-language evaluation only. The school district did not believe that the vocational evaluation was at issue and, as a result, did not present any evidence about the evaluation. Therefore, I do not address the appropriateness of that evaluation in this order and leave the issue open for the parties to address either by agreement, alternative dispute resolution, or a new due process hearing.

January 2011 IEP amendment

As far as I can tell, the main point of contention for the January 2011 IEP amendment is the inclusion of a behavior plan that includes mandatory drug testing of the student and the amount of reading services provided to the student. On the issue of drug testing, the school district presented evidence establishing the need for such testing as it relates to the student's services and placement at the out-of-district placement. The out-of-district placement is proposing the behavior plan and its drug testing provisions. The witnesses presented by the school district, which included personnel from the out-of-district placement, established that the behavior plan and its drug testing provisions are appropriate to address the student's behavioral issues, academic issues, and the policies and requirements at the out-of-district placement.

With respect to the reading provisions, the guardian wants reading to be provided on a daily basis pursuant to the language of two evaluations in the record. The January amendment allegedly increases the amount of services provided, but still does not provide on a daily basis. School district witnesses testified that the student is essentially receiving the same amount of services over three days as he would over five days and that the student is making substantial progress. The guardian agrees that progress is being made, but points to NECAP scores that show the progress is not enough and notes that the CTOPP testing that was supposed to be performed by the school district to measure progress was not performed. He also noted that the reading goal has been the same over several IEPs.

I note that the school district needs to perform the CTOPP test as required by the IEP and I include that in my order.

The student is at very low levels across the board in reading, but the evidence establishes that he is making substantial progress at this stage. As a result, I find that the IEP amendments are appropriate for the time period that they cover because the student is making sufficient progress with the services noted in the amendments. I understand that the guardian contends that the progress made is not enough given the short period of time the student may be in school, however, the guardian did not present evidence establishing that more services over five days would provide more progress then the services provided over three days, or that more services or more progress was necessary to provide FAPE at this time. There are also some questions about the extent to which the student's behavior and drug use have affected his progress.

Additionally, my ruling does not address whether these services provided to the student are sufficient to bring the student to the level of being ready to graduate in August of 2011. In other words, to the extent that the guardian is arguing that the services provided have not been sufficient to provide the student FAPE over the years, and that is why the student is at such low levels and that the student is not prepared to graduate at those levels, my order in this proceeding does not address that issue one way or the other. I am simply finding that the evidence provided by the school district which includes in the progress reports from the out-of-district placement and the summary of instructional progress by Cecile Selwyn establish that the student has made substantial progress during the time period that those

reports cover and that information along with the testimony of the witnesses on this issue supports the appropriateness of the proposed amendments as they relate to reading.

March 2011 IEP

The guardian provided 18 detailed exceptions to this proposed IEP which I take to be the guardian's objections to the IEP. Many of them are just the guardian's preferences regarding the language used in the IEP and there are also similar objections to the reading goals and objections to limits on the student's ability to return home for visits from the out-of-district placement. None of the objections were proven at the hearing to rise to the level of making the IEP inappropriate under the relevant legal standards.

One of the issues raised by the guardian relates to transition services. Some of the evidence presented to me raises concerns about whether the services were being provided or had been provided in the past, but those issues aren't before me. The issue before me is the terms of the IEP itself, and on that inquiry the information in the IEP regarding the student's transition meets the relevant legal standards based on the information known about the student.

I have the same caveat here as with the January 2011 IEP. I am not addressing any issues with respect to graduation as I believe that issue is not before me and it relates to whether services have been provided or not. The issue before me is simply whether the IEP on its face is appropriate. I do not have sufficient information before me to know whether graduation for this student in August 2011 is appropriate or not.

The guardian also raises and issue with respect to the student being identified as a student with an emotional disturbance in the IEP. I am unclear when and how that identification began and I don't have sufficient information to make a decision about whether the student should be coded ED or not. While the guardian did mention that in his due process complaint, no real evidence was provided about the issue because there were so many other issues floating around. So that is an issue that I leave open for the parties to address by agreement, or alternative dispute resolution, or the guardian can file a due process hearing over the issue.

Parent participation

The guardian also provided some evidence regarding the ability of the guardians to participate in meetings, the school district failing to provide information to them ahead of the meetings, and the school district's failure to provide access to the student's records in a timely fashion. The evidence did not rise to the level of demonstrating that the school significantly impeded the guardian's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. 20 U. S. C. § 1415(f)(3)(E)(ii), I do note that going forward the school district shall ensure that all procedural requirements regarding notice and participation in team meetings are followed and that both guardians are provided the required information under relevant state and federal regulations. The school district shall also continue to provide the guardians with access to the student's records upon request and do so in a timely fashion.

Stay put

The guardian filed a motion for stay put noting that the student's reading services are not being provided. The school district responds noting that they have not changed the student's placement and that the information provided by the guardian is not accurate. Stay put applies to more than just the student's placement. It also requires the school district to provide the services in the student's IEP during the pendency of proceedings. There was some testimony at the hearing about the student's reading services stopping due to the conduct of the student.

To the extent this is accurate, the school district is responsible for ensuring that services are provided. If the current service provider is no longer willing to provide services due to the student's conduct, then the school district must make efforts to find a new provider to do so, or convene a team meeting to discuss the issue if services are no longer appropriate due to the student's behavior, or go through the disciplinary process if it is a discipline matter. The school district cannot simply stop providing the services.

Unequal Treatment

The guardian included a claim that the school district is violating the student's rights by requiring the student to submit to drug testing. The guardian did not establish that the out-of-district placement or the school district is treating the student differently than it does other students in similar situations. To the extent the claim is actionable under the IDEA, I find that the claim fails for a lack of evidence. To the extent the guardian meant to file that claim just to preserve any potential 504 claims, I find that I do not have the authority to address Section 504 claims.

Findings of Fact and Rulings of Law

The school district submitted Findings of Fact and Rulings of law. I rule on those as follows:

Findings of Fact

Granted:

1-13, 16-37, 40, 43, 47-50, 52, 54-62

Neither granted nor denied as beyond the scope of the issues before me

14,15, 38, 39, 51

Denied

42, 46, 53

Rulings of Law

Granted:

1, 3-7, 9, 11

Neither granted nor denied as beyond the scope of my rulings or the issues before me

2, 8

Denied:

10

Order

1. The Zabel evaluation and the speech-language evaluation are appropriate and the guardian is not entitled to an independent evaluation at district expense for those evaluations.
2. The informal reading assessment complies with the parties' agreement over the reading assessment.
3. The vocational evaluation is not properly before me, so I am not ruling on its appropriateness one way or the other.
4. The January 2011 amendment to the IEP is appropriate with the caveats noted in this decision.
5. The school district must perform CTOPP to assess progress as agreed to in the student's IEP.
6. The March 2011 IEP is appropriate with the caveats noted in this decision.
7. The school district must follow all of the notice and meeting participation requirements in state and federal law for both guardians and allow both guardians to participate in the process.
8. The school district shall continue to provide the guardians with access to the student's records upon request and do so in a timely fashion.
9. The school district shall address the student's reading services as noted in the "stay put" section of this order.

So Ordered

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Date Scott F. Johnson