

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

**Student/Londonderry School District
IDPH-FY-12-07-026**

DUE PROCESS DECISION

I. INTRODUCTION

This due process proceeding commenced on February 7, 2012, initiated by [] (hereinafter “Parent”) of []. (hereinafter “Student”). A prehearing conference was held on March 14, 2012. The issues for due process were: 1) Whether evaluations were conducted in a timely manner; 2) Whether the proposed IEP is appropriate; 3) Whether the proposed day placement in-district is appropriate. No procedural violations were alleged, and none are found.

The due process hearing was held on the originally scheduled dates of March 27 and 28, 2012; a third day of hearing took place on April 6, 2012. Parent presented first, and had the burden of proof. Parent testified and also called the following witnesses: ¹ [], Student’s therapist at []; [], M.D., a psychiatrist at [] Counseling; [], Student’s outpatient therapist at [] Counseling; and [], in-home therapist. The District called the following witnesses: [], Housemaster for sixth and seventh grade at Londonderry Middle School; Richard Zacchilli, Londonderry Middle School Principal; [], Student’s teacher and case manager; Mary Beth Kelly, Londonderry Middle School English teacher; Christine Wheeler, Board Certified Behavioral Analyst who observed Student at school; Megan Slattery, school psychologist; Gino McCarthy-Tiella, science teacher and Kim Carpinone, Director of Pupil Services. Both parties submitted exhibits and filed post-hearing submissions. Because the proceedings continued to a third day, the parties agreed to extend the decision date from April 20 to April 25, 2012.

II. FACTUAL BACKGROUND

Student is a twelve-year-old seventh grader who resides with Parent and [] younger siblings in the Londonderry, New Hampshire School District. Student is eligible for services pursuant to the Individuals With Disabilities Education Act (IDEA) and applicable state regulations.

When Student was [] years old, Parent obtained full legal and physical custody over h--. At that time, Student was hospitalized at [] Hospital in [] where Student received a multidisciplinary evaluation. Diagnoses given to Student have included Attention Deficit Hyperactivity Disorder, Reactive Attachment Disorder and Post Traumatic Stress Disorder. Student is currently identified by h-- educational team as having an Emotional Disability.

¹ By agreement, some witnesses testified out of order, and some testified telephonically.

Since June of 2004, Student has attended school in the District, and, with the exception of one year during which [] had a Section 504 Plan, Student has received special education and related services pursuant to an IEP. Student has been described as enjoying school for the most part, and experiencing it as a safe place.

In sixth grade, for school year 2010-2011, Student was placed in the [], a program designed to provide additional focus and structure to address organizational deficits and difficulties with executive functioning. The communication system between school and home was also a significant factor contributing to successful programming.

Parent has been very involved with the District and other community agencies. Parent and District have, over the years, worked collaboratively around Student's program and needs, and Parent has tried to acknowledge positive interventions and approaches by school staff.

There were three disciplinary incidents during the 2010 -2011 school year, two of which occurred on the school bus. All three incidents were addressed by school staff and consequences were imposed. According to school staff, Student made appropriate progress during [] sixth grade year. Student's IEP and placement for the 2011-2012 school year were developed and agreed-upon by the team, which included the Parent.

Accounts of Student's behavior, particularly toward the end of sixth grade and during the late fall of 2011, differ as between the Parent and the District personnel. In any event, following a crisis assessment in December of 2011, Student was placed at [] School in [state]. Student attended school in Londonderry briefly that month, but returned to [out-of-state school] and has not returned to Londonderry Middle School.

School staff that worked with Student testified that Student earned the grades [] received, had no behavioral issues in the classroom, enjoyed school and interacted with peers. Although Student struggled in some academic areas,[] made academic progress overall. Without exception, school staff endorsed the proposed IEP and placement, and did not believe that Student required a more restrictive, residential placement to benefit from education. Behavioral analyst Christine Wheeler saw no maladaptive behaviors at school warranting a behavior plan, and she did not recommend one.

The IEP team met in February of 2012 to consider the information obtained from evaluations conducted during the fall and early winter. The IEP proposed on March 9, 2012 contained numerous additional services, including sessions with the school psychologist and speech-language pathologist, several new goals and objectives, and increased sessions in the [] program. The proposed IEP also provides for a one-on-one paraprofessional. The District members of the team recommended placement at the Londonderry Middle School, with which Parent disagrees.

Dr. [], psychiatrist at [] Counseling, explained that her role was to prescribe and monitor Student's medications, rather than to provide an opinion regarding Student's

educational programming. Dr. [] was not aware of what supports were available to Student at the Middle School. Dr. [] described a program whereby students who were hospitalized attended regular schools during the day. [], Student's therapist at [] testified as to her recommendation that community-based services be exhausted and that Student be discharged to [] home with in-home therapy and other supportive interventions. For the most part, Parent's witnesses opined that Student was in need of residential placement for treatment and management of [] safety.

III. DISCUSSION

Parents have the burden of proof and persuasion relative to the issues in this case. *See Shaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

The IDEA does not require that the School District provide Student with an IEP and placement that will "maximize" educational potential. *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F. 3d 18, 23 (1st Cir. 2008); *see also 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). School districts must ensure, *to the maximum extent appropriate*, that children with disabilities are educated with non-disabled peers. Ed 1111.01(a). (Emphasis added)

A tribunal must determine whether a residential placement is necessary for the child's education, rather than any social, medical or emotional problems *distinct* from his learning problem; an educational agency is not necessarily responsible to remedy behavior problems that occur at home. *See Gonzales v. Puerto Rico Department of Education*, 254 F.3d 350, 352 (1st Cir. 2001) (emphasis added).

Although Parent argues that Student's needs are such that a residential program is required for educational purposes, the weight of the evidence does not support this conclusion. Rather, the evidence shows that, to the extent that Student requires residential placement, such placement is for treatment purposes and not primarily oriented toward enabling [] to benefit from education.

Tribunals should recognize the expertise of educators with respect to the efficacy of educational progress. C.G. v. Five Town, 513 F.3d 279, 289 (1st Cir. 2008). Student's program at the Londonderry Middle School has proved successful to a large degree thus far. The proposed IEP as amended would provide even more services with a greater degree of structure. The District staff and consultants unanimously voiced opposition to residential placement, believing it to be too restrictive and not necessary to enable Student to benefit from [] education and make meaningful progress. Despite [] challenges, Student was held to the same behavioral standards and subject to the same disciplinary consequences as were other students. Although there were behavioral incidents on the bus, they were appropriately addressed by school personnel. According to school staff, it was never necessary to implement a behavior plan for Student. Despite somewhat conflicting testimony as to the need for a one-on-one paraprofessional, the District agreed to provide this service, did so, and incorporated it once again into the proposed IEP. School personnel cautioned that a residential placement would deprive Student of important peer role modeling, and may in fact be detrimental to [].

Although Parent expresses concern about Student's behaviors, she declined all counseling services from the District. As her rationale for doing so, Parent cites two isolated instances where she disagreed with what had occurred during counseling sessions – as reported to Parent by the Student. On the one hand, Parent emphasizes the severity of Student's tendency to fabricate; on the other hand, the record is unclear as to what, if any, attempts were made to address these matters directly with the school counselor before withdrawing Student from this service.

Finally, Parent maintains that the District did not conduct certain evaluations in a timely manner during the fall of 2011. 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). The record does not reflect that any of these things occurred.

IV. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

Parents' Proposed Findings of Fact: None submitted.

Parents' Proposed Rulings of Law: None submitted.

District's Proposed Findings of Fact: 1 – 9; 11 – 44; 46 - 79 are **granted**; the remaining proposed findings of fact can neither be 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 - 44 are **granted**.

V. CONCLUSION AND ORDER

The proposed 2011-2012 IEP as amended, with placement at the Londonderry Middle School, is appropriate and reasonably calculated to provide meaningful educational benefit to the Student. Parent has not met the burden of demonstrating that residential placement is necessary for Student to benefit from education. Although there was a slight delay in performing requested evaluations, the delay was not unreasonable under the circumstances and had no adverse impact upon the Student's educational programming.

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 competent jurisdiction. The Parent has 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 or School District, seeks judicial review of the hearing officer's decision

So ordered.

Date: April 25, 2012

*Signed,
Amy B. Davidson*

Amy B. Davidson, Hearing Officer