STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

Student./Mascoma Valley Regional School District
IDPH-FY-13-08-010

DECISION

I. INTRODUCTION

This due process proceeding commenced on August 3, 2012, initiated by the Mascoma Valley Regional School District ("District"). [1] A prehearing conference was held on August 17, 2012 at the Department of Education Hearings Office in Concord. The Prehearing Order issued on August 21, 2012 set forth the issues for due process as well as other prehearing matters.

The due process hearing was initially scheduled for August 31 and September 4, 2012, with a decision date of September 16, 2012. At the parties' request and by agreement, two additional hearing days of September 11 and 17, 2012 were held, with a new agreed-upon decision date of September 27, 2012.

The substantive issues for due process were as follows: a) whether the District's proposed placement at Spaulding Youth Center day program can effectively implement Student's IEP in the least restrictive environment; b) whether the Student requires twenty-five to thirty hours of intensive Applied Behavior Analysis ("ABA) [2] therapy in order to receive a free appropriate public education ("FAPE"); c) whether the Student requires an extended school year, an extended day and services in the home in order to receive a FAPE; d) whether the IEP team's decision of April 9, 2012 to implement the Student's IEP in a residential school was appropriate; and e) whether maintaining the Student's placement at the Hartford (Vermont) Autism Regional Program ("HARP") while the District filed for due process was substantially likely to result in injury to the Student and/or others, supporting the decision to implement the Student's IEP on a 45-day interim basis or until the hearing officer's decision on the appropriateness of the proposed placement. In addition, three procedural violations were alleged by the Guardians and are discussed in Section II below. .

Parents/Guardians ("Guardians") and the District submitted exhibits in the form of documents and DVD recordings. The District presented first and had the burden of proof relative to IEP team proposals from April 9, 2012 and maintaining Student's

[1] A companion case involving the same parties but filed by the Parents, was withdrawn during the pendency of the hearing in this case.

[2] ABA is the application of behavior principles to socially significant behaviors, based on the principle that certain behaviors can be strengthened or weakened by altering the consequences that follow the behaviors. The goal of ABA, which is commonly recommended for individuals with autism, is to generate skills across settings persons and places in order to achieve functional use of skills.

placement at HARP; the Parents had the burden of proof relative to the remaining issues for due process, including allegations of procedural violations.

The following individuals testified on behalf of the District: Dwayne White, Behavioral Consultant to the District; Janice DeCosta, Director of HARP; Colleen Sliva, Spaulding Youth Center Principal and Special Education Director; Randy Welch, Spaulding Youth Center Chief Program Officer; Barbara Logan, Special Education Director for the District. Guardians called the following witnesses: Jennifer McLaren, M.D., Student's treating psychiatrist; Thea Davis, founder and Clinical Director of Autism Bridges, Inc.; Madelyn Crudo-Burke, Assistant Superintendent of Windsor Southeast Supervisory Union in Vermont; JoEllen Emerson, provider at SD Associates; and both Guardians. Post-hearing submissions were filed by both parties.

II. PROCEDURAL VIOLATIONS

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 FAPE, 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 Guardians first allege that the District failed to consider a Functional Behavioral Assessment ("FBA") compiled by SD Associates in late March of 2012. A fair amount of conflicting testimony was presented regarding whether this report was "shared" at the April 9, 2012 team meeting and the parties argued about whose responsibility it was to insure that the document was actually disseminated. The evidence suggests that the report was at least available at the time of the meeting, as well as subsequently, and that the team did not make use of it during the April 9, 2012 meeting. According to District witnesses, however, it was apparent that the FBA supported the District's recommendation for residential placement.

The second procedural violation alleged by the Guardians is that the District failed to conduct a behavioral assessment or modify the behavioral intervention plan developed by Lakeview NeuroRehabilitation Center or SD Associates once it was determined that Student's behavior was a manifestation of his disability. The Guardians also allege that the District failed to return the Student to his placement or a similar placement after conducting a manifestation determination. At the time, both parties agreed that HARP was no longer appropriate for Student. The District argues that, since no disciplinary action was involved, there was no obligation to conduct a manifestation determination in the first place and that the District did so merely to facilitate the team's assessment of the Student. The guardians point to District counsel's comment at a team meeting regarding expulsion to support their theory that a manifestation determination was, in fact, required. Regardless of the interpretation of events, the District made FAPE

available at all times pertinent. Therefore, it cannot be concluded that either deprivation of a free appropriate public education ("FAPE") or impediment to Parents' participation occurred.

III. FACTUAL BACKGROUND

Student is currently 18 years old, and resides with his parents/Guardians and a sibling in the District. Student has an educational code of autism, and has also been diagnosed with pica, which involves chewing and ingesting inanimate objects. Since preschool, Student has been receiving special education and related services in the District. From fifth grade until mid-March of 2012, Student attended HARP in Vermont, a specialized day program in a special education school which primarily serves students with autism spectrum disorders.

As a younger child, Student engaged in self-injurious behaviors such as biting and hitting himself. For a period of time, those behaviors were effectively managed at school. In approximately the fall of 2009, Student's self-injurious behaviors returned and began increasing in intensity. During the 2011-2012 school year, although he made progress on his IEP goals, Student's behaviors both at home and at school continued to escalate, warranting several weekend emergency room visits and two psychiatric hospitalizations in the summer and fall of 2011. During this period, Student also underwent several medication changes. In October of 2011, the IEP team, including the Guardians, agreed to have Student undergo a comprehensive diagnostic assessment on a residential basis at Lakeview NeuroRehabilitation Center. Despite some concerning aspects of Student's Lakeview admission, there was indication that he received some benefits as well. Student was discharged from Lakeview in late December of 2011 and returned to the HARP program on January 3, 2012.

As Student's aggressive behaviors escalated and became more unmanageable at school and home, HARP staff made it known that an alternative placement needed to be considered. On March 13, 2012, Student underwent major intestinal surgery for removal of ingested objects. It is likely that the severe pain associated with objects lodged in Student's intestine contributed to some significant behavioral incidents around that time. Student required a lengthy recuperation and was not medically cleared by his physician until April 24, 2012.

On April 9, 2012, the team convened to discuss Student's placement. At that point, the parties agreed that HARP could no longer safely provide Student with an education. The District proposed placement in a residential facility, and offered the Guardians a number of choices including Spaulding Youth Center, May Institute and New England Center for Children, all of which were designed to serve children with autism. Desirous of allowing their son to remain at home, the Guardians rejected the proposed residential placement, but continued, through counsel, to explore other options.

During the summer of 2012, the District learned that Student's behaviors had improved and his medical condition had stabilized. In addition, the District was able to arrange for specialized transportation for the Student. At the team meeting held on July 27, 2012, cognizant of the Guardians' wishes to have their son remain at home, the District proposed to place Student at SYC day program. SYC participated telephonically at the team meeting, and offered extensive testimony at the due process hearing regarding their program. SYC staff opined that Student sounded like a good candidate for placement at their school.

.Since April of 2012, Student has been receiving ABA services through SD Associates in Vermont; these services were recommended by Student's psychiatrist and procured by the Guardians in conjunction with Pathways. Specifically, from April 26 to August 10, 2012, Student received services for two-and-a-half hours per day, three days a week, at home. From August 13 to the time of the hearing, services were increased to five hours per day, three days per week, at a location in North Hartland, Vermont.

IV. DISCUSSION

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 2012.

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); Me. Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 11 (1st Cir.2003); Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993). 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).

As to the Guardians' proposed placement, the evidence suggests that Student has made progress since April of 2012; according to the Guardians, his aggressive behaviors, while still occurring, have notably diminished. Nevertheless, Student's progress in the SD Associates program, in and of itself, does not establish that this placement is appropriate. *See* Gagliardo v. Arlington Central School District, 489 F.3d 105 (2nd Cir. 2007).

There is no real dispute regarding Student's need for "waking hours" programming and structure, supported by, among other things, the benefits received at the Lakeview program. The difficulty is that the program as proposed by the Guardians is not capable of implementing Student's IEP, which calls for a comprehensive array of services. SD Associates is not an "educational program" in and of itself, and, in Student's case, essentially consists of home-based services utilizing discrete trials on a one-to-one basis. It is clearly not the least restrictive alternative on the continuum of placements.. There is no access to the general curriculum, no special education or related services being provided by qualified educational staff, and no proposal for direct and consultative services of a BCBA as called for in Student's IEP. SD Associates is also not licensed by either the state of New Hampshire or the state of Vermont to provide special education services, nor does its program comport with applicable regulations in several respects, including use of restrains and the physical location.

SYC is a state-approved program with appropriately qualified and trained professionals and paraprofessionals providing special education and related services to students with autism and other behavioral disorders, utilizing ABA methodology. Student would receive instruction in a small classroom with essentially one-to-one student/teacher ratios. There is also a home-based component, transitional programming for 18 to 21-year-old students. SYC has indicated a willingness to have the District's BCBA provide services on site.

According to the Special Education Director, the District supports the provision of an extended school day as well as extended school year programming. The Student has an agreed-upon IEP and there is no question that Student requires more services than he currently receives, including ABA services. The dispute centers primarily around the *type* of ABA services and number of hours of intensive ABA services the Student requires to enable him to receive a FAPE. Guardians maintain that Student requires 25-30 hours per week of intensive ABA therapy; the District argues that this level of one-on-one, discrete trial training is inappropriate given Student's age and needs, and that in any event, ABA programming is provided throughout Student's day. The evidence does not support a conclusion that, at this time, a minimum of 25-30 hours per week of intensive ABA therapy is required, or even appropriate. However, the team can and should revisit this matter, and may reach a different determination as data is collected and Student's programming progresses.

V. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

Guardians' Proposed Findings of Fact: Numbers 1-11, 13, 15-21, 23-27, 31, 34-37, 42-46, 49, 57-64, 67, 76-79, 82, 85-87, 90, 91, 95, 97, 99, 101, 111, 112, 124, 125, 128, 135, 141, 159-163, 165-167, 170, 173, 177, 178-184, 189-191, 193, 198, 199, 201, 221, 222, 226, 227, 231, 232. 234-237, 239-244 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.

Guardians' Proposed Rulings of Law: Numbers 18-21 are **granted.** The remaining proposed rulings of law 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 Findings of Fact: Numbers 1- 14, 16, 18-22, 24-27, 34-38,42-44, 48-50, 52-57, 60-72, 74, 76-80, 82-90; 92-94, 98-104, 107-110, 111-149, 151, 154-156, 158-172, 174-176, 180, 181, 186-198, 199-213 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: Numbers 1-30 are **granted.**

VI. PENDING MOTIONS

A. District's Second Motion for Partial Summary Judgment

During the course of the hearing, the District sought partial summary judgment relative to its obligation to conduct a FBA. This issue has been addressed via the ruling on the corresponding alleged procedural violations, above.

VII. CONCLUSION AND ORDER

For the reasons set forth above, I find that:

a) The Guardians have not met their burden of demonstrating that Spaulding Youth Center cannot effectively provide Student with a FAPE in the least restrictive environment.

b) Guardians have met their burden of demonstrating that Student requires both extended day services and extended school year programming. The IEP team shall convene as soon as is appropriate to amend the IEP accordingly.

c) Guardians have not met their burden of demonstrating that Student

requires a minimum of 25-30 hours of intensive ABA therapy per week at this time.

d) The District's April 9, 2012 to implement the Student's IEP at a residential school was appropriate based upon the circumstances as they existed at the time.

e) The day program at Spaulding Youth Center as proposed by the District on July 27, 2012 is reasonably calculated to provide Student with a FAPE in the least restrictive environment.

f) Although the team's failure to consider SD Associates' FBA did not rise to the level of impeding the Student's receipt of FAPE or the Guardians' ability to participate in the process, the team is cautioned to take steps to insure that, at future team meetings, all available information is considered by the team.

VIII. 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 Guardians 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, Guardians or School District, seeks judicial review of the hearing officer's decision

So ordered. *Amy B. Davidson*

Date: September 27, 2012

Amy B. Davidson, Hearing Officer