

New Hampshire Department of Education

Student/Hudson Sch. Dist.

IDPH FY 12-08-009

Due Process Decision

This case is a request for reimbursement for a unilateral placement. Both parties are represented by counsel. The case hinges on whether the student requires services in an integrated, language based program with other students with similar capabilities. The parents content that she does and presented evidence at the hearing that the student would be able to make more meaningful progress in such a setting both academically and socially.

In order for me to be able to order reimbursement, the parents must establish that the school district did not provide or offer FAPE and that the unilateral placement is appropriate. The parents through counsel argue that the services that the student has received and that are contained in the IEP in dispute have not, and will not, provide meaningful benefit to the student. The parents note that the student is capable of achieving greater progress than she has achieved at the public school to date and that the public school has low expectations for the student. The parents' expert witness also testified that the student has not made "effective or meaningful progress" in the programs and services offered by the school.

I agree that based on the evidence, the student's progress has not been meaningful or significant and that the student appears capable of achieving better results in an integrated, language based program such as the one offered by the unilateral placement.

However, the First Circuit has rejected the meaningful benefit standard and continues to use the "some educational benefit" standard. *See e.g. Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 22-23 (1st Cir. 2008). While a federal district court in Massachusetts apparently used the "meaningful benefit" standard after *Lessard*, *see Dracut School Committee v. Bureau of Special Educ. Appeals of the Massachusetts Dept. of Elementary and Secondary Educ.*, 737 F.Supp.2d 35, 51 (D.Mass. 2010), the federal district court in New Hampshire has not. *See Burke v. Amherst School Dist.*, 2008 WL 5382270 at *8 n.2 (D.N.H. 2008).

As the New Hampshire District Court noted in *Samantha B. ex rel. H.B. v. Hampstead School Dist.*, 2009 WL 5217035 (D.N.H. 2009), the focus with the some educational benefit test is on passing grades and some amount of progress/benefit. In that case, the court denied reimbursement for a student, who had received better than passing grades in all subjects, demonstrated improvement in her grades over the course of the year, and the student's teachers and special education specialists felt that the student was making educational progress. The court noted the oft quoted legal standard in the First Circuit:

A school district meets its obligation to provide a FAPE “as long as the program that it offers to a disabled student is ‘reasonably calculated’ to deliver ‘educational benefits.’ ” Five Town, 513 F.3d at 284 (quoting Rowley, 458 U.S. at 207).

[A] FAPE has been defined as one guaranteeing a reasonable probability of educational benefits with sufficient supportive services at public expense. ... [C]ourts have concluded that a FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice.... [A] FAPE is simply one which fulfills the minimum federal statutory requirements.

G.D., 930 F.2d at 948 (quotations, citations, and emphasis omitted) (listing cases). “The IDEA does not place school systems under a compulsion to afford a disabled child an ideal or an optimal education.” Five Town, 513 F.3d at 284. The Act “emphasizes an appropriate, rather than an ideal, education.... Appropriateness and adequacy are terms of moderation.... [Thus] the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.” Lenn, 998 F.2d at 1086. Stated differently, while disabled students are undoubtedly entitled to receive an appropriate education, the IDEA “does not imply that a disabled child is entitled to the maximum educational benefit possible.” Lessard, 518 F.3d at 23.

Id. at *6.

As a hearing officer, I am bound to follow the New Hampshire District Court and First Circuit’s interpretation of the law. Under the “some benefit” standard utilized by the First Circuit and New Hampshire District court, the fact that the student is capable of doing better, or making more meaningful progress at a private unilateral placement is not something I can consider. Rather, the legal analysis that I am constrained to follow is simply whether the programs and services provided or offered by the school provide “some benefit” which means “some” amount of progress.

Here the school presented documentary evidence and live witness testimony that the student has made “slow and steady” progress in areas affected by her disabilities such as reading, writing, math, and social skills. Under the some education benefit standard, as interpreted by the First Circuit and the New Hampshire District court, that level of progress is sufficient to meet the legal obligations under the IDEA. *See e.g. Burke v. Amherst School Dist.*, 2008 WL 5382270 at *8 (noting the student’s steady progress sufficient to provide FAPE).

As a result, I find that the parents did not prove that the school district failed to offer the student FAPE and because of that I am unable to order reimbursement. If the parents feel that the record demonstrates that the student has not made sufficient progress under the “some benefit” standard, they are free to file a motion for reconsideration to argue that point. The parents also have the ability to appeal my decision under 20 U.S.C. 1415(i)(3).

Section 504 Claim

The parents filed a Section 504 claim as part of their due process request and the school district filed a motion to dismiss. The New Hampshire Department of Education does not have jurisdiction over Section 504 claims and the school district's motion to dismiss is granted.

Findings of Fact

Parent

None proposed

School District

Granted

1-5,7,8,11-13, 15,17,19-53,56-65,69-79,82-98,101-121,123-134,136-150

Neither Granted nor Denied

6,9,10, 14, 16,18,54,55,66,67,68,80,81,99,100,122

Denied

135

Rulings of Law

Parents

None proposed

School District

Granted

2,5,6,9,10,12,13,14,16,17,18,22,24

Neither Granted nor denied

1,3,4,7,8,19,20,21,25,28

Denied

11,15,23,26,27,29

So ordered

11/4/2011

Date

Scott F. Johnson