

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

Student/_____ School District
IDPH-E-FY-15-11-014

DUE PROCESS DECISION

I. INTRODUCTION

This expedited due process proceeding was initiated by the _____ School District (District) on November 4, 2014, on behalf of the Parents of [Student]. The due process hearing was scheduled for November 12 and 14, 2014, with a decision date of December 3, 2014.

A prehearing conference was held on November 7, 2014. A Prehearing order was issued on November 8, 2014.

The due process hearing was held on November 12 and 14 as scheduled, but was not completed. Additional time was necessary for the full and fair disclosure of evidence. The parties waived the initial timelines, and as there was no indication that they had waived the resolution session, a third hearing day was scheduled for December 11, 2014.¹ A decision date was set for December 17, 2014, and the 45 day deadline is December 19, 2014.

The Parent presented his/her case first. Both [parent] and his/her advocate, [], testified. The Parent also called Dr. [], a psychiatrist from [] who recently assessed the Student. The District called [], Behavior Analyst; [], Paraprofessional; [], Student's classroom teacher; and _____, Director of Special Education.

The issue for due process was placement. The Parent had the burden of proof.

Both parties submitted exhibits. Post-hearing submissions were received from both parties.

II. FACTS

Student is currently at the [] School in _____. At the end of his/her [] grade year [], Student was identified under the IDEA as having a learning disability and eligible for special education and related services. In early 2014, the school district developed a behavior plan for Student. This plan was designed to improve functional communication, adaptive skills and social skills, and to reduce problem behaviors. In [], [], a Board Certified Behavior Analyst (BCBA) was hired as a consultant to work with staff on Student's behavior plan. He/She observed Student, consulted regularly with staff, and recommended revisions to the behavior plan as needed. According to [], despite some difficulty in April of 2014, for the most part Student's behavior plan worked during his/her [] grade year. There were no incidents of restraint use from April to August of 2014.

In the summer of 2014, [] began providing services to the family. [] and [] from that organization were also involved in taking Student to medical appointments and providing information to evaluators. [] served as the Parent's advocate at the due process hearing.

¹ This was the only date available to all parties and the Hearing Officer.

In September of 2014, [] of [] performed a neuropsychiatric evaluation of Student, and diagnosed him/her as having autism. Later that month, the Student's special education team met and changed Student's primary identification to autism. The team also amended the IEP to include a one-on-one paraprofessional as well as additional modifications and accommodations.

Student began [] grade in the [] program at []. Student's behaviors that fall had worsened considerably, becoming increasingly aggressive. School staff also noted that the behaviors were qualitatively different than what had been exhibited in [] grade. During the first two months of the school year, Student's focus on academic tasks drastically diminished and the use of restraints markedly increased.

On [], Student struck his/her paraprofessional, [], causing him/her to sustain a concussion. His/Her medical provider advised him/her that he/she needed to stay home from work for about a week to allow his/her brain to heal, and to avoid bleeding and possibly permanent damage. His/Her medical records and testimony showed that, during the week following the injury, he/she experienced severe headaches, nausea and light sensitivity, lack of energy, difficulty focusing and impaired thought processes.

Student remained at [] until [], at which time a manifestation meeting took place. The Parent attended, accompanied by [] and [] from []. According to the transcript and witness testimony, the team unanimously concluded that Student had caused serious bodily injury to []. The school district determined that he/she should be placed in the day program at [] for the 45-day interim alternative educational placement (IAEP). According to _____, [] would be able to implement Student's IEP and meet his/her academic and behavioral needs.

On October 31, 2014, the Parent and [] visited the []. They did not bring Student, despite being asked to do so.

The Parent disagrees with the [] placement, and instead proposes an interim placement at []. Parent also proposed placement at [].

III. DISCUSSION

The focal point of this case is whether the District's decision to place Student at the [] day program as a 45-day IAEP pursuant to Ed 1124.01 and 34 C.F.R. §300.530(g)(3) was appropriate and in accordance with applicable law. This placement decision was based upon the October 2, 2014 injury to paraprofessional []. The Parent and advocate maintain that the paraprofessional did not incur "serious bodily injury", and therefore Student should be returned to his/her current educational placement at the [] or be placed with [] on a temporary basis.

The infliction of serious bodily injury upon school staff by a student is one of three special circumstances under which the school may remove the student to a 45-day interim emergency educational placement without regard to whether his/her behavior was a manifestation of his/her handicapping condition, and without a team meeting or parental consent as long as the parent is properly notified. 34 C.F.R. §300.530 (g).

Serious bodily injury is defined as an injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a function of a bodily member, organ or mental faculty. 18 U.S.C. §1365(h)(3). The term

encompasses many conditions, including physical pain, illness, impairment of a bodily function, organ or mental faculty, or any other injury no matter how temporary. 18 U.S.C. §1365(h)(4).

After careful review of the medical documentation and the parties' respective arguments and legal citations, I conclude that the injury inflicted upon [] constituted "serious bodily injury" within the meaning of the applicable regulations.

The Parent's proposed interim placement, [], is not an approved curriculum-based educational program into which a Student can be placed. Parent also suggested, through his/her advocate, that [] could be an alternative placement. Aside from the fact that neither the Parent nor [] had visited or contacted [] regarding the Student, there was no evidence on any level as to the appropriateness of this placement for the Student.

The Parent's challenges to the qualifications of school district staff were essentially regarding their ABA certification and experience. Determining the most suitable methodologies and selecting service providers is the responsibility of school authorities, not the parents. *See, e.g., Lessard v. Wilton-Lyndeborough Cooperative School District*, 2008 WL 3843913 (D.N.H. 2008), *affirmed* 592 F.3d 297 (1st Cir. 2010). Numerous courts in other circuits have concurred. (Citations omitted). In any event, New Hampshire educational standards do not contain a separate certification requirement for autism. The educational staff working with Student maintain the proper certifications and are qualified in their respective areas. Staff in Student's program, including the classroom teacher, are certified in crisis intervention and have considerable experience implementing behavior plans and working with autistic students. [], who is a certified BCBA, has provided ongoing consultation with school staff and has assessed Student. As noted above, the District has committed to continuing provision of ABA services to Student.

The Parent express certain concerns about placement at [], but his/her primary objection to [] seems to be that it is not an "autism specific" school. There was no evidence that Student requires an "autism specific school", and no one is proposing to discontinue the ABA services as have been provided to Student since [] grade. _____ testified that the school would provide ABA services at [] and [] was willing to work with the school in that regard. Moreover, the evidence, including testimony from Dr. [], is that ABA services are only a portion of what this Student needs. Not a single witness, including the Parent's own experts, recommended ABA as the *sole* methodology, or even the primary methodology. In fact, Dr. [] him/herself was emphatic that ABA is only one part of a comprehensive array of services to be provided utilizing a wraparound approach.

Although the District's was appropriate, there remains the question of placement for the remainder of the 2014-2015 school year. The Parent chose not to bring Student to the requested interview at [], and to date has declined that placement in favor of services from []. [] Autism is not an educational placement with an approved curriculum, nor did the evidence demonstrate that it can implement Student's IEP. During the hearing, questions were raised regarding various factors, such as medication and family circumstances, that may be impacting on Student's behaviors. These were also noted by the Parent in his/her post-hearing submission. BCBA [], who conducted a lengthy assessment just prior to Student's removal from school, testified that revision of a behavior plan was an ongoing process. Although Parent's advocate alluded to an improvement in Student's behavior, there was no concrete evidence supporting this contention. Clearly, updated information is warranted. Consequently, the team should convene as soon as possible to review Student's IEP, behavioral needs and placement for the remainder of the 2014-2015 school year.

IV. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

District's Proposed Finding of Fact: Numbers 1 – 19 and 22 – 31 are granted. Numbers 20 and 21 are neither granted nor denied as written.

District's Proposed Rulings of Law: Numbers 1 – 11 are granted.

Parent's Proposed Findings of Fact: Parent's post-hearing submission is essentially in the form of a memorandum of law; as such, the arguments therein were considered but specific findings of fact cannot be made.

Parent's Proposed Rulings of Law: Parent's post-hearing submission is essentially in the form of a memorandum of law; as such, the arguments therein were considered but specific rulings of law cannot be made.

V. CONCLUSION AND ORDER

1. The District's decision to place Student at [] as an Interim Alternative Educational Placement was appropriate and made in accordance with applicable law.
2. The District shall, as soon as is practicable, convene a team meeting to address, among other things, Student's current programming needs, any necessary IEP modifications, continued development and updating of the Student's BIP, and the appropriate placement for the remainder of the 2014-2015 school year. The Parent will sign any necessary releases authorizing the school staff to communicate with outside service providers.

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 Parents 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, Parents or School District, seeks judicial review of the hearing officer's decision

Date: December 17, 2014

Amy B. Davidson, Hearing Officer