

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION

Student/\_\_\_\_\_ School District

**IDPH-FY-17-06-042**

DUE PROCESS DECISION

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This due process proceeding was initiated on July 13, 2017 by the Parents of (Student). The due process hearing was originally scheduled for July 26 and 28, 2017 with a decision date of August 20, 2017. <sup>1</sup>

A prehearing conference was held on July 6, 2017, and a Prehearing Conference Order was issued on July 7, 2017.

The substantive issues for due process were as follows:

1. Whether Parents should have been asked to sign and participate in the development of a current Functional Behavioral Analysis;
2. Whether, since May 15, 2017, the effective date of dismissal from [ ], Student has not been provided a free appropriate public education as defined by current IEP;
3. Whether Student is entitled to compensatory services for any time period(s) between May 15, 2017 and July 19, 2017 (date of admission to new placement).

Procedural violations alleged are as follows:

- a) [ ] failed to follow and implement Student's IEP with fidelity and consistency since February 20, 2017;
- b) Placement discussions were initiated in IEP meetings on 9/12/16, 11/28/16, 2/20/17 and 4/10/17 when placement was not on Written Prior Notice;
- c) Parents were excluded as IEP team members during the six month period from September 12, 2016;
- d) Violation of LRE placement.

The District presented first, and the Parents had the burden of proof. The District called the following witnesses: [ ], Assistant Director of Student Support Services; [ ], Director of Student Support Services; and [ ], Board Certified Behavior Analyst (BCBA), [ ]. Parents called the following witnesses: [ ] and [ ].<sup>2</sup>

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<sup>1</sup> Due to an unavoidable change in the Hearing Officer's schedule which necessitated a shorter day on July 28, a third full hearing date was scheduled for August 4, 2017 to insure a full and fair opportunity for both parties to be heard.

<sup>2</sup> Parents' preliminary witness list contained the names of 31 witnesses, subsequently reduced to 13 witnesses, all of whom were [ ] staff. Parents were offering their testimony to show, among other things, that Student's IEP was not implemented with consistency or

Parents also testified. All witnesses had considerable experience working with Student.

Both parties submitted exhibits and filed post-hearing submissions.

## II. FACTS

Student is [ ] years old, and resides with [ ] family in the [ ] School District. [ ] is eligible under the IDEA for special education and related services, identified as having autism and intellectual disability. Since 2014, Student has been placed by the District's IEP team at the [ ] day program in [ ], New Hampshire. Student has also received home-based BCBA services from BCBA [ ].

Student's IEPs for the 2015-2016 and 2016-2017 school years were agreed-upon by the parties and were reasonably calculated to provide Student with a free appropriate public education. Student also has an agreed-upon IEP for the 2017-2018 school year through January 5, 2018.

During the 2015-2016 school year, Student made meaningful progress on all but one of [ ] behavioral IEP goals. In August of 2016, the IEP team met and agreed that Student had not achieved sufficient progress on [ ] social/emotional goal, which called for a decrease in interfering behaviors. According to the professionals working with Student, the two behavior antecedents are denial of preferred activities or things, and demands for performance. On a number of occasions, Student's behaviors, which include scratching, biting, kicking or head-banging, required two to four crisis intervention staff to insure safety.

In the fall of 2016, the team proposed changes in an effort to address Student's lack of progress on [ ] behavioral goal. One such proposal was to assign [ ] BCBA [ ], to monitor Student throughout the school day; [ ], who was not on campus daily, would continue in-home services and consult with [ ]. In making this proposal, [ ] contemplated better monitoring of Student's behaviors throughout the day. There were some initial concerns expressed at the team meeting regarding this change, but ultimately the team agreed and the plan was implemented.

During the 2016-2017 school year, and in accordance with Student's IEP and [ ] Behavioral Support Plan, Student participated in the Positive Behavior Intervention System (PBIS), which emphasizes teaching and rewarding positive behavior and social skills. In addition, the IEP called for multiple, highly trained staff to work with Student. A core staff of three professionals which included the classroom teacher provided consistent programming to Student.

The IEP team held several meetings during the 2016-2017 school year to review the IEP and Student's progress, particularly with respect to [ ] behavioral goal. The Parents attended and participated in all of those meetings. The [ ] staff tried a number of interventions and strategies with Student in an effort to decrease the intensity of [ ] behaviors and particularly avoid the need for physical interventions and restraint. At team

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fidelity. Parents were advised to speak to their proposed witnesses beforehand to ascertain the substance of their testimony, and determine whether some or all could testify by telephone.

After receiving a request from [ ]'s counsel to limit the number of subpoenas to its staff so as not to disrupt [ ] programming, the Hearing Officer held a telephonic conference to resolve the issue. The Parents, [ ], Attorney [ ] and [ ] counsel participated. Ultimately, [ ] agreed that classroom teacher [ ] and BCBA [ ] would attend on July 28, 2017 without the need for a subpoena. Another witness proposed by the Parent, [ ] Principal and Special Education Director [ ], was unavailable on the scheduled dates; the Parents were given the opportunity to follow up regarding [ ] availability and to consider the necessity for additional witnesses once [ ] and [ ] testified. The parties also explored, unsuccessfully, the option of holding the hearing at [ ]. The Parents subsequently chose to conclude their case on August 4, 2017 without calling additional [ ] witnesses.

meetings and throughout these proceedings, Parent strongly suggested that the onset of Student's [ ] and the excessive number of staff interacting with Student contributed to the increase and severity of Student's negative behaviors at school. [ ] also tracked the behaviors to determine changes in antecedents, including whether Student's [ ] or digestive issues correlated with the behaviors, but found no evidence of such a correlation. The team also discussed the fact that Student was not exhibiting the behaviors at home, and struggled to figure out the reasons why they could not achieve comparable results at school. In February of 2017, [ ] recommended adjustments to Student's Behavioral Support Plan; Parents did not sign the Plan, later asserting that a Functional Behavioral Analysis needed to be performed.

At the April 2017 team meeting, when [ ] staff raised the subject of a placement change, both the District and the Parents pointed out that a placement meeting needed to be scheduled. That placement meeting occurred on May 4, 2017.

Ultimately, due to the severity of Student's behaviors, some of which resulted in serious injury to staff, [ ] determined it could no longer safely provide educational services to Student. At the May team meeting, [ ] gave formal notice that it would be discharging Student effective May 12, 2017. Prior to that meeting, the District reasonably believed that a new placement would need to be obtained for the 2017-2018 school year; it did not expect that [ ] would be discharging Student on such short notice.<sup>3</sup>

Following Student's discharge from [ ], the District provided in-home tutorial support, initially at the rate of two hours per day, increased to three hours per day. According to [ ], the tutoring was more intensive than the [ ] classroom instruction. The District also provided BCBA support for the tutor, and related services. The Parents were offered, but declined, additional in-home services.

Nonetheless, the District, which had already begun to search for another placement for the upcoming school year, accelerated its efforts and both parties worked diligently to secure a new placement for Student. During the week of May 15, 2017, Student interviewed at [ ]; [ ] was accepted there on or about June 11, 2017, and began attending on July 19, 2017 as scheduled. In contrast to [ ], [ ] provides a longer school day (6.5 hours as opposed to 6 hours), an additional day each year, and enhanced BCBA services.

There was no evidence of regression from Student's discharge from [ ] to [ ] admission to [ ]. Both parties agree [ ] is making educational progress there; although Student has exhibited the same behaviors as had been observed at [ ], Parents note that [ ] behaviors have actually improved since [ ] admission to [ ].

### 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).

Parents claim that [ ] should have conducted a Functional Behavioral Analysis. According to both BCBA's who testified, no new behavioral antecedents were identified, so that a new Functional Behavioral

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<sup>3</sup> Shortly after the May 4, 2017 meeting, the Parents filed an expedited due process request in light of Student's imminent dismissal from [ ]. At the time of the prehearing conference in that matter, the parties had already identified another placement for the Student, and were anticipating acceptance and admission in the near future. The Parents sought to have Student remain at [ ] pending the start of Student's new program. The District formally requested an order that [ ] was Student's "stay-put" placement during the pendency of the proceedings; the Parents concurred, and the order was issued on May 17, 2017. As there was no further relief that could be provided in that matter, it was dismissed, with a provision specifically preserving claims that Parents have brought forth here.

Analysis was unnecessary. [ ] did, however, make adjustments to Student's behavior plan in February of 2017. Moreover, the District advised that the team would consider Parents' request.

Parents have consistently maintained, in this case and in the prior matter, that [ ] was an appropriate placement for Student. This claim is inconsistent with Parents' position that [ ] failed to implement Student's IEP with fidelity and consistency, nor does the testimony of [ ], [ ] and [ ] support such a conclusion. There was no evidence that any staff working with Student lacked appropriate qualifications and training.

Parents also maintain that, between May 15, 2017 and July 19, 2017, Student was not provided with a free appropriate public education in accordance with [ ] IEP and, as a result, they are entitled to an award of compensatory education.

A gap in service provision, or the failure of a school district to provide all services identified in an IEP does not, without more, constitute a denial of a free appropriate education or justify an award of compensatory education. *See Burke v. Amherst School District*, 2008 DNH 210 (D.N.H. Dec. 18, 2008).

Despite having been placed in a difficult position by [ ]'s termination of placement prior to the end of the school year, the District exercised due diligence in locating another placement and providing services in the interim. The District actually provided *more* BCBA services that Student would have received at [ ], in addition to occupational therapy, speech therapy, 47 hours of educational programming of greater intensity than what [ ] would have provided, and an offer (declined by the Parents) of in-home BCBA support. On these facts, any negligible shortfall in service hours has not been shown to have compromised the *quality* of service delivery. Therefore, the District did not fail to provide Student with a free appropriate public education.

An entitlement to compensatory education is not automatic, but is determined based upon the particular facts of each case. (Citations omitted). Here, Parents seek compensatory education for the actual classroom time Student might have missed during the eight weeks between placements. However, the Parents have not demonstrated that these more intensive supported tutorial sessions provided less benefit than classroom days at [ ] would have provided. Student made substantial progress at [ ], and there was no evidence that Student had experienced any regression during the eight week period between placements.

In addition, the [ ] program will more than compensate for any classroom time that Student might have missed at [ ]. [ ] was agreed-upon by both parties; Parents acknowledge that [ ] is appropriate, will provide additional service hours, more intensive ABA support. Parents also point out that Student has already demonstrated improvement at [ ].

#### **IV. PROCEDURAL ISSUES**

Parents' claim regarding [ ]'s failure to follow and implement Student's IEP with fidelity and consistency since February 20, 2017 is addressed above.

Parents next claim that placement discussions were initiated in IEP meetings on 9/12/16, 11/28/16, 2/20/17 and 4/10/17 when placement was not on Written Prior Notice. The IDEA does not prohibit informal discussion of placement issues.<sup>4</sup> In any event, no placement changes were formally proposed at the meetings prior to May 4, 2017. The May meeting was specifically noticed as a placement meeting at the request of the Parents and [ ].

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<sup>4</sup> Indeed, it would undermine the collaborative team process to interpret the IDEA so rigidly as to prohibit any discussion of, for instance, continued appropriateness of a placement.

Parents claim that, in September of 2016, they were presented with a unilateral decision to change service providers. The selection of providers is generally within the province of the school district. Student's IEP did not designate a particular provider, there was no dispute as to [ ]'s qualifications, and the proposal called for continued services by and consultation with BCBA [ ]. Under the circumstances, a proposal to provide more consistent monitoring was reasonable as a measure to attempt to address Student's lack of progress in [ ] behavioral goal.

Parents claim that they were excluded as IEP team members during the six month period from September 12, 2016. The record does not reflect such exclusion; the Parents attended and participated in each of the team meetings, and had regular written and face-to-face communication with [ ] staff and District representatives.

Finally, Parents claim that placement at [ ] constitutes a violation of the IDEA's mandate for provision of education in the least restrictive environment. 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) (emphasis added). 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) (emphasis added). In other words, a student must be placed in the least restrictive environment in which the student can make meaningful educational progress.

There is no dispute that this Student requires placement in an out-of-district day program in order to make educational progress. As noted above, not only have the parties agreed on [ ] School as appropriate, but the Parents acknowledge the enhanced hours of programming and have specifically noted a reduction in negative behaviors during the first eight days. The only factor cited by the Parents in support of their claim is the increased distance from home. However, [ ] is a day placement for Student; Parent drives [ ] to and from school every day, and there was no evidence that the additional driving time has impeded Student's ability to be involved in [ ] community.

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 (1<sup>st</sup> Cir. 1990). On this record, it cannot be concluded that any of these things occurred.

The Parents are knowledgeable, active participants in their child's educational programming, and have raised understandable concerns during team meetings. By the same token, the District has gone above and beyond under difficult circumstances. A new, appropriate placement with enhanced programming for Student was procured within an extraordinarily short period of time. It is hoped that the parties can continue their collaboration going forward.

## **V. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW**

Parent's Proposed Findings of Fact: Parents' factual allegations can neither be granted nor denied as written, except to the extent that they conflict with this Decision, they are deemed denied. Administrative notice is taken of the factual allegations regarding statements made at IEP team meetings (pp. 12-20) to the extent that they are actual *verbatim* representations of participants' statements.

Parent's Proposed Rulings of Law: None proposed.

District's Proposed Findings of Fact: Numbers 1-39 are granted.

District's Proposed Rulings of Law: Numbers 40-51 are granted. .

## **VI. CONCLUSION AND ORDER**

1. The Parents have not met their burden of proving that Student did not receive a free appropriate public education between May 15, 2017 and July 19, 2017;
2. The Parents have not met their burden of proving that Student is entitled to compensatory services for the period between May 15, 2017 and July 19, 2017;
3. The Parents have not met their burden of proof with respect to alleged procedural violations.

## **VII. 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, Parent or School District, seeks judicial review of the hearing officer's decision.

**So ordered.**

/s/ Amy B. Davidson

**Date: August 20, 2017**

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**Amy B. Davidson, Hearing Officer**