

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION

Student/\_\_\_\_\_ School District  
IDPH-FY-17-07-006

DUE PROCESS DECISION

**I. INTRODUCTION**

This due process proceeding was initiated on July 11, 2016 by the Parent of (Student). The due process hearing was originally scheduled for September 14 and 15, 2016, with a decision date of September 22, 2016. The hearing was subsequently continued to October 11 and 12, 2016, with a decision date of October 27, 2016.

The issues for due process were as follows:

- a) Whether the Student should be identified as having a Specific Learning Disability by virtue of dyslexia and dysgraphia;
- b) Whether the proposed occupational therapy services are sufficient and appropriate to address Student's fine motor skills (handwriting);
- c) Whether the document designated as "Parent Concerns" should be included in the IEP in its entirety;
- d) Procedural issues as set forth in Section F (pp. 8-9) of Parent's due process request, as amended in Parent's Amendment to Due Process Request, except Issue #9 pertaining to access to records.

Parent presented first, and had the burden of proof. Parent called the following witnesses: Parent; Dr., Staff Psychologist at ( ); and Dr. ( ), Assistant Physician, ( ). The District called the following witnesses: ( ), Specialist in Assessment of Intellectual Functioning; Occupational Therapist; Student's Special Education teacher at ( ) School; and, Director of Pupil Services for the District. Both parties submitted exhibits and filed post-hearing submissions.

**II. FACTS**

**A. Eligibility under the Identification of Specific Learning Disability**

1. Since 2014, Student has been eligible for special education under the identification of Autism. In June of 2016, the team also determined that Student was eligible under the identification of Other Health Impaired by virtue of Student's diagnosis of ADHD.
2. Over the past two years, the District IEP team has conducted numerous evaluations, some at the Parent's request, including evaluations to determine the appropriateness of

a Specific Learning Disability identification. The team also reviewed data from evaluations conducted by ( ), and discussed Student's learning profile at several team meetings. The District members of the team concluded that Student did not qualify under this classification.

3. In December of 2015, Student was evaluated by Dr.( ) at ( ). Dr. ( ) did not conduct academic testing, nor was he able to assess Student's writing. Dr. ( ), in conjunction with other clinicians at ( ), diagnosed Student as having dyslexia and dysgraphia; the IEP team recognizes these diagnoses and they are noted in Student's IEP.
4. In the spring of 2016, the clinicians from ( ) developed a treatment plan for Student which provided that Student's IEP needed to include autism spectrum disorder and ADHD.
5. According to clinicians from ( ), Student has the following diagnoses: Autism Spectrum Disorder, ADHD, Specific Learning Disorder with Impairment in Reading and Specific Learning Disorder with Impairment in Written Expression.
6. In May of 2016, the ( ) team recommended that Student's IEP include classifications of both autism spectrum disorder and ADHD (other health impaired) due to the significant impact of these diagnoses on Student's education.
7. In June of 2016, the IEP team reviewed the report from ( ). At that time, the draft IEP recognized Student's identifications of Autism and Other Health Impaired, and also noted the ( ) diagnoses of dyslexia and dysgraphia.
8. In June of 2016, at Parent's request, Dr. ( ) wrote a revised letter which again recommended classifications of Autism Spectrum Disorder and ADHD/other health impairment.
9. In September of 2016, at the Parent's request, Dr. ( ) wrote another letter; this letter recommended, for the first time, that Student's IEP should include a classification of Specific Learning Disability.
10. Between May of 2016 and September of 2016, Dr. ( ) did not conduct any additional assessments of the Student, nor had he or other members of his team observed Student in the classroom or spoken with educational providers about Student's school performance.
11. Student's autism impacts his educational performance in the areas of reading and writing.
12. Student is receiving services designed to address his dyslexia and dysgraphia.

**B. Sufficiency And Appropriateness Of Proposed Occupational Therapy Services To Address Fine Motor Skills (Handwriting)**

13. Student's handwriting is difficult to read at times. Student's ( ), with whom Student spends a significant amount of time, testified that ( ) handwriting was getting worse.
14. In March of 2015, an occupational therapy evaluation was conducted by ( ), a licensed occupational therapist. ( ) evaluated Student's handwriting skills, among other things. Based upon ( ) evaluation, ( ) recommended accommodations, but not occupational therapy.
15. In August of 2016, Parent obtained an outside occupational therapy evaluation from ( ). The ( ) evaluation recommended classroom adaptations and accommodations to help increase legibility.
16. ( ), Student's special education teacher at ( ), testified that occupational therapy for handwriting would not be a productive use of Student's time.
17. The District has offered accommodations and other services to assist Student with handwriting tasks.

**C. Parent Concerns**

18. In a three-page document dated August 22, 2016, Parent set forth his/her concerns relative to the IEP, and requested that the District include his/her statement *verbatim* in the IEP.
19. Portions of the Parent's concerns were incorporated into the IEP.
20. Copies of the entire three-page document were distributed to all of Student's teachers.
21. Parent testified that including only certain portions of his/her statement constituted censorship by the District, and that Parent would have no way of knowing whether the District had actually distributed copies of his/her unedited statement to the teachers.

**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 appropriateness of a school district's action must be reviewed in terms of what was reasonable at the time the IEP was developed. See Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990), *cert.denied* 111 S. Ct. 1122 (1991).

The team's conclusions with respect to Student's identification reflected appropriate consideration of Parent requests and available information from educators and outside providers.

A clinical diagnosis does not, in and of itself, automatically qualify a student for special education under a particular identification category. Alvin Independent School District, 503 F. 3d 378, 382 (5<sup>th</sup> Cir. 2007). A clinical diagnosis is one factor among many to be considered in determining eligibility categories for special education, particularly in the area of Specific Learning Disability. The clinicians at ( ) presented as knowledgeable and professional; however, significant weight and deference must be given to opinions of teachers and other trained educators who have worked closely with a student in the educational setting and observed the student over time. J. W. v. Contoocook Valley School District, 154 F. Supp. 2d 217 (D.N.H. 2001). There is no dispute as to the appropriateness of the categories of Autism and Other Health Impaired; however, the criteria for eligibility under the category of Specific Learning Disability have not been met.

Special education and related services *must address the unique needs of the Student*, and *are not* contingent upon a particular category of disability. (Citations omitted.) In this case, Student's diagnoses of dyslexia and dysgraphia are noted in ( ) IEP and addressed through the provision of services and accommodations, including daily writing instruction, graphic organizers and assistive software, and daily instruction in spelling. The services provided have been consistent with recommendations of the outside evaluators.

With respect to the provision of occupational therapy for handwriting, the evidence does not support a conclusion that occupational therapy is necessary, or even advisable. Professionals familiar with the Student have opined that occupational therapy would not be productive or beneficial for Student. The District has offered a number of accommodations consistent with recommendations from ( ) and other evaluators, such as allowing dictation of responses, use of an iPad, and shortened assignments.

The IEP must be reasonably calculated to provide demonstrable, meaningful educational benefit, in light of the student's potential. Lessard v. Wilton-Lyndeborough Cooperative School District, 518 F. 3d 18, 27 ((1<sup>st</sup> Cir. 2008). The IDEA does not require the provision of an optimal education, but rather an appropriate one – even if it is not the choice of the parents or certain select experts. (Citations omitted.) In this case, the services offered to the Student are reasonably calculated to provide Student with a free appropriate public education.

As to the three-page Parent Concerns document, there is no requirement that it be included *verbatim* in the IEP. The District did incorporate what it considered to be relevant portions into the IEP. Perhaps more importantly, copies of the entire document were distributed to all of Student's teachers, thereby insuring that the teachers had precisely the information Parent wished them to have, in the form preferred by the Parent.

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

In his/her original due process request, and as amended, Parent alleges a number of procedural violations.

Allegation 1: Parent alleges that “[a] signed IEP was not presented to the ( ) School until April, 2016.” No evidence was presented as to this allegation, and no finding is made.

Allegations 2 and 3: Parent alleges that the IEP wasn’t followed as written in that the IEP called for two writing sessions per week, but the teacher increased it to three group sessions per week without informing Parent or amending the IEP. The IEP could, as Parent suggests, have been amended to reflect the additional session, since a third session appears to have been educationally beneficial. No violation is found.

Allegations 4 – 8: Parent takes exception to the way in which the District’s scheduled IEP meetings to develop the 2016-2017 IEP, as well as the expiration and extension of the prior IEP. These allegations were either not supported by the evidence or did not state a *prima facie* violation. None met the standard articulated in Roland M.; accordingly, no violation is found.

Allegation 9: Dismissed by prior order.

Allegation 10: Parent alleges that the District “attempted to delay access to student records by stating there was a 14 day grace period before records could be viewed and an appointment was needed.” The evidence does not support this allegation as stated. In any event, the allegation pertains to records access under the Family Educational Rights and Privacy Act (FERPA), and, as such, is beyond the scope of this forum’s authority.

Allegation 11: Parent alleges that the “IEP which was presented with WPNs <sup>1</sup> was unfinished. WPN reflected additional changes which would be added to the IEP.” This allegation refers to ( )’s inadvertent omission of certain agreed-upon IEP changes in a proposal sent to the Parent while ( ) was away on a family emergency. Upon him/her return, ( ) corrected the error. No violation is found.

Allegation 12: Parent alleges that “[w]ritten PLOPs <sup>2</sup> which are cited as the reason for decisions made by the school district were not provided to the parent yet.” This appears to be moot. Alternatively, the record shows that Parent was provided with IEP progress reports as required by law, and had frequent meetings and communication with school personnel regarding Student’s progress.

Allegation 13: Parent’s amended due process request alleges that Parent was not provided with minutes from the April 18 and June 6, 2016 team meetings, despite several written requests. No testimony was offered on this issue, and no violation is found.

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<sup>1</sup> WPN = Written Prior Notice

<sup>2</sup> PLOP = Present Level Of Performance

Allegation 14: Parent alleges that, with the exception of spelling, Student's progress was "largely measuredly [sic] by subjective data provided rather than objective data." The record does not support this allegation.

Allegation #15: Parent initially alleged that he/she was "not an equal member of the IEP team." Parent's amended allegation states that he/she was "not consistently included as a member of the IEP team in communication between ( ) School District and ( )", <sup>3</sup> and that he/she should have been included in all communications. Parent cites two examples of how he/she believed this impacted the Student. The first refers to assistive technology training which "was originally scheduled for September 2015 and only took place in January 2016..." The second example pertained to Student's access to a scribe during Smarter Balance testing. The record does not reflect exclusion of the Parent by the District, nor do these examples appear to describe decisions that required an IEP team meeting.

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.

## **V. SCHOOL DISTRICT'S MOTION TO DISMISS**

In a separate motion filed prior to the hearing, and deferred, the District sought dismissal of Parent's allegations regarding Student's participation in Advanced Math (due process request, p. 6, 2<sup>nd</sup> full paragraph). At the prehearing conference, the Parent also stated that Student was not given extra time for the placement test. The record does reflect that the Parent was informed about Advanced Math placement options, but no testimony was presented by the Parent in support of his/her allegations. Accordingly, the burden of proof was not met.

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

Parent's Proposed Findings of Fact: 1, 2 and 12 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.

Parent's Proposed Rulings of Law: 1 – 3 are denied.

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<sup>3</sup> ( ) School

District's Proposed Findings of Fact: None proposed.

District's Proposed Rulings of Law: None proposed.

## **VII. CONCLUSION AND ORDER**

Accordingly, the following is ordered:

1. There was insufficient evidence to conclude that the Student should be identified as having a Specific Learning Disability;
2. There was insufficient evidence to conclude that occupational therapy services for handwriting would be appropriate, or necessary to provide Student with a free appropriate public education;
3. The services and accommodations provided to address Student's dysgraphia and dyslexia are appropriate to meet Student's unique needs;
4. The Parent has not met his/her burden of proof with respect to procedural violations, nor does the evidence demonstrate that procedural violations impeded the Student's right to a free appropriate public education, or significantly impeded Parent's right to participate in the process.

## **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 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.**

**Date: October 27, 2016**

/s/ Amy B. Davidson

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**Amy B. Davidson, Hearing Officer**