

New Hampshire Department of Education

School District/Student

IDPH-FY-19-09-007

Due Process Decision

The issue in this case is the appropriate placement for the student. The student is currently in the 7th grade and attends the public middle school. The student has multiple disabilities. is developmentally delayed, and non-verbal. uses a wheelchair and requires health services throughout the school day.

has a one-one-one LNA that assists throughout the school day. is lifted out of the wheelchair and placed into a stander twice a day. The student wears various braces for back and feet. is fed through a G-tube. School personnel estimate the student's cognitive ability to be around the 6 month old level, but the student's inability to communicate makes it difficult to truly assess cognitive ability. There was conflicting evidence at the hearing about the student's ability to move arms and hands and select switches on an augmented device to communicate independently.

The parties agree that things went well during elementary school and during the 5th grade school year at the middle school. The school contends that things started to decline during the 6th grade year, and are now at the point where they can no longer provide the student with FAPE at the middle school.

The parties have an agreed upon IEP for the 2018-2019 school year. The school district acknowledges that it cannot implement that IEP, and that the student is not receiving any academic or non-academic benefit from current placement at the middle school. It recommends placement at the School.

The parent contends that the regression last year was due to a brace that was often improperly placed on the student by school staff after moving him, which caused the student to be uncomfortable and in pain, which in turn led to the regression. That brace has since been replaced with a different brace that is not causing the same problems. The parent wants the student to remain at the middle school with a one-on-one nurse in the classroom, as opposed to the LNA that currently has, and allow the student to have access to communication device in the classroom. The parent contends that this would increase the student's time in the regular classroom, and improve interaction with peers. also wants the school to contact outside organizations that specialize in inclusion to advise the school on ways to keep the student at the middle school.

However, the evidence presented shows that an RN is not going to completely resolve the issues at the middle school. While it may help to decrease out of class time to some extent, it won't help the student be engaged in the curriculum, or with peers while in the classroom. The evidence presented at the hearing established that neither was currently occurring. The amount of the decrease in out of class time that would occur from a nurse is uncertain, as is how well the nurse will be able to assist the student with other tasks that an LNA is currently responsible for. Further, the school's speech-language pathologist does not believe that using an augmented communication device in class would benefit the

student because the student has not shown the ability to use the device in group or one-on-one sessions at school and school staff are not trained on how to use such devices in the classroom. As a result, it is not clear that the school is able to help the student successfully use the device in the classroom at this point. In terms of bringing in outside organizations to help, the school has a full time inclusion specialist who performs the tasks that the outside organizations would perform in terms of developing ways to ensure that students with disabilities are included in the regular classroom environment. School personnel testified that there are not any changes that could be made at the school that would allow for them to meet the student's needs, so contacting outside organizations would be futile.

The other issue is that the student is currently sleeping during school hours, which results in the student missing services that are required in IEP, such as speech-language services, since they have to be provided at scheduled times. The nurse, the augmented communication device, and the inclusion organizations would not be able to address that issue.

Additionally, even if the school were to agree to the nurse, the augmented device, and the outside organizations to see if it would help, putting all of that in place, implementing staff training and any proposed changes could take months. During that time, the student would not be receiving FAPE.

By contrast, School's program can address all of the student's needs, and they can address them now. It has all of the things that the parent believes the student needs. has nurses in the classroom along with a one-on-one aide. uses augmented communication devices in the classroom, and integrates or embeds services that the student needs within the classroom setting instead of pulling out of the classroom, which is what is currently done at the middle school.

has much smaller class sizes and student to staff ratios, so the student will get the services and attention that needs to benefit academically and non-academically. will also work around the student's sleep pattern and adjust the time and delivery of services, so that receives them when wakes up rather than missing out on them completely as is now.

The parent is concerned about the student attending because will not be educated with students who do not have disabilities. That is true. However, the evidence presented at the hearing shows that is not getting that exposure at the public school either, and is getting little, if any, benefit from it when does. In the Fall of 2017, the student was in the regular classroom 40 percent of the time. By the Spring of 2018, it had decreased to 29 percent of the time. So far this school year, it is down to just 2 percent of the time.

The parent is also concerned that if the student is placed at that it will become the least restrictive environment, and the student will never be able to return to the public school. The placement decision for the student will continue to be made on an annual basis. It may be that after some time at the student progresses to the point where the public school can meet needs, and can return to the public school. Or, it may be that some other program that has non-disabled students could meet the student's needs in the future.

The student is capable of making progress. By contrast to the lack of progress at school in the sixth grade and currently in the seventh grade, the parent's witnesses testified that the student has made

good progress during this time with the speech-language, occupational therapy, and physical therapy services that are provided to the student after school at an outpatient facility. During these services, the student has used an augmented communication device independently, and has moved his hands or arms independently during certain activities, which the school testified has not done at school. The student is doing well and progressing with services overall with this after-school service provider. The disparity between the lack of progress at the middle school, and the progress made after school, helps illustrate that the public middle school is not an appropriate placement for the student.

School is an appropriate placement that can implement the student's IEP and meet the student's academic and non-academic needs. While does not have any non-disabled students, the least restrictive environment requirement is considered in light of what is appropriate for the student. 20 U.S.C. § 1412(a)(5). Removal from the regular educational environment can occur when the "nature and severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2). When making placement decisions and selecting the LRE, the team must consider "any potential harmful effect on the child or on the quality of services" that the child needs. 34 C.F.R. § 300.116(d).

Here, the nature and severity of the student's disability is such that the school is unable to implement the student's agreed upon IEP, educate satisfactorily in regular classes with supplementary aids and services. Leaving the student in the middle school is having a harmful effect on the quality of services provided to the student since is not receiving the services in IEP at this time. Moreover, the student is only in the regular classroom for 2 percent of his school day at the middle school, has very limited interaction with non-disabled peers during the school day, and does not appear to be benefitting from it at this time. The student will continue to have interaction with non-disabled peers in various after-school activities. The school district also mentioned working with the parent so that the student could come to the middle school on Friday afternoons when closes to participate in some type of activity with non-disabled peers.

For these reasons, placement at the middle school is not currently appropriate for the student. Placement at the School for the remainder of the 2018-2019 school year is appropriate.

School District's Proposed Findings of Fact

Granted: 1-7, 9-82

Denied: 8

School District's Proposed Rulings of Law

Granted: 1, 2, 3, 5, 6

Denied: 4

Order

Placement at the public middle school is not currently appropriate for the student because the school is unable to implement the student's IEP, and the student is not receiving FAPE. School is an appropriate placement. The school district's proposal to place the student at for the 2018-2019 school year is affirmed.

Placement is only for the 2018-2019 school year. Pursuant to the IDEA and state law requirements, the IEP team shall meet towards the end of the 2018-2019 school year to determine if continued placement at is appropriate for the 2019-2020 school year, or if the student can be transitioned back to the public school, or needs some different placement. That process will then continue on an annual basis as required by the IDEA and state law. The fact that the School is the least restrictive environment for the student for the 2018-2019 school year, should not be used to prevent the student from going to a placement that includes non-disabled peers in future school years as long as that placement can implement the student's IEP, and is an appropriate placement.

So Ordered.

10/24/18
Date

Scott F. Johnson
Scott F. Johnson
Hearing Officer

Appeal Rights

If a party is aggrieved by the decision of the Hearing Officer, that party may appeal this decision to a court of appropriate jurisdiction. The parents have the right to a transcription of the proceedings at no cost from the Department of Education. The District shall notify the Commissioner of Education if either party appeal's this decision.