

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

Student/ School District
IDPH-FY-20-05-033

DUE PROCESS DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This due process proceeding was initiated by the School District on May 20, 2020. Initially, the prehearing conference was scheduled for June 3, 2020, and the hearing scheduled for June 16 and 17, 2020, with a decision date of July 1, 2020. Shortly after the case was filed, the Parents requested a continuance of 60 days to allow for sufficient case preparation; the District objected, noting that the Student had been out of since December of 2019, and receiving home-based services. After weighing the respective concerns, a continuance was granted in part. As a result, the prehearing conference was rescheduled to June 10, 2020; the due process hearing was rescheduled to July 8, 9, and 10, 2020¹ with a new decision date of July 22, 2020.

A number of prehearing motions and requests were filed, primarily by the Parents. Some requests were addressed in written orders; others were addressed on the record during the proceedings.

Over the course of the proceedings, it became apparent that additional days would be necessary, in large part to allow the Parents full opportunity to cross-examine District witnesses and to present their own case. Accordingly, it was agreed and determined that additional dates of July 22 and 23, 2020, would be assigned, with July 22 allocated for District witnesses to return for additional cross-examination by the Parents,² with July 23, 2020 set aside exclusively allocated to the Parents. A new decision date of July 31, 2020 was established.

The due process hearing was held telephonically on July 8, 9, 10, 22 and 23, 2020. Generally, in part because the District relied upon affidavits to streamline witness testimony, the District's direct examination was relatively limited. The majority of time was utilized by the Parents' cross-examination. July 23, 2020 consisted exclusively of Parents' cross-examination of the Director of Student Services. Parent presented their case on July 23, 2020.

Both parties submitted exhibits.³ The District presented first, and bore the burden of proof on issues for due process.

¹ The third day was added per District's request.

² At that time, Parents believed that they had not yet received all of the documents they requested from the District during discovery; therefore, the three witnesses representing out-of-district programs and one District employee were asked to return for a second day and agreed to do so. Parents subsequently advised that these witnesses were no longer necessary, and they were excused.

³ District's exhibits consisted of core exhibits 1- 6 (675 pages), plus affidavits of District witnesses. Core exhibits were provided to the Parents on June 19, 2020. Parents' Exhibits 1 – 25 included documents provided to them by the District during discovery. Parents' electronically submitted exhibit packet contained passages highlighted by the Parents; as the highlighted portions were not visible on copies made by the Hearing Officer, the Parents were invited to submit their original with the highlighted portions for the official record. The Parents have elected not to submit their original highlighted exhibits.

The District called the following witnesses, who testified credibly:

(12 names redacted)

Parents presented their case on the final day of hearing, which consisted of factual testimony as well as their theory of the case and oral argument. Post-hearing submissions were filed on July 28, 2020.

There were three issues for due process, as raised in the District's request, and set forth in the prehearing conference report.

1. Whether the Parents are entitled to an Independent Educational Evaluation (IEE);
2. Whether the Student should be classified as Orthopedically Impaired (OI);
3. Whether the District's proposed placement(s) is/are appropriate and least restrictive.

Parents' position in response is that the District's evaluations did not appropriately consider the effects upon the Student of what the Parents considered to be bullying, which in turn resulted in an insufficient IEP, which IEP in turn resulted in inappropriate placement proposals.⁴ As relief, Parents request an order for an IEE.

II. FACTS

1. The Student began attending _____ School on October 15, 2019, approximately six weeks into the fall semester. Student had previously attended school in _____, New Hampshire. At the time of _____ enrollment in _____, the Student was eight years old and in the third grade.
2. Student has the diagnoses of ADHD, Tourette's (Motor tics, including head and clearing throat), dyspraxia (motor processing issues that affect the ability to write), and many behaviors consistent with obsessive compulsive disorder. Parents Exh. 15.
3. Shortly after Student began at _____, Parents filed a bullying complaint. That complaint was investigated by the school principal;⁵ the conclusion was "unfounded" as to whether bullying had occurred as is defined by statute.⁶
4. Although no other formal bullying complaints were made during the Student's two months at _____, there were other conflictual or concerning incidents documented and maintained in an administrative log.
5. It is the District's position that none of the incidents rose to the level of bullying; it is Parents' position is that at least some of the incidents should have been considered bullying, noting in particular their son's own statements.

⁴ Parents have raised a number of other issues during these proceedings. As Parents themselves recognized in their written closing statement, a number of those issues are beyond the scope of this due process proceeding, and/or outside the scope of this forum's jurisdiction. That said, Parents were given wide latitude with respect to both their cross-examination of District witnesses, and their own presentation. Parents were unrepresented by counsel and advocated vigorously for their son.

⁵ Bullying is, by law, investigated by the principal or the principal's designee. RSA 193 -F:4, II (j) and (k).

⁶ According to the District, regardless of whether a conflict is found to involve bullying within the meaning of the statute, appropriate measures would taken to address and remediate the concerns.

6. On October 22, 2019, Student's mother requested that the Student be referred for a special education assessment. On October 24, 2019, the District notified the Parents that it had scheduled a referral meeting for November 13, 2019.
7. On November 13, 2019, the District convened an IEP team referral meeting. The team, including the Parents, determined that the Student should be tested for special education eligibility under the classifications of speech language impairment (SI), specific learning disability (SLD) and other health impairment (OHI). Following the referral meeting, at the Parents' request, the District agreed to also consider whether the Student should be classified under the orthopedic impairment (OI) category due to diagnosis of dyspraxia.
8. Following the November 13, 2019 referral meeting, at the Parents' request, the District agreed to also consider whether the Student should be classified under the orthopedic impairment (OI) category due to diagnosis of dyspraxia.
9. On November 22, 2019, the District forwarded permission to test (PPT) form to the Parents, along with a written prior notice (WPN). The District amended the WPN and PPT twice in response to Parents' requests to conduct adaptive testing, and to remove the student interview portion of the evaluation process.
10. As of December 11, 2019, the Parents had fully executed and transmitted the PPT and parental response to an IEP team proposal.
11. On December 16, 2019, the Parents removed the Student from following an incident that occurred at school. The District agreed to support home instruction during the evaluation period. Student has been receiving home-based instruction since that time.
12. The District convened two eligibility meetings, one on February 10 and the other on February 17, to review all four classification areas. On February 10, 2020, the IEP team determined that the Student was eligible for special education pursuant to the SLD classification and issued a WPN to the Parents.
13. On February 17, 2020, the IEP team reconvened to consider the other three classifications, including the order of classification. Following that meeting, another WPN was issued
14. On February 26, 2020, the Parents transmitted their agreement with the IEP team's eligibility determination, including their consent to the classifications of OHI as the primary classification, SLI, as a secondary classification and SLD, as a tertiary classification.
15. The District had scheduled an IEP team meeting within 30 days of the Parents' consent to the Student's special education eligibility but had to reschedule it due to school closure resulting from the COVID-19 pandemic.
16. According to speech/language pathologist , the Parents agreed to the appropriateness of the evaluations conducted.
17. With respect to the evaluation process, the record reflect the following:

- a. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the Student, including information provided by the Parents, to assist the IEP team in determining the Student's eligibility for special education services and the contents of his IEP, including information related to enabling the Student to be involved in and progress in the general education curriculum.
- b. The District did not use any single measure or assessment as the sole criterion for determining whether Student was a Student with a disability and for determining an appropriate educational program for the Student.
- c. The District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- d. The District selected and administered assessments and other evaluation materials so as not to be discriminatory on a racial or cultural basis.
- e. The District's assessments and other evaluation materials were provided and administered in the Student's native language and in the form most likely to yield accurate information on what the Student knows and can do academically, developmentally, and functionally.
- f. The District's assessments and other evaluation materials were used for the purposes for which the assessments or measures are valid and reliable.
- g. The District's assessments and other evaluation materials were administered by trained and knowledgeable personnel.
- h. The District's assessments and other evaluation materials were administered in accordance with any instructions provided by the producer of the assessments.
- i. The District's assessments and other evaluation materials included those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- j. The District's assessments were selected and administered so as to best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the Student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the Student's impaired sensory, manual, or speaking skills (except where those skills were the factors that the test purported to measure).
- k. The District assessed the Student in all areas related to the suspected disability, including health, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.
- l. The District's evaluation of the Student was sufficiently comprehensive to identify all of his special education and related services needs, whether or not commonly linked to the disability category in which the Student has been classified.

- m. The District utilized assessment tools and strategies that provided relevant information that directly assisted the IEP team in determining the educational needs of the Student.
18. The District's evaluations included two written observations authored by a special education teacher and the Student's regular education teacher. The District and the Parents discussed various options for conducting the Student's observations in light of school removal, including conducting an observation during tutoring session. The Parents suggested, and the District agreed to having the special education teacher and the Student's regular education teacher write up their observations of the Student on December 16, 2019, The Student's classroom teacher also summarized observations of the Student since enrollment began on October 15, 2019.
19. During the evaluation process, the Parents agreed to all of the evaluations selected and administered by the IEP team's selected evaluators. Each of the four evaluators attested that they would have selected the same evaluative instruments and administered them in the same manner even if the Student had been bullied.
20. The Parents produced no evidence, beyond their personal opinions, in support of their position that the assessments were not appropriate.
21. The Parents provided lay opinions that the Student's diagnosis of dyspraxia should qualify Student for identification under the OI eligibility classification.
22. The IEP team considered whether the Student's dyspraxia diagnosis qualifies as an OI classification under the IDEA.
23. District personnel and contracted professionals on the Student's IEP team concluded that the Student's dyspraxia, which is a neurological rather than an orthopedic impairment that may affect motor planning, does not qualify for special education eligibility under the classification of OI but falls within the OHI classification. However, the Student's IEP includes goals, objectives, accommodations and services to address the Student's dyspraxia.
24. The IEP team considered medical information provided by the Parents.
25. The IEP team convened to develop the IEP on March 31, 2020, within 31 days of obtaining full parental consent to the Student's eligibility for special education. The team reviewed a draft IEP, and the District's IEP team members conveyed their opinion that the Student's IEP could be effectively implemented at HMS.
26. The District's placement proposal included consideration of implementing the Student's IEP at a private school if appropriate and if the school accepted the Student.
27. The special education coordinator made a typographical error on the placement proposal page that referenced home instruction for the 2020-2021 school year. A review of the meeting minutes, WPN and parental exchanges indicate that neither the Parents nor the District were recommending implementing the Student's IEP via home instruction for the 2020-2021 school

year. Rather, home instruction was intended to be temporary, and became the Student's "stay-put" placement during these proceedings.⁷

28. On April 7, 2020, following parental input, the District transmitted a revised IEP and WPN to the Parents. On April 19, 2020, the Parents signed the proposed IEP, with two exceptions that addressed their concerns with the proposed placement at . The Parents' exceptions did not challenge the substantive components of the Student's IEP, including goals, objectives and the provision of related services.
29. Team members acknowledged that there were social interactions that presented challenges to the Student, including a series of incidents that involved Student and peers. This information was taken into account during the evaluations and the IEP development process. Because the Student was removed from the school environment before the IEP was implemented, the District did not have the opportunity to implement the IEP. However, implementing the Student's IEP in a public school environment would enable staff to address the Student's social behavioral functioning and to allow for typical peer interactions. Student's pediatrician recommended that " would benefit from encouragement and support while at recess and with any other opportunities to interact with the school community." Parents Exh. 15
30. The Parents requested that the District place the Student at , an out-of-district day program. After receiving the Student's evaluations and IEP, advised the District that they did not believe they could meet the Student's educational needs and declined enrollment for the 2020-2021 school year.
31. The Parents expressed their desire to explore other private schools that could implement the Student's IEP.
32. The District explored four other private special education day schools within driving distance of that indicated that they had openings and which the District believed could be capable of implementing the Student's IEP.
33. On April 29, 2020, the District asked the Parents to sign releases to explore the following possible placements . The Parents declined to sign the releases.
34. On several occasions, the District requested the Parents to identify other schools they wished the District to consider for the Student's enrollment, but the Parents did not identify any.
35. The District forwarded redacted copies of the Student's evaluations and IEP to each of the four private schools and requested those schools to consider the Student for enrollment in the 2020-2021 academic year.

⁷ Home-based instruction is the second most restrictive on the continuum of placements. See Ed. 1111.03, Table 1100.3.

36. determined that it could not effectively address the Student's educational needs at the time of the communication.
37. Based upon their review of the Student's IEP and evaluations, the representatives from the program, , and testified that they believed their respective schools could effectively implement the Student's IEP. They continue to have openings, and would consider the Student for enrollment following Student and Parents interviews. Each of these three out-of-district schools is approved by the host state to provide special education services to students classified with OHI.
38. Upon learning that an out-of-district school believed that it could implement the Student's IEP in its program, the District communicated with the Parents inviting them to explore the school. Parents declined to consider any of the three schools, and, except for asking the school representatives questions during the due process hearing, Parents did not communicate with any of the schools.
39. The District stipulated on the record that it would ensure that the related services called for in the Student's IEP would be implemented at no cost to the Parents if the Student enrolls in one of the three out-of-district placements that have expressed a willingness to consider the Student for admission, as two of the schools may not have qualified personnel on staff to deliver OT and speech services.
40. The District's Director of Student Services testified that, of the three potential private school placements, appears to be the best fit for the Student.
41. The Parents did not submit evidence of any school at which they wished the Student to be placed for the 2020-2021 school year.
42. At Parents' request, a meeting was held on May 8, 2020 to address Parents' IEP exceptions. At that meeting, the Parents raised their request for an individual educational evaluation (IEE) at public expense.
43. On May 15, the District issued a WPN denying the Parents' request for an IEE at public expense. The District also advised the Parents that the request for an IEE would necessitate that the District request due process.
44. On May 20, 2020, the District filed a due process hearing request that included a request for a determination that its evaluations were appropriate, as well as a determination that Student did not qualify for special education under an OI classification, and a determination that it had proposed appropriate placements for the Student.

III. DISCUSSION

1. IEE

As noted above, Parents maintain that the evaluations did not sufficiently address what they assert was bullying of Student. Parents may also feel that an IEE would be a fair and just resolution for what they perceive to be various rights violations. However, this forum is bound by the law governing evaluations; as such, the inquiry is limited to whether the District performed its evaluations in accordance with applicable regulations. Those regulations pertaining to evaluations are found at 34 CFR §300.301 - 34 CFR §300.311, and in particular, 34 C.F.R. §300.304. This forum cannot order an IEE based on speculation that a second evaluative opinion might yield a different result. Further, although a formal determination of bullying within the meaning of RSA 193-F:4 was not made, the record shows that the IEP team did consider the incidents in question both during the evaluation process and IEP development. The evaluators assessed Student's social challenges and the team formulated IEP goals to address social/behavioral needs.⁸ Accordingly, on this record, the District has met its burden of showing that its evaluations were appropriate and in conformance with the applicable regulations.

2. Eligibility under a classification of OI

As noted above, Student has been found eligible for special education under three classifications. There was a significant amount of testimony relative to whether Student also qualified for a classification under OI. There is no question that Student has been diagnosed with dyspraxia. However, there was insufficient evidence on this record to conclude that OI is an appropriate classification. The evidence supports the District IEP team members' determination that the Student's diagnosis of dyspraxia is a condition that falls within the OHI classification rather than the OI classification. 34 C.F.R. § 300.8(c)(8) and (9).⁹

3. Placement

The District team members proposed _____ as the placement that is most appropriate and least restrictive for Student based upon the information available at the time – including information provided by the Parents. Unfortunately, Student's attendance at _____ was brief; _____ was removed from school during the evaluation process, and thus _____ IEP had not yet been developed. School staff were continuing to become familiar with Student in the school setting, and have had no opportunity to implement the IEP in that setting.

The Parents have clearly expressed their mistrust of the District; they do not believe their concerns or Student's behaviors have been adequately addressed, nor do they have confidence that the District can educate Student at HMS. It is in recognition of the Parents' mistrust that the District also explored schools outside of the District. The Parents have not articulated a preferred placement, although they have emphasized that Student is experiencing success at home. The record reflects that there are no other out-of-

⁸ Even where, after investigation, bullying within the meaning of RSA 193-F:4 has been found, different students are affected in different ways.. By the same token, behavior that is considered to be concerning or inappropriate may not necessarily also rise to the level of bullying as defined by RSA 193-F:4. Either way, appropriate interventions would depend on the specific circumstances and the needs of the individual student.

⁹ It should be kept in mind that evaluations must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified. 34 C.F.R. §300.304(c)(6) (emphasis added). In other words, the IEP is driven by the individual needs of the Student.

district placements within reasonable driving district from Student's home that have not already been explored by the District, including the school specifically requested and approved by the Parents.

On this record, I find that, based upon the information the team had at the time, the District's proposal of _____, and alternatively, three out-of-district schools, satisfy the District's obligation under the IDEA.

In this particular case, the Student has received home-based instruction since December of 2019, a circumstance that, more recently, has also been necessitated by the COVID-19 restrictions. It is unclear at this time what impact the pandemic will have on Student's programming generally.

Parents have requested that they be given the "discretion to weigh [Student's] best interest next to the district's proposed placements at hand." Parents' Closing Statement at page 7. There is nothing to prevent the IEP team from meeting to further explore and consider proposed placements, as well as how best to address Student's needs as they exist today and going forward. As team members, Parents participate in the decision-making process, provide input and information, and are ultimately free to accept or reject placement proposals¹⁰. The parties are encouraged to work together in good faith and it is hoped that will be able to accomplish this.

IV. FINDINGS OF FACT AND RULINGS OF LAW

The District has submitted proposed findings of fact and rulings of law. The Parents have included their legal arguments in their closing statement, which is in narrative form.

Both parties' submissions have been carefully considered, and portions of those submissions have been incorporated into this Due Process Decision. To the extent that proposed findings and rulings are inconsistent with this Decision, they should be deemed denied.

V. CONCLUSION

In this case, the record supports the following conclusions relative to the issues for due process:

- a) There is insufficient basis upon which to find that the Parents are entitled to an IEE;
- b) There was insufficient evidence upon which to find that Student meets the eligibility requirements for an OI eligibility classification;
- c) The District's proposal of _____ as the most appropriate and least restrictive placement to implement the Student's IEP, and its additional proposal of three out-of-district placements, satisfies the District's obligations under the IDEA;
- d) It is recommended that the IEP team meet as soon as is practicable to address Student's current needs, review the IEP and amend the IEP if and where necessary, and give further consideration to proposed placements.

So ordered.

/s/

Date: July 31, 2020

Amy B. Davidson, Hearing Officer

APPEAL RIGHTS

¹⁰ Nothing herein should be construed as a determination or recommendation relative to other options that may be available to Parents, such as home-schooling, or as to whether any particular option should be pursued.

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.

Cc:

Via electronic transmission and certified mail, return receipt requested.