

STATE OF NEW HAMPSHIRE
STATE DEPARTMENT OF EDUCATION
IDPH-FY-24-03-043
[REDACTED] School District

[REDACTED] . Post-Hearing Proposed Findings of Facts & Rulings of Law & Relief Sought

Proposed Findings of Fact

1. The District's IEP from March 1, 2022 to March 1, 2024 failed to provide [REDACTED] with FAPE, for substantive and procedural reasons.
 - a. DE 34 page 263-264 of 386, in 2024 **"Input from [REDACTED]'s classroom teacher: [REDACTED] used a word that I could NOT understand. [REDACTED] kept saying "eel-blence." I asked him to use it in a sentence, and [REDACTED] couldn't. [REDACTED] then said, "it's the opposite of firetruck." I finally figured out that [REDACTED] was saying "ambulance." I will say that I often have a hard time understanding him..."**
 - b. DE 35 Student Observation of October 2023 demonstrated social pragmatic regression and need, "It should be noted that in discussions with [REDACTED] classroom teacher and the OT, **areas that challenge [REDACTED] most in class are social interactions"**
 - c. In 2023, Dr. [REDACTED] shared 1st grade teacher input, "**[REDACTED] teacher reported mild difficulties with social communication, peer socialization, unusual language, and social reciprocity**" and "**[REDACTED] classroom teacher reported mild concerns about behavioral challenges, learning difficulty, unusual behavior coping skills, and functional communication skills."**
 - d. [REDACTED] continues at PE 23-7 "**[REDACTED] will require continued supports and services through an Individual Education Program (IEP), including supports for functional language, regulation skills, and motor skill development in a psychologically supportive setting. While [REDACTED] has the cognitive capacity to succeed...trauma symptoms (including reduced cognitive, behavior, and emotion regulation) and language and motor weaknesses will interfere with [REDACTED] ability to consistently access the curriculum and make effective educational progress."**
 - e. At PE 23-7-8 Dr. [REDACTED] recommends Direct Services: Speech/language therapy, Occupational Therapy, Psychological Support, Direct Academic support, Social Skills, FBA/BIP, Classroom supports (noting seven accommodations), and school home communication.
 - f. PE 6 [REDACTED] reports "that due to staffing issues, [REDACTED] will not be happening this year" so social pragmatics and skills were not available via ESY.
 - g. Both District SLPs testified they were unfamiliar with all of Dr. [REDACTED] testing instruments, and provided no rationale to discredit [REDACTED] report.
 - h. DE 34 and DE39 demonstrate the District did not administer all the subtests of the CELF, specifically **not social pragmatics.**

- i. ██████ testified ██████ did not assess all aspect of vocabulary in 2021, and DE 39 demonstrates the version of the CELF ██████ used was the “**Preschool-3**” version, when ██████ was in Kindergarten, “age 5 years 8 months.”
 - j. DE 14, WPN of March 2023, when ██████ was 7 years old, notes SLP services for language and social skills were denied, based on ██████ results from the Preschool assessment completed of 2021. Concerns for LRE were raised for 1:1 pull-out support, and the push-in model was not considered and was available.
 - k. PE 7 ██████ was dismissed from summer camp “due to three major themes” Following Orders, Language, Refusal to Acknowledge ██████ Actions. ██████ social pragmatics were not adequate or age appropriate at age 7.
 - l. PE 25, Clinical Director ██████ ██████ recommends “supports at school to help him with emotional and behavioral regulation and to help build on ██████ social skills and understanding of social norms and expectations...**in the year that I have been seeing ██████ I notice ██████ struggles with receptive language skills...**” All IEP team members were reported this report and parents testified amendments do not require team meetings, in fact 4 due process issues have been resolved with amendments and WPNs since 3/1/24. Parents testified they had no response.
2. The district has conflated 504 Accommodations of a child’s disability with IEP Specialized Instruction and remedial education. Student has an IEP, not a 504 plan.
- a. ██████ and other District witnesses provided testimony student performs best in structured, predictable settings with routines.
 - b. Dr. ██████ (PE 22) stated, “█████ classroom should have a consistent, predictable schedule with minimal changes and transitions.”
 - c. Student was placed in K-1 looping class, with the same students, same teacher and same educational assistant per testimony of ██████ and ██████.
 - d. 2nd grade teacher ██████ testified ██████ is district’s most experienced teacher with over 30-years experience and completed a sabbatical in adoption and trauma
 - e. ██████’s testimony affirmed students educational assistant is the ██████ of ██████ K-1 educational assistant and this is a benefit to ██████
 - f. Regression in social skills and vocabulary was demonstrated in 2022 by Dr. ██████, and in October 2023 by SLP observations and teacher reports (DE_)
 - g. Deficits in social skills was noted by the District SLP evaluation of 2024 (DE34), but this data was already available from parents summer camp, swim lessons, and school bus driver (DE 12, parent and ██████ testimony) and in October 2023 by SLP observations and teacher reports (DE 11,12)
 - h. ██████, school psychologist, testified student required individual adult support 35% of the time ██████ observed him, redirection is not education.
 - i. District staff testimony relied on observations in ideal settings with accommodations, and do not reflect student’s social skills at recess, the school bus, etc. where children must rely on their individual educationally acquired skills.

3. District has allowed disputes to interfere with provision of FAPE.
 - a. PE 13 ██████ reported to parents “I do not agree to mediation at this time.”
 - b. Several district staff testified parents have meaningfully participated in IEP process, but have no knowledge of the WPNs or the legal IEP process between parents’ and ██████. Note ██████’s testimony that ██████ is the Case Manager and reported ██████ has neither spoken with parents in over a year nor knows the contents of WPNs.
 - c. ██████ in fact runs ██████ IEP meetings as evidenced in meeting minutes spanning the 2022-2024 (DE 3, 11, 12, 15, 21, 25, 32), emails parents (PE9, 13, 14), and issues WPNs. ██████ was not called on as a witness.
 - d. ██████ testified due process is a high conflict, resource intensive means to resolve simple items that were not resolvable otherwise: such as the student’s doctor prescribed- toileting plan of 3 years, creating a school-home communication log of 2 years, 5th academic literacy instruction of 1 year, and missing 2x30min/week SLP goals to address both language comprehension (syntax, vocabulary) and social pragmatics of 2 years.
 - e. Parent testified ██████ has been in conflicts with ██████ for in regards to other students and requests ██████ not be the LEA/case manager of ██████ ██████
 - f. Furthermore, several matters were at issue in parents filing for due process that were not resolved in two years and now are resolved though this high conflict, resource intense process

4. Parents urge caution in weighing district’s testimony as their reports outside of the hearing seem contradictory to some testimony.
 - a. ██████, the 2nd grade classroom teacher, March 5, 2024 PE 17 reported to Dr. ██████ that ██████ “Very Much” or “Quite a Bit” find ██████ “Often has difficulty playing or engaging in leisure activities quietly, Often has difficulty awaiting ██████ turn, Often interrupts or intrudes on others, Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (e.g. school work or homework).”
 - b. ██████’s has been at the helm of the IEP team since ██████ was a foster child, yet all district testimony omitted that fact (DE generally).
 - c. ██████’s testimony that PE 19 was unusual is not supported by ██████ more timely report to Dr. ██████ of behavioral, social and emotional concerns when ██████ was in ██████ class. (PE 23) and communication logs of the time.
 - d. District has failed to recollect relevant data before. Parents testified the creation of a communication log has been resolved, but time will tell if is used as before logs have not been used and parents testified ██████ is provided updates regarding student’s struggles in the hall at school, ██████ lunchbox comes home uneaten or soiled clothes are found in ██████ backpack. See PE 11, PE16.

- e. This creates two narratives, 1-all is fine and 2-independent teacher reports to evaluators student struggles with social skills and communication, as well as parent's testimony of student not eating at school, having toileting accidents on Mondays and days staff are absent, and in ability to recall [REDACTED] classmates names.
 - f. When reminded of [REDACTED] daughter's wedding in August 2022, [REDACTED] clarified [REDACTED] testimony, [REDACTED] was ESY PreK-5th grade to address predicated regression in social and emotional domains, and a separate transition ESY Camp was done for PreK into K. Having the benefit of counsel preparation, [REDACTED] initial testimony was [REDACTED] was the PreK-K transition plan.
5. The District has failed to implement the IEP, acknowledging working with the school counselor is an accommodation listed in the IEP, as well as available to every student (DE generally of IEP)
 - a. District witnesses all shared 1-their opinion [REDACTED] does not need counseling, 2-that [REDACTED] IEP accommodation includes school counseling, and 3-they are not allowing him to see a school counselor because they feel [REDACTED] does not need it.
 - b. Accommodations in the IEP are determined by the IEP Team and must be followed.
 - c. No one has ever suggested amending the IEP to remove counseling, which would be the proper course of action if the district believed it was not necessary.
 - d. The counselor and teacher did not implement the IEP accommodation as identified through their testimony.
6. The district and NH Dept of Education failed to have an IEP in place at the start of the school year.
 - a. DE of 2023 – 2024 generally.
7. District inaccurately interprets that extracurricular activities must be school sponsored to be considered in present levels or for adverse impact.
 - a. DE 17 WPN parent wants included functional skills data from extracurricular activities, summer camp, swim lessons, etc saying not necessary info to create an IEP that is appropriate to develop the supports and services to meet [REDACTED] identified educational needs.
 - b. DE 34 page 264 of 361 SLP Evaluation of 2024 reports, "However, there appears to be a disconnect between [REDACTED] demonstrated abilities in a one-on-one setting versus [REDACTED] performance in the classroom when following directions."
 - c. Parent testified [REDACTED] has assigned seating on bus 1st-2nd grade, second grade teacher reported unaware of this, K-1 teacher reported aware of an incident [REDACTED] could not control [REDACTED] body.
8. Nondisclosure agreements used by schools are a violation of the law and violate federal protections.

- a. First, violation of the US constitutions right to free speech and
 - b. Second violate whistle blower protections when NDAs involve violations of the IDEA and/or the ADA, and as such violations constitute a crime, whether the alleged violation has been substantiated as a crime or not or not is expressly contemplated in whistleblower protections.
 - c. This is at issue, given parents lengthy conflicts with the district, the parents articulated their refusal to ever sign a NDA again with the district. The District thus did not have an NDA settlement at its disposal in this case as its go-to dispute resolution method, refused mediation (PE 13), offhandedly in an emailed WPN proposed neutral conference in 12/27/23 (PE 14), and sat idle until parents filed for due process in 2024 because parents had specifically announced refusal to ever use an NDA with district again.
9. Parents seek comp ed for statutory limitation determined by Hearing Officer to be two years.¹
- a. Parents request for due process expressly limited only proposed solution regarding the pull out (under placement) literacy instruction.
 - b. Parents testified this has been resolved as the district restored the 5th session/week of literacy instruction back into IEP.
 - c. In parents' request for due process all other areas of redress clearly state "over a year," awaiting the Hearing Officer's interpretation of the statue of limitations.

██████████ . Proposed Conclusions/Findings of Law

The District failed to meet its burden of proof ██████████ IEP provided a FAPE reasonably calculated to meet ████████ educational needs. NH RSA 186-C:16-b III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.

First, there seems to be an absence on case law around IEP accommodations, at least that parents are aware of. We do not find any enabling regulation or law however, that enables teachers or staff to use their own discretion over the written and explicit IEP accommodations. If a child is to be given state assessments in a quiet room, that must be provided and a teacher cannot decide it is not needed and not implement the established accommodation. The school counselor and several other school witnesses testified the counseling accommodation in ██████████ IEP includes seeing the counselor. Therefore, it stands to reason a teacher cannot substitute ████████ opinion or use discretion in following the IEP accommodations.

¹parents respectfully affirm G.L. v. Ligonier Valley School District Authority, U.S. App. LEXIS 16776 (3d Cir. Sept. 22, 2015) has precedent.

The IDEA defines "special education," in relevant part, as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. . . ." [20 U.S.C. § 1401\(29\)](#). A federal regulation, promulgated by the Department of Education, elaborates:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child . . . , the content, methodology, or delivery of instruction —

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

IDEA provided **specialized instruction explicitly to remediate** [REDACTED] areas of need in language, including syntax, social pragmatics and vocabulary, and instead provided accommodations not found in the IEP that allowed [REDACTED] difficulties to go un-remediated. 504 plans established pursuant to the Rehabilitation Act of 1973 (29 U.S.C. section 701 et seq.) accommodate disabilities. with providing a free and appropriate education pursuant to RSA 186-C:7 and the Individuals with Disabilities Education Act (IDEA).

34 C.F.R. § 300.502(c) speaks to Parents obtaining two independent evaluations at their own expense (PE 22 and 23). The result of the evaluation must be considered by the school in any decision regarding the provision of a FAPE to the student, as the evaluations met the school's criteria for evaluations.

[REDACTED] social pragmatics and social skills are areas of need and supported under the IDEA. See, e.g., *Mr. I v. Maine Admin. Sch. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993), 20 U.S.C. § 1400(c)(5); 34 C.F.R. § 300.101(c), § 304(b)–(c), § 305(a)(2), § 300.43.

As the magistrate judge and the district court observed, Maine's broad definition of "educational performance" squares with the broad purpose behind the IDEA: "to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, *employment*, and *independent living*." [20 U.S.C. § 1400\(d\)\(1\)\(A\)](#) (emphases added). We have likewise held that the IDEA entitles qualifying children to services that "target 'all of [their] special needs,' whether they be academic, physical, emotional, or social." *Lenn v. Portland Sch. Comm.*, [998 F.2d 1083, 1089](#) (1st Cir.1993) (quoting *Burlington*, [736 F.2d at 788](#)). It is true that we have also stated that IDEA services need not address "problems truly 'distinct' from learning problems." *Gonzalez v. P.R. Dep't of Educ.*, [254 F.3d 350, 352](#) (1st Cir.2001); see also *Rome Sch. Comm. v. Mrs. B.*, [247 F.3d 29, 33](#) n. 3 (1st Cir.2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, "[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn").

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP as defined in 34 CFR § 300.323(a).

See IDPH FY 22-05-037 "From the parents' perspective, services were not provided because they would not sign and IEP that they did not agree to....While the reasons and details may be in dispute between the parties, the information provided establishes that the school district permitted

disagreements between the parties to result in a lack of services during the 2023-2024 school year and currently. This cannot continue going forward.”

And although ED 1125 has been changed to eliminate the requirement to request due process **under state regulations, the school district’s obligation to ensure that FAPE is provided under IDEA has not...When parents do not agree to proposals, the school cannot allow unresolved issues to result in the student not receiving appropriate services.**

See e.g. *W.G.*, 960 F.2d. at 1486 (parental conduct does not waive responsibility of a school district); *Town of Burlington v. Department of Educ.*, 736 F.2d. 773, 795 (1st Cir. 1984) (same), *aff’d* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). *Murphy v. Timberlane Reg’l Sch. Dist.*, 22 F.3d 1186, 1195 (1st Cir. 1994)

Hearing officers have discretion in awarding compensatory education.

While Parents accept Hearing Officer’s decision on Motion to Dismiss that Parents must make a claim within two years of knowing or having reason to know of an injury, that merely indicates that Parents can only claim of the injury to [REDACTED] from lack of speech services after June 2022. This does not define the limits of relief unless the Hearing Officer believes Parents sat on an injury beyond the time they should have known that it was indeed an injury affecting their [REDACTED]. Per the Third Circuit in *Ligonier*, compensatory education has no “time limitation” but is instead the amount of service that is required to bring the child to adequate progress. Here, since the teaching team allegedly saw no deficits with respect to peers in 2022, [REDACTED] should be brought to performance in speech and social pragmatics fully in line with peers, which would allow him to participate in all activities in all settings that involved peer relationships and social pragmatics without difficulty. Currently, evidence showed [cite findings of fact where teachers and camp reported difficulty understanding and struggles with peer relationships] that [REDACTED] is missing out every day on opportunities to practice speech and social pragmatics precisely because [REDACTED] disabilities went unremediated. The inability to adequately access peer interactions over two years could easily lead to more than two years of regression if not proper. Parents’ requested relief aims to bring [REDACTED] as quickly as possible to the level of peers so that [REDACTED] can enjoy the ongoing learning opportunities embedded in successful peer relationships and successful social pragmatics.

“broad discretion,” *Bucks Cnty. Dep’t of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61, 71 (3d Cir. 2004), that Congress has granted to the courts “to remedy the deprivation of the right to a free appropriate education,” *Carlisle Area Sch/ v Scott P.*, 62 F.3d 529, 536 (3d Cir 1995). “*Ligonier*” at 12.

“Congress’s purpose in [IDEA] is clear: In order to effectuate the law’s broad remedial goals, a court finding a deprivation of a free appropriate public education should return a child to the educational path he or she would have traveled had the educational agency provided that child with an appropriate education in the first place. See *D.F.*, 694 F.3d at 498-99; *Reid*, 401 F.3d at 518; see also *Ridgewood*, 172 F.3d at 251 (remanding to district court to consider eight years of claims for compensatory education); *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 873-74 (3d Cir. 1990) (affirming grant of thirty months of compensatory education). Consistent with that purpose and the traditional way in which a discovery-based statute of limitations functions, courts since the passage of the

2004 reenactment have routinely affirmed awards of compensatory education that remedy deprivations of greater than two years, or at minimum, remanded for an administrative agency to consider those claims. See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 715 (3d Cir. 2010) (affirming award of three years of compensatory education); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 324 (4th Cir. 2009) (holding that the broad discretion afforded under the IDEA allowed a 39 district court to consider reimbursement for three years of a child’s allegedly inappropriate placement); *Draper v. Atl. Indep. Sch. Sys.*, 518 F.3d 1275, 1286-90 (11th Cir. 2008) (rejecting a school district’s argument that a child’s long-undiscovered injury was time barred and upholding an award of approximately five years of compensatory education); *Reid*, 401 F.3d at 526 (remanding to consider claims over a four and half year period of time); *K.H. v N.Y.C. Dep’t of Educ.*, No. 12-1680, 2014 WL 3866430, at *20 (E.D.N.Y. Aug. 6, 2014) (finding that “the IDEA’s clear statutory language mandates” that a remedy is not limited by the statute of limitations when a claim is timely filed)” *Ligonier* at 39.

Counseling is absent from the IEP but is a related service under 34 C.F.R. § 300.24(c)(10) and 34 C.F.R. § 300.24(c)(14). In this case the District asserted counseling is in the IEP as an IEP accommodation, and as such the District is bound to implement the IEP. Should the district want to propose an amendment to remove counseling, it has not done so. Parents find no caselaw to support teacher discretion in providing the accommodations listed in an IEP, be those accommodations a quiet testing room, noise cancelling headphones or counseling.

ESY In *Tatro v. Texas*, Judge Gee, writing for the court, stated that the EAHCA has “placed primary responsibility for formulating handicapped children’s education in the hands of state and local school agencies in cooperation with each child’s parents.” In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, we stated in *Tatro* that the Act creates a “presumption in favor of the education placement established by [a child’s] IEP,” and “the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.” ...

The testimony concerning ██████’s particular regression-recoupment tendencies was directly conflicting: The School District’s employees and consultants were unanimous that they observed no significant regression, while the doctors, therapists, and former teachers who testified on behalf of ██████ all agreed that ██████ required a continuous structured program in order to prevent significant regression. The record thus clearly supports, although it does not compel, the district court’s assessment of the facts presented—“that ██████ would suffer at least substantial regression without continuous, structured programming.”² In the case before the Hearing Officer, ██████ case the written evidence presented is more clear, ██████ therapist, summer camp director, classroom teacher and OT as noted in SLP observations of October 2023, and parents testified to the same, and SLP report of 2024 all demonstrate regression and/or lack of communication skills in the first place.

² Rothstein, L., & Johnson, S. F. (2020). *Special Education Law* (6th ed.). SAGE Publications, Inc. (US). <https://bookshelf.vitalsource.com/books/9781544388243>

Transportation is addressed in Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), and as stated earlier was required for student for ESY 2023 and was offered when ESY social skills program did exist in 2021.

Should the Hearing Officer find the District erred in denying ESY social skills education in 2022 and/or 2023, then transportation must be considered appropriate as ESY services includes the provision of transportation to and from the location of the services at no cost to parents.

██████████. Relief Sought

1. Provide reimbursement for ESY 2022 and 2023.
 - a. 2022 \$2301.86 (PE24 and 26)
 - b. 2023 \$2280.68 (PE 24 and 26)
2. Provide compensatory education Social Pragmatic Skills March 1, 2022 to March 1, 2024. Parents suggest broad discretionary relief for emotional/behavioral lack of counseling or lack of SLP as follows:
 - a. ESY para support for a full-time summer camp either for students with some disabilities in 2024 or for a typical camp with 1:1 para support focused on SLP, with the para consulting with SLP and counselor regularly
 - b. Services 5x/week by SLP and/or Counselor with consultation between the two until ██████████ has the same success level as peers in all social situations (with IEP goals designed to measure social pragmatics success).
3. Order the district Direct district to carefully consider ESY provisions for 2024, which might include a social skill based camp or behavioral and social supports for a camp with for nondisabled peers.
4. Have an IEP in place for the 2024-2025 school year as required by state and federal law. If there is a dispute between the parties, the school district is ordered to request despite resolution with the NH Dep of education to resolve the dispute
5. Order district to implement IEP accommodation for counseling direct service and provide compensatory education for 2 years having failed to follow IEP.
6. Suggest that the conflict between parents and ██████████ may interfere with creation of FAPE and District would do well to find and use a case manager who can facilitate meetings, issue WPNs and communicate effectively with all team members.
7. Provide staffing needs of ██████████ (looping, trauma informed, etc.- in as much as staff are available) as accommodations in IEP since district is relying on these accommodations and in as much as parents have requested, and district rejected, same.

Respectfully Submitted

Dated May 8, 2024

By [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was sent via email to District and Its Attorneys May 8, 2024.

[REDACTED]