

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

Student/ School District
IDPH-FY-20-08-011

DUE PROCESS DECISION

I. INTRODUCTION

On August 15, 2019, the Parents filed a due process request against the School District (District) relative to evaluation, IEP, and placement. A prehearing conference was held on September 24, 2019.

The due process hearing was originally scheduled for October 2 and 4, 2019, but was continued to and held on October 28, 29 and November 4, 2019.

Issues for due process were:¹

1. Whether the District timely proposed an appropriate IEP and placement at the Early Childhood Program for the 2019-2020 school year; if not, whether the Parents' private placement at Nursery School was appropriate, and whether they are entitled to reimbursement for tuition and other costs of that private placement.
2. Whether the District timely proposed appropriate ESY services for summer of 2019; if not, whether the Parents' private placement for ESY 2019 was appropriate and whether they are entitled to reimbursement for that private placement.
3. Whether the District committed procedural violations which resulted in a denial of FAPE.

The Parents called the following witnesses: Dr. , Pediatric Neuropsychologist; Dr , Speech-Language Pathologist; both Parents. The District called the following witnesses: , Assistant Principal/Preschool Coordinator; , Speech-Language Pathologist; and , Director of Student Services/Special Education. Both parties submitted exhibits, including a video of Student in various settings.

II. FACTUAL BACKGROUND

¹ The first two issues listed in the Parents' Prehearing Conference Statement, relative to evaluations, were resolved prior to the prehearing conference..

1. Student is a three-year-old child who resides with Parents and siblings in New Hampshire. is identified as eligible for special education under the IDEA.
2. Student has strong social skills and “joint attention”, is very available for learning and eager to learn, is well-mannered, curious, and interested in surroundings.. Student’s expressive signing skills are stronger than expressive speaking skills, and receptive language skills are stronger than expressive language skills. Student has progressed meaningfully in every level of programming has attended.
1. Student was born with Down Syndrome. When was approximately three months old, Student was found eligible for early intervention services. Until third birthday, received programming through New Hampshire’s Family Centered Early Supports and Services. That process makes use of as the provider entity for the service determination process. The early intervention process resulted in the development of Individualized Family Service Plan (IFSP), which identified service and support levels for Student.
2. Per Student’s IFSP, received a variety of services, including physical therapy, occupational therapy, special instruction, and speech therapy.
3. At approximately sixteen months old, Student began attending , a child care center in ; New Hampshire. attended for two years, from the summer of 2017 through the summer of 2019.
4. Until January of 2019, Student attended the program for 3.5 hours a day (which includes a lunch hour), three days a week. On or about January 22, 2019, Student’s family extended program at from three to five days a week, from 8:30 a.m. to 12:00 noon.
5. Throughout time at , the therapies Student received through were provided to at his home.
6. On October 1, 2018, referred Student to the School District to begin the process for developing an IEP and programming to start on Student’s third birthday in June of 2019. That same date, the District issued a Written Prior Notice proposing to begin the IEP development process in early March 2019. On March 12, 2019, the IEP team held its initial meeting to develop an evaluation plan.
7. Prior to the start of the District’s IEP team process, Student’s Parents obtained two private evaluations. One was a speech and language evaluation by Dr. which was completed on or about January 31, 2019 and provided to the IEP team at its March 12, 2019 meeting. The other was a neurodevelopmental evaluation by Dr. , completed in February of 2019; Dr. report was provided to the IEP team at its May 7, 2019 meeting.

8. Although, due to the Parents' evaluations, the District could not conduct a full range of assessments, the District did conduct an occupational therapy evaluation, a speech and language evaluation, and a developmental evaluation.
9. On May 7, 2019, the IEP team met to determine eligibility. At that meeting, the team had before it all the evaluations referenced above, and found Student eligible as a special education student based on a developmental delay in the areas of physical, cognitive, communication, and adaptive development. The team also identified as having a speech/language impairment.
10. A meeting to develop Student's IEP was scheduled for May 22, 2019. An initial draft IEP was sent to the Parents on or about May 17, 2019.
11. Principal , who oversees the preschool program, also sent the family an email addressing the process for developing an IEP and offering a placement, in which cut and pasted from the NH procedural safeguards statement, noting that the IEP is to be developed prior to a determination of placement.
12. On May 17, 2019, Parents provided the team with extensive written input relative to the content of the draft IEP, including placement and other components.
13. Based upon Parents' input, the team made revisions to the draft IEP; the revised draft was utilized as a working document at the next team meeting, held on May 22, 2019.
14. At the May 22, 2019 meeting, the District team members and the Parents disagreed as to whether the length of the school day and the number of days per week were components of the IEP, or whether they constituted placement; the District understood it as the latter, and deferred the discussion of length of school day/number of days per week to the next meeting, which was held on June 6, 2019.
10. Prior to the June 6, 2019 meeting, Parents sent a letter to the school informing them that they rejected the proposed IEP, that they would be placing Student at the School beginning June 13, 2019, and that they would be requesting reimbursement for the costs of that placement. Although from the District's perspective it had not formally proposed "placement" (i.e., length of days and number of days per week), the Parents rejected what they understood was the District's proposal for placement in the preschool program.
11. In accordance with Dr. ' recommendation, the Parents sought a five-day a week placement, with three speech sessions,
12. The IEP team reconvened on June 6, 2019. For the 2019-2020 school year, the District offered a fourth day of programming (2.5 hours for the day), on top of its core, three-day-a-week program for three year olds. The District also proposed to extend its core, three-day-a-week program by moving related services outside the 2.5 hour day. This meant that

the placement would be four days a week instead of three, with the length of those core three days extending from 2.5 hours to 3 hours in length. The fourth day of programming would be 2.5 hours in length.

13. On June 25, 2019, the parents sent a letter to the District notifying them that they were rejected the IEP and placement as proposed by the District. They advised that Student would be starting at _____ School on September 3, 2019. Parents also rejected the proposed ESY program, advising that Student would be attending _____ for the summer.
14. On July 2, 2019, the Parents received written prior notice from the District, in which the District proposed ESY services, consisting of two days per week, for three hours per day, over a four week period, and one weekly session each of speech/language and occupational therapy.
15. For the ESY, the Student attended _____ three and half (3.5) hours per day, four (4) days per week for six (6) weeks. During this time, the Student also received one (1) hour per week of individual speech and language services at home. _____ does not have speech therapists or occupational therapists on staff. The _____ program is not a special education program and does not provide special education.
15. On September 3, 2019, the Student began attending _____ School. _____ currently attends four (4) hours per day, four (4) days per week. In addition, the Student receives an hour and a half (1.5) of individual speech and language services and one (1) hour of individual occupational therapy per week.
16. There is no dispute about as to the appropriateness of the IEP goals, statements of present levels of performance, methodologies, content of services, service delivery model, or any other aspect of the IEP or placement. In fact, there does not appear to be a dispute as to the appropriateness or quality of the _____ program itself, except for the proposed length of the school day and, the number of days per week.²
17. Testing performed by Dr. _____ showed Student to be operating in the broad range of average in _____ cognitive capacity, in _____ receptive language, in _____ fine motor skills, and even in _____ gross motor skills. _____ expressive communication skills came in at the first percentile. Testing performed by the District's and the Parents' evaluators were consistent regarding Student's communication skills, with _____ receptive language being a relative strength compared to _____ expressive language..

² According to the minutes of the June 6, 2019 team meeting, Parent stated that _____ would send Student to the program if it were offered five days per week, SD Exh. 234.

18. The recommendations by Dr. [redacted] in [redacted] written report, including recommendation for four days per week of programming, appear to generally support the District's proposed program for the 2019-2020 school year.³

19. Dr. [redacted] recommended, among other things, a low student/teacher ratio, a special education teacher in the classroom, several support staff with experience working with students with communication and motor delays, and a one-to-one instructional aide. Pertinent to the issue in dispute, Dr. [redacted] recommended that Student attend school for a full day, five days per week, in order to reach [redacted] "innate potential". [redacted] opined that

"[w]ith the expectation that [redacted] scores in the cognitive domain will start to slip over time, we want to make sure we are really using this critical period of [redacted] being at a similar level to [redacted] peers to, you know, be teaching [redacted] all of the skills that we are teaching all of the children [redacted] age. But [redacted] needs it to happen in a very intensive way so that [redacted] can – so we can prevent that gap from getting, you know, any wider than it needs to be." Testimony of Dr. [redacted]

20. According to District providers, three year olds do not necessarily benefit more from more services, especially if the services they are receiving are strong, and therefore capable of tiring a child out who needs down time both because of a disability and because of the child's very young age. [redacted], the District's speech-language pathologist, recommended against such a lengthy program based on Student's age and disability. [redacted] noted that most three year olds need down time and nap time during the day, and would be very unlikely to remain focused and educationally available for five full days of programming a week.

21. The District's proposed IEP includes: a) agreed-upon goals and objectives in the areas of speech and language, occupational therapy and academics; b) extensive classroom accommodations; c) present levels of performance; d) service delivery description; e) placement in the [redacted] Elementary School regular early childhood classroom for three days a week, for 2.5 hours per day; one 30-minute occupational therapy session and three 30-minute speech therapy session, with all but one speech therapy session taking place after the regular school day; a fourth day of educational services for 2.5 hours; one-to-one paraprofessional throughout Student's entire program time, including related services. The service delivery model consists of a team approach, with special educators and related services providers on staff and in the classroom throughout the week; shared conferencing; data gathering, and signing as a regular part of the classroom communication.

22. Although there is some question as to whether the [redacted] School's program is consistent with the recommendations of the Parents' outside evaluators,⁴ none of the

³ There was a concern that Dr. [redacted] appeared willing to – and did, in fact - adjust [redacted] recommendations based upon Parents' request. [redacted] has neither viewed the [redacted] program nor observed Student in an educational setting.

witnesses testified that they believed either or School was inappropriate.

III. DISCUSSION

Parents bear the burden of proof on all issues in this case.. Schaffer v. Weast, 546 U.S. 49, 58 (2005).

Parents seek reimbursement for costs associated with the 2019 summer program, and the 2019-2020 placement at School. Reimbursement for unilateral placements may be granted if “the public placement violated IDEA and that the private school placement was proper under the Act.” Florence County School Dist. v. Carter, 510 U.S. 7, 15 (1993).

The proposed placement for the 2019-2020 school year

A school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” Andrew F. v. Douglas County School District, RE-1, 137 S.Ct. 988, 1001 (2017). The benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993); Roland M. v. Concord Sch.Comm., 910 F.2d 983, 992 (1st Cir. 1990). An IEP can be appropriate even if it is not “the *only* appropriate choice, or the choice of certain select experts, or the child’s parents’ *first* choice, or even the *best* choice.” G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991).

Deference should be accorded “the expertise and the exercise of judgment by school authorities”; specifically, “cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” Andrew F. at 1002.

Services and programs must also be delivered in the least restrictive environment in which the child can receive educational benefits. To the maximum extent appropriate,” the student must be placed in setting that provides access to non-disabled peers. *See* 20 U.S.C. 1412(a)(5)(A); 34 C.F.R. 300.114(a)(2)(i). To determine a particular child’s place on the continuum, the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement...” Roland M at 993; *see also* C.D. v. Natick Public Schools, 924 F.3d 621, 630 (1st Cir. 2019).

As noted above, the only disagreement is with regard to length of school day, and number of days per week. Although Dr. recommended a four to five hour day, five days per week year round, it was unclear from recommendations how such a program should be configured, or how considerations such as fatigue, nap time, and down time should be addressed for a child

⁴ For instance, there was testimony from Mr. suggesting that Student’s teacher at School was not currently certified in special education. Although Parents’ counsel challenged the reliability of this information, no explanation or clarification was offered. In addition, there are no related service providers on staff.

Student's age in a program of that duration. As noted above, there was also countervailing testimony from the educators familiar with the program recommending against a full-day, full-week program for three year olds and Student in particular. Moreover, the basis for Dr. ' recommendation is not the standard by which FAPE is measured. Considering all of the evidence, Parents have not met their burden of showing that IEP and placement for the 2019-2020 school year as proposed after the June 6, 2019 team meeting would not provide Student with a FAPE.

Proposed ESY for summer 2019

This is discussed below, under Procedural Issues.

Procedural issues

In matters alleging a procedural violation, a hearing officer may find that procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

Parents' position with respect to procedural issues is twofold. First, they assert that the District predetermined both the 2019 ESY program, and the placement for the 2019-2020 school year. Schools can be cited for predetermining the IEP team outcome when there is clear evidence that they have failed to provide the family with meaningful input into the team process. *See Deal v. Hamilton Count Bd. of Educ.*, 392 F.3d 840, 857-58 (6th Cir. 2004). District officials may form opinions beforehand, as long as the Parents have the opportunity for meaningful participation in the process, school officials are willing to listen to the Parents with open minds, and there is evidence that the District "could have possibly been swayed by the Parents". *R.L. v. Miami-Dade County School Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014).

The District's core preschool program for three-year-olds, like any other core program, is based upon educators' determination of what is appropriate for students in that age group. The program serves students both with and without disabilities. A recommendation for placement in the District's core program, does not, in and of itself, amount to predetermination, as long as the District was willing to adjust or alter its program for children with disabilities. In this case, the Parents participated in all meetings, the District considered Parents' information, and made alterations to its core program for the 2019-2020 school year based upon Parents' requests and input as well as recommendations from the outside evaluators.

The Parents' second procedural issue concerns the distinction between IEP and placement. The District representative believed that length of school day and week were placement issues, distinct from the IEP itself. Parents disagreed, maintaining that the team impermissibly refused to discuss length of school day and week until after, rather than as part of, IEP development. However, at least as of the June 6, 2018 team meeting, the team had discussed in detail both 's IEP and placement, including quantity of service per day and week. This discussion resulted in a proposed IEP and placement, which the Parents rejected.

Consequently, with regard to the proposed IEP and placement for the 2019-2020 school year, Parents have not met their burden of showing that a procedural violation that significantly impacted their ability to participate, or that caused a deprivation of educational benefits to Student.

The circumstances are somewhat different with regard to the proposed ESY program. NH Ed 1110(b) provides that “the LEA shall provide extended school year services at times during the year when school is not in session, if determined by the IEP team to be necessary for the provision of FAPE. Extended school year services shall not be limited to the summer months or to predetermined program design.” The District witnesses testified that they utilized a “regression/recoupment” standard.

For the summer of 2019, the District proposed the following: two days per week, three hours per day, with two 30-minute sessions per week of speech and one 30 minute session of occupational therapy. This was the District’s existing ESY program. The parties agreed that Student was eligible for ESY, but disagreed as to the standard to be utilized, and, as with the proposed 2019-2020 program, with the number of service hours. As noted above, an offer of an existing program does not necessarily constitute predetermination. However, in this instance, there appears to have been little meaningful discussion regarding the proposed ESY program for summer of 2019, including whether any part of the proposed service delivery should be expanded or adjusted. Also as noted above, there was no testimony that Parents’ placement at was inappropriate, nor is it required to meet the state standards that apply to public schools. *See Mr. I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007). Accordingly, although no finding is made as to the appropriateness of the District’s proposed ESY program, or any bad faith on the part of the District, Parents are entitled to some level of reimbursement for the costs of the summer placement.

IV. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW

Parents’ proposed conclusions of fact: Numbers 2 – 8, 11, 12, 26, 30 – 32, 37 – 39, 40 are granted. The remaining are neither granted nor denied *as written*; to the extent conflict with this Decision, they are deemed denied.

Parents’ proposed conclusions of law: Number 1 is granted; the remaining are neither granted nor denied *as written*; to the extent that they conflict with this Decision, they are deemed denied.

District’s proposed findings of fact: Numbers 1 – 5, 8, 10, 13, 16 – 22, 24, 25 are granted. The remaining are neither granted nor denied *as written*; to the extent that they conflict with this Decision, they are deemed denied.

District’s proposed conclusions of law: Numbers 1 and 2 are granted; the remaining are neither granted nor denied *as written*; to the extent that they conflict with this Decision, they are deemed denied.

V. CONCLUSION AND ORDERS

- A. The proposed IEP and placement for the 2019-2020 school year was reasonably calculated to provide Student with meaningful educational benefit in the least restrictive environment; Parents have not met their burden and are not entitled to reimbursement for the 2019-2020 School placement.

- B. With respect to the proposed 2019 ESY program, Parents have demonstrated that a procedural violation rose to the level of impeding their ability to participate meaningfully in the decision-making process as it pertained to that program. Accordingly, the District will reimburse the Parents, on a *pro rata* basis as agreed upon by the parties, for the difference in number of service hours between the District's proposed ESY program and the program.

- C. Except as set forth in Paragraph B. above, the Parents have not met their burden with respect to alleged procedural violations.

So ordered:

Date: December 6, 2019

Amy B. Davidson, Hearing Officer

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.

Cc: Attorneys

Via electronic transmission and certified mail, return receipt requested.