

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

IDPH-FY-06-06-069 / Middleton School District

DECISION

I. INTRODUCTION

A Prehearing Conference was held in this matter on July 21, 2006 . Representing the interests of the Student were Theresa Kraft, Esquire and the Student's mother. Representing the School District were Katherine Bubar, Esquire and Susan Pleau, Director of Pupil Personnel Services. There is an agreed upon IEP and the only issue to be determined is that of placement. The School District proposed placement in the Henry Wilson Memorial School which is the Student's local public school. The Parent believes that the Henry Wilson Memorial School (herein after referred to as HWMS) is not an appropriate placement in that the Student should be placed either at the Oyster River School or the Shaker Road School . The matter proceeded to hearing on August 21, 2006 and August 23, 2006 .

II. PROCEDURAL VIOLATIONS

The Parent has not alleged that any procedural violations occurred in this matter.

III. DISCUSSION

The mother testified as the first witness (the Parent presented first by agreement of the parties). The Student is nine year old and about to enter fourth grade. The Student has a number of medical problems which are not in dispute, and which include a latex allergy. There is an agreed upon IEP and no dispute relative to the educational handicap. The Parent disagrees with the proposed placement at HWMS for three reasons. First is the issue of the latex allergy. Parent Exhibit 318 consists of a number of photographs of the playground at HWMS. It is undisputed that there are a large number of tires in the playground and the mother believes that the Student's latex allergies would be exacerbated through exposure to the tires. She indicated that she repeatedly raised this issue with the Team and was told that the Student would simply not be allowed to play on the playground. However, the Student has ADHD and needs to get out and exercise. The Student's peers would be playing on the playground and be exposed to the latex and then come into contact with the Student. In addition, the mother was told that the classroom and the school were latex proofed. However, she is concerned that students bring items into the classroom that may contain latex and thereby expose the Student to the latex allergy. Parent Exhibits 158 through 161 consist of a letter wherein the mother notified the Team regarding the latex issues and the mother indicated that Susan Pleau did not allow her to address these issues at an IEP meeting.

The Parent's second concern involved communication with the HWMS staff. The Student's older brother attended HWMS and the mother had a number of problems with communicating with the staff regarding the older brother's latex allergies. She indicated that the older son was harassed by staff members regarding the latex allergies and that one teacher had a motorized scooter as a result of an accident and the scooter had tires

containing latex and that the principal misled her regarding the scooter being present in the school and then when she confronted the principal about this she was thrown out of his office. She also indicated that a nurse threatened to quit her position at HWMS over the issues raised by this Student's older brother when he attended HWMS. Parent Exhibit 14 contains a list of incident reports relative to the older brother's attendance at HWMS after the Parent filed a complaint with OCR. The mother cannot communicate with the principal and the principal does not believe that the Student has the allergies in question. The mother believes that the principal wants to purposely expose the Student to latex to prove that there is no latex allergy.

The third issue is air quality and the mother believes that there are high levels of carbon dioxide in the air. There were air quality reports submitted over the years including one at Parent Exhibit 223, and the mother is concerned that high CO₂ levels could cause seizures for the Student. She indicated that the Team would not allow her to address the air quality level issues at team meetings. The mother is looking for placement at a latex free school either in the Oyster River School District which is a public school or the Shaker Road School which is a private school. The Oyster River School is latex safe however, the mother is not sure if the Shaker Road School is latex safe. She has had no discussion with the staff at the Shaker Road School to determine whether Shaker Road would make the school latex safe if the Student attended. As such, it would appear that Shaker Road School is not a viable option as an alternative placement.

On cross-examination the Mother indicated that she raised the issues relative to the playground with Susan Pleau in the past and that at the placement meeting when she intended to discuss her concerns as addressed above she was told to put these in writing. There was discussion regarding a Section 504 Complaint that is still pending. (Though, as the parties know or should know, the Hearing Officer has no jurisdiction over any 504 issues). With respect to the mother's testimony that exposure to CO₂ could cause the Student to have seizures, the mother indicated that she obtained this information from an attorney of hers in California who consulted with an environmental professional. She acknowledged that the air quality report at Parent 228 and the recommendations section indicated that the air quality was acceptable however, she felt this did not take into account a student with handicaps. She further acknowledges that the recommendation in the air quality report was to monitor CO₂ levels.

Susan Pleau testified on behalf of the School District and was taken out of order by agreement of the parties as the Parent's second witness had not yet arrived. Ms. Pleau is the Director of Pupil Personnel Services. She indicated that she was in attendance at a School Board Meeting that discussed the air quality report and that the representative from the company that issued the report indicated that the rating scale used was one for children not adults. The school has been tested a number of times for air quality. Ms. Pleau indicated that the reason that the mother was not allowed to address some of her concerns was that those concerns related to the IEP and this was a placement meeting, and in addition the mother wanted to discuss personnel issues at HWMS and Ms. Pleau did not believe that would be appropriate to do at the placement meeting. She indicated that latex safe procedures were already in place at HWMS and remain in place. She indicated that there are areas in the playground where the student could play and not be exposed to the tires including an area of blacktop where the student could throw a ball against the wall. HWMS was the only placement offered and according to Ms. Pleau the

IEP could be implemented at HWMS which is the local public school for the Student and which is the least restrictive environment. The IEP could be fully implemented at HWMS. Ms. Pleau is aware of the Student's medical issues and felt that there are no impediments to educating the Student at HWMS. She requested additional medical information from the mother to substantiate the mother's concerns, but the mother refused to provide it.

On cross-examination Ms. Pleau agreed that the photographs depicting the playground (Parent 318) are an accurate portrayal of the playground. In addition, Ms. Pleau referred to an Affidavit issued by the principal, Joel Shagnon where Mr. Shagnon references "fake gasses" in referring to the latex contained in tires and the exposure to the latex. With respect to the request for additional medical records Ms. Pleau admitted that she made that request after the IEP had been agreed upon.

The Parent's second witness was Katrina Rhodes who was the Student's Case Manager in 2005/2006. She oversaw the Student's program and provided services and supports and also taught the Student in the Resource Room. She read the Student's files in their entirety before becoming the Case Manager and was involved in the 2005/2006 IEP. She also acted as the contact person for the mother and indicated that the mother voiced concerns over the personnel at HWMS as well as the latex issue during the time that Ms. Rhodes was Case Manager. On cross-examination Ms. Rhodes indicated that she felt that the Student could be safely educated at HWMS.

The Parent rested at that point.

Lynn Olden testified as the second witness for the District. She is a Registered Nurse and the School Nurse at the Valley View Community School where the Student attended for third grade. Her Affidavit is set out at SD13. She is aware of the Student's medical issues and dealt with all of the latex allergy issues in the school and made sure that latex free products were purchased including cooking equipment, pencils, balls, etc. She reviewed the allergy testing at SD2 and 3 which appeared to indicate that the Student was not latex allergic, though, she indicated that regardless of what the testing showed she would continue to treat the matter as if the Student was latex allergic. She has never seen the Student have an allergic reaction in the three years that the Student was in Valley View. She also talked about an incident that is referenced at SD13 where the Student had an aide that was also latex allergic and the Student brought a ball to school that contained latex. The Student had no reaction whatsoever to it, however, the aide touched the ball and had a severe reaction including considerable amount of hemorrhaging. Ms. Olden believes that the Student can be educated at HWMS.

On cross-examination Ms. Olden was not aware of any after school/extra curricular situations where the Student had any reactions. There was discussion about the Student having red ears and red face and it was her testimony that this was common for children who are running and getting heated up. This witness has consulted with the nurse at HWMS on three occasions relative to the Student transitioning to that school.

Cynthia Sparks, principal of Valley View Community School testified as the next District witness, she is in her fifth year and knows the Student and is aware of the concerns relative to the Student. She never had any interaction with the Student due to anything the Student did or was involved in during the Student's tenure at Valley View. No teacher ever came to her with respect to any concerns about the Student. Her involvement included some telephone calls relative to purchasing latex free merchandise.

On cross-examination Ms. Sparks indicated that she was aware of the Student attending a Christmas Concert where he was exposed to some tennis balls and that the mother called the following day and raised the issue. However, she was not aware of the Student having any reaction to exposure to the tennis balls.

The Due Process Hearing resumed on August 23, 2006 and Ann Bartoloni, Registered Nurse at HWMS testified on behalf of the District. Her Affidavit is at SD14. Her efforts to make HWMS latex safe include educating the staff and passing out a packet of information (at SD14 (Page 144-167)), posting latex safe signs in the building and providing epi-pen training. Ms. Bartoloni orders only latex free products and sent an e-mail to other school nurses asking for input in terms of what she could do additionally to make the school latex free. With respect to the playground she indicated that there are several areas where there are no tires and if children touch the tires they would not be able to interact with the Student and would have to go in and wash their hands at the end of recess. The school obtained a Grant of approximately \$5,000.00 and there is a committee that has been assembled and she is a member of the committee and hopes that removing as many tires as possible will be a priority for the use of the \$5,000.00. She indicated that the location of the classroom is no more of a threat than any other classroom with respect to the latex exposure. With respect to air quality issues this witness indicated that she is on the Air Quality Committee and there were no concerns as a result of a number of CO2 spot checks that she undertakes on a weekly basis. In her opinion the Student can be safely educated at HWMS.

On cross-examination Ms. Bartoloni indicated that her packet of latex safe instructions went out at the end of the school year to all fourth and seventh grade teachers. She did not share the additions to the individual health plan for the Student (SD 6) with the mother because she was told that the Student would not be attending HWMS. It was her opinion that she could get everything in place with respect to the Student's safety and the latex issues within twenty-four hours if she was told that the Student was coming, however, she has been told that the Student is not going to be attending.

Joel Chagnon, Principal at HWMS testified as the final witness his Affidavit is set out at SD 12. Mr. Chagnon has lived in Farmington his entire life and has received numerous awards and certificates. He has known the family for sometime having met the children at the 500 Boys and Girls Club and Mr. Chagnon felt that his relationship with the family was decent and cordial until the incident that occurred on January 6, 2006. With respect to that incident the Student's older sibling's teacher had been injured in a car accident in December, 2005 and crutches were not successful. The teacher had then obtained a motorized scooter and the Parent asked Mr. Chagnon about that scooter and Mr. Chagnon indicated that the scooter would be in the older sibling's class and the Mother wanted the sibling moved to another class and Mr. Chagnon agreed to this to begin the following Monday. The teacher was supposed to get the scooter over the weekend however, on Thursday evening the teacher called Mr. Chagnon and indicated that he already picked up the scooter and would have it on Friday morning. Mr. Chagnon told the teacher that he could not use the scooter until Monday morning, and he told the teacher to park the scooter in the closet. On January 6, 2006, the Mother accused Mr. Chagnon of being a liar because the scooter was in the class, she was yelling at him loudly, and he got frustrated and made the comment regarding fake gases emanating from the tires and told the Mother to get out. There had been several visits that week by the mother and

grandmother accusing the staff of various things and he had "had enough." His only regret with respect to the incident is that the older sibling of this Student heard the exchange. That student has not returned to the school since, however, Mr. Chagnon saw the student at church on Easter and the student appeared to be very happy to see him and hugged him and did not appear to be frightened at all. With respect to the mother's allegation that Mr. Chagnon would intentionally expose this Student to allergens to prove that she is wrong regarding the allergy to latex Mr. Chagnon indicated that he resented that statement and that it was absolutely not true. He does not doubt that the Student has medical needs and issues. If the Student were to attend HWMS he would look forward to working with the family and he has assigned the Student to a teacher who gets along well with the family.

On cross-examination Mr. Chagnon indicated that there was no specific plan with respect to the scooter because he had called the company that manufactures the scooter to determine whether there is any latex in the scooter and had not yet received a call. With respect to the fake gas comment, Mr. Chagnon stood by his position that gases would not emanate from tires that were not moving in a scooter that was in a closet and not operational.

The hearing concluded at the close of the testimony by Mr. Chagnon.

V. DECISION

The Hearing Officer is satisfied that the proposed placement at HWMS is the appropriate placement for the Student and will provide the Student with a Free Appropriate Public Education in the least restrictive environment. The School District has been and is prepared to take all necessary steps to ensure a healthy environment for the Student taking into consideration the Student's latex allergies as well as other health issues. It is unfortunate that the incident between the principal and the parent that resulted in the removal of the older sibling occurred at all, however, that in and of itself is not a sufficient basis to find that the personality problems between the parties would justify removal of the Student from the local school which is the least restrictive placement.

VI. APPEAL RIGHTS

If either party is aggrieved by the Decision of the Hearing Officer set forth above, either party may appeal this Decision to a Court of appropriate jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The District shall notify the Commission of Education when either the District or the Parent seeks judicial review of the Decision.

VII. STATEMENT OF COMPLIANCE WITH ED-1128.22 (B)

If neither party appeals this decision to a Court then the District shall within ninety (90) days provide to the Office of Legislation and Hearing (Department of Education) and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to the Parents. If the Parents do not concur with the District's report, the Parents shall submit their own report through the Commission of Education.

SO ORDERED .

Dated: September 11, 2006

John P. LeBrun, Hearing Officer