

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION

**IDPH-FY-06-11-033 / Keene School District**

**Decision of the Hearing Officer**

**Background**

Parent filed a request for a due process hearing by email that was received by the Department of Education on November 30, 2005 . The complaint was based on the contention that the School District has not provided a free and appropriate public education (FAPE) to Student. Parent requested placement at Crotched Mountain Day Program. The Due Process Hearing Schedule provided notice on December 2, 2005 . The School District responded to the Parent denying the complaint in a communication dated December 9, 2005 and filed a counterclaim to assure this matter survived a motion to withdraw and seeking a finding that the education provided Student at Keene 's Fuller School during this school year was appropriate. Parents responded with objections on December 20, 2005 .

Continuances were requested and granted and a pre-hearing conference was held on January 10, 2006 . At the conference, Parents were represented by Elizabeth Maynard, Esq. Jeanne Kincaid, Esq. represented the Keene School District and Bruce Thielen, Special Education Director for SAU 29. A pre-hearing order was issued on January 24, 2006 establishing a hearing schedule and limiting the scope of the hearing, excluding both procedural violations in the development of the 2005-06 IEP that did not appear in the complaint and interpretation of the intent and proceedings leading to the mediated agreement of March 30, 2005 . Parents asserted in the complaint that the School District had failed to provide opportunity for communications during the IEP process as a procedural violation.

The parties met for hearing at Antioch College in Keene on three dates: January 19 and 20 and February 3, 2006 . Post hearing submissions were received and a Motion to Strike portions of the Parents post-hearing submissions was received from the School District dated on February 16, 2006. Parents responded by letter dated February 24, 2006.

**Hearing**

Parents went forward with their case on the first day of hearing, February 16, 2006 . The School District followed. The parties made adjustments in witness order to accommodate the parties' and witnesses' schedules. Parent's exhibits numbered one through eighty-four and School District 's exhibits numbered one through eighty-five and supplements, A through P, were accepted into evidence.

Parents' first called their first witness, Dawn Winslow, Student's bus driver for two and one half years. She was sworn and testified that she had heard Student speak of being hit by other students. She felt that school personnel handled the matter in such a way that Student is uncomfortable continuing at Fuller School .

... Student's father testified that Student was first diagnosed as autistic and that mild mental retardation has more recently been added. He noted that Student has experienced a change in attitude in the last year or two going from a happy child to a more reserved and sometimes sad and upset child who calls himself stupid. Student has told his Father that he is being hit and harassed by two other students including a student named ..... Student's father believes his son doesn't feel safe enough to complain at school about the treatment. The Father objects to the School's response of disbelief, resulting in Student being checked daily for bruises. Student's father states that his child has on more than one occasion taken off his clothing and put it in a pile. When asked the reason, Student has told his father that it is because he has to and he makes reference to Cassie, Student's one on one aide.

He testified that, one day this autumn, a substitute driver delivered Student to his home earlier in the afternoon than usual and left him alone. No one was home. Student's father testified that he arrived home to hear Student calling out for his mother from the backyard. The front door of the home was open and the Student was outside without a coat. There had been miscommunication between the bus company and the school regarding the drop off. Student may have been home alone for twenty minutes.

The witness stated that it was agreed between Parents and School District that Student would have a one on one aide so that he was never alone at school but that he observed Student for several minutes alone on the playground at recess with no one around him this fall. He recalled that a written mediated agreement signed toward the end of the school year 2004-2005 (SD Ex. 39) promised a counselor to assist Student in dealing with his situation but no counselor was provided over the summer. Student has suffered and is showing frustration and is beginning to be violent to his Father.

Rita L. Phinney, Director of Admissions at Crotched Mountain Day Program, testified that her program serves a population of students who are mentally and physically disabled. Among these students are children who are autistic or have dual diagnoses. It is a year round program with eight or fewer students per class. Crotched Mountain would consider evaluating Student to see if there is a match. The school's capacity is one hundred and twenty-eight and there are presently two openings. When a student is admitted, the parents and school district personnel are part of the student's team.

...Student's aunt and his nurse aide employed to work with Student through a company in Nashua . She has known Student since birth. The witness testified that she has noticed behavior changes in Student and that he has begun using self-deprecating and inappropriate and childish sexual language. He has suggested that he is required to take his clothes off at school and talks of inappropriate touching. He has had tantrums when

conversation turned to happenings at school and he was seen in the emergency room for such a tantrum. Conversations about school are avoided.

Student is rarely echolalic but will respond to questions with reasonable answers related to the questions on most occasions. The witness stated that she has observed signs of regression such as thumb sucking, phobias, loss of toilet training, more spilling of liquids, crying, aggressive acting out toward his parents and laughing at discipline. Testimony included descriptions of bruises or scratches. The witness stated that she and the Student's parents do not feel he is safe at school.

Lisa Trombley next testified for the Parents. She has worked with Student as a tutor for the School District and has heard Student use self-deprecating language and state that he has been hit by another student and that he does not like school.

...Student's mother... has seen behavior changes in Student and expressions of unhappiness with school. She testified that Student has told ... that ...dislikes ... classroom teacher and that ... teacher and classmates are mean ... She recalls seeing a scratch and being told by Student that another student named .... scratched him.

She testified that school personnel will not or are not allowed to communicate with her and that share sheets that were used during the prior school year that gave some useful information about Student's attitudes and activities are not being used (P Ex. 24) but have been replaced with a sheet that tells only the time and activity performed (SD Ex. 82 p. 280). She returned to the stand on the last day of the hearing as a rebuttal witness.

Lawrence Kaplan, M.D., Student's developmental pediatrician, testified telephonically for the Parents. He is Director of Genetics and Child Development at Dartmouth Hitchcock Medical School , who has seen Student on several occasions since his first medical visit in 1999. He discussed Student's history and noted that he has seen symptoms of anxiety and depression, both of which confound learning. He finds that the Student is exhibiting obsessive compulsive behavior and has begun thumb sucking. He understands that Student is showing a new symptom of emotional lability after school when .. with .. family. Dr. Kaplan said that he would expect the routine of checks by the nurse and repeated bullying by other students would be traumatic to Student. Dr. Kaplan has not found a predominant pattern of echolalia in Student's responses but instead has noted direct answers to questions asked. He knows the day program at Crotched Mountain and feels it would be reasonable for Student to be considered a candidate for a school like Crotched Mountain.

Witnesses for the School District were John Moran, PhD in Child and Youth Studies. Moran teaches courses related to autism spectrum disorder at Antioch Graduate School and Keene State College. His affidavit is in evidence. He has performed research on children with autism and Student has participated in those studies some years ago. He first met Student when he was three years of age. Moran is an independent contractor, one of whose contracts is with the School District . He has observed Student. He notes that Student's echolalia has decreased but likely is present in unfamiliar or unsure

situations. Student can use pronouns and is able to generalize. Reviewing the prior IEP, he testified that he sees progress on most objectives.

Dr. Moran testified that he is aware of Nurse Brow's protocol of daily inspection of Student and said he has no evidence that this is a strip search or that Student is unhappy about the checks. He has seen no signs of anxiety or regression in Student's behavior and believes the Student is appropriately partially mainstreamed in his present school. He feels educating Student in a homogeneous setting would be a mistake and would likely lead to regression. Dr. Moran indicated that he had input into Student's 2005-6 IEP but that he had not conferred with Student's Parents nor with Dr. Kaplan on the matter. As to Student's toilet training, he believes that putting Student back into pull-ups during the school day has caused the regression in that area.

Laura Lee Brow testified for the School District that she has been a nurse for nine years. Her affidavit was submitted. She is the school nurse at Fuller School who sees the Student morning and afternoon in her office for a five minute visual check. Student is a happy child who usually arrives with his tutor, Cassie Markham. The inspection protocol was developed because there had been accusations that Student was being bullied and that he has come home with marks on his body. She stated that she doesn't think the Student is aware of the inspection and she has seen no expressions of anxiety. Student uses the bathroom in the nurse's office in any case as his mother does not want him to use the student's bathroom. She stated that she was aware that Student's Mother had called the police and made a report about law violations at school related to a misunderstanding of Student's checks.

Cassandra Marston, whose affidavit was provided, testified that she has been Student's tutor for two and one half years. She is with Student during the day including recess and lunch and accompanies student to Nurse Brow's office twice daily. She has not seen ... hurt by other students and no one has asked ... to remove ... clothes, as the inspection by Ms. Brow is completely visual. She knows ..., the student accused of causing Student harm. Other student. is neither in Student's class nor in the Collaborative. At recess, Student and Other student are not together and are not part of the same group. The witness stated that she is with the Student throughout the day.

Linda Risley, Student's special education teacher and case manager, testified that Student had benefited from his previous year's schooling and had mastered two-thirds of the goals on his prior IEP. Ms. Risley's affidavit is in evidence. She noted that Student's Mother had refused to sign the IEP but would not state any objections to goals of the IEP. Though Parents stated at the hearing that they have not received periodic progress reports, the witness said they were sent home three times during the year in Student's backpack. She was asked about a medical report from Dr. Kaplan, Student's developmental pediatrician, dated February 2, 2005, (S.D. Ex 3) that states that Student is making excellent progress and should continue in this excellent educational program and a report from Dr. Kaplan dated October 2005, (S.D. Ex. 4 p.41-44), that talks about a loss of skills. She noted that the Student had made slow, steady progress and was not regressing. She explained the share sheet process that had been used in prior years to

maintain communication between school and Student's Parents and that many had not been returned. She testified that the first she was aware of claims another student named .... hurting Student was on June 5, 2005.

Loren B. Wilder testified that she has been the Principal at Fuller School for six years and has known Student for the three years .. has attended school at Fuller. Her affidavit was supplied. Wilder, She stated that there are seventeen students participating in the Fuller Communication Disorder Collaborative Program this year and most are autistic and have 1:1 tutors. There is an attitude of acceptance and Student is encouraged to participate socially. Student is never alone. She supports the nurse protocol and feels it is for his protection as well as for the school's and noted that there has been only one superficial mark since the program began in September of this year when Student reporting ..'d been hit.

Wilder stated that every claim had been investigated and none was substantiated. Parents do not get reports of investigations and she leaves communication to Ms. Risley and Ms. Binder. She said she finds Student to be a "happy ..." who sometimes expresses sadness when not allowed to win when playing at recess. Student is flourishing with partial inclusion and she has heard nothing of bad language at school. She agreed that ... had been toilet trained but that ... is not now but said that the parents had asked that they not pursue it.

Joan Binder, Special Education Coordinator for the Keene School District , submitted an affidavit and testified that she has known the family since Student entered pre-school. She serves as LEA for IEP teams. She recalls Student's Mother speaking approvingly of Fuller at the August 22, 2005 meeting as she took the meeting minutes. (SD Ex. 50, p. 165). She testified that she had never seen a set if minutes kept by Mother from a meeting with Ms. Risley and herself on October 13, 2004 that indicates that she was copied with the minutes. She knew of no problems between Student and Tyler before 2005. She was aware of a meeting in November 2, 2004 for which she took minutes (SD Ex 30, p. 109-111) and testified that there was no mention of Other student.... hitting Student though it was less than two weeks after the meeting of which Student's mother has a record. She stated that she believes Student is happy and progressing at Fuller and would continue to do well if Student's IEP were carried out at Fuller. Parents have left while meetings are in progress and have notified us that they will not attend meetings. Binder stated that they've always tried to include Parents. But, she agrees that the Parents were not made aware of and have asked that the nurse checks be stopped but they continue. The IEP team hopes to include Dr. Kaplan in the IEP process.

The final witness for the School District was Bruce Thielen, Special Education Director at Fuller School . His affidavit was supplied. Mr. Thielen recalls no suggestions for changes to IEP goals from Parents. No other options were raised that might meet Student's needs and movement within the Keene School District would not be helpful.

## **Discussion**

The outcome of the present matter depends on credibility. The Parents allege that their disabled child was physically harmed by a fellow student over a period of time beginning in 2004. Mother asserts that she notified school staff and Student's case manager by returning share sheets on which she wrote desperate complaints to no avail. Parents allege that the complaints were ignored and that School District 's response was inadequate leaving an autistic Student exhibiting symptoms of anxiety. They assert that he has been unable to benefit from education in this setting and should be placed in Crotched Mountain Day Program with other disabled students.

Parents claim that the School District mediated an agreement on March 30, 2005 and then failed to act in good faith avowing that Student did not get the Extended Year Services (ESY) and year round counseling agreed at the mediation.

Parents, School District and experts vehemently disagree on what has occurred and what should now be done. The hearing itself was fraught with tension. Student's case manager states that she was not made aware of repeated complaints of Student's school engendered misery and of bullying by another student named .... until June 2005, one year after the Parents claim this pattern of bullying and distress began.

Both parties have erred at various stages and to varying degrees. The Parents strongly desire their child to attend Crotched Mountain 's day program. Student's pediatrician, Dr. Deborah Hansen, hints at this as early as January 2004 (P Ex. 3). Parents' evidence of records of the daily communications between Parent and school throughout 2004 known as share sheets, in the original, have been altered. (P Ex 27). Examination shows erasures, additions and write-overs. On one sheet, the name of a child, had been changed to ..... There was much testimony on the subject of the differences between the share sheets that the School District had retained (SD Ex. A-P) and those that the Parents offered (P. Ex. 1,2, 6-9, 11-13, 15-18, 20, 23-28, 31-34, 36,37, 48-50, 53, 54, 57, 58, 65,69, 77,79). This body of evidence is thus made unreliable and does not support the Parents' contention that there has been a long consistent plea for relief from bullying that the school personnel have ignored. In addition, it is well explained why communication was kept to a minimum after Parent indicated no interest in perfecting Student's IEP.

On the other hand, the School District has acted questionably in removing a child from ... school routine and instituting a twice-daily body check without either the Parents' knowledge or consent. As to the mediated agreement, the hearing officer must take the document on its face and cannot inquire as to the intent (SD Ex. 39). The ESY services may or may not have been adequate in content but it is clear that the agreement called for counseling of a duration that considers the recommendation of the counselor. One can question the School District 's decision to discontinue counseling over the summer months without input from the counselor.

In this case, as in any other case, the party seeking a change bears the burden of persuasion. *Brian Schaffer v. Jerry Weast*, U.S. (November 2005). Parties, often parents, who have requested relief under 20 USC section 1400 *et seq*, (IDEA) must bring a sufficient complaint and then fashion a case based on that complaint such that relief provided under IDEA may be granted. 20 U.S.C. 1415 (f)(3). They must show convincing evidence that the individualized education plan (IEP) proposed by the School District cannot provide a free and appropriate public education (FAPE) for the Student in question as was articulated in *Board of Education, Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Though the Parents desire a homogenous program such as Crotched Mountain Day Program, IDEA states a strong presumption for mainstreaming, 20 U.S.C. Section 1412(5)(B), to the degree tailored to the individual child. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989), 1044. That presumption is hard to overcome with the best of evidence. Parents have failed to make their case because evidence material to their case is not credible.

As to the School District's cross complaint held in abeyance, it is now referred to the Department of Education for processing. The last matter for decision is the Motion to Strike certain of the Parents' Findings of Fact and the Parents' objection to same. It was helpful to review the parties arguments in this matter but it seems proper to treat the request in accordance with the earlier ruling adhering to the limitations stated in the Pre-hearing Conference Report here attached.

### **ORDER**

Reviewing the testimonial and documentary evidence presented by the parties, it is found that the Parents have not demonstrated that Student has been and will be denied a free and appropriate education at Fuller School. It is the duty of the School District to carry the spirit as well as the letter of the mediated agreement of March 30, 2005 through to benefit this Student's future education and to ensure that counseling continues along with educationally useful extended year services. Parents are free to enroll the Student elsewhere but they cannot compel Keene School District to enroll Student in Crotched Mountain given that the School District is offering Student services in the Fuller School and the Fuller Communication Disorders Collaborative specifically tailored to Student's needs and reasonably calculated to provide Student with a free and appropriate public education. The School District prevails in this matter.

**So ordered .**

Dated: March 15, 2006 \_\_\_\_\_  
Gail C. Morrison, Hearing Officer

**Appeal Rights**

If either party is aggrieved by the Decision of the Hearing Officer set forth above, that party may appeal this decision to a court of appropriate jurisdiction. The Parents have the right to a transcription of the proceedings. The District shall notify the Commissioner of Education should either party seek judicial review of this decision.

**Statement of Compliance with Rule Ed 1128.10 (b).**

If neither party appeals this Decision to a court, then the District shall, within 90 days, provide the Commissioner of Education, the Hearing Officer and the Parents 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 to the Commissioner of Education on the implementation of the Decision.