STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

IDPH-FY -07-09-0015 / Sanborn Regional
School District

Decision of the Hearing Officer

Procedural Background

On September 11,2006, the Department of Education, Office of Legislation and Hearings received the Parents' request for a due process hearing on the issues of placement and reimbursement for tuition for a unilateral placement and on the issue of the Student's IEP. After the scheduling notice was sent and after a substantial delay requested by the Parents, a pre-hearing conference was held on … and a pre-hearing report and order was issued that day. Exhibits were received timely via mail in preparation for the hearing.

The Sanborn Regional School District (School District) forwarded a Motion for Summary Judgment dated …. Parents' response was dated …. The Motion was denied on … and a four-day hearing commenced … and was concluded on …. Post-hearing submissions were received from the parties.

Hearing

At the hearing, the Parents were represented by Peter Smith, Esq. and the School District was represented by Katherine Bubar, Esq. School District exhibits … were received into evidence and included signed affidavits from witnesses covering background information and the outlines of testimony. Parents' exhibits … were accepted as evidence and included witnesses' resumes. Jackie Teague was present assisting the Parents who presented eight witnesses. Much of the Parents testimony was taken telephonically from witnesses in …*(other states)*. The School District presented five witnesses from the School District who testified over the last days of the hearing.

Issues

1. Parents seek payment for schooling at ..., a private residential high school accredited for special education in ..., for a period beginning on ... and continuing to the present. Parents contend that placement was made to provide the Student with appropriate schooling whereas the School District's placement would not have allowed the Student the opportunity for an appropriate education.
2. Parents assert procedural violations stating that the Director of Student Services informed Parents by letter, prior to completion of the IEP, that the School District had decided to place Student in district and that an out of district placement would not be considered, and, in further violation, the Director of Student Services made

a unilateral placement decision without input from the entire IEP team, which is required to include Parents.

3. Parents charge that the School District's refusal to engage in meaningful discussion in August 2006 on the subject of goals, objectives and services to be provided for the Student and the refusal of the Director of Student Services to meet with Parents in regards to the Student's IEP, despite repeated requests, and refusal to recognize Parents role as team members constitute procedural violations.
4. The refusal of the School District to give Parent a copy of the IEP at the meeting of May .., 2007, and before the meeting of May ..., 2007, constitutes a separate procedural violation.

The School District has refused reimbursement for the private placement saying that the notice requirements for removal of Student from the School District were not met. Further, the School District asserts that the Student was removed for treatment of a … problem and not for educational reasons and that Student was succeeding educationally under … IEP at Sanborn Regional schools and so was receiving a FAPE.

Factual Background

Student is a 9 grade …, who had received special education in the School District throughout … public school career until … Parents unilaterally placed … in a therapeutic residential school at the end of … eighth grade year on …. This immediately followed … attendance at a therapeutic wilderness program in … beginning …, for which no reimbursement is sought.

Throughout Student's early years, … IEP team recognized the diagnosis of ADHD and Student was coded other health impaired (OHI) until recently. Testimony and the record illustrate that student showed signs of depression, anxiety, low self esteem as well as lack of focus and disruptive, defiant behavior in school and at home. Early on, the use of a behavior plan was recommended. Medical reports and educational evaluations pointed to the need for further evaluation to rule out other problems such as emotional disturbance as an additional coding.

In the sixth grade, Student's behavior had worsened both at home and in school. … A basic behavior plan was instituted for the first time that year and, on recommendation of the school psychologist who did Student's three-year evaluations, a secondary code of emotional disturbed was added. The School District did not arrange for a psychiatric evaluation.

Reviewing … three year evaluation reports …, it appears parents were led or allowed to believe that financial responsibility for investigating any psychiatric involvement was strictly their own and not the School's. Testimony and records show Parents were advised to seek help at their own expense as illustrated by the report of school psychologist, Michelle White. In suggesting a psychiatric consult, White informed that she found many characteristics consistent with a

DSM-IV diagnosis of depressive or anxiety disorder. *!d.* at 270. An additional and secondary coding of serious emotional disturbance was added that year.

The School District views the sixth grade year as an aberration from which Student recovered. Over the course of the year, the most obvious bizarre in-school behaviors were controlled but in other settings Student's behavior continued to worsen resulting in hospitalizations, … and violence against other persons, …. However, Student was not failing in …academic classes. Student is bright and was called clever. Student was accomplishing generally average grades and testimony by … teachers was that Student was succeeding. However, attendance at school worsened and tardiness became chronic in the seventh and eighth years.

IEP meeting notes…, warn that Student was beginning to isolate …self at school and this was said to interfere with learning. Student became obsessed with violence and, in class, was observed to mumble while making drawings depicting violent subjects. *Id.* Again, despite … hospitalizations … as well as continued worrisome behavior, the School District pursued no deeper inquiries into causation. At the same time, Parents did seek psychiatric help for Student on their own.

An encounter with the law in early … involving … proved the straw that broke the camel's back. Student's Mother attested that Parents sought emergency help in the form of an educational consultant, to find a "boot-camp" type of program to "shake" Student out of these behaviors. Notes of an IEP Placement meeting …, confirm that Mother told School District personnel of her intention to enroll Student in a treatment facility. Reasons stated in the notes …. Student entered the...Wilderness Program in … on ….

Parents had intended Student to return home after the six or eight weeks of the wilderness program. Professionals who had worked with Student in … advised it would be detrimental for … to return home and recommended that … continue in a residential program to work on … emotional growth. Student was responding and it was feared Student would lose what had been learned. Parents conferred with School District and two team meetings were held … and letters were exchanged about Student’s IEP and this placement. Student was transported to a therapeutic residential school, …in …on ….

Discussion

Parents brought this request for a due process hearing under the Individuals with Disabilities Education Act (IDEA) as amended, *20 Us.* C. *section 1400, et seq.* Parents seek to prove that they were justified in removing Student from the School District and

followed procedures so entitling them to an order that the School District reimburse them for tuition from ... and continuing while Student finishes the positive peer culture program in which he participates at ...High School, a school accredited for special education by *(other state).*

IDEA provides that every child identified as eligible under this chapter shall receive a free and appropriate public education (FAPE). *20 USC. section 1400 (d)(I)(A).* School districts must create an individualized education program (IEP) to meet the needs of the disabled child employing IEP teams in which parents have a part, Section 1414(d). A parent who challenges the School District in any part of this process may request an impartial due process hearing, Section 1415(f). In such a hearing, it is the parents, as plaintiffs, who must persuade on the essential aspects of their claim. *Shaffer* v. *Weast,* 126 S. Ct. 528, 534 (2005).

The School District argues that Parents' recovery is barred because the Parents did not provide notice to the School District when they removed Student from the School District to place him in a private facility, when Student was sent to the program in ... on .... The lack of standing to seek tuition reimbursement was the primary basis of the Motion for Summary Judgment that was denied on January ..., 2007. And, it is true that in such a case of removal, the first determination for parental reimbursement is whether the notice requirement has been met. *20 USC. section 1412(a)(10)(C).*

Parents' respond that removal, as referred to by the Act, did not occur until ... 2006, when Student began at High School and that removal was done in the manner prescribed.

Indeed, it was the decision to place Student at High School in ..., not the enrollment in the wilderness program in March, that constituted removal for special education purposes and it is for the period at High School beginning June ...,2006 and continuing, that Parents seek reimbursement. The stay at the ... facility is understood to be more in the nature of a hospital stay, an emergency intervention, rather than a removal to a private school. Parents knew the ... stay was temporary and planned to bring Student home to New Hampshire at the end of the six to eight week program, though they had been told that it might not be possible.

It is true that the Mother had complained to the School District of fears that the IEP was inadequate for social emotional reasons at a team meeting of February ...,2006, and had suggested that they might seek a long-term change in placement if advised by those providing intervention for Student.

By letter of May ...,2006, the first of two letters on the subject to the School District, Parents notified Jennifer Pomykato, the School District's Director of Student Services, that Student required education at a therapeutic residential school and invited the School District's input. The first letter states, "This letter is to inform you of our intention to seek a therapeutic residential placement for [Student.] We are looking forward to working with our school district to determine an appropriate therapeutic

residential placement." While in ..., Louise Vaughn, a psychologist, served at Student's counselor. Testimony from Louise Vaughn, NCC, of ...Wilderness Program was that Student would be harmed by returning to ... home and school in June 2006. Her testimony is supported by records from ...Wilderness Program in ....

Ms. Pomykato replied to the Parents by letter ..., acknowledging that the Parents' "... seek a therapeutic residential placement *at the district's expense."* (Italics added), and informing them, that "it is the school district's intent to propose placement within Sanborn Regional School District." The School District's letter notified Parents of an IEP meeting to be held on May ..., 2006, that they may attend to see what ... IEP team has proposed for Student. At about that time, Pomykato arranged an evaluation of Student in ...but it did not occur before Student left for *(other state).* On June ..., 2006 because of a conflict in the examiner's schedule. The School District's evaluation has yet to occur.

Notes from an IEP meeting of May ..., 2006 indicate that Parents doubt the proposal's adequacy to meet Student's needs. Parents' letter dated May ...,2006 notified the School District more formally of the upcoming intended placement and invited cooperation, including a suggestion of a preferred alternative placement.

Also, addressed in Parents' testimony and in Parents' letter of May ..., 2006, they complain that Student's Mother had asked and had been refused a copy of the IEP that had been available in a stack at the meeting of May ...,2006. This was confirmed by testimony of Jennifer Pomykato. Also, in the May ..., 2006 letter, Parents protested that they had not been provided a copy of the IEP proposed by the School District in advance, even though it was intended for approval on May ..., 2006. Parents did not sign the IEP at that meeting.

Parents were notified by the ... Wilderness Program, as reflected in the report of staff psychologist, Louise Vaughn, who had worked with Student for 24 hours per week in the ... program, that Student's prognosis for social and emotional progress was poor without substantial therapeutic intervention. She recommended a positive peer culture model rather than a rewards and punishment based plan, which she said would have little effect. *Id.* p75. It was advised that it would be unwise to return Student to ...home for even a short time but that ... should be transported directly to a residential placement because of the seriousness of ... condition. Student’s stay in the ... facility could be no longer than June ..., 2006.

There is sufficient evidence that the School District had actual notice of Parents' intentions plans to remove Student from the proposed placement and that notice confirmation is in the form of the IEP meeting notes and Parents' letters of May ... Also, Jennifer Pomykato's letter of May ..., 2006, could not be clearer as to her knowledge that Parents were seeking the private therapeutic placement at the District's expense. The treatment records, and testimony from psychologist Louise Vaughn, NCC, of ... Wilderness Program and testimony of Amy Bernardi, Psy.D., High School, show Parents can rely on exception to formal notice allowed the by the Act when immediate removal is needed to avoid serious harm to the Student. 20 U.S.C. section *1412(a)(10)(C)(iv).*

The requirements of IDEA have been met on the matter of notice. First, removal met legal requirements because Parents had given written notice well in advance of removal by letter of May ..., 2006, and then again on May ..., 2006, *20 USC. section 1412(a)(10)(C)(iii)(I)(aa),* and, second, because of the exception to the notice requirement found at *section 1412(a)(10)(C)(iv)(II)(bb),* applicable when requiring compliance would result in severe emotional harm to the Student.

IDEA allows reimbursement to Parents who undertake unilateral placement and demonstrate that their private school placement, rather than that of the IEP, is the proper placement under the IDEA. *School Committee of Burlington* v. *Department of Education,* 471 U.S. 359,369 (1985). When Parents remove a child without approval of the local or state officials, they subject themselves to financial risk. *Burlington,* 471 U.S. at 373-74. They must persuade that the public placement violated IDEA and that the private placement comports with the Act.

When Parents remove a child without agreement of the School District and then seek reimbursement for tuition paid, they must first demonstrate that the program offered by the School District is not calculated to provide a free and appropriate education (FAPE) to meet the unique needs of the Student in question as articulated in *Board of Education, Hendrick Hudson Central School District* v. *Rowley,* 458 U.S. 176 (1982) and second, "that the private placement is appropriate" for the particular student. To show that the School District's proposal violated IDEA, the Parents must convince, first, that the School District did not follow the procedures of the Act and, second, that the School District's actions deprived Student of a free and appropriate education (F APE). *Rowley,* 458 U.S. 176, 206-7.

On the first procedural matter, the Parents are convincing that they were deprived of an opportunity to meaningfully participate in the development of Student's IEP when they were denied access to the IEP available at the May ..., 2006, meeting and that they did not receive the IEP until the May ..., 2006 meeting. By the time they received the IEP, it was complete and even placement had been decided by school personnel and waited Parents' approval at the meeting. There was simply no consideration of any but the internally developed IEP and placement "within Sanborn Regional School District." However, Parent delayed signing in order to more completely review the document. The failure to allow participation by the Parents in the IEP procedure did have a material and deleterious effect on the outcome. *Lenn* v. *Portland School Committee,* 998 F2d 1083, 1088 (1st Cir. 1993).

On the second and substantive question of whether FAPE has been provided, the Parents ask that we examine the meanings of the words "education" and "appropriate" because the crux of this dispute is the parties' differing views of what constitutes education for purposes of IDEA and so what is appropriate under the definition. The Parents contend that the School District's definition is too narrow for purposes of IDEA; that the meaning

of education is to be broadly construed looking beyond the academic to the whole child. The School District's words, actions and argument are consistent with a narrow definition of education that equates academics with education. Under such a definition, a bright student getting average or passing grades is succeeding educationally despite obvious social and emotional difficulties.

In this case, School District has not readily pursued to remedy the whole child but has viewed its responsibility as limited and this is illustrated by its choice not to inquire into causation for isolating and other behaviors and not to give Student a primary code of serious emotional disturbance until just before his departure for ....

Yet, an IEP must be a package that must target "all of a child's special needs," *Lenn,* 998 F2d at 1089 quoting *Town of Burlington* v. *Department of Education,* 736 F.2d 773, 778 (lstCir. 1984), whether they be academic, physical, emotional or social. *Id.* citing *Roland M* v. *Concord School Committee,* 910 F.2d 983,992 (lstCir 1990). Purely academic progress is not the only indicator of educational benefit implicated by IDEA. *!d.* citing *Roland M.* at 992. IDEA services need not address problems truly distinct from learning problems, such as an independent ... problem, but it does not follow that a child without academic needs is per se ineligible for IDEA benefits. *Mr. I and Mrs. I* v. *Maine School Administrative District No.* 55, _F.3d- (lst Cir. March 5, 2007).

In light of the above, this child's education must include services to address ... serious emotional disturbance and secondary problems ..., inappropriate problem solving and disruptiveness. Testimony of Amy Bernardi, Clinical Psychologist, High School. The treatment plan drawn up by High School lists Student's diagnoses as
major depressive disorder, oppositional defiant disorder, ... abuse, attention deficit disorder, mathmatics disorder (historical) and parent-child relational problem. The School District has failed to address social and emotional needs to any degree and the IEP proposed in the traditional day school setting is not sufficient for this at-risk child with multi-layered, long-standing issues. *Id.*

The emphasis at High School is on the behavioral and students are immersed in group interaction and problem solving through which Student is making progress dealing with ... many issues including lack of self-acceptance and lack of confidence, impulsiveness and disruptiveness and it is expected that ... will be able to return home in a few months. Testimony of Dale Parker, Executive Director, High School. A review of the many information packed pages of minutes of the Team meeting of May ...,2007, and the resulting IEP prepared for Student for the upcoming year, attest that most of this child's unique needs have been discounted or not addressed appropriately by the School District. The School District protests that Student's academic needs are not being met at High School but it is clear that this is a temporary remedial program that provides critical elements missing from the public school offering and all needs not be addressed in an appropriate placement chosen by Parents as an alternative placement. *Mr. and Mrs. I* _F.3d _(1 st Cir. March 7, 2007).

School District reminds us that IDEA does not require that the perfect program be provided for Students identified through IDEA, rather, a program reasonably calculated to allow some benefit is required. *Rowley*, 458 U.S. 176,206-7. Because the School District did not acknowledge and act on the nature and severity of Student's problem, it could not prepare an IEP that would have allowed benefit in the social and emotional aspects of Student's life that had been so long neglected. Looking at the plethora of evidence presented by the Parents including Jennifer Pomykato's testimony regarding her belief that Student left the District to receive ... treatment, along with the ... IEP notes of worsening behaviors discussed as truancy, absences, isolation from other students and obsession with violence that interfere with Student's education, and Michelle White's testimony about her findings and earlier referenced opinion that Parents are responsible for evaluation and treatments for conditions resulting from Student's emotional disability, one is not reassured that FAPE could be expected had Student remained in District in June 2006.

Decision

The Parents have met their burden in this matter and they prevail. They have demonstrated that the School District has not followed the procedures of the IDEA and in ways material to the outcome. Student has been denied FAPE. The most recent IEP and placement offered by the School District lacked the potential to provide services made necessary by Student's severe emotional disability.

ORDER

The School District is required to provide reimbursement for Student's tuition and related expenses for the Student's approximately one year of schooling at High School beginning on June ..., 2006 and continuing.

So ordered.

Dated: May 21, 2007

Gail C. Morrison, Hearing Officer

Appeal Rights under Rule 1128.20

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 competent 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 1128.22(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. It 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.