

**STATE OF NEW HAMPSHIRE
STATE DEPARTMENT OF EDUCATION**

Student /... Regional School District
IDPH-FY-08-11-035

DECISION

I. INTRODUCTION

On November 30, 2007 the Regional School District ("District") filed for due process on the issue of placement stating that Parents ("Parents") unilaterally placed Student at ... for the 2007-08 school year and were seeking tuition reimbursement from the District. The District claimed Parent did not provide notice required by 34 CFR Section 300.148 for reimbursement. The District's position is that the Middle School ("Middle School"), the agreed upon placement in the student's 2007-08 IEP, is the least restrictive environment and is appropriate for the student. The District seeks a determination that placement at the Middle School is appropriate.

At the pre-hearing conference on January 3, 2008 the District filed two motions alleging procedural violations. In its Written Statement District claimed that parents were "estopped from raising any claims for reimbursement, the statute of limitations for said claim having run." In a Pre-Hearing Order the Hearing Officer determined that she would hear evidence on the issue of proper notice. If parents were given proper notice by the District, any request by parents for reimbursement at this time would be barred by the 90- day statute of limitations as required by NH RSA 186-C:16(b)(11). If parents were not given proper notice by the District of both the type of placement at issue here (unilateral) and the statute of limitations bar, the hearing officer will order that the statute of limitations "shall run from the time notice of those rights is properly given." NH RSA 186-C:16-b(III). The District also filed a Motion for Entry of Judgment in Favor of the District alleging that Parents failed to file a response to the District's request for due process within ten (10) days and that judgment in favor of the District was appropriate.

District filed a Motion for Ruling on the Burden of Proof . Citing *Shaffer v. Weast*, 44 IDELR 150 (U.S. 2005), where the Court held the burden of persuasion was on the party challenging the IEP, District argued that because Parents sought to change the agreed upon placement , the burden of proof as to the appropriateness of the placement rests with Parents. The Hearing Officer granted District's Motion and ordered that Parents bear the burden of proof as to whether the district's proposed placement was reasonably calculated to provide the student with FAPE in the least restrictive environment. See 34 CFR § 300.114 and 34 CFR § 300.115.

On January 18, 2008 District filed a Motion in Limine seeking to exclude from hearing any evidence regarding the appropriateness of the Student's identified disability. Student has a primary identification of a speech and language disability and a secondary identification of Orthopedic Impairment. Parents sought to include evidence that Student should be identified with Attention Deficit Hyperactivity

Disorder (“ADHD”) and Non-Verbal Learning Disability (“NVLD”). At hearing, the Hearing Officer agreed to hear evidence with regard to whether the district received and considered any outside evaluations that diagnosed Student with ADHD or NVLD, only, because this evidence might have bearing on the Hearing Officer’s determination of whether the district provided the Student with FAPE. For the record, District disagreed with the inclusion of this evidence and preserved this issue for appeal.

II. DISCUSSION

Student is an 11 year old ... who has been diagnosed with ... Student’s current IEP (6/11/07-6/11/08) states she is “significantly language impaired. She struggles to understand written and oral language...[She] works on grade level for all academics except for reading comprehension.” (SD Ex. 11) In the “Consideration of Special Factors” (Id.) it is noted that Student’s behaviors do not impede her learning or that of others and that she requires “consultation by OT and PT staff to make sure her access to the building is assured, her seating is appropriate and accommodations are in place to allow her sensory breaks during class.” (Id.) Her current IEP includes three goals: Reading, Writing and Speech and Language. (Id.) The IEP provides for Speech and Language (Group 2x30/per week) and consultation with the Speech Pathologist (1x30/ month.) (Id.) The IEP includes Modified Curriculum (5x45) throughout the day. (Id.) Student’s Present Functional Performance in Reading states: “[Student’s] ability to focus is a significant factor in her academic success.” (Id.) Her Present Level of Academic Achievement in writing states: “[Student’s] language processing difficulties make staying on topic, writing succinct topic and summary statements and using paragraphs to format her pieces very difficult.” (Id.)

A review of Student evaluations indicates some progress. The Hearing Officer notes that the Student’s NECAP scores remained in the “substantially below proficient” range for both Fall 2005 and Fall 2006. In Fall 2005 she scored: Reading (424) and Math (425). (SD Ex. 90) In Fall 2006 she scored: Reading (524), Math (522) and Writing (523). (SD Ex. 64) On the WISC-IV Student showed a full scale IQ of 81 in 2004 and 84 in 2007 (SD Ex. 42). The WIAT-II scores were somewhat mixed, where Student’s Word Reading Score declined from 92 in 2001 to 94 in 2007 and her Reading Comprehension Score stayed constant at 88 but her Pseudo word Score increased from 85 to 89 and her Written Expression score increased from 89 to 99 between the two evaluations, all scores normed for age level. (P Ex. 27) Student’s Gates – MacGinitie Reading Score in Grade Five increased by 8 months from a 3.2 grade level equivalent on September 6, 2006 (SD Ex. 102) to 4.0 on May 8, 2007. (SD Ex. 101)

Parents state that Student has been diagnosed with ADHD and NVLD; that they shared a May 2005 independent educational evaluation with the District; and that the District failed to consider this diagnosis in the Student’s IEP. District states it never received a copy of this evaluation.

Parents presented their case first. (Note: One Parent prepared for and presented Parents’ case for hearing, therefore “Parent” is noted throughout the remainder of this order.) Parent’s first witness was ..., School Principal (“Principal”). Principal stated she was not aware of any evaluation indicating that student had been diagnosed with ADHD or NVLD. She stated that, at the beginning of fourth grade

(Student was later retained in third grade that year) Student was having behavioral difficulties; that she created a "Student Success Plan" for Student and that Student's behaviors subsequently improved. She stated that Student has made many academic gains and that there have been problems with Student not handing in homework and not acknowledging her responsibility when issues arise.

Parent's next witness was ..., Director of Special Education ("Director") for the District. Director stated she participated at Team Meetings held on October 7, 2007 and October 24, 2007. She stated she has never worked with or observed Student. Director testified that she believes placement at the Middle School is appropriate because Student would be receiving speech and language services in the classroom; the 6th grade building is separate from the larger building and the program is a structured setting. Director stated she did not see a May 2005 evaluation from Dr. ... diagnosing student with ADHD and NVLD and that she had compiled a list of evaluations that District had in student's file which she mailed to parents in a letter during November 2007. She stated the District did not receive a copy of the evaluation directly from Dr. ... and that the District's policy is to send any reports they receive from an outside evaluator to parents. On cross examination, Director read an excerpt from a report from Dr. ... from 5/19/06 stating that Student was "well adjusted in school." (D Ex. 152)

Parent's third witness was ..., Physical Therapist, who participated via conference call. She stated she has worked with Student since 10/15/01 and that currently she provides 1:1 treatment for Student with hands-on manual physical therapy. She stated Tracy Hanson (Student's teacher at unilateral placement at Bryant Academy) has observed one of Student's PT sessions and implements some PT strategies in Student's current school program.

Students' current teacher at ... Academy was Parent's next witness. She stated that there are three students at ... Academy and that students work on a self-paced computer curriculum. She also works with the students on an individual basis. She stated students are learning to advocate for themselves and they engage in many outside activities. She also stated they are working on social skills and manners. She stated Student scored not too far below the 6th grade level in Key Math but "there were gaps." According to her, Student is comfortable in the environment at ... and enjoys school. On cross examination, she stated that Student is not receiving Speech and Language Services and that in her opinion student doesn't need these services. She stated that at the present time there are no regular education students at ... Academy.

The Director of ... Academy, was the next witness for the Parents. He stated he met Student in August 2007 and that she attended the ... Academy summer program. He testified that ... Academy is a New Hampshire Department of Education fully certified Special Education school although he stated the school anticipates they will be including regular education students in their program.

Student's special education teacher in the district was Parent's next witness. She has been Student's case manager since Student was in Kindergarten. She also provided direct instruction for the student during her fifth grade year. She stated she believed student made adequate progress in district.

The School Guidance Counselor, was the Parent's next witness. She described Student's behavior as one who made up stories and who could hurt other children's feelings. She stated that she had called home in the past when she had concerns about Student's behavior. On cross examination, she stated that she provided counseling for Student on an "as needed" basis because there were periods of time when the Student had no behavioral issues. She stated that it was better to take care of behavioral issues immediately when they arose. (SD Ex. 35) When questioned about the appropriateness of the Middle School program, she stated she believed Student's IEP could be implemented successfully as student was in a small class. She stated Student showed progress in both the reading and math sections of the NECAP. On redirect, she indicated that she only looks a special education records for Team meetings and generally does not have access to them. She stated she was not aware that Parents had given the district an independent education evaluation diagnosing student with ADHD and NVLD. When questioned about the student's IEP with regard to a reference to student's behavioral issues, (P Ex. 29) she stated that in her view student did not require a behavior plan in her current IEP.

Dr. ...,a pediatrician at the Dartmouth-Hitchcock Medical Center, was the Parent's final witness. In his testimony, he made references to a cognitive evaluation completed by Dr. ... in May 2005. He stated that Student achieved low average to average scores in non-verbal reasoning and below average performance in recognizing similarities. He stated Dr. ... (evaluating physician) diagnosed Student with ADHD and that evaluating physician recommended Student be treated and educated as a child with difficulty processing language. He testified that the May 2005 evaluation stated the "district should consider ADHD." (P Ex. 18) Dr. Kaplan stated that when an evaluation report is complete the protocol is to send a copy of the report to the primary care provider and two copies of the report to the parent so that the parent may give one copy to the school. On cross-examination Dr. ... suggested Student did not require academic placement in a resource room.

The first witness for the District was ..., the district's School Psychologist ("Psychologist"). She stated that she administered cognitive and academic evaluations to Student (the WISC -IV and the WIAT-II) for her IEP re-evaluation meeting on May 11, 2007. (SD Ex. 42) She stated that Student had made progress on the WIAT-II commensurate with her same aged peers from the last time it was administered to Student in 2004. She stated that the evaluations indicated Student was performing at her expected ability level. On cross-examination, Parent introduced several exhibits that included Parent's concerns and desires for a behavioral assessment for student. Parent also questioned the witness about behavioral issues as noted in student's IEP. In response, Psychologist stated that she does not attend all student IEP Team meetings but typically only attends meetings where she is presenting student evaluations. When questioned about a behavioral observation completed by district guidance counselor, Psychologist stated that no other behavioral testing had been recommended by the Team.

A district sixth grade teacher was the next witness for the district. She has taught for 25 years and would have been Student's sixth grade teacher at the Middle school. She stated there are two sixth grade classrooms in the school; that students are placed in heterogeneous homerooms and there are two classroom teachers and one aide. There are currently 24 students in the sixth grade. She stated she would have placed Student in the Connected Math Program (with nine children) and that Student would

have received reading instruction from the District's other sixth grade teacher, ..., with a group of 11 students, including two seventh graders. she stated she believed she would be able to provide all of the accommodations listed for student on her current IEP. (SD Ex 11). On cross-examination, parent asked whether the reading curriculum was being modified for student [IEP indicates that parent did not want the curriculum modified.] (Id.) She stated it was not.

The District's other sixth grade teacher was District's next witness. She stated she has taught at the middle school for ten years. She is Student's neighbor. She stated that Student attended a summer math program with her during the summer of 2007 and that Student enjoyed the program. She was assigned to be Student's reading teacher at the middle school. She stated that she believes the middle school could meet student's needs and provide the accommodations listed in her IEP. She also stated that the 6th grade teachers have been given a duty-free lunch so they can help students during that time and that a morning homework club is also available to student. On cross-examination, she stated that three students in the sixth grade are on IEPs and that she (Ms. Ferreira) is trained in Wilson Reading and GLAS analysis. On re-direct, she indicated that Student does not work at grade level in reading comprehension.

Student's fifth grade teacher, was the District's next witness. She has taught for 35 years. She stated there were twelve students in Student's fifth grade classroom and that Student was taught a fifth grade curriculum. She testified that she taught Student Language Arts, Math, Social Studies, Science and Penmanship. She stated that Student had Daily Oral Language (DOL) instruction for part of the year and that Student completed the DOL program at the 5th grade level. She stated that except for reading (Student was in Mrs. ... reading group) Student had the same assignments as other students in the fifth grade. (SD Ex. 107) She also stated that Student did not have a modified curriculum. (SD Ex. 22) She stated that Student had inconsistent work habits and that homework was not always completed. She testified that she discussed the homework issue with Parents throughout the course of the year. (SD Ex. 174) She also stated that Parents did not sign Student's assignment book consistently and that she wanted the book signed so that everyone would know about work Student had not completed. (P Ex. 64) Ms. Berg commented on numerous pages of Student's work (SD Ex 217) and stated that Student's work product/grades were inconsistent but that Student seemed to do better work when she completed her homework. She stated that she believed Student made progress in the regular fifth grade classroom and that she received meaningful educational benefit. She also stated that she believed the Middle School is the appropriate placement for Student and that peers were important to Student. (SD Ex. 15) On cross-examination she stated she believed Parents were not always on top of Student's work. (SD Ex. 62) When asked by Parent if she (fifth grade teacher) ever called her with concerns regarding Student's work, she stated that she wrote notes to Parents in Student's assignment book. When asked about a meeting on January 31, 2007 when Parent brought behavioral issues to fifth grade teacher's attention, she stated that she recalled Student was not paying attention during instructional time and that she drew on another student's paper.

Students in-district special education teacher testified for the District, having previously testified as a Parent witness. She stated she has known Student since she was in Kindergarten. She stated she taught

Student's fifth grade reading group in the resource room and there were two-three students in the reading group. She testified that at the Team Meeting on January 31, 2007 she saw "Areas of Concern" section but that she did not see the "Parent Suggestions" addendum Parent states she presented at the meeting. (SD Ex. 112). The "Parent Suggestions" addendum stated Parent's concerns regarding students ADHD and behavioral issues. She testified that Student's grades in reading were inconsistent and when she asked Student why she didn't understand the reading, Student often stated she had not done her reading homework. (SD Ex. 220). The District presented as evidence special education teacher's grade roster that included dates the Student was missing her homework. (SD Ex. 110). She stated that she believed Student made at least one year's progress in reading during fifth grade and that Student's instructional level was between mid-fourth and mid-fifth grade. She stated that although Student would be in a larger reading group at the Middle School, speech and language services would be provided during Student's reading group to help Student with comprehension and language processing. She stated that she believes the IEP can be implemented at the Middle School. She stated that, without speech and language services at ... Academy, Student's current, signed IEP could not be implemented there. On cross-examination, Parent questioned her about Student's behavior. She stated she believed Student's behavioral issues were often related to the inconsistency of Student's completion of homework and that, within the small group, it was easy to redirect Student's attention.

The District's Student Services Coordinator was the District's next witness. For the record, she attested that she was present throughout the hearing and had heard all of the testimony. She testified that she did not attend all of Student's IEP meetings but she attended Student's placement meetings on August 28, 2007 (SD Ex. 8), September 5, 2007 (SD Ex. 4) and October 2, 2007. (SD Ex. 2). She stated her belief that the Middle School placement is appropriate for Student because it is the least restrictive placement where Student would be educated with non-disabled peers; the program is team-taught by regular and special education teachers and Student would be provided with social opportunities that are developmentally appropriate.

III. PROCEDURAL VIOLATIONS

The Hearing Officer is persuaded that the District provided parents with proper notice that Parents' placement of student at ... Academy was a unilateral placement. In a letter dated September 7, 2007, the District's Special Education Director, sent parents a copy of the New Hampshire Procedural Safeguards Handbook highlighting page 22 addressing unilateral placements. (SD Ex. 3) The parents are estopped, therefore, from seeking reimbursement for the student's placement at ... Academy up until November 29, 2007, the date the District filed for due process regarding the appropriateness of student's placement at the Middle School.

The District filed a Motion for Entry of Judgment in favor of District because Parents did not respond to the District's request for due process within ten (10) days. The Hearing Officer acknowledges that Parents committed a procedural violation. The Hearing Officer denied District's Motion, however, because it is not a meritorious claim as compared to the crucial substantive issue of determining whether District's proposed placement for Student at the Middle School is appropriate.

IV. FINDINGS OF FACT AND RULINGS OF LAW

The Hearing Officer grants District's Request for Findings of Fact numbered: 1, 2, 3, 4, 5, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 31, 32, 34, 35, 36, 37, 39, 40, 41, 42, 45, 46, 48, 49, 50, 51, 53, 54, 55, 58, 59, 60, 61, 62, 63, 64, 65, 66.

The Hearing Officer neither grants nor denies District's Request for Findings of Fact numbered: 6, 7, 9, 11, 23, 24, 30, 33, 38, 41, 43, 44, 52, 56, 57.

The Hearing Officer grants District's Request for Rulings of Law numbered: 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30.

The Hearing Officer neither grants nor denies District's Request for Rulings of Law numbered: 1, 2, 5.

V. DECISION

The primary issue at hearing is the appropriateness of the District's proposed placement at the Middle School. In a pre-hearing order, the Hearing Officer, citing *Shaffer v. Weast*, 44 IDELR 150 (U.S. 2005), determined that Parents, in this hearing, bear the burden of proof by a preponderance of the evidence, that the District's proposed placement for student is not appropriate nor reasonably calculated to allow student to receive educational benefit. An IEP, in its implementation, must be "reasonably calculated to enable the child to receive educational benefits." *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 207 (U.S. 1982).

The Hearing Officer, at hearing, determined she would hear testimony regarding student's special needs identification only with regard to whether the district considered the student's independent educational evaluations, and if not, whether their lack of consideration had a potential effect on whether the district had provided the student with FAPE. The Hearing Officer is not persuaded by the testimony at hearing, or by the submitted documents, that the District failed to consider student's identification as the result of an independent educational evaluation. Although there is sufficient evidence that the topic of ADHD and a potential diagnosis of NVLD arose at various Team meetings, the Hearing Officer has reviewed the submitted documents thoroughly and sees no convincing evidence that the District ignored an evaluation they received. The Student's 2006-07 IEP states in the "Emotional/Behavioral Concerns" section to "have Pediatrician rule out ADHD and increase [Student's] socialization outside of school." (SD Ex 67). This statement indicates that a diagnosis of ADHD had not been confirmed and that Parent was to confer with Student's pediatrician regarding ADHD. Parent attended the IEP Team meeting and signed the IEP. Parent has also signed the current 2007-08 IEP indicating the student's primary identification is speech and language impairment with a secondary orthopedic disability.

This decision does not preclude Parents from seeking a change in the student's special needs identification. The Hearing Officer encourages parents to become acquainted with 34 CFR §

300.305(a)(i);(ii) which implicitly expects that Parents will provide any independent educational evaluations to the District for review at a Team meeting. Under IDEA, the District is not required to accept an outside evaluator's diagnosis at the Parent's word, but rather is provided the opportunity to review the evaluation, determine if there are additional evaluations the District would like to perform to determine if Student has ADHD and/or NVLD. The Team (including parents) then determines whether the disability adversely affects the student's educational performance to the extent that student requires an IEP for the disability.

Parents, in this case, bear the burden of persuasion that the District's proposed placement does not offer the student a free and appropriate education (FAPE) in the least restrictive environment (LRE). NH ED 1115.04 describes the continuum of services each LEA must to meet the needs of special needs students, ranging from a student receiving services in a regular classroom with some resource room assistance (least restrictive) to student placement in a full time special class or in a home or hospital program (most restrictive). The District has a legal obligation to place the Student in the least restrictive environment among this continuum See 34 CFR §300.114 and 34 CFR § 300.115. The Team must consider the least restrictive environment requirements in tandem with the requirements that the student be placed in an appropriate program that can implement the student's IEP and meet the student's unique needs. Amann v. Stow, 982 F.2d. 644 (1st Cir. 1992); Town of Burlington v. Department of Education, 736 F.2d 773, 789 (1st Cir. 1

The Hearing Officer is persuaded that the District's placement proposal for the student at the Middle School is reasonably calculated to meet the Student's educational needs and will provide an appropriate education for Student in the least restrictive environment. An IEP, in its implementation, must be "reasonably calculated to enable the child to receive educational benefits." Bd. Of Educ. v. Rowley, 458 U.S. 176, 207 (U.S. 1982). The IDEA and New Hampshire law, however, do not require an IEP to "maximize" a child's educational benefits. Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Circuit, 1993). Federal law does not require that "the benefit conferred reach the highest attainable level or even the level needed to maximize the child's potential. The IDEA contemplates more modest goals and expects that Districts will provide a program that is "sufficient to confer some educational benefit upon the handicapped child." Rowley, 458 U.S. at 200.

The Hearing Officer is persuaded that the district has provided the student with adequate progress, or FAPE in the last three years. A review of Student evaluations indicates some progress. On the WISC-IV the Student showed a full scale IQ of 81 in 2004 and 84 in 2007. The WIAT-II scores were somewhat mixed, where Student's Word Reading Score declined from 92 in 2004 to 91 in 2007 and her Reading Comprehension Score stayed constant at 88 but her Pseudo word Score increased from 85 to 89 and her Written Expression score increased from 89 to 99 between the two evaluations. (Note: all scores are normed for age level.) (P Ex 27, p. 192) Student's Gates-MacGinitie Reading Score in Grade Five increased by 8 months from a 3.2 grade level equivalent on September 6, 2006 (SD Ex. 102) to 4.0 on May 8, 2007. (SD Ex. 101). Student's progress, therefore, was approximately one month improvement in reading for each month of school during fifth grade. The Hearing Officer is persuaded that Student's

increase of 10 points on the WIAT-II score for Written Expression (normed for her age) and the increase in the Gates score during 5th grade indicate Student has received educational benefit in District.

The Hearing Officer has reviewed the Student's IEPs from 2006-07 and 2007-08 and is persuaded that the District, having made significant changes in Student's current IEP, has developed a program and placement for student that is reasonably calculated to enable Student to receive educational benefits. Student's 2006-07 IEP only has one goal in Speech and Language. This goal includes short term language objectives that Student will respond to specific questions, will increase vocabulary, produce grammatically correct sentences and answer sentence completion activities with accuracy. Student's 2007-08 IEP contains three goals (Academic/Reading; Academic/Writing and Speech and Language). These goals include numerous short term objectives to advance Student's skills in processing and comprehending written language, produce an effective written piece with up to three paragraphs ; and, in speech and language, continue to increase Student's vocabulary, word usage and ability to answer specific questions.

The Hearing Officer is persuaded that the student's current IEP will be appropriately implemented at the Middle School. The Middle School is the Least Restrictive environment where Student would be educated with her non-disabled peers. The program is team-taught by regular and special education teachers and is a low student-teacher ratio setting (1:12). Student would receive speech and language services during her reading group where she can receive additional assistance in reading comprehension, language processing and writing. Student would be provided with social opportunities with her non-disabled peers where she can continue to work on successful social interactions.

The Hearing Officer acknowledges that she need not reach a decision regarding the appropriateness of ... Academy as a placement for student but notes that along the continuum, ... Academy would be considered the most restrictive environment for the student as there are only three students in the program and there are no regular education students. The Hearing Officer acknowledges Parents' position that Student is appropriately placed as one of three students at ... Academy where Student works on individualized curricula and receives significant one-to-one instruction from the classroom teacher. ... Academy, however, is not an appropriate placement, as required by 34 CFR §300.114 and 34 CFR §300.115, because Student's current IEP does not indicate student requires placement in the most restrictive environment and because Student is not receiving speech and language services at ... Academy, as required by her current IEP.

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 Parent. If the Parent does not concur with the District's report, the Parent shall submit her own report through the Commission of Education.

SO ORDERED.

Joni S. Reynolds
Hearing Officer
February 11, 2008