

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

**Student/Hillsboro-Deering Cooperative School District
IDPH-FY-08-12-036**

DUE PROCESS DECISION

I. INTRODUCTION

This proceeding was initiated by the Hillsboro-Deering Cooperative School District (“District”) on December 4, 2007. A prehearing conference was held on January 3, 2008. [] (“Student”) is currently attending the day program at Crotched Mountain Rehabilitation Center (“CMRC”) in Greenfield, New Hampshire. The issue in the case was whether the District’s proposed 2007-2008 placement at the Life Skills Program at Hillsboro-Deering High School (“HDHS”) is reasonably calculated to provide the Student with a free appropriate public education (“FAPE”) in the least restrictive environment.

The due process hearing was held on March 6 and 7, 2008¹ at the Hearings Office on Regional Drive in Concord, New Hampshire. The Parents appeared on their own behalf and on behalf of the Student. The District was represented by Attorney Margaret-Ann Moran. Both parties submitted exhibits.² The following witnesses testified credibly: Megan Slater, Student’s former CMRC classroom teacher; Gwen Rumburg, Student’s Occupational Therapist at CMRC; Jane Cummings, Middle School/Out-of-District Special Education Coordinator/Court Liason; Karen Ralph, High School Special Education Building Coordinator; Danielle Bond-Ishak, Speech-Language Pathologist at the middle and high schools; Jill Severino, Occupational Therapist Ana Shackelford, LPN, school nurse at CMRC;³ [], Parent; Dr. Richard Morse, Pediatric Neurologist, Dartmouth-Hitchcock Medical Center;⁴ Candice Garvin, Hillsboro-Deering High School nurse; Shannon Bernier, Life Skills classroom teacher; and Patricia Parenteau, Director of Student Support Services.

II. PROCEDURAL VIOLATIONS

No procedural violations were alleged, and none were found.

III. FACTUAL BACKGROUND

¹ The hearing was originally scheduled for January 17 and 18, 2008, but was rescheduled on motion filed by the Parents.

² Exhibits will be referenced herein as page numbers.

³ Ms. Shackelford’s testimony was taken telephonically.

⁴ Dr. Morse’s testimony was also taken telephonically.

Student is 17 years old, identified as Other Health Impaired, with a secondary code of Autism. Student resides with [] parents in the District. Student has been diagnosed with Lennox-Gestaut Syndrome, which manifests in complex seizure disorder; Student experiences several seizures a week requiring close supervision and wearing of a protective helmet. Student also suffers from dysphagia, a disorder affecting swallowing. Student requires a self-contained, structured program of special education and related services staffed by individuals trained to address Student's medical needs throughout the school day. Student requires an area where [] can remain safe during seizures and for necessary sleep following a seizure.

Prior to moving to the District in November of 2007, the family lived in Henniker, which is part of the John Stark Regional School District. Student attended Henniker schools for grades 1 – 4. For fifth grade, the Henniker team placed Student at CMRC, because there was no in-district self-contained classroom at that time. Testimony of Parenteau. However, Student's return to an in-district program had been contemplated at the time of the CMRC placement, and, in June of 2007, the Henniker team began to discuss Student's return to an in-district program now available at John Stark Regional High School. At the request of the LEA representative, Parent visited the program at John Stark. Testimony of Parent.

In October of 2007, the Parent informed the John Stark Regional School District and the Hillsboro-Deering Cooperative School District that the family would be moving from Henniker into the District. The Parent, believing in the importance of open communication, readily authorized District staff to obtain information regarding the Student.

A transition meeting was held on October 24, 2007, attended by Parent, District staff and the out-of-district coordinator for John Stark Regional School District. On October 29, 2007, a special education/placement team meeting was held to discuss placement for the Student. A second team meeting was held on November 15, 2007 to continue placement discussions. In preparation for Student's enrollment, District staff had gone to CMRC, several times collectively, where they observed Student's program and gathered information from providers. Testimony of Cummings, Bernier, Parenteau, Parent. Those participating in the team meetings were knowledgeable about the Student, the CMRC program and pertinent evaluation data. The District members of the team proposed placement in the Life Skills Program located at HDHS. The team made no changes to Student's CMRC Individual Education Plan ("IEP"), but District team members did believe that it could be successfully implemented at the Life Skills Program.

The Parents disagreed, relying heavily upon a written recommendation from Student's pediatric neurologist, Dr. Brian Kossak, that Student continue to receive educational programming at CMRC; Parents also maintain that the District's proposal was made without sufficient input from CMRC staff or an effective plan for transitioning Student from CMRC to the Life Skills program.

IV. DISCUSSION

In this case, the Parents had the burden of demonstrating that the proposed placement in the Life Skills Program was not reasonably calculated to provide Student with a FAPE and to receive appropriate educational benefit. *See Shaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

The Individuals With Disabilities Education Act (“IDEA”) does not require that the School District provide Student with an IEP and placement that will “maximize” educational potential. *See Board of Education of Hendrick Hudson School District v. Rowley*, 102 S. Ct. 3036, 3048 (1982). Rather, an IEP is “appropriate” if it is “reasonably calculated to enable the child to receive educational benefits”; and was developed in accordance with the procedures required by the Act. *Id.* at 3051. An IEP can provide a FAPE even if it is not “the *only* appropriate choice, or the choice of certain selected experts, or the parents' *first* choice, or even the *best* choice.” *G.D. v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original).

In addition, the IDEA and federal and state special education regulations require that Student be placed in the least restrictive appropriate environment. *See* 20 U.S.C. § 1412(a)(5)(A). Schools must make available a “continuum” of placement options, ranging from mainstream public school placements, through placement in special day schools, residential schools, home instruction and hospital placement. *See* 34 C.F.R. § 300.551(b)(2), 300.552(c), (e), 300.553; Ed. 1115.04(b). If placement in a less restrictive setting can provide an appropriate education, than placement in a more restrictive setting would violate the IDEA's mainstreaming requirements. *See Abrahamson v. Hershman*, 701 F.2d 223, 227 n.7 (1st Cir. 1983).

All witnesses who testified at the hearing had appropriate familiarity with the Student and [] educational needs. District staff had spoken to CMRC providers, reviewed written reports and other data, and testified without reservation that Student's needs could be met in the Life Skills program.⁵ The program is amply staffed with nurses; the classroom teacher and related service providers have relevant certifications and experience to implement Student's IEP. Consistent with the mandate to offer programming in the least restrictive environment, the Life Skills program is close to Student's home and provides opportunity for interaction with non-disabled peers.⁶ The classroom itself contains ample space for Student to lie down during seizures, and places to rest afterwards. A paraprofessional would be assigned to Student at all times. To the extent that transitions present a particular challenge for the Student, the evidence shows that [] has already experienced several transitions, including the move to the District and

⁵ Ms. Bond-Ishak, the speech-language pathologist, initially had reservations about Student's entry into the Life Skills program, but changed her mind after observing Student at CMRC.

⁶ The evidence was inconclusive as to whether Student would actually benefit from such interaction given the nature and extent of [] challenges.

staff changes at CMRC. The proposed transition to the Life Skills program would not and should not be hastily carried out, but rather, carefully planned and implemented.

Dr. Brian Kossak, Student's pediatric neurologist for many years, provided a letter in which he recommends that Student remain at CMRC. Parents understandably feel very strongly that this recommendation should prevail. There is no question as to the extent of Dr. Kossak's experience and familiarity with Student's medical needs. However, Dr. Kossak did not reference Student's IEP, nor did he offer an opinion as to the appropriateness of the Life Skills Program. Therefore, his recommendation must be weighed in that context.⁷ See J.W. v. Contoocook Valley School District, 154 F.Supp. 217 (D.N.H. 2001) (where expert had not visited the program in question and was essentially uninformed about it, less weight could be given to the expert's opinion regarding educational programming).

In sum, the overwhelming weight of the evidence, including testimony by CMRC staff, warrants a conclusion that the Life Skills placement is both appropriate and least restrictive.

V. PROPOSED FINDINGS AND RULINGS

District's proposed findings of fact: Numbers 1 – 12, 14 – 30, 32 – 99, 101- 118 are granted *as written*. All other proposed findings of fact are neither granted nor denied, except that, to the extent that they conflict with this Decision, they are deemed denied.

District's proposed rulings of law: Numbers 1, 2, 4 – 28 are granted *as written*. All other proposed rulings of law are neither granted nor denied, except that, to the extent that they conflict with this Decision, they are deemed denied.

Parents' proposed findings of fact and rulings of law: Parents did file a post-hearing memorandum which appears to be a combination of facts and legal argument. Although the form of the Parents' memorandum is such that I was unable to rule upon specific proposed findings, it was carefully considered and reflected in the main Decision.

VI. PENDING MOTIONS

The Parents and the District have each filed motions for judgment in their favor; in light of the decision and order herein, it is unnecessary to rule on those motions.

VII. CONCLUSION AND ORDER

As noted above, the proposed placement in the Life Skills Program at HDHS is reasonably calculated to provide Student with a FAPE. However, the transition plan, a critical facet of Student's program, has yet to be finalized. Accordingly, within 14 days of the date of this Order, the team will convene to finalize the development of the

⁷ I want to emphasize that this is in no way intended to discount Dr. Kossak's expertise with respect to this Student.

transition plan to be implemented immediately thereafter. Concurrently, the team should modify, as necessary, any other treatment or service plans (such as the seizure plan), determine what, if any, further training is needed for program staff and insure that such training is provided in a timely manner. The team should invite and encourage participation and input from CMRC providers, Student's pediatric neurologist, and other individuals as deemed appropriate by the team. The involvement and advocacy on the part of Student's Parents is highly commendable and is expected to contribute to a successful transition for this Student.

VIII. APPEAL RIGHTS

If either party is aggrieved by the decision of the hearing officer as set forth above, either party may appeal this decision to a court of competent jurisdiction. The Parents have the right to obtain a transcription of the proceedings from the Department of Education. The District shall promptly notify the Commissioner of Education if either party, Parents or District, seeks judicial review of the hearing officer's decision.

So ordered.

Date: March 28, 2008

Amy B. Davidson, Hearing Officer