

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION  
Student./Manchester School District  
IDPH-FY-09-12-020

**DECISION**

**I. INTRODUCTION**

This due process proceeding commenced on November 26, 2008, initiated by Mr. and Mrs. [ ] (“Parents”) on behalf of their [ ] (“Student”).

A prehearing conference was held on January 2, 2009 at the Department of Education Hearings Office on Regional Drive in Concord. The Prehearing Order issued on January 12, 2009 set forth the issues for due process as well as other prehearing matters.

After two continuances, the due process hearing took place on February 17 and 19, 2009. Parents and the Manchester School District (“District”) submitted exhibits in the form of documents and DVD recordings.<sup>1</sup> The Parents had the burden of proof relative to the issues for due process, and presented their case first.

The issues for due process were whether the Parents are entitled to reimbursement for the costs of their unilateral placement of Student at [ ] School in [ ], New Hampshire (“Private School”) for the 2008-2009 school year; b) whether the District failed to implement Student’s IEPs for the 2006-2007 and 2007-2008 school years;<sup>2</sup> and c) whether Student is entitled to compensatory educational services.

The following individuals testified on behalf of the Parents: Parent; [ ], Student’s maternal aunt; [ ], Student’s home health care provider; [ ], Director of the Private School; [ ], Speech-Language Pathologist, who provided home-based and in-school services to Student. The District presented testimony from the following individuals: [ ], Special Education teacher and Student’s teacher for the 2007-2008 school year at Hillside Middle School; [ ], Speech-Language

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<sup>1</sup> References throughout this Decision to documentary exhibits, either the District’s (SD) or the Parent’s (P) are to page numbers.

<sup>2</sup> As to the Parents’ original claims which also included a challenge to the design of the IEPs for these two years, *see* Section VI (A), *infra*.

Pathologist during the 2006-2007 school year; [ ], Student's teacher in the [ ] Program; [ ], Student's Occupational Therapist at Hillside Middle School; [ ], Student's Speech-Language Pathologist during the 2007-2008 school year; [ ], Special Education teacher at Central High School; [ ], Speech-Language Pathologist at Central High School; [ ], consultant; and [ ], the District's Special Education Coordinator.

Post-hearing submissions were filed by both parties.

## **II. PROCEDURAL VIOLATIONS**

In matters alleging a procedural violation, a hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the student, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); *see also* Roland M. v. Concord School Committee, 910 F.2d 983 (1<sup>st</sup> Cir. 1990)..

The Parents first allege that the District failed to evaluate Student in all areas of suspected disability. However, the evidence shows that Student was evaluated on an ongoing basis; specific needs were addressed in a timely and appropriate fashion, and modifications were made to the IEP as necessary. In January of 2007, the team, including the Parent, determined not to conduct a three-year evaluation; the Parent was advised that updated testing could be requested at any time. SD Exhs. 517 – 520.

The second procedural violation alleged by the Parents is that the proposed 2008-2009 placement at the in-district high school was predetermined. To be sure, placement at the High School was addressed early in the year, an acknowledged educational practice. This process unfolded not only without protest from the Parents, but with their active participation. During the spring of 2008, and over the course of several team meetings that took place, Parent visited the ninth grade classroom and spoke with the teacher, and participated in placement discussions at various meetings. Also during this time period, anticipating possible out-of-district placement for ninth grade, Parents began visiting and gathering information about schools such as Lighthouse School as well as the Private School into which Student was ultimately placed. While the process must occur in an orderly fashion, the IDEA is not so rigid as to prohibit a discussion of placement aspects of a student's IEP before other portions are completed.

In any event, neither deprivation of a free appropriate public education ("FAPE") nor impediment to Parents' participation occurred.

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

#### **A. General history**

Student is [ ] years old, and resides with [ ] Parents in the Manchester School District. Student has been diagnosed with [ ], and identified under the educational disability category of [ ]. Student is currently attending a Private School in [ ], New Hampshire, where [ ] was placed by [ ] parents. Student has been receiving special education and related services since preschool.

Student's educational profile has been characterized by a number of challenges due to developmental delays, severe [ ] and [ ]. Among Student's greatest areas of need are communication and acquiring skills for living independently in the community. Student's strengths include eagerness to learn and socialize with [ ] peers as well as ability to learn in a hands-on experiential manner.

Since preschool years, Student has utilized an alternative augmentative communication ("AAC") device manufactured by the DynaVox company, known as the DynaMyte ("Myte"). This device, which enhances expressive communication by means of a touch screen with icons, requires proper training and programming in order to be effectively utilized. Over the years, appropriate use of the Myte has been considered a critical part of Student's programming.

Student attended the [ ] School in Manchester for grades one through five. In fifth grade, Student was in a regular classroom supported by a one-on-one paraprofessional. The communications and AAC specialist hired by the Parents the previous year, also provided direct service and AAC consult in the classroom, at Parents' expense. Student began attending Hillside Middle School for sixth grade during the 2005-2006 school year. This was considered to be a good first year of middle school, including in the area of speech-language. Testimony of [ ].

#### **B. 2006-2007 school year (seventh grade)**

For seventh grade at Hillside Middle School, Student was placed in a self-contained classroom known as Transitional Special Needs ("TSN"). [ ], who worked well with Student in sixth grade, had left, and his position took awhile to fill. Testimony of Parent. The new Speech-Language therapist, [ ], began providing speech-language services to Student in early October of 2006. Testimony of [ ]. According to Parent, Student received none of the group therapy services called for in the IEP, a statement disputed by the speech/language therapist. It appears that Student did miss a significant amount of speech-language services that were not made up at all due to the speech/language therapist's schedule. A team meeting summary in mid-year acknowledged that Student was not getting all of the needed services. SD Exh. 518. A second unit of group therapy was added, but not until March of 2007. The private therapist continued to provide six hours per month of service as required by the IEP. Testimony of [ ]. By the end of the school year, Student demonstrated progress in several

areas as measured by various assessment tools and as indicated by earned grades. Testimony of [ ], [ ]. However, none of the objectives had been mastered, and, based upon a subjective rating scale, Student did not make satisfactory progress in any speech-language objective. P. Exh. 102 – 110; SD Exh. 634.

### **C. 2007-2008 school year (eight grade)**

Student's eight grade IEP was developed and signed on June 19, 2007. Although minimal gains were made in communication skills in seventh grade, service hours were reduced for eight grade for reasons which were unclear.

Student's teacher for eight grade was [ ], who has known Student since preschool. Testimony of Parent, [ ]. Student was also assigned a new speech-language therapist, [ ]. That therapist had limited experience with the Myte, but indicated that s/he used a "total communication" approach which involved other forms of communication. Student's grades for seventh and eight grade indicate significant achievement; according to school staff, those grades reflected what was actually earned. SD Exhs. 593, 634; Testimony of [ ]. In March of the school year, Parents learned that Student's laptop computer, which ran certain programs, had been broken for a good portion of the year. No keyboarding instruction occurred in eight grade. Testimony of Parent, [ ].

According to the private therapist, her interaction with teacher [ ] was positive; the two worked well together facilitating usage of the Myte and coordinating classroom activities, resulting in successes early in the year. The teacher got busier in mid-year with two new students whose needs required additional attention. The parties vehemently dispute the accuracy of the school's speech/language therapist's end-of-year report with respect to Student's use of the Myte and the degree to which goals and objectives were addressed. As with seventh grade, Student's eight grade report card indicates progress in all areas, and testimony of District staff confirmed this. However, a review of the record as a whole leaves considerable uncertainty as to whether, in the area of communication, Student obtained meaningful benefit.

### **D. Proposed 2008-2009 IEP and placement**

The team met on May 30, 2008 to begin work on the 2008-2009 IEP. At that meeting, a draft IEP was developed. The team met again on June 11, 2008 at which time a proposed IEP was offered to the Parents. After that IEP was rejected by the Parents, a series of communications ensued between Parents and school staff in an attempt to address Parents' concerns. Testimony of [ ]. Three additional team meetings took place on August 11, 19 and 29, 2008.<sup>3</sup>

At least as of the May 30, 2008 meeting, Parents were aware that [ ]'s class might be split according to ability. Parents were also aware that the self-contained classroom composition would be different from that which Parent observed in June of 2008.

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<sup>3</sup> It was the District's understanding that, per Parents' request, meetings could not be scheduled in July. Testimony of [ ].

LifeShare, with which the special education coordinator was familiar, was discussed at the August 29, 2008 meeting.

Although the IEP did not specify actual location of community-based activities, there was credible testimony as to the objectives that addressed transition skills. There was discussion of agencies which would provide Student with community opportunities, and this was included in the proposed IEP.

The team met again on August 11, 2008. Parents brought with them to the meeting a list of concerns. SD Exh. 302. Those concerns were addressed at subsequent meetings. At the August 11 meeting, pre-vocational and social goals were added to the IEP. At subsequent meetings, the District offered to conduct a vocational assessment. Testimony of [ ].

The next team meeting, held on August 19, 2008, was lengthy and difficult, leaving the parties feeling frustrated. Testimony of Parent, [ ], [ ]. The team thoroughly reviewed and attempted to address the concerns of Parents and their advocate, but it was not as productive as hoped. It was the special education coordinator's perception that, during the meetings in August, "things went around in circles" which impeded the team's ability to provide things sooner. Testimony of [ ]. Initially, the District indicated that there were insurance issues relative to taking Student into the community; however, that matter was later resolved by offering to contract with an outside agency. Testimony of [ ]. At the August 19 meeting, the Parents gave notice to the team that they would be placing Student at the Private School. Testimony of Parent.

Upon learning of Parents' intent to make a unilateral placement, the school convened another meeting, which was held on August 29, 2008. The IEP that resulted from that meeting was the final proposal, rejected by the Parents.

The discomfort at the meetings notwithstanding, a careful review of the records, including both the Parents' and the Districts' transcribed minutes, reveals that, at each meeting, concerted efforts were made to ascertain and clarify Parents' expressed concerns. The adjustments and additions made to each successive proposed IEP reflect those efforts. By the time the final proposed IEP was presented to the Parents, virtually all of the Parents' requests had been and incorporated into the IEP; the few points of discrepancy (e.g., designation of a Special Education teacher to implement the Life Share services, which was used because of a lack of available choices in the drop-down menu and could have easily been clarified at the meeting) did not constitute fatal flaws in an otherwise appropriate IEP. Transition services, such as self-help and daily living, were embedded in goals and objectives throughout the IEP. Testimony of [ ]; SD Exhs. 99 – 100.

The placement proposed for the 2008-2009 school year is at the in-district school that Student would attend if not disabled. Student would be in a self-contained classroom with numerous opportunities to interact with typically-developing peers throughout the day. Testimony of [ ], [ ]. Staff are qualified to implement Student's IEP goals and

objectives, and have experience with AAC devices such as the Myte. Testimony of [ ]. Student would have opportunities to interact with typically developing peers throughout the day.

#### **E. Private School placement**

On September 3, 2008, Student began attending the Private School on a day basis. Testimony of Parent, [ ]. By report and observation of Parents' witnesses, Student enjoys school, is actively engaged in school and community activities and is making impressive progress. Testimony of Parent, [ ], [ ]. On the other hand, it appeared to the District's classroom teacher after watching a videotape of Student at Private School that Student required more verbal and physical prompts than [ ] had required during eight grade, that [ ] was not being given sufficient processing time, and had less independence. Testimony of [ ].

### **IV. DISCUSSION**

#### **A. Reimbursement issue**

Reimbursement for the costs of a private, unilateral placement is only available to Parents if they can demonstrate that the school district failed to make a FAPE available in a timely manner, and also that the parental placement was proper. *See Florence County School District Four v. Carter*, 510 U.S. 7, (1993) As noted above, the Parents have the burden of persuasion as to both prongs of the test.

When the appropriateness of a school district's action is under review, the action must be reviewed, not in hindsight, but in terms of what was reasonable at the time. *Cf. Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991). Thus, the appropriateness of placement proposals made by the District must be viewed in terms of what was reasonable during the spring and summer of 2008, culminating in a final proposed IEP on August 29, 2008.

The 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 Dist. 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' child's *first* choice, or even the *best* choice." *G.D. v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original).

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).

As to the Parents’ unilateral placement, no single factor is necessarily dispositive in determining whether the parents’ placement is reasonably calculated to enable the student to receive educational benefit. Student’s progress at Private School, in and of itself, does not establish that the private placement is appropriate. *See* Gagliardo v. Arlington Central School District, 489 F.3d 105 (2<sup>nd</sup> Cir. 2007).

A great deal of testimony was presented by Parents’ witnesses regarding Student’s educational progress and positive experiences at Private School; on the other hand, it is clearly not the least restrictive environment in two important respects – it is over an hour’s drive one-way from Student’s home community, and there are no typically-developing peers other than those participating as part of internships and at the recreational center one afternoon a week. In addition, Student’s eight grade providers opined, upon reviewing a video recording of Student in the Private School, that Student was being overly prompted; the teacher did not see Student doing anything that hadn’t already been done in the class at Hillside. Testimony of [ ].

The final proposed IEP presented on August 29, 2008 was reasonably calculated to provide Student with a FAPE. The goals and objectives are appropriate for the Student’s needs and skill levels, and considerable effort was made to incorporate Parents’ requests and address their concerns. As to the request for transition goals and objectives, those were embedded throughout the IEP as appropriate. The IDEA does not require a stand-alone transition plan; rather, the statute contemplates integration of transition services throughout the IEP under applicable components Lessard v. Wilton-Lyndeborough Cooperative School District, et. al., 518 F. 3d 18 (1<sup>st</sup> Cir. 2008). Although fewer service hours in the area of communication were recommended for the first few months of ninth grade, it was clear that those levels would be increase as necessary. Accordingly, the Parents have not shown that the District failed to make FAPE available to Student in a timely manner.

## **B. Compensatory Education claim**

Parents have demonstrated, by a preponderance of the evidence, that over the course of seventh and eight grade, services to Student in the areas of communication were provided in something of a fragmented manner or, in some instances, not at the

level required by the IEP. In eight grade, the malfunctioning of Student's Myte for much of the year was a substantial failure given the importance of the device for Student's communication. As with Student's seventh grade year, there were conflicting accounts of the nature and frequency of communication between the Student's private speech/language therapist and school staff. What does seem apparent is that, when combined with other problems during the year, the communication was not sufficiently consistent to provide Student with meaningful opportunities given the nature and severity of Student's deficits. Fault is not a necessary element for an award of compensation, and no bad faith on the District's part is found.

## **V. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW**

Parents' Proposed Findings of Fact: Each numbered paragraph contains multiple statements/allegations and, as such, can neither be granted nor denied **as written**, except that to the extent that they conflict with this Decision, they are deemed denied.

Parents' Proposed Rulings of Law: neither granted nor denied **as written**, except that to the extent that they conflict with this Decision, they are deemed denied.

District's Proposed Findings of Fact: neither granted nor denied **as written**, except that to the extent that they conflict with this Decision, they are deemed denied.

District's Proposed Rulings of Law: neither granted nor denied **as written** except that, to the extent that they conflict with this Decision, they are deemed denied.

## **VI. PENDING MOTIONS**

### **A. District's Motion *in limine* relative to excluding evidence as to design of 2006-2007 and 2007-2008 IEPs.**

There is no dispute as to the Parents' agreement with the 2006-2007 and 2007-2008 IEPs, and no evidence to the contrary was adduced at the hearing. Accordingly, the motion is granted. The IEPs are deemed to be appropriate as written, and the only issue is implementation.

### **B. Parents' and District's Objection to testimony and documentary evidence**

Both parties filed objections to proposed witnesses and exhibits of the other party. All evidence relative to the period of time prior to November 26, 2006 is considered for historical purposes only. The remaining objections are denied; documents and testimony are admitted and have been given such weight as is deemed appropriate.

### **C. District's motion to reconsider**

As no new information is contained in this motion, it is denied.

## **VII. CONCLUSION AND ORDER**

For the reasons set forth above, I find that:

- a) The Parents have not met their burden of demonstrating that the District failed to provide Student with a FAPE in a timely manner prior to their unilateral placement;
- b) Except as set forth below, the Parents are not entitled to reimbursement for the costs of the Private School;
- c) To compensate for the shortfall in IEP implementation during the 2006-2007 and 2007-2008 school years in the area of communication, Parents shall be reimbursed for their expenditures at Private School for speech therapy services, from September 3, 2008 through the end of May, 2009.

## **VIII. APPEAL RIGHTS**

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

**So ordered.**

**Date: March 16, 2009**

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**Amy B. Davidson, Hearing Officer**