New Hampshire Department of Education

Student/_____ School District

IDPH-FY-16-02-020

Due Process Decision & Order

Findings of Fact

1. The student is currently ___ years old and in kindergarten for the 2015/2016 school year.

2. The student was held back a year and repeated preschool.

3. The student was diagnosed with Autism in May 2011 and sensory integration disorder in August 2011.

4. The student is eligible for special education services under the identification of Autism.

5. The student began attending the school district's preschool program in May 2012.

6. The parents have had the student assessed by a variety of different professionals at [ ] at [ ] and [ ] here in New Hampshire. Both specialize in providing services to students with Autism.

7. The professionals at both the [ ] and [ ] have recommend that the student receive around 30 to 35 hours per week of intensive one-one-one ABA/discrete trial training (DTT) therapy.

8. The student started receiving ABA/DTT services from [ ] in September 2013 in the parents' home and at the parents' expense.

9. The parents removed the student from the district preschool program in October 2013 and focused on having the student receive the 30 to 35 hours of ABA/DTT services in their home.

10. During the 2014/2015 school year, the parents briefly tried the public preschool program again, but then decided to go back to having the full time [ ] program because it seemed to be working so well for the student, and the student was making good progress.

11. The student made significant growth under the [ ] program. There is a variety of information in the record that documents meaningful progress during the times the student received services from [ ]. See e.g. SD Exh. 21 at pg. 123.

12. The professionals from the [ ] and [ ] recommended that the student continue to receive the 30 to 35 hours of services while attending kindergarten during the 2015/2016 school

year. This could be done with the student receiving 20 to 25 hours of services at school and 10 hours at home.

13. The school district proposed an IEP for the kindergarten 2015/2016 school year. The IEP did not include any reference to one-on-one ABA/DTT services, but the school team members agreed that the student was making significant progress using ABA/DTT, so they said it would be provided at some unspecified level and in some unspecified amount. The parents rejected the IEP.

14. In October 2015, the parties reached a settlement agreement whereby the student would attend the kindergarten program for 6 weeks for 2.5 hours per day. During that time, the student would be provided with 1 hour per day of ABA/DTT. During this time, the parents also continued providing some ABA/DTT services through [ ] at their home and at their expense.

15. The student ended up staying past the six week mark until February 29th. The parents removed the student from school at that time and went back to [ ] for the full 30 to 35 hours per week.

16. During the time that the student was at the kindergarten program, the parents observed the student regress in a number of areas including behavioral issues that had previously been extinguished which came back during the time in the kindergarten program.

17. Information from [ ] providers who performed observations of the student during the trial kindergarten period and collected data about it, also shows some regression in some areas during this time.

18. The IEP progress reports for the student show minimal to no progress on IEP goals during the student's time in the kindergarten program.

19. The student's report card shows some progress in a few areas during this time, but most areas remained the same without improvement from one trimester to the next.

20. An observation by a professional from the [ ] noted that the student received some benefit from some of the instruction, but not from other parts of the instruction provided during the day observed. SD Exh. pg. 76 – 83.

21. School witnesses testified that the student made progress during this trial period and the record does support that some progress was made in some areas.

22. On balance, I credit the parents' witnesses testimony and evidence regarding the lack of progress during this time and the needs of the student generally over the school district's witnesses because the parents' witnesses were more familiar with the student, particularly the [ ] providers as they have provided services to the student since September 2013, and they have more expertise with students with Autism.

23. In December 2015, the school district proposed an IEP for the remainder of the 2015/2016 school year. The IEP removed and reduced some of the goals that were in prior IEPs.

24. The IEP did not include any reference to ABA/DTT services. While the school members of the team agreed that the student benefited from those services and that the services would be provided, they declined to put in anything specific about how much would be provided because they did not want to put a methodology in an IEP. As a result, it is unclear how much ABA/DTT services the student would receive under the IEP.

25. The school did put together a draft schedule, See SD Exh. pg. 1341, and if that schedule were followed it looks like the student would receive 2 hours per day of ABA/DTT at school. No services would be provided at home.

26. The IEP offered by the school provides for one 1 hour per week of special education services in math and 2 ½ per week in language arts along with a paraprofessional that would be with the student all day and provide some amount of services during that time, though the exact amount and type of special education services to be provided by the paraprofessional is unclear in the IEP.

27. The IEP also includes three and a half hours of per week total in related services such speech, physical therapy, and occupational therapy. See SD Exh. Pg. 54.

28. Aside from different methodologies, the level of special education and related services offered to the student in the proposed IEP are much less than the 30 to 35 hours per week that the student received at parent expense during the prior school years and for parts of the 2015/2016 school year.

29. The school district is not offering to provide any services to the student in the home.

30. School district witnesses all testified that the proposed IEPs would provide the student with meaningful benefit and the parents' witnesses all testified that the proposed IEPs would not. I credit the parents' witnesses testimony regarding the IEPs over the school district witnesses because the parents' witnesses were more familiar with the student, particularly the [ ]program providers as they have provided services to the student since September 2013, and they have more expertise with students with Autism.

Rulings of Law

1. The "primary vehicle" for delivery of a FAPE is an IEP. *Lessard v. Wilton–Lyndeborough Coop. Sch. Dist.* (*Lessard I*), 518 F.3d 18, 23 (1st Cir.2008).

2. While the IDEA does not require a school to provide "an optimal education," an IEP must be "reasonably calculated to provide meaningful educational benefit," in light of that particular student's potential. *D.B. ex rel.Elizabeth B. v*. Esposito, 675 F.3d 26, 34-35 (1st Cir. 2012); *Lessard*, 518 F.3d at 29-30.

3. A student's potential is important to the analysis because "children of different abilities are capable of different achievements and only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement." *Esposito*, 375 F.3d at 36.

4. A school district is generally not required to put a specific methodology in an IEP, but it is not prohibited from doing so either, and it should do so when the IEP team agrees that the student will receive special education services that utilize a particular methodology.

5. The IEPs offered and services provided by the school district to the student for the 2015-2016 school year were not reasonably calculated to provide the student with meaningful benefit.

6. The school district did not provide the student with FAPE during the 2015-2016 school year.

Discussion

The record is full of evidence regarding the efficacy of using ABA/DTT with this student and it demonstrates that the student made significant progress when these methods were used for 30 to 35 hours per week. This progress establishes the student's potential and should be considered when assessing what the school district offered and provided during the 2015/2016 school year.

When measured against that standard, the progress the student made or would make under the school's program is minimal. During the time the student was at the school kindergarten program, some progress was made in some areas, while regression was noted in other areas. However, the progress made does not compare to the progress the student made under the 30 to 35 hours per week of ABA/DTT provided by [ ].

Similarly, the school district's IEP does not match that level of service, regardless of what kind of methodology the school would employ. It offered fewer hours of service and no services in the home. It also reduced and lowered IEP goals as compared to prior IEPs. At the hearing, the school district did provide some justifications for changing the speech language IEP goals to make them more manageable, but it did not provide much justification for changes to other goals, the reduction of services, or the lack of home services.

Therefore, I find that the IEPs offered and services provided by the school district to the student for the 2015-2016 school year were not reasonably calculated to provide the student with meaningful benefit and the school district did not provide the student with FAPE during the 2015-2016 school year.

Methodology in IEP

While there are a litany of cases that say that methodology does not have to be included in an IEP, or that schools have discretion in deciding methodology, that discretion is not absolute and

those cases are generally in the context of parents wanting a specific methodology that the school does not feel is necessary to provide. While there is some of that in this case, there is no dispute that the ABA/DTT methodology worked for this student and the team agreed that ABA/DTT services should and would be provided. The team even developed a schedule showing that ABA/DTT would be provided.

As a result, the dispute here is more about the school district's reluctance to put specific language in an IEP about a service and a particular methodology that the Team agreed would be provided. The school members of the IEP team did not want to include any specific amount of ABA/DTT services in the IEP because they did not want to "tie their hands" and it was "not good practice" to include methodology in an IEP. That led to uncertainty about how much and what kind of special education services the student would receive.

While the cases say that methodology does not have to be included, they do not say that it cannot be included. There is nothing in the law that would prohibit the school from including a methodology in an IEP. Methodology is part of the definition of special education and specialized instruction in the IDEA and its regulations, 34 CFR § 300.30(b)(3), and it seems that it should be part of the listing of the amounts of special education services a student will receive when part of those services will knowingly be from some method like ABA/DTT.

The United States Department of Education has long held the position that methodology can be included in an IEP if a particular method is required to provide FAPE. For example, the comments to regulations in 2006 state:

> There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

71 FR 46665, August 14, 2006. Similarly, comments to prior regulations shared a similar view:

> In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is 'individualized' about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP.

64 FR 12552, March 12, 1999.

Therefore, if a team agrees that a student requires ABA/DTT services, which it did here, those services should be included in the IEP. That does not mean that the school would be prevented from using other methods as well, or that it had to only use ABA/DTT. The record shows that some progress was made with other methods, and even some of the parents' witnesses acknowledged that some other forms of ABA will work for the student in some areas. Other types of proven methods can be used, but given the fact that the student has made such significant progress with ABA/DTT, that method should also be part of the student's program, and it should be part of the IEP as part of the special education services to be provided, so that the school and the parents know what and how much special education services the student will be receiving.

As it stands now, the IEP is unclear on how many hours of special education services the student will receive regardless of what methodology is used. It lists a paraprofessional for 6.5 hours 5 times a week, which would be the entire school day. The paraprofessional may be with the student for the entire school day, but she is not going to provide special education services to the student every minute of the school day.

Credibility of witnesses

As mentioned above, on balance I am crediting the parents' witnesses on the issues of student needs, proposed IEPs, and the student's progress, or lack thereof. The parents' witnesses from the [ ] and [ ] are all very knowledgeable and experienced with students with Autism in general and they know this student in particular very well, especially the [ ] witnesses since they have provided services to the student since 2013. Overall, the parents' witnesses came across as more objective and knowledgeable in their testimony about the student and the student's needs. One school witness whose testimony I did credit was the speech-language pathologist for the school who came across as very helpful and knowledgeable about the student and some of the progress the student did make in speech-language while at the school.

Parents Claims and Requested Relief

In their complaint, the parents raise the following issues and seek the following relief:

1. Did the school violate state and federal regulations when it conducted a meeting on 7/14/15 to discuss the student's IEP without a special education or regular education teacher present at the meeting? From the record and testimony, it appears there was a misunderstanding amongst the parties regarding whether this was an official team meeting, or more of an unofficial meeting to try to resolve differences. Schools are allowed to meet with parents outside of the team meeting context. Based on the record before me, I do not find a violation with this meeting.

2. Did the school violate state and federal laws by not including a parental concerns section, or not accurately including the parents' concerns? The record established that the IEPs at issue have a parental concerns section, but they do not accurately reflect the parent's concerns. While the provisions cited by the parents for this violation do require an IEP team to consider parental concerns, they do not directly require a parent concerns section, or an accurate version of the parents' concerns. Including an accurate version of the parents' concerns would likely help the school team members, teachers and providers understand and meet the student's needs, and it would also help develop a trusting relationship between the parties, but the law does not require such a section so there is not a violation of the law.

3. Whether the school district failed to provide the student with FAPE during the past two school years? I interpret this to mean that the proposed IEP's were not appropriate and that FAPE was not actually provided during the 2014/2015 and 2015/2016 school years.

   The parents did not meet their burden of establishing that FAPE was not offered or provided during the 2014/2015 school year school year. Most of the evidence focused on the 2015/2016 school year.

   The parents did meet their burden of establishing that FAPE was not offered and provided during the 2015/2016 school year. The IEP's offered for this time frame were not reasonably calculated to provide the student with meaningful benefit and the school did not provide the student with FAPE.

4. The parents also seek compensatory education and reimbursement. The school district raised some issues with those requests in its post-hearing memoranda and the parents should brief those issues consistent with the order below.

Order

1. The IEPs offered and services provided by the school district to the student for the 2015-2016 school year were not reasonably calculated to provide the student with meaningful benefit and the school district did not provide the student with FAPE during the 2015-2016 school year.

2. The school and parents shall meet to develop an IEP that incorporates ABA/DTT services and is consistent with the recommendations of the professionals from [ ] and [ ], including the provisions for home services. This is not intended to preclude the team from using some other proven methods, particularly in areas where there was some progress made using other methods, and it is not saying that DTT is the only ABA method that can be provided, but the IEP must include a specification of the special education services to be provided that includes the one-on-one services that will be provided and those services should be consistent with [ ] and [ ] recommendations and what the team has observed to work for this student.

3. The parents shall submit a brief regarding their requested relief for compensatory education and reimbursement in light of this decision that addresses the issues that the school raised as barring that requested relief. This brief shall be submitted by June 3, 2016. The school will then have until June 17th to file a response. After receiving this information, I will issue a further order on those issues.

So ordered.

_____ _____

Date

Scott F. Johnson
Hearing Officer