

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education
Case #DP13-15 (A.L.)

Due Process Hearing

BACKGROUND

A Due Process Hearing Complaint was filed in this matter on March 8, 2013. A Pre-hearing Conference was held on April 26, 2013 in Rutland, Vermont. The hearing that was scheduled for May 8 and 9, 2013 was rescheduled for May 29 and 30 due to changes in four of the issues to be raised at the hearing. Present at the hearing were: the Father, Attorney Nicholas Michael, representing the Student and Parents, Attorney Dina Atwood, representing the School District (hereafter "the School" or "the District"), Eloise McGarry, Director of Special Services, _____, Assistant Principal and Hearing Officer, Catherine Stern.

ISSUES

The issues raised in this case are:

1. Whether or not the Student received a free and appropriate public education (hereafter "FAPE") because the following was not provided:
 - a. services by a school _____ as stated in the Student's 2011-2012 IEP between September 2011 and January 2012;
 - b. the _____ consultation as stated in the Student's 2011-2012 IEP between September 2011 and January 2012;
 - c. the attendance of the gym teacher and art teacher at IEP meetings between September 2011 and June 2012;
 - d. sufficient training of one _____ and the sharing of data by the _____ between September 2011 and June 2012 as stated in the Student's IEP;
 - e. lesson plans and material to the Parents that would be used by the Student prior to the beginning of each week between September 2011 and June 2012 as stated in the Student's IEP;
 - f. updates to the Parents of the Student's progress in meeting goals as stated in the

Student's IEP; and

g. sufficient training of service providers for Student from September 2012 to present as provided in the Student's IEP.

FINDINGS OF FACT

1. The Student was born on _____ and is _____ and _____ years old. (Stipulation of the parties).
2. The Student attended _____ in school year 2011-2012. (Stipulation of the parties).
3. The Student is currently attending the _____ grade at the District's _____. (Stipulation of the parties).
4. The Student has an IEP based upon a disability category of _____. (Stipulation of the parties).
5. The Student currently has an IEP whose initiation and duration dates are: 1/9/13 – 6/11/13; 8/28/2013 – 1/8/2014. (Stipulation of the parties).
6. The Student's 2011-2012 IEP called for consultation by a _____ weekly for 60 minutes, 'in class' as opposed to 'out of class' and with a group size of 1:1. The group size of 1:1 in the Student's IEP, refers to the focus of the consultation being on one child as opposed to a group of children. It does not mean one-on-one direct services provided by the _____ to the child. (School District Core Exhibit #143; Testimony of _____).
7. _____, the _____ providing related services to the Student pursuant to _____ IEP, observed the Student in the classroom and made suggestions, attended meetings with the Student's Special Educator and meetings with the Special Education Director as well as IEP meetings. She also consulted about the analysis of the data tracking the Student's progress. _____ did not provide direct services to the Student. (Testimony of _____).
8. _____ was included in the Student's IEP as a result of the Parents' request for a _____ to be a part of the Student's program. (Testimony of _____).

9. From September 14, 2012 to December 21, 2012, _____ was on maternity leave. Prior to going on maternity leave _____'s consultation role had become minimal. During the time _____ was absent, the Student's Special Educator/Case Manager, _____, felt she did not need to consult with anyone. Had Ms. _____ needed to consult with someone, she could have contacted _____ from the _____;

(Testimony of _____; Testimony of _____; Testimony of _____).

10. Because _____, the Student's Special Educator and Case Manager, had the same or higher level of expertise in the areas of _____ necessary to meet the Student's needs, _____ maternity leave did not adversely affect the Student's program. The Student continued to progress during _____ absence. (Testimony of _____; Testimony of _____).

11. The Parents did not voice any concerns about _____ maternity leave to Eloise McGarry, the Director of Support Services, nor did they request a replacement. (Testimony of Eloise McGarry).

12. The Student's 2011 IEP included consultation by a _____ consultant for 360 minutes (6 hours) per month for a period of time that included March to June of 2011. (School District Core Exhibit #202).

13. _____ from the _____ began providing consultation services and technical assistance to the Student's service providers when the Student was in kindergarten. _____ met with members of the Student's Team and the Parents, instructed the staff in data collection and analysis, trained, modeled and coached service providers. (Testimony of _____).

14. Initially, _____ spent more time at School because the Student's staff needed to learn and practice interventions. From September 2011 to December of 2011 _____ held monthly trainings attended by the _____ and _____ Special Educator on the Student's team. These trainings included designing goals and objectives as well as presentation and individual work. Later, during the spring of 2011, _____ spent less time at School. Problem solving, revising of interventions and other staff issues could be addressed via email or on the telephone and a 6 hour on site

consult was no longer required. (Testimony of

Testimony of

15. At a December 20, 2010 IEP meeting, the Principal suggested that the Student's Art and Gym teachers be invited to attend an IEP meeting. Although neither teacher attended subsequent meetings, the Art teacher did provide written input to an IEP meeting during the 2011 – 2012 school year. There is no evidence that the Parents followed through with the Principal's suggestion nor did they make a request to have these teachers invited. (Testimony of the Father; Parent Exhibit #7, p. 3 of Meeting Minutes).

16. Data is shared with the Parents 3 times a year (October, March and June) in the Student's progress reports. In addition, data is discussed at the monthly IEP or team meetings. The Parents also receive daily updates in the school to home log and in discussions with the Student's para-educator. The Parents have not asked for more data or information than has been provided. (Testimony of

Testimony of

; Testimony of

School District Core Exhibit ##256-296 (meeting minutes); ##297-339 (progress reports); ##348-519 (daily log).

17. The Father believes that tasks agreed to in statements made in IEP or Team meeting minutes are part of the IEP "contract" and the Team member must accomplish the task. (Testimony of the Father).

18. At a meeting in December of 2012, the Student's (hereafter was asked by the Parents to provide data regarding the Student's progress (in addition to the progress reports provided 3 times a year). Although agreed, she forgot to do so and the Parents did not renew their request. (Testimony of).

19. Teacher's lesson plans are created by teachers and are not given to parents. (Testimony of Eloise McGarry).

20. IEP Teams are only required to meet annually. It is unusual for IEP Teams, such as the Student's, to meet on a monthly basis. The District agreed to do so at the request of the Parents. (Testimony of Eloise McGarry).

21. who began working with the Student when was in kindergarten, has attended all or most of the Student's IEP meetings. Between 2009 and 2012 training in has included,

and monthly participation in the _____ (hereafter _____) program entitled "Evidence Based Practices for Teaching Children with _____". (Testimony of _____; Affidavit of _____)

22. During the summer of 2011, members of the Student's IEP Team, including the parents and _____ Special Educator, participated in the summer session of the yearlong program, "Evidence Based Practices for Teaching Children with _____".

(Testimony of Eloise McGarry; Testimony of _____; Testimony of _____; Testimony of _____)

23. The _____ program required a commitment of time and effort by the participants. After the summer session, the participants collected data and had a monthly telephone conference with the _____ staff from the _____ to discuss concerns including, problem solving and strategies to move forward. In the afternoon, the Parents joined the conference to discuss the program and the Student's progress. (Testimony of Eloise McGarry; Testimony of _____; Testimony of _____; Testimony of _____; Testimony of _____).

24. _____ the Student's Special Education teacher and Case Manager is a certified Special Educator K-21. She holds a B.A. in _____ and is working toward a Master's Degree in _____ with a focus on _____

She is certified as a Crisis Prevention and Intervention instructor. She also holds an Autism Case Manager Certificate issued by the Vermont Agency of Education based on college courses she has taken including, Assessment and Intervention for _____

_____ (Testimony of _____; Affidavit of _____; Testimony of Eloise McGarry).

25. _____ has done a good job training the staff that works with the Student. She is skillful and has been able to find ways for the Student to access learning and to feel good about it. (Testimony of _____; Testimony of _____)

26. When _____ began to work with the Student 5 years ago, _____ spoke approximately _____ and _____ Now

walks down hallways quietly and calmly, waits to use the computer patiently and follows directions while doing tasks is asked to do. (Testimony of
27. , the Student's , is qualified to provide services to the Student based on her training and years of experience. She has been providing special education services to children since 1981. She holds a Certificate of , a nationally recognized certification that allows her to practice as a throughout the country. is licensed and holds certification through the Vermont Agency of Education to provide services to children in educational settings. (Testimony of ; Testimony of Eloise McGarry; Affidavit of

28. Between 2009 and 2012 , training in has included, training in the , online training in and ; and monthly participation in the program (Testimony of

Affidavit of

29. The Parents had the Student evaluated by from Children's Hospital, Boston MA in 2009 and 2011. received some information from the School and additional information from the Parents. did not observe the Student at the School and did not talk to , the Student's Special Educator, , the Student's or other members of the staff working with the Student. The Parents provided copies of , evaluations to the School. (School District Core Exhibits ##561-580; Testimony of the Father; Testimony of

30.) is not the only evidence based methodology but in opinion, it is the best. (Testimony or

31. The Father believes that the School should maximize the Student's potential and that the Special Educator who provides case management, academic skills and development for the Student should have certification. (Testimony of the Father).

32. An [redacted] board certified person is not necessary for the Student as long as evidence based methodologies are being provided. There are children for whom [redacted] alone does not work. (Testimony of [redacted])

33. [redacted] is an umbrella under which there are other methodologies such as [redacted] (hereafter [redacted]) which focuses on motivation, responding to multiple cues, initiation, and self-management. An [redacted] token system for reinforcement as well as natural reinforcers and other methodologies including [redacted] and modeling are being used with the Student in [redacted] and other services. It has benefited the Student to use different strategies and ideas. (Testimony of [redacted]).

34. The Student interacts with classmates using [redacted]. When the Student goes to recess or lunch, there is a plan for what [redacted] will do such as play on the jungle gym or eat with peers, depending on what skill [redacted] is working on. The role of the peers is to help the Student interact socially. Classmates involved in a particular interaction with the Student are told about [redacted] goal. When the Student achieves the goal, the classmates, under the direction of the para-educator give the Student a reward. [redacted] has been a positive methodology for the Student. (Testimony of [redacted]).

35. The peers with whom the Student socializes have taught [redacted] how to interact and how to be kind and patient. (Testimony of [redacted]).

36. The methodologies used last year were discussed in IEP meetings with the Parents participation. Visual supports were used as well as different methodologies. [redacted] was used as were encompassing [redacted] principles such as functional shaping and chaining tasks. It would not be appropriate to use one methodology with the Student because not all of [redacted] academic and social needs would be met. (Testimony of [redacted]).

37. The Student requires and has an eclectic mix of evidence based methodologies that have been combined to provide a program that meets [redacted] specific needs and can be adjusted as [redacted] needs change. One methodology, such as [redacted], should not be the only methodology used with the Student. (Testimony of [redacted] Testimony of [redacted])

[redacted]; Testimony of Eloise McGarry; Testimony of [redacted]

38. The Student does, on occasion,
However, these are not significant events and they do not indicate any loss of progress by the Student. (Testimony of _____).
39. Last year the Student's progress included an increase in _____ conversing with peers and making verbal requests and a reduction in _____. (Testimony of _____)
40. The Student is making progress as evidenced by _____ 2011- 2012 and 2012-2013 progress reports. If _____ were not, an IEP meeting would be held to determine how the Student's program should be altered to meet _____ needs. (Testimony of Eloise McGarry)
41. The Student's goals for last year were not below _____ abilities. Success in meeting goals required being challenged. _____ was challenged and when _____ succeeded the bar was raised and _____ was again challenged. The Student has made progress based on observation, data and assessments. (Testimony of _____)

DISCUSSION AND CONCLUSIONS OF LAW

The Parents position is that the District has failed to provide the Student with FAPE between March 7, 2011 and March 8, 2013 as outlined in the seven issues they have raised. To prevail, the Parents must establish substantively that the District has not provided the Student with a program that is "reasonably calculated to enable the child to receive educational benefit" and procedurally that the District has failed to comply with IDEA procedures adequately. *Bd. Of Ed. V. Rowley*, 458 U.S.176, 206-207 (1982); *Mrs. B. v. Milford Board of Ed.*, 103 F.3rd 1114, 1120 (2d Cir. 1997). This educational benefit must be more than minimal. *Rowley*, 458 U.S. at 192; *Walczak v. Florida Union Free School District*, 142 F.3rd 119, 130 2d Cir. 1988).

Rowley held that the "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms *than to guarantee any particular level of education once inside.*" 458U.S. at 192 (emphasis added). The *Rowley* Court specifically held that, "[w]hatever Congress meant by an 'appropriate' education, it is clear that *it did not mean a potential maximizing education.*" 458 U.S. at 197, n. 21 (emphasis added). The Second Circuit and many other federal courts have adopted this "no duty to maximize" rule. *Grim v. Rhinebeck Central School District*, 346 F.3d 377,

379 (2d. Cir. 2003) (IEPs are subject to numerous requirements but are not required to furnish every special service necessary to maximize each handicapped child's potential, but a "basic floor of opportunity", consisting of services that are individually designed to provide educational benefit to a child with a disability (citing *Rowley*). *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998). ("The school district is required by statute and regulations to provide an appropriate education, not the best possible education or the placement the parents prefer") (quoting *Heather S. v. Wisconsin*, 125 F.3d 692,708 (10th Cir. 1997). In the case at hand, the Parents' desire to have the Student receive the best program so that potential can be maximized is understandable but is not required by the applicable federal law.

The Parents' claim that the Student has not received the required level of educational benefit from program and IEP is not supported by the evidence. To the contrary, the evidence supports a finding that the Student's progress academically and socially have provided with meaningful educational benefit. Although progress reports reveal some to be expected ups and downs, overall they show significant progress toward achievement of goals. Likewise, the observations of his Special Educator, the the Assistant Principal and his para-educator show that has made good progress in many areas including interactions with peers, communication with others and self-control. Nonetheless, the Parents argue that specific omissions in the Student's program have led to a denial of FAPE. These issues must be considered.

The first matter relates to the services of a as provided in the Student's 2011- 2012 IEP between September 2011 and January 2012. In 2012, a licensed , was brought in as a part of the Student's team at the request of the Parents. role was that of a consultant. She did not provide direct services to the Student at any time. The Parents, apparently, misunderstood the reference in the Student's IEP to 1:1 to mean that was to provide one-on-one services to the Student when in fact it meant that the focus of her consultation was on one student as opposed to a group. With respect to this claim, the Parents' allegation is based on a mistaken understanding of what was actually required in the IEP. The evidence demonstrates that the IEP was in fact followed.

The Parents also contend that although the Student's 2011-2012 IEP provided for the services of a [redacted], [redacted] was on maternity leave from September 14, 2012 until December 21, 2012 and was not replaced. Prior to her departure in September, [redacted]'s role had as a consultant had become minimal. Her absence did not affect the Student's program because the Student's Special Educator, [redacted], had as high or higher a level of expertise in [redacted] than [redacted] did not feel the need for a consultant and could have contacted [redacted], if the need had arisen. During the time of [redacted] leave, the Parents did not voice any concern about her absence to the Director of Special Services, Eloise McGarry, nor did they request a replacement. The diminished need for [redacted] services, the Parents' failure to voice concern, as well as the lack of evidence regarding any adverse effect on the Student's program or progress, supports a finding that [redacted] absence did not result in the District's failure to provide FAPE.

The Student's IEP called for 6 hours per month of consultation by the [redacted]. At the beginning, [redacted] teaching and problem solving work required a full day. By the spring of 2011, a full day was not necessary and much of her work could be done via email or on the telephone and [redacted] teaching skills allowed her to train new staff and teach the Student with success. Thus, her on-site visits of 6 hours a month became unnecessary. There is no evidence that the decrease in the amount of time [redacted] spent at the School between March 2011 and June of 2011 had an adverse effect on the Student's program or on his progress.

The Parents allege that the Student's art and gym teachers' absence from IEP meetings between September 2011 and June of 2012 was a contributing factor to a denial of FAPE. At an IEP meeting prior to September 2011, a suggestion was made that the gym and art teacher be invited to attend a meeting. Although the art teacher did provide written input neither teacher attended a subsequent meeting. The art and gym teachers are not among those required to be on a child's IEP Team. Mandatory individuals are: the local education agency representative; the parents; at least one of the child's special education teachers; and, at least one of the child's general education teachers. VSER 2363.4(a). There is no evidence that the District has failed to comply with this requirement nor is there evidence that the Parents requested that the art and gym teacher attend a meeting or

that they objected to their absence after the suggestion was made. More importantly, there is no evidence that the absence of these teachers had a negative effect on the Student's program or progress.

The Parents contention that the Student's _____, was inadequately trained and did not provide sufficient data is without merit. _____ used a combination of evidenced based methodologies including _____ that allowed the Student to meet goals that were high but attainable. The Parents have failed to demonstrate that the Student did not progress under _____ tutelage. Likewise, the Parents failed to show that the data they received from _____ was inadequate. The law requires that parents be provided with progress reports "at least as often as other parents in school receive progress reports" VSER 2363.8(b)(4). Progress Reports were given to the parents 3 times a year. The Parents requested additional data from _____ in December of 2012 and although _____ agreed, she did not remember to do so. The Parents did not renew their request. In addition to the progress reports, the data regarding the Student's progress was discussed with the Parents at monthly IEP and Team meetings. The District has exceeded its obligation to provide the Parents with reports and other information about the Student's progress.

The Parents contend that they were not provided with lesson plans, material to be used by the Student at the beginning of each week and updates of the Student's progress in meeting _____ IEP goals between January 2012 and June 2012 as provided in _____ IEP. The Parents believed that a statement made at IEP meetings or Team meetings constitute a commitment to accomplish something that if not achieved would be a breach of the IEP. However, tasks that are discussed in an IEP or Team meeting are not part of a child's IEP. VSER 2363.8. The Parent further asserts that not receiving updates of the Student's progress was detrimental to the Student because they would show that _____ was not being held to a high enough standard and not enough was being asked of _____ which in turn prevented _____ from progressing to the next skill level. There is no evidence that failure to provide the Parents with the updates or other material were detrimental to the Student meeting his IEP goals or in any other way benefiting from his education.

The Parents argue that the training of the Student's service providers from September 2012 to the present has been insufficient. The Parents concur with _____ that the

people working with the Student should have level training in an evidence based methodology and be directed by someone who is a
However, neither the Student's IEP nor Special Education law requires service providers to have a particular level of training or certification in a particular methodology.

The evidence is clear that the Student's service providers have had a significant amount of training to be successful in their work with children on the . in general and working with the Student in particular. When the Student was in kindergarten, from the provided technical assistance, instruction for data collection and data analysis and trained service providers on an as needed basis. In the Summer of 2011, most of the Student's Team attended the summer training on teaching children with and in the following months participated in the year long continuation of this program.

, the Student's Special Educator, has taken a number of courses covering many aspects of teaching children with and is pursuing an accelerated Master's Degree program in Special Education with a focus on

, the Student's , also had extensive training in teaching methodologies for children on the . The training, experience, degrees and certification of the Student's teachers are the tools through which the Student receives education. For the purposes of this case, the adequacy of their qualifications and expertise is determined by whether or not the Student has received meaningful educational benefit. If the Student has, then whether the teacher has a particular certification or degree is irrelevant.

CONCLUSION

The Parents allege that the District has failed to provide the Student with FAPE and have identified a number of failures that they contend have led to a denial of FAPE. The underlying question for each allegation is whether or not it has prevented the Student from receiving meaningful educational benefit. Contrary to the Parents assertions, the evidence establishes that the Student has received meaningful educational benefit from IEP and the resulting services. The District has gone to great lengths to meet and exceed its obligations in the training it has made available to the Student's teachers and


the time it has spent meeting and working with the Parents regarding the Student's program and progress. The Student is progressing and his success is a testament to the efforts of educators who have sought and gained the knowledge and expertise that have made possible the high degree of educational benefit he has received.

ORDER

Based on the Foregoing, it is hereby ORDERED that:

The District has provided the Student with a free and appropriate public education.

Dated at Hartland, Vermont this 30th day of June 2013.


Catherine C. Stern
Hearing Officer