

Special Education Due Process Hearing Decision
Parent v. Augusta School Department

CASE NO: 00.157

REPRESENTING THE SCHOOL: Donald Kopp, Esq.
Drummond Woodsum & MacMahon

REPRESENTING THE PARENT: Father represented himself

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207-B et. Seq., and 20 USC §1415 et. seq., and accompanying regulations.

The case involves the student whose date of birth is dob. He resides with his father, in Augusta, Maine. The student is identified as a student with a disability under the category of "emotional disability". He is diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Depression. Testing confirms a learning disability in the area of written language and math.

The parent requested the hearing on May 25, 2000. A prehearing conference was held on June 8. The parent alleged that the IEP developed for his son was not appropriate to meet his needs with the result that the student would not receive a free, appropriate public education in the 2000-2001 school year. At the conclusion of the meeting, the parties jointly requested an extension of the scheduled hearing date to pursue possible settlement options. The hearing was rescheduled for July 12. The parties did not resolve the issues under dispute and the hearing went forward on that date.

The hearing convened on Wednesday, July 12, 2000, at the Kennebec County Superior Court, Augusta, Maine. Eighteen documents numbered J.1-J.18 were entered into the record of the hearing; two witnesses gave testimony. The hearing officer for lack of relevance disallowed five documents, numbered S.16-S.23. There was no objection to this decision by the parties.

Following is the decision in this matter.

I. Preliminary Statement

The student is a xx year-old middle school student who is eligible for special education services under the category of "emotional disability". He has been diagnosed with attention deficit hyperactivity disorder, oppositional defiant disorder and depression. Testing shows he also exhibits a learning disability in the areas of written language and reading.

His most recent individualized education program (IEP) places him in the Buker Middle School. He is to attend the Alternative Program at the school for 140 minutes per day, and regular seventh grade mainstream classes, with the assistance of an educational technician, 120 minutes per day. The plan also provides for psychological services 2 times per month as a related service. In addition, the PET determined that a behavioral assessment instrument would be developed during the summer. The purpose of the instrument is to determine the student's behavioral triggers, successes and failures as he proceeds through the school day.

It is the parent's position that the school has failed to identify the student's special education needs, and that they have failed to develop an IEP that is appropriate to meet those needs. He cites a lack of assistive technology services, and a lack of positive behavioral interventions as contributory factors.

It is the school's contention that it has developed an IEP that is appropriate to meet the student's special needs. They state that they were unaware that the parent found the proposed IEP unacceptable. It is their position that the student can receive meaningful educational benefit from the program proposed.

II. Issues

The issue to be decided by this hearing is:

Has the Augusta School Department failed to provide the student with a free appropriate public education? Specifically, has the school failed to provide him with an individual education plan which is reasonably calculated to provide him educational benefit by failing to provide:

- assistive technology services
- functional behavioral assessment
- behavioral Interventions appropriate to the student's needs

The parent claims no procedural violations.

III. Findings of Fact

1. The student is a xx-year-old boy diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Depression. Testing reveals a learning disability in the areas of written language and reading. He receives special education services under the category of “emotional disability”. (Exhibit 1, 7, 8, 9, 10, 14, 15)
2. The student attended the sixth grade at Buker Middle School during the 1999-2000 school year. He was in regular sixth grade classes, with support from an educational technician, for a portion of the school day. The balance of his day was spent in the Middle School Alternative program. “The Middle School Alternative programs are self-contained programs which are part of the Augusta School System. The purpose of the Alternative programs is to educate students from the...district who are behaviorally impaired...and require an alternative to the regular middle school...” “Each student has specific criteria they need to meet before mainstreaming can occur...” “An IEP is written targeting particular behaviors the student would be working on. Included in the IEP is the criteria the student would need to meet before resuming classes at their home school or other programs...All students are required to follow the rules of the Alternative programs and participate in the level system as well as having individual behavioral goals”. All students in the program participate in a behavioral “point/level” system that is based on a list of target behaviors common to all students. (Exhibit 2; Testimony Rideout-Dawes, Parent)
3. The student passed all subjects during the first three quarters of the 1999-2000 school year¹. Teachers report varied results in his academic and behavioral achievement in the regular classroom, but overall he was considered to have benefited in both his regular and special education classes. “[The student] has had inconsistent but primarily passing academic grades for the 1999-2000 school year”. Completion of homework assignments and make-up work is cited as a recurring problem. Behaviorally, he had the most difficulty in his Unified Arts classes, which included art, physical education, and health. Disruptive and inattentive behaviors, rude remarks and argumentative conduct were the behaviors noted most often. During the school year, his success in accruing points on his daily behavioral contract fluctuated from level 1 (the highest positive level) to level 4 (the lowest). A random review of the daily point totals during the period January 31 through May 19 showed no consistent pattern from day to day or week to week. (Exhibit 3, 4, 5, 6; Testimony Rideout-Dawes)
4. The daily behavioral contract used by the student during 6th grade contained the same list of behavioral expectations as all students in the program. Points were awarded by individual teachers, if in their opinion, a student has complied with the behaviors. Points were removed for negative behaviors or an infraction of the rules. Points were awarded or removed based on the same set of expectations for all students. (Exhibit 2; Testimony Rideout-Dawes, Parent)
5. The pupil evaluation team (PET) met on May 4, 2000, to “review [the student]’s educational program and to make recommendations for the next school year”. After a discussion of the student’s present status the PET developed program recommendations

¹ No grades were entered into evidence for the fourth quarter. The student was removed from school by his father on, or about, May 19, 2000, after an altercation at school involving the student. The student was not suspended. No services were offered or requested from the date the student was removed until the end of the school year, on, or about, June 12, 2000. End of the year academic status was not an issue for this hearing.

for the coming school year. In addition, the PET reached agreement on several other determinations relevant to the student's program. Two of those determinations state: "[The student's father] will meet with the school psychological examiner during the summer of 2000 to assist in the creation of a functional assessment tool to be used during the beginning of the 2000-2001 school year" and "a PET will be scheduled during the fall of 2000 to discuss assessment outcomes and programming options". (Exhibit 4)

6. The PET recommended that the student attend Buker School for the 2000-2001 school year, again splitting his time between the Middle School Alternative Program and the regular classroom. His individual education program (IEP) provides for 140 minutes of direct instruction in the Alternative Program. In addition, the IEP provides for 120 minutes a day in regular seventh grade classes with the assistance of an educational technician in each of the classrooms. Psychological services are to be provided "two times per month" for both individual and group therapy. The student's assistive technology service needs are defined as "access to computers for written assignments as needed". This program represents an increase in special education services from the 1999-2000 IEP. (Exhibit 1; Testimony Rideout-Dawes)

7. The IEP contains two goals. Goal 1: The student "will maintain passing grades in all scheduled academic classes". Goal 2: The student "will participate in the Buker Alternative point/level system. Students are evaluated daily from level one (the highest behavioral level) to level four (the lowest behavioral level)." (Exhibit 1)

8. The student's most recent assessment was completed in July 1999. The evaluation included the Wechsler Intelligence Scale for Children-III (WISC-III), the Wechsler Individual Achievement Test (WIAT), The Achenbach Child Behavior Checklist and Teacher Report Forms, a records review and interviews with the student, the parent and the student's teacher. "Testing with the WISC-III and the WIAT profile a student of high average ability who is achieving somewhat below that level in mathematics and significantly below that level in reading and writing"... "Achenbach Child Behavior Checklists did not show significant concerns on Teacher Report Form profiles...[h]owever the comments on the teacher forms refer to [the student's] difficulty dealing with his anger, his lack of responsibility, his difficulty handling consequences, and the fact that his behavior often interferes with his academics." (Exhibit 7)

IV. Conclusions

Has the Augusta School Department failed to provide the student with a free appropriate public education? Specifically, has the school failed to provide him with an individual education plan which is reasonably calculated to provide him educational benefit by failing to provide assistive technology services, and a functional behavioral assessment to identify behavioral interventions appropriate to the student's needs?

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a "free appropriate public education" which is described in the student's "individualized education program" (IEP). [20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)] Through court interpretation of the law a "free

appropriate public education” is described as a program which is “reasonably calculated to enable the child to receive education benefit” (*Board of Education v. Rowley*, (3 IDELR 553:656, 667 [1982])

In order to assess whether a student’s program meets the court’s standard of ‘educational benefit’, it is necessary to review past performance. The 1999-2000 IEP does not appear in the record. However, based on the evidence presented, it is possible to ascertain that the student made academic gains during the previous school year. Documents in the record and testimony from school’s witness support the school’s position that the student maintained an academic standard sufficient to pass all subjects. His behavior, however, was problematic throughout the school year and his ability to accumulate points on his behavior contract was inconsistent. Teachers do report occasions where the student was removed from class due to inappropriate behavior. Nevertheless, evidence shows that he was able to maintain sufficient behavior control to benefit from in his regular and special education program. The parent expressed concern that there were occasions throughout the year when the student’s behavior was volatile, creating situations of heightened behavioral stress for the student. While this is likely true, there was no evidence that the student’s behavior resulted in out-of-school suspensions, or that removal from individual classes resulted in a pattern of removal which interfered significantly with the student’s ability to benefit. The pattern, if there is any, appears to be continuing inconsistency in behavior compliance, positive peer relationships and self-control.

The parent raises objections that the behavioral program being offered his son is not addressing these problems. He objects to the Alternative Program as lacking in individuality, and positive behavioral interventions that are designed with his son’s needs in mind. He cites the lack of appropriate assessment to identify his son’s unique behavioral needs as the basis for this failing². He argues that this assessment is necessary in order for the PET to develop a behavior plan unique to his son, and without it, the proposed IEP will result in a denial of a free appropriate public education. His argument has merit.

Based on her testimony, the student’s special education teacher clearly has a good understanding of the student’s behavior needs. However, it is troubling that the alternative program and the point/level system as it was described uses a ‘one size fits all’ approach. By her own admission, there is no individual behavior plan *per se* for this student,³ or for the other students in the program. She meets with teachers at the beginning of the year and reviews each student’s evaluation, behavior profile, and IEP, but all students go through the day with the same behavior contract, with the same rewards and consequences. The program does not appear to be tailored to the needs of the student; rather the student is expected to conform to meet the expectations of the program. The proposed IEP does nothing to dispel that supposition.

² During his testimony, the parent argued that the school’s assessments were not ‘non-discriminatory’. Nothing in his testimony or in the written record indicated that he was using the term as defined in Section 9.16 or that he was making the claim that the school’s assessment of students was in violation of Section 9.16.

³ The teacher did testify that such a plan had been developed for the student for a specific activity, math team, but that there was no such plan for his school day.

“The IEP is the basis for educational programming and placement of the student...” (Maine Special Education Regulations, 10.1) “Each Individualized Education Program shall contain...[a] statement of measurable annual goals including...short-term objectives, relating to meeting the student’s needs that result from the student’s disability...” (Id., 10.2[B]) “In developing or revising each student’s IEP the PET shall, in the case of a student whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior...” (Id., Section 10.3[D])

The most recent evaluation data submitted into evidence is an assessment completed in July 1999 by J. Whitfield. This assessment constituted a three-year re-evaluation of the student as required by regulations. The assessment was performed by a qualified evaluator, used valid and reliable evaluative instruments, and resulted in a written evaluation report that was used to assist the PET in making some of its program decisions. The evaluation provided insight into the student’s learning disability, but offered little direction regarding the student’s behavioral needs.

A review of the discussion summary of that PET meeting, and testimony from the student’s teacher, demonstrates that the PET considered the parent’s concerns regarding the subject of insufficient information about his son’s behavioral functioning in a public school setting. The team supported this concern and agreed to complete a “functional assessment” with the student when the new school year began, and use this information to revise his IEP.

Part of the disagreement over the functional behavior assessment was the instrument to be used in gathering data. Apparently, the only time an individual functional behavior assessment has been conducted by the district, thus far, was when a student with a disability was removed from school for disciplinary reasons. [Id. 14(2)(B)] That assessment tool was not considered an appropriate vehicle to assess this student’s behavior. ‘Functional behavior assessment’ has broader usage and implications in the regulations. In regulations the term is defined as “a school-based process used by the Pupil Evaluation Team, which includes the parent and, as appropriate, the student, to determine why a student engages in challenging behaviors and how the behavior relates to the student’s environment. The term includes direct assessments, indirect assessments and data analysis designed to assist the PET to identify and define the problem behavior in concrete terms; identify the contextual factors (including affective and cognitive factors) that contribute to the behavior; and formulate a hypothesis regarding the general condition under which a behavior usually occurs and the probable consequences that maintain the behavior”. [Id., 2.10] To the school’s credit, they complied with the parent’s request and agreed that the parent and school psychologist would meet to develop an instrument more appropriate to the information desired about the student.

I can find no fault with the PET’s decision regarding the assessment, and there was no evidence that the school intends not to follow through with its determination. The fact that the assessment instrument has not yet been developed is presently without consequence.

There is nothing in regulations that would require the school to have completed a school-designed instrument prior to the beginning of the school year. The PET determination states clearly that the assessment will be designed over the summer and that the PET will convene in the fall to “discuss the assessment outcomes”. An interpretation of evaluation regulations would give the school 45 school days from the beginning of the current school year in which to complete this process and present the information to the PET for consideration. [See *Id.* 9.17] The team proceeded to develop the IEP, but made a recommendation to develop an assessment tool over the summer. It is clear that there is intent to enhance the program as necessary once the assessment is complete, and no evidence to conclude otherwise.

In regards to the 2000-2001 IEP, it is difficult to conclude that this program “is reasonably calculated to provide [the student] educational benefit” prospectively. The program does offer special education services that are similar in substance and amount to that provided last year, with some increases in support. However, the goals and objectives in the IEP fall short of compliance. The student has been determined to have special education needs related to his emotional disability and his learning disability. Yet, neither of the two goals in his *individual program* constitutes a “statement of measurable annual goals...relating to meeting the student’s needs that result from the student’s disability...” The goal relating to the student’s emotional disability states that he “will participate in the Buker Alternative point/level system”. “Participation” in a program is not a goal, but a placement. And, while placement in the alternative program will likely provide a setting to address the student’s emotional/behavioral needs, the proposed IEP goals and objectives do not reflect the statement of measurable purpose of program envisioned by the law. In fairness to the school, the Alternative program philosophy and program description speaks to the individual needs and individual approach of the program. The IEP, however, does not reflect the description that each student in the program have an IEP “...targeting particular behaviors”.

The student has an identified learning disability in the areas of written language and reading. Neither IEP goals reflects these needs. A goal, which states that a student “will maintain passing grades” does not give direction to the reader as to how, the program proposes “to [meet] the student’s needs that result from the student’s disability”. The general student population is expected to maintain passing grades. The PET has an obligation to develop an individual program plan that sets annual goals related to the individual student and his individual disability needs. It would be difficult to measure progress toward meeting the student’s special education needs based on these goals.

I do find, however, that the IEP meets the specific assistive technology needs of the student. “In developing or revising each student’s IEP the PET shall...consider whether the student requires assistive technology devices and services”. (*Id.* 10.3[H]) The student’s IEP clearly states that he will have access to computers whenever necessary to address his written language needs. In addition, computer instruction has been provided as part of his curriculum. There was no evidence that the student has additional assistive technology needs.

V. V. Order

1. The school shall proceed to comply with the PET determination of May 4, 2000, to develop an instrument appropriate to conduct a functional behavioral assessment of the student. That assessment and any recommendations shall be completed in such time that a PET can convene within 45 school days of the beginning of the 2000-2001 school year. The PET shall use the information to consider including in the student's IEP behavioral interventions, strategies, and supports to address the behaviors which impede his learning or the learning of others.

2. The PET shall convene within 10 days of the beginning of the 2000-2001 school year for the purpose of revising the student's current IEP. Measurable annual goals, including short-term objectives, relating to meeting the student's educational needs that result from his disability shall be rewritten.

Carol B. Lenna
Hearing Officer