

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING
DECISION ON MOTION FOR JUDGMENT AS A MATTER OF LAW

October 24, 2000

Case # 00.220, *Parent v. MSAD #72*

REPRESENTING THE SCHOOL: Amy Tchao, Esq..

REPRESENTING THE FAMILY: Peter Rice, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

A partial hearing was held, pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 USC §§1415 et. seq., and accompanying regulations. At the conclusion of the family's case, the District moved for Judgment as a Matter of Law. Following a review of the documents submitted by both parties and the testimony heard during the family's presentation, it was concluded that the family failed to meet its burden of showing a prima facie case of denial of a free appropriate public education (FAPE). Therefore, the District's motion is granted.

I. Procedural History

This hearing was requested by the family on July 21, 2000. The case involves the student, whose date of birth is dob. She resides with her mother, in Lovell, Maine. The student is currently eligible for special education services under the category of Traumatic Brain Injury. She currently attends ninth grade at Fryeburg Academy, but during the period at issue in this hearing she attended the Molly Ockett Middle School, in Freyburg, Maine.

The parties met in a prehearing conference on September 15, 2000, at the Department of Human Services Building, Portland, Maine, to clarify the issues for hearing and to exchange documents and lists of witnesses. At that time, the District submitted a Motion of Dismissal, arguing that the issues in dispute were not special education issues, and therefore not appropriately heard at a due process hearing conducted under the Individuals with Disabilities Education Act.

A conference call was held on September 20, 2000, to hear arguments in favor of, and against, this motion. Present on the conference call were the hearing officer, and counsel for both parties, and the call was held on the record. At the conclusion of the arguments, and following a review of the documents submitted at the prehearing conference, the Motion for Dismissal was denied. In a September 21, 2000 memo denying the motion, it was stated:

“...[T]here could be facts in this case which, if proven, would provide a basis for showing a denial of a free, appropriate public education to student and consequently permitting a remedy under the IDEA. The issues to be addressed in this hearing will be narrow, specifically was there a denial of FAPE and, if so, what is the appropriate remedy?”
(Exhibit: H1-2)

It was further stated that the family must show that student had a serious fear of Mr. Randy Davison, a teacher at the Molly Ockett Middle School, that the District knew of this fear, that the District placed student in ongoing contact with this teacher despite knowledge of this fear, that such placement led to serious emotional consequences on student’s part, that consequently student was denied a free appropriate public education during the 1999-2000 school year, and compensatory educational services would be an appropriate remedy for this denial of a FAPE.

The hearing schedule was confined to one day for the family’s case, one day for the District’s case, and a partial or full day for rebuttal witnesses.

II. Document Production Request

During the September 20, 2000 conference call, the District presented a Document Production Request. After a consideration of the relevance of various documents, the family was ordered to produce specific neuropsychological and psychiatric documents from the period between July 1999 and June 2000. In the order it was stated that if the family was unable to produce the documents because they are not in the family’s possession, the family shall sign a release permitting counsel for the School District to request and receive the documents directly from the originators of the documents.¹

A second conference call was held on September 27, 2000, to clarify the time frame for the hearing, the parameters of the issues in dispute and the burden that the family would have to meet to make their case. An October 5, 2000 memo was distributed, summarizing the content of that conference call. In that memo it was stated

“What I would expect to be presented at the hearing is evidence sufficient for me to make a decision about whether student was denied FAPE during the 1999-2000 school year. In IDEA terms, the question is whether the District developed and implemented an IEP that was reasonably calculated to enable student to make educational progress. In this case, that question appears to turn on student’s placement during the fall of 1999, and whether that placement was appropriate, considering student’s emotional issues.”
(Exhibit: H-3)

III. Stipulations

¹ The family resisted complying with requests for documents throughout the course of this hearing. One of the family’s own witnesses testified that certain documents had been sent to the family, yet they were never produced. Other documents were selectively edited or had pages or sections removed, based on the family’s conclusion about what was, and was not, relevant to the issues in dispute.

The parties stipulated that the District committed no procedural violations during the period in question. This stipulation did not preclude the family from raising the issue of whether a PET meeting should have been held in fall 1999, upon dissolution of the temporary restraining order and prior to returning student to Mr. Davison's class.

The family presented their case on October 17, 2000, at the West Bath District Court. The District entered 368 pages of documents into the record and the family entered 539 pages of documents and one videotape. Two witnesses testified.

At the conclusion of the family's case, the District made a Motion for Judgment as a Matter of Law, and oral arguments were presented for, and against, this motion.

On October 18, 2000, the motion was granted through email communication to the parties.

IV. Preliminary Statement

This case involves a xx year-old female student, who is eligible for special education services under the category of Traumatic Brain Injury. Student currently attends ninth grade at Fryeburg Academy, but attended the Molly Ockett Middle School, in Fryeburg, during the 1998-1999 and 1999-2000 school years. Her IEP's during the 1998-1999 and 1999-2000 school years describe a program that consisted of placement in a Resource Room, with partial, supported mainstreaming.

During spring of the 1998-1999 school year, student began exhibiting increasing behavioral difficulties, at home and at school, with such behaviors continuing into, and worsening, in fall 1999. In October 1999, student's mother placed her in Bridgton Memorial Hospital. She was transferred to, and spent six weeks at, Spring Harbor, and then spent the balance of the school year in residence at Lakeview Neurorehabilitation Center in New Hampshire.

The family filed for this due process hearing, initially requesting compensatory education and compensatory damages. At the beginning of the hearing, this hearing officer stated that it was her opinion that hearing officers in Maine did not have authority to award compensatory damages under the IDEA and that the only remedy to be considered would be compensatory education.

V. Issues to be Decided by the Hearing

- **Did MSAD #72 fail to provide a free appropriate public education to student during the 1999-2000 school year?**

VI. Findings of Fact

1. Student's date of birth is dob and she is currently xx years old. (Due Process Request)

2. Student was adopted by the mother at the age of nine. According to the mother's testimony, student suffered head injuries at the ages of three and five, at the hands of her natural mother. (Testimony: Mother)
3. Susan Holinger, MS, NCSP, evaluated student on March 31st and April 7th, 1997. Student's scores on the WISC III were as follows: Verbal IQ, 88; Performance IQ, 82; Full Scale IQ, 84. The evaluator found significant scatter on the Performance subtests, which ranged from 3 on Coding to 10 on Picture Arrangement. She also found significant problems with short-term memory and attention, and weak motor skills, especially when copying symbols. The Bender Motor Gestalt Test showed visual-perceptual weaknesses and the Developmental Test of Visual Motor Integration produced a standard score of 67, at the first percentile, predicting a significant impact on writing. Ms. Holinger recommended that student be taught using a multi-sensory format, with classroom modifications such as preferential seating and individualized attention. (Exhibit: P442-445)
4. During the 1999-2000 school year, student was eligible for special education services under the category of Traumatic Brain Injury. Her placement was the Resource Room, with periods of mainstreaming, with special education support. Student's IEP's included math, written language and social-emotional goals. (Exhibits: P321-336)
5. During the period at issue, student was prescribed a number of psychotropic medications. At any given time, student was taking a combination which included between one and four of the following medications: Depakote, Buspar, Elase, Zoloft, Risperadol, Lithium, Benadryl, Ativan and Lorazepam. (Exhibits: P298, 306; Testimony: Mother)
6. Student also regularly met with Sylvia Pond, M.S.W. According to Ms. Pond's reports, student remained uninvolved with therapy and might only have been in therapy because the state required therapy in order to continue medications. In addition, Ms. Pond's reports suggest family dynamics may be impacting student's emotional issues. (Exhibits: P303-304, 320, 355-359, 434; Testimony: Mother)
7. Around November 1998, student's behavior at home, and at school, deteriorated. Although student had previously exhibited some behavior problems, she now became violent, hitting, kicking, screaming and breaking property. The mother attributed this deterioration to medical failure, and sought to have student's medication protocol reviewed and changed. Student had previously experienced medication failures. (Exhibit: P319; Testimony: Mother)
8. In Spring 1999, student began telling Ms. Pond and the mother that she no longer wanted to attend school because she could not "stand being around" her teacher, Randy Davison. Although student was having interpersonal difficulties with the

- mother's boyfriend, the mother reported to Ms. Pond that student was really upset with Mr. Davison, and was just taking it out on the boyfriend. However, in a number of her reports, Ms. Pond notes an inconsistency between reports of the student and the mother. (Exhibits: P318, 362; Testimony: Mother)
9. On April 7, 1999, the mother forwarded a memo to the PET, in which she requested that student be transferred to the Essential Life Skills class, stating "No one can accuse me of not warning the School Department that they have a "potential loose cannon" on the premises." (Exhibit: P344)
 10. In an April 12, 1999 memo to the PET, the mother demanded immediate placement in the special education classroom and, in an apparent reference to Mr. Davison's suggestion that student be placed in a Behavioral classroom, she states "Given a choice of putting her in with other handicapped children or into a school of rapists and car thieves, there is no choice. [Student] would learn bad behavior from bad children." (Exhibit: P340)
 11. During summer 1999, student's behavior deteriorated further. Her doctor, Gerald Taylor, M.D., made some changes to her medication, but her anger and stress level continued to increase. She frequently lost control, becoming rigid and incoherent. On July 2, 1999, student was admitted to Maine Medical Center with a serious dystonic reaction. (Exhibit: P298, 305-307; Testimony: Mother)
 12. During that summer, the mother decided to plan a 30-day hospitalization for student, so that her medications could be adjusted. She was put on a waiting list at Lakeview Neurorehabilitation Center, a location recommended by Dr. Taylor. (Exhibit: P305; Testimony: Mother)
 13. On August 20, 1999, the mother told new principal Sonergan that "[student's] team agrees she needs to be placed in the full special education classroom while waiting for Lakeview," even though there was no evidence that the team had agreed to the necessity of this placement. (Exhibit: P306)
 14. At a PET on September 8, 1999, the mother again requested that student be placed in the Essential Life Skills classroom, because she needed a non-stressful environment until she transferred to Lakeview. Although the mother presented a letter from Dr. Taylor, suggesting such a placement, there is no evidence that Dr. Taylor had any information about the student composition of the classroom or of the Essential Life Skills program itself. (Exhibit: P294; Testimony: Mother)
 15. It was the determination of the PET, Mr. Davison included, that the life skills classroom was not an appropriate placement for student, given her academic ability, and student's placement continued to be the Resource Room, with one on one support at times, and small group instruction at other times. Student's IEP also included a Behavior Plan. (Exhibits :P289-293)

16. In the afternoon of September 8, 1999, student lost control at school and the mother had to remove her from school and bring her home. (Testimony: Mother)
17. On September 10, 1999, the mother wrote a letter to the school in which she stated that Mr. Davison had lied at the recent PET meeting, and in which she first articulated her accusations against him, regarding his behavior towards the student. In that memo, the mother requested that student be re-assigned to a different special education teacher. At a meeting of the PET members on September 13, 1999, it was agreed that student would be taught by special education staff other than Mr. Davison. (Exhibits: S74-78; Testimony: Mother)
18. Although the mother testified that between her letter of September 10, 1999 and September 21, 1999, student was in very frequent contact with Mr. Davison, the student's home-school journal includes no indication of this level of contact. (Exhibits: P266-287; Testimony: Mother)
19. The mother noted that during the period at issue, student was also suffering from serious pre-menstrual syndrome (PMS) and in her journal the mother documented incidents possibly related to PMS. (Exhibits: P349, 351, 354, 362, 370, 423, 429; Testimony: Mother)
20. On September 21, 1999, the mother got a Temporary Restraining Order against Mr. Davison, from the Bridgton District Court. (Exhibits: S71; Testimony: Mother)
21. In the week following the issuance of the TRO, due to behavior, student had to be taken home during the school day at least two, maybe more, times. (Testimony: Mother)
22. On October 4, 1999, following a District Court hearing, the TRO was dissolved. (Exhibits: P131-246)
23. On October 13, 1999, Ms. Tonken, student's case manager, suggested that the mother consider transferring student to the Adams School, an alternative school. The mother refused to consider a transfer, contending that this was a school for "bad kids." (Exhibit: P340; Testimony: Mother)
24. On October 29, 1999, student demonstrated significant "out of control" behavior at school, such that a teacher felt in danger from her. The mother picked student up and observed that her behavior was not de-escalating. On that evening, student was placed in Bridgton Hospital, in the psychiatric unit, since the mother felt student was not safe at home. (Testimony: Mother)
25. Bridgton transferred student to Spring Harbor in Portland, where she remained until being admitted to Lakeview Neurorehabilitation Center on December 1, 2000. She remained at Lakeview until June 23, 2000. Lakeview is a residential

- placement, which accepts students with neurological deficits and behavioral disorders. Although the mother testified that her initial goal was for student to have a thirty-day placement at Lakeview so that her medications could be adjusted, it was Ms. Linekor's testimony that Lakeview placements are almost always between three months and four to five years. Ms. Linekor is the Director of the Learning Center at Lakeview. (Testimony: Mother, A. Linekor)
26. Student's behavior improved significantly during her stay at Lakeview. For the period of January 2000 through June 2000, the following observations were made: physical aggression, 8 incidents in January, none in February through May; verbal aggression, 36 incidents in January, 28 in February, 7 total from March through June; non-compliance, 13 incidents in January, 10 in February, 2 total from March through June; compliance, 146 incidents in January, February through June ranged from 107 to 151 per month; self-injurious behavior, 3 incidents in January, 1 in February, and none from March through June²; positive peer interaction, for five months beginning in February, 142, 162, 106, 96, 66; self-soothing behavior, for five months beginning in February, 16, 34, 28, 22, 20; anger management, for five months beginning February, 8, 19, 11, 9, 10; ineffective anger management, 6 in April, 4 in May; rudeness, 45 in February, 9 in March, 43 in April, 4 in May; use of restraints, twice in January, none after that. (Testimony: Ms. Linekor)
27. While at Lakeview, student received a full educational program, including 2.5 hours each morning of academic work, followed by lunch, medications and a break, with various therapies, based on student's IEP, in the afternoon. According to Ms. Linekor, student continued to work somewhat below her level of ability, and demonstrated a mild to moderate math-based learning disability and more significant deficits in the area of written language. (Exhibit: P538; Testimony: A. Linekor)
28. Student was discharged from Lakeview on June 23, 2000. Ms. Linekor did not express an opinion about whether she agreed with discharge at that time, but rather that student was discharged at the request of the family. (Testimony: Ms. Linekor)
29. On July 21, 2000, the family requested a due process hearing from the Department of Education. (Due Process Request)

VII. Conclusions

There is no question that student does have significant emotional issues, which could impede her educational performance. Both testimony and documentary evidence indicate that she is likely performing somewhat below what she is capable of. Given her emotional issues, this is not surprising.

² One suicide incident was reported, although Ms. Linekor was not in residence at the school during the time of the reported incident, and was unsure of the date.

There is also no dispute that student had a very difficult 1999-2000 school year. Perhaps the placement decision made by the PET at the September 8, 1999 was not optimal, given her significant emotional distress. However, there is no evidence that an Essential Life Skills classroom would have been more appropriate, given that life skills classrooms are typically for students with lower cognitive levels, mental retardation, Down Syndrome and similar disabilities. Just because this classroom might be quieter or less stressful than a resource room is no basis for placement.

However, the issue is whether student's placement in September 1999 led to her behavioral deterioration and eventual residential placement, and whether student was consequently denied FAPE.³ There are numerous indications that student may have needed medication adjustments during the period in question, and suggestions that she may have experienced prior medication failures. At the time, the mother believed that her medications were the cause of her deteriorating behavior. Dr. Taylor, the physician who prescribed student's medications at that time, repeatedly changed student's medication protocol, and at times it appeared that student was experiencing almost daily medication changes.

Likewise, there is evidence that during the period in question student was suffering other somatic disorders, with emotional components, such as serious PMS. The mother's journal and her comments to student's counselor include numerous references to student's menstrual cycle and to PMS and to the effects that this might have on student's behavior.

Although student was experiencing rapid decomposition at this time, with significantly out of control behavior, the evidence indicates that she had previously experienced behavioral deterioration, to the extent that the mother wrote a memo to the school stating that they had a "potential loose cannon on the premises."

While student's placement may have marginally contributed to her behavioral issues, the presence of medication difficulties, other somatic symptoms and a history of serious behavioral issues, suggest that it was not the controlling factor, and the family failed to present evidence sufficient to rebut that supposition.

V. Decision on Motion for Judgment as a Matter of Law

The family failed to meet their evidentiary burden to show by a preponderance of the evidence that the School District failed to provide FAPE to student during the 1999-2000 school year. Therefore, the Motion for Judgment as a Matter of Law is granted in favor of the School District. There is no order issued.

³ It should be noted that the various residential placements were paid for by Medicaid and that the family is not seeking reimbursement from the School District for these placements.

Lynne A. Williams, J.D., Ph.D.
Hearing Officer

Date

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S129-130 Memo to Mr. Davison from mother (December 21, 1999)

S131 Drug Reaction Sheet (December 1, 1999)

S132-136 Special Education Program Review Letter from Ms. Macklin (Undated)

S137 Note to Ms. Lyons from mother (November 2, 1998)

S138-139 Memo to Mr. Davison from mother (October 19, 1998)

S140 Telephone Message Slips to Mr. Davison from mother (September 9, 1998)

S141 Memo to Principal Underwood from mother (September 9, 1998)

S142 Memo to Mr. Gervais from mother (September 9, 1998)

S143-148 PET Minutes (May 13, 1998)

S149-159 IEP (including Behavior Plan) (May 13, 1998)

S160 Proposed Change of Program Notice (May 13, 1998)

S161 Waiver of Prior Written Notice (May 13, 1998)

S162 Drug Reaction Sheet (May 8, 1998)

S163-168 Discharge Summary from Charter Brookside Behavioral Health System of New England (January 25, 1998)

S169-173 PET Meeting Minutes (May 19, 1997)

S174-183 IEP (including Behavioral Plan) (May 19, 1997)

S184-185 Learning Disability Evaluation Report (May 19, 1997)

S186-189 Psychological Evaluation (May 31 and April 7, 1997)

S190-195 Neuropsychological Evaluation from Braintree Hospital (June 8, 1994)

S196-209 Grades, Absences and Promotion Record from Grades 5-8 (undated)

A1-159 Notes from Home-School Journal (October 1998 through October 1999)

Prehearing Documents Prepared by Hearing Officer

- H1-2 Decision on School District's Request for Dismissal and Document Production Request (September 21, 2000)

- H3 Memo from the Hearing Officer, clarifying issues for hearing and stipulations (October 5, 2000)