STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

October 31, 2000

Case # 00.224, Parents v. Maine School Administrative District 35

REPRESENTING THE PARENT: Richard L. O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

This hearing was held and the decision was written pursuant to 20-A MRSA 7202 et seq. and 20 USC 1415 et seq., and accompanying regulations.

The hearing was requested, on August 4,2000, by the parents of S, a xx year-old student (DOB: xxx) diagnosed with Downs Syndrome. He has been identified as eligible for special education services under the category of mental retardation and has been receiving special education services throughout his educational career. He is currently enrolled at Marshwood High School (MHS) and is in his final year of eligibility for special education services. Pursuant to the IEP for school year 1999-2000, S received services from 7:30 – 10:30 each day at MHS; at approximately 10:30, he was transported to Work Opportunities Unlimited (WOU), where he received services for the remainder of the school day. The IEP proposed for school year 2000-2001 called for S to receive nearly all of his educational services at WOU.

A telephonic pre-hearing conference was held on August 25, 2000. At the conference, the parties disagreed about what the current placement was for "stay-put" purposes. That question was answered in a written decision issued by the hearing officer on August 31. With the consent of the parties, the hearing was held on September 13, 14 and 20. At the close of the hearing, the record was left open for the submission of final arguments. The record was closed on September 29.

The decision is attached.

I. Preliminary Statement

This case is before the hearing officer pursuant to the parents' challenge of the Individualized Education Program (IEP) proposed by the school for the 2000-2001 School Year. The IEP called for nearly all of the special educational services received by the student to be provided at, or through, the Work Opportunities Unlimited program (WOU) and by staff employed there.[1] The parents assert that the IEP is neither appropriate, for both procedural and substantive reasons, nor delivered in the least restrictive educational alternative (LRE), as required by law. The parents' procedural concerns include arguments that the IEP was "pre-determined" by the school and that the pupil evaluation team (PET) did not include a regular education teacher. Their substantive concerns include arguments that the WOU program as expressed in the IEP is not reasonably calculated to provide any meaningful educational benefit to the student, does not contain a behavior intervention plan and does not provide for the special education services to be delivered by properly certified personnel. The parents also assert that the requirement that students eligible for special education services be educated in the least restrictive educational alternative means that their son should receive at least some of his education at MHS, with other non-disabled MHS students.

The school disagrees, and asserts that the student, who is in his last year of eligibility for special education services, is best served by a program that emphasizes the kind of vocational training and experience offered by WOU. Further, the school asserts that the goals and objectives contained in the IEP, which both parties agree are appropriate, can be accomplished via the programming described in the IEP. The school also argues that the student has consistently demonstrated, through an increasingly unruly, maladaptive, and potentially dangerous pattern of behavior at MHS, that the school itself has become an inappropriate situation for his education. In support of this argument the school emphasizes that, during the school year 1999-2000, the student did not display such maladaptive behavior when he was participating in the program offered by WOU. In short, the school asserts that the WOU program is the least restrictive environment in which the student can receive an appropriate education.

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[1] In addition to the services provided at the Work Opportunities Unlimited program, the student would be offered up to five hours of "Leisure and Pro-social Skills" programming at the Wellness Center at MHS each week.

The hearing took three days, during which more than a thousand pages of documents were admitted into evidence. Both parties presented written final arguments.

For remedy, the parents request that the hearing officer find that the IEP is inappropriate and in violation of the LRE requirement, under the Individuals with Disabilities Education Act. (IDEA). The also ask for an order requiring the school to have the student evaluated by an "outside expert in the inclusive education of students with Downs Syndrome" to aid in the development of a new IEP. The school requests that the hearing officer sustain the IEP as both procedurally and substantively in compliance with state and federal law and order its immediate implementation.

II. Issues

Does the Individualized Education Plan adopted by the school for school year 2000-2001 provide the student with a free and appropriate public education in the least restrictive environment?

III. Findings of Fact

1. The student is a xx year-old male (DOB: xxx) with Downs Syndrome identified as eligible for special services under the category of mental retardation. He is in his last year of eligibility for special education services.

2. He is currently, and has been throughout his high school career, enrolled at MHS.

3. In school year 1999-2000, the student received special education services at MHS from 7:30-10:30; after that, he was delivered to the WOU program which provided services to the student until the end of the day, about 2:30. These services included supervised working experiences at various job sites in the area. For some weeks late last winter, there were no work opportunities available and the student spent the time he was assigned to WOU watching television at the home of his "job coach". The school did not learn of this until sometime after the fact. (Testimony of S)

4. In school year 1999-2000, during the 7:30-10:30 time period when he was receiving services at MHS the student:
    a. had minimal interaction with his non-disabled peers;

b. was educated mostly in what could be called "tutorial" situations, where he was with one, or sometimes two, adults;
c. much of this "tutorial" work was carried out in the cafeteria with the student and tutors working at one of the tables there;
d. spent considerable time washing and processing towels and uniforms used in the athletic program at MHS. (Testimony of Morgan-Janes)

5. In school year 1999-2000, during the 7:30-10:30 time period when he was receiving services at MHS, the student engaged in a pattern of behavior that ranged from inappropriate to offensive to indecent, including:
    a. the use of vulgar language, both to staff and other students ("bitch", "fat butt", "fat poop");
    b. frequently would display "the finger" to staff and students;
    c. disrobing in public places in the school;
    d. entering the girls bathroom, on at least one occasion, and refusing to leave for 10–12 minutes (S 542);
    e. hitting, spanking, striking teachers and educational technicians multiple times on many days, sometimes hard enough to leave small bruises and red marks;
    f. spitting in the face of educational technicians;
    g. kicking his sign language instructor;
    h. touching and grabbing at the genitals of his educational technician;
    i. kicking at the genitals of a staff member.

    This is not an exhaustive list of such incidents. There were other instances of this sort of inappropriate behavior. This kind of behavior occurred each month from September, 1999 to May, 2000 during the time the student was at school. The parents did not challenge the school's evidence that the student was in fact engaging in this inappropriate behavior while at school. (SE, 142-152, 157-162, 225-234, A-1, testimony of Morgan-Janes)

6. In school year 1999-2000, during the time the student was receiving services from WOU, no instances of inappropriate and/or assaultive behavior were reported.

7. A "Behavioral Management and Support Plan" was developed by the PET for school year 1999-2000. (SE, 111-116)

8. The IEP adopted by the school for school year 2000-2001 does not contain any document which could be understood to be a Behavioral Intervention Plan, or its functional equivalent. (SE, 38 et seq)

9. The IEP for school year calls for the student to receive "vocational training" for 6 hours each day, 5 days each week. This training is to be provided by "Work Opportunities Staff." Intermixed with this vocational training, 'instruction in functional skills" is also to be provided by WOU staff on an "on-going" basis. (SE, 40)

10. The WOU staff member contemplated to be the student's "job coach" is not certified as a provider of special education services. WOU intends to pursue his certification by the Maine Department of Education as an "educational technician". The Maine certification scheme provides for certification as an Educational Technician I, II, or III, with each level having a different range of permitted activity and autonomy. There was no evidence as to what level certification the WOU staff member would be seeking. (Maine Department of Education Rules, Ch. 115, Sec. 5.5)

11. The manner in which "instruction in functional skills" was to be provided in an "on-going" manner is not specifically identified either in the IEP or by evidence offered at the hearing. (SE, 38 et seq.)

12. The manner in which the "goals and objectives" contained in the IEP are to be accomplished by the program proposed in the IEP is not specifically identified either in the IEP or by evidence offered at the hearing. (SE, 38 et seq.)

IV. Conclusions

Does the Individualized Education Program adopted by the school for school year 2000-2001 provide the student with a free and appropriate public education?

A.

The parents advance a series of arguments to support their position that the IEP adopted by the school for school year 2000-2001 does not provide their son with a free and appropriate public education. They make two procedural claims. The parents assert that the placement

in which the IEP was to be delivered was "pre-determined" by the school prior to the development of the IEP itself, thus violating the law. While it is true that, under some circumstances, procedural deficiencies can serve as a basis for finding a violation of the FAPE requirement, such is not the case here. In school year 1999-2000, the PET met ten times to discuss and debate the student, his development and needs, and to determine the appropriate program and placement for his last year of school. One or both of the parents attended each PET, at times accompanied by a representative to provide assistance. These parents are concerned parents who availed themselves of every opportunity to participate in the development of the educational plan for their son. The school made staff available for these meetings and provided the parents with a real opportunity to take part in the educational process. Enormous amounts of time, concern, energy and expertise have been invested by both parties to this dispute. It is hard to imagine a publicly funded process that could be more thorough. It may be unfortunate that unanimity of opinion could not be reached, but the fact that the parents and school disagreed about at least part of the IEP does not amount to a procedural deficiency.

The parents also argue that the placement decision "preceded" the program decision. While this argument might have some merit if the school and the student were strangers who first met at the June, 2000 PET, the facts here are otherwise. Not only was the June PET preceded by nine other PET meetings at which both program and placement issues were discussed, but also the student had already been served, relatively successfully under many measures, in a WOU placement during the majority of his school day throughout school year 1999-2000. The 2000-2001 placement is an extension of an existing placement, and arises out of a full school year's experience with that placement. The gravemen of the parent's argument here is that the placement must flow from an understanding of the student's needs, as reflected in the IEP. Again, while parents and school disagree about the content of the IEP, the parent's viewpoints were heard and considered throughout the process. There is no procedural violation.[2]

[2] The parents also assert that the fact that a regular education teacher did not sign the attendance sheet at the June 20, 2000 PET amounts to a fatal procedural error. However, the regular education teacher, Mr. Mohammed, is reported as present at the PET in the minutes of the meeting itself. (S, 53) Even assuming that the absence of Mr. Mohammed would be fatal to the IEP, the parents have not carried the burden to establish that a violation sufficient to invalidate the IEP occurred. Roland M (get citation)

B.

The parents next argue that the IEP is substantively deficient because it is not reasonably calculated to confer meaningful educational benefit upon the student as required by the IDEA and state special education law and regulations. At the beginning of this discussion, it is important to note that both parents and school agree that the "goals and objectives" as set forth in great detail in the IEP at pages 42-53 of the school's exhibits are appropriate for the student. Given that agreement, two questions remain: (1) can those goals and objectives be accomplished by implementing the program as described in the IEP; and, (2) is the placement, at WOU, in compliance with the LRE requirement of state and federal law?

The program designed at the PET to accomplish the goals and objectives of the IEP is set forth on page 40 of the school's exhibits. At the heart of the program, is the "vocational training" component, occupying six hours per day, five days per week. As described by testimony at the hearing, the student will be picked up at his home by his "job coach" from WOU, taken to the work site to work under the supervision of his job coach. The IEP contemplates that the student will be in the company of his job coach throughout the entire six hour day. At the end of the work day, the job coach will take the student to the "Wellness Center" at the school for "leisure and pro-social skills" for "up to five hours per week". The job coach will then take the student home. In addition, the program includes one meeting a month between the student and an American Sign Language interpreter, one 30 minute consultation per month with a Speech and Language therapist, behavioral consultation on an "as needed" basis and one visit to the work site per week from school's Special Education teacher. Further, the program calls for "Instruction in Functional Skills" to be provided by WOU staff on an "on-going" basis. The only WOU staff identified at the hearing was the student's job coach, who is not a certified special education teacher. WOU is apparently seeking to have the job coach certified as an Educational Technician by the Maine Department of Education, but no such certification is currently held by the job coach and there was no testimony as to which level of certification (Educational Technician I, II, or III) is being sought. The IEP does not contain a Behavioral Intervention Plan.[3]

The parents argue that there is a "complete disconnect" between the goals and objectives in the IEP and the program described in the IEP.

[3] Other, earlier IEP's have contained such Behavioral Intervention Plans. See School's Exhibits, pps 111-116.

While I do not agree entirely with that contention, I find the IEP fails to contain sufficient information as to how the student is to be instructed in those areas referred to in the goals and objectives section of the IEP. Presumably, the part of the program which is intended to teach the student the skills needed to achieve, or at least to increase competence in, the goals and objectives of the IEP is found in the section entitled "Instruction in functional skills". Remarkably, the program contains no information as to how, when, where or by whom this instruction is to be provided. Indeed, given that 'vocational training" is scheduled for six hours each day and "leisure and pro-social skills" work is scheduled for one hour per day, it is hard to imagine that the student will have sufficient time, energy or attentiveness to work beyond those seven hours of programming. At the hearing, there was no clear response to questions about when or how this instruction would occur, beyond the assertion that the job coach, who was identified as the member of the WOU staff expected to provide the instruction, would weave the instruction into the other activities that fill the student's day.

The IEP does not pass muster for several reasons. First, the IEP does not even attempt to describe how the goals and objectives are to be accomplished at the WOU placement. It is simply inadequate to assert that the lengthy and detailed goals and objectives will be taught on an "on-going" basis by an uncertified Work Opportunities Unlimited staff member during the interstices of a seven hour day already fully programmed with activities. The goals and objectives, which both parties to this matter agree are appropriate for the student, contain specific and detailed information about what the student is supposed to learn to do and when he is expected to accomplish each goal.[4] The IEP contains no bridge between those goals and the program described on page 40 of the school's exhibits. It is insufficient for the school to entrust the WOU with the responsibility to design the means of accomplishing the goals and objectives without guidance from the school, and from the PET. This IEP does exactly that and is therefore deficient in this regard.

[4] The goals and objectives are found at pages 42-53 of the School's exhibits. As an example, the goal on page 45 concerns the student's ability to read, stating: "(the student) will engage in functional reading and reading related tasks with 90% accuracy as measured by teacher observation and charting." This goal established over a dozen dates by which certain specific skills will be mastered. On page 46, the goal is that the student will "learn 15 new sight words from work and bank related forms or signs" by October 2000 and 20 more by May 2001 "with 85% accuracy as measured by cumulative reviews…" One of the goals on page 48 is that the student "will be able to relate a 6 sentence story using total communication by Sept 2000 as evidenced by teacher charting" Other goals include increasing skills in the areas of measuring, using money, cooking, shopping, and doing laundry.

The IEP is inconsistent with state and federal requirements in another aspect as well. At the hearing, there was testimony that the student's job coach was to be the WOU staff member responsible for providing the vast majority of the special education services described in the IEP.[5] The job coach was specifically identified as the person who would provide all the "instruction in functional skills". The job coach, however, is not certified as a teacher of regular or special education by the Maine Department of Education. Neither is he certified as an Educational Technician. Under those facts, the services provided by the job coach do not meet the standards set by state law and regulations. MSER Section 5.5(A). This deficiency is not cured by the once weekly visit to the work site by the special education teacher that is required by the IEP.

Finally, the IEP for school year 2000-2001 does not contain a behavior intervention plan for the student, despite the presence of such a plan in prior years. Given the evidence presented at the hearing about the student's maladaptive and inappropriate behavior during the past school year, such a plan must be included in the IEP.

C.

The final issue is whether the placement at WOU complies with the requirement that special education services be provided in the least restrictive environment in which the student can receive an appropriate education. I find that it does, for the reasons set forth below.

Many hours of the hearing were devoted to the student's behavior during recent school years when much of his programming was provided at MHS, with particular emphasis on school year 2000-2001, when his program was split between MHS and WOU. The parties largely agreed about the factual aspects of the student's behavior during the last school year, at MHS and WOU.[6] The student's behavior at MHS was frequently inappropriate and offensive during his time there. The behavior included instances of kicking, spitting, swearing, obscene gesturing, disrobing, inappropriate touching, mostly directed at MHS staff but sometimes at students as well. Further, the student refused to attend certain classes with other students, refused or resisted instructions to move from one place to another and often indicated his desire to leave the school.

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[5] Certain services are to be provided by others: the special education teacher would visit the work site once a week; a certified ASL interpreter would consult once a month at the work site, and a speech consultant would provide 30 minutes of speech/language therapy each month.

[6] Despite this factual agreement, the parties flatly disagreed about both the cause of, and the appropriate response to, the student's behavior.

There was minimal interaction between the student and other students at MHS, either from the regular or special education sections of the student body. It is clear that the student, who has limited language skills, did not enjoy his time at MHS; his behavior articulated that point unambiguously. He was not a willing participant in his program at MHS despite the best efforts of MHS staff. The meaning of the student's behavior at MHS is amplified when contrasted to his behavior during the portion of his program provided by WOU: none of the offensive and/or inappropriate behavior was reported when the student was at WOU.

I reach the conclusion that the student's placement at WOU is consistent with the LRE requirement for two reasons. First, there is a limit to the amount of disruptive, maladaptive and inappropriate behavior that a school must tolerate in its attempt to maintain a student in an in-school placement. That limit has been reached here.[7] Second, the student's interests are not well served by keeping him in a situation that has become so problematic that little, if any, education is able to occur. The student has demonstrated by his behavior that MHS is no longer an appropriate situation for him. By placing the student in the WOU placement, the school keeps him in his home community, as opposed to a residential placement, and in a situation where he has already experienced some measure of success. While the IEP must modified, as discussed above, the placement itself does not violate the LRE requirement of state and federal law.

V. Order

1. The school shall convene the PET to develop an IEP that:
    a. describes in sufficient detail how the goals and objectives set forth in the current IEP are to be accomplished in WOU placement. No further evaluations are ordered as a result of this hearing, though any new evaluation that may have been conducted since the hearing may of course be considered by the PET;
    b. requires that the special education services provided to the student are delivered by properly certified providers, or under the direct supervision of properly certified special educators;

[7] The school argued that the student should be removed from MHS on the basis that he presented a substantial risk of harm to himself or others should he remain at MHS. I have considered this argument carefully, but find that the record does not support the school's argument on this matter.

c. contains a behavioral intervention plan to be employed by WOU/MHS staff, should the need for such intervention arise.

2. The stay-put order issued on August 31, 2000 remains in effect until (1) the new IEP is completed or (2) the parties agree to an alternative placement.

Peter H. Stewart, Esq. Date
Hearing Officer

LIST OF WITNESS

LIST OF EXHIBITS