

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

September 25, 2000

Case # 00.244, *Litchfield (Union #44) v.Parent*

REPRESENTING THE SCHOOL: The School District represented itself.

REPRESENTING THE FAMILY: Anthony Ferguson, Esq.

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

This hearing was requested by the Litchfield School Department (Union #44) on August 30, 2000. The case involves student, whose date of birth is dob. He resides with his mother and his stepfather, in Maine. S is currently eligible for special education services under the category of Emotionally Disabled. He attends seventh grade at the Carrie Ricker Middle School, in Litchfield, Maine.

The parties met in a pre-hearing conference on Friday, September 8, 2000, at the Department of Human Services Building, Augusta, Maine, to exchange documents and lists of witnesses, and to clarify the issues for hearing. The hearing was held on September 15, 2000, at the same location. The District entered 75 pages of documents into the record and the family entered 31 pages of documents. Eight witnesses testified.

I. Preliminary Statement

This case involves a xxx year-old male student, who is eligible for special education services under the category of Emotionally Disabled. Student currently attends seventh grade at the Carrie Ricker Middle School in Litchfield. His current IEP describes a program that consists of placement in an alternative classroom, with regular education classes in Social Studies and Science. During spring of the 1999-2000 school year, student began exhibiting increasing behavioral difficulties, and eventually stopped attending the regular education classes. In May 2000, student was suspended for three days.

Both the District and the family requested a due process hearing on or about the same date. In its request, the District sought to conduct a neuropsychological examination of student, absent permission by the family. The family requested that student be removed from the alternative classroom, and placed in regular education.

At the beginning of the hearing, a settlement of one issue was reached by the parties. The parent's gave permission for the District to conduct an extensive psychological examination of student, to be done by a licensed clinical psychologist. The District

agreed to forward a list of qualified psychologists to the family, so they could review that list and choose a psychologist to conduct the evaluation. That list was forwarded to the family on September 21, 2000.

II. Issues to be Decided by the Hearing

The remaining issue to be decided by the hearing was framed as follows:

Is student's current placement, the alternative education classroom, the most appropriate placement for student?

III. Findings of Fact

1. Student's date of birth is dob, and he is currently xxx years old. (Due Process Request)
2. Student was referred for a special education evaluation in May 1995, due to behavioral difficulties at school. At this time, student was at the end of first grade at the Litchfield School. Student's WISC III scores were as follows: Verbal IQ, 100, Performance IQ, 100, and Full Scale IQ, 100. A WIAT was conducted, resulting in below average scores in Reading Comprehension (76) and Reading Composite (80). (Exhibit: P-6)
3. The evaluator also administered the Connor's Behavior Rating Scale, completed by the teacher, in which she rated student's behavior in the "problem range" in one area, that of "emotional." The evaluator noted that this subscale includes behaviors such as easily frustrated, overly sensitive, overly serious, somewhat sullen, frequent mood changes, and stubborn. (Exhibit: P-6)
4. The evaluator stated in her report that "one can see that there is a substantial discrepancy between his reading achievement score and his intelligence quotient standard score." She recommended scheduling a PET to discuss student's programming and suggested the use of multi-sensory reading strategies. She also suggested utilizing the services of the school social worker and/or guidance personnel to assist student in expressing his feelings. A PET meeting was held; however, the team determined that student "was not a student with a special education handicapping condition." (Exhibits: P-5, P-6)
5. Student began attending fourth grade at Carrie Ricker Middle School in September 1997, and is currently attending seventh grade at that school. (Exhibit: P-1, S-5, S-6)
6. In May 1998, student was once more referred for special education testing, again because of "behavioral issues." Student's WISC III scores were as follows: Verbal IQ, 95; Performance IQ, 100; Full Scale IQ, 97, in line with his previous scores. His WIAT scores also showed similar patterns to his prior scores,

although with less of a discrepancy (Reading Comprehension, 87; Basic Reading, 83). In addition, the evaluator now administered a written language component, and student scored 80 in Written Expression and 82 in the Writing Composite. (Exhibit: P-5)

7. The evaluator noted, based on completed Teacher's Reports, that student "often argues, is defiant, is disobedient, disturbs other pupils, does not seem to feel guilty after misbehaving, feels others are out to get him, gets in many fights, acts without thinking, not liked by other pupils, talks out of turn, has explosive and unpredictable behavior and often has hot temper." (Exhibit: P-5)
8. The evaluator again recommends a PET meeting, to consider student's achievement testing as well as staff observations. She suggests written language modifications, a behavior plan targeting one or two particularly troubling behaviors and social work services. She further suggests that "art could be used either as a reward or as means of communication" for student. (Exhibit: P-5)
9. Apparently a PET meeting was held at some time subsequent to this report, finding student eligible for special education services under the category of "Behavioral Impairment." Neither the minutes of that meeting nor the IEP that was developed were admitted into evidence; however, the minutes of a May 26, 1999 PET meeting (one year later) state that the purpose of that meeting was a "Review of Program." It is probable that the PET meeting was held on June 10, 1998, since it was on that date that a "Behavioral Impairment Evaluation Report" on student was completed. This report states that student exhibits "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." There is no evidence that the possibility that student has a learning disability, based on his written language scores, was ever considered or discussed. (Exhibit: S-1, P-4)
10. At the PET meeting held on May 26, 1999, Ms. Morris, the special education teacher for the 1998-1999 school year (student's fifth grade year), noted that student "still demonstrat[es] good academic ability but his achievement is significantly impeded by his behaviors". There was discussion about whether an alternative learning environment would be beneficial for student and the PET determined that an alternative program would meet student's needs and student should attend the Alternative Education Program, beginning in September 1999 (student's sixth grade year). At this meeting student was found eligible for special education services under the category of "Behavioral Impairment." (Exhibits: P-4, S-1)
11. During the summer of 1999, student attended an alternative education summer program and, according the mother, that program seemed to go very well. (Exhibit: S-2; Testimony: Mother)

12. A PET meeting was held on September 30, 1999, at which student's behavior over the years, as well as his current academic program, were discussed. It was noted that student had had numerous behavioral incidents on the playground, but that his behavior improved when he was provided an alternative to recess. During this meeting, Mrs. Mc Cue, the Carrie Ricker principal, stated, "success in the alternative program would be the indicator of return to regular education." The PET determined that student would participate in the alternative education program for two weeks and then the PET would reconvene to make a determination about adding a regular education class to student's schedule. (Exhibit: S-2; Testimony: C. McCue)
13. A PET meeting was held on October 13, 1999, and at that meeting it was determined that on October 18, 2000, student would begin transitioning into the regular education class taught by Mr. Curtis Jack. The I.E.P prepared at this meeting includes classroom modifications and social worker services. Student's goals include one goal in written language, one goal in coping skills and two goals in behavior control. (Exhibit: S-3)
14. At some time subsequent to this PET meeting, probably around mid-November 1999, a regular education science class was added to student's schedule. (Testimony: C. Jack, D. Dodge, Mother)
15. Beginning around November 1999, student began exhibiting increasing behavioral problems, often centering on foul language directed at peers and non-compliance with staff orders. None of this behavior, however, occurred in the regular education classes. (Exhibit: S-10, S-11, S-12; Testimony: D. Dodge, Mother)
16. By all accounts, student performed very well in the Social Studies class. Student's social studies teacher, Curtis Jack, has had student in his class since October 1999 and found student to do well on tests and pay attention in class. He did not need to modify either the curriculum or the tests, except to make some writing modifications, since writing was difficult for student. Student's attendance was good, as was his homework completion, until the end of the school year, when student stopped coming to class. Mr. Jack stated that although group work was somewhat of a difficulty for student he "never had a behavior problem with him in my classroom." (Testimony: C. Jack)
17. Mr. Jack did note that although he felt that student could function in regular education, that structure was a problem for him and modifications would need to be made such that student would have an opportunity during the day to spend time somewhere, or at some activity, that was less structured. He suggested that student might possibly need an educational technician at times during the day, although he never felt that student needed an aide while in his regular education classroom. (Testimony: C. Jack)

18. Student's homework completion for the science class was problematical. He often left his homework at school, having taken it out to work on with his alternative education teacher. Likewise, his attendance at this class was not good. Again, both Ms. Dodge and student testified that the timing of the class was such that in order to attend he often had to miss some of the more enjoyable activities in the Alternative Classroom, such as rewards or art, a favorite subject. Notes from Ms. Dodge to the family further indicate that, in her opinion, student was doing well "upstairs", yet still having significant behavioral problems "downstairs."¹ And, since his ability to attend his regular education classes was contingent on his behavior in his alternative education classroom, his misbehavior in that class sometimes caused his absence from a regular education class. (Exhibits: P-7, P-8, P-9; Testimony: D. Dodge)
19. On March 6, 2000, a PET meeting was held, to consider the addition of a third regular education class to student's schedule. Ms. Beganny, student's science teacher, expressed concern about student's attendance and work completion. She stated that student's program should either remain the same or it should be reduced to one regular education class. Mr. Jack concurred with this opinion. It was at this meeting that a conflict between reward time in alternative education and the science class was pointed out. The PET determined that no change in student's program was appropriate at that time. When told about the PET's decision, student was apparently very disappointed. (Exhibit: S-4; Testimony: C. Jack, D. Dodge, Mother, Student)
20. About this time, student's behavior began to deteriorate significantly. He was either sent home, or stayed home, for twenty days between March 15th and May 24th, 2000. According to student's stepfather and mother, student just "gave up" after the determination not to increase his regular education course load. (Exhibit: S-9; Testimony: Mother, Stepfather)
21. On May 26, 2000, Ms. McCue was called to the gym because of an incident that was occurring there. Student was apparently very upset and yelling and swearing and refusing to leave the site. Ms. McCue tried to escort student from the site and in doing so she inadvertently stepped on the hem of student's jeans. Student then refused to leave the gym and threatened to physically harm Mrs. McCue. Also during this incident, student swore profusely. Due to this incident, student was suspended for three days. (Exhibit: S-13, S-5; Testimony: C. McCue)
22. A June 9, 2000 PET meeting was held, in order to discuss the incident leading to student's suspension. It was noted in that minutes that since the suspension, student's behavior had improved and that he was now making better behavioral choices. His IEP was reviewed and his Behavior Plan was somewhat modified. It

¹ The regular education classes, such as social studies and science, are held in the upstairs part of the building, while the alternative education classroom is downstairs. Thus, the staff and students use the shorthand "upstairs" and "downstairs."

- was determined that the school would request permission from the family to conduct a psychological evaluation of student, and that the PET would meet in October 2000, if not sooner, to review the results of the evaluation and review student's IEP. (Exhibit: S-5)
23. Student's end of the year grades were as follows: Language Arts; 86%, Mathematics, 90%; Science, 83%; Social Studies, 81%. Although student had only 1.5 absences in the first trimester and 6 absences in the second, his report card indicates 28.5 absences in the third trimester. (Exhibit: P-11)
 24. A PET meeting was held on August 10, 2000, to discuss student's program for the 2000-2001 school year. The team members again repeated their observations of student's behavioral issues and problems with authority. After the team rebuffed the stepfather's suggestion that student was routinely called "fat" by his peers, the family left the meeting. They subsequently refused to give permission for the psychological evaluation and suggested that they might remove student from the District. Dr. Will Burrow, who had recently become the new Special Education Director, was unable to persuade the family to remain at the meeting. (Exhibit: S-7)
 25. On August 10, 2000, Dr. Burrow forwarded a letter to the family in which the District offered to pay for an independent psychological evaluation of student. In this letter, he states that if permission is not granted, the District will file a Due Process Request. (Exhibit: S-8)
 26. Student began the 2000-2001 school year on or about August 30, 2000. On August 30, 2000, while in the alternative education classroom and without obvious provocation, student began to get agitated and stated that no one was permitted to touch him. At this time he used abusive language and damaged a chair in the course of a 60-90 minute outburst. The current alternative education teacher was able to eventually calm student and return him to his cubicle. (Exhibit: S-15; Testimony: W. Gammon)
 27. Student's most current IEP, dated June 19, 2000, continues student's placement in the alternative education placement and includes a Behavioral Intervention Plan based on the Levels System. (Exhibit: P-10)
 28. When school began in September 2000, student was not scheduled to attend any regular education classes, but as of September 17, 2000, student had begun attending two regular education classes. His main placement, however, continues to be the alternative education classroom. However, his attendance in his regular education classes is no longer contingent on his behavior in his alternative education classroom. (Exhibit: S-17)

IV. Conclusions

There appears to be no dispute that student exhibits significant behavioral problems at school, and has done so for a lengthy period of time. He is eligible under the category of Emotionally Disabled (formerly Behavioral Impairment) and has a behavioral intervention plan as part of his IEP. Likewise, the District has requested, and the family has now given permission for, a comprehensive psychological evaluation of student, to help inform the placement and programming process.

However, the question before us is whether student's current placement, the alternative education classroom, with two regular education classes, is the least restrictive environment within which student can make educational progress. As the Maine Special Education Regulations state,

“...removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

MSER §11.1 (1999); *See also* 34 CFR §300.550(b)(2)

Additional clarification of these regulations was given in the Federal Department of Education's *Appendix A to Part 300 – Notice of Interpretation*. In response to a question regarding regular education placement for a child whose behavior would significantly impair the learning of others, the Department responds that the PET is required to consider “strategies, including positive behavioral interventions, strategies and supports to address the behavior” of that child. Furthermore, “If the child can appropriately function in the regular classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA.” *DOE Q & A Document*, Question 39, 64 Fed. Reg. 12479 (March 12, 1999).

There should be no question about the intent of these regulations – self-contained classrooms are disfavored, and any student who can, with appropriate aids and supports, be educated in a regular education classroom should be. The simple fact that the new I.E.P form requires a statement of the “extent, if any, to which the child will **not** participate with non-disabled children in regular classes,” indicates a presumption that children with disabilities are to be educated in regular classes if at all possible.

The testimony in this case presents an unusual dichotomy. Apparently, student has performed well, both behaviorally and academically, in the regular education classrooms, particularly social studies, yet exhibits continuing behavioral difficulties in the alternative education classroom. Student's social studies teacher, Curtis Jack, has had student in his class since October 1999 and found student to do well on tests and pay attention in class. Student did not need an aide in his class and did not exhibit behavior problems while there. Homework completion and attendance was good for most of the year.

Although there were difficulties with regular education science, specifically attendance problems and lack of homework completion, the testimony by Ms. Dodge indicates that those problems may have had more to do with scheduling issues than with student's

behavior. Likewise, student at times missed his regular education classes due to misbehavior in his alternative education classroom.

True, late spring of 2000 saw declining attendance, and eventual non-attendance at student's regular education classes. Ms. Dodge, the family, and student himself, testified that he was extremely disappointed when the PET declined to give him a third regular education class and just "gave up." This may be the full explanation, or there may be other reasons for student's decline at the end of the year. However, the fact remains that student was able to achieve academically and behave appropriately while in the regular education classes.

In light of student's progress and behavior in the social studies class, it seems that the PET would have tried to identify additional opportunities for student to be successful. Rather, it tried to punish student by withholding what was a functional reward for him – an additional regular education class. Tying a positive change in schedule, i.e. an additional regular education class, to student's behavior in the alternative education class is not only unwise but also legally unsound. A student does not have to prove that he can achieve and behave while in regular education; rather, there is a presumption that a student can, and will, be educated in regular education.

If a district believes that a student needs to be educated in a more restrictive environment, either for educational reasons or to protect the safety of the student and/or others within the school, it must produce evidence supporting that contention. That evidence is just not present in this case. It is clear that student is able to achieve academically and to control his behavior within the regular education classrooms. Obviously, there is some reason why he is unable to control his behavior within the alternative education setting. That reason could range from willful misbehavior aimed at getting him out of that setting, to the presence of triggers within that setting. Whatever the reason, it appears obvious that this more restrictive setting is not working for student, while the less restrictive setting is.

In addition to indicating a strong preference for the education of special education students alongside regular education students, the regulations clearly state that the placement must be based on a student's IEP, not the other way around. *See* MSER §11.2(A) (1999), 34 CFR §300.552(b)(2). In this case, it appears that the placement determination, i.e. the alternative education class, was made prior to the development of student's goals and objectives. Likewise, the addition of regular education class time was determined by the placement, and student's behavior therein, rather than by whether student could progress academically and meet his goals and objectives in those regular education classes.

This is not to suggest that student does not need a Positive Behavioral Intervention Plan, and appropriate supports and supplementary services to give him the best possible chance of educational success. Nor am I suggesting that student's behavior will be perfect if he is given a full regular education schedule. What I am stating is that there is little, if any, evidence that student cannot be successfully educated alongside his regular education peers.

Since student will soon be evaluated by a clinical psychologist, any changes in student's program should wait until the results of that evaluation are presented to, and discussed by, the PET. Unless and until the results of this evaluation present clear evidence that student is unable to achieve educationally in a regular education setting, given appropriate supports and supplementary services, or that student is a danger to himself or others within the regular education setting, student must be placed in the less restrictive placement. The PET should convene immediately after the results of the evaluation are available to develop a new IEP for student. This IEP should include a regular education placement, a Positive Behavioral Intervention Plan² and any supports and supplementary services that are indicated.

V. Decision

Student's current placement, the District's Alternative Education Classroom, is not an appropriate placement for student, since it is not the least restrictive educational setting in which student can be successfully educated.

VI. Order

Within ten business days of the availability of the pending psychological evaluation of student, the PET shall meet to develop a new IEP for student. Unless contraindicated by the results of the pending evaluation, student's placement shall be in regular education. The PET shall order a Functional Behavioral Assessment, if deemed necessary, and shall develop a Positive Behavioral Intervention Plan for student. The IEP shall also include those supplementary supports and services that would be needed in order for student to be successfully educated in regular education.

Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator.

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

Date

School District's List of Documents

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| S-1 | PET Minutes (5/26/99) |
| S-2 | PET Minutes (9/30/99) |
| S-3 | PET Minutes and IEP (10/13/99) |

² I would caution the school to look carefully at sending student home early, due to behavioral issues, as these early dismissals could be construed as suspensions and a pattern of these might call the disciplinary provisions of §1415 et. seq. into play.

- S-4 PET Minutes (3/6/00)
- S-5 PET Minutes (6/9/00)
- S-6 IEP and Behavior Plan (6/9/00)
- S-7 PET Minutes (8/10/00)
- S-8 Letter from Dr. Will Burrow to the Family (8/10/00)
- S-9 Absence and Dismissal Summary (1999-2000)
- S-10 Summary of Behavioral Incidents (November 1999)
- S-11 Referral and Detention Notices (December 1999 – April 2000)
- S-12 Log of phone calls to Family (December 1999 – June 2000)
- S-13 Suspension Notice (5/26/2000)
- S-14 Summary of August 30, 2000 incident
- S-15 Draft Functional Behavior Assessment (9/6/2000)
- S-16 Psychological Assessment (5/98)
- S-17 Email from Dr. Burrow to Family and Hearing Officer (9/21/00)

District’s List of Witnesses

Dr. Will H. Burrow, Director of Special Education, Union #44

Mrs. Cathy McCue, Principal, Carrie Ricker Middle School

Mr. Curtis Jack, Social Studies Teacher

Mr. Wayne Gammon, Special Education Teacher, Alternative Education Classroom

Family’s List of Documents

- P-1 Pre-Referral Documentation of Alternative Interventions (undated)
- P-2 Individual Education Evaluation Report (6/10/98)
- P-3 Individual Education Evaluation Report (6/11/98)

- P-4 Behavioral Impairment Evaluation Report (6/10/98)
- P-5 Psychological Test Report (5/20/98 and 6/4/98 evaluation dates)
- P-6 Psychological Test Report (4/25/95)
- P-7 Debra Dodge note to Parents (11/5/99)
- P-8 Debra Dodge note to Parents (11/16/99)
- P-9 Debra Dodge note to Parents (3/1/00)
- P-10 IEP (6/19/00)
- P-11 Report card, 1999-2000 school year

Family's List of Witnesses

Step-father

Mother

Debra Dodge, Student's Special Education Teacher, 1999-2000 school year

Student