

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 27, 2000

Case # 00.256, Parent v. China School Department

REPRESENTING THE FAMILY: The Family represented self.

REPRESENTING THE SCHOOL: Elizabeth Olivier, Esq.

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

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 Mother on September 14, 2000. The case involves Student whose date of birth is dob. He resides with his parents in Maine. Student is currently eligible for special education services under the category of multi-handicapped. He is currently attending kindergarten at China Primary School.

The prehearing was originally scheduled for October 13, 2000, and the hearing for October 20, 2000. However, by mutual agreement, both dates were rescheduled. The parties held a prehearing conference on November 1, 2000, at the Department of Human Services, Augusta, Maine. At that time, the parties defined the issues for hearing and exchanged witness lists and documents.

The hearing was held on Wednesday, November 8, 2000, at the Waterville District Court, Waterville, Maine. The family submitted documents P1-P22, the School District submitted documents S1-S4 and the parties jointly submitted documents J1-9. Six witnesses testified.

I. Preliminary Statement

This case involves a xx year-old male student, who began receiving occupational therapy through Child Development Services (CDS), under an Individualized Family Services Program (IFSP) developed in summer 1999. This IFSP was amended in December 1999 to include speech and language services. On August 29, 2000 student entered kindergarten at China Primary School. He is currently attending the morning kindergarten and receives occupational therapy and speech and language therapy on-site, under an IEP developed on September 13, 2000.

The family requested this hearing. It is their contention that student should receive his related services after school, rather than during his school day. They further argue that student should receive transportation from these services to his home.

The school department denies these contentions and argues that it can appropriately meet student's needs through service delivery within the school day.

II. Issues to be Decided by the Hearing

1. Was an IEP developed at the May 3, 2000 PET meeting?
2. If so, did the China School Department violate the IDEA by subsequently changing student's placement and program without holding a PET meeting and developing a new IEP?
3. Is the IEP developed at the September 13, 2000 PET meeting reasonably calculated to provide educational benefit, particularly in the areas of related services and transportation.
 - Can the China School Department provide appropriate therapies and related services within the school day or does student need extended day service in order to receive a free appropriate public education?
 - If extended day services are necessary, is the China School Department required to provide transportation from those services to the home?

III. Findings of Fact

1. Student's date of birth is dob (Due Process Request)
2. CDS referred student for an Occupational Therapy (OT) evaluation, which was completed by Kellie J. Huard, OTR/L at the STEP Center in Pittsfield, Maine, on August 13, 1999. In her report, Ms. Huard noted sensory processing concerns related to motor planning/processing motor actions. She also noted that student's self-care skills were not age appropriate, and he had a moderate dysfunction in fine motor skills. The evaluator's recommendations included OT twice a week, in 45-minute sessions, to address fine motor function, sensory processing function and self-care skills. (Exhibit: P-3)
3. At some time between the August 13, 1999 OT evaluation and the end of October 1999, student began receiving two 60-minute sessions per week of OT, at the Therapy Corner in Winthrop, Maine. These services were provided under an IFSP, which was developed at some time between August and October 1999. (Testimony: Mother)
4. Kristin Cushman Inman, MOT, OTR/L, a therapist at the Therapy Corner, completed an extensive evaluation of student, which is detailed in a report dated November 4, 1999. In her report, Ms. Inman notes that student "presents with difficulties in all 4 domains of sensory processing – sensory defensiveness, sensory modulation (self-regulation), sensory registration and sensory integration." She recommended that student continue his schedule of OT services, to improve his sensory processing, gross and fine motor skills, visual-motor perceptual skills, and self-care skills. (Exhibit: P-4)

5. A psychological evaluation of student was completed by Michael Nurick, Ph.D., at Maine Medical Center, on December 4, 1999. Dr. Nurick notes that during testing student understood and followed rules, such as cleanup of the toys, although his play was somewhat disorganized and rough. He further states, "It is clear that he thrives on his parents attention...." During testing, student sat very well, was cooperative and displayed good effort. He displayed some minor distractibility but responded appropriately to verbal prompts to return to task. (Exhibit: P-5)
6. On the Stanford-Binet Intelligence Scale, student scored at the 92nd percentile in Verbal Reasoning, 21st percentile in Abstract/Visual Reasoning and 40th percentile in Short Term Memory. Dr. Nurick noted that the 35-point gap between Verbal and Abstract/Visual Reasoning might suggest concerns with visual/spatial and/or visual motor functioning. Dr. Nurick further noted that statements made by the parents suggesting that student has been unable to learn the alphabet or count to three are not at all consistent with his verbal reasoning score. Dr. Nurick state, "Basically, it does not make sense that he would earn such an incredibly high score and not be able to display these skills." (Exhibit: P-5)
7. Dr. Nurick also administered various behavioral and self-help checklists to the parents to complete. On the Vineland, the parent's endorsements indicate significant weaknesses with student's ability to take care of himself in an age appropriate manner and contribute to the household, as well as great difficulties interacting with others and regulating his emotions and behavior. Dr. Nurick again stated, "These scores are not at all consistent with his intellectual functioning, and suggest that he should, in fact, have the ability to perform the appropriate adaptive skills. The reason he is not performing the tasks is not clear, but could very well be due to secondary gain, such as "yanking his parents chain"...." (Exhibit: P-5)
8. Based on what appears to be concerns articulated by the parents, Dr. Nurick concluded that student "meets the diagnostic criteria for Disruptive Behavior Disorder (DSM-IV 312.9), as a function of showing oppositional defiant features, and attention deficit features. He recommends that student be involved in a regular preschool setting. He further recommends that the parents receive behavior management counseling to assist them in dealing with student's behavioral difficulties. (P-5)
9. Barbara Browne, MA, CCC-SLP completed an informal speech and language evaluation, done through observation of student's speech, on December 7, 1999. Ms. Browne recommended that student have short-term speech therapy in order to establish a home program of oral motor exercises to promote motor planning and more consistent speech patterns. A Speech-Language Plan of Care was developed on January 4, 2000, which indicated that student would receive two sessions per

- week of speech and language services, each session to be 50 minutes of small group or individual work. Student's therapist was Karen Sundqvist, MS, CCC-SLP, and the plan included motor skills and expressive language goals and objectives. (Exhibit: P-6, P-7; Testimony: Mother)
10. An Occupational Therapy Plan of Care was developed on November 4, 1999. This plan continued the twice weekly 60 minute long sessions of OT that student had been receiving, and included goals and objectives in the areas of sensory processing, gross motor skills, fine motor skills, visual perceptual and visual motor skills, and self-care skills. This plan was coded by the therapist on February 4, 2000 and her coding indicates the following progress: out of 32 goals, student had met 4 goals, had made adequate progress towards 12 goals, had made some progress towards 8 goals, had made limited progress towards 4 goals, and had made no progress towards 2 goals. One goal was not addressed, and one goal had not been tested for. The period covered by this plan was from November 4, 1999 to May 4, 2000. (Exhibit: P-10)
 11. Ms. Sundqvist completed a Speech-Language Progress Note on April 30, 2000. In this report she notes that student's progress was slow but steady. Student was receiving therapy twice a week, once in an individual 7:10 a.m. session and once in a small group, at 1:45 p.m. Ms. Inman notes that student "is much more focused in the morning, he has more trouble staying on task and being compliant with directions in the afternoon. An early morning session is planned for both sessions for the summer months." Ms. Inman further notes that, in addition to his speech therapy and OT, student was receiving developmental therapy three times per week, and she suggests, "It is possible that this level of programming is too much for this young child, and that his difficulty with staying on task in an afternoon therapy session is related to fatigue." The Progress Note includes goals in the area of oral motor skills. (Exhibit: P-16)
 12. On May 4, 2000, a new Occupational Therapy Plan of Care was developed for student. This plan continued the same services, and again included 32 goals, although the goals student had met at this time were replaced by new goals. Coding done by the therapist on August 4, 2000 indicated that student had met 8 goals, had made adequate progress towards 9 goals, had made some progress towards one goal, had made limited progress towards 10 goals, and had made no progress towards 5 goals. (Exhibit: P-11)
 13. Ms. Inman completed an Occupational Therapy Progress Report, dated May 3, 2000. Testing of student on the Peabody Developmental Fine Motor Scales demonstrated below average abilities in fine motor skills. The Test of Visual Perceptual Skills-Revised (TVPS-R) indicated significantly below average skills in visual spatial relationships and visual sequential memory. The Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) resulted in a standard score of 88, below average performance, although the age equivalence score suggests that student is only about one month behind in this area. Sensory

processing and gross motor skills testing suggest delays in these areas. In her report, Ms. Inman recommends the continuation of OT at the same rate. She also recommends alternative seating positions, such as beanbag chairs, and fat writing implements. (Exhibit: P-12)

14. A PET meeting was held on May 3, 2000. This meeting was attended by the parents, by Ms. Sundqvist and Ms. Inman, as well as by Marjorie Childs, speech/language therapist, and Pamela Perry, occupational therapist. Also in attendance were the former special services director, Rebecca Allen, Ann Austin, the kindergarten teacher, Kathy Jacobs, the special education teacher, Carla Bonenfant, the OT assistant and Janice Harmon, from Project PEDS-CDS. At this meeting, the team reviewed the reports from Ms. Sundqvist and Ms. Inman and discussed student's behavioral and developmental therapy, as described by the mother. Ms. Sundqvist reiterated what she had stated in her Progress Report, that student shows no signs of sensory issues in the morning sessions, but in the afternoon sessions he is tired and cannot always hold it together. She further stated that it was hard to say what services student would need in the fall. The team held a preliminary discussion about student's needs when he began attending kindergarten in August 2000. It was decided that student would continue to receive services under his IFSP through the summer 2000, and would continue receiving those services when he entered kindergarten in August 2000. The minutes state, "[student] will continue receiving services through Project PEDS through August. When [student] enters kindergarten, he will receive speech/language therapy (60 minutes/week) and occupational therapy (60 minutes/week)." It was further decided that a PET meeting would be held within one month of the beginning of the 2000-2001 school year, to refine student's goals and objectives. (Exhibit: P-13, J-1; Testimony: M. Childs, P. Perry)
15. The minutes of the May 3, 2000 PET meeting were forwarded to the family, and signed by the father. The father also made typographical and linguistic changes on the minutes prior to returning them to the school. (P-13; Testimony: Father)
16. On August 29, 2000, student began attending Ann Austin's morning kindergarten at China Primary School. Within a week of the beginning of school student began receiving speech and language therapy and occupational therapy. (Exhibit: S-1, S-2; Testimony: A. Austin, Mother, M. Childs, P. Perry)
17. On August 30, 2000, the mother contacted the school, and requested a PET meeting, so that the scheduling of student's related services, and necessary transportation, could be discussed. A PET meeting was held on September 13, 2000. At this meeting, Project PEDS discharge reports, as well as reports from the school's therapists, were reviewed and an IEP was developed for student. Student was to continue to receive speech and language therapy and occupational therapy for 60 minutes each per week. This is the same frequency that student was receiving under his IFSP. The kindergarten teacher, as well as the occupational therapist, stated that they did not believe that student needed

- extended day services in order to benefit from his education. The family submitted a memo from Karen Sundqvist, in which she stated that student should remain in his kindergarten classroom for the full time, and not be pulled out for related services. The father testified that he requested that Ms. Sundqvist write a letter of this nature. An IEP, including goals and objectives in the areas of expressive language, sensory processing and motor skills, was developed. At this meeting, the family expressed their position that student should receive his related services after school, and that appropriate transportation should be provided. (Exhibit: P-19, J-6, P-18; Testimony: Mother, A. Austin, M. Childs, P. Perry, M. Long)
18. On September 14, 2000, the family requested a due process hearing. (Due Process Request)
 19. On September 21, 2000, Ms. Inman, student's former occupational therapist, submitted a letter that supported the delivery of student's related services after the school day. The father testified that this letter was produced at his request. (Exhibit: P-21; Testimony: Father)
 20. Since the September 13, 2000 IEP, student has been receiving speech therapy three times a week, from 8:10 a.m., when his school bus arrives at school, to 8:30 a.m. He has been receiving occupational therapy for 60 minutes per week. This includes 45 minutes per week of in-class occupational therapy, delivered by Ms. Perry and by her OT assistant, Ms. Bonenfant. In addition, student receives 15 minutes per week of pull out work, at which time he works with Ms. Perry in the gym, on gross motor movement activities. (Exhibit: S-1; Testimony: P. Perry)
 21. According to his teachers and therapists, student is making good progress in school. According to Ms. Austin, student's skills are varied. In some areas he is within the average range of the class, in some areas is he below average, and in some areas he is above average. For example, he needs help with written language and he is superior in working with three-dimensional characters, such as Legos. Ms. Austin also noted that she has not observed socialization problems, except to the extent that student usually stands back, and does not get involved, during recess. According to Ms. Perry and Ms. Childs, student is making good progress in both OT and speech and language therapy. Ms. Austin, as well as Ms. Perry and Ms. Childs, testified that they had received the impression from the parents that student had needs which were significantly more serious than they have observed at school. (Testimony: A. Austin, P. Perry, M. Childs)
 22. When questioned about the advisability of having student remain after school to receive his related services, student's teacher and both of his therapists opined that keeping student after school was not to his benefit. They noted that he would have no peers to lunch with, since the kindergarten students do not eat lunch at school. He would have to then wait a bit after lunch, by himself, until his therapy time arrived. And, if the therapist were suddenly called away, there would be no

classroom for student to be returned to. Both Ms. Perry and Ms. Childs noted that, in their experience, the only students who receive related services after school are those students who have needs which are so significant that those needs alone take up a good portion of the school day. An example would be a student who required frequent breaks for toileting and medical intervention. (Testimony: P. Perry, M. Childs)

IV. Motions

At the beginning of the hearing, both parties made motions requesting exclusion of certain documents. The School Department requested exclusion of documents that were prepared by various providers during the 1998-1999 school year, prior to the May 3, 2000 PET meeting. The family requested exclusion of documents that were prepared by current school personnel subsequent to the date of the due process hearing request. Both motions were denied.

V. Conclusions

- **Was an IEP developed at the May 3, 2000 PET meeting?**
- **If so, did the China School Department violate the IDEA by subsequently changing student's placement and program without holding a PET meeting and developing a new IEP?**

Holding a PET meeting on May 3, 2000 was an appropriate way to begin the transition of student from Child Development Services to the School Department. Student had an IFSP, developed at some time between August and October 2000. At this meeting the PET reviewed this IFSP and the services student was receiving under this IFSP. After this review, they determined that student would continue to receive services under his IFSP during summer 2000, and that when he began kindergarten in late August 2000, he would receive the same services at the elementary school. They further determined that a PET would be held within one month of the beginning of the 2000-2001 school year, to develop student's IEP.

The family argues that at the May 3, 2000 PET, the team agreed to provide student's related services after the end of his school day, and to provide the necessary transportation to his home after these services. However, the May 3, 2000 PET minutes very clearly state that that student will continue receiving services from Project PEDS through August and, after entering kindergarten, he will receive speech/language therapy (60 minutes/week) and occupational therapy (60 minutes/week). The minutes further state that the PET will meet after one month of school to refine student's goals and objectives.

What the PET did at this meeting was decide to continue student's IFSP through the summer and to then implement the same services when student began kindergarten. The family argues that an IEP was developed at this meeting, and that the IEP included the

provision of extended day services and transportation for student. However, there is no evidence, documentary or testimonial, which supports that argument.

Alternatively, the family argues that the school department violated student's right to a free appropriate public education by failing to develop an IEP following the May 3, 2000 PET meeting, and that they did not consent to having the IFSP remain in place until a PET was developed at the beginning of the 2000-2001 school year.

Taking the second contention first, it is simply not true that the family did not consent to having student's IFSP remain in place until the beginning of the 2000-2001 school year. As noted above, the minutes of the May 3, 2000 PET meeting state that student will continue receiving services as specified under his IFSP through August 2000 and will continue to receive the same services upon entering kindergarten. The father signed these minutes, after having reviewed them closely enough to have made corrections to typographical errors. In addition, the mother testified that it was her understanding that student was to receive the IFSP indicated services through summer 2000. If the family truly believed that they did not agree to the continuation of student's IFSP indicated services through summer 2000, then they should not have accepted those services from the Child Development Services providers.

Likewise, the family is incorrect in arguing that federal and state law and regulations require the school department to develop an IEP in the situation at hand. Maine special education regulations have specific provisions for those students transitioning to school from Child Development Services/Early-Intervention Programs. With regard to these students, the regulations state that

“a school administrative unit may elect to implement the student's IFSP upon entry into the public school and develop the student's IEP upon the anniversary date of the IFSP.” MSER §10.10

This is exactly what the PET chose to do when they met on May 3, 2000. They decided to continue student's IFSP and meet again in the fall. There was no need to create an IEP at this time, and the PET did not do so. Consequently, the school district did not violate the IDEA or Maine regulations when it continued to provide student with exactly the same services that he was receiving under his IFSP.

- **Is the IEP developed at the September 13, 2000 PET meeting reasonably calculated to provide educational benefit, particularly in the areas of related services and transportation.**
 - **Can the China School Department provide appropriate therapies and related services within the school day or does student need extended day service in order to receive a free appropriate public education?**
 - **If extended day services are necessary, is the China School Department required to provide transportation from those services to the home?**

Student's current IEP, developed on September 13, 2000, includes services that are identical to those services that he was receiving under his IFSP. Those services include 60 minutes per week of speech and language therapy and 60 minutes per week of occupational therapy. It appears that the family's objection to student's current IEP is not to the substance, but rather to the timing and location of the delivery of services. Their position is that student's needs can only be met by delivering his related services after the end of his school day. They argue that his disability is such that he needs to spend the whole kindergarten school day with his peers. Furthermore, they argue that even the time between 8:10 a.m. and 8:30 a.m., free time after student's bus arrives at school, must be spent with peers, in order for student to benefit from his education.

There is simply no evidence to suggest that student's needs demand that he receive extended day related services. As discussed above, student is making good progress in his current program. Although the family suggested at the May 3, 2000 PET meeting that student's behavioral and social needs are significant, there is no evidence of behavioral or social issues at school. All of student's current providers concur that it would not be in his best interest to have him remain after school to receive therapy, in essence single him out for different treatment. Karen Sundqvist, student's former speech therapist, noted that while student performed well in his early morning therapy sessions, he did not do very well in his afternoon sessions. She opined that fatigue may be a factor and further opined that student may be overwhelmed by the number of therapies that he was receiving at the time. Student's two therapists have tried very hard to schedule student's therapy sessions so as to minimize the time he is removed from class. He is currently removed from class for about 15 minutes per week.

It is clear that the family has a very strong preference for extended day services. However, the school department is only required to develop and implement an IEP that is "reasonably calculated to enable [student] to receive education benefit." *Lenn v. Portland School Committee*, 998 F. 2d 1083, 1085 (1st Cir. 1993), citing *Board of Education v. Rowley*, 458 U.S. 176, 207. The First Circuit Court of Appeal states in *Lenn* that "the [IDEA] emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than an optimal, IEP." *Lenn*, at 1086.

Likewise, although parental preference is one consideration under MSER §10.3(A), it cannot be the basis for compelling a school department to provide a specific educational plan for a student. *Brougham by Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993). Therefore, it must be held that the China School Department has met, and is continuing to meet, its legal requirements regarding the provision of a free appropriate public education to student.

Procedural Matters

At the close of their case, the family made a motion for declaratory judgment, based on a finding that the China School Department violated the IDEA by failing to develop an IEP within the statutory period following the May 3, 2000 PET meeting. This motion was denied.

In their closing written argument, the family argued that this hearing officer denied their fundamental right to cross-examine the school's witnesses on significant relevant matters, including credibility, in contravention of federal and state statutes and regulations. They specifically argued that they should have been permitted to continue to ask questions which this hearing officer determined to be either already answered, irrelevant or outside the scope of the witnesses knowledge. In addition, certain questions pertaining to methodology were disallowed.

A hearing officer has notable discretion in conducting a due process hearing, including determining the scope of evidence. See e.g., *Board of Educ.* 29 IDELR 135 (N.Y. SEA 1997). By disallowing certain lines of questioning, this hearing officer was using her discretion under federal and state law and precedent. Likewise, it is not an abuse of discretion for a hearing officer to disallow methodology evidence. *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F. 3d 962 (10th Cir. 1998)

V. Decision

The China School Department met the requirements of state and federal law and regulations in the transition of student from Child Development Services to public school and in the development of student's current IEP. Student's current IEP is reasonably calculated to provide educational benefit.

VI. Order

Since there have been no violations of state or federal law or regulations, no order has been prepared.

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

Date

Family's List of Exhibits

- P-1 Speech Evaluation (Hastings), July 16, 1998
- P-2 Speech/Language Evaluation (Browne), July 15, 1999
- P-3 Occupational Therapy Evaluation (Inman), July 30, 1999
- P-4 Occupational Therapy Plan of Care (Inman), November 4, 1999
- P-5 Psychological Evaluation (Nurick), December 2, 1999
- P-6 Speech/Language Evaluation (Browne), December 7, 1999

- P-7 Speech/Language Plan of Care (Sundqvist), January 4, 2000
- P-8 Occupational Therapy Progress Report (Inman), February 4, 2000
- P-9 Speech/Language Progress Note (Sundqvist), April 30, 2000
- P-10 Occupational Therapy Plan of Care (Inman), November 1999 – May 2000
- P-11 Occupational Therapy Plan of Care (Inman), May 2000 – November 2000
- P-12 Occupational Therapy Progress Report (Inman), May 3, 2000
- P-13 PET Meeting Minutes (Union 52), May 3, 2000
- P-14 Pediatric Physical Therapy Evaluation (Kelleher), June 29, 2000
- P-15 Occupational Therapy Progress Report/Discharge (Spence), July 31, 2000
- P-16 Speech/Language Reevaluation Discharge (Sundqvist), August 10, 2000
- P-17 Parental PET Notification (Union 52), September 5, 2000
- P-18 Sundqvist Letter Re: PET Meeting of May 3, 2000 (September 12, 2000)
- P-19 PET Meeting Minutes (Union 52), September 13, 2000
- P-20 Dispute Resolution Request and Correspondence (Parent), September 14, 2000
- P-21 Inman Letter Re: PET Meeting of May 3, 2000 (September 21, 2000)
- P-22 China Primary School Progress Report (October 10, 2000)

Family’s Witnesses

Father

Mother

School’s List of Exhibits

- S-1 Occupational Therapy Log (September 6 – October 20, 2000)
- S-2 Speech Language Service Record for Services from August 30, 2000 through October 4, 2000

S-3 Speech Language Service Record for Services Rendered from October 4, 2000 through October 24, 2000

S-4 Portfolio of Work of Student

School's Witnesses

Margaret Long, Special Services Administrator

Ann Austin, Kindergarten Teacher

Marjorie Childs, Speech/Language Therapist

Pamela Perry, Occupational Therapist

List of Jointly Submitted Documents

J-1 PET Meeting Minutes (May 3, 2000)

J-2 Special Factors for Consideration by the PET/IEP Team

J-3 May 3, 2000 Consent for Placement

J-4 PET Meeting Minutes (September 13, 2000)

J-5 Written Parental Notice of Change of Program (September 13, 2000)

J-6 September 2000 IEP

J-7 Speech Language Progress Note prepared by Karen Sundqvist (April 30, 2000)

J-8 Occupational Therapy Progress Report and Discharge Summary/Therapy Corner (July 31, 2000)

J-9 Discharge /Speech Language Reevaluation prepared by Karen Sundqvist (August 10, 2000)