

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

February 26, 2001

Case # 01.021, *Parent v. Franklin*

REPRESENTING THE PARTIES: Both Parties were pro se.

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.

The hearing was requested by Parents on January 24, 2001. The case involves Student, whose date of birth is dob He resides with his parents at Franklin, Maine. Student is currently eligible for special education services under the category of Multiple Disabilities. He is currently attending second grade at Mountain View School.

The parties held a prehearing conference on February 7, 2001, at the Department of Human Services, Ellsworth, Maine. At that time, the parties defined the issues for hearing and exchanged witness lists. All documents were submitted in a timely manner.

The hearing was held on Wednesday, February 14, 2001, and continued on Friday, February 16, 2001, at the Department of Human Services, Ellsworth, Maine. The School Department submitted documents S1-28, and the parties jointly submitted documents J1-10, a total of 89 pages of documents. Eight witnesses testified in person and two witnesses testified by conference call.

I. Preliminary Statement

This case involves a xx year-old male student, who was identified as multi-handicapped¹, in spring 1998. During the 1998-1999 school year, student was placed in a regional, self-contained kindergarten classroom. During the 1999-2000 school year, student attended a regular education, combined first-second grade classroom, with resource room services, occupational therapy, speech and language services, and counseling. Now in the second grade, student is currently placed in the same multi-grade classroom, and receives resource services, a brushing program, speech and language services, and family counseling.

At the family's request, a Complaint Investigation was conducted in October 2000. The family alleged a failure to provide a free, appropriate, public education ('FAPE'), along with various procedural violations. The Complaint Investigator found

¹ This eligibility category has been renamed "Multiple Disabilities", under the Maine Special Education Regulations amended in 1999.

that the School Department was providing FAPE, but that they did commit the two alleged procedural violations.

The family requested this hearing, as an appeal from the Complaint Investigator's finding that the school was providing student with FAPE. They contend that student requires the services of a full-time, one-on-one aide in order to receive FAPE, and that such services are not currently being provided.

The school department denied this contention. Furthermore, the school department appealed the Complaint Investigator's findings of procedural violations, and contends that no procedural violations were committed with regard to a PET meeting held on May 15, 2000.

II. Issues to be Decided by the Hearing

- Does student require the full-time services of a one-on-one Educational Technician in order to receive FAPE?
- Did the school department fail to use the PET meeting on May 15, 2000 to inform parents and enable them to make, joint, informed decisions regarding the services needed to support the student in achieving the agreed-upon goals?
- Did the school department fail to notify the parent of a change of program?

III. Findings of Fact

1. Student's date of birth is dob (Exhibit: Due Process Request)
2. At some point prior to entering kindergarten in September 1998, student was identified with bi-polar disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder. Student currently takes medication for these conditions, including Lithium, Wellbutrin, Ritalin and Tenex, and his physician is Dr. John Van Pelt, M.D., F.A.A.P. On the basis of these conditions, student was identified as eligible for special education services under the category of multi-handicapped.² (Testimony: Mother, R. Higgins)
3. During the 1998-1999 school year, student was placed in a self-contained, regional kindergarten classroom. Beginning in November 1998, student received the full-time, one-on-one services of Educational Technician Linda Woodworth within the classroom. He also received speech and language services, occupational therapy and one hour per week of counseling. (Exhibit: S28; Testimony: W. Dove, L. Woodworth)

² See 1 supra.

4. During the 1999-2000 school year, student attended a multi-grade (first and second) regular education classroom, with similar services, including a one-on-one aide, along with 150 minutes per week of resource services. Upon entering the first grade, the student's reading level was found to be significantly below grade level, at Level 4 (Emergent Reader) on the Reading Recovery Survey. Student's IEP for that year included goals in the areas of math, reading, written language, interpersonal skills, fine motor skills and eye-hand coordination. (Exhibit: S23; Testimony: P. Campbell, L. Woodworth)
5. During the 1999-2000 school year, Ms. Woodworth did not work exclusively with student, but also worked with other students in a small group setting. However, she was available to student whenever he indicated he needed her attention or assistance, or whenever she observed that he might need assistance. (Testimony: L. Woodworth)
6. At the parent's request, a PET meeting was held on October 26, 1999. An amended IEP was developed at that time, increasing student's resource services to 180 minutes per week. (Exhibit: S9)
7. Student's progress toward his goals was coded on his IEP on September 29, 1999, January 21, 2000 and March 31, 2000. As of the last coding date, he had met three out of five of his short-term math objectives, all of his interpersonal skills objectives and one out of two of his fine motor objectives, with progress towards the objectives in these categories. Student had made progress on all of his written language objectives, on five out of seven of his reading objectives and all but one of his eye-hand coordination objectives. (Exhibit: S18)
8. A PET meeting was held on May 15, 2000, to determine student's placement and program for the 2000-2001 school year, and the parents were in attendance at this meeting. At this time, Ms. Woodworth stated that student was making solid progress in Reading and Math, noting that he was "doing great," although he "is expected to continue to need the support of an Ed. Tech." Ms. Senechal, the Special Education Teacher, reported "excellent progress with fine motor skills, math, social skills, peer interaction, sequencing and reading." Ms. Campbell, student's classroom teacher, reported that student was working at mid-first grade level and that his listening comprehension needed emphasis. The determinations of the PET at this meeting included a continuation of resource services and therapies at current levels and "[c]ontinue Ed.Tech. available in class." Student's goals and objectives were updated. The IEP resulting from this PET meeting stated, under Specific Support Services/Amount of Services, "Ed. Tech. available." (Exhibit: S-14, S16)
9. On May 15, 2000, a Prior Written Notice, indicating that student's goals and objectives had been updated, was mailed to the parents. This form stated that the proposed change was "[u]pdate goals and objectives for 2000-01 due to progress," and "[n]o services rejected due to documented need." (Exhibit: S15)

10. It was the parents' impression, as well as the impression of Ms. Woodworth and Ms. Young, the family counselor, based upon discussion (or lack of discussion) at the May 15, 2000 meeting, that student would continue to receive the services of a full-time, one-on-one Educational Technician during the 2000-2001 school year. It was also clear that this aide would not be Ms. Woodworth, since she was leaving her position. (Testimony: Mother, Father, L. Woodworth, C. Young)
11. However, on or about May 19, 2000, Mr. Dove, the principal of Mountain View School, gave the Mother a copy of the minutes of the May 15, 2000 PET Minutes, and stated that his interpretation of the minutes was that student would no longer have the full-time services of a one-on-one aide, although there would be Educational Technicians available in his classroom, to whom he would have access on an as-needed basis. (Testimony: W. Dove, Mother)
12. During the summer of 2000, the Mother tried to reach Mr. Higgins, the Director of Special Services for Union 96, in order to discuss the issue of the aide with him. On August 3, 2000, the mother and Mr. Higgins did speak, and he confirmed for her that student would not have a one-on-one aide, but rather would have access to one or two Educational Technicians who would be in his classroom. The Mother told Mr. Higgins that she would see how the first couple of weeks of school went, and then make a decision whether to pursue a one-on-one aide. (Exhibit: S13; Testimony: Mother, R. Higgins)
13. A PET meeting was held on September 25, 2000, and the team decided to keep student's Educational Technician services unchanged, i.e. he would continue to have access to an Educational Technician on an as-needed basis. The parents disagreed with this decision. (Exhibit: S11; Testimony: Mother, R. Higgins)
14. On October 2, 2000, the family requested a Complaint Investigation (#00.276). The allegations in that complaint were identical to the issues being considered in this hearing, and the Complaint Investigation Report was submitted by Dr. Jeannie Hamrin on December 18, 2000. Dr. Hamrin concluded that the student's IEP, with as-needed Education Technician availability, did meet the student's unique needs. However, she also found that the lack of discussion and clarification provided to the family at the May 15, 2000 PET meeting, regarding the change in Educational Technician service from one-on-one to an as-needed basis, did constitute a procedural violation of the Maine Special Education Regulations, as did the absence of a description of this change in the May 15, 2000 Prior Written Notice. The Corrective Action Plan in Dr. Hamrin's report ordered the school to provide training for special education administrative staff with authority to run PET meetings in the following areas: writing an appropriate prior written notice that complies with regulations; listening and communicating with parents especially around changes in service; and, writing minutes that show that the discussion took place, as well any dissension or consensus. (Exhibit: J4)

15. On January 24, 2001, the family requested an Expedited Due Process Hearing. At the prehearing conference, the family stated that they were appealing the Complaint Investigator's conclusion on the issue of FAPE and student's need for a one-on-one aide. The school department stated that they were appealing the Complaint Investigator's conclusions on the issue of full discussion at the May 15, 2000 PET meeting and the contents of the May 15, 2000 Prior Written Notice. (Exhibit: Due Process Request, Prehearing Memorandum)
16. Judy High is one of two Educational Technicians in students' current classroom. Student sits at Ms. High's table, with three other students, when doing math and writing. She often accompanies student to the Resource Room. Ms. High estimates that she spends between one and one and a half hours per day with student, either alone or in a small group setting. She has observed few, if any, social or interpersonal problems between student and other students. When student has academic problems he is usually already at Ms. High's table and can easily access her. If not, he can seek her out and she will respond. Ms. High believes that student is functioning very well with the current level of support that he is receiving. (Testimony: J. High)
17. Eleanor Koons is the other Educational Technician currently working in student's classroom. Her contact with student includes taking him from the classroom to another location and administering the brushing program. (Testimony: E. Koons)
18. Ms. Campbell is currently student's teacher, as she was during the last school year. She admits that at times student is "drifty" and needs to be cued back to the task through the use of verbal or visual cues. This is done either by her or by Ms. High. (Testimony: P. Campbell)
19. When student entered second grade, he was at Level 8 in the Reading Recovery Program. He is now reading independently at Level 14, and working with the teacher at Level 18. Level 14 is first grade, third quarter, so student is approximately one year behind in reading. His January 2001 Progress Report shows similar progress in reading. (Exhibit: J1; Testimony: P. Campbell)
20. A November 2000 coding of student's current IEP indicates that student has made progress towards two out of three of his math objectives, three out of five of his reading objectives. The remaining objectives had not been addressed as of that time. (Exhibit: S14)
21. Student's Resource services currently include 180 minutes per week of work on language arts, reading and math. (Testimony: P. Campbell)
22. When student arrives home from school, he does show signs of stress, and often exhibits difficult behavior for the rest of the day. Sometimes he cries and says that the other children do not like him. He also has problems with his homework, in that he often does not understand the instructions. He was not like this last

year, and the family attributes these problems to the absence of a full-time, one-on-one aide for student. (Testimony: Mother, Father)

IV. Conclusions

- **Does student require the full-time services of a one-on-one Educational Technician in order to receive FAPE?**

Federal law and precedent require school departments to develop and implement an IEP that is reasonably calculated to provide student with educational benefit. *Board of Educ. V. Rowley*, 102 S.Ct. 3034 (1982). In *Rowley*, the Supreme Court further defined educational benefit as enabling “the child to achieve passing marks and advance from grade to grade.” *Rowley* at 3049, 3051.

Maine Special Education Regulations likewise require school departments to provide special education and supportive services to meet a student’s unique needs. MSER § 1.3 (1999)

In this case, student is receiving the services of an Educational Technician within the classroom on an as-needed basis. I can see no substantive difference between the Educational Technician services which student received during the 1999-2000 school year and the current services. The key aspect to consider here is whether student has access to the Educational Technician *whenever he needs her*. I must conclude that he does have such access, and thereby concur with the conclusion of the Complaint Investigator.

The family argues that student is exhibiting stress-related behaviors upon his arrival home from school, and they and Ms. Young, the family counselor, believe that those behaviors are due to the loss of his long-time, one-on-one aide, Ms. Woodworth. This may in fact be true. Ms. Woodworth was student’s aide for eighteen months, and is obviously a supportive and empathic professional. Perhaps student could have been better prepared emotionally for her departure. However, student is currently making progress towards his IEP goals and is not exhibiting any behavior within the school setting that would impede that progress.

By focusing their argument on the level of Educational Technician services being received by student, the family may really be expressing their concern about student’s level of academic achievement and his rate of progress towards his goals. Perhaps they are concerned about the substance of the goals themselves. However, if their concerns are academic, they would be better served by looking towards the level of academic services and support, particularly resource services, that student currently receives, rather than focusing on the essentially unchanged level of Educational Technician services.

Whether, and to what extent, student is making academic progress was not a stated issue in this hearing, although it was a subtext that ran through the hearing testimony. Although Ms. Campbell, student’s classroom teacher, did discuss student’s

level of progress in reading, no standardized testing results were submitted into evidence. It appears that standardized testing has not been administered to student since his initial psycho-educational assessment in 1998.

Student's current IEP indicates that he is due for a triennial reassessment in September 2001, although the IEP also indicates that his annual reassessment is due in May 2001. The PET will be meeting this spring in order to develop an IEP for student's third grade year, and will be better able to plan his placement and program if they have access to the extensive testing done during a triennial reassessment. Therefore, the school department should move up to the date of his triennial to coincide with the date of his annual assessment, and complete the full battery of testing prior to a May 2001 PET meeting.

By considering the results of a full psycho-educational assessment, including cognitive testing, academic achievement testing, a clinical evaluation and a classroom observation, the PET will be better able to determine whether student's level of Educational Technician services is adequate, whether student is receiving an appropriate level of academic support, and what, if any, additional emotional or social support student might need.

- **Did the school department fail to use the PET meeting on May 15, 2000 to inform parents and enable them to make, joint, informed decisions regarding the services needed to support the student in achieving the agreed-upon goals?**

Although there was no substantive change of service from the 1999-2000 school year to the 2000-2001 school year, there was a change in the category of personnel providing those services, i.e. from one-on-one aide to access on an as-needed basis. That change could have resulted in a substantive change. We now have the luxury of hindsight, and know that student is not only receiving the level of Educational Technician support that he needs, but also that the level of service is basically identical to that which he received in the last school year, from Ms. Woodworth. However, when the school department chose to give student "access to an Educational Technician" rather than a one-on-one aide, his level of support could have decreased. There was, in fact, no way to predict.

As Maine Special Education Regulations state, "The PET meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding...[student's program]." MSER §8.11(C) (1999). Therefore, it was the responsibility of the school department to present an explanation of this change at the May 15, 2000 PET meeting, in order to allow the family and the student's providers to discuss the change and give the family the opportunity to agree to, or contest, the change.

There was no evidence presented at the hearing that would indicate that any discussion about the level of Educational Technician support took place at the May 15,

2000 PET meeting. Therefore, I concur with the Complaint Investigator's conclusion that the school department, by this omission, failed to meet the procedural dictates of the Maine Special Education Regulations.

- **Did the school department fail to notify the parent of a change of program?**

Special Education Regulations require that a school send Prior Written Notice in the event of a significant change in a student's program. Such changes shall include a significant change in the amount or frequency of previously provided services. MSER §10.4 (1999)

As discussed above, we now know that there was no actual change in services, although there could have been. As the Complaint Investigator concluded, even though there was no actual reduction in services, there was still a requirement that "the notice accurately portrayed the change in services", whether "real or perceived." I would just add to this "or possible." Again, no one could be sure that the change from a one-on-one aide to an as-needed basis would result in no decrease in services to student. The school department had to be up front about this, and this possible change should have been noted on the Prior Written Notice. Therefore, I concur with the Complaint Investigator that the school department failed to notify the parent of a change in program, under MSER §10.4.

V. Order

1. The school department shall immediately begin scheduling a full psycho-educational battery of tests to satisfy the requirement to perform a triennial assessment of student. This testing shall be completed by April 30, 2001, and a PET meeting shall be held during May 2001 to consider the results of this testing and to develop student's IEP for the 2001-2002 school year.
2. The school department shall implement the Corrective Action Plan which resulted from Complaint Investigation #00.276, dated December 18, 2000, to wit:
 - The school shall provide training for special education administrative staff with authority to run PET meetings. Training shall be in the following areas: writing an appropriate Prior Written Notice that complies with regulations; listening and communicating with parents, especially around changes in service; and, writing minutes that clearly show whether a discussion took place, as well as any dissension or consensus.
 - This training should take place prior to April 5, 2001.

Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator. Proof of compliance for Item #1 shall include a copy of the new IEP. Proof of compliance for Item #2 shall include the name and the qualifications of the trainer, the date and number of hours of the training, an agenda of the substance of the training, copies of any handouts used in the training, and the names and titles of those who attended the training.

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

Date

Joint Index of Documents

- J1 Mountain View School Progress Report, dated January 2001 (one page)
- J2 Dispute Resolution Request Form, dated January 22, 2001 (3 pages)
- J3 Letter from Commissioner of Education to the Parents and Supt. Ashmore, dated December 20, 2001 (2 pages)
- J4 Complaint Investigation Report, dated December 18, 2000 (8 pages)
- J5 Letter from Jennie Hamrin to the Parents and Richard Higgins, dated November 11, 2000 (one page)
- J6 Statement from Richard Higgins (Written Response to Complaint #00.276), dated November 10, 2000 (one page)
- J7 Letter from John C. Van Pelt, M.D., F.A.A.P. to William Dove, dated October 23, 2000 (one page)
- J8 Mediation Form, with mediation date of October 19, 2000 (one page)
- J9 Letter from John C. Van Pelt, M.D., F.A.A.P. to PET, dated October 18, 2000 (one page)
- J10 FAX from Susan Parks to Richard Higgins, dated October 6, 2000 (4 pages)

Family's List of Witnesses

Mother

Father

Susan Lizzotte, Former Caseworker

Charlotte Young, Family Therapist

Linda Woodworth, Former Educational Technician

School's Index of Documents

- S1 Brushing and Medication schedule for Students, dated January 26, 2001
(one page)
- S2 Communication Documentation, dated January 25, 2001 (one page)
- S3 Communication Documentation, dated January 23, 2001 (2 pages)
- S4 FAX sheet, Franklin School Department to Jeannie Hamrin, dated January
16, 2001 (one page)
- S5 Letter from Susan Parks to Franklin School Department, with attachment,
dated January 10, 2001 (2 pages)
- S6 FAX from Richard Higgins to Jeannie Hamrin, dated November 21, 2000
(one page)
- S7 Extension Request Form, Complaint Resolution Meeting, dated November
10, 2000 (one page)
- S8 Letter from Commissioner of Education to Dr. Jeannie Hamrin, regarding
Mediation, dated October 10, 2000 (2 pages)
- S9 Letter from Commissioner of Education to Dr. Jeannie Hamrin, regarding
Complaint, dated October 10, 2000 (3 pages)
- S10 Prior Written Notice, dated September 26, 2000 (one page)
- S11 PET Minutes from September 25, 2000 PET Meeting (2 pages)
- S12 Parental Notice of PET, dated September 15, 2000 (2 pages)
- S13 Communication Documentation, dated August 3, 2000 (one page)
- S14 IEP, dated May 15, 2000 (6 pages)
- S15 Prior Written Notice, dated May 15, 2000 (one page)
- S16 PET Meeting Minutes from May 15, 2000 PET Meeting (2 pages)
- S17 Parental Notice of PET, dated May 8, 2000 (2 pages)

- S18 May 4, 1999 IEP, Amended October 26, 1999 (11 pages)
- S19 PET Meeting Minutes, dated October 26, 1999 (2 pages)
- S20 Prior Written Notice, dated October 26, 1999 (2 pages)
- S21 Parental Notice of PET, dated October 15, 1999 (2 pages)
- S22 Letter from Claudia Harvey, DMHMRSAS/SCSN to Charlotte Young, Family Counselor, date July 20, 1999 (one page)
- S23 IEP, dated May 4, 1999 (11 pages)
- S24 Prior Written Notice, dated May 4, 1999 (one page)
- S25 Communication Documentation, dated June 18, 1999 (one page)
- S26 Communication Documentation, dated May 26, 1999 (one page)
- S27 Communication Documentation, dated May 13, 1999 (one page)
- S28 Parental Notice of PET, dated April 26, 1999 (2 pages)

School's Witness List

Richard Higgins, Director of Special Services, Union 96

Judy High, Educational Technician, Mountain View School

Eleanor Koons, Educational Technician, Mountain View School

Pam Campbell, Classroom Teacher, Mountain View School

William Dove, Principal, Mountain View School