

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

April 11, 2001

Case # 01.071 and #01.073, Parents v. Penobscot (Union #93)

REPRESENTING THE FAMILY: The family was pro se.

REPRESENTING THE SCHOOL DEPARTMENT: Eric Herlan, 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.

The hearing was requested by Father on March 12, 2001. The case involves Female Student, whose date of birth is dob and Male Student, whose date of birth is dob. Both students reside with Parents in Penobscot Maine. Female Student is eligible for special education services under the category of Speech and Language Impairment. She currently attends tenth grade at George Stevens Academy. Male Student is currently eligible for special education services under the category of Speech and Language Impairment. He is currently attending third grade at Penobscot Elementary School.

The parties convened a prehearing conference call on March 28, 2001. At that time, the parties defined the issues for hearing and discussed witness lists. All documents were submitted in a timely manner.

The hearing was held on April 9, 2001, at the Department of Human Services, Ellsworth, Maine. The School Department submitted documents SF 1-182, regarding Female Student, and SM 1-159, regarding Male Student, for a total of 341 pages. The family submitted documents PJ 1-9, regarding Female Student and PC 1-11, regarding Male Student, for a total of 284 pages. Three witnesses testified.

I. Preliminary Statement

This case involves two students, a xx year-old female and a xx year-old male. Both students are eligible for special education services under the category of Speech and Language Impairment. The female student currently attends George Stevens Academy and receives direct instructional services and speech and language services.

The male student currently attends third grade at Penobscot Elementary School and receives speech and language therapy and direct educational services.

On December 6, 2000, the family requested a complaint investigation from the Department of Education. This investigation was conducted during December 2000 and January 2001. The Complaint Investigator's reports were distributed on January 24, 2001.

The family requested this hearing, as a partial appeal of the Complaint Investigator's findings regarding staff qualifications, the adequacy of students' goals and objectives and IEP implementation.

The School Department argues that the Complaint Investigator's findings in these areas are correct.

II. Issues to be Decided by the Hearing

With regard to female student, the issues to be addressed at the Due Process Hearing are as follows:

- Did the School Department fail to provide qualified staff to deliver speech and language services to student during any, or all, parts of the 2000 – 2001 school year?
- Does student's 2000 – 2001 IEP contain verifiable goals and objectives?

With regard to male student, the issues to be addressed at the Due Process Hearing are as follows:

- Did the School Department fail to implement student's 2000 – 2001 IEP?
- Did the School Department fail to provide qualified staff to deliver speech and language services to student during any, or all, parts of the 2000 – 2001 school year?
- Did student's 2000 – 2001 IEP contain verifiable goals and objectives?

III. Findings of Fact

1. Female student's date of birth is dob. Male student's date of birth is dob.
(Exhibit: Due Process Request)
2. Female student is eligible for special education services under the category of Speech and Language Impairment. She is currently attending tenth grade at George Stevens Academy, and is receiving services under an IEP dated October 20, 2000. This IEP calls for 80 minutes per day, four days per week, of direct instruction with a special education teacher in the special education classroom and 60 minutes per month of direct consultation time (direct service) with a Speech and Language Clinician. (Exhibit: SF33)
3. Male student is eligible for special education services under the category of Speech and Language Impairment. He is currently attending third grade at

Penobscot Elementary School, and is receiving services under an IEP dated March 1, 2001. Student receives thirty minutes, two times per week, of speech therapy services and twenty minutes per day, five days a week, of special education instruction. (Exhibit: SM2, SM4)

4. On February 11, 2000, male student's PET met and developed an IEP for student. The father¹ was present at this PET meeting, and did not express any dissatisfaction with the IEP at that time. He did subsequently express dissatisfaction with the IEP to his attorney, James Munch, but did not file a request for a Due Process Hearing to obtain a ruling on the appropriateness of the IEP. (Testimony: Father)
5. On April 27, 2000, the school and the family entered into a mediation agreement regarding the development of both students' IEPs, for the 2000-2001 school year. As part of the agreement, the parties agreed to engage the consultation services of Candice Bray, Sc.D., to conduct record reviews, make recommendations regarding placement, and participate in the development of the IEPs. (Exhibits: SF66, SM124)
6. Dr. Bray completed the required record reviews and teacher interviews, and presented her findings in two reports, both dated June 15, 2000. In her report on female student, Dr. Bray makes extensive recommendations regarding accommodations, direct instruction, language strategies and study skills acquisition. In her discussion of language therapy, Dr. Bray suggests a possible consultative/collaborative model, rather than a pullout model, and opines that "[t]his could be done by a learning specialist in consultation with an SLP as one possible model." (Exhibit: SF110-118, SF112)
7. In her report on male student, Dr. Bray likewise makes recommendations regarding ways to improve articulation, semantics and other speech and language based areas of weakness, and includes possible goals and objectives. In a number of places throughout the report, Dr. Bray refers to the "SLP" from whom student is receiving speech and language services. In a subsequent email to Mr. Peer, Dr. Bray clarifies her use of the term SLP, by stating the following:

"Regarding my use of the term "Speech/Language Pathologist"... a better term might have been "Speech/Language Person/Individual" or person with specific training in the field of speech/language development, disorders and delays. I did not intend that it should only be a Speech/Language Pathologist versus a Speech/Language Clinician in my recommendations." (Exhibit: SM57-62, SM12)
8. Following receipt of Dr. Bray's June 2000 reports, Mr. Peer and the father engaged in numerous telephonic discussions regarding male student's 2000-2001 IEP. Various draft IEPs were exchanged by the parties. Mr. Peer also had

¹ Although the parent in this case is father of one student, and grandfather of the other, I will use the term father throughout this document.

discussions with Dr. Bray during this period, regarding both students' goals and objectives. (Exhibits: SM24, 29, 34, 37, 42, 49; Testimony: S. Peer, Father)

9. On October 19, 2000, male student's PET reviewed a draft IEP and approved the services called for in that IEP, including the 60 minutes per week of speech therapy and the 20 minutes per day of direct instruction that student is currently receiving. The father was present at this meeting. (Exhibits: SM14, 19, 21, 22; Testimony: Father)
10. Male student's October 19, 2000 IEP includes four goals and objectives in the following areas: articulation, oral and written grammar and editing, word retrieval strategies and listening skills. Measurement of student's progress includes clinical observation, staff review of written and edited work, teacher observation, and student's development and management of a "word bank." (Exhibit: SM14-18)
11. On October 20, 2000, female student's PET reviewed a draft IEP and approved the services called for in that IEP, including the 320 minutes per week of direct special education instruction, and the 60 minutes per month of time with the Speech and Language clinician, that student is currently receiving. (Exhibits: SF32-45)
12. Female student's October 20, 2000 IEP includes seven goals and objectives in the following areas: listening skills, organizational skills and informational processing, written language skills, reading skills, higher level language concepts, and compensatory memory skills. Measurement of student's progress includes documentation of assignment completion, progress reports, daily teacher review, special education and regular education teacher critiques and documented observations, daily classroom performance, self-observation and clinical written critiques. The IEP also calls for administration of the Gray Oral Reading Test, the Expressive Vocabulary Test and the Test of Written Language (TOWL) prior to June 2001 and the Woodcock Reading Mastery Test by August 2001. (Exhibit: SF33-41)
13. Female student's IEP also includes a list of accommodations, including preferential seating, minimization of distractions, additional test time, shortened or modified assignments, study hall, pre-taught vocabulary, use of a calculator when needed and use of a computer for final drafts, as necessary. (Exhibit: SF41)
14. Female student's Goals and Objectives were graded on December 22, 2000, indicating the following progress: student made adequate progress on 17 objectives, inadequate progress on 2 objectives (in the area of listening skills and turning in reports), with 2 objectives not yet being taught. (Exhibit: SF2-8)
15. Both students are currently receiving speech and language services from Denise Giles. Ms. Giles is a Speech and Language Clinician, who has a conditional

certification from the Maine Department of Education. Ms. Giles has been providing speech therapy services since 1969 and is certified in two other states. Her certificate of conditional certification was received by the School Department on February 1, 2001; however, the certificate states that the certification's "validation date" is August 31, 2000. (Exhibit: PM3, PF3, SF1; Testimony: D. Craig)

16. On December 6, 2000, the family filed a complaint with the Department of Education, on behalf of both students, alleging failure to implement the IEPs, failure to provide qualified personnel, failure to comply with timelines and failure to develop verifiable goals and objectives. Regarding both students, the Complaint Investigator found that the School Department provided qualified staff to deliver speech and language services to these students, and both students' IEPs contained verifiable goals and objectives. With regard to the male student, the Investigator also found that the School Department did not fail to implement student's IEP. On the other allegations, the Complaint Investigator found in favor of the family. The Complaint Investigator's Reports were distributed on January 23, 2001, for male student, and on January 24, 2001, for female student. (Exhibits: PM3, PF3)
17. On March 1, 2001, male student's PET met in order to consider the findings of the Complaint Investigator. The team also reviewed student's progress and noted that he "continues to make progress in areas of literacy and speech and language. He has met his "listening skills" goal." (Exhibit: SM2-3)
18. On March 12, 2001, the family filed two Due Process Hearing Requests, on behalf of the two students, challenging the findings of the Complaint Investigator with regard to those allegations in #16 above that were found in favor of the School Department. Because of the overlapping issues, the two hearing requests were combined into one. (Exhibits: PM1, PF1)
19. At this time, Father admits that he is satisfied with the program in male student's current IEP, and also agrees that student is currently receiving these services. (Testimony: Father)

IV. Conclusions

- **Did the School Department fail to provide qualified staff to deliver speech and language services to student during any, or all, parts of the 2000 – 2001 school year?**

Maine Special Education Regulations provide that a "speech clinician certified by the Department [of Education] may provide speech and language services if recommended by the [PET]...and [a] certified speech clinician may provide speech and language services if employed by an administrative unit. MSER § 5.10

The Speech and Language Clinician who is providing services to both students, Denise Giles, is employed by Union #93, and has a conditional certification from the Maine Department of Education. Under Maine Special Education Regulations, Ms. Giles is considered to be a qualified provider of speech and language services and the School Department is therefore providing qualified staff to deliver speech and language services to both students.²

- **Does female student's 2000 – 2001 IEP contain verifiable goals and objectives?**

Maine Special Education Regulations require that an IEP contain a “statement of measurable annual goals including benchmarks or short-term objectives, relating to meeting the student’s needs that result from the student’s disability...” MSER §10.2.B.

Female student’s October 20, 2000 IEP contains an extensive list of goals and short-term objectives, with very specific descriptions of how student’s progress towards her goals will be assessed. Such assessments include teacher observation, written record keeping, biweekly progress reports, graded reading passages, development and written critique of student’s portfolio, participation in and evaluation of progress in the “leveled” reading system, classroom performance, and administration of the Gray Oral Reading Test, the TOWL, the Woodcock Reading Mastery Test, and the Expressive Vocabulary Test.

When assessing a student’s progress, particularly a student with a language-based disability, it is important to utilize testing instruments that are given in different modalities, instruments that can measure what student knows, as well as how well she can express what she knows. The above list addresses this need, in that it includes observation and evaluation of both written and oral work, ongoing written and oral work production, assessment of classroom participation and standardized testing.

Father queried how the evaluators might find the “truth” about the students’ progress. Educational evaluation is in an inexact science, and the best we can do is utilize various instruments to ascertain student’s performance level on various tasks, and then reassess her performance on those same tasks at some points in the future. Progress is therefore defined as any gains in performance on those same instruments.

Although PETs must always strive for objective measurability, the 1st Circuit has concluded that even inclusion of goals that are not objectively measurable does not deny a student a free, appropriate, public education or invalidate an IEP. *Kathleen H. v. Massachusetts Dep’t of Ed.*, 154 F.3d 8, 28 IDELR 1068 (1st Cir. 1998), *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993)

² Father no longer alleges that Ms. Giles is not appropriately licensed to deliver speech and language services to students, but rather argues that she is not “eminently qualified” to deliver such services. However, just as a School Department is required to provide an appropriate, rather than optimal, education, it is likewise only required to provide appropriately certified, rather than “eminently qualified”, personnel.

Female student's October 20, 2000 IEP meets the regulatory requirements regarding "measurable goals and objectives," as the objectives are specific, related to student's needs and measurable through a variety of instruments and modalities.

- **Does male student's 2000 – 2001 IEP contain verifiable goals and objectives?**

Male student's October 19, 2000 IEP contains goals and short-term objectives with specific and varied modes of measurement, including teacher and clinician observation, portfolio review, and "word bank" development. These varied ways of assessing student's progress range in degree of subjectivity, but taken together, can provide a fairly complete and reliable picture of student's progress.

Male student's October 19, 2000 IEP meets the regulatory requirements regarding "measurable goals and objectives," as the objectives are specific, related to student's needs and measurable through a variety of instruments and modalities.

- **Did the School Department fail to implement male student's 2000-2001 IEP?**

Although the issue as worded suggests a failure to implement student's IEP, the crux of the father's argument at hearing was a suggestion that male student had no IEP in place at the beginning of the 2000-2001 school year.

Male student's PET met and developed an IEP for student on February 11, 2000. The father failed to inform the PET, either at this time or soon after, that he disagreed with the February 11, 2000 IEP. Nor did he file a Due Process Request to challenge the appropriateness of this IEP, and the IEP was therefore implemented.

However, even if the father did object to the IEP, the IEP still would have been implemented and the father's recourse would have been to file a Due Process Request. As the Maine Special Education Regulations note, "If the team cannot reach consensus...the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. MSER § 811

The February 11, 2000 IEP remained in place until the PET developed a subsequent IEP on October 19, 2000. That IEP remained in place until the current IEP was developed on March 1, 2001. Subsequent disagreement with the content of an IEP, absent a favorable decision by a Hearing Officer, does not invalidate an IEP.

There is no suggestion that student's various IEPs were not implemented, and father has conceded that he is satisfied with student's current IEP and that those services called for in the IEP are being provided.

The School Department therefore has met the requirements of the Maine Special Education Regulations by having an IEP in place for male student, and by implementing that IEP, during the 2000-2001 school year.

V. 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 Index of Documents

Documents Regarding Female Student

- PF1 Appeal of Complaint Investigative Report, dated March 12, 2001 (17 pages)
- PF2 Corrective Action Plan received from Director of Special Education Steve Peer, dated March 7, 2001 (23 pages)
- PF3 Complaint Investigative Report, dated January 24, 2001 (7 pages)
- PF4 Correspondence between the Parties, dated from April 16, 1999 through March 14, 2001 (43 pages)
- PF5 IEP, dated October 20, 2001 (9 pages)
- PF6 Chapter 77 Speech-Language Pathologist and Audiologists Subchapter 1 General Provisions, undated (11 pages)
- PF7 Department of Professional and Financial Regulation Board of Examiners on Speech-Language Pathology and Audiology Rules, undated (35 pages)
- PF8 School Union #93 Cycle IV Special Education Program Review conducted April 9, 10, and 11, 1996 with Correspondence, Action Plan , and Full Approval Letter, dated May 9, 1996 (24 pages)
- PF9 Dr. Candice Bray's Report for female student, dated June 15, 2000 (9 pages)

Documents Regarding Male Student

- PM1 Appeal of Complaint Investigative Report, dated March 12, 2001 (17 pages)

- PM2 Corrective Action Plan received from Director of Special Education Steve Peer, dated March 7, 2001 (7 pages)
- PM3 Complaint Investigative Report, dated January 23, 2001 (7 pages)
- PM4 Correspondence between the Parties, dated from April 24, 2000 through March 14, 2001 (46 pages)
- PM5 IEP, dated October 19, 2001 (5 pages)
- PM6 Chapter 77 Speech-Language Pathologist and Audiologists Subchapter 1 General Provisions, undated (11 pages)
- PM7 Department of Professional and Financial Regulation Board of Examiners on Speech-Language Pathology and Audiology Rules, undated (35 pages)
- PM8 School Union #93 Cycle IV Special Education Program Review conducted April 9, 10, and 11, 1996 with Correspondence, Action Plan , and Full Approval Letter, dated May 9, 1996 (24 pages)
- PM9 Dr. Candice Bray's Report for Male Student, dated June 16, 2000 (6 pages)
- PM10 Correspondence between Father and Mr. Peer, dated between August 17, 1999 and May 5, 2000 (12 pages)
- PM11 Letter from Father to the Hearing Officer and to Mr. Herlan, April 8 , 2001 (2 pages)

Witnesses for the Family

Parent

School Department's Index of Documents

Documents Regarding Female Student

- SF1 Speech Clinician Conditional Certificate, dated February 1, 2001 (one page)
- SF2-8 Graded Goals and Objectives, dated December 22, 2000 (7 pages)
- SF9-29 Response by School Union #93 to Complaint Investigation, dated December 8, 2000 (21 pages)
- SF30-31 Initial Complaint for Filing, dated December 6, 2000 (2 pages)

- SF32 Proposed Change of Placement, dated October 22, 2000 (one page)
- SF33-41 2000-2001 IEP, dated October 20, 2000, with attached accommodation plan, (10 pages)
- SF42 Proposed Change of Program Form, dated October 20, 2000 (one page)
- SF43 PET Minutes, dated October 20, 2000 (one page)
- SF44 Agenda for PET meeting, dated October 20, 2000 (one page)
- SF45 PET Notice, dated October 10, 2000 (one page)
- SF46-54 Letter from Mr. Peer to Parents, dated October 5, 2000, with attached draft IEP (9 pages)
- SF55-63 Letter from Mr. Peer to Parents, dated October 2, 2000, with attached draft IEP (9 pages)
- SF64-70 Draft IEP, dated September 19, 2000/September 20, 2000 (7 pages)
- SF71-77 Draft IEP, dated August 30, 2000/September 20, 2000 (7 pages)
- SF78-82 Draft IEP, dated August 30, 2000 (5 pages)
- SF83-88 Draft IEP, dated August 29, 2000 (6 pages)
- SF89-90 Draft IEP, dated August 24, 2000 (2 pages)
- SF91-96 Draft IEP, dated August 18, 2000 (6 pages)
- SF97-101 Draft IEP, dated August 8, 2000 (5 pages)
- SF102-108 Draft IEP, dated June 29, 2000 (7 pages)
- SF109 Letter from Mr. Peer to Father, dated June 20, 2000 (one page)
- SF110-118 Memorandum Report by Ms. Bray, dated June 15, 2000 (9 pages)
- SF119 Letter from Mr. Peer to Candace Bray, dated May 5, 2000 (one page)
- SF120 PET minutes, dated April 27, 2000 (one page)
- SF121-122 Draft IEP, dated April 27, 2000 (2 pages)

- SF123 Proposed Change of Program Form, dated April 27, 2000 (one page)
- SF124 Mediation Agreement, dated April 27, 2000 (one page)
- SF125-151 Learning Disabilities Evaluation, dated November, 1999 (28 pages)
- SF152-175 Letter from Mr. Peer to Ms. Lamontagne, dated March 7, 2000, with corrective action documentation (24 pages)
- SF176-182 Complaint Investigation Report, dated January 24, 2001 (7 pages)

Documents Regarding Male Student

- SM1 Speech Clinician Conditional Certificate, dated February 1, 2001 (one page)
- SM2-3 PET Minutes, March 1, 2001 (2 pages)
- SM4-7 IEP, dated March 1, 2001 (4 pages)
- SM8 Proposed Change of Program, dated March 1, 2001 (one page)
- SM9 PET Notification, dated February 12, 2001 (one page)
- SM10 Note from Ms. Giles to Parents, dated February 9, 2001 (one page)
- SM11-12 Fax Cover Sheet, dated November 7, 2000, with attached e-mail from Candace Bray, dated November 6, 2000 (2 pages)
- SM13 Letter from Mr. Peer to Parents, dated October 23, 2000 (one page)
- SM14-18 2000-2001 IEP, dated October 19, 2000 (5 pages)
- SM19 Proposed Change of Program Form, dated October 19, 2000 (one page)
- SM20 PET Minutes, dated October 19, 2000 (one page)
- SM21 Agenda for PET, dated October 19, 2000 (one page)
- SM22 PET Notification, dated October 6, 2000 (one page)
- SM23 Letter from Mr. Peer to Parents, dated October 5, 2000 (one page)
- SM24-28 Draft IEP, dated September 29, 2000 (5 pages)
- SM29-33 Draft IEP, dated August 20, 2000 (5 pages)

- SM34-36 Draft IEP, dated August 18, 2000 (3 pages)
- SM37-41 Draft IEP, dated August 18, 2000 (5 pages)
- SM42-48 Draft IEP marked up by participants, dated August 8, 2000 (7 pages)
- SM49-55 Draft IEP, unmarked, dated August 8, 2000 (7 pages)
- SM56 Cover letter from Mr. Peer to Father with enclosed report by Candace Bray (one page)
- SM57-65 Report by Candace Bray, dated June 16, 2000 (9 pages)
- SM66-67 Mediation Agreement, dated April 27, 2000 (2 pages)
- SM68-117 Comprehensive Evaluation of Male Student, dated September through December, 1999 (50 pages)
- SM118-124 Letter from Steve Peer to Ms. Lamontagne regarding corrective action (7 pages)
- SM125-131 Initial Complaint Investigation Report, dated February 8, 2001 (7 pages)
- SM132-152 Response by School Union #93 to Initial Complaint, dated December 8, 2000 (21 pages)
- SM153-154 Letter from Mr. Herlan to Dr. Williams, dated April 6, 2001 (2 pages)
- SM155-159 IEP, dated February 11, 2000 (5 pages)

School Department's Witness List

Steve Peer, Director of Special Education

Dewaine Craig, Superintendent