

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

June 20, 2001

Expedited Hearing Case # 01.139, Parent v. Lewiston

REPRESENTING THE FAMILY: Richard Hoy, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

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

A partial hearing was held, pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 USC §§ 1415 et. seq., and accompanying regulations. At the conclusion of the family's case, the complaint was dismissed without prejudice, based on documentary evidence and testimony presented by witnesses called by the family

I. Procedural History

This hearing was requested by the family on May 18, 2001. The case involves student, whose date of birth is xxx. He resides with his mother, his stepfather, and his brother in Lewiston, Maine. Student is currently eligible for special education services under the category of multiple disabilities. Student was attending McMahan Elementary School, until March 20, 2001, when he was suspended following a behavioral incident at school. Since an April 5, 2001, PET meeting, Student has been receiving two hours a day of tutoring services at Hillview Conference Center ('AES'), along with counseling and OT consult services.

The parties met in a prehearing conference on June 5, 2001. At that time, the attorney for the School Department submitted a prehearing memorandum, in which he argued that the case was moot, citing the following circumstances. First, the AES is only an interim alternative placement, pending a day treatment placement for the 2001 – 2002 school year; second, as of the hearing date of June 15, 2001, only three days of school will remain, and on one of those, June 19, 2001, student will be at McMahan School to attend graduation; third, an ESY program for summer of 2001 has been developed and agreed to by the parents.

After reading the School Department's memorandum, and hearing arguments from both attorneys, it was decided that the hearing would proceed. Even if the above allegations were, in fact, true, there still remained an issue of whether the AES was an appropriate placement for student.

The parties exchanged documents and witness lists during the prehearing conference. By mutual agreement, additional documents were received after the prehearing, and prior to the hearing. The family entered into evidence documents P1-37, 48 pages, and the School Department entered into evidence S1- S209, 209 pages. Hearing Officer documents were numbered H1-38, 38 pages.

The hearing was held on June 14, 2001, at the South Paris Courthouse, Grand Jury Room. At the beginning of the hearing, an on-the-record statement was made, conveying to both parties that a decision on dismissal would be made subsequent to the presentation of the family's case.

Five witnesses testified at the hearing.

II. Preliminary Statement

This case involves a xxx year-old male student, who is eligible for special education under the category of multiple disabilities. Student is currently placed in an alternative educational placement and receives two hours per day of tutoring services. Prior to this placement, student attended McMahan Elementary School, and received all services in a special education, self-contained classroom, except for regular education science, according to an IEP developed on February 13, 2001, and a subsequent modification giving the regular education science class. He also receives 30 minutes per week of OT consult, 120 minutes per week of counseling with a Spurwink counselor and the full-time services of a 1:1 aide.

Following a March 20, 2001, behavioral incident, and a resulting suspension, student was placed in an AES, at Hillview Conference Center, and began receiving two hours per day of tutoring at this site. Student's related services, with the exception of the 1:1 aide, continued.

The family requested this due process hearing on May 18, 2001, alleging that student's current placement is inappropriate.

The School Department contends that while day treatment is probably the most appropriate placement for student, at this time the AES is an interim placement, until such time as student enters a day treatment placement.

II. Issue to be Decided by the Hearing

- **Is student's current placement, made at an April 5, 2001 PET meeting, the least restrictive educational setting within which student can receive a free, appropriate, public education?**

III. Findings of Fact

1. Student's date of birth is xxxx. (Exhibit: H3)

2. Student has been attending McMahon Elementary School since entering school and is currently completing the sixth grade. He will graduate from McMahon School on June 19, 2001. (Testimony: Mother)
3. During the 2000-2001 school year, student received special education services under the eligibility category of multiple disabilities, based on his emotional and behavioral needs. (Exhibits: S12-28, S55-71, S108-121)
4. On August 16, 2000, student was hospitalized at St. Mary's, due to certain behaviors at home and "highly impulsive behavior which is felt to endanger him in the community." It was noted on his admission report that he had had "greater than 10 inpatient psychiatric admissions" as well as a series of medication trials, with varying levels of success. (Exhibits: S123-126)
5. On September 1, 2000, Tracy Bradbury, LSW, who is student's case manager from Tri-County Mental Health Services, facilitated the creation of a Crisis Plan for student. This plan was designed to coordinate responses to student's behavior over all settings, including school and home. It includes behavioral warning signs, known coping skills, individuals to contact when student is exhibiting crisis behaviors and professional resources. A "Script for De-escalation" was also created at this time. The plan and the script were made available to school personnel, and were added to student's IEP as a supplement to student's Positive Behavioral Intervention Plan. (Exhibits: S121, 122; Testimony: T. Bradbury)
6. On or about October 30, 2000, a serious behavioral incident involving student occurred at school. This incident resulted in the police being called, and a criminal charge being lodged against student. (Testimony: Mother)
7. A PET meeting was held on November 8, 2000 and continued on November 13, 2000. At this time, it was determined that student would receive the full-time assistance of a 1:1 aide. (Exhibits: S102-103)
8. During this time period, there were a series of meetings held, at which student's crisis plan, as well as classroom rules, were discussed. A meeting held on November 29, 2000, also included police and probation office personnel. (Testimony: T. Bradbury)
9. During the weeks prior to March 20, 2001, student missed some school days. Due to these absences, student had missed a science test, and was behind in his science assignments. On the morning of March 20, 2001, the mother called the school to say that student was not having a good morning, and may have some problems at school. Student's tutor, Brian Beaulieu, confirmed that when student arrived at school, he was under some stress, and was worried about being behind in science. After lunch, and after getting a copy of the missed test to complete with his tutor, student stated, "I am very overwhelmed," and started pulling his

hair. This is a warning sign indicated on student's crisis plan. When given a choice to not take the test, but to take a self-imposed timeout, student chose to go ahead with the test. However, he was unable to remain focused.

At one point, student got out of his seat and climbed on the table. When directed to get off the table, he did so, but began running around the room, saying, "I'm going to call my mom." He grabbed the receiver of a telephone and began dialing, then took a walkie-talkie from the desk. Mr. Beaulieu stated that student was "out of control."

The tutor sent another educational technician to evacuate the other children from the room and to go and find Ms. Cyr, the special education teacher. About that time, student ran out of the room and down the hall, but the tutor was able to talk him back into the room, and somewhat calmed him down. The special education teacher entered the room, and the tutor stated that student appeared to be making better choices, per the De-escalation Script.

Student's mother was called, but was not at home at that time. Ms. Cyr instructed Mr. Beaulieu to tell the principal, Ms. Golding, what had happened and to get instructions about whether student should take the bus home. Mr. Beaulieu opined that the best course would probably be to get the parent to transport the student home.

At that time, student was relatively calm, and was beginning to do some OT exercises to help calm himself. He was then told that he would have to complete an accountability sheet, and he refused. Mr. Beaulieu went to bring back the principal, Ms. Golding, and when they, along with Ms. Walker, the assistant principal, came back to the room where student was with Ms. Cyr, student was screaming and throwing things. He picked up a chair and threw it at Ms. Cyr. Student also knocked over a partition that Ms. Walker had her arm upon, and Ms. Walker injured her hand.

At this time, Ms. Golding made the administrative choice to call the police, based on the protocol in student's crisis plan. The police arrived shortly. The mother arrived at school around 3:00 p.m. and transported student home. (Exhibits: S30-36; Testimony: B. Beaulieu)

10. Based on this incident, student was suspended for ten days. (Exhibits: S30-36, Testimony: Mother)
11. A PET meeting was held on March 27, 2001, at which the discussion centered around the occurrences on March 20, 2001, resulting in student's suspension, and whether the crisis plan was appropriately followed. (Exhibits: S30-36)
12. A PET meeting was held on April 5, 2001, the tenth day of student's suspension, in order to conduct a manifestation determination, and it was determined that

student's behavior on March 20, 2001 was a manifestation of his disability. Following this determination, there was extensive discussion regarding the capability of McMahan school staff to educate student while keeping him, and others at the school, safe. Dr. Powers, the school psychological services provider, commented on the nature of student's behaviors, noting that they were atypical and intense. She stated that "each episode is different and we do not have a handle on how different episodes impact the IEP." It was determined that student would be placed in an interim alternative educational setting ('AES'), pending placement in a day treatment center. The IEP developed at this meeting gave student a program consisting of two hours per day tutoring at the Hillview Conference Center. The school department would also continue conducting the evaluations that had been started, including a speech and language evaluation and a functional behavior assessment. OT consult was to continue, as well as counseling before or after the tutoring, and the crisis plan/script would continue to be followed. Once the family agreed to a fall day treatment placement, such a placement would be located. The family stated objections to the off-site placement, and did not agree with the tutoring plan. However, although Director Curtis assured them that they had the right to pursue a due process hearing, they did not invoke "stay put", and did agree to permit student to be placed in the alternative educational setting. (Exhibit: S2-9; Testimony: Mother)

7. At some time subsequent to the April 5, 2001 PET meeting, it was determined that student would receive ESY services during the summer of 2001. The family agreed with the ESY plan. (Testimony: Mother)
8. Following the April 5, 2001, PET meeting, student began receiving educational services for two hours per day at Hillview Conference Center. There appears to be no dispute about the quality of the academic services that student is receiving. (Exhibit: Testimony: Mother)
9. On May 18, 2000, the family filed for a due process hearing, with the aim of returning student to McMahan School prior to the close of school on June 19, 2001. (Exhibit: H4-6)
10. Student was invited to attend the graduation ceremony on the final day of school (June 19, 2001) and planned on doing so. (Testimony: Mother)

IV. Conclusions

There is no dispute that student's behavior on March 20, 2001 was a manifestation of his disability. The PET found that it was, and the family agrees. Nor is there any question that student's significant disabilities require extensive supports within the educational setting. Student had a full-time, 1:1 aide, and was placed within a self-contained classroom. He has experienced at least eleven psychiatric hospitalizations in his thirteen years. Student has a crisis plan, developed by a counselor at Tri-County Mental Health,

and this crisis plan includes emergency measures designed to deal with serious behavioral situations on the part of student. Student also has a Positive Behavioral Intervention Plan, and a De-escalation Script. He had a serious behavioral incident while at school in October 2000, which resulted in criminal charges being brought against him and the March 20, 2001 incident resulted in injury to an administrator.

There seems to be agreement that the local Middle School, which student would normally attend following his recent graduation from McMahan Elementary School, cannot meet student's emotional and behavioral needs, and that a day treatment placement might be most appropriate for the 2001-2002 school year. Although no specific day treatment program was identified during the course of the hearing, the general sentiment seemed to be that an appropriate day treatment placement was being sought by the school department.

Therefore, the only issue at hearing was whether the alternative educational placement ('AES'), within which student was currently receiving his educational services, was appropriate. Since the family did not file for due process and invoke "stay put" at the time of student's placement in the AES, and in fact allowed the placement to be made, the school department was not required, at this time, to show that student is dangerous to himself or to others within the school setting. Rather, the family had the burden of showing that the AES is inappropriate.

There was no dispute over whether student is receiving an appropriate educational program while within the AES. The family agreed that student was receiving the academic services called for within his IEP, and no compensatory education was requested. Rather, it was student's isolation from the McMahan student body that the family sought to change through this hearing.¹

It was the nature of student's behavior on March 20, 2001 that resulted in his subsequent suspension. However, student's need for a crisis plan to stand alongside his Behavioral Intervention Plan, his extended psychiatric hospitalizations, and his acknowledged need for significant emotional and behavioral supports within the school setting, suggests that McMahan School may no longer be able to meet student's needs.

At the prehearing conference, the School Department argued that the issues in this case were moot, but this hearing officer declined to dismiss the case. However, after hearing the family's evidence at the hearing, and acting within the discretion of an independent hearing officer, I am hereby dismissing this complaint without prejudice.²

¹ Since there has been no request to consider compensatory education as a remedy in this case, the only remedy would have been an order to return student to school for the final three days of the 2000-2001 school year, one day of which (graduation day) he is already scheduled to be there. The family agrees with the IEP plan regarding ESY services, as well as with the plan to place student in day treatment for the 2001-2002 school year.

² If, at the beginning of the 2001-2002 school year, the student continues to be placed in an AES which is unsatisfactory to the family, they have leave to re-file a due process request on this same issue.

Student's academic services are being implemented within the AES, apparently to the satisfaction of the family. Likewise, there is consensus that the AES is only an interim, rather than a long-term, placement. It must be remembered that student's previous placement at McMahon School was not a mainstream placement, but a self-contained special education placement, with only one mainstream class. Likewise, student required, and had, the full-time, one-on-one assistance of an aide who is a trained behavioral specialist. Student was already in a relatively restrictive placement, although the AES is certainly more restrictive. However, given student's emotional and behavioral needs, the AES is an appropriate, interim placement for student, while a day treatment placement is pending.

V. Decision

The family failed to meet its evidentiary burden to show by a preponderance of the evidence that the AES within which student has been receiving his educational services since April 5, 2001, is not an appropriate placement. Therefore, the family's request for a full due process hearing is dismissed without prejudice.³

VI. Order

Since no statutory or regulatory violations were found, no order has been prepared.

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

Date

Family's Index of Documents

P1	Daily Behavior Report, dated January 10, 2000 (sic)
P2	Daily Behavior Report, dated January 17, 2001
P3	Daily Behavior Report, dated January 18, 2001
P4	Daily Behavior Report, dated January 23, 2001
P5	Daily Behavior Report, dated January 24, 2001
P6	Daily Behavior Report, dated January 25, 2001

³ This decision was verbally communicated to both parties at the close of the family's presentation on June 14, 2001.

- P7 Daily Behavior Report, dated January 26, 2001
- P8 Daily Behavior Report, dated January 29, 2000 (sic)
- P9 Daily Behavior Report, dated January 30, 2001
- P10 Daily Behavior Report, dated January 31, 2001
- P11 Daily Behavior Report, dated February 2, 2001
- P12 Daily Behavior Report, dated February 8, 2001
- P13 Daily Behavior Report, dated February 13, 2001
- P14 Daily Behavior Report, dated February 26, 2001
- P15 Daily Behavior Report, dated February 27, 2001
- P16 Daily Behavior Report, dated March 1, 2001
- P17 Daily Behavior Report, dated March 2, 2001
- P18 Daily Behavior Report, dated March 5, 2001
- P19 Daily Behavior Report, dated March 7, 2001
- P20 Daily Behavior Report, dated March 9, 2001
- P21 Daily Behavior Report, dated March 14, 2001
- P22 Daily Behavior Report, dated March 15, 2001
- P23 Daily Behavior Report, dated March 19, 2001
- P24 Daily Behavior Report, dated March 20, 2001
- P25 Speech Evaluation, dated May 15, 2001
- P26 Letter from Mother to M. Curtis, dated May 23, 2001
- P27 Report of Officer Huffman, dated March 20, 2001
- P28 Functional Assessment Form (blank), undated
- P29 Daily Behavior Report, dated February 4, 1998

- P30 Daily Behavior Report, dated February 6, 1998
- P31 Incident Report, dated February 5, 1998
- P32 Daily Behavior Report, dated April 30, 1998
- P33 Daily Behavior Report, dated May 4, 1998
- P34 Student Behavior Documentation Sheet, dated June 8, 1998
- P35 Incident Report, dated March 8, 1999
- P36 Classroom Re-entry Form, dated March 10, 1999
- P37 Daily Behavior Report, dated December 16, 2000

Family's Witness List

Mother

Student

Brother

Brian Beaulieu, McMahan School tutor

Tracy Bradbury, LSW

School Department's Index of Documents

- S1 Telephone Communication, dated April 6, 2001
- S2-7 PET minutes, dated April 5, 2001
- S8-9 Manifestation determination for PET meeting
- S10 Prior notice of change of program
- S11 Telephone communication, dated April 4, 2001
- S12-28 IEP for April through June 2001 (with attached crisis plan), dated April 5, 2001
- S29 Notice of PET meeting, dated March 30, 2001
- S30-37 PET minutes, dated March 27, 2001

S38 Waiver of seven-day notice requirement, dated March 27, 2001

S39 Letter to Mother from Principal Golding, dated March 26, 2001

S40 Communication log, dated March 21, 2001

S41 Notice of PET meeting, dated March 16, 2001

S42-43 Occupational therapy sensory interventions, dated March 5, 2001

S44 Notice of PET meeting, dated March 1, 2001

S45-47 PET minutes, dated February 27, 2001

S48 Notice of PET meeting, dated February 16, 2001

S49-51 PET minutes, dated February 13, 2001

S52-53 Consent for evaluation, dated February 13, 2001

S54 Waiver of seven day notice, dated February 13, 2001

S55-71 IEP for January through June 2001 (with attached behavior and crisis plans), dated February 13, 2001

S72 Notice of change of program, dated February 12, 2001

S73-75 PET minutes, dated February 7, 2001

S76 Notice of PET meeting, dated January 26, 2001

S77-79 Summary of occupational therapy evaluation, dated January 24, 2001

S80-82 Functional behavior assessment, dated January 22, 2001

S83-86 Occupational therapy report, dated January 17, 2001

S87-89 PET minutes, dated December 15, 2000

S90 Notice of PET meeting, dated December 4, 2000

S91 Notice of PET meeting, dated November 27, 2000

S92-94 PET minutes, dated November 21, 2000

S95 Notice of change of program, dated November 21, 2000

S96-97 Consent for testing, dated November 21, 2000

S98-99 Consent for testing, dated November 14, 2000

S100 Tri-County Crisis Plan, dated November 13, 2000

S101 Notice of PET meeting, dated November 9, 2000

S101-3 PET minutes, dated November 8, 2000

S104-6 PET minutes, dated November 7, 2001

S107 Waiver of seven day notice, dated November 7, 2000

S108-121 IEP for November 2000 through November 2001 (with attached behavior and crisis plans), dated November 8, 2000

S122 Tri-County Crisis Plan, dated September 1, 2000

S123-126 St. Mary's assessment, dated August 16, 2000

S127 PET minutes, dated May 3, 2000

S128-9 PET minutes, dated March 8, 2000

S130 Positive behavior plan, dated March 9, 2000

S131-139 IEP, dated March 8, 2000

S140 Waiver of seven day notice, dated March 8, 2000

S141-143 Discharge summary, dated November 19, 1999

S144 Discharge summary, dated November 8, 1999

S145-148 Report by Dr. Griffy, dated October 30, 1999

S149-154 Evaluation by Ms. Bumpus, dated October 1999

S155-163 Psychological evaluation by Dr. Powers, dated October 1999

S164-166 Academic assessment, dated March 1999

S167-172 Speech and language evaluation, dated October 1997

- S173-179 Psychological evaluation by Dr. Powers, dated October 1996
- S180-187 Speech evaluation, dated November 1996
- S188-192 Psychological evaluation by Dr. Sheckart, dated September 1995
- S193-196 History and Physical conducted by Louis Velazquez, M.D., dated September 7, 1995
- S197-206 (Excluded from Record)
- S207-209 Functional Behavior Assessment, completed by Jennifer Roberts, M.S., dated May 30, 2001

Hearing Officer's Index of Documents

- H1-2 Letter of Appointment, dated May 25, 2001
- H3 Docket Sheet
- H4-6 Dispute Resolution Request Form, dated May 18, 2001
- H7-20 Letters and Reports regarding Program and Review of the Lewiston School Department, various dates
- H21 Letter from Pat Newmeyer to Oxford County Superior Court, dated May 25, 2001
- H22-23 Parent's Statement of Issues and Findings Expected, undated
- H24 Parent's List of Witnesses, undated
- H25, 26 Parent's Index of Exhibits, and revised Index of Exhibits, undated
- H27 Letter from Robert Hoy, Esq. to the Hearing Officer, submitting Witness List, Index of Exhibits and Statement of Issues and Findings Expected, dated June 4, 2001
- H28 Letter from Eric Herlan, Esq. to the Hearing Officer, regarding scheduling, dated May 29, 2001
- H29-31 School Department's Index of Documents
- H32 School Department's Witness List

- H33 Letter from Melvin Curtis to the Hearing Officer, submitting additional documents, dated June 5, 2001
- H34 Letter from Robert Hoy, Esq. to the Hearing Officer, submitting additional documents, dated June 7, 2001
- H35-36 School Department's Prehearing Memorandum, dated June 4, 2001
- H37 Prehearing Memorandum, dated June 11, 2001
- H38 Email from Eric Herlan, Esq. to the Hearing Officer, regarding the hearing issue, dated June 12, 2001