**STATE OF MAINE**

**SPECIAL EDUCATION DUE PROCESS HEARING**

February 22, 2002

*Case # 01.264, Parents v. Wells Ogunquit CSD*

**REPRESENTING THE FAMILY:** The Family appeared *pro se.*

**REPRESENTING THE SCHOOL:** Eric R. Herlan, Esq.

**HEARING OFFICER:** Peter H. Stewart, Esq

This hearing was held and the decision written pursuant to 20-A MRSA 7202 *et seq.,* 20 USA 1415 *et seq.,* and accompanying regulations.

This hearing was requested by the family on October 15, 2001. The hearing involves their son (DOB: xx/xx/xxxx) who was, during the school year at issue here, a ninth grade student. The pre-hearing was initially scheduled for November 1, 2001. At the request of the parties, the hearing officer rescheduled the hearing to accommodate their desire to try to settle the issues informally. Those attempts at settlement failed. The pre-hearing conference was held on December 12, 2001 in Sanford, Maine. The hearing began on December 21, 2001 and concluded on January 18, 2002. The parties submitted written closing arguments which were received by the hearing officer early in February, 2002, at which time the record was closed.

## I. Preliminary Statement

This case involves a gifted student with a type of autism known as Asperger's Syndrome. He is particularly gifted in science, mathematics and with computers; his area of greatest need is in the area of language arts, and with the development of social skills and peer relationships. In the spring of 2000, the parents and the school decided that it would be in the student's best interest to "skip" the eighth grade and go directly to ninth grade. He entered the high school as a xx year old ninth grader in the fall of 2000. This case involves a series of issues arising out of the implementation of the IEP which placed the student at the high school. The family asserts that the student did not receive the educational program described in the IEP and that they did not receive notice on those occasions when the school departed from the IEP. Specifically, they assert that the student did not receive any educational services in the first academic period of the day for three days each week and further assert that the absence of such services violates the IDEA. They also assert a series of

procedural violations of the IDEA centering upon their arguments that the school changed the IEP without notifying the family of the proposed change. The parents argue that the school violated the IDEA by failing to require the student to eat lunch in the high school lunchroom. The parents seek compensatory education as a remedy.

The school argues that the student's ninth grade year was a remarkable success, given his youth and his disability. The school emphasizes that the student earned five high school credits during a ninth grade school year he entered at age xx and is therefore far ahead of his chronological peers. The school asserts that the IEP was properly implemented and that, to the extent that any departures from the IEP did occur, they occurred for valid educational reasons and were made with notice to and participation and input from the family. The school contends that, even assuming the IDEA was violated, no remedy should ordered because the student, in fact, received meaningful educational benefit from the program provided to him during school year 2000-2001.

## II. Issues

1. What standard of review should be applied in this due process hearing?
2. Did the school's implementation of the student's IEP for school year 2000-2001 violate the IDEA or Maine special eduation law and regulations?

## III. Findings of Fact

1. The student's birth date is xx/xx/xxxx. (Dispute Resolution Request)
3. The student's disability is autism, specifically Asperger's Syndrome. (Dispute Resolution Request)
4. The student is gifted, with a full scale IQ of either 141(J- 6, p.2) or 146 (S-83).
5. The student had "skipped" a grade in elementary school and also "skipped" the eighth grade, pursuant to a decision confirmed by a PET in June of 2000, and entered the ninth grade in the fall of 2000 to receive the educational services set forth in the IEP developed for him by the PET (S-83 to 99, 131).
6. At a PET held in June 2000, George Bergevine, the Director of Special Services of the school, stated that the student didn't have to take a full load of courses at the high school and that graduation might take longer to achieve than normal "based on a modified schedule" (S-129, testimony of Bergevine).
7. The high school day was organized into four "blocks" of time, each eighty minutes long, with lunch time in between two of the blocks. Over the course of a school week, there were about 28 hours of instructional time. If pre-school time, lunch time, and time between classes is included, the school week is about 35 hours long. (Testimony of Bergevine)
8. Over the summer, after the decision to educate the student in the high school had been made, school officials met with the parents to select the courses he would take in ninth grade. For the first 80 minute block in the fall semester, the school and parents agreed to a computer course three days each week and occupational

therapy sessions the other two days. When school started in September, the computer class "fell apart" because the student was quite advanced and wanted only to learn LINUX while the computer teacher was not the appropriate person to teach it. (Testimony of Bergevine and Cohen)

9. The school offered an art course to replace the computer course but neither the student nor his family wanted art. The school and parents talked about the problem but did not come up with any other options. The school never told the student that he should stay home for first block three days each week. The parents did not raise the issue of some alternative programming at a PET meeting in late September, nor at other PET meetings during the fall. Robert Cohen, case manager for the student, thought that the student could benefit from the shorter academic day three times a week; that the student, as a 12 year old in his first semester of high school, did not need to be "overwhelmed with a schedule crammed with things to do when just making the adjustment to high school was a tremendous challenge." (Testimony of Cohen)
10. The parents wrote a letter dated September 6, 2000, to George Bergevine, the school's Director of Special Services, in which they protested the loss of the computer course during the first block. That letter was not mailed. Mr. Bergevine never received it. (P-10, testimony of Bergevine)
11. The student was taken to the lunchroom in the high school "nearly every day…for milk and ice cream" and was offered an opportunity to stay there to eat his lunch. The lunchroom was crowded, loud and chaotic. The student consistently chose to leave the lunchroom and eat his lunch in a classroom with a small group of other students, many of whom were disabled in some way. The student, who appeared uncomfortable in the lunchroom to the adults who accompanied him there, was not compelled to remain in the lunchroom to eat. The case manager believed that "making him eat in a place where he was so clearly uncomfortable is nearly punitive…", especially when he appeared much happier and more comfortable eating in the smaller area. He was also observed to interact with some of the other students in the smaller area. (Testimony of Cohen.)
12. The case manager wrote to inform the parents of the school's decision to allow the student to eat lunch where he chose. He did not get a response from the parents. (Testimony of Cohen)
13. The school had hired an Educational Technician ("Ed Tech") specifically to be available 35 hours/week to work with the student, one-on-one. This Ed Tech was in school all day, worked with the student in all his classes and would have been available to work with the student had he attended the art class offered for the first block, three days each week. She was quite successful with the student in many ways, including his behavior. (S-83, Testimony of Bergevine, Braese)
14. During the 2000-2001 school year, the student took and passed four regular education courses and was given credit for the individualized English course designed for him. The English course was based on the "Harry Potter" books. (Testimony of parents, Beregevine)
15. Written language is a particular problem for this student. The IEP contains extensive goals and objectives in this area. (S-85).

16. After the initial transition into the high school, the PET met November 20, 2000 to review progress and make adjustments if necessary. Both parents attended this meeting. Several options regarding language arts instruction were discussed: a regular ninth grade English class, a correspondence course, and the Aucocisco School, a Portland area day school specializing in language based learning disabilities. The minutes reflect that the correspondence option was selected. (S 40-41, Minutes of PET)
17. A PET met on January 9, 2001. The student's mother attended the meeting, along with school officials, and expressed her concern that the language arts/written expression component of her son's program was not successful. An Aucocisco placement was offered as a remedy. (S 38-39)
18. In a letter to the student's mother dated February 2, 2001, Bob Cohen described the "language arts independent study" he had designed for the student. It was based upon the Harry Potter books. (S – 51.)
19. On February 27, 2001, another PET meeting was held. Both parents attended. This meeting was called to discuss the English program for the student, which was necessary because the Aucocisco placement did not occur, though the school was willing to fund it. The English program was added to the student's third block support study time. (S 35-37).
20. The English program stated that the student would receive ½ credit for each book completed. The student read all of one book and part of a second book. The student was awarded one full credit for the course by Bob Cohen. (Testimony of mother and Cohen.)
21. Throughout the school year, the school made daily notes describing what the student did each day at school. These notes ran to hundreds of pages over the year. The notes were provided to the parents on a regular basis as required by the IEP. (Testimony of Cohen; S 204 – 460).
22. The parents filed a complaint with the Maine Department of Education on July ii, 2001. The Report of the Complaint Investigator was issued on September 21, 2001. (S 4-20)

## IV. Conclusions

### A. What standard of review should be applied in this due process hearing?

This case has its roots in a complaint filed by the parents pursuant to 20-A MRSA 7206 in the summer of 2001. A complaint investigator was appointed and she issued her report on September 21, 2001. The parties testified that each was dissatisfied with certain aspects of the complaint investigator's report. Maine law provides that such a report may be appealed by requesting a due process hearing within 30 days from receipt of the report by the parent or a school administrative unit. 20-A MRSA 7206(4). The parent's filed a timely appeal, which has lead to this due process hearing.

Maine law does not specify what standard of review is to be applied in such an appeal, and this hearing officer is unaware of any judicial or administrative authority on this point. This matter was discussed both at the pre-hearing and on the first day of the hearing itself. At that time, the hearing officer ruled that this due process hearing was to be conducted as a *de novo* proceeding, with the moving party carrying the burden to prove the violations of the IDEA and state special education law asserted in the due process hearing. This hearing has been conducted, and this decision written, on that basis. The burden is upon the moving party, the family, to prove the asserted violations of the IDEA; the hearing officer is not obligated to defer to the findings of fact or conclusions contained in the complaint investigator's report.

### B. Did the manner in which the school implemented the student's IEP violate the IDEA?

1.

The parents' arguments focus upon the manner in which the IEP was implemented, rather than upon its contents. They assert that several aspects of the implementation of the IEP violate the IDEA and state special education law. Those assertions are discussed below.

The parent's first argument concerns the fact that the student did not attend school for the first class block three days of every week amounts to a violation of the IDEA. While it is true that the proposed computer class "fell apart" after the first meeting and that the art class offered by the school was declined by the parents, the IDEA is not violated by the student's failure to attend school during that time. First, the computer class was not a part of the IEP. There is no requirement in the IEP that the student be provided with a computer course during school year 2000-2001. The computer course was selected during the summer of 2000, after the PET made the decision to place the student in the high school, when school officials and parents met to discuss the courses the student would take in 2000-2001. The program developed as a result of these discussion was carefully designed to suit the student's needs, to reinforce his strengths and to work on his weaknesses. The program included the computer course. But the decision to include the computer course was a programming choice made by the school and parents together, and not by the PET. That it "fell apart" and did not occur was disappointing to everyone involved, but that event does not violate the IDEA. The student has no entitlement pursuant to his IEP to the computer course that can be enforced in this proceeding. Further, the computer course itself is a course that falls within the ambit [sic] of regular, and not special, education; regular education itself is beyond the ambit [sic] of the IDEA.[1]

[1] It is not at all clear that I, as a due process hearing officer, have jurisdiction to rule on choices made regarding regular education courses taken by special education students.

There are other reasons why the family cannot sustain its burden to prove a violation of the IDEA on this point. When it became clear that the computer course was not going to work for the student, the school reviewed its course options and suggested an art course as a replacement. At least one art course must be taken to qualify for graduation and the school viewed this course as more appropriate than the alternative, a writing course that likely would be very problematic for the student, given the difficulty he has with written language. The student and the family rejected the offered art course as a "bad idea" and apparently let the matter drop. The student's father wrote a letter on 9/6/00 protesting the loss of the computer course but never mailed or otherwise delivered it to the school. The issue was not raised at a PET meeting later in September, or at other PET meetings during the fall of 2000. The school never told the family that the student couldn't come to school during first block; had the student and family been willing to accept the art course offered by the school, the educational technician would have been there to work with him. This issue seems to have slipped off the table.

The school, however, did not think it a bad idea for the student to stay home during the first block. He had just skipped a grade, was only twelve years old in the ninth grade and was taking a full load of regular high school courses for the most part.[2] The student was faced with huge challenges and the school was concerned that he not be overwhelmed by them. Staying home an extra hour or so three days a week seemed like a good idea to the student's case manager, Robert Cohen. The parents, too, seemed to have given this arrangement their approval, at least tacitly. They were aware of the situation and must have been aware that their son was staying home later three days a week yet they did not press the issue of the "missing" programming with the school during the fall of 2000.

Consequently, I conclude that the decision that the student not attend school the first block three days a week belongs to the parents, as well as to the school. It was made jointly; both parties knew about and participated in it. Assuming *arguendo* that this is an IDEA issue, the decision that the student not attend school during first block three days a week does not, under the circumstances presented here, violate the IDEA or state special education law.

2.

The parents next argue that the school failure to require the student to eat his lunch in the high school lunchroom constitutes a violation of the IDEA. This argument is not supported by the facts of this case or the relevant law on this issue.

The IEP does not specify where the student should take his lunch: consequently, there is no requirement under the IEP that he be forced to eat in any particular

[2] Some of the courses were advanced courses within the regular education curriculum.

place within the school. There was undisputed testimony at the hearing that the student ate in the lunchroom on the first day of school but didn't want to eat there after that experience. He was taken to the lunchroom nearly every day to buy milk and/or dessert, but never wanted to stay to eat. The lunchroom was described as loud and chaotic and the student didn't want to eat there. Instead, he chose to eat in a smaller quieter room with fewer people in it, many of whom were disabled in some way. He seemed happier there, was more comfortable there, and voluntarily interacted with other students who were eating there.

While there is no basis to argue that the IEP was not fully implemented in this regard, the question is whether any provision of the IDEA was violated by this practice. I conclude that no violation has occurred here. 34 CFR 300.553, *Nonacademic settings,* requires schools to, "ensure that each child with a disability participates with nondisabled children…to the maximum extent appropriate to the needs of that child." This is not an absolute mandate; the regulation requires a school to ensure contact among disabled and nondisabled students only to the extent it is appropriate for the disabled student. Here, the school employees who worked most closely with the student[3] made the determination that it was more appropriate for him to be allowed to eat in a smaller, quieter room, rather than be forced to eat in a large, crowded, noisy and chaotic lunchroom. I find this determination to be supported by the facts of this case[4], and to be consistent with the regulations at issue.

3.

The family challenges the appropriateness of the Support Studies block of instruction provided by the school, asserting that it did not provide appropriate language arts education. In summary, the parents contend that the student didn't get enough effective instruction, didn't learn enough by the end of the year, and was given too much credit for the work he did for the course.

When reviewing a claim such as this, the standard is whether the IEP at issue is "reasonably calculated to enable the child to receive educational benefits". *Rowley v. Board of Education,* 102 S. Ct., 3034, 3051 (1982). It is important to note that the IDEA doesn't guarantee either perfect programs or maximum results. The IEP, to be considered appropriate, must be designed to provide some educational benefit. *Lenn v. Portland School Committee,* 998 F. 2d. 1083 (1st Cir., 1993). In this instance, I find that the language arts component of the Support Studies block of the IEP meets the established standards.

[3] The case manager, Robert Cohen, supported by the two educational technicians assigned to the student throughout the year, concurred in this decision.

[4] See, Joint Exhibit 6, the Yale University study evaluating the student, which states that the student does better in smaller, more controlled settings and that placing him in settings which increase his discomfort and anxiety "will likely set him up for failure". J-6, at 14.

The language arts educational goal is found in the goals and objectives section of the IEP. (S-85) While the use of written language is required in other courses in the student's program, language arts became its own course in the winter of 2000-2001. Bob Cohen designed a course for the student based upon the Harry Potter series of books. This program was implemented for the rest of the school year. The student read all of one Harry Potter book, and some part of a second book. He completed written work required for the course and was awarded one credit at the end of the year. Bob Cohen was generally pleased with the work that the student did in the course, even though he didn't complete all of the scheduled projects. Cohen testified that the student responded to the course in good faith, worked hard, was responsible, and wrote "full sentences with good punctuation." Cohen further testified that he could see no educational benefit by denying the student a credit, finding the student's performance "something to celebrate." While it is certainly true that the student did not accomplish all the written language arts goals set forth in his IEP, that in itself does not amount to a violation of the IDEA. I find that this aspect of the IEP was reasonably calculated to provide some meaningful educational benefit.

4.

The parents assert that the IDEA was violated by the school's failure to develop a behavior plan for the student. I am not persuaded by this argument. The IEP contains a page entitled "BEHAVIOR PLAN", which recognized that the student may need time and a safe place to calm and collect himself. From the first, the school assigned an Ed Tech to work with the student, in a one-on-one relationship, all day. She was quite successful in helping him learn to behave appropriately and to avoid the "melt-downs" which had characterized his earlier school behavior. She used computer time for the student as a reward for good behavior. The parents themselves admit that their son's behavior at school during 2000-2001 was far better than in previous years and explain the improvement by stating that his "current placement (for the 2000-2001 school year) is much more supportive and appropriate."[5] The means and methods used by the school to deal with the student's difficult behavior, when it arose, seem to have worked. It should be noted, for instance, that the student's behavior issues did not prevent him from completing a normal course load for a ninth grader. At the very least, it is clear that he [sic] student's behavior in his ninth grade year demonstrates a considerable improvement upon earlier school years. Given these facts, there is no violation of the IDEA in this regard.

5.

[5] See, J-6, at 11, the Yale University study.

The parents maintain that the school improperly denied them an opportunity to participate in the development of the IEP. This assertion is not supported by the record in this case.

The evidence in this case, both documentary and testimonial, reveals that these parents were involved to an extraordinary degree in the educational life of their son. They were full participants in a series of PET meetings with school employees and professionals. They were in constant communication with school officials because the student brought home the daily notes made by teachers and his Ed Tech. The parents also had frequent contact with the school on the telephone and by letter. The parents knew how to invoke their right to call a PET meeting, and did so. They knew how to make their wishes and ideas known to the school, and did so on a frequent basis.[6] These parents were not excluded in any way from the process of designing or implementing the IEP for their son.[7]

## V. DECISION

Based on the record in this matter, I find that the school did not violate the IDEA or Maine state special education law by the way it developed and implemented the student's IEP for school year 2000-2001.

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Peter H. Stewart, Esq. Date
Hearing Officer

[6] It is true that the school did not always do what the parents wanted them to do. However, the IDEA does not obligate the school to accede to every parental request.

[7] Throughout the hearing, the parents emphasized that what they perceived as the school's failure to implement every goal/objective in the IEP immediately and consistently throughout the year violates the IDEA. This is not so. Goals and objectives should be understood as destinations toward which the year's work was aimed. The IDEA does not require that every goal be specifically addressed every day. The IDEA requires that the IEP be designed and implemented in such a way as is "reasonably calculated" to produce some real educational benefit. When the student's school year is reviewed as a whole, given both his disability and his relative youth, the facts in this case demonstrate real progress toward the goals and objectives in the IEP. Certainly, there is more work to be done but this is a ninth grade student who presumably will make more progress over the next three years. Finally, it should be noted there is no guarantee in the IDEA that all goals and objectives in an IEP will be accomplished in a school year. I find that the IEP was properly implemented.