

State of Maine
Special Education Expedited Due Process Hearing
Decision

Parent v. Surry School Department (Union #92), Case No. 02.160

REPRESENTING THE SCHOOL: Eric Herlan, Esq.
Drummond Woodsum & MacMahon

REPRESENTING THE PARENT: Parent Represented Herself

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, §7207-B et seq., and 20 USC §1415 et seq., and accompanying regulations.

The case involves Student, whose date of birth is XX/XX/XX. She resides with her mother in Surry, Maine. Student currently attends Surrey[sic] Elementary School. She is eligible for special education services as a student with multiple disabilities. She has been determined to have significant developmental delays and cognitive impairment. In addition, she has a hearing impairment, a seizure disorder, features associated with the autism spectrum and is blind.

This expedited hearing is brought by Student's mother who argues that the extended school year services offered by the school will not afford Student a free appropriate public education. She contends that Student's needs cannot be met in a 3-day a week, 7 week program at the Bryant Moore Elementary School in Ellsworth with an additional week at Surry Elementary School. She argues that Student requires a 5-day a week program like the program offered in the Surry Elementary School during the summer of 2001.

The pre-hearing conference in this matter was held by telephone conference call on Monday, June 10, 2002. During that call, Parent asserted that she had not been allowed adequate access to her daughter's file, that she felt documents in the file had been removed, and that documents that should be in the file were not there. She requested that a records violation become another issue for the hearing. The school challenged her version of the facts around these assertions. Given the constraints in meeting the timelines available to conduct the expedited hearing, the alleged educational records violation was not included as a dispute for this hearing. In an attempt to address the parent's allegation that she had not had proper access to the records, the five-day disclosure rule was set aside to give her additional time to prepare for the hearing.

In a letter received by the hearing officer on June 12, the parent objected to this ruling, writing that she believed that the ruling evidenced a lack of understanding and bias on the part of the hearing officer. She asked that the hearing officer step aside because of this perceived bias. The hearing officer has no bias in this dispute, nor is there any evidence to suggest the hearing officer lacked impartiality. However, the parent was notified on Thursday June 13 through the Department of Education that the hearing officer would dismiss the hearing without prejudice in order that a new case could go forward, with a new hearing officer, so that she could present this additional issue. Alternatively, if she preferred, she could go forward with the expedited hearing issue as it was originally framed with the current hearing officer. She opted to continue with the expedited hearing under the procedures outlined by the hearing officer. The parent was encouraged to pursue her claims of records violations through another arena, which she indicated she has done.

The hearing convened on Tuesday, June 18, 2002. The hearing was limited to one day by the hearing officer. The school called three witnesses; the parent called six witnesses. The district entered documents numbered S1-S255 into the record. The parent entered documents numbered Section 1, 1-13, Section 2, 1-24, and Section 3, 1-7¹. Given the need for the parties to have a ruling on this dispute before the July 1, 2002 start date for the extended school year (ESY) program, the parties were given the hearing order by memorandum from the hearing officer on June 26, 2002. Following is the full decision in this matter.

I. Preliminary Statement

The student is an xx year, xx month old student who currently attends the Surry Elementary School. She is identified as a student eligible for special education services under the category of multiple disabilities. Evaluations have determined that she has significant developmental delays, cognitive impairment, a hearing impairment, a seizure disorder, features associated with the autism spectrum, and is blind.

The student's mother requested this expedited hearing to dispute the extended school year (ESY) program offered by the district. She argues that the program fails to provide the student with a free appropriate public education. She asserts that the student's needs cannot be met in the program proposed by the school. It is her position that the student requires a more intensive program like the program offered in the Surry Elementary School during the summer of 2001

It is the school's position that the student has made remarkable gains over the past school year. They argue that the program will provide the student with a free appropriate public education that will allow her to maintain skills currently mastered.

¹ Because the parent was given until the day before the hearing to prepare and present documents, there are a number of duplicate documents that were not removed from the record prior to the hearing. Duplicate documents will be referred to by only one exhibit number.

Further, they argue that by attending the program at the Moore School, the student will gain benefit from the increased exposure to wider experiences.

III. Issue

Has the school made available extended school year (ESY) services to the extent necessary to ensure that a free appropriate public education is available to the student?

1. Findings of Fact

1. The student is an xx year, xx month old student with multiple disabilities. She has significant developmental delays and blindness due to retinopathy of prematurity and cataracts. She has some hearing loss. Expressive communication and verbal comprehension skills are low. Functioning and history suggest features associated with the autism spectrum. She is medicated for a seizure disorder. She is tactile defensive and her gross motor skills are below her age peers. Her school program provides an individualized, self-contained program at the Surry Elementary School. (Exhibit 101-S144; Testimony Hobson, Parent, Ferguson)
2. On May 18, 2001 the PET met to determine ESY services for the summer of 2001. The team decided that the student's ESY program would run from July 16 through August 10, 2001. The IEP states that the amount of ESY services will be 4 days a week for 6 weeks in duration for 4 hours/day with music therapy 1 time per week for 50 minutes. The program actually ran for 4 weeks from approximately 8:00 a.m. until 4:00 p.m. Monday through Friday. Daily Progress Notes from the ESY program show the student was present 5 days per week from Monday, July 16 through Friday, August 10. The teacher billed the district for 36.5 hours to 41.5 hours each week. The student made satisfactory progress on the goals in her IEP during that period. The student also had additional services provided by United Cerebral Palsy Center during the summer. (Exhibit S196-S200, P1.12, P3.6, S255; Testimony Neff)
3. On October 9 and 10, 2001 the student was evaluated on-site at the Perkins School for the Blind. The evaluation consisted of assessment of the student's psychological/developmental status, speech and language development, educational progress, physical and occupational therapy development, orientation and mobility needs and audiological functioning. The Psychological evaluation involved informal interaction with the student and an interview with her mother and two sisters. The evaluator determined that the student has a severe level of cognitive impairment with skills scattering within the 1 to 2 year developmental level. Behavioral challenges

suggested an underlying irritability, which is probably based in neurological impairment, and are also related to communication deficits. Her history and functioning suggest the presence of features associated with the autism spectrum. Significant delays exist in both receptive and expressive language skills, with formal testing showing skills at approximately the 1-year level. She communicates through gestures, vocalizations, body language, facial expressions, and self-injurious behaviors. Results of the Audiological assessment determined that the student has “grossly normal hearing in at least one ear within the speech frequency range, and probable adequate hearing for communication purposes”. Occupational and Physical Therapy assessments were limited due to the student’s fatigue and lack of participation, but muscle tone, strength and endurance were determined to be decreased for her age. Self-care skills were determined to scatter into the 2-year to 3-year old level. (S101-S144, Testimony Talbot)

4. On November 8, 2001, the PET met to revise the student’s individualized education plan (IEP). An oral report of the Perkins evaluation was shared with the team. (The actual report was not completed until March 2002.) Direct services listed in the IEP for the school year were: 35 hours/week of instructional services, 40 minutes/week of speech and language services, and 2 hours/week of music therapy services. In addition, the program included consultations from physical therapy 1 hour/quarter, occupational therapy 1 hour/month, speech and language therapy 40 minutes/week, and psychological services as needed. Consultations from the orientation and mobility specialist 1 hour/month, from a Teacher of the Blind 1 hour/month, a Deaf/Blind Consultant as needed, and Behavioral Consultant 1hour/month are also listed in the IEP. ESY services are “to be determined”. The PET reached consensus on the IEP. (Exhibit P1.13, S147-S149, S100, S94)
5. Progress Notes from the Orientation and Mobility Specialist dated January 25, 2002, stated that the student’s progress with adaptive mobility equipment was inconsistent. She noted that the student’s negative behaviors continued to interfere with her progress. She recommended that mobility lessons “once again be given on a monthly basis”. Progress Notes dated April 26, 2002, state that the student continues to be inconsistent in her use of the adaptive mobility device, but the Specialist comments that she observed the student engaged in positive activities such as playing on the playground, complying willingly with toileting routine, and going to the gym for hot lunch. (Exhibit 219-S220)
6. Progress Notes from Music Therapy, dated April 12, 2002, find that the student has made significant and noticeable development in her music therapy sessions. The therapist writes, “She is easier to engage and sustain in interpersonal and interactive music and movement activities. She is more communicative vocally and verbally. She is more relaxed...” The therapist

- recommended that music therapy continue through the summer 1-2 times per week. (Exhibit S225)
7. On April 25, 2002, the PET met to consider the 2002 ESY services for the student. The team recommended that the services occur in conjunction with the Ellsworth program and run from July 1-August 14, 2002 for 4 hours each day for 3 days each week. Consultation from the occupational therapist, the physical therapist, the speech therapist, and the orientation and mobility specialist would be provided to the program once during the summer. The student would attend music therapy one hour per week. The parent was in attendance at the meeting. There is disagreement whether the team reached consensus regarding the program, but on May 20 the parent requested a hearing to object to the program as described in the IEP. (P1.14; Testimony Sereyko, Parent)
 8. On June 3, 2002 the parent informed the school, by handwritten note to the special education teacher, that she would not send either the student or her sister to the ESY program. (S-2)
 9. The student's special education teacher and speech and language therapist conducted a Skills Inventory from the Oregon Project for Visually Impaired and Blind Preschool Children on May 2, 2001. Results showed the student performs[sic] at the 8-month level in cognitive skills; up to 1-year, 2 months in language; at the 1-year level in social skills; up to 2-year, 2 months in compensatory skills; up to 2-year, 1 month in fine motor skills; and up to 1-year, 9 months in gross motor skills. (Exhibit S3-S90)
 10. The student's attendance records from the 2001-2002 school year shows a 94% attendance rate as compared to a 70% attendance rate from the previous school year. (Exhibit P2.9²)
 11. The student has made significant gains over the school year. Negative behaviors that interfere with her school program have decreased as her skills have increased. She shows greater interaction with her environment and greater verbal interaction. Her self-help skills have increased. (Testimony Ferguson, Mintz, Hobson, Davis, Parent)
 12. The district modified the extended school year (ESY) program proposed for the student. The current ESY program for the summer 2002 includes: 5 hours per day of direct special education instruction, 3 days per week, with music therapy 1 hour per week, for 7 weeks at the Moore Elementary School in Ellsworth, Maine. In addition an 8-hour, 1-week program is proposed to re-orient the student to the Surry Elementary School the week before the school year begins. Consultations from the physical therapist, occupational

² The parent introduced this document with the names of other students not involved in this dispute. The hearing officer, to remove the names of these students, altered the document.

therapist, orientation/mobility therapist and speech and language therapist will be provided to the student once during the program³. (Exhibit S1; Testimony Sereyko)

13. "Wrap-around" services, which were provided during the summer of 2001 through money available from United Cerebral Palsy, will possibly not be available to the student this summer due to staff unavailability. (Testimony Neff)

IV. Conclusions

Has the school made available extended school year services to the extent necessary to ensure that a free appropriate public education is available to the student?

Each school administrative unit shall ensure that extended school year services are available to each student with a disability to the extent necessary to ensure that a free appropriate public education is available to the student. Pupil Evaluation Team determinations to provide extended school year services, including special education and supportive services beyond an administrative unit's normal school year, shall be made on an individual basis and based on the probability that the student is at risk of losing skills previously mastered and unable to recoup those skills within a reasonable period of time.

Maine Special Education Regulations, §5.9

There is no dispute that the student meets the definition of a student eligible for extended school year services (ESY). Her multiple disabilities and significant impairments interfere with normal development. While all agreed that she made significant progress over the past school year, she requires year round intervention to maintain skills previously mastered and to prevent regression, particularly in the acquisition of language.

The parent argues that the student requires the same program offered during the summer of 2001: 35 plus hours per week of direct services at the Surry Elementary School⁴. She maintains that the student will regress with anything less than a five-day a week program. She maintains that the program lacks supports, lacks

³ The document actually states that occupational therapy, physical therapy, and orientation/mobility consultations will occur once per week. This was never understood to be the proposal and was corrected during hearing testimony.

⁴ The IEP, dated 5/08/01, stated that the ESY program during the summer of 2001 would consist of 16 hours per week for 6 weeks. It is not clear how the program became 35 plus hours per week for 4 weeks, although there is at least one document that suggests that this may have been in the way of a compensatory offer by the school. See P2.3.

consistency, lacks trained staff and lacks consultation to the staff. She bases this assertion on her allegations of past failures by the school. Through her witness, Kay Davis, the parent also contends that the student suffers from Post Traumatic Stress Disorder, and that moving her to an unknown school with people unknown to her will trigger a fear response. Because she is blind and has limited language, Ms. Davis believes this unfamiliar setting will cause her to revert to primitive negative behaviors to communicate that fear.

Is the setting of the proposed program appropriate to meet the student's needs.

The school maintains that the program offered in the Moore Elementary School is designed to provide the student with a free appropriate public education that will meet the individual needs of the student to prevent a loss of skills and prevent regression. They argue that the student is ready for a wider environment than the Surry School and will actually benefit from moving to another setting.

Both the parent and the school raise valid issues, but the school makes the more compelling argument regarding the location for the program. The student has had a successful year and made measurable gains. Of that, there is no dispute. Her vocabulary and verbalizations are increasing daily. Negative behaviors in school are more predictable. Her willingness to explore her surroundings has increased. The school staff point to these gains to support the program setting they have proposed for the summer. The Fifth Circuit restated the underlying premise that the IDEA

placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . the Act creates a "presumption in favor of the education placement established by [a child's individualized education plan]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate.

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1158 (5th Cir. 1986 (quoting *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984)) (footnotes omitted). See also *Hartmann v. Loudoun County Ed. Educ.*, 118 F.3d 996 (4th Cir. 1997) (Local educators deserve latitude in determining the IEP most appropriate for a disabled child)

The testimony from the student's teacher was particularly compelling. She has seen the student daily for nine months. Her experience is sufficient to make educational judgments regarding the student's need to move from the very cloistered environment of her familiar school to a more challenging environment. She clearly has a good sense of the student's tolerance for change and her ability to benefit from that change. The student's speech and language therapist also has the experience to make educational judgments regarding the student's ability to receive benefit from the proposed ESY program. She has worked with the

student for three years, and has had some contact with her in the school setting three days each week over the past year. She testified that the student has increased her exploration of the Surry School building, including going to her office in another building. It is her opinion that the student has accepted new experiences well this year and is likely to benefit from the new location.

The only witness who adamantly opposed the change of setting was parent's witness, Ms. Davis. Ms. Davis made strong statements that the student will be negatively affected if her program is located in the Moore School. She stressed her concern that the student's Post Traumatic Stress Syndrome, coupled with her blindness, would drive a fear response, which would cause the student to revert to primitive negative behaviors. This would be compelling evidence but for the fact that Ms. Davis has not seen the student in her school setting since November 2001 and the fact that her concerns are not borne out by other evidence, particularly the observations of evaluators at the Perkins School⁵. The student was transported to Massachusetts to the Perkins School for this evaluation. This was a totally foreign environment for the student where she was asked to interact with many people previously unknown to her. She demonstrated negative behaviors, but the descriptions of her behaviors in this setting were nothing approaching the type of behaviors Ms. Davis predicted. This leads to the conclusion that with familiar people (in this instance the student's sisters or her mother) and the intervention of skilled staff (the Perkins evaluation team) the student could become compliant to the setting, commensurate with her developmental and behavioral deficits.

Both the parent and the school staff see increased socialization opportunities for the student as a desired outcome of her education⁶. Clearly there is a trade-off between a setting that is safe and secure for the student, and a setting that affords her the opportunity for increased socialization. The school has made a convincing argument that they are fully cognizant of the potential hazards in the Moore School program, and that they are prepared to address problems to make the experience less stressful. The student will attend the program with at least two staff members currently known to her. The routine of the program will be the same as that offered during the regular school year. Program activities and materials will be transported to the Moore School to add another element of familiarity.

Is a 3-day a week, 7 week ESY program sufficient to ensure that a free appropriate public education is available to the student?

⁵ While reporting the opinion of another psychologist in the evaluation report that the student carried a diagnosis of Post Traumatic Stress Syndrome, the Perkins psychologist did not endorse this finding. She offered no opinion on this matter; however, she and other evaluators at Perkins did remark that they were of the opinion that the student's "tendency toward behavioral irritability appeared to be related to her general neurodevelopmental disorder. That is, many children who have neurological impairments have difficulty with behavioral regulation and control of impulses". Elsewhere in the report evaluators opined that "negative behaviors have a communicative element to them".

⁶ In fact, documents in the record make it clear that the parent has fought for the student's right to increase opportunities for socialization, as evidenced by a prior complaint to the Office for Civil Rights and a requested due process hearing.

The second question - the number of hours per week that is reasonably calculated to provide the student with an appropriate program that will prevent regression of previously mastered skills – is more problematic. There is insufficient objective criteria offered in the record upon which to determine whether the parent's or the school's position should hold. The school argues that the student has not shown a pattern of significant regression over vacations throughout the school year. They point to this data to support their position that a 3-day a week program is sufficient to maintain the student's skills. It is difficult to be convinced that that should be the only measure of the student's summer program.

At least one court has ruled that although regression is a factor to consider when determining whether a disabled student should receive an extended school year (ESY), it is not the only measure to be applied. In *Johnson v. Independent School District No. 4 of Bixby* 921 F.2d 1022 (10th Cir. 1990) the Tenth Circuit opined that all the factors that are typically considered when determining a FAPE should also be involved when analyzing the appropriateness of an ESY. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs.

Faulders v. Henrico County School 36 IDELR 183 (E.D. Va. 2002) See also *Yaris v. Special School Dist.*, 558 F.Supp. 545, 551 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984) (ESY services should consider areas of the child's curriculum which need continuous attention and the child's vocational needs.)

The parent urges that the school provide the same program as last year, 35 plus hours a week for four weeks. She maintains that the student will regress with anything less than a five-day a week program. But, this approach leaves the student with almost a month break before school begins in the fall. There is no objective data upon which to draw the conclusion that the additional hours over a four-week period is[sic] appropriate either.

Based on evidence regarding the student's school experience thus far, she is presently not a student whose progress can adequately be compared from year to year, or vacation to vacation. She is significantly delayed across several domains. She had two significant seizures in July 1999, which resulted in a loss of skills previously learned. There was upheaval in the staffing of her program during the 2000-2001 school year causing significant absence, making the 2001-2002 school year the first truly stable school year. The district points to the significant progress made by the student over the past school year and her observed ability to quickly re-enter the classroom routine within a half to a full day after a lengthy vacation to support their estimation that the student will succeed in the program they have

proposed. There is no reason to doubt that this is an accurate observation; however, the fact that it occurred while the student was in a five-day a week, 6-hour a day structured routine, in a familiar setting, for several weeks before each of these vacations cannot be ignored. This student remains a student with significant disabilities. There is insufficient data to use these vacation breaks as a determinate that a program with four days off each week is appropriate.

The student has changed significantly since last summer. There has been a reduction of negative behaviors with concomitant increases in skills gained, but these changes are not consistent and reliable. She remains a child with significant impairment at an emerging developmental level. Parent witnesses Cushman and Talbot both worry that the four-day breaks each week before the student is again introduced to a routine of instruction has the potential to be disruptive to the progress she has achieved and might possibly jeopardize the benefits accrued to the student during the school year. *Johnson v. Independent School District No. 4 of Bixby* 921 F.2d 1022, 1024 (10th Cir. 1990) (The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data but also should include predictive data.)

In the absence of objective evidence regarding the student's possible regression over a summer, and considering her significant impairments, 3 days per week does not seem reasonably calculated for the student to maintain present development. Likewise, an 8-hour day for 5 days a week for 4 weeks leaves the student with too long a period of unstructured program time before and after the regular school year. It, as well, cannot be concluded to be a program reasonably calculated for the student to maintain skills. The only reasonable compromise is to extend the number of days a week over the 7-week period offered in the proposed program, with an additional week for re-orientation to the student's regular elementary school. This provides the student with an instructional schedule that continues her regular school year routine, without lengthy breaks before and after the regular school year. In addition, a 4-day program tips the balance to give the student more days with an educational routine, than days without. This seems especially important in light of the possible gap in services that were previously provided through the United Cerebral Palsy.

V. Order

- 1. The school shall provide extended school year services to the student for 4 days each week for 5 hours per day. The program shall begin on July 1, 2002 and run for 7 weeks. Music therapy shall be provided 1 hour each week for the 7 weeks. Consultations from an occupational therapist, physical therapist, speech and language therapist, psychologist or behavioral specialist, and orientation and mobility specialist shall occur at least one time during the 7 weeks.**

- 2. The location of the program shall be the Bryant E. Moore Elementary School in Ellsworth, Maine.**
- 3. The school shall provide 8 hours of re-orientation to the Surry Elementary School during the week before students begin the 2002-2003 school year.**

Carol B. Lenna
Hearing Officer