

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

November 18, 2002

Case #02.238, Parent v. Falmouth School Department

REPRESENTING THE FAMILY: Richard L. O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

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

(Father) and (Mother) requested this hearing on August 16, 2002, on behalf of their son, (DOB: x/xx/xx), who lives with his parents within the Falmouth School District. Student has been diagnosed with autism and is therefore eligible for special education services. The pre-hearing conference was held on September 16, 2002. The hearing was held on October 4, 8, 10 and 16, 2002. The parents presented seven witnesses and introduced documents identified as P 1-116 into evidence. The school presented four witnesses and introduced documents identified as S 1- 587 into evidence. The record was closed upon receipt of the written closing arguments submitted by the parties.

I. Preliminary Statement

This dispute involves an xx year old boy, now in his third grade year, who is diagnosed as having Asperger's Syndrome, an autism spectrum disorder on the milder, or higher functioning, end of the spectrum. While gifted in certain cognitive areas - he is quite skilled with mathematics and on computers, for instance - he struggles with others, such as speech and language, and has marked difficulty in processing sensory information. This "Sensory Integration Disorder", which is typical of Asperger's Syndrome, is at the root of much of the discomfort the student experiences, both in educational settings and in other parts of his life.

The family moved into the school system in the summer between the student's first and second grade years. His second grade year was split between instruction at school and instruction by his parents at home. Over the year, the student gradually increased his attendance at school; he attended school full time for the last six weeks of second grade.

Parents and school agree that the IEP implemented in his second grade year produced significant educational benefit.

The issues presented in this hearing involve the 2002-2003 Individualized Education Program (IEP) developed for the student. While the family asserts that this IEP contains a series of violations of state and federal law, at the heart of the dispute is a disagreement between the family and the school over how much time the student is to spend in the mainstream third grade class setting, as opposed to smaller special education settings, within the school. The family believes that the student will not, indeed cannot, be successful in the program described in the IEP because the program, which calls for nearly full inclusion with a full-time aide, requires the student to spend too much time in mainstreamed classes and not enough time in smaller special education classes or “pull-out” services. The family fears that the student cannot tolerate what they believe is an overwhelming amount of mainstreamed class time, and predicts the student will experience only frustration and failure. These fears are based on the family’s perception of the student as a fragile child who cannot tolerate much in the way of sensory stimuli without either shutting down or acting out in primitive, unacceptable ways. For these reasons, the parents have been educating their child at home since the beginning of the academic year.

The school believes that the IEP is appropriate for the student and, beyond that, believes that the student will continue to do well in school, as demonstrated by his success, both socially and academically, toward the end of last year. The school emphasizes that the IEP calls for a full-time aide to accompany the student to all his classes and notes that the aide can both assist the student with his class work and, should problems arise in a particular class, can intervene as needed. The school believes that the student can benefit from attending the same classes as his non-disabled peers, and can learn social and interpersonal skills as well as the academic subjects being taught there. The hopes the school staff has for the student’s success in the third grade are based on his demonstrated success in the second grade and their perception of him as a child with the ability to continue to progress toward more complete integration with his non-disabled peers. The school asserts that the IEP provides the student with an appropriate education in the least restrictive environment.

II. Issue

Whether the 2002-2003 IEP provides the student with a free and appropriate public education in the least restrictive environment?

III. Findings of Fact

1. The student is an xx year old boy (DOB: x/xx/xx) who has been diagnosed with Asperger’s Disorder, an autism spectrum disorder on the milder, or higher functioning, end of the spectrum. (Dispute Resolution Request Form, Mother)

2. The student is talented in certain cognitive areas, such as mathematics and with computers. He has difficulties with speech and language, and has displayed difficulty with processing sensory information. (Dispute Resolution Request Form, Mother)

3. The student initially enrolled in school in Maine for his second grade year, the 2001-2002 academic year, after spending most of his first grade year being home schooled by his parents. His second grade year was split between instruction at school and instruction at home. He began the year with approximately 2.5 hours at school, and the rest at home. During school time, the student had about 1.5 hours of special education and/or therapy (speech or language, physical or occupational), and 1 hour of mainstreamed education, with a 1:1 aide assigned to him throughout the school day. One goal of both parents and school in the second grade was to increase the student's school time incrementally, as he became more comfortable in the school setting, until he was at school for an entire school day. After a problem, which occurred during the first week of school before his IEP was fully implemented, the student seemed to do well under the program. His school time increased gradually over the year until he was at school full time for the last six weeks of the year. At the end of his second grade year, the student was in mainstream classes, with his aide, about 25% of the school day. For the remainder of the day, the student was in special education classes or in various therapy sessions. (Mother, Simokaitis, S 96-113)

4. While the parents and the school disagreed about the student's abilities and needs - the parents consistently believed that their son was more fragile, more needy and less ready for mainstreamed education than did school staff members - by the end of second grade, both parties agreed that the student was doing well. The parents were "comfortable with what was going on at school" by the end of the year. The mother described the year as "a success in some very basic ways...he came a long, long way from September...he was in school with non-handicapped peers...the first success in his whole life was in second grade." The school was also pleased by the student's progress during the year. He had grown to a point where he could be at school for the whole day, had learned to navigate from one part of the school to another, sometimes by himself, had success attending group functions such as recess, assemblies and field trips with other students without incident. He typically ate with a small group of students and talked freely with the other members of the "lunch bunch". At least once he chose to eat in the school's cafeteria with the rest of his second grade class and sat at a table with several other students without an adult with them. He learned to converse with, and to initiate conversations with, other students and adults. He became increasingly more able to work without difficulty in classrooms where other children were present, kids and adults talking and moving around, entering and leaving the room, tapes playing. The student's behavior improved significantly during the year. While he required a 1:1 aide throughout the year, and there were times, particularly at transition points in the day, where the aide needed to "cue" or help guide the student, the school did not observe the kind of behavior that required significant interventions. He enjoyed jokes, both hearing them and repeating them to the "lunch bunch", liked listening to stories at speech therapy, and did well in French class (Mother, Simokaitis, Christy)

5. Even after the relative success of the student's second grade year, the mother described her son as so sensitive to sensory input - sound, or light or touch - that the sound of someone breathing was "painful to him", that florescent lights made so much noise that he could not concentrate on tasks in a room containing them and that accidental touching sometimes provoked violent responses. She said that he could not converse with others, that he had a toddler's social skills and that, in the presence of too much sensory input, he would at times simply "shut down" and withdraw into himself, while at other times he would behave in primitive ways. (Mother)

6. The Lunt School, which the student attended during second grade, contains grades K-2; the Plummer-Motz Elementary School, which the student would attend for his third grade year, houses grades 3-4. The buildings are separate but are on the same campus, and are approximately 200 yards apart. The two schools share a playground area. (Simokaitis, Mother)

7. The school proposed a nearly "full inclusion" model as the basis of the student's IEP for school year 2002-2003. During the PET process, the parents did not agree with that proposal, and urged the school to adopt a different model for the IEP. The family argued for less mainstream time, more time in segregated classes with small group or individual instruction. (Simokaitis, mother)

8. The 2002-2003 IEP was to be implemented at the Plummer-Motz Elementary School, beginning in September 2002. It provides for a 1:1 aide, an education technician, to be with the student at all times except when he is in direct instruction with the special education teacher or in therapy, calls for approximately 5.5 hours per week of "pull-out" services and/or therapy and provides that the student will otherwise be educated in the regular classroom with non-disabled peers. In addition, modifications include: space provided in the regular classrooms to accommodate the student if necessary, access to computer for writing assignments if the student becomes frustrated, continued use of visual cues and written directions to assist student as needed, extra time to transition from one task to another or to process auditory information, a brushing program, and the possibility that the student may be removed from the regular classroom into the quiet spaces within the classroom if agitated by the level of sensory input in the classroom. (S 11-26)

9. The school staff that would implement the third grade IEP included an Educational Technician ("Ed Tech"), who would work 1:1 with the student at all times he was in mainstream classes. This Ed Tech had been trained in how to work with autistic children generally and Asperger's children [sic] in particular by the student's second grade special education teacher. She had, in fact, worked with such children in school settings, under the supervision of certified teachers. The Ed Tech had also been sent by the school to several training sessions and conferences, some of which earned continuing education credit for teachers, dealing with the general issue of autistic children in the schools. She had worked extensively with the teacher who would have been the student's third grade teacher. The Plummer-Motz special education teacher has been trained in working with autistic students and has had direct experience with such children. The staff of Lunt

School that had worked with the student during his second grade year would typically consult with the staff of Plummer-Motz prior to the start of school, or shortly thereafter, about the implementation of the IEPs developed for special education students who were moving to Plummer-Motz. (Simokaitis)

10. The parents believed that the IEP, as written, provided for too much mainstreaming for the student, that “the student will not be able to function at all in the proposed program, and placement, that he will not benefit either academically or socially from implementation of the district’s proposal, and that the sensory overload of the increased mainstream time proposed by the district very likely will result in emotional harm and regression” for the student. This view was supported by the testimony of Greggus Yahr, Ph.D., who interviewed the student in June and July 2002. Dr. Yahr did not speak -or seek to speak - with school staff about the student’s second grade year, nor did he review - or seek to review - any documents from the student’s school records, except the 2001-2002 IEP. He recommended an IEP with severely reduced mainstreaming time, and different staff than that proposed by the school. Rather than allow their child to attend school under the IEP proposed by the school, the parents chose, in September of 2002, to educate the student at home where he remained at the time of the hearing. (Dispute Resolution Request Form, mother, Yahr)

IV. Conclusions

The question presented in this matter is whether the 2002-2003 Individualized Education Program(IEP) developed for the student provides him a free and[sic] appropriate public education in the least restrictive environment, as required by federal and state special education laws. It is well established law that the applicable standard is whether the IEP is reasonably calculated to enable the child to receive some educational benefit. *Rowley v. Board of Education*, 102 S.Ct .3034, 3051(1982). Neither the IDEA, 20 USC 1401 et seq., nor state special education laws, 20-A 7202 et seq., obligates a school to create an IEP which provides the “highest attainable level (of benefit) or even the level needed to maximize the child’s potential.” *Rowley*, at 3047. It is enough if the IEP is designed to provide some educational benefit. *Lenn v. Portland School Committee*, 998 F. 2d 1083 (1st Circuit 1993.) Furthermore, it is clear that , “...parental preference alone cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child.” *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me 1993)

The family asserts that the IEP proposed by the school for the student’s third grade year falls short in several ways. The IEP describes a program in which the student attends mainstream classes, with a 1:1 aide, for about 75% of his school day, and is “pulled out” for speech or occupational therapy, or special education, for the remainder of the day. The family holds a very sincere, indeed passionate, belief that such a program will not work for their son. The family argues that the IEP calls for too much mainstreaming too soon, too much sensory input too soon, too many new situations and people too soon. They assert that their son, whom they perceive as unable to cope with such a level of sensory input because of his autism spectrum disorder, will be overwhelmed by the

program, will experience severe frustration with consequent “melt-down” and/or withdrawal behavior and that he will inevitably fail at school. The family feels the IEP is doomed to fail, that their son will regress, and that all the gains made in the second grade will be lost. Instead, they urge the school to adopt a different model, in which the mainstreaming component is greatly reduced, the amount of “pull out” time greatly increased, consultants/staff hired, and the student introduced to mainstreamed education with non-handicapped peers at a much slower rate. The parents presented their position to the school during the PET process of last spring and summer, but did not persuade the school to adopt this model.

The school defends the IEP as appropriate under the law, and argues that it is consistent with the capabilities and skills of the student, as he demonstrated during second grade, which he attended full-time, and successfully, for the last six weeks of the year. The IEP is 100% special education, with a 1:1 aide being assigned to the student at all times except some of the pull-out time. The aide, who is trained and experienced in working with autistic children, including some with Asperger’s Syndrome, will be able to help the student with class work and will be able to monitor the student’s response to the sensory environment in the mainstream class. Should a problem arise, the aide will be able to remove the student from that environment into a separate and quiet area within the room. The school asserts that if the student encounters problems under the mainstream model that are unmanageable by the aide and other staff using the intervention mechanisms in the current IEP, the staff will modify the program to suit the student’s needs. However, given the student’s performance at school in the second grade, the school does not expect major problems in the third grade under this IEP. The school expects that the student will continue to succeed in third grade, and will continue to grow toward full integration with his non-handicapped peers. The mainstreaming component of the IEP is intended to assist the student’s progress, both academically and socially, toward integration. The school asserts that the program complies with the law because (1) it is reasonably calculated to enable the student to receive some educational benefit and (2) it is delivered in the least restrictive educational environment.

What is striking about this case is the degree to which the parties' perceptions of the student differ. The parents describe the student as so fragile, so afflicted by his autism, especially the sensory integration disorder, that he is unable to communicate in any real sense, has a toddler’s social skills, is always on the verge of a meltdown, or a shutdown, or a relapse to primitive, sometimes violent, behavior. His family described him as incapable of learning except in a room without stimuli, no noise, no lights, no other people. The school however, sees a totally different child, one whose needs are significant, but who not only is capable of learning at school with other kids but who has in fact done so over the course of his second grade year. He requires a full-time 1:1 aide at school, but he can attend to tasks with other kids in a room, can converse with classmates or adults at school, can play with other children at recess, can go to school assemblies and on field trips, can learn to guide himself from one part of his school to another, sometimes on his own, can eat with other children and enjoy himself while doing it. He was described by school staff in second grade as having a good sense of humor, being fond of jokes and of repeating them to his friends at lunch, and being a wonderful

conversationalist. His second grade special education teacher said that the student's behavior, after the first few weeks of school, was so acceptable that there was no need for any significant interventions. The perceptions of the school and of the parents contradict each other nearly completely.

It is not surprising that these different perceptions of the student lead the parties to create different models for the education of the student. It is important to note that the primary goal of both parties is the same: the full integration of the student into the mainstream cirrocumuli[sic]. The central difference in the positions of the two parties is the amount of mainstreaming to be offered at the beginning of the year. The school believes, sincerely in my judgment, that the student can handle the mainstreaming provided in his IEP, about 75% of the school day, with a 1:1 aide present to help in the classroom, to cue and intervene as necessary, and to remove the student to a quiet space if needed. The parents believe, again sincerely in my judgment, that the student should begin the year with mainstream classes amounting to a much lower percentage of the school day, somewhere between slightly more than the 25% figure the student successfully handled at the end of second grade (father), to about the same amount (mother), to significantly less than 25% (Yahr).

On balance, I am persuaded that the school's perception of the student's needs, behavior, performance and accomplishment in the school setting is more accurate than the parents' description of their child at school. There are two reasons for accepting the school's version of events, and of the student. One is that the school's perceptions are based upon current observations, made by educational professionals with experience in teaching autistic children, of the student's behavior in various educational settings at school while the family's testimony is based upon the observations of committed and determined parents over the course of the student's entire life, xx years now, mostly at home. It could be that both perceptions are correct, but for the purpose of determining whether the school's plan for educating this student this year is appropriate under the law, the school's perception of his behavior and performance at school is more relevant, more valuable and, ultimately more persuasive. The second reason is that, notwithstanding the divergence of perception, there is one area of agreement. Both parties agree that by the end of the student's second grade year, "things were going pretty well at school...", that progress was made over the year and that an effective plan was in place. In short, there was agreement that the student was receiving educational benefit from the second grade educational program. Such agreement reinforces the validity of the school's judgment regarding the education of the student.

I conclude that the IEP as proposed by the school for the 2002-2003 school year is reasonably calculated to provide the student with meaningful educational benefit. The IEP was designed by an educational staff with training and experience in teaching both autistic children in general and this student in particular. A 1:1 aide, an Ed Tech with good training and some experience with autistic children, will be with the student all the time he is in mainstream settings, to help with class work, to assist with transitions, and to intervene if necessary. The interventions in the IEP range from simply cueing the student to removing him from the mainstream class and accompanying him into a nearby

quiet space if he is agitated by the amount of sensory input present in the mainstream setting[sic]. The IEP is not inflexible, and should either parents or school staff identify problems with it, there are mechanisms available under the law to adjust the program. I further find that this IEP, which calls for approximately 75% mainstreaming with a full time 1:1 aide, complies with the legal requirement that special education be provided in the least restrictive environment.

For the reasons set forth above, I conclude that the Individualized Education Plan at issue in this matter does not violate the IDEA or Maine special education law.

V. Order

Finding no violation of law, no order need be issued.

Peter H. Stewart, Esq. Date
Hearing Officer

WITNESS LIST

FOR THE FAMILY:

Mother

Father

Debra Hannon, LCSW

Andrew Taranko, Case Manager

Greggus Yahr, Ph.D.

Karen Cook

Jane Walker, MS (OT)

FOR THE SCHOOL:

Ruth Simokaitis, Special Education Teacher

Sarah Griffiths, Education Technician

Susan Christy, Speech Therapist

Jan Conley, MS (OT)