

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

April 29, 2004

Case # 04.041H, Parent & Parent v. Scarborough School Department

REPRESENTING THE FAMILY : Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

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

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

This due process hearing was requested by the mother, on March 18, 2004, and is an appeal of a complaint investigation report, issued on February 24, 2004. The case involves her son, whose date of birth is xx/xx/xxxx. He is currently attending Scarborough Middle School, and is in the xx grade.

A prehearing conference call was held on March 30, 2004. Present on the prehearing conference call were mother; Richard O'Meara, Esq., counsel for the family; Eric Herlan, Esq., counsel for the school department; Alison Marchese, Director of Special Education; and Lynne Williams, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner.

The hearing was held on April 7, 2004, in Portland, Maine. The family submitted 2 pages of documents, and the school district submitted 82 pages. Three witnesses testified. Written closing arguments were submitted on April 15, 2004, and the record was closed at that time.

Following is the decision in this matter.

I. Preliminary Statement

Student is a xx year-old male, currently in the xx grade at Scarborough Middle School. He is eligible for special education services under the category of Mental Retardation.

Student's parents are divorced, and share joint custody of Student. Both parents live in Scarborough. Student alternates weekly between the two residences. When he travels to and from school and his father's home, Student travels on the regular school bus, as he does when he travels to school from his mother's home in the morning. In August 2003, Scarborough Transportation Director Rick Soules agreed to provide afternoon transportation on the regular school bus, with Student only being permitted to exit the bus

if there is an adult to take responsibility for him. This only applies to those days when Student is staying at his mother's home.

In December 2003, the school department proposed utilizing the special education bus to provide this specialized transportation. Mother requested a complaint investigation, which was completed in February 2004 and which found no violations. This due process request is an appeal of that investigation.

The school district continues to propose transporting student door-to-door to his mother's house, using the special education bus, while continuing the morning transport on the regular school bus. The hand-off policy would not change. Mother contends that transportation on the special education bus would constitute a violation of Student's least restrictive education alternative (L.R.E.) rights under the I.D.E.A.

Continuing application of Student's stay put rights, first invoked when Mother filed for a complaint investigation in December 2003, has kept Student's transport arrangements as specified in the December 2003 I.E.P., pending the outcome of this hearing.

II. Issues to be Decided by Hearing

- **Does the Scarborough School Department's proposal to transport Student to his mother's home on the special education bus violate Student's L.R.E. rights under the I.D.E.A.?**

III. Standard of Review

The federal district court in Maine recently upheld a Maine hearing officer's decision to apply *de novo* review to a party's appeal of a complaint investigation report, noting that the burden of proof in such an appeal is on the party bringing the appeal. *See Donlan v. Wells-Ogunquit CSD*, 226 F. Supp. 2d 261, 37 IDELR 274 (D. Me. 2002). Under this standard, the family has the burden of proving that the complaint investigator erred in her decision, whereas the hearing officer is not bound by the investigator's findings of fact or legal conclusions.

IV. Findings of Fact

1. Student's date of birth is xx/xx/xxxx, and he is currently xx years old. (Exhibits: Due Process Request)
2. Student is eligible for special education services under the category of Mental Retardation. Results from Student's most recent intelligence testing on the Wechsler Intelligence Scale for Children-III (WISC-III), done in October 2001, indicate that he scored 46 on Verbal IQ, 46 on Performance IQ, and 40 on Full Scale IQ. Student has also been diagnosed with cerebral palsy, vision problems and seizure disorder. Student's developmental abilities vary, with his functioning at about a three to four year old developmental level in most areas. He has a

- particular weakness in understanding safety concepts. (Exhibits: S58; Testimony: Mother)
3. Student was placed in a full inclusion setting from xx through xx grade. Since entering xx school, he has been placed in self-contained settings which can better support his academic progress, but he continues to be integrated in homeroom, physical education, technology, art, drama club, and field trips. Student is progressing academically, and is currently functioning at the xx-xx grade levels in all academic areas. (Exhibits: S59; Testimony: Mother)
 4. Student's parents are divorced and they share joint custody. Both parents live in Scarborough. Student stays with one parent for a week, moving to the home of the other parent for the next week, essentially altering living arrangements weekly. (Testimony: Mother)
 5. Student rode the regular school bus through his xx grade year, when he lived with his mother most of the time. The school bus drove past Student's home, and he was dropped off there. During the xx and most of the xx grades years, Student's mother transported him to and from school, due to the long bus ride on his route. (Testimony: Mother)
 6. It is undisputed that Student is able to successfully ride the regular school bus, and that his behavior on the bus is excellent. Student receives opportunities to interact with his non-disabled peers while riding the regular bus, and he prefers this mode of transport. (Testimony: Mother, R. Soules)
 7. Student receives after-school services from Casa, an agency that provides in-home habilitation services for individuals with developmental disabilities. Student's mother does not complete work in time to meet Student at his afternoon drop-off, so she initially depended on the Casa personnel to meet the school bus. However, it was stated by a Casa representative at the September 2003 P.E.T. meeting that they are unable to guarantee that an adult will be present at the time of drop-off on every school day. (Testimony: Mother, A Marchese)
 8. In May 2003, Transportation Director Rick Soules and Mother spoke by telephone, and agreed that Student would again ride the regular bus to and from his mother's home. It was also agreed that there would be an adult available to receive Student in the afternoon and, if no adult was present, Student would not be permitted to exit the bus. In that case, Student's mother would be called and it would be determined where she would pick Student up. (Testimony: R. Soules, Mother)
 9. When there is no adult to receive Student, there is a protocol to be followed. Since the school bus drivers only carry radios, protocol requires the driver to radio the transportation office, where he may, or may not, get an answer to his call. If there is no one there, which is highly possible, he is to call Mr. Soules, who is

- most likely driving a bus. When Mr. Soules is reached, he is to first call the home to see if there is anyone inside. If not, he is then to call Mother at work and decide on a place where the bus can drop off Student for Mother to pick him up. Mr. Soules must then contact the driver and give him this information. This scheme was informally agreed to by Mother and Mr. Soules, but was never incorporated into Student's I.E.P. (Testimony: Mother, R. Soules)
10. During May and June 2003, there were two occasions when the driver dropped Student off at the bus stop without an adult present. Peers assisted him to return to his house, where he called his mother on the phone. He was extremely upset by these situations and continued to speak about them for a period of time. (Testimony: Mother)
 11. In August 2003, Mother and Mr. Soules spoke about transportation for the 2003-2004 school year. Mother suggested the possibility of Student traveling on the special education bus, but was told that the ride on that bus would be 45-60 minutes, while the regular bus ride would only be 15-20 minutes. It was agreed that Student would be dropped at the bus stop if there was an adult present to receive him. If there was not, Mother would be called and would pick up Student at an agreed upon location. (Testimony: Mother; R. Soules)
 12. At the beginning of the 2003-2004 school year, Student walked to the bus stop with his mother in the morning and walked home with the Casa adult. There were five occasions during September 2003 that the driver dropped Student off at the bus stop without an adult being present. A P.E.T. meeting was held on September 30, 2003. At this meeting, Mother raised the issue of these incidents, which seriously upset Student. She requested that the P.E.T. determine that Student not be permitted to exit the bus unless someone was waiting for him. She asked that she be called to pick him up, or that he be taken to the bus terminus or brought back to school. The P.E.T. did not make this determination but agreed to consult Scarborough's special education director, Alison Marchese. Mother strongly disagreed with this course of action. (Exhibit: S35; Testimony; Mother, R. Soules)
 13. The I.E.P. developed on September 30, 2003 continued to list Student's transportation as "Standard." (Exhibits: S40)
 14. In October 2003, there was another occasion where Student was permitted to exit the bus without an adult present. Following that incident, Mother called Superintendent Michaud to discuss the situation. The superintendent explained that the transportation policy for all children, whether disabled or not, was to discharge them from the bus at the appropriate stop without checking for the presence of an adult. (Testimony: Mother)

15. In late October 2003, Student had surgery that resulted in his wearing a walking cast. At this time, the regular bus driver began dropping Student off in front of his mother's house. (Testimony: Mother)
16. A P.E.T. meeting was held on December 5, 2003. At this meeting, Mr. Soules explained the various bus routes and schedules, and noted that if the regular bus driver were required to check for adult supervision and, if no one was present, to continue the stop while making one or more telephone calls, all of the students on the bus would experience delays. Ms. Marchese stated that the door-to-door transportation, with the adult hand-off proviso, could be more expeditiously handled using the special education bus. There are at most five students on the bus, so fewer students would experience delays. Additionally, there are two adults on the bus, so one could be making the telephone calls while the second one was driving. Mother rejected this option. (Exhibits: S32; Testimony: A. Marchese, Mother)
17. The school department sent Mother prior written notice, dated December 10, 2003, stating, "Specialized transportation was offered to parent to accommodate mother's request for door to door transportation and confirmation of adult present at the home." (Exhibits: S33)
18. There was another occasion, either in December 2003, or January 2004, when there was no adult supervision available when the driver brought Student to his house. On this occasion, the driver did not permit Student to exit the bus and called Mr. Soules, who then called the office at the Blue Point School, as well as Mother. Mother left work and picked Student up at Blue Point. (Testimony: R. Soules, Mother)
19. On December 31, 2003, Mother filed a request for a complaint investigation. In her request, Mother alleged that the school department violated the principle of Least Restrictive Educational Alternative by offering only special education bus transportation for those afternoons when Student returns home to his mother's house. The investigation was conducted by Carol Lenna and a Complaint Investigation Report was issued on February 24, 2004, in which it was stated that there were no violations found and therefore no corrective action plan issued. (Exhibits: S6)
20. Mother filed a hearing request on March 18, 2004, in order to appeal the complaint investigation report. (Exhibits: Due Process Request)
21. Stay put, first invoked when Mother filed for a complaint investigation, has continued to be applied, and Student's transportation from school to his mother's home remains door-to-door on the regular school bus, with an adult hand-over provision, pending resolution of this hearing. (Testimony: Mother, R. Soules)

V. Discussion and Conclusions

The issue addressed in this hearing is a narrow question of law, to wit whether L.R.E. requires full transportation inclusion in the case of a student who is clearly able to successfully travel on a regular school bus. The L.R.E. principle, as codified in federal and state statutes and regulations, requires that a student be educated to the “maximum extent appropriate” with his non-disabled peers. 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. § 300.550(b)(1); M.S.E.R. §11.1. L.R.E., however, presupposes a balancing of competing interests. Full inclusion often comes with positives and negatives, for the fully included student as well as for the other students and personnel involved. *See Roland M. v. Concord School Comm.*, 910 F.2d 983, 993 (1st Cir. 1990); *Oberti v. Board of Educ. of the Clementon School Dist.*, 995 F.2d 1204, 1216-17 (3rd Cir. 1993). As the court in *Oberti* states, it is permissible to consider the possible “negative effect” that the student’s inclusion could have on other students. *Oberti*, 995 F.2d at 1217.

Transportation services are to be subjected to the L.R.E. balancing equation, just as educational services are. The I.D.E.A. states that

the I.E.P. team must consider how the child’s disability affects the child’s need for transportation, including determining whether the child’s disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children.

34 C.F.R. Part 300, App. A., 64 Fed. Reg. 12479 (March 12, 1999) (Q & A #33).

Furthermore, “[t]here is no question that the general education bus is a less restrictive environment when compared to the special education bus used for home-to-school transportation.” *Modesto City Elem. Sch. Dist.*, 38 IDELR 88 (Calif. Dep’t of Educ. 2002)

That Student is able to successfully ride the regular school bus is undisputed. He has been doing that, on and off, since kindergarten. It is also not in dispute that Student successfully rides the regular school bus every morning and afternoon, when he is staying at his father’s house, as well as on those mornings when he is staying at his mother’s house. And, the school department has indicated that it is willing to continue regular door-to-door transportation when returning Student to his mother’s home, as long as there is no hand-off requirement. The choice therefore, becomes riding the regular school bus with no guarantee of an adult hand-off¹ or riding the special education bus with an adult hand-off.

¹ Student’s father has guaranteed the presence of an adult in his home whenever Student is dropped off. Student is therefore able to ride the regular school bus to his father’s home. Mother has this same option -- to hire a child care worker, or other adult, who will guarantee his or her presence at the home every afternoon when Student is dropped off, thereby making it possible for Student to ride the regular school bus to Mother’s house.

Application of a rigid L.R.E. analysis might conclude that since Student is able to successfully ride the regular school bus, L.R.E. demands that he do so on all of his trips to and from school. This analysis, however, ignores important factors that must be considered. First, there is the potential impact on the students that ride the regular school bus if there are instances when no adult is apparent at Student's drop off. As Mr. Soules testified, the process is not as simple as making one phone call to Mother to arrange for pick up. There would need to be one or more radio calls to reach Mr. Soules, followed by his making a series of telephone calls, first to ascertain whether anyone was inside the house, then to Mother, then to an alternative drop off site, and finally a call back to the bus driver to inform him of the drop off location. All the while the bus would remain idle. This would certainly result in a significant delay for the bus and its riders, as well as for those who pick up the children at the various subsequent bus stops.

Setting up a system with as many variables as this one is not analogous to simply installing seat belts on the bus or providing an aide for a student. Those accommodations have minimal, is [sic] any, impact on any of the other riders, on the driver, on school personnel or on other parents and caregivers. Conversely, what Mother is asking for could potentially have significant impacts on all of these individuals.

The balancing aspect of the L.R.E. analysis also demands that we address the impact that riding the special education bus home to Mother's house will have on Student. Student rides the regular school bus every morning and alternate week afternoons. What is being considered here is, therefore, only 25% of Student's bus-riding time. It is not academic time, and while it is potentially social time, there is evidence that Student is fully included for a large portion of his day, as well as during 75% of his bus-riding time, thereby allowing for extensive social interaction with non-disabled peers. The impact, both positive and negative, of riding the special education bus in the afternoon on alternate weeks is minimal.

In summary, while a L.R.E. analysis must be applied to transportation issues, not just topplacement [sic] and services questions, L.R.E. demands a balancing approach rather than a strict adherence to L.R.E. at all costs. The bus trip from school to Mother's home is 20 minutes long. In this case, the impact of transporting Student on the special education bus for 100 minutes, on alternate weeks, is minimal and does not violate Student's L.R.E. rights under the I.D.E.A. Additionally, Mother has the alternative option of guaranteeing an adult presence at the appropriate times, in which case Student could continue riding the regular school bus during the time at issue.

V. Decision

The Scarborough School Department has not violated federal or state laws or regulations and there is therefore no order.

Dated: _____

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

FAMILY'S INDEX OF DOCUMENTS

- P01 E-mail communication from Father to Carol Lenna, regarding busing situation, dated January 23, 2004
- P02 Proposed Change of Program, dated December 10, 2003

FAMILY'S WITNESS LIST

Mother

SCHOOL DEPARTMENT'S INDEX OF DOCUMENTS

- S1 E-mail communication to and from Mother and Ms. Marchese, dated March 24, 2004
- S2 Letter from Ms. Marchese to Mother, dated March 16, 2004
- S3 E-mails from Mother to Ms. Marchese, dated March 4, 2004
- S4-14 Complaint investigation report, dated February 29, 2004
- S15-20 E-mail communication to and from Mother and Investigator Lenna, dated January 22 and January 20, 2004
- S21 Letter from Mr. Herlan to Investigator Lenna, dated January 20, 2004
- S22-30 Memorandum from Scarborough School Department to Investigator Lenna, dated January 20, 2004
- S31-32 P.E.T. minutes, dated December 5, 2003
- S33 Change of program, dated December 5, 2003
- S34-36 P.E.T. minutes, dated September 30, 2003
- S37-53 I.E.P., dated September 30, 2003

S54-62 Neuropsychological evaluation by Dr. Slap-Shelton, dated October 2001

S63-82 I.E.P. for 2002-2003 school year, dated September 30, 2002

SCHOOL DEPARTMENT'S WITNESS LIST

Rick Soules, Scarborough Director of Transportation

Alison Marchese, Director of Special Services