

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

February 11, 2005

Case No. 04.168H, *Parents v. Palermo School Department*

REPRESENTING THE FAMILY: The student's father appeared *pro se*.

REPRESENTING THE SCHOOL: James C. Schwellenbach, Esq.

HEARING OFFICER; Peter H. Stewart, Esq.

INTRODUCTION

This special education due process hearing has been conducted pursuant to state and federal special education law, 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

Parent and Parent requested this hearing on December 13, 2004, on behalf of their son ("student"). The student was born on xxxx xx xxxx, lives with his father in Palermo, Maine and is eligible for special education services under the category of Emotional Disability. Palermo operates a K-8 educational system and does not have a high school of its own. Instead, Palermo pays tuition to approved high schools to fulfill its obligation to educate its secondary school students. The student attends Winslow High School and is currently in the xx grade. The 2004-2005 school year is his first year at Winslow High School.

Prior to moving to Palermo with his family, a Pupil Evaluation Team ("PET") in his former school placed the student in an out-of-district placement in Maine. The former school contracted with the student's father to transport him to and from the out-of-district placement, and paid the father for both his time and mileage. When the family moved to Palermo, neither the student's placement nor the transportation arrangement changed.¹

¹ In January of 2004, the school informed the family that the school was no longer going to provide transportation for the student to attend his out-of-district placement and,

Sometime in the summer of 2004, the student and his family determined that he would attend Winslow High School in the fall. This decision was made by the family acting on its own, without any discussion with the Palermo Pupil Evaluation Team (“PET”). The student was enrolled in the xx grade at Winslow High School for school year 2004-2005. On September 28, 2004, a PET meeting was convened to develop the student’s new Individualized Education Program (“IEP”); its members included the parents, as well as participants from both Winslow and Palermo school systems. This PET determined the nature of the special education services the student would receive at Winslow and drafted a new IEP for him. The PET began to discuss the transportation issue but tabled that discussion before reaching consensus. The IEP that was written after the PET meeting stated that no special education transportation was needed for the student. On October 8, 2004, the parents requested that the Department of Education appoint a Complaint Investigator to investigate a series of allegations about the student’s special education services, including the transportation issue. On December 3, 2004, the Commissioner of the Maine Department of Education issued her Complaint Investigation Report.

On December 13, 2004, the parents requested this special education due process hearing. The pre-hearing conference was held on January 3, 2005. The hearing was held on January 14, 2005. Witnesses [sic] lists and documents were exchanged in a timely manner. The family presented one witness. The school presented three witnesses. Documents identified as School Exhibits 1-18, pages 1-54 and Joint Exhibit 1, the Dispute Resolution Request Form, were entered into evidence at the hearing. The parties submitted written closing arguments and the record was closed on January 29, 2005.

The family believes that the Palermo School Department is obligated under Maine law to provide transportation to his [sic] son, who is eligible for special

therefore, was no longer going to pay the father for transporting his son. The family requested a due process hearing to challenge this decision by the school. The hearing officer found that, since no PET had decided to discontinue the existing transportation arrangements, those arrangements would continue and the father would continue to receive payment “for mileage and time...up to such time that the PET changes the student’s transportation services at a PET meeting.” Case No.04.055H, Parents v. Palermo, p. 8 (May 25, 2004.)

education services, to and from classes at Winslow High School. Therefore he [sic] requests [sic] that the hearing officer order the school to continue paying him for his time and the mileage he incurs when transporting the student between home and Winslow High School. The Palermo School Department disagrees, asserting that the student does not need transportation as a result of his disability and therefore, should be treated like the other secondary school students from Palermo. Palermo is not obligated to transport, and does not transport, those students between their home [sic] and the secondary school they attend. The school argues that neither its policies regarding the transportation of secondary school students generally, nor the application of those policies to the student in this matter, violate [sic] state or federal education law. The school requests that the hearing officer find that the school is not obligated to provide transportation to the student to and from Winslow High School.

ISSUE

This case presents a single issue to be resolved:

Is the school required to transport the student from his home to Winslow High School, where he is enrolled?

FINDINGS OF FACT

- 1) The student was born on xxxx xx xxxx and has lived during the school week with his father in the Town of Palermo, Maine since 2002. He has been diagnosed as having an emotional disability and is thereby eligible for special education services. Pursuant to a series of IEPs developed by the PET at former schools, [sic] the student has been educated in out-of-district placements since 2001. He was at the Goodwill-Hinckley school until 2003, and then transitioned to Averill High School, a less restrictive setting on the same campus. The student completed his program at Averill High School in the spring of 2004. In the summer of 2004, the student's family decided to enroll him in Winslow High School for his xx grade year. The family made the decision for the student to attend Winslow High School on its own,

without consultation with or input from the PET. The student was not placed at Winslow pursuant to an IEP. (Testimony of Father, Joint Exhibit 1);

- 2) The Town of Palermo is the municipality that is now responsible for educating the student. Palermo operates a municipal school system for students from kindergarten through the eighth grade. It does not have a high school. Instead, Palermo allows its secondary school students to enroll in out-of-district high schools and pays tuition for those students. Maine law allows, but does not require, municipal schools such as Palermo to provide transportation to secondary school students. Palermo has chosen not to provide such transportation. Palermo does provide special education transportation services to certain special education secondary school students, such as a 16 year-old student with a developmental age of 2 years, when the PET has determined that the student requires it to benefit from his/her educational program. (Testimony of Lombardi);
- 3) The student's father has been transporting the student from home to school for several years, and has been paid for his time and mileage incurred in that undertaking. Early in 2004, Palermo notified the father that it intended to stop paying him for transporting the student between home and school. The father requested a due process hearing on this issue. The hearing officer found that the father was entitled to be paid for his time and mileage for the student's transportation "from January 26, 2004 up to such time that the PET changes the Student's transportation services at a PET meeting. [sic] (Testimony of Father, Case # 04.055H, Parent v. Palermo, May 5, 2004);
- 4) On September 28, 2004, after the student had begun his xx grade year at Winslow High School, a PET meeting was convened to develop an IEP for the student. The PET included the parents as well as staff from both Winslow and Palermo schools. The question of whether the student required transportation to and from school in order to benefit from his special education program was raised at the PET meeting. The PET did not reach consensus on this issue and the matter was tabled so that the PET could discuss other aspects of the student's IEP. The IEP that was sent to the parents on 10/5/04 stated that

special education transportation was not needed by the student. The IEP is essentially a mainstream program with minimal modifications: the student also receives 40 minutes per day of direct instruction intended to help him manage any emotional issues which may arise. (Testimony of Father, Lombardi, School Exhibits at 14- 28.);

- 5) The student is doing very well at Winslow High School, where he spends about half his day at the high school, and the rest of the day at a vocational- technical center located off-campus. He is transported from the high school to the vocational-technical center on a regular school bus with other high school students. There have been no reports of difficulties involving the student while on the bus. The student is doing well academically and has had no serious behavioral or disciplinary problems while at Winslow. He seems happy and is reported as doing “extra-ordinarily” well there. He plays on a basketball team and travels to games on a regular school bus with the other players. (Testimony of Father and Carville); and
- 6) On October 5, 2004, the school sent the minutes of the 2/28/04 PET meeting, along with a copy of the proposed IEP developed for the student, to the parents. On October 8, the parents filed a request with the Commissioner of the Maine Department of Education to appoint a Complaint Investigator to investigate a series of allegations about the student’s special education services, including the transportation issue. The Commissioner issued the report of the Complaint Investigator on December 3. On December 13, the parents requested this special education due process hearing. (School Exhibits at 2-12 and 18, Joint Exhibit 1)

DISCUSSION

The single issue to be resolved here is whether the school is obligated to transport the student to and from the secondary school he has chosen to attend. If the school is so obligated, then it must continue paying the family for the time and mileage incurred in transporting the student to and from his high school. If not, then the school may discontinue such payment. The family contends that 20-A MRS 5401(4), which states,

in part, that “...special education students shall be provided transportation: (A) As provided by chapter 301; or (B) To and from classes.”, [sic] should be read to require the school to transport their son to the high school he attends.² The family’s argument is straightforward: their son is a “special education student” and therefore is entitled to be transported “to and from classes” by the school. The school disagrees with this argument. The school asserts that under the circumstances presented here - where a municipal school operates a K-8 school system, educates its secondary school students via a tuition arrangement with out-of-district secondary schools and generally does not transport its secondary students to those schools³ - it has no obligation under 20-A MRSA 5401(4) to transport the student to his secondary school. Further, the school argues that it has no obligation to transport the student under any state special education law, because the PET correctly concluded that the student does not require transportation services to benefit from his special education program. For reasons which are set out below, the hearing officer concludes that the school is not obligated to provide the student with transportation to or from the high school he attends.

The provisions of 20-A MRSA 5401(4) (A) & (B) state that special education students shall be provided with transportation either (A) “As provided by chapter 301” of the Title 20-A or (B) “To and from classes”. While the hearing officer is not aware of any published interpretation of these statutory provisions, the plain language of this law appears to set up alternate methods for a school to achieve compliance. There is nothing in this statute that may be interpreted to give a family the right to choose the alternative it prefers from those offered in the statute. Consequently, the hearing officer concludes that the school is not obligated to provide special education transportation “to and from classes” to the student in this case under the provisions of 20-A MRSA 5404(4)(B).

² The student attends high school in an out-of district placement because the school district in which he resides does not operate a secondary school. The student’s “home” school administrative unit operates a K-8 school system, and pays tuition for its secondary students who attend out-of-district secondary schools.

³ Palermo does transport special education secondary school students to and from school when a PET has found that transportation is required to enable those students to benefit from their educational program. In this case, the PET specifically found that transportation was not required for this special education student.

The next question is whether the provisions of chapter 301 require the school to transport the student “to and from classes.” Chapter 301 states, in part, that special education transportation means transportation that is “required by exceptional students.” (emphasis added) Chapter 301 grants the Commissioner of Education the authority to promulgate rules necessary for the administration of the chapter. In the Maine Special Education Regulations (“MSER”), promulgated on November 1, 1999, the transportation of students determined eligible for special education services is referred as a “supportive service”.⁴ The Maine regulations define “special education transportation” as a service that is required “to assist a student with a disability to benefit from his/her special education program.” (emphasis added). [sic] The regulatory scheme contemplates that the need for such supportive services should be determined in the PET process and further states that any such service, if required, must be specified in the student’s Individualized Education Program.

In this case, the most recent PET held for the student considered the transportation issue and determined that special education transportation was not needed by the student in order to benefit from his special education program.⁵ That PET met on September 28, 2004 to develop the student’s IEP for school year 2004-2005; the PET consisted of the student’s parents and staff members from both the Palermo and Winslow schools. The PET discussed, among other things, the issue of whether special education transportation to the high school was required by the student. The discussion ended before the PET reached consensus on the transportation issue. However, the school determined that the student did not need special education transportation as a supportive service and, on October 5, 2004, notified the parents of this determination⁶ by sending them a copy of the IEP written after the PET meeting. (R at 21) As is their right under the regulations, the

⁴ See, MSER Ch 101, sections 2.28 and 6.17. These regulatory provisions mirror the federal counterpart, 34 CFR 300.24.

⁵ In my view, the PET correctly determined this issue. By all accounts, the student is doing very well under his current IEP, essentially a mainstreamed program with only 40 minutes per day of resource instruction to support him in managing his emotional issues. There is simply no reason related to his disability or his IEP that transportation should be provided for this student. Indeed, in this regard, the student is like any other Palermo secondary school student. Palermo does not provide transportation to its secondary school students, and there is no reason to provide it to the student in this case.

⁶ See, MSER, Ch 101, section 8.11.

family challenged the school's decision that the student did not require transportation by requesting this due process hearing.

The process the school followed in this case was in compliance, both procedurally and substantively, with the regulations promulgated pursuant to chapter 301 of Title 20-A of the MRSA. If a school provides transportation to special education students "as provided in chapter 301" of Title 20-A, it is in compliance with 20-A MRSA 5401(4) and cannot be compelled under the provisions of that statute to transport the student "to and from school".

For the reasons set forth above, the hearing officer concludes that, under the circumstances presented here, the school is not obligated to provide special education transportation to this student.

ORDER

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

Peter H. Stewart, Esq. Date
Hearing Officer

WITNESS LIST

FOR THE FAMILY:

Father.

FOR THE SCHOOL:

Douglas L. Carville, Principal of Winslow High School.

Wilma T. Lombardi, Director of Special Services for the Palermo schools.

Debra Jean Scheibel, Special Education Director for Winslow High School.

DOCUMENTS

SCHOOL EXHIBITS 1 – 18, pages 1 – 54.

JOINT EXHIBIT 1, Dispute Resolution Request Form.