STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

October 23, 2007

Case No. 08.008H, *Parent v. MSAD #40*

FOR THE FAMILY: Lynne A. Williams, Esq.,

FOR THE SCHOOL: James Schwellenbach, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

This special education due process hearing has been conducted, and this decision written, pursuant to state and federal special education statutes[1] and the regulations accompanying each.

This case involves Student, who is now XX years old, and comes before the hearing officer on remand from the federal district court of Maine. The court reviewed a due process decision, issued on January 20, 2006 by this hearing office, that denied the family's claims for reimbursement for costs associated with: (1) a unilateral placement of the student in Walkabout, a program in Utah, during the 2003-2004 school year and, (2) another unilateral placement at the Hyde School in Bath, Maine for school year 2004-2005. The hearing officer also dismissed the family's claim for re-imbursement for tuition and costs associated with the student's placement at the Hyde School for school year 2005-2006. On the family's appeal, the federal district court affirmed all aspects of the 2006 due process decision except for the dismissal of the reimbursement claims for school year 2005-2006. The court remanded that issue for further proceedings before the hearing officer.

In the remand proceeding, the family asserted that the school violated the IDEA by not preparing an individualized education program (IEP) for the student for school year 2005-2006 and by not providing certain tutorial and counseling services during that year. As remedy, the family seeks to be reimbursed for tuition and fees for the student's

[1] See, 20-A MRSA 7202 *et seq.* and 20 USC 1400 *et seq.*

education at the Hyde School in 2005-2006, as well as the costs for tutoring, counseling services, and associated transportation costs during that school year. The school argues that, after the 2004 amendments to the IDEA[2], it had no obligation either to prepare an IEP for, or provide services to, the student under the circumstances presented in this matter. Therefore, the school argues that the family is not entitled to any remedy.

A telephonic pre-hearing conference was held on August 16 and the hearing was held in Rockland, Maine on August 21, 2007. The family presented two witnesses, the student's mother and his treating psychiatrist, who testified telephonically and introduced Parents [sic] Exhibits 1-11. The school presented a single witness, the special education director of SAD 40 during the years at issue in this proceeding. The record of the prior hearing was admitted into evidence. At the end of the hearing, the parties chose to submit written closing arguments, and agreed to mail them to the hearing officer on or before September 19.[3] The hearing officer granted a request to extend the time for filing until September 22. The final closing argument was received on September 25, and the record was closed on that date.

ISSUES

The issues presented in this case are:

1. Whether the school violated the IDEA when it did not prepare an IEP for the student for school year 2005-2006;
2. Whether the school violated the IDEA by not providing tutorial and counseling services to the student during school year 2005-2006; and,
3. If so, what remedy is the family entitled to receive?

[2] These amendments were effective on July 1, 2005,

[3] The September 19th date was set because of scheduling conflicts and family commitments involving travel plans that had been long scheduled and pre-paid. Further, the student is now 20 and graduated from high school; no services to him were interrupted by the extension of time.

FINDINGS OF FACT

The decision by the federal district court of Maine that remanded this matter back to the hearing officer for this hearing contained extensive factual findings that are hereby incorporated into this decision.[4] In addition, the hearing officer makes the following factual findings upon the testimony and evidence produced at this hearing:

1. At the June 13, 2005 PET meeting held to discuss the student's then current situation, the team discussed his performance and experience at the Hyde School during the 2004-2005 school year. The student did well at Hyde, and did better academically and seemed happier in the second semester than in the first. He ended the year successfully and, according to Hyde staff, was well prepared to enter his senior year there in the fall of 2005. The student's family was pleased with his progress at Hyde and made it clear throughout the PET meeting that the student would continue at Hyde for his senior year. His mother repeated her belief that the student was doing well at Hyde, that he was going to stay there and that SAD 40 was going to pay for it. The school declined to pay the expenses for the Hyde placement, saying that last year's PET had developed an appropriate IEP for the student which still could be implemented at a local day school stating, "…Lincoln Academy is an option…" The family responded by stating they would go to due process. Another PET meeting was scheduled for June 16th. On June 15th, the school's special education director cancelled the June 16th PET both because of the family's intention to enroll the student in Hyde for 2005-2006 and his belief that, under those circumstances, SAD 40 was not obligated to prepare an IEP for the student in 2005-2006. The student did attend the Hyde School in 2005-2006 and successfully completed his senior year there. (Testimony of Mother, Kauffman; Record at 18, 172-175)

[4] See, *Ms. K v. MSAD 40,* No. 06-42-P-H, slip op. (D. Me. 10/26/06).

DISCUSSION AND CONCLUSIONS

I.

The first issue to address is whether the school violated the IDEA by not developing an IEP for the student for school year 2005-2006. In circumstances such as in this case – where the family privately places an eligible student in an out-of district school - the scheme in effect prior to the 2004 amendments to the IDEA required the LEA in which the parent of the student resides to prepare an IEP for the student. In fact, the school did prepare an IEP for the student for school year 2004-2005, even though his mother had given the school written notice at a May, 2004 PET meeting[5] that he was going to attend a private school the next year, beginning with a summer 2004 session. The student attended the summer session, did well there, and was accepted into Hyde School for the 2004-2005 year during which he enjoyed considerable success. His mother enrolled him in Hyde for the 2005-2006 school year and, at a June 2005 PET meeting, asked the school to pay the costs of his placement at Hyde. The school declined to pay for the private parental placement because (1) it did not pay for regular education placements and (2) there was already an IEP that would provide FAPE to the student in the setting of a local day school.[6] The student attended the Hyde School for the 2005-2006 school year.

The school did not prepare an IEP for the student for the 2005-2006 school year, believing that after the 2004 amendments to the IDEA became effective on July 1, 2005, it no longer had the obligation or the authority to determine the student's IEP.[7] The question then is whether those amendments and the regulations enacted thereto remove

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[5] The Hyde School in Bath, Maine, required the student to attend, and succeed, in its summer program as a precondition for his acceptance into Hyde as a full-time boarding student for school year 2004-2005. At this same PET, the parent informed the school that she was going to seek reimbursement from the school for the student's private placement. **See**, Id. at 27-28.

[6] At the conclusion of the June 2005 PET meeting, the mother's advocate stated that she "would utilize her rights to due process".

[7] See, *Ms. K v. MSAD 40,* supra at 30 and Record at 175.

from the school the obligation to prepare an 2005-2006 IEP for the student, who was an eligible student parentally-placed in an out-of-district private school for that school year.

While [sic] is not immediately apparent how the relevant statutory provision, 20 USC 1412(a)(10)(A)(i), helps to resolve the question before the hearing officer, the federal regulations are more useful. 34 CFR Part 300, federal regulations that implement the 2004 amendments to the IDEA, became effective in the fall of 2006. In response to questions arising after the circulation of the draft federal regulations, the U.S. Department of Education published explanatory commentary along with the publication of the final regulations. One question involving 34 CFR 300.131 was which LEA is responsible for offering FAPE to parentally-placed eligible students in out-of-district private schools. The commentary states, in relevant part:

> If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private…[school]…located in another LEA, the LEA where the child resides need not make FAPE available to the child…[8]

This comment reflects a general rule that the LEA in which such a student resides has the responsibility to make FAPE available to him or her except when the parent has made clear the family's intention to keep the child enrolled in the private school; in the latter case, the LEA where the student's family lives "need not make FAPE available to the child".

The facts of this case bring it within the exception expressed above. After a review of the testimony and documents presented in both hearings that were held in this matter, the hearing officer concludes that, at least from the time the student successfully completed his first academic year at the Hyde School, school year 2004-2005, the family was firmly committed to keeping him enrolled in the Hyde School for the duration of his high school career. At the PET meeting in June of 2005, the family never seriously considered enrolling the student in the public day school placement suggested by the

[8] Vol. 71 Fed. Reg. 46593 (August 14, 06)

school.[9] The family never gave any indication that the public day school placement was acceptable to them. The mother's position at this PET was that the student had done well at the Hyde School in 2004-2005, that he needed the support and structure provided by Hyde, that he was going to stay there for his senior year and that SAD 40 was going to pay the tuition. Returning the student to a local day school program, as SAD 40 proposed to do, was never a real option for the student's family.[10] After considering the evidence from both hearings, this hearing officer concludes that the family's intention[11] throughout the process that included the June 2005 PET meeting was to keep the student enrolled in the Hyde School as a boarding student for school year 2005-2006. Therefore, the hearing officer concludes that SAD 40, the LEA in which the student's family lived during the time at issue in this proceeding, had no obligation under the IDEA, as amended, to prepare an IEP for the student for the 2005-2006 school year. SAD 40's failure to prepare such an IEP did not violate the IDEA, and the family is not entitled to reimbursement on this claim.

II.

The second issue to resolve is whether the school was obligated under the amended IDEA to provide tutoring and counseling services to the student during the 2005-2006 school year. The school recognized that it was obligated under the "old" IDEA to provide these services and did, in fact, provide them to the student during the 2004-2005 school year. Again, the inquiry here is whether the 2004 amendments to the IDEA, effective on July 1, 2005, relieved the school of its obligation to do so.

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[9] The minutes of the June 13, 2005 PET meeting state, in part, "An IEP was written last year that is appropriate for [the sudent's] needs…" At this PET meeting, Mr Kauffman, the school's special education director, stated that the school "could design a program to make adequate progress without Hyde…Lincoln Academy is an option…" Record at 173,175.

[10] For school year 2004-2005, the school offered the student an IEP, to be implemented in Lincoln Academy, a local day school setting. The family turned down this placement and, instead, unilaterally placed the student at Hyde as a boarding student. In the prior hearing, this hearing officer found that the 2004-2005 IEP that the family rejected in favor of the residential placement at Hyde would have provided him with a FAPE if implemented as written; this conclusion was upheld by federal court that reviewed it.

[11] While there was testimony to the contrary presented by the family at the remand hearing, that testimony was not persuasive.

While there was no guidance available to this hearing officer in January of 2006, when the initial due process hearing decision was issued, new final federal special educations regulations, 34 CFR Part 300, were published in the summer of 2006, with an effective date of October 13, 2006. Since the publication of these new regulations, both federal and state education agencies have published commentary that discusses the issue presented here: which LEA is responsible for provision of equitable services to eligible students parentally-placed in out-of-district private schools. The US Department of Education, Office of Special Education and Rehabilitative Services (OSERS), in response to questions about this issue, published a written statement explaining that the new federal regulatory provision,[12] "…assigns responsibility for equitable participation to the local educational agency (LEA) where the private school is located. [Under prior law, this was the responsibility of the LEA of the parent's residence.]…" (parenthetical in original). This OSERS advice was repeated in an Administrative Letter issued by the Commissioner of the Maine Department of Education on October 11, 2006, which said, in part, "Both the federal statute and federal regulations reflect a change in the district responsible for parentally-placed children with disabilities in private schools. Now, the district in which the private school is located is responsible for child find and the provision of equitable services, rather than the district in which the parent of the student resides."

Taken together, these statements from the federal and state administrative agencies responsible for implementing their respective special education statutes and regulations resolve what had previously been a murky issue. It is now clear that the 2004 amendments to the IDEA place responsibility for providing equitable services to parentally-placed students upon the LEA in which the private school is located. Thus, in this case, SAD 40, the district in which the parent of the student resides, had no obligation to provide the student with tutoring and counseling services, or transportation to those services, in the 2005-2006 school year. Consequently, the family is not entitled to any reimbursement from the school on this claim.[13]

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[12] 34 CFR 132.

[13] The school argued vigorously and cogently that the hearing officer does not have jurisdiction, under the then current state regulations, to decide this issue. However, in her

ORDER

Finding no violation for the reasons discussed above, no order is required.

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Peter H. Stewart, Esq. Date
Hearing Officer

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decision, the federal Magistrate Judge directly ordered the hearing officer to consider this issue on the remand. Given the result of the analysis here, it appears appropriate to reach the substantive issue in this decision.

WITNESSES

For the Family: Parent, the student's mother

Theresa Hermida, M.D., the student's treating psychiatrist.

For the School: Richard Kauffman, Director of Special Education, SAD 40.

DOCUMENTS

Record of State of Maine Special Education Due Process Hearing 05.116H, pages 1- 880.

Family's Exhibits, pages 1-11.