

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

February 26, 2008

08.054AH—Parent & Parent v. Sanford School Department

REPRESENTING THE FAMILY: Pro Se

REPRESENTING THE SCHOOL: James Schwellenbach, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on February 4 and 8, 2008 at the Department of Health and Human Services in Sanford, Maine. Those present for the entire proceeding were the mother, stepfather, Attorney Schwellenbach, Elizabeth St. Cyr, Director of Special Education, Stacey Bissell, IEP Administrator for Sanford High School and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
Thomas Grebouski	Monarch School psychologist and behavioral consultant
Katherine Sisneroz	Teacher, Monarch School
Sarahmarie Gervais	Monarch School educational technician
Paul Searles	Student's godfather, home services provider
Denise Toshach, M.D.	Pediatrician
Joseph Toshach, M.D.	Pediatrician
Elizabeth St. Cyr	Director of Special Education
Stacey Bissell	IEP Administrator, Sanford High School
Tammy Delaney	Autism consultant, May Center
Frances Bodkin	Speech and Language Pathologist, MMCC

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

The mother and stepfather (also referred to as “the parents”) initially requested a due process hearing on December 19, 2007 regarding the student, whose date of birth is xx/xx, xxxx.

The following day, the Sanford School Department (“District”) challenged the sufficiency of the hearing request. The hearing officer agreed that the hearing request was not sufficient under 20 U.S.C. §1415(b)(7), and allowed the parents until January 4, 2008 to amend their request. The parents filed an amended hearing request on January 3, 2008, at which time their original hearing case file, 08.054H, was closed, and 08.054AH was opened.

On January 23, 2008, the parties attended a prehearing conference at the Department of Health and Human Services in Sanford, Maine. Participating in the conference were: the mother, the stepfather; Paul Searles, the student’s godfather and in-home support person; Charissa Robert, case manager from Woodfords Family Services; Melissa Brown, field supervisor from Woodfords Family Services; Elizabeth St. Cyr, Director of Special Education; Stacey Bissell, IEP coordinator for Sanford High School; James Schwellenbach, Esq., counsel to the District; and Shari Broder, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner. The parents submitted 17 documents consisting of 75 pages of exhibits, and the District submitted 26 documents consisting of approximately 111 pages of exhibits.

The hearing took place over the course of two days. The parents presented a closing argument at the end of the hearing, and the District was granted leave to file a written closing argument, which was received electronically by the hearing officer on February 12, 2008. The record closed at that time. The District submitted an 18-page memorandum.

II. ISSUES:

1. Is the IEP developed by the District in November 2007 reasonably calculated to provide the Student with educational benefit in the least restrictive environment?
2. If so, what should the Student’s transition involve?
3. If not, should the Student remain at the Monarch School through the end of the 2007-2008 school year?

III FINDINGS OF FACT

1. The student is xx years old (DOB: xx/xx/xxxx), and lives with his parents in Sanford, Maine. He is eligible for special education and related services as a child with multiple disabilities, particularly Autism and speech and language disorder.
2. The student's adaptive skills, including motor, social, communication, personal living, and community living, all fall between a two and four-year-old age level. [S-52] He has very little spoken language, and is not yet toilet trained. [Testimony of S. Brusso, T. Delaney, F. Bodkin]
3. The Student has attended the Monarch School of New England (henceforth "Monarch") since his kindergarten year. [Testimony of E. St. Cyr] At that time, the District did not have an in-district program for students with Autism. [Id.] Monarch educates only students with disabilities, so the student does not have an opportunity to interact with nondisabled peers. Monarch is a transitional program, intended to stabilize student's behaviors, then allow the student [sic] move on. [Testimony of T. Grebouski] It is by design a temporary program, and was not intended to be a permanent K-12 program. [Id.] Monarch's summer program includes horseback riding and swimming, and the student loves and benefits from these activities. [Testimony of S. Gervais]
4. When the student first began attending Monarch, he had substantial behavioral problems. [Testimony of K. Sisneroz] His behaviors are now under control, and he is identifying numbers and words, and participating in group activities. [Id.] When under stress, he is sometimes aggressive, and will hit staff and other children, or bite his hands hard enough to leave a mark. [Testimony of Mother, K. Sisneroz]

5. In the fall of 2006, the District began to consider whether the student was a candidate for the Striving Toward Accomplishment and Reaching Success (STARS) program at Sanford High School (SHS), which is the District's program for students on the Autism spectrum. [Testimony of S. Bissell] The program expanded from the elementary levels to SHS in the fall of 2006. [Testimony of E. St. Cyr] STARS would provide the student with a highly structured program that integrated Applied Behavior Analysis (ABA) methodologies, intensive communication instruction and support, picture exchange communication (PECS) instruction and support, sensory diet and integration activities, social skills training, and a full-time 1:1 educational technician. [Testimony of E. St. Cyr, S. Bissell, S-1-2]
6. As an initial step in determining whether a STARS placement would be appropriate, Stacey Bissell, the IEP coordinator at SHS, observed the student at Monarch in November 2006. [Testimony of S. Bissell] In June 2007, the District held an IEP meeting at which the IEP team first discussed the District's proposal to move the student to the STARS program. [Testimony S. Bissell; S-86-87] Because the mother did not attend that meeting, the District scheduled another IEP meeting for July with the mother present to discuss this proposal. [S-86-87] After receiving the minutes and written notice from the June IEP meeting, the mother called Ms. Bissell to express her concerns, and they discussed the District's proposal and the process involved. [Testimony S. Bissell] In the meantime, District staff observed the student at Monarch. [Testimony S. Bissell; F. Bodkin]
7. On July 20, 2007, the IEP team met again to discuss the student's possible move to STARS. [S-78-79] This time, the parents were able to attend, and their concerns were

discussed at length. [S-78-79] In light of the parents' opposition, the District backed off its initial plan to move the student at the start of the school year and scheduled another meeting for September. [Testimony of S. Bissell; S-78-79] Anticipating that the student would begin attending SHS after the beginning of the school year, the District hired Missy Baker, an experienced educational technician. [Testimony of B. St. Cyr] Ms. Baker has five years of experience working with students with significant Autism, and has ABA certification from the May Center. [Id.] As of the date of the hearing, she is still employed by the District, and remains ready to work with the student. [Id.] The other staff who would work with the student is [sic] also qualified to perform the services they would offer. [Id.]

8. The IEP team met on September 21, 2007, reviewed assessment data, and heard from Monarch staff regarding the student's performance there. [S-70-72] Again, the parents' concerns were discussed, and again, the school did not push the issue of when the student would start at SHS. [Testimony S. Bissell] The District agreed to conduct additional evaluations and observations, and the mother was to observe the STARS program at SHS. [Testimony S. Bissell; S-70-72]
9. On November 19, 2007, the IEP team met for a fourth time regarding the student's placement in STARS. [S-45-48] At the meeting, staff from Monarch acknowledged that the student had regressed in some areas. [S-47, Testimony of T. Grebouski]¹ The IEP team reviewed the assessments and observations, and developed the student's IEP. [Testimony S. Bissell] The IEP contained 24 pages of goals and objectives, provided for full-time instruction in the STARS classroom, full-time educational technician support,

¹ Dr. Grebouski testified that the student nearly eliminated his physical aggression until recently, and that his behavior has been up and down during the two and one-half years Dr. Grebouski has worked with him.

speech-language, occupational therapy (OT), physical therapy (PT), adaptive physical education, and social work services, and consultation by the May Center. [S-13-44; Testimony T. Delaney; F. Bodkin] The IEP team also adopted the behavior plan that had been developed at Monarch. [Testimony T. Delaney] At the meeting, no one raised any objection to the goals, objectives, or services in the IEP. [Testimony S. Bissell] Everyone except the parents agreed that the student was ready to transition to the STARS program. [Testimony S. Bissell] The IEP team determined, without the agreement of the parents, “to implement a transition plan to SHS so [the student] is full time in Sanford by January 2, 2008.” [S-48]

10. After the IEP team meeting, District and Monarch staff met and drafted a transition plan, with transition activities scheduled to begin on December 10. [Testimony S. Bissell; K. Sisneroz] The plan included two observations at Monarch by Missy Baker, the student’s 1:1 ed tech in the STARS program, and two visits by the student to the STARS program, accompanied by staff from Monarch. [Testimony S. Bissell] The plan also provided that when the student began on January 2, 2008, Monarch staff would accompany him to SHS. [Testimony S. Bissell; K. Sisneroz] Furthermore, the District consulted with Woodfords Family Services to see what support the family might need during the transition. [Testimony of S. Bissell] Tammy Delaney, the Autism consultant from the May Center, visited Monarch four times, and had the opportunity to observe the student, speak with the staff, and ask questions. [Testimony of T. Delaney] She had a number of concerns about some of the things she observed, including the fact that the student engaged in self-stimulatory behavior approximately 90 percent of the time she was observing him, with minimal staff interaction. [S-4, 57] Ms. Delaney felt the staff’s

attempts to redirect the student were ineffective and sometimes inappropriate. [S-4] She was also concerned about the method in which discrete trials were conducted, as the correction model for incorrect responses was not followed. Lastly, she was concerned about the student's lack of comprehension and ability to use a communication system.

[S-4]

11. On December 5, 2007, the District gave the parents notice that the student's goals and objectives could be implemented in a less restrictive setting than Monarch, and that the IEP team proposed implementing in the IEP in the STARS program beginning on January 2, 2008. [S-10]
12. Difficulties soon arose in implementing the transition plan. The parents chose not to allow the student to attend school at Monarch on the days that Ms. Baker was scheduled to observe him. [S-113-117; Testimony of K. Sisneroz; S. Bissell, mother] The stepfather called Ms. Sisneroz to express concern that the student would not have time at SHS before the transition. [S-117] Ms. Sisneroz responded that the student would have had time, had he come to school on the days Ms. Baker was scheduled to observe him. [S-117] The mother did not observe the STARS program. [Testimony of S. Bissell, mother] Ms. Sisneroz told the stepfather that she would be with the student on January 2 at SHS, to which the stepfather responded that he was not sending the student there until this due process hearing was concluded. [Testimony of K. Sisneroz, S-117] Consequently, the transition plan was revised several times. [Id.] Despite these roadblocks, the District continued its preparations, and it was ready for the student's arrival on January 2. [Testimony of S. Bissell; T. Delaney] The Monarch staff supported

the move on January 2, 2008 as well.² [Testimony of K. Sisneroz, S. Gervais; S-116] The student's parents did not send him to SHS on January 2, however, and filed an amended hearing request the following day to prevent the move. [Testimony of mother]

13. Members of the Monarch staff agree that the student is capable of transitioning to SHS, but that the transition plan must be developed and undertaken in response to the student's needs. [Testimony of T. Grebouski, K. Sisneroz, S. Gervais] The plan needs to be flexible, based upon the student's reaction to it. [Testimony of T. Grebouski, K. Sisneroz] The District agreed that it could be flexible with the student's transition, and has demonstrated this. [Testimony of E. St. Cyr, S-118] The District also represented that, although horseback riding is not a part of the STARS program, it is offered to some students who benefit from it, and that many STARS students engage in these activities after school. [Id.]

IV. DISCUSSION AND CONCLUSIONS

Brief summary of the position of the parents:

The parents are primarily concerned that, if the student transitions to another school, he will regress, and this will be very difficult for both the student and his family. The student has done well at Monarch, and the staff there knows him well and is able to meet his needs. The parents would like the student to remain at Monarch indefinitely.

The student needs a strong behavioral program in place before he can be transitioned. Furthermore, this transition must be lengthy, and should preferably take place over the summer. The student enjoys the summer programming at Monarch, particularly horseback riding and

² Ms. Sisneroz testified that she did not oppose the student's move to the STARS program, felt comfortable with Ms. Baker, and thought the student would do beautifully with the appropriate transition. Ms. Gervais agreed that with an appropriate transition, the student was capable of returning to public school.

swimming, and the parents would not want the student to lose the opportunity to participate in these activities.

The parents acknowledge that both programs have the student's best interests in mind, and are good for the student.

Brief summary of the position of the District:

The evidence in this case overwhelmingly supports a finding that the student's IEP implemented in the STARS program at SHS is reasonably calculated to provide the student with educational benefit in the least restrictive environment. The IEP is the same as the student has at Monarch, but it can and should be implemented in a less restrictive setting at SHS.

The District has been sensitive to the parents' concerns and has not rushed the transition process. Nonetheless, everything is in place and ready for the student to begin attending the STARS program. Observations have already taken place. There is no need for a lengthy transition plan. There is no evidence that a transition to SHS would result in substantial regression.

Despite the student's progress at Monarch, it is no longer an appropriate placement for him. The hearing officer should order placement of the student at SHS after a brief transition period.

I. Is the District’s proposed Individualized Education Program (IEP) reasonably calculated to provide the student with a free, appropriate public education (FAPE) in the least restrictive environment?

There is no dispute about the type of services the student needs, or the fact that transitions are very difficult for him. There is also no dispute that the student’s IEP is reasonably calculated to provide the student with FAPE. There is even no dispute about the ability of the STARS program to implement the student’s IEP. This hearing is about the parents’ desire to keep the student at Monarch to avoid any possible temporary regression that may occur during the student’s transition to public school.

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... *designed to meet their unique needs* and prepare them for employment and independent living." 20 USC 1400(d)(1)(A) (emphasis added). The First Circuit elaborated that the student’s educational program must guarantee “a reasonable probability of educational benefits with sufficient supportive services at public expense.” *See G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). It is well established that a school is not obligated to offer an IEP that provides the "highest attainable level (of benefit) or even the level needed to maximize the child's benefit" in order to comply with the IDEA. *Id.* Furthermore, "parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993). The educational benefit must be meaningful and real, and not trivial or de minimus, in nature.³ The family has the burden of proof that the

³ As the First Circuit stated in *Lenn v. Portland School Comm.*, the law does not “[sic] promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.” 998 F.2d 1083, 1086 (1st Cir. 1993). In *Roland M.*

proposed IEP is inappropriate. *See Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005).

Thus, the hearing officer must examine whether the student’s proposed educational program contained in his IEP was “reasonably calculated to enable the student to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985).

As noted above, there really is no dispute on this issue, so there is no point entering into a lengthy analysis of the IEP or the STARS program. It is quite evident that the District’s proposed IEP is reasonably calculated to provide the student with FAPE in the least restrictive environment. There was no evidence to the contrary. The student would have essentially the same IEP as he does at Monarch. Both programs utilize the same methodologies, and provide similar levels of related services. The goals and objectives are the same, so the student would continue to work on skills he is now trying to master. In the STARS program, he could attend public school, and take his education to the next level. Monarch was not intended to be a permanent placement, and the evidence demonstrates that the student is ready to move to the STARS program. In fact, there was evidence that the STARS program would better meet the student’s needs, as the staff at Monarch has been ineffective in certain areas discussed above.

[Fact #10]

The parents also object to the lack of horseback riding and swimming during the summer.

Ms. St. Cyr testified, however, that the student could continue to have these services while at

v. Concord School Comm the First Circuit described the goal is to provide the student with “demonstrable” benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990).

SHS. The IEP team would need to discuss it and make a determination to this effect, or these services could be provided after school by outside agencies. His IEP contains other physical therapy and physical education programs to meet his needs. [Facts #9,13]

Because the parents decided at the outset that they wanted the student to remain at Monarch, they have been unwilling to give the District's program a chance. The mother has not taken the time to observe the program, and has kept the student out of school, thereby not giving the transition a chance. While it is understandable that she fears for her son's safety, and for the impact that the transition may have on family life, there is simply no legal justification for keeping the student at Monarch. In fact, the contrary is true. The law requires that the student be placed in the least restrictive environment, which is the STARS program at SHS.

II. What should the Student's transition involve?

This is the other real issue in the case—whether the transition plan is appropriate for the student.

At the hearing, it was apparent from the testimony that the student needed a transition plan that would allow him to become acquainted with his new environment, teachers, and service providers while still in the care of people he knows and trusts. This is very sensible and appropriate for the student, and is a part of the District's proposed transition plan. The District's transition plan is similar to that agreed upon by Sanford and Monarch in November 2007. This would include two visits to Monarch by the student's educational technician from SHS to work with him there, and two visits by the student to the STARS program and SHS. All these visits can and should start immediately. Once the student is in the STARS program, his Monarch teacher, Ms. Sisneroz, would attend with him until the District and Monarch agree that the student's performance indicates that it is no longer necessary.

There was ample evidence that the District has been very receptive and sensitive to the parents' concerns and is willing to be flexible about the student's transition. Should the student have unexpected problems adapting to the STARS program, the District would then revisit his transition and make appropriate adjustments, which the District has already agreed to do. The District has good communication with the staff at Monarch, and there was evidence that staff in both programs will be flexible, if needed. Although some regression is to be expected during a transition, supports are in place to address this as well.

There is no reason to delay this inevitable transition until the summer. The STARS program is ready for the student, and is, as discussed above, where the student should be educated under the IDEA. If the parents wish to continue the student's placement at Monarch, they must do so at their own expense.

V. ORDER

After consideration of the evidence presented during this due process hearing, the hearing officer orders as follows:

1. The District's proposed IEP is reasonably calculated to provide the student with a free, appropriate public education in the least restrictive environment. The IEP shall be implemented as written.
2. The student's transition plan developed by District and Monarch staff is appropriate, and District may begin implementing it immediately.

SHARI B. BRODER. ESQ.
Hearing Officer