STATE OF MAINE
DEPARTMENT OF EDUCTION

SPECIAL EDUCATION DUE PROCESS HEARING

December 29, 2012

Parents, on behalf of their minor child, v. Regional School Unit 75

Case No. 13.017H

FOR THE FAMILY:	Parent Parent Sara Hellstedt, Esq.
FOR THE SCHOOL: `	Daniel Nuzzi. Esq. Peter Lowe, Esq.
HEARING OFFICER:	Peter Stewart, Esq.

INTRODUCTION

This special education due process hearing was conducted and this decision written pursuant to 20 U.S.C. 1415 *et seq.* and 20-A MRSA 7207 *et seq,* and accompanying regulations.

This special education due process hearing was initiated by PARENT and PARENT on behalf of their son, XX (DOB: XX), currently a XX year-old student in the XX grade at the Woodside XX School within RSU/SAD 75 (SAD 75) in Topsham, Maine. XX ("the student") has been diagnosed with multiple disabilities including autism, intellectual disability, and a variant of Landau-Kleffner syndrome, a neurological disorder often associated with autism that has left him essentially non-verbal and able to communicate only through gestures, some signs and a mechanical communication device. He has been educated in SAD 75 schools since XX.

The specific incident that underlies this hearing occurred on February 10, 2012 when the student, who was being picked up after school by his mother, burst into tears upon getting into the family car and continued to cry for about 90 minutes, something

that had never happened before and hasn't happened since. Being unable to get an explanation from their non-verbal son, the parents sought an explanation for his prolonged crying from the school staff members who worked with him that day, but none of them reported noticing anything unusual about the student's behavior at school. Not satisfied with the school's response, the parents asked the school (1) to provide them with copies of all documents in the possession of the school that related to their son and, later, (2) to allow the student to wear a recording device on his person while attending school. The school provided the parents with some, but not all, of the requested documents and refused to allow the student to wear the recording device in school. The parents filed a Hearing Request Form (HRF) with the Due Process Office of the Maine Department of Education on September 12, 2012, alleging that those two decisions by the school were in violation of state and federal special education law.[1]

At the request of the parents, the Maine Department of Education issued subpoenas to compel the presence of people and documents at the hearing. On October 11, the school filed a Petition to Vacate and/or Modify those subpoenas, to which the parents responded on October 14. The hearing officer issued a ruling on October 21, vacating and modifying certain subpoenas and sustaining others. The school also filed a motion to dismiss all claims contained in the parent's Hearing Request Form. On October19, the hearing officer issued a ruling on that motion, dismissing one of the allegations from the HRF but denying the school's request to dismiss two other allegations.

The pre-hearing conference was held on October 15, 2012. The student's father, himself an attorney practicing in Maine[2], appeared on behalf of the family. Daniel Nuzzi, Esq., and Nathaniel Bessy, Esq., appeared on behalf of the school. The parties exchanged pre-hearing memoranda, witness lists and proposed exhibits, and argued the motions describe above.

The hearing was conducted in the administrative offices of SAD 75 in Topsham, Maine; it was held over three days, October 29 and 30 and December 5, 2012. Both

[1] The Hearing Request Form originally contained four allegations; the family withdrew one allegation and the hearing officer dismissed another before the hearing.
[2] The student's mother is also a practicing attorney.

parties presented witnesses. The family entered exhibits, marked as P-1 through P- 14 and P-17 through P-27, into evidence. The family called the following witnesses: PARENT, father; PARENT, mother and Patrick Moore, the Director of Special Services for SAD 75. The school entered exhibits, beginning with S-1 and ending with S-66, into evidence[3] and called the following as witnesses: Kelly Allen, autism consultant; Tanji Johnston, special education coordinator; William Zima, XX school principal; Jessica Fournier, special education teacher; Terry Bell, educational technician; Jody Surace, educational technician; Phoebe Fraser, educational technician; Margaret Brown; math specialist and teachers association chief negotiator; and Katie Anderson, current special education teacher.[4] Both parties submitted written closing arguments. The decision is being issued on December 29, 2012.

ISSUES

The two issues to be decided in this matter are:

1) Whether the school's failure to produce records as requested by the parents violated federal or state special education law; and
2) Whether the school's refusal to allow the student to wear a recording device while at school violated federal or state special education law.

FACTUAL FINDINGS

1) The student's parents initiated this special education due process hearing on September 12, 2012 by filing a Hearing Request Form ("HRF") with the Due Process Office of the Maine Department of Education on behalf of the student, XX, (D.O.B: XX) who has been diagnosed with autism, an intellectual disability, and a variant of Landau-Kleffner syndrome, a language disorder. He is non-verbal and communicates using gestures,

[3] The following exhibits offered by the school were marked for identification but were not entered into evidence at the hearing: 23, 29, 33, 34, 46, 47, 54, and 65.
[4] All witnesses called by SAD 75 are employed by SAD 75.

some signs and a mechanical communication device. He is eligible for special education services. (Hearing Request Form, Testimony of parents; Patrick Moore.)

2) The student has attended SAD 75 schools since XX when he was placed in a self-contained program that included three other boys with diagnoses within the autism spectrum. That group has been together since; they are now in the XX grade at a SAD 75 XX school. Several of school staff that worked with that group of students in XX school transitioned into the XX school with them in August 2011 and continue to work with them today. According to his father, he is a "very happy kid" who "loves going to school". The student has made considerable progress in school. His father said that the last couple of years at school have "actually been fairly good. Especially last year I think he made significant progress." Kelly Allen, his case manager, testified "Everyone loves [the student] and he is very comfortable with his teachers at school". Katie Anderson, his current classroom teacher, reinforces that opinion, testifying that he "is doing awesome" at school. While there has been some serious disagreement over the years, the parents and school have managed to work together through the difficulties. (HRF, Testimony of parents, Kelly Allen, Katie Anderson, Patrick Moore)

3) On February 10, 2012, when the student's mother came to pick him up at the end of the school day, the student seemed somewhat upset, went directly and hurriedly to the family car, got in, and then burst into tears. They drove home where the student continued to cry for about an hour and a half. There were no similar incidents in the ten years prior to this one and none since. The student's mother, understandably distraught and concerned, contacted the school in an attempt to find out why the student was so upset. No one at school who had been in contact with the student on February 10 reported noticing anything out of the ordinary in the

student's behavior or attitude; school staff consistently reported that the student seemed normal and happy, with no sign of emotional distress. Every day the school staff fills out a "daily report" for the student. It is a form that divides the school day into 12 separate time periods and has a series of columns in which information is entered.

In the column named "Emotional Regulation" on the daily report for February 10, 2012, the student's emotional regulation was described as either "great" or "good" throughout the day. In the final period of the day, from 2:02 – 2:20, just before he was picked up by his mother, the entry under Emotional Regulation for the student was "good". The aide who was with the student during the final period of that day testified that the student seemed happy and normal during her time with him, that everything was "just fine, nothing different that day." Despite repeated attempts, the family has failed to learn what may have caused the student's crying episode of February 10. No firm evidence about the reason for the student's tears was introduced at the hearing. (Testimony of Mother, Jody Surace)

4. On April 13, 2012, the family submitted a written request for records and information about the student to the school and submitted a second similar request on June 13, 2012. Prior to the hearing in this matter, the parents served a subpoena upon the school, requesting that the school produce *inter alia,* "All records…[in any format]…relating in any way to [the student] or his parents that are in the possession or control of SAD 75…[or its agents…] that were created or received after January 26, 2012." That subpoena was challenged by the school but was upheld by the hearing officer. The school produced the requested documents and delivered them, in the form a stack of 8 1/2" by 11" unbound documents approximately 12" high, to the parents on the first day of hearing in this matter. The parents did not seek to admit any of those documents into evidence at the hearing. (HRF, case file)

5. On June 12, 2012, the student's mother wrote to the XX school principal requesting that the student, who is non-verbal, be allowed to wear an audio recording device to school so the family could have a audio record of the student's day in school. The school denied that request on September 1, 2012. (HRF, Mother, Patrick Moore)

6. The school and family have developed a variety of ways for the family to communicate about and participate in the development and implementation of the student's educational program and about the student's experience while at school in general. The family is an active member of the IEP team, participates in the annual meeting and often asks that additional team meetings, sometimes as many as ten, be convened at other times during the school year. The school staff prepares a "daily report" for this student. This report, described above in Paragraph 3, is given to the family at the end of the school day when the student is picked up at school. This time can be used for a quick conversation between parent and school staff about the student's day. There have been monthly meetings scheduled between the parents and members of the school staff, including the special education director and the student's case manager. The school has used the Monthly Progress Report, a 30-page document filled out by Kelly Allen, the student's case manager, in these meetings as the central discussion document. The meetings last approximately one hour; however, during the current school year, these meetings have not been held regularly. The parents have access to an online website set up by the school as another source of information about goings on at the school. The parents and school staff have an active e-mail correspondence that is frequently used. One of the parents, usually the student's mother, drives him to and from school and, therefore, is physically present at or near the school twice each day In general, and excepting the question of what may have happened on February 10, the family appreciates the school's responsiveness: the father testified that

"…the school is very responsive. Our concern is that if we don't know about a problem, we can't ask for the change…[but]…in just about every case, if we ask for a change in something like that, they're very receptive…." (Testimony of Patrick Moore, Parents, Kelly Allen, S-66, S-58)

DISCUSSION

I.

The first issue to be decided is whether the school's failure to produce records as requested by the parents violated federal or state special education law. For the reasons set forth below, the hearing officer concludes that, under the facts and circumstances presented here, no such violation occurred.

The family advances a series of arguments in support of its claims (1) that the school failed to provide the family all records in its possession relating to the student, thereby (2) violating the federal and state special education law. The family notes that the IDEA states that a school must provide the parents of a child eligible for special education service with an opportunity "to examine all records relating to such child…" 20 U.S.C. 1415(b)(1). They argue that "all" means exactly what it says and is not modified by the term "education records" as contained in the Family Educational Rights and Privacy Act ("FERPA')[5] or in state and federal special education regulations. Accordingly, the family asserts that the school did not provide them with "all" records related to the student, thereby violating the IDEA. For remedy, the family seeks an order directing the school to allow them an opportunity to examine all records in the school's possession that identify or relate to their son that were generated or received after January 26, 2012.

The school admits it is required to provide the family with all the "education records" relating to the student that are in its possession and asserts it has done so. The

[5] FERPA is expressly incorporated into the IDEA. See, 20 U.S.C. 1232.

school interprets the term "education records" to mean those records that are maintained in a central office or central file including such records as final grades, standardized test scores, attendance records, progress reports and evaluative materials; the school states it has, and will continue to, provide such records to the family. The school argues that the term "education records" as contained in special education regulations and FERPA does not include items such as internal e-mails, e-mails exchanged among staff members and teacher's notes not maintained in the central office file and asserts, therefore, that it has no obligation under the IDEA to provide such records to the family. The school also points out that a special education due process hearing officer is charged with interpreting the provisions of the IDEA, not FERPA.

Finally, the school notes that this hearing officer ordered it to comply with the family's subpoena requesting production of:

> All records (whether in electronic, documentary, or other format) relating in any way to …[the student]…or his parents that are in the possession or control of SAD 75 or any employee, contractor, or other agent of SAD/RSU 75, and that were created or received after January 26, 2012.

The school moved to vacate this subpoena; the hearing officer denied the school's motion in part and upheld this paragraph of the subpoena "to the extent the requested document is not otherwise confidential." The school made no claim of confidentiality; it produced approximately one thousand pages of documents and gave them to the parents toward the end of the first hearing day. None of those documents was offered into evidence during the final two days of the hearing; a fact the school asserts demonstrates that "their prior lack of access to these documents did not amount to a denial of opportunity to participate meaningfully in [the student's] education."

The hearing officer finds the school's position on this issue to be more persuasive than the family's. First, FERPA itself provides for a hearing procedure for the resolution of disputes involving the interpretation or application of FERPA. Complaints that a school has violated the provisions of FERPA are more properly resolved under the

complaint and hearing process set forth in FERPA, rather than in the context of a special education due process hearing.[6]

Second, even assuming *arguendo* a finding that a FERPA violation had occurred does not by itself mean that the provisions of the IDEA have been violated. There must be an additional finding that the FERPA violation deprived the student of a free appropriate public education. The family asserts that the school's initial failure to produce "all the records in its possession" relating to the student amounts to a procedural violation of the IDEA because it deprived them of (1) a meaningful right to participate as IEP team members and (2) the ability to exercise their due process rights under IDEA. The evidence produced in this hearing does not support either contention.

The student has been educated in SAD 75 since he entered XX and his parents have been intimately involved in the planning, development and implementation of his educational program from the beginning. The parents participate in the annual IEP team meeting required by the IDEA and have frequently requested and participated in additional IEP team meetings throughout the school year.[7] In addition to the frequent IEP meetings, the parents received brief daily reports from staff that had worked with the student during the day; the reports were given to the student's mother in the afternoon when she picked him up at the end of the school day.[8] The parents had scheduled monthly meetings with school staff, including the Director of Special Services and the student's case manager, to discuss the student's progress at school and to adjust or modify elements of the student's school day if necessary. The school has engaged an autism expert both as a consultant and case manager for autistic students, including the student here; the parents received "timely and responsive" e-mails from her. The parents

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[6] The parties have cited conflicting authority as to the definition of "education records". The school cites *Owasso I.S.D. v. Falvo, 534 U.S. 426 (2002),* for its contention that "education records" are limited to "…institutional records kept by a single central custodian", *Id.* at 434-5*,* or "…in a filing cabinet in a records room at the school…" *Id.* at 433. The family relies upon a 2005 letter from the US Department of Education Family Office Compliance Office in support of its more inclusive definition.

[7] In some school years, the parents have requested and participated in as many as nine or ten IEP team meetings about the student.

[8] The student is generally escorted out of the schoolroom to meet his mother who drives him home from school, so there can be brief conversations about student's school day.

also had access to a website maintained by the school that offered additional information about events at school.

During the time period at issue in this proceeding, from January 26, 2012 until September 12, 2012 when the parents filed the Hearing Request Form that initiated this hearing, they have been remarkably active participants in the planning, design, implementation and monitoring of their son's educational program at SAD #75. The school has provided the parents with advanced notice of IEP team meetings (S-34). The parents have asked the school to provide them access to the student's education records in preparation for IEP team meetings (S-24, S-27). The record contains dozens of examples of written communications, largely e-mails, between the parents and school staff members dealing with various aspects of both the content and the implementation of the student's program on a very fine level of detail. The parents' claim that the school's failure to provide them with all the records they requested prevented them from exercising their right under the IDEA to "meaningful participation as IEP Team members and advocates for our son…" is simply not supported by the evidence produced at the hearing. Rather, the evidence clearly revealed the parents to be active and informed participants in the development and implementation of the student's instructional plan as well as vigorous and effective advocates for the student.[9]

Finally, it is instructive to review the remedy sought by the parents here, "We therefore request that the Hearing Officer order the District to provide to us the opportunity...to examine all records that personally identify… [the student]… or that relate to him, that were created or received after January 26, 2012…". This language is essentially the same as that in a subpoena served on the school by the parents prior to the hearing: "Paragraph 2. All records…[in any format]…relating in any way to [the student]…or his parents that are in the possession or control of SAD 75…[or agent thereof…] that were created or received after January 26, 2011". The school moved to vacate that paragraph of the subpoena. The hearing officer denied the school's motion, stating, "Paragraph 2 is upheld to the extent the requested document is not otherwise

[9] The fact that this hearing is occurring at all rebuts the parent's claim that they were prevented from exercising their IDEA due process rights by the school's failure to produce all the records they requested.

made confidential. Documents may be redacted or de-identified if appropriate." In response to this subpoena, the school produced a stack of 8 1/2" by 11" documents, close to a foot in height, and gave the documents to the parents during the first day of the hearing. Though the hearing lasted three days, none of those documents was offered into evidence at the hearing. In light of the school's compliance with the subpoena as described above, and the fact that none of the more than one thousand pages of documents was offered into evidence, it is difficult to conclude that issuing the order the parents seek would produce any additional evidence.[10]

II.

The second and remaining issue to be decided is whether the school's refusal to allow the student to wear a recording device while at school violated federal or state special education law. For the reasons set forth below, the hearing officer concludes that school's refusal to allow the student to attend school while wearing a recording device did not violate federal or state special education law.

The family's argument on this issue is much like their argument on the previous issue: here, the parents assert that, given the *status quo* at the school, they do not have access to sufficient information to participate in a meaningful way in either the planning process leading to the development of the student's IEP or in exercise of the student's IDEA due process rights, thus violating the IDEA. As remedy for that perceived violation of the IDEA, the family asks the hearing officer to order the school to allow the student to attend school equipped with an audio recording device that would record the words and sounds of the student's day. The parents would then be able to listen to the recordings at home, learn what happened to the student during each school day and, thus, have sufficient information to participate meaningfully in the education of their son.

The school refused to grant the permission sought by the parents, citing a series of reasons for its denial[11]. However, the IDEA argument the school makes is that such a

[10] The issue of mootness was never raised in this matter.

[11] Those reasons include the school's assertions that the presence of such a recording device on the student would have a detrimental effect on the "overall educational environment" at school, could have a detrimental effect of the student's educational experience at school, would raise "privacy concerns" re: other students and staff, and could raise legal issues, including those arising from existing collective bargaining

recording device is not necessary in order for the student to receive the free appropriate public education to which he is entitled under the IDEA.

The parents argue that, without the recording device on the student and the daily audio tape of the student's day at school, they will not have enough information to participate meaningfully in the planning and implementation of the student's IEP or to make decisions regarding the exercise of due process rights related to the educational program of their son, The record in this case – the documentary and testimonial evidence submitted by the parties during the course of three days of hearing - simply does not support the parent's view of the situation that exists among the parties to this dispute, the student, his school and his family.

The student, now in the XX grade, has been educated in SAD 75 schools since he entered XX and has never come to school equipped with a recording device at any time during those years. Notwithstanding the absence of a device the parents now claim is required to provide the student with a FAPE, these parents are not unconcerned, uninformed, uninvolved, inactive nor excluded from any aspect of their son's education at SAD 75; rather, they are very involved and central participants in the entire process. They are active members of the IEP team, take part in the team's discussions in the development of the student's IEP[12]; the parents receive written daily reports from the school about the student's day at school, have monthly meetings with school staff, - often including both the school's director of special services and the student's case manager – to discuss the student's progress, have nearly daily contact with school staff when the student is being dropped off or picked up at school, carry on an active e-mail correspondence with school staff members, and have access to a school maintained online website. Rather than being excluded from access to their son's educational experience by the absence of a recording device they now seek, the record shows that the parents are, and have been, concerned, active and respected members of an effective and

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agreements involving the school and its employees. None of these alternate arguments is considered in this decision.

[12] Not only have the parents participated in the annual IEP team meetings, they frequently request – and receive – additional IEP team meetings during the year, sometimes as many as nine or ten additional meetings in a year, according to the school's director of special services.

competent team that has been responsible for the education of their son since he entered XX. The parents are intimately and significantly engaged on a day-to-day basis in the educational experience of their child.[13] The hearing officer concludes that the parents have had access to sufficient information to allow them to participate, in a significant and meaningful way, both in the development and implementation of their son's educational program at SAD 75 and in the invocation of the family's due process rights arising from the IDEA. The school's refusal to allow the student to attend school while wearing an audio recording device did not violate the IDEA.

CONCLUSION

For the reasons stated above, the hearing officer concludes that neither the school's response to the parent's request for documents nor its refusal to permit the student to wear a recording device while attending school violates state or federal special education law. No violation having been found, no order need be issued.

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Peter H. Stewart, Esq. Date:
Hearing Officer

[13] It is important to note that there is no challenge to either the content of the student's IEP or its implementation. Both the family and the school staff think that the student is doing quite well at school: the father testified that "…the last couple of years have actually been fairly good…last year I think he made significant progress…"; one school staff member reported "I think he's doing awesome this year.", and another said, "He's doing great." Given the challenges the student faces as a result of his various diagnoses, both his family and the school deserve congratulations on the progress he has made.