

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

May 21, 2013

13.059H— Parent & Parent v. RSU #57

REPRESENTING THE FAMILY: Pro Se

REPRESENTING THE DISTRICT: Eric Herlan, 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 took place on April 24, 2013 at the offices of Drummond Woodsum in Portland, Maine. Those present for the entire proceeding were the Mother, Father, Donna Ford, Director of Special Education, Attorney Herlan, and the undersigned hearing officer. Hearing Officer David Webb, Esq., observed the proceedings. Testifying at the hearing were:

The Father	
The Mother	
The Stepmother	
Mark Fisher	Principal, Massabesic Middle School
John Davis	Superintendent of Schools
Donna Ford	Director of Special Education
Elissa Covello	Special Education Teacher, Massabesic High School
Kristina Bear	Teacher, Waterboro Elementary School

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On February 28, 2013, the Parents filed this hearing request on behalf of their son (“Student”). On April 2, 2013, a prehearing conference was held at the offices of the Department of Health and Human Services (DHHS) in Biddeford, Maine. Participating in the conference

were: the Father; the Mother; Donna Ford, Director of Special Education; Eric Herlan, Esq., counsel to RSU #57 (“District”); and Shari Broder, Hearing Officer. David Webb, Esq., observed the proceedings. Witness lists were exchanged in a timely manner. The District submitted approximately 285 pages of exhibits (herein referenced as S-#). On April 5, 2013, the Father mailed 35 pages of exhibits (herein referenced as P-#¹). Although these were not within the time frame of the five-day rule, the District did not object to the admission of these documents into evidence.

The hearing took place on April 24, 2013. Both parties requested to keep the hearing record open until May 6, 2013 to allow the parties to prepare and submit closing arguments, which were submitted by both parties. The record closed upon receipt of these documents electronically on that day. The parties further agreed that the hearing officer’s decision would be due on May 21, 2013.

II. ISSUES:

1. Does the hearing officer have jurisdiction to hear the dispute over the limitations imposed by the District on the Student’s capacity to access the Internet on his school iPad after school hours?
2. Did the limitations imposed by the District on the Student’s capacity to access the Internet on his school iPad after school hours in any manner violate the Student’s rights under the Individuals With Disabilities Education Act (IDEA), including violating his IEP or denying him a free, appropriate public education?
3. If so, what shall the remedy be?

These issues are addressed below.

¹ The Father did not mark his exhibits with page numbers as instructed, but grouped them together, giving them exhibit numbers 1-11. The hearing officer marked all of these pages in exhibit order with numbers P-1 through P-35.

III. FINDINGS OF FACT

1. The Student is xx years old (DOB: xx/xx/xxxx), and lives with his mother (“Mother”) in N. Waterboro, Maine. His parents have joint custody, so the Student spends time regularly with his father (“Father”) and stepmother, who live in Standish. The Student is eligible for special education and related services as a student with multiple disabilities, including autism, mental retardation and speech/language impairment.
2. In the spring of 2011, the Student, who has a Facebook account, sent a teacher at Waterboro Elementary School, Kristina Bear, a Facebook friend request. Both of his parents have access to the Internet in their respective homes, and the Mother has an iPhone with a data plan, so the Student had Internet access at home. [Testimony of Father, Mother] In May 2011, the Student contacted Ms. Bear on Facebook from the Mother’s account, writing, “hi mrs bear this is [Student].” Ms. Bear responded to say that she does not talk with students or friend them on Facebook. [Testimony of K. Bear]
3. During xx grade (2011-2012), the Student had a school-issued laptop computer. The Student had some difficulties with laptop use, and was sending inappropriate messages to staff members which said things like “I hate you.” [Testimony of M. Fisher]
4. RSU #57 has a policy regarding student computer and Internet use. [S-1] This policy makes it clear that using computers and the Internet at school is a privilege, and that students who violate these policies and rules may lose these privileges. [Testimony of D. Ford, S-1-5]
5. The Student continued to contact Ms. Bear through the Mother’s Facebook account and his own account. Ms. Bear asked him not to do this. These emails frequently coincided with the Student seeing Ms. Bear somewhere in the area. [Testimony of K. Bear] Sometimes, the Student invited Ms. Bear to come to the Student’s house to drink beer and play games. [S-44]

When the Mother learned that the Student was sending messages to Ms. Bear, she emailed Ms. Bear, apologized and said she was working with the Student on stopping this behavior.

[Testimony of Mother]

6. The Student began using obscenities and threatening language in his emails to Ms. Bear. On September 22, 2011, the Student contacted Ms. Bear through the Mother's Facebook account again, and wrote, "This [Mother] My son play a bed word game I not let him play you want come my house? And have a beer? I'm kill you go to hell you fucking bitch your ass hole." [S-44] Consequently, the Student's computer use at school was tightly monitored.
7. In November 2011, Ellen Popenoe, Ph.D., conducted a neuropsychological evaluation of the Student. [S-170] Dr. Popenoe diagnosed the Student with autism and cognitive disabilities, and stated that he was in the very low range of intellectual ability. [S-178-179] She noted that the Student had shown increasing aggression since entering middle school. Dr. Popenoe reported that the Student's ability to efficiently and accurately process what people said to him was limited. [S-181] Dr. Popenoe also reported that the Student was very sensitive to perceived rejection and failure, and should be treated in a positive way. [S-180] At the time of Dr. Popenoe's testing, the Student was at a xx grade level of reading comprehension. [S-181]
8. The Student was in a life skills program with some mainstreaming. He also participated on the cross-country running and track teams at school. Although he always came in last, he enjoyed it and continued to participate, with hearty encouragement from his teammates. [Testimony of Father, P-1]
9. Alan Bloom, a licensed psychological examiner, conducted a psycho-educational observation and file review of the Student in November and December of 2011. [S-166-169] In his report

dated December 19, 2011, Mr. Bloom concluded that although the Student appeared very motivated to engage peers and adults in social interactions, his timing was not always appropriate. [S-169] Furthermore, he tried to use humor as a way of reaching out to people, but these attempts did not always end well, and often came across as being inappropriate.

10. The District addressed the Student's behavior issues by hiring a behavioral consultant, who created a behavior support plan for the Student. [S-184-189]

11. Because the Student continued to contact Ms. Bear, Ms. Bear met with the Mother, Father and Student at the Waterboro Fire Department on April 18, 2012 to attempt to work out the problem. Ms. Bear and the Parents tried to explain to the Student why it was important for him to stop contacting Ms. Bear, and to help the Student understand this. Ms. Bear felt the meeting was positive. [Testimony of K. Bear, S-39] Later that day, however, Ms. Bear received an email from the Student that was sent from the Mother's iPhone which said, "Hi kris your hoe." [S-40, Testimony of K. Bear] The Student sent Ms. Bear another email the next day, writing, "Hi Mrs bear how are you?"

12. Because the Student continued to contact Ms. Bear, she sought a protection from harassment order on May 22, 2012. [S-33] If the Student did not contact her for three months, she planned to drop the harassment order. [Testimony of K. Bear] The Student did not stop contacting her, however.

13. Towards the end of the Student's xx grade year, the school administration took the Student's laptop away from him because he was sending inappropriate messages to people. [S-29] The Parents were not notified of this. [Testimony of Father]

14. During the summer of 2012, Ms. Bear was teaching summer school at the same school the Student was attending. [Testimony of J. Davis, D. Ford] The Parents and school officials had

some concern about this, given the Student's online behavior towards Ms. Bear, so this was brought to the attention of John Davis, Superintendent of Schools. [Testimony of J. Davis] In early July 2012, the Father corresponded with the Superintendent about possible ways to deal with this, but it appeared that there was no easy solution. [S-229-233, testimony of Father] The following day, the Student emailed Ms. Bear from the Father's email account, and wrote, "You bitch" and "I will kill you." [S-28] The Father apologized and said the Student would no longer have access to the Father's computer or email. Two weeks later, on July 26, 2012, the Student attempted to "friend" Ms. Bear's husband on Facebook. [S-25] He sent Ms. Bear an email from his Mother's account on August 14, 2012 which said, "Hi kris boo." On August 20, 2012, the Student again emailed Ms. Bear from the Mother's account, and wrote, "Hi bitch how are you." [S-21, 22]

15. In September of 2012, the Student began attending xx grade at Massabesic High School.

Like all xx grade students, the Student was issued an iPad. [Testimony of J. Davis] Because of the Mother's and school personnel's concerns about the Student's Internet use, he was not issued an iPad until approximately two weeks after his classmates. This caused him some anxiety, as he did not like being treated differently than his peers. [Testimony of E. Covello] The Mother requested a meeting to explore safeguards to prevent the Student from sending emails to Ms. Bear. [Testimony of Mother] Special education director Donna Ford, the Student's teacher, Elissa Covello, the Parent, and Bob Stackpole, the school's technology director, met and discussed ways to block District email and all internet browsers. The Mother did not want the Student's Internet access too restricted, as she did not want his education to be compromised. [Testimony of E. Covello, S-243] The Mother also felt that the Student should receive an iPad just like every other xx, and that the pending legal action on

the protection from harassment order should not affect whether he was issued one. [S-243]

The participants agreed that the Student always had to be monitored on any device at school that had Internet access, and that he could still use apps. [Testimony of D. Ford, S-9] Only Ms. Covello was permitted to have the password that controlled the Student's Internet access.

16. The Student wanted to put music that he liked on his iPad, and the Mother wanted to install apps that would facilitate the Student's learning. [Testimony of Mother] Mr. Stackpole did not feel comfortable giving the Mother the password that gave the Student access the Internet. [Testimony of E. Covello] The plan was that the Student would come to school with an iTunes gift card, and he could purchase music and apps with this. Ms. Covello downloaded a few apps, and never refused a request from the Parents to download apps. [Testimony of E. Covello, Mother, D. Ford] The Student gave her a very long list of songs to download, and Ms. Covello asked the Mother's permission about some of the songs, as they were "racy." [Testimony of E. Covello] There were a number of apps available that benefitted students with autism but did not require Internet access.

17. In the Student's special education classroom, the students use laptops, not iPads. Half of the students in Ms. Covello's class do not have iPad², and none know that the Student has restricted access to the Internet. [Testimony of E. Covello] The Student's IEP does not call for Internet or computer use, and he has no goals involving either. [Testimony of E. Covello, D. Ford, S-92] The Student does not get homework assignments in his special education classes and does not need to use a computer at home for his classwork, nor does his schoolwork require Internet access at home. It does, however, cause the Student some stress when he cannot use his iPad to access the Internet and other classmates can. [Testimony of E.

² Only the xx received iPads, and half of Ms. Covello's students were xx.

Covello] Ms. Covello did not see this as affecting the Student's ability to benefit from his educational program, however.

18. Ms. Covello described the Student as happy, energetic and very driven. [Testimony of E. Covello] He does not like to be singled out in any environment. In xx school, he is very respectful. Although he has a behavior plan, his behavior has been very positive, and he has not been aggressive at all. [Testimony of E. Covello] Ms. Covello was not aware of any staff members who were afraid of the Student. The Student has great relationships with both his classmates and teachers, and is progressing towards his goals. Ms. Covello believes the Student has all the tools he needs to achieve the goals in his IEP. The Student has been working directly with a reading specialist. His current reading comprehension is at a third or fourth grade level. [Testimony of E. Covello]

19. In November of 2012, the Student began attempting to contact Ms. Bear over the Internet again. [S-10] On Facebook, he also asked a friend for Ms. Bear's cell phone number, and "poked" Mr. Bear. [S-12, 14, 15, 17] This prompted another meeting on November 29, 2012, with school personnel and the Mother³ to discuss the Student's Internet access. Ms. Ford described this as a difficult meeting. [Testimony of D. Ford, S-9] The participants agreed that they would work on loading the Student's music and selected apps onto his iPad at school, then disconnect his Internet access. [S-9] The District would not agree to allow the Student to access the Internet from the iPad at home, as they were concerned that the Student did not have good judgment when it came to avoiding contact with Ms. Bear. [Testimony of D. Ford] The Mother said that she felt the school was discriminating against the Student, and that he did not understand why he could not use his iPad in the same manner as other students. There was no discussion or other evidence that the Student's academic progress had suffered

³ These were the same participants as attended the September 2012 meeting.

because he could not access the Internet from his iPad at home. [Testimony of D. Ford]

Furthermore, the Student had the ability to access the Internet outside of school at either his Mother or Father's house on their computers. [Testimony of Mother, Father]

20. On December 13, 2012, the Student attended a basketball game at Massabesic with his Father. They were unaware that Mr. and Ms. Bear were there, too, but Ms. Bear became very upset when she saw the Student across the gym. [Testimony of Father, K. Bear, S-268, P-34-35] Mr. Bear wanted the Student removed from the school, and considered this a violation of the protection from harassment order. When Deputy David Chauvette arrived from the York County Sheriff's Office, he met with the Bears. Mr. Bear was very upset and verbally aggressive. [P-34] The Deputy checked with the District Attorney (DA), who said the Student's attendance was not a violation of the court order, and confirmed that there had been no contact between the Student and Ms. Bear. When the Deputy told Mr. Bear the DA's opinion, Mr. Bear became very irate, and began yelling and screaming profanities as he stormed out of the gymnasium and into the hallway. Ultimately, Deputy Chauvette had to restrain Mr. Bear, arrested him for disorderly conduct, and escorted him from the school. [P-34] When the Father learned what had happened, he and the Student left the school to avoid any problems.

21. Because the Parents were unhappy with the restrictions on the Student's Internet access, Ms. Ford suggested they meet with Superintendent Davis. In February 2013, the Parents met with the Superintendent. The special education office had told the Superintendent that having a home Internet connection was not a critical component of the Student's program. [Testimony of J. Davis] Superintendent Davis wanted to make sure that the Student had access to his program while assuring a harassment-free environment for District staff. Consequently, the

Superintendent was unwilling to change the existing status prohibiting the Student from having Internet access on his iPad at home as long as the protection from harassment order was in effect. [Testimony of J. Davis]

22. On April 19, 2013, the Mother and Ms. Bear appeared in Springvale District Court. At that time, the judge extended the Order for Protection from Harassment for another year.⁴ The current order is effective until April 19, 2014. [S-284]

23. Since he has been a student in Ms. Covello's class, the Student has not misused the Internet in class. [Testimony of E. Covello]

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parents:

The District has punished the Student for something that occurred outside of school, and justified it by applying its policy on school issued computers. There is no mention that this policy applies to home computers. As the Student made contact with Ms. Bear on home computers and iPhones, he did not violate this policy, and should not be punished by having his Internet access restricted. This was a matter between two families, and the District should not have become involved at all.

The District also argues that the Student's IEP does not require him to have an iPad with Internet access. This argument is apparently made to justify the District's ability to revoke the Student's Internet access and treat him differently. It does not make sense, however, because most students who have iPads or computers with Internet access have no mention of them in their IEPs.

The District's decision to deny the Student Internet access except when his teacher is

⁴ District Court Docket No. SPRDC-PA-2012-00226

supervising him has affected the Student negatively academically, socially and emotionally. The Student knows he is being treated differently than other students, and this is stressful for him. Computer training is very important for all students. The Student learns through repetition and visual learning, and the iPad helps him by offering repeated practice that he can do at home. Hindering the Student's access to the Internet prevents him from accessing certain applications that would help him succeed in school, while allowing him this access would enhance his curriculum and learning opportunities. If he is to reach his reading goal by graduation, Internet access would help him achieve that goal.

The Student's behavior this year shows that his punishment is unwarranted. Ms. Covello said he has had no behavior problems and she was unaware of any teachers in the xx school who were afraid of him. The punishment is unrelated to the Student's current status. The hearing officer should conclude that the District's restriction on the Student's Internet access violates his rights under the IDEA.

B. Brief summary of the position of the District:

The hearing officer only has jurisdiction over issues involving the identification, evaluation, placement and delivery of a free, appropriate public education (FAPE) under the IDEA. The hearing officer does not have authority over whether the District properly applied its local policies regarding Internet access when those policies apply to all students, unless the application of this policy denied the Student FAPE. That is not the case here. The Student's IEP does not include having Internet access, let alone access outside of school hours, so the denial of after-school Internet access does not violate the IEP. Therefore, this case should be dismissed.

Even if the hearing officer determines that she has jurisdiction, there is no evidence that the District's actions violated the IEP or denied the Student FAPE. As noted above, the

Student's IEP did not include Internet access, and therefore the decision to limit access did not violate the IEP. He does not even have homework requiring him to access the Internet. Second, the Student had Internet access after school hours on computer systems owned by his parents. Lastly, the Parents have made no showing that the Student's special education program fell short of IDEA standards. By all accounts, the Student is doing very well in school, making progress and having a very good year. Therefore, the Parents have failed to prove that the denial of after school Internet access on the iPad deprived the Student of FAPE or otherwise violated the IDEA.

C. Does the hearing officer have jurisdiction to hear the dispute over the limitations imposed by the District on the Student's capacity to access the Internet on his school iPad after school hours?

According to Maine Unified Special Education Regulation XVI.1 (B)(3) any parent or school department may submit a written request for a due process hearing when there is a dispute regarding the identification, evaluation, placement or the provision of appropriate services to a child. Here, the Parents have alleged that the Student's education has been compromised academically, socially and emotionally because he does not have access to the Internet on his school-issued iPad like other students do. As I have to examine whether this has affected the Student's educational program and deprived him of FAPE to answer this question, I conclude that this dispute is within the jurisdiction of the hearing officer.

D. Did the limitations imposed by the District on the Student's capacity to access the Internet on his school iPad after school hours in any manner violate the Student's rights under the IDEA, including violating his IEP or denying him a free, appropriate public education?

Every student who is eligible for special education is entitled under state and federal law to receive a free and appropriate public education designed to meet his unique needs and delivered in the least restrictive environment. 20 USC 1400(d)(1)(A). 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). The First Circuit also stated in *Lenn v. Portland School Comm.*, that the law sets a fairly modest goal of an appropriate, rather than an ideal, education. The benefit conferred does not need to reach the highest attainable level or even the level needed to maximize the child’s potential. 998 F.2d 1083, 1086 (1st Cir. 1993).

Decisions about what methodology to use are normally the province of the school district. “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).

As the Supreme Court held in *Schaffer v. Weast*, the burden of persuasion usually falls upon the party seeking relief. 546 U.S. 49 (2005). Therefore, the Parents have the burden of proving that the Student’s rights under the IDEA were violated by not having Internet access on his iPad after school.

Although I understand why the Parents are disappointed that the District will not allow their son the same privileges as other Students,⁵ I can find no evidence to conclude that this results in a deprivation of FAPE. There was no issue raised regarding violations of the IDEA’s procedural requirements. Substantively, by all accounts, the Student is having a very good year and making good progress in his educational program. [Fact #17] His parents and teachers were all pleased with his progress, and he is reportedly happy in school. The Father pointed out that Dr. Popenoe’s opinion said, “Individuals with cognitive functioning in the mild range of mental

⁵ On the other hand, the District’s position is also understandable, in light of the Student’s uncanny ability to obtain access to the Internet on various devices in his parents’ homes and to send inappropriate emails to Ms. Bear, despite his parents’ supervision.

retardation such as [the Student] are often able to achieve at least xx grade reading levels by the time they complete xx school.” When Dr. Popenoe evaluated the Student 17 months ago, she reported that his word reading and reading comprehension were both in the very low range and at a xx-grade level. [Fact #7] The Student has been working directly with a reading specialist at school. At the hearing, Ms. Covello testified that the Student was presently reading at a xx-to-xx grade comprehension level. [Fact #17] While reading comprehension is only one measure of progress, the Student has certainly progressed well in this area. There was no evidence that the Student was not making adequate progress in any area. In other words, he is making the kind of progress guaranteed to special needs students under the IDEA.

The Parents asserted that the Student was being deprived of educational benefits because he could not access certain apps that could supplement his learning in school. As the District noted, the Student’s IEP did not require Internet access or the use of apps. Therefore, failure to provide these does not violate the Student’s IEP. It is possible that the Student may obtain greater educational benefits or faster results by using iPad apps at home.⁶ The evidence was uncontroverted, however, that the District was willing to download any apps selected by the Parents onto the Student’s iPad, and never refused a request from the Parents to load apps onto the iPad. Furthermore, Ms. Covello did not think the lack of access to these apps was affecting the Student’s ability to benefit from his educational program, and there was no evidence to the contrary.

For these reasons, I cannot conclude that the unavailability of Internet access on the iPad deprived the Student of a free appropriate public education or otherwise violated the IDEA.

E. If not, what remedies are appropriate under the Individuals with Disabilities Education Act to compensate the Student?

⁶ This was not included in the Findings of Fact because there was no specific evidence upon which to make such a finding.

As the District has not violated the IDEA, no remedy is required.

V. ORDER

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

1. The District did not violate state or federal special education laws by not permitting the Student to have Internet access on his District-issued iPad when not at school.

SHARI B. BRODER. ESQ.
Hearing Officer