

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

MAY 15, 1997

Case # 97.005,

Parent v. School Administrative District # 1

Counsel for the Parent: Joseph Baldacci, Esq.

Counsel for the School: Eric Herlan, Esq.

Hearing Officer: Katherine Neale, M.Ed., J.D.

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-1, M.R.S.A., §7207 et. seq.; TITLE 20 USC, § 1415 et. seq.; AND IMPLEMENTING REGULATIONS.

On January 13, 1997, the Department of Education received a request for a Due Process Hearing from the mother through her counsel on behalf of her son, (hereafter Student).

The pre-hearing was scheduled for February 6, 1997. The parties mutually agreed to postpone the dates for the pre-hearing and hearing by at least ten days as they were actively engaged in settlement discussions. This request was granted and the new date was scheduled on February 25, 1997 following winter vacation week. The pre-hearing conference was held on February 25, 1997 via a telephone conference call. Exhibits submitted by the Parent are numbers P-1 through P-225 and exhibits submitted by the School are numbered S-1 through S-204. The parties failed to create a joint exhibit list and much of the production was duplicative. It was agreed to refer to the School's pagination unless the document at issue was solely produced by the Parent. Nine witnesses presented testimony. At the February 25, 1997 pre-hearing conference, the parent's counsel requested a ruling as to whether the hearing officer has authority to modify graduation requirements by ordering a district to accept elective credit from an organization outside the school district. On February 27, 1997, the parties' counsels were sent a decision on this issue via facsimile. The February 27, 1997 letter is **Attachment A** to this hearing decision.

The new hearing date was scheduled for March 7, 1997 and

canceled due to a winter snow storm. The hearing was rescheduled for April 1, 1997 and again canceled due to a spring snow storm. The hearing was held on April 30, 1997 in Presque Isle, Maine following spring vacation.

I. PRELIMINARY STATEMENT

Student is an xx year old student who is currently attending grade 12 at Presque Isle High School. He will be 2.75 credits short of the requisite 22 credits for graduation at the end of the 1996-1997 academic year. The initial complaint was based on the denial of waiver of credits for courses student took at the Upward Bound Intensive Supplemental Educational Support Program during the summers of 1995 and 1996. Additionally, the complaint alleges that the transition plan did not meet Student's needs and modifications in his Individualized Education Program (IEP) were not implemented. As noted above, Attachment A contains the decision that the hearing officer does not have the authority to modify graduation requirements by ordering a district to accept elective credits from an organization outside the school district.

Student was referred for evaluation by his kindergarten teacher in January, 1984 and found eligible for special services under the identifying category of Learning Disability. Student received special services from 1984 through May, 1989 at which time services were terminated by agreement of the Pupil Evaluation Team (PET). The services ceased at the end of his 4th grade (he repeated 1st grade). Student was again referred for evaluation in March, 1996 while in 11th grade and failing four core subjects. On June 3, 1996, the PET determined Student eligible for special education placement and services.

II. ISSUES

1. Whether the School failed to implement the classroom modifications in the Individualized Educational Program, thus denying the student a free appropriate public education.

2. Whether the School failed to develop a transition plan in a timely manner, thus denying the student a free appropriate public education.

III. FINDINGS OF FACT

1. Between August and February of 11th grade, Student made three Add/Drop course requests resulting in an academic course reduction. The Special Progress Reports from his regular education teachers indicate a student who was failing. Nearly every report references a failure to

complete assignments. In a letter dated March 5, 1996, the parent requested a psycho-educational evaluation because Student “failed last quarter, was receiving services in Elementary School, and is not presently achieving to his potential.”

[Exhibits S-81 through S-100].

2. On April 30, 1996, the School conducted an evaluation utilizing the Woodcock-Johnson Psycho-Educational Battery-Revised. The evaluator found Student to be functioning in the average range of aptitude with his cognitive skills failing in the low average to superior ranges. The greatest weakness was in processing information through auditory channels.

The evaluator found that Student displayed average or better levels of academic achievement in all areas except written language and this was attributed primarily to his low spelling skills.

Following a review of the records, the evaluator chronicled Student’s academic history since 4th grade when special services were terminated. In summary, she found that he failed spelling in 7th grade and failed geometry and Spanish in 10th grade, and passed all other subject until the 1995-1996 academic year (11th grade). It was the examiner’s opinion that factors other than Student’s previously identified learning disability were the primary cause of the difficulties he was experiencing. [Exhibits S-67 through S-74]

3. The Pupil Evaluation Team (PET) met on June 3, 1996 to review the evaluation and determined that Student was eligible for special education placement and services, ordered further evaluation for attention deficit disorder (ADD), and developed goals/objectives and classroom modifications. Special education services consisted of four to five hours per week of instruction in the resource room to improve spelling skills; to improve organizational skills; and to improve written assignment completion. Teachers were notified of the classroom modifications through a notice sent by the special education teacher to the regular education teachers of special education students. Additionally, the guidance counselors meet with regular educators and review IEP goals and objectives. [Exhibits S-50

through S-59; Testimony of Sharon Brown; Eric Wydell; Lisa Charette; Jennifer Plante; Edward Buckley]

4. The School’s copy of the IEP developed at the June 3, 1996 PET meeting included a transition plan calling for conferences with the guidance counselor. The parent’s copy did not include the transition plan page. The Parent say the transition plan for the first time at the October PET meeting. Melinda Duval noticed in August that there was no transition plan attached to the Parent’s IEP. The transition plan page of the IEP is part of the computer generated IEP. [Exhibit S-59; Testimony of Parent and Melinda Duval; Testimony of Sharon Brown]

5. On June 26, 1996, Dr. Franklin Thompson conducted cognitive, ADD, and emotional assessments. This evaluator confirmed the classification of learning disability and found a significant level of depression. He also identified Student as having Attention Deficit Disorder. Following a review of two evaluation scales submitted later by teachers, Dr. Thompson submitted an Addendum to Psychological Report on September 9, 1996 and concluded that there was no indication of ADD. [Exhibit S-40 through S-49]

6. The Pet met on August 22, 1996 to discuss the evaluations and review Student's program. A list of classroom modifications provided by the parent was discussed and agreed upon with minor changes. The modifications addressed three areas, i.e. written language, spelling and perceptual-motor assistance; auditory processing and attention assistance; and time and organizational issues. In all, there are thirteen specific modifications [Exhibit S-28 through S-38, there is no page 37]

7. Student stated that most of the modifications have not been implemented by his teacher. Specifically, the following: notes are not provided by any teacher; access to the word process is not offered unless the whole class goes to the lab; teachers are not standing still while giving oral information; teachers do not check his comprehension; he is not offered preferential seating; and he believes he is penalized for spelling and handwriting errors. [Exhibit S-38. Testimony of Student]

8. The College English III teacher reported: received a copy of the modifications following the August 22nd PET meeting and keeps it on his desk; note-taking is not required in his class; there is no penalty for spelling or handwriting errors; there is no computer in his room, but Student has been able to take assignments home to do; extra time is given for assignments; and the planner log is used every day. [Testimony of Eric Waddell]

9. The College Algebra II teacher reported; she is familiar with the modifications; provides long assignments in writing; word processing is not necessary in math class; note-taking is not required as all the information is in the text book; extra time is given for tests which can also be taken in the resource room for fewer distractions. [Testimony of Lisa Charette]

10. The General English IV teacher reported: she attended the August PET meeting and is familiar with the modifications; assignments are given in writing; a majority of the work is done in class and Student is allowed to go to the computer lab; assignments are kept in the planner log; Student's last quarter mark was 94% and so far this quarter he has a 93%. [Testimony of Jennifer Plante}

11. The Applied Physics teacher reported: he is familiar with the modifications, but

doesn't remember when he got a copy; note-taking is not required as he uses the board for examples, then the class uses work sheets in small groups; no homework is given; Student asks questions in class and does well' Student has not required extra time to complete quizzes and tests; Student's grades are good and he is doing well in class. [Testimony of Edward Buckley]

12. The PET met on October 30, 1996 to consider transition services and the parent's request for credit waiver. The minutes reflect much discussion around the graduation credits and the parent's request to award elective credits for the Upward Bound classes. School representatives expressed concern that the Upward Bound classes did not seem equivalent in time and expectations, nor were they supervised by high school personnel. Representatives for the family's position stated that the course work at Upward Bound was rigorous and appropriate to use for electives, and that summers spent at Upward Bound were far more appropriate for Student than summer school and better reflected his future goals. Despite the parent's objection, the determination was not to award credits for the classes at

Upward Bound. Regarding the transition services, the minutes reflect that Student had taken inventories at Upward Bound to help decide career options and had been planning for a career with his guidance counselor. Student wants to go to college and hopes to be a nautical navigator. A representative from Vocational Rehabilitation was present at the PET meeting and explained their program. The team added to the transition plan that Student "will take classes that will prepare him for post-secondary success" and a "referral to Voc-Rehab". The special education teacher reported in the minutes that Student had made good progress in spelling and writing and had jumped two grade levels. The team agreed to increase his goals for spelling and writing. The guidance counselor testified that he had been meeting with Student to develop his post-secondary goal. As early as August 25, 1995, there is an add/drop form containing a statement that Student "understands that by dropping chemistry, this may affect his choice of post-secondary schools." [Exhibit S-20 through S-23A; S-93.

Testimony of Mike Tardiff]

IV. CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA) requires that the local school unit provide students identified as disabled with a "free appropriate public education." [20 U.S.C.A. § 1412 (2) (B)] IDEA provides little guidance as to what constitutes an appropriate program. The United States Supreme Court in Board of Education v. Rowley, 102 S. Ct. 3034 (1982) concluded that the law imposes a two-fold obligation on the school in developing an appropriate program: the program

developed must meet the procedural requirements of the law and regulations; and the program developed must be reasonably calculated to provide the student with educational benefit. [Rowley, 102 S. Ct. at 3051] The Court concluded that IDEA does not require schools to maximize a student's potential in developing the IEP. [Rowley, 102 S. Ct at 3049]

In addressing the first prong of the Rowley test, the Court ruled that the procedural requirements of IDEA are as important as the substantive requirements of the law. The 1st Circuit Court of Appeals (Maine is in this Circuit) noted that a school's program may be found in violation of the law on procedural grounds when the "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formation process, or caused a deprivation of educational benefits." [Roland M. v. Concord School Dept., 910 F. 2d 983, 984 (1st Cir. 1990)] However, it should be noted that where the school's procedural violation has been technical and non-prejudicial, it may not, per se, defeat an individualized educational program. [Doe by Doe v. Defendant I, 16 EHLR 930 (6th Cir. 1990)] Relief is also not available where the due process violation does not cause harm. [Myles S. v. Montgomery County Board of Education, 20 IDELR 237 (M.D. Ala. 1993)]

In addressing the second prong or the issue of "educational benefit", the Supreme Court stated that for a student with a primarily mainstream program, the standard is likely met if the program "is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." [Rowley, 102 S. Ct. at 3049, 3051 n. 28] It is clear from the law that the standard is more than minimal benefit or slight academic gains. The First Circuit Court of Appeals has also made it clear that educational benefit would require "demonstrable improvement." [Roland M., F.2d at 991]

In the present case, the Parent alleges that the modifications identified in the student's IEP have not been implemented in the regular education classes, thus denying him a free appropriate public education (FAPE). Student testified to the following regarding modifications: he has not been provided notes by teachers or classmates in any of his four subject classes; he has not been offered access to the word processor except when the whole class goes to the lab; three of the four teachers routinely move around the room when giving instructions; three of the four teachers do not check his listening comprehension through periodic feedback; he has no preferential seating; extra time for assignments completion is routinely given; and he believes he has been penalized for

spelling and handwriting errors. The School maintains that all the modifications are not necessary or relevant in every class. All four faculty members testified that they had been provided with a copy of the modifications at the beginning of the school year and are familiar with the contents. Regarding the modifications pertaining to written language, spelling and perceptual-motor assistance, i.e. providing notes, using a word processor and not penalizing for spelling mistakes, the teachers testified that they did not have note-taking requirements; that any long assignments are given in writing to the students; that the topics discussed are also in the text book (College Algebra II); that permission to use the word processor is given (General English IV) or in the case of the class without a computer in the room (College English III), S was allowed to take the assignment home to do there; and that there is no penalizing for spelling or handwriting. The Algebra and Applied Physics teachers did not believe a computer would be useful or beneficial in their classes. Another modification area with eight subparts is auditory processing and attention assistance. In General English, the teacher noted that Student received a grade of 94% last quarter and has attained 93% so far this quarter. In Applied Physics, where no homework is given, Student is doing well in class on quizzes and tests and has good class participation. The Algebra teacher stated that Student very often has his hand up to answer questions long before other students have worked it through to the answer. The third section relates to time and organizational issues. The teachers reported allowing for extended time for tests and assignments, and that Student could take the test in the resource room if he chose. The Applied Physics teacher found that Student did not require extra time to complete assignments. The two English teachers reported using the planner log.

It appears from the record that Student's teachers are all aware of the modifications in the IEP (one teacher keeps it on his desk) and do in fact implement the specific subsections that are relevant and necessary to ensure Student's participation in the regular education program. IT also appears from the record that Student is doing well in his courses and in some classes doing very well. There is no evidence of teachers not implementing modifications when necessary, nor is there evidence of any harm to Student if all of the thirteen specific modifications are not used. Hopefully, Student feels confident enough to advocate for himself if he needs a particular modification. In conclusion, there is no finding of a failure to

implement the IEP as per the modifications. Student is achieving passing grades and is making more than slight academic gains.

The parent is also alleging that the School failed to develop a transition plan in a timely manner, thereby denying Student a FAPE. Maine Special Education Regulations §§ 2.27, 5.16, 8.8 all pertain to the provision of transition services. The law requires the PET to include transition services in the IEP “beginning no later than age 16”[MSER § 5.16] At the time Student was determined eligible for special education services on June 3, 1996, he was already 17 years old. The School maintains that a transition service plan was developed at the June 3, 1996 PET meeting and the school produced a copy. The Parent states that her copy of the IEP did not contain a transition plan page. The Parent and Student testified that there was no discussion of transition services at the June 3rd PET meeting. There is no mention of a discussion of transition services in the June 3rd or August 22nd PET minutes. The minutes from the October 30, 1996 PET meeting indicate a discussion of transition services and a representative from Vocational Rehabilitation was present at the meeting.

Transition services means “a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education...”[MSER § 2.27] The minutes from the October 30th meeting include a statement that Student “has been planning a career with his guidance counselor.” The guidance counselor testified that he knew of Student’s interest in nautical navigation; had looked into the Maine Maritime program requirements; had reviewed the math requirements with Student’s Algebra teacher; and had

consulted with Student regarding course requirements and his credit status. Further, Student had taken career inventories through the Upward Bound Program. The Special Education Director testified that from her perspective the discussions at the June 3rd PET meeting regarding course work for college preparation and the resource room services to help prepare him to succeed constituted transition planning. Arguably it would have been more appropriate and productive to have a framework around the discussion of transition services so that everyone at the table could participate intelligibly on the subject. The Parent's frustration and belief that she was unable to participate in the process of developing the transition plan until the October 30th PET meeting is understandable. Even if the plan was not properly formulated until October, the evidence indicates that the guidance counselor and Student met and discussed course options relative to his plans for college prior to October. Even if a procedural violation were to be found here, it is non-prejudicial and Student has not been harmed. There is no evidence that Student was denied FAPE due to the (arguable) delay in properly developing the transition plan.

V. DECISION

There is no evidence of a failure to implement the IEP as per the modifications nor is there evidence of a denial of a FAPE regarding the allegation pertaining to transition services. The School has prevailed.

Katherine A. Neale, M.Ed., J.D.
Hearing Officer

LIST OF WITNESSES

Sharon Brown, Special Education Director

Parent

Student

Melinda Duval, Upward Bound Coordinator

Mike Tardiff, Guidance Counselor

Lisa Charette, Algebra Teacher

Eric Waddell, English Teacher

Jennifer Plante, English Teacher

Edward Buckley, Physics Teacher

ATTACHMENT A

**Katherine A. Neale, M.Ed.,
J.D.**

32 Vesper Street, Portland, ME 04101 207-761-8040;
kneale@ime.net

February 27, 1997

Joseph M. Balacci, Esq.
VIA FACSIMILE

6 State Street, Suite 403
(942-8271 & 772-3627)

P.O. Box 1423

Bangor, ME 04402-1423

Eric R. Herlan, Esq.

Drummond, Woodsom & MacMahon

245 Commercial Street

P.O. Box 9781

Portland, ME 04104-5081

RE: Eaton v. M.S.A.D. No. 1, Hearing # 97.005

Dear Messrs. Baldacci and Herlan:

Pursuant to our telephone conference call of February 25, 1997,
the purpose of this

letter is to respond to the query of whether or not a hearing officer has the
authority to

modify graduation requirements by ordering a district to accept elective
credits from an

organization outside the district.

The short answer appears to be, no, there is no such authority.

A review of the literature and decisions indicates that "a school

district is not

required to award a regular diploma to a handicapped student who does not meet the

requirements for a regular diploma, regardless of whether the handicapped student has met

the requirements of the IEP.”[16 EHLR 307, Special School District of St. Louis County

(1989)] That being said, there are notice requirements of a credit deficiency and the need

for the PET to meet prior to graduation to ensure that the graduation requirements have

been met and that the IEP goals and objectives have been achieved. [25 IDELR 161,

Lauderdale County School District; 17 EHLR 288, Letter to Richards (1990)]

Federal regulations do not speak to the question of standards for graduation.

Qualifications for graduation are strictly a local district matter. The federal regulations

require only that the criteria for participation in the regular graduation ceremony be neutral

on its face with respect to handicap {34 C.F. R. § 194.4] Has any other student in the

district been given credits toward graduation from Upward Bound or a comparable

program?

The parents of a student with a student with a disability may question through a due process

hearing “any matter, decision or recommendation relating to the identification, evaluation,

placement of the student and/or the provision of a free appropriate public education to the

Eaton Letter # 97.005 p.2

student.” [Maine Special Education Regulations, §1.6] Modifying graduation credits by

accepting the Upward Bound Program as elective credits does not appear to be a FAPE

issue.

In light of this communication, please inform me of the outstanding issues for

hearing.

Sincerely,

Katherine A. Neale

Hearing Officer

cc: A. Leigh Phillips, Due Process Consultant (via mail)