

Special Education Due Process Hearing Decision
Parents v. Freeport

June 26, 1998

CASE NO: 98.063

REPRESENTING THE PARENT: Mother

REPRESENTING THE SCHOOL: Peter Lowe, Esq.
Brann & Isaacson

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207 et. seq., and 20 USC 1415 et. seq., and accompanying regulations.

The Student an xx year old student and resident of Freeport, Maine filed a complaint with the Department of Education on his own behalf on March 18, 1998, in which he alleged that the school had failed to comply with a recent hearing officer's decision. (See Case #97.204, 2/11/98) On April 21, The Student filed a request for a due process hearing stating that the school had failed to implement the program ordered by the hearing officer by denying certain services to him. Both the complaint and the hearing were assigned to the same hearing officer. However, after completing the complaint investigation but before convening the hearing, the hearing officer resigned.

The present hearing officer was appointed on May 22. A pre-hearing conference convened on May 29. The student presented his issues for hearing. The school objected to the issues presented on the grounds that most of these issues had been the subject of the complaint investigation, and the complaint investigator had reached conclusions on these issues. The hearing officer ruled that since the complaint investigation report had yet to be released by the Department, and had not been reviewed by the hearing officer or the parties, the hearing issues would go forward as presented in the student's request. The parties exchanged documents and witness lists. The student objected to schools documents S-1, S-8, and S-9. The hearing officer ruled that these documents were not relevant to the issues under consideration.

The hearing convened on June 4, 1998. Mother, represented her son at this hearing. During her opening statement she objected to a number of additional school documents: S-2, 3, 5, 10, 11, 12, 13, 14, and 15. After review of these documents, the hearing officer finds they lend historical context to the issues under dispute and has allowed them to remain in the record. Items S-8 and 9 were reinstated during hearing testimony, also for this reason.

The school entered 36 documents into the record numbered S-2 through S-38; the student entered 37 documents, numbered P-1 through P-37. Five witnesses gave testimony. The parties elected to waive oral closing statements in favor of written submissions. The hearing record remained open through June 11 for this purpose. Following is the decision in this matter

I. Background Statement

The student is an xx year old student who is eligible for special education services under the category of “behavior”. He enrolled in the Freeport Schools in the summer of 1996. In September 1997 he was removed to an interim alternative educational placement for 45 days as a result of bringing a knife on school grounds. In November he returned to the high school, but was suspended a few days later for threatening and assaultive behavior. The PET met and recommended a therapeutic day treatment placement. The Student’s mother objected to the recommendation and requested a due process hearing. The hearing officer found the placement recommendation “educationally sound”, but determined it was not reasonably calculated to provide him with educational benefit because he had refused to attend. The hearing officer then ordered individual counseling for the Student and his family, and tutoring at the public library “at a rate sufficient to allow for the Student’s spring graduation if the Student. participates fully in the tutoring program”.

On March 18, The Student filed a complaint with the Department of Education alleging that the school had failed to comply with the hearing officer’s order. On April 21 he filed a request for a due process hearing stating that the school had failed to implement his program.¹

It is the contention of the student that the school has failed to provide him with the tools necessary to be successful in his tutoring program, and that this failure has resulted in his inability to complete the required coursework to earn a diploma. He argues that the school made significant changes in his program without his participation, and that they have failed to provide the program in a location appropriate to his needs. He argues that these procedural and programmatic violations have interfered with his ability to receive a free appropriate public education.

It is the position of the school that since the hearing decision in February, the Student’s tutoring program has been marked by a lack of cooperation and attendance, and a failure to perform required work. They state that he has engaged in threatening and abusive conduct toward his tutor. They argue that the change in location was the direct result of the Student’s behavior resulting in the public library withdrawing its permission to use this space, and their concern for the tutor’s safety.

II. Issues

1. Has the school implemented the program as ordered in the hearing decision, 97.204, and described in the IEP written on March 31, 1998? Specifically, has the school:
 - a. denied the student’s identified need to tape record material,
 - b. failed to provide a certified special education teacher to implement the program,
 - c. failed to provide the program in a location appropriate to the needs of the student,
 - d. failed to provide instruction in a course chosen for credit by student, and

¹ Initially both due process actions were assigned to a single hearing officer. After completing the complaint investigation, but prior to convening the hearing, the hearing officer resigned. The report of the complaint investigation was held in abeyance until the conclusion of the hearing. The school objected to the consideration at hearing of any overlapping issues. The hearing officer ruled that all issues identified in the student’s request for hearing would be considered in the hearing, regardless of whether they had been investigated by the previous hearing officer in the complaint.

- e. failed to allow student to take an exam resulting in a failing grade in subject.
2. Has the school violated procedures in regulation that interfered with the student's ability to receive a free, appropriate public education? Specifically:
 - a. were significant changes made in the Student's program without the student's participation or notice,
 - b. did the school fail to transfer rights to the student on the occasion of his xx birthday.²

III. Findings of Fact

1. Recent psychiatric testing states that the Student has a "14 year history of problems with inattention, hyperactivity, aggression, negative attention-getting behaviors, use of abusive language towards others, and difficulty getting along with peers and adults. He has particular difficulty with rules and limits." He is diagnosed with Attention Deficit Disorder and Conduct Disorder, Childhood Onset. The evaluator has known the Student for three years. (Exhibit: S-6)
2. The hearing officer's order in Case # 97.204 dated February 11, 1998, states:

Freeport will provide off campus counseling and supporting transportation costs for up to 5 sessions/week. The actual number of sessions up to 5 to be decided by the counselor³.

Freeport will provide the Student's mother with up to one session of family counseling and transportation cost per week. The actual number of sessions up to one per week to be decided by the counselor. These counseling sessions will continue uninterrupted through school vacations until changed by the PET action or the Student's graduation.

Tutoring will continue at the Freeport Public Library at a rate sufficient to allow for the Student's spring graduation if the Student. participates fully in the tutoring program.

Freeport is to revisit the existing transition plan to bring it into compliance with IDEA 97, specifically as it relates to adult students and notification of the transfer of rights and safeguards. (S-19)

3. As a result of the hearing officer's decision, the PET met on March 31, 1998 to write a new IEP which reflected the hearing officer's order to continue tutoring, and to write a transition plan. The team was notified at that meeting that the Student and his mother had received notice of the transfer of rights to the student in a letter dated March 9, 1998. (Exhibit: S-27)

² At the prehearing conference the student also asserted that the school had failed to assume all costs associated with a PET ordered evaluation performed in October 1997. Review of billing documents associated with this evaluation showed that the school had paid all costs, but the agency performing the evaluation had double-billed the parent in error. This issue was removed from consideration.

³ Currently, C only participates in one individual counseling session per week. The counselor did not testify, so it is not clear if more frequent sessions are desirable. It was not raised by the student as an issue. School staff stated that authorization for more sessions per week has been given to the counselor.

4. The school continued to provide tutoring up to 2 hours per day at the public library. Library staff terminated access to the facility on April 28, 1998, because of the Student's "inappropriate behavior while in the library". The tutoring location was moved to the school's administrative offices. The Student has attended tutoring only twice since that date. He states he cannot focus on work at this tutoring location. (Exhibit: S-29; Testimony: Nason, Pelletier, Student)
5. In a letter dated March 9, 1998, the school notified the Student that "parental [special education] rights transferred to him on his xx birthday". Minutes of the PET meeting following the receipt of this letter state that "[t]he team reviewed the transition plan and the transfer of rights of an adult student". (Exhibit: S-27)
6. The Student has been receiving tutoring services (except for a brief period) since September 1997 for all coursework. The Student has not earned sufficient credits to graduate. The tutor who works with him is not a certified special education teacher. She does not work under the supervision of a special education teacher assigned to the Student. (Testimony: Nason, Pelletier)
7. The Student attends individual therapy once a week and family counseling with his mother once a week. The counselor writes that "[t]he primary focus of our work has been anger management. [The Student] has been invested in the therapy as shown to me by both his attendance and his involvement". There has been no communication, nor coordination, between the counselor and school staff. (Exhibit: P-34, Testimony: Nason, Pelletier)
8. The Student turned xx on December 16, 1997.

IV. Conclusions

Has the school implemented the program as ordered by the hearing officer in Case No. 97.204?

The hearing officer in Case No. 97.204 concluded that the therapeutic day treatment program recommended by the PET was a sound educational decision, but reasoned that to order such a program was unlikely to provide the Student educational benefit. The Student's past history with treatment programs, his age, and his adamant refusal to attend such a program were sufficient to convince the hearing officer. Therefore, based on The Student's testimony at the hearing and his recent work effort with the tutor, the hearing officer ordered the school to continue individual tutoring with the aim of assisting the Student to graduate at the end of the 1997-98 school year.

The student argues that he was unable to benefit from this tutoring because he was refused certain tools to succeed: the use of a tape recorder during instructional time; a certified special education teacher to work with him when he began to fail math; instruction in a course he selected for the last quarter called "Independent Living"; and, the opportunity to take his final "Balance of Power" exam which resulted in his failing the course. He states that the school's actions have made it impossible for him to complete his senior year and graduate with his class. From the Student's viewpoint it has been a dismal year full of stress created by the school. He states that this is the worst school year in his entire school history.

This assertion is in direct contrast to the school's position that the Student has failed to earn the credits to graduate because of his abusive, angry demeanor toward his tutor and his refusal to do the work assigned to him. School staff testified that the Student's behavior concerning his schoolwork and the tutoring sessions has been non-compliant to the extreme. He has been verbally abusive to the tutor, has expressed anger in inappropriate ways, and has threatened her safety. The school denied his requests to tape tutoring sessions because he was using the recorder to harass the tutor. He was denied the opportunity to turn in his "Balance of Power" exam because he failed to comply with the timelines given for completing the exam. He was given no instruction in "Independent Living" because he gave no indication by his actions that he was prepared to complete the work to pass this course. He has used foul and provocative language in a loud, rude voice so that the library staff have denied him access to the building as a site for tutoring. He worked only sporadically on academic assignments and has consistently handed in assignments late and of marginal quality.

It is clear from a review of the record that the school year has been full of turmoil for both the school and the Student. Evidence supports the school's contention that the Student has displayed behaviors and a work ethic not conducive to the successful completion of his school year. However, it must not be forgotten that the Student is a special education student whose disability is "behavioral impairment". Use of abusive language, impulsive behavior that undermines his progress, and aggressive negative attention-getting behaviors make up his psychological profile.

While these were perhaps the very reasons the school wished to place the Student in a therapeutic treatment center, the hearing officer removed that option. He did not, however, order the school to disregard the Student's need for support and structure. Evidence does not support the Student's contention that the school failed to implement the hearing officer's order because of the specific items he lists. However, it is clear that the Student has failed to benefit from the tutoring ordered by the hearing officer. The Student is unable to maintain his behavior in an appropriate manner so that he can obtain educational benefit. He has been unable to interact with the tutor and accept assistance in a way that has allowed him to complete work and earn credit toward graduation. This does not excuse his behavior, but rather, reinforces his need for some type of therapeutic support with the purpose of assisting him to manage his behavior and therefore benefit from his tutoring program.

Secondly, the problems exhibited by the Student throughout the school year point to his need for properly certified personnel to direct his program. The Student has been receiving tutoring for the majority of the school year. Regulations state that "[t]utorial services shall not be conducted for more than 60 calendar days without prior approval by the Commissioner. Tutorial services in excess of 60 calendar days shall be provided by a certified special education teacher." [MSER, Section 5.11] The school has secured the permission of the Commissioner of the Department of Education to extend tutoring beyond the 60 day limit. The requirement for a certified special education teacher to provide the tutoring was not be waived by the Commissioner's letter. The Student argued that he required access to a certified teacher to support his deficits in math so that he might pass his algebra class. There is no evidence that the Student requires special education in the area of math. His claim for a certified special education teacher in this area is unconvincing. However, there is certainly a need for a certified special education teacher with knowledge and experience in working with behaviorally impaired students to manage a program for him.

The school states that they have been unable to hire a certified special education teacher to tutor the Student, in spite of multiple advertisements, but that they made a special education teacher available to the Student. He chose not to access these services. This does not meet the intent of the regulation. If the school was unable to hire a certified teacher to provide tutoring, at the very least, a certified teacher should have been supervising the provision of services, and assisting the in management of a behavior plan. Testimony from the tutor makes clear that a special education teacher did not supervise the Student's program, and, in spite of the Student's continuing inappropriate behavior toward her around his school assignments, no behavior plan exists. This is not to diminish the tutor's efforts to carry out the Student's program. She was in a position of managing a program for which she is not qualified, for a young man who presents multiple challenges. Obviously, the Student cannot manage his behavior on his own. This inability has a direct and significant impact on his ability to benefit from his education.

The student's therapist writes that therapy sessions focus is on anger management, and the Student is invested in his therapy. It is not evident if the Student will invest that same energy in managing his anger and other inappropriate behaviors in an educational setting. But, he should be given the tools to try. The PET, with the assistance of the Student's therapist, must develop a behavior plan that determines appropriate behavior goals and consequences for the Student. The Student must buy in to this plan so that he can participate successfully in the tutoring program, and earn his high school diploma. The Student's therapist must have an active role in implementing this plan with school staff.

Has the school violated procedures?

The Student asserts that the school has violated procedural safeguards that have resulted in his ability to receive a free appropriate public education. Specifically, he claims that the school made significant changes in the IEP without notifying him, or allowing him to participate in the decision, when administrative staff extended the timeframe for the second grading period. Secondly, he claims that the school failed to properly transfer rights from the parent to student who has turned xx resulting in a violation to his right to privacy.

Recent changes in the Individuals with Disabilities Education Act (IDEA) now require schools to transfer rights assigned to parents of disabled students to the student when the student reaches the age of majority. "...[T]he public agency shall provide any notice required by this section to both the individual and the parents; (B) all other rights accorded to parents under this part transfer to the child; (the Student) the agency shall notify the individual and the parents of the transfer of rights..." [20 USC Sec. 1415 (m)(1)] The record shows that the school properly notified the Student and his mother of the transfer of rights, a fact the Student does not dispute. Rather, it is his claim that the school violates his right to privacy by including all notices to both he and his mother.

The school is not in violation of procedures relating to the transfer of student rights. The law requires that notice be provided to "both the individual and the parents". The school has complied as required by law. There is no merit to the Student's claim that addressing notices and letters relating to his special education program to both the Student and his mother violates his right to privacy. There are no extenuating circumstances that would dictate them to do otherwise. The Student

resides with his mother. She continues to write letters to the school on his behalf. She represented him in this hearing.

All other rights accorded to parents have been transferred to the Student. The Student has clearly exercised these rights as evidenced by his recent request for a due process hearing and a complaint investigation.

“The parent [or student of legal age]...shall be sent prior written notice...prior to the implementation of a change of the student’s placement or the student’s Individualized Education Program. Notification shall be repeated in the event of a proposal that the Individualized Education Program be terminated or significantly altered. Changes that significantly alter an [IEP]...shall include: the addition of new services...; a significant change in the amount or frequency of services...; the termination of...services; the transfer...from one special education placement to another, and; a change in the educational goals and/or objectives...” [Maine Special Education Regulations, Section 9.5]

School administrative staff extended the time for the second grading period beyond that of the regular curriculum. This action by the school does not constitute a “significant change of program” as defined in regulation. Therefore, there was no requirement for the school to provide prior written notice, nor to convene a PET to make this change in his program. The Student claims that this action by the school resulted in his third quarter being only 3 weeks long, putting him at a disadvantage. Having no advance notice of the change in dates might have caused some disruption in his personal agenda, but it is not a violation of procedures. Given that his program is individually structured and that grades earned are based on an individually designed set of requirements, it is unclear what impact this might have had on his ability to benefit from his education.

III. Order

1. The school shall convene the PET within 10 days of the beginning of the new school year to develop a behavior plan for the Student as part of his tutoring services. The team shall include the Student’s counselor personally, or a document to the team from the counselor, for his input regarding the construct of such a plan.

Documentation that the school has complied with this order shall consist of the minutes of the PET meeting at which the plan was developed, and a copy of the plan. This material shall be sent to the Commissioner no later than September 15, 1998.

2. The school shall hire a certified special education teacher with a background in behaviorally impaired students to provide tutoring services for the Student. The school is to advertise for such a person throughout the summer. If the school is unable to hire a qualified professional, the school shall assign a certified special education teacher with background and experience in working with behaviorally impaired students to supervise and direct the Student’s program, and the daily work of the tutor who instructs the Student.

Documentation shall consist of copies of advertisements for this teacher, and a letter from the Director of Special Education to the Commissioner detailing the personnel and structure of the

Student's tutoring program for the 1998-99 school year. This material shall be sent to the Commissioner no later than September 15, 1998.

Carol B. Lenna, Hearing Officer