

Special Education Due Process Hearing Decision
Lewiston School Department v. Parent _____

CASE NO: 99.055

REPRESENTING THE SCHOOL: Eric Herlan, Esq.
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REPRESENTING THE PARENT: Richard O'Meara, Esq.
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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 case involves the Student who resides with the Parents. The Student is eligible for special education services under the category of "other health impaired". He is currently attending school at the Day School of the Southern Maine Learning Center, a private special purpose school for students with learning disabilities and attention problems in Portland, Maine. The Student's placement at the Day School was the result of a unilateral placement by his parents.

The hearing was requested by the Lewiston School Department on March 13, 1999. The parties convened by telephone conference call on Wednesday, April 7 1999, for a prehearing conference in preparation for the hearing. Participating were: The Parents; Mr. Richard O'Meara, their attorney; Mr. Curtis, Director of Special Education, Lewiston School Department; and Mr. Eric Herlan, the school's attorney. Documents and a list of witnesses were exchanged by the parties prior to the telephone conference call.

At the direction of the hearing officer, and with no objection by the parties, the hearing was limited to two days of testimony. Each party was allowed one day in which to present their case. The hearing convened on Tuesday, April 13, and was continued to Wednesday, April 28, 1999, the first day available to both parties. At the request of the school, and with no objection from the parents, the hearing record remained open until May 10 for the submission of closing briefs. One hundred and nineteen documents were entered by the school; ninety-three documents were entered by the parent. Eight witnesses presented testimony.

Following is the decision in this matter.

I. Preliminary Statement

The student is a xx-year old fifth grader who is eligible for special education services under the category of "other health impaired". He is diagnosed with Attention Deficit Hyperactivity Disorder and Bi-polar Disorder. He is currently attending a private special purpose school in a neighboring city, having been placed there by his parents.

The school brings this hearing, arguing that it has offered a free appropriate public education for the student in the least restrictive educational environment. It is their contention that they have in place a program which is reasonably calculated to provide the student with educational benefit in the public school, and are prepared to implement that program should the student return to the public school.

It is the contention of the parent that the public school cannot meet the student's needs. They argue that in order to benefit from his education, he requires the structure and expertise offered by the private school. Further, they contend that the school violated procedures, which drove them to seek out alternative educational options.

II. Issues to be Decided by the Hearing

1. Has the school provided the student with a free appropriate public education in the least restrictive educational environment?
2. If not, are the parents entitled to reimbursement for their unilateral placement?
3. What remedies are the parents entitled to receive for any violations of law and regulations?

In addition to the issues stated, the parents have alleged the following procedural violations.

1. Failure to refer, evaluate and identify the student as a student with a disability in a timely fashion.
2. Failure to evaluate the student in all areas of his disability.
3. Failure to include the parents in the development of an IEP and proceeding with the development of an IEP outside of the PET process.
4. Predetermination of the student's placement before the development of an IEP.
5. Offering a public school placement for the student that was not currently available due to excessive student enrollment.

III. Findings of Fact

1. The parents moved into the school district in 1994 at the conclusion of the student's first grade year. They enrolled him in parochial school where he repeated first grade. He remained in the parochial school through third grade. The parents testified that third grade had been particularly difficult for the student. He experienced significant physical symptoms such as sleepwalking, anxiety, headaches, and stomachaches, which they felt were school-related. They reported that he was angry and depressed, and was often aggressive toward his younger brother. They removed him from the parochial school at the conclusion of that year. The student was home-schooled for his fourth grade year, with the assistance of a tutor hired by the parents. He received tutoring for 9 hours a week from November 1997 through June 1998, and 4 hours of tutoring through the summer months. A summary written by the tutor details the student's problems with attention, focus and work-related behaviors. According to the tutor the student exhibited a high intelligence when focused on his work, completing grade five work in math, language arts, and science. Her report, written in July 1998, recommended that the student continue to receive one-to-one tutoring. (Exhibit 93, P 31-P 36; Testimony: Father)
2. The parents sought an evaluation of the student by a private psychologist. The psychologist conducted the evaluation on November 6, 1996. Results showed the student scored in the average range on the Bender-Gestalt. He scored well within the average range on the Wechsler Intelligence Scale for Children-III resulting in a Full Scale IQ score of 106. Scores on Freedom from Distractibility and Processing Speed were 104 and 116, respectively. The evaluator wrote that "[t]he primary interpretation from the instrument is that [the student] has good native intelligence which is at least average to above average. Subtests which measure the need to attend and concentrate, were found to be appropriate". He noted little variation in Verbal subtest scores, but wide variation in Performance subtest scores leading the evaluator to conclude that the student demonstrated strengths in verbal comprehension, spatial ability and conceptualizing ability.

The student's mother participated in a clinical interview and completed the Burks' Behavior Rating Scale. Her responses indicate that she sees the student as "somewhat anxious and self blaming, displaying aggressive and resistance behaviors, and having a general sense of persecution". Her responses on the Attention Deficit Disorders Evaluation Scale: Home Version, and the Conners' Parent Rating Scales led the evaluator to determine that, "from parent ratings [the student] is exhibiting traits of an Attention deficit/Hyperactivity Disorder".

The student's third grade teacher completed the Burks' Scale, and the Behavior Evaluation Scale-2. Based on the teacher's responses of her observations of the student in a school setting, the evaluator concluded that the student "has had, and continues to have, difficulties with learning problems and significant difficulties related to physical symptoms and fears". The teacher commented that

the student “does present a challenge”, but is “a hard worker most of the time who appears to be a capable student with a lot of enthusiasm”.

The evaluator concluded that the student demonstrated characteristics of Attention Deficit (Combined Type) and Generalized Anxiety Disorders. In his summary the evaluator made some general educational recommendations and referred the parents for medical follow-up. (Exhibits: P 39-41, 107-116; Testimony: Thurlow)

3. In January 1997, the parents had the student evaluated by a pediatric neurologist. A report of this visit states “...we feel that his AD/HD symptoms may be accompanied by possible childhood bipolar disorder. In view of these circumstances, we are comfortable recommending medication and have referred [the student] for a child psychiatry evaluation”. (Exhibits: 105-106)
4. The parents consulted with a child psychiatrist in April 1997. After an interview with the parents and a review of the psychological evaluation, he concluded that “my working diagnosis are ADD-combined type, Major Depressive Disorder, Somnambulism, Generalized Anxiety Disorder, and probable reading, writing, and spelling learning disabilities¹”. He recommended medication therapy and psychotherapy. (Exhibits: 98-101)
5. On March 21, 1998, the student began psychotherapy with the private psychologist who had performed the evaluation in November 1996. Therapy continued weekly until the summer. The weekly sessions resumed in the fall of 1998. Currently, sessions are every other week. (Exhibits: 40-41; Testimony: Thurlow)
6. The student’s mother met with the director of special education on May 6, 1998, to discuss a referral to special education for the student. The parent mailed assessment information they had obtained independently to the school on May 8. The director mailed a referral form to the parent on May 15. The completed referral was received by the district on July 28, and was forwarded to the neighborhood school for follow-up. The parent called the school in late August to request a PET be convened prior to the beginning of school. The parent signed a “waiver of seven day notice”, and the PET met on August 31, 1998, the first day teachers returned. (Exhibits: 91, 95-97, 98-116, P 38; Testimony: Parents, Curtis, Pare)
7. The student was enrolled in school in the district on August 24, 1998. He was placed in a regular fifth grade in his neighborhood school. (Exhibit: 94)
8. At the PET meeting on August 31, the team reviewed the data produced by the parents and reviewed the student’s school history, including the tutoring report from the previous school year. Attending were the parents, the student, the fifth grade teacher, the special education teacher, the principal and the special education coordinator for the school. The parents expressed their concerns about the student and their reasons for referring him to special education. The team did not find the student eligible for special education services. They based

¹It is unclear how the psychiatrist determined the existence of a learning disability. There is no indication that either the psychiatrist or the psychologist conducted testing to make such a determination. The PET, on December 17, 1998, did not find him to meet criteria as a student with a learning disability. (See Exhibit 50)

the decision on the fact that the student was achieving at grade level, had no history of special education and did not have conclusive evidence of a condition that created an adverse effect on his education. No evaluations were ordered, although the team did recommend a follow-up meeting in mid-October to reconsider the issue. (Exhibit: 88-89,; Testimony: Pare)

9. The student's mother signed a document indicating she had received the district's parent handbook that included the "Parental Rights and Procedural Safeguards". The student's father testified that he had read, and was aware of parent rights and procedural protections assured by special education law. (Exhibit: 90; Testimony: Father)
10. The PET met again on October 15, 1998, to review the student's status. He was performing at grade level in his fifth grade class, with some organizational and work completion issues emerging. His grades had been in the 80's and 90's in the first quarter, but were beginning to deteriorate. The parents reported that he was having serious problems at home with completing homework, and physical symptoms evident during his third grade year were returning. The team determined to move forward with evaluations. The parent signed a "consent to evaluate" on that date. The evaluations included academic testing, speech and language testing, psychological evaluation and behavior rating scales. In addition, a classroom observation was completed. (Exhibits: 80, 82, 83-84, 117; Testimony: Pare, Courchesne, Father)
11. An outside psychologist on contract with the school completed the psychological evaluation on December 1, 1998. The evaluation included a review of records, clinical interviews with the student and the parents, the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), the children's Assessment of Verbal Learning-Test II, Projective Drawings, Thematic Apperception Test (TAT), and the Children's Depression Inventory. In addition, the psychologist had the student's parents and teacher complete the Connor's Behavior Rating Scales that she interpreted.

Results of the WISC-III show the student's overall intellectual ability is within the Average range with a Full Scale score of 104. Scores on all subtests were in the average range or better. She found minimal evidence of a processing deficit². These results were consistent with the findings of previous psychological evaluations.

She determined that the student displayed relative weakness in attention to verbal stimuli and short-term auditory memory. She found that performance

² The parent's opening and closing statements argue that student has a serious processing problem. A report entitled "Psychoeducational Testing" produced by the private school (See Exhibit P 9) also states that the student has low scores in processing speed. But, the report seems internally inconsistent. Earlier in the document the author states "[p]rocessing speed is at the level of automatic processing..." The author does not seem to have conducted independent testing, but appears to be drawing her conclusions from the school's testing. The author was not a witness at the hearing. No other witness offered testimony on this document. However, evaluations conducted by both the school's and the parent's psychologists show the student scores in the average range in subtests assessing processing speed.

anxiety was a contributing factor. Issues regarding self-esteem and appropriate strategies to deal with life situations were evident from personality assessment. "He can feel that he lacks control over his environment and his sense of dyscontrol can result in heightened levels of anxiety. [He] does not present with significant levels of depression..." He "can become unduly upset due to his limited strategies to assist him when he feels challenged or in conflict." The student's teacher reported "very significant problems in the area of social problems while, his inattention fell at the significant level" on behavior rating scales.

The evaluator summarized her report by stating that the students "will benefit from a highly structured, consistent educational environment with reduced assignments" and "modeling of effective coping strategies such as relaxation and cognitive behavioral techniques to assist with anxiety management". She also noted that the student "may need individualized instruction in written language and organizing his written language". The student "will require the opportunity to improve his social and emotional functioning through activities which increase his self-esteem, social skills and compensatory strategies". (Exhibits: 60-67; Testimony: Powers)

12. On December 15 and 16, 1998, the special education teacher assessed the student's written language skills using the Test of Written Language-Second Edition (TOWL-2). His scores fell in the "below average" and "poor" range. The teacher concluded that the student showed poor mechanics of writing and poor spelling skills. (Exhibits: 58-59)
13. Achievement testing conducted as part of the PET ordered evaluation was completed on December 8 and 10. Using the Woodcock Johnson Test of Achievement-Revised and the reading subtests of the Diagnostic Achievement Battery, the evaluator found the student "scored within the average range of performance in Reading and Knowledge areas. He scored below average in math [by age, but within the average range by grade] and [was] moderately delayed in the Written Language domain". The evaluator noted that he required frequent breaks, was distracted by environmental noises, and required slower auditory presentation. He "demonstrated poor mechanics in his writing and below grade expectations in spelling". (Exhibits: 68-71; Testimony: Pare)
14. The student achieved B's and C's in all subjects in the first quarter³. During the first half of the second quarter, his grades deteriorated significantly. At the parent's request, the teacher reduced his homework requirements, but by the time the December 17 PET met, he was failing all but two subjects. Daily grades and test scores improved in the second half of the second quarter, but he failed all subjects for the term except Science. The Progress Report shows that both grades and effort were below passing. Homework completion was the major factor. Classroom behavior was problematic. (Exhibits: 27, 28, 117, P 28, P 30; Courchesne)

³ Documentary evidence is contradictory regarding the student's grades first quarter. The handwritten "progress report" at P 28 does not agree with the student's transcript at J 27 in the reading and language grades. No explanation for this discrepancy was given.

15. The PET met on December 17, 1998, to review the results of the evaluations ordered in October, and the student's educational status. The team completed a learning disabilities evaluation report. The team concluded that the student did not meet the criteria of a student with a "learning disability". It was determined that the student did meet the criteria of a student eligible for special education services under the category of "other health impaired". Consent for placement was signed on that date. An IEP was written which placed the student in the resource room for 125 minutes per week for a daily check-in for organizational support. The IEP had one annual goal, which stated that the student "will successfully maintain passing grades"; objectives stated that the student will complete homework assignments and class assignments at least 90% of the time. (Exhibits: 46-47, 48-56; Testimony: Pare, Powers, Father)
16. PET met again January 14, 1999, to review the program. The parents presented a written document that requested increased interventions in a more restrictive setting. Discussion at the meeting centered on the concept of "least restrictive education" and what alternatives might be available for the student in the district to address the parents' concerns. A review of the student's status by the classroom teacher indicated that the student's work completion was improving, as were his grades. She described some anxiety around his transition back to the class from the resource room each day. A new IEP was written which increased special education services to eight hours a week to provide the student with direct services in reading, spelling, written language and organizational support. A system PET was arranged to consider the parents' request for a more restrictive placement. A notice for a system PET was mailed on January 26, 1999. The meeting was scheduled for February 5. (Exhibits: 26, 32, 33-42; Testimony: Courchesne, Pare, Mother)
17. The system PET met February 5, 1999. Attending were: the Director of Special Education, the student's special education teacher, the student's regular education teacher, the principal of the neighborhood elementary school, the special education coordinator of that school, the principal of the elementary school housing a district-wide self-contained special education program, the special education coordinator of that school, a special education teacher from that school, the psychologist who had recently completed an evaluation of the student, both parents, two advocates from the Department of Mental Health, Mental Retardation and Substance Abuse Services, and a legal advocate. In addition, the student's private psychotherapist attended via speakerphone. After a lengthy discussion of the student's needs, and the parents' concerns, the PET made the following determinations: a recommendation for placement in a self-contained class in the district, an occupational therapy evaluation, and special transportation. Implementation of the placement was scheduled to begin "upon parent agreement". Consensus was not reached regarding this placement. (Exhibits: 4, 7-11, P 47-P 93; Testimony: Pare, Curtis, Father)
18. The school drafted an IEP that described the proposed placement of the student in the self-contained class, with the goals and objectives for the program. This IEP, along with the "Notice of Proposed Change of Placement", "Consent for

Placement' and "Consent to Evaluate" forms were mailed to the parent on February 11, 1999.

The proposed IEP places the student in a self-contained class with art, music, and physical education classes occurring with non-disabled peers in a regular elementary school setting. Goals state that the student will: increase the ability to stay focused in the classroom setting, demonstrate more effective social skills and a reduction of anxiety, increase reading fluency and decoding skills to a fifth grade level, increase reading comprehension to a sixth grade level, produce written passages in paragraph form which are edited for mechanics and spelling, demonstrate mastery of math skills to grade level, and demonstrate his knowledge in content areas. (Exhibits: 13-25, P 1; Testimony: Pare, Curtis)

19. The parent mailed a letter to the school, dated February 8, 1999, notifying them of their decision to unilaterally enroll the student in The Day School of the Southern Maine Learning Center. The school received this letter on February 10. The parents received a letter from the Southern Maine Learning Center dated February 3, 1999, accepting the student as a "full time student at The Day School, effective immediately". The Psychoeducational Evaluation done by The Day School, and the resulting Service Plan for the student are both dated February 1, 1999. (Exhibits: 2, P 2, P 8, P 9, Testimony: Pare, Father)

IV. Conclusions

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a "free appropriate public education" which is described in the student's "individualized education program" (IEP). [20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)] The IDEA further requires that:

[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USC § 1412 (a)(5)(A)

Since the passage of IDEA by Congress in 1975 (formerly the Education for Handicapped Children Act), schools and parents have struggled with Congress' intent of the term "appropriate". In 1982 the Supreme Court considered this issue and determined that a program is found to be appropriate if the school has "complied with the procedures set forth in the Act", and has in place an individualized educational program developed through the Act's procedures which is "reasonably calculated to enable the child to receive educational benefits". (*Board of Education v. Rowley*, 3 IDELR 553:656, 667 [1982])

The parents' claim that the school has failed to comply with several of the procedures set forth in the Act. They claim that the failure to comply with these procedures rendered the program so flawed that the student's right to receive a free appropriate public education was violated.

Did the school fail to follow procedures to refer, evaluate and identify the student as a *student with a disability* in a timely manner? Did the school fail to evaluate the student in all areas of his suspected disability?

Schools must have "in effect policies and procedures to ensure that...all children with disabilities residing in the State...who are in need of special education and related services, are identified, located and evaluated...and an individualized education program...is developed..." Individuals with Disabilities Education Act, §1412(a) "[A] local education agency shall conduct a full and individual initial evaluation...to determine whether a child is a child with a disability...and to determine the educational needs of [the] child" Id. §1414(a) "As part of an initial evaluation...the IEP team...shall review existing evaluation data on the child, including evaluations and information provided by the parents of the child... [O]n the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine...whether the child needs special education and related services..." Id., §1414(c)

The parent contacted the school on two separate occasions, May 1997 and May 1998, to inquire about special education services in the district. Evidence does not support the parent's contention that the school failed to act on a referral made by them in 1997. After a phone conversation with the parent, the school responded with a letter and a copy of the district's "Parent Handbook", which includes parental rights and procedural safeguards. The parent insists that their phone call constituted a referral and they were waiting for the school to act. The school remembers that the conversation terminated with the parent promising to get back if they felt there was a need to proceed with a referral. The wording of the school's letter is vague regarding what, if anything, the school offered to do as a follow-up to this conversation, however there was no further contact by the parents that year. It is not reasonable to assume that the parents were waiting for the school to follow up on this referral for a full calendar year.

No referral had been made by the parochial school on behalf of this student in the three years before the parents' 1997 phone call, even though the parochial school often made such referrals to the district. Additionally, the tutor hired by the parents during the student's fourth grade year – a person who had previous experience with the district's special education services, made no referral. Absent a follow-up from the parent during the 1997-98 school year, there was no reason for the school to believe that the student was a potential candidate for special education referral.

In May 1998, the parents again contacted the district. They met with the director of special education to discuss their concerns about their son's needs. They followed up that meeting by providing the district with evaluation data and physician's reports obtained by them. Again, the school followed up with a letter. A referral form was enclosed, with instructions for the parents to complete and return the referral form so that the process might begin. The parents did not return the completed form until July 28. On August 31, the first day teachers returned to school, the Pupil Evaluation Team (PET) met to consider the referral⁴. This constitutes a timely response to the referral. There is no finding that the school failed to process the referral for special education in a timely manner.

The lack of action by the PET on August 31 however, is a failure on the part of the school to comply with procedure. The PET had a clear request from the parent to evaluate the student and assess his eligibility for special education services. They presented the school with evaluative and anecdotal data to support their concerns that their son was in need of such services. The student had a confirmed diagnosis of Attention Deficit Disorder and Bi-polar Disorder. Clearly, the information was not conclusive. The PET could not have made a determination for eligibility based on this information. However, the information was sufficient for the PET to order further evaluations at that time. Although he had achieved at grade level during his previous school year, this had been accomplished through individual tutoring outside of school. Waiting to see if an identified diagnosis creates an adverse affect on a student's education is not a prerequisite to proceeding with the eligibility determination process.

The school argues that the parents participated in the August meeting and agreed with the decision to wait and see if the student's ADHD and Bi-polar Disorder created an adverse affect on his education. It is true that the parents did not disagree with this decision⁵. However, the school has an affirmative obligation to determine if students are in need of special education services. When there is expressed concern that a student is in need of support, that student should not have to fail in a regular classroom before the school exercises this obligation. There was

⁴ The parents assert that the August 31 meeting would not have happened if they had not insisted that the school hold the meeting before school began. Whether or not that is true is irrelevant. The school was under no statutory obligation to convene the meeting before school actually started.

⁵ In closing arguments the parent alleged that the school failed to provide "prior written notice" (See MSER, 10.3) of the decision not to identify the student in August. This issue was not raised at the pre-hearing, nor at the hearing. No evidence was submitted to support this claim. The intent of "prior notice" is to put the parents on notice of the school's intent to act, or in this case not act, on behalf of a student. The PET minutes state clearly that the PET determination was "no services are appropriate at this time". The parent received a copy of the minutes and testified that they understood the conclusions of PET and the implications of that decision. They voiced no disagreement with that decision. The parent received the "parent handbook". The referral process and the procedural safeguards, including the right to dispute PET action, are spelled out in this information. One of the parents signed that they received this information on August 31, 1998. Upon reflection, they may have wished they had been more assertive in their requests that the school move forward more quickly, but there is not indication that they were somehow unaware of the implication of their agreement with the decision.

sufficient data for the PET to order evaluations in August, rather than waiting until October.

Once the school did initiate the evaluation process in mid-October, the district complied with required procedures in their evaluation of the student. Consent from the parent, with a description of the assessments being recommended, was obtained. The evaluations were completed within 45 school days. The assessments were conducted by qualified and certified personnel. Written summaries of the findings and conclusions of the evaluators were provided to both the school and the parent. The assessments ordered provided a comprehensive evaluation of the student in all areas of the suspected disability⁶. The PET met in mid-December to review the evaluation data and consider the information. Based on the evaluations, they found the student eligible for special education services. (See Maine Special Education Regulations, Section 8) However, had the evaluation process begun earlier, the student would have been found eligible for services by mid-October and, arguably, might not have failed most of his subjects for the second quarter.

Did the school fail to include the parents in the development of an IEP by developing that IEP outside of the PET process?

The parents argue that the school developed the IEP for the proposed self-contained classroom outside of the PET process. The PET met on February 5 and discussed the possibility of placement for the self-contained program. Minutes of the meeting and a partial transcript⁷ of that meeting show that the meeting was lengthy and focused on the student's educational needs. The members included, among others, past and present evaluators, the student's special and regular education teachers, the parents and parent advocates. There was active participation by each of them, especially the parents. The discussion clearly was about the student and what was required in the student's program. The team did not come to consensus on what the next step would be for the student. A recommendation was made for the student to be placed in the district's self-contained class for students with learning and attentional problems.

School staff then left the meeting and drafted an IEP that was sent to the parent five days later. The letter transmitting the document makes clear that it is a proposed document for discussion at another team meeting, not a finished product. District staff testified that purpose was to provide a written offering of what the program in the self-contained classroom would encompass. The school did not violate procedures for involving parents in the development of an IEP. This document

⁶ The PET did order an additional evaluation in February. This occupational therapy evaluation determination was in response to concerns raised by the special education teacher after an observation done in January. This was not a suspected area of disability initially.

⁷ The parents entered a typed record of this meeting as evidence. The document is not a certified transcript nor is it complete. A reading of the document makes clear that the quality of the audiotape was poor, rendering a verbatim account of the meeting impossible. However, it does offer some insight into the length and quality of the discussion. (See P 47)

clearly reflects the discussion of the February meeting, and was not presented as final product. Schools may present written drafts of an IEP to parents, as long as those draft documents are subjected to a “full discussion with the child’s parents, before the IEP is finalized”. 34 CFR Part 300, App. A, Q. 32 The review and discussion of the document never occurred because the parents removed the student from school and enrolled him in a private school.

Did the school predetermine placement for the student before the development of the IEP?

The parents argue that the placement in the self-contained classroom was predetermined by the school before the February 5 meeting. Evidence makes it clear that the school and the parent were in disagreement regarding the student’s placement at the January 14 PET meeting. The parents wanted the student out of the regular classroom. They presented the team with a document that spelled out what they wished in the student’s program. In an effort to respond to the parents’ insistence for a more restrictive placement, the school scheduled a system PET for February 5.

The school was clear that they felt the program offered in January would meet the student’s needs, given time; they were not recommending a self-contained program. The parent was equally clear that they wanted a small classroom setting with intensive special education instructive in a highly restrictive program. The school in an attempt to address the parents’ concerns set up meetings for the parent to view options in the district that were more restrictive. The parties used the period between the PET meetings of January 14 and February 5 to that end. When the team assembled in February, the parents had visited the programs in the district that offered the type of placement requested by the parent. The conversation at the system meeting was a broad discussion of the student’s needs, his strengths, the parents concerns and possible solutions to meet the parents’ concerns and the student’s needs. In an ideal situation, the PET would have developed an IEP, debated the components of the IEP, the goals and objectives and then determined the appropriate placement. The parties were way beyond that phase by February.

If the outcome of the meeting was pre-determined, it was predetermined by both parties. By the time the parties met in February the parents had already made up their minds that the self-contained program was not going to meet the student’s needs. They were certain that the student required placement in the private school, and had already completed the initial steps to enroll him there. From the school’s perspective the self-contained classroom was the only option left to the student if he was to remain in the district. There was not a predetermination of placement, but an attempt by the school to negotiate a placement with the parent that kept the student in a less restrictive placement than the private school.

“[The school] shall ensure that the parents of each child with a disability are members of any group that makes decision on the educational placement of their child”. 300.501(c) The discussion around placement was extensive; the parents participated fully and had the assistance of four advocates. In the end, there was no consensus. When the team fails to come to consensus, the school must make a decision, subject to the parent’s right to exercise due process. The parents did not agree with placement in the self-contained program, but failed to exercise these rights. They removed him from school shortly after the meeting and enrolled him in the private school. If the parents are active participants in the discussion, regardless of whether they ultimately agree, no “predetermination” has occurred.

Did the school offer a public school placement unavailable to the student because of excessive enrollment?

The parents asserted that the school was in violation of procedure because the self-contained program being discussed at the February 5th PET was at capacity, therefore making it unavailable to the student. Regulations do not require that a placement be available in order for the PET to recommend it. Regulations require that “the IEP is implemented as soon as possible following the [Pet meeting]”. Maine regulations give further guidance in this area by stating that schools must implement the IEP as soon as possible or reconvene the PET to develop alternative arrangements to address the needs of the disabled student. [See MSER, Section 9.8] There is no restriction on recommending a placement because that placement is not immediately available. The school made a convincing argument that the placement would likely be available in the near future, or could be made available through an acceptable process such as a waiver granted by the Department of Education. There was no violation.

The school did not move forward in a timely manner to order evaluations which would have allowed the PET to determine the student’s eligibility. By the time the student was identified as a student with a disability, he was almost halfway into his academic year. He had no special education services from September until December. Classroom modifications were not sufficient to address his needs. He failed most of his subjects for one grading term. Evaluations and parent descriptions of home behavior indicated that he suffered increased anxiety around schoolwork. This was the direct result of the school’s failure to comply with “the procedures set forth in the Act”. However, evidence is not convincing that this failure, *by itself*, renders the program so flawed as to support the parents’ ultimate action to remove the student from the public school. One must look to the substantive content of the programs offered to make that determination.

Has the school provided the student with a free appropriate public education in the least restrictive educational environment?

Since the student was found eligible for services, the school has proposed three different programs for him. In mid-December, the IEP placed the student in the resource room for one period a day to give assistance to help him organize and complete his assignments. In mid-January the PET met again and increased services. The new IEP placed him in the resource room for 3 periods a day. Annual goals applied to reading and language arts. In February, the PET recommended placement in a self-contained class for all academics. The proposed IEP included goals in reading, written language, math, other content areas and behavior.

The initial IEP does not address all areas of the student's disability. The evaluations reviewed by the PET in December made clear that the student showed a written language deficit. Results of both the psychological assessment and the educational assessment support a need for intervention in the written language arena. Additionally, the record supports the student's need for behavioral intervention.⁸ The classroom behaviors, coupled with the parents' description of the extreme behavior at home, should have guided the PET to include IEP goals in each of these areas in December. In January the IEP was modified to address the area of written language, but still no goals to address the student's identified need for social skills training or behavioral interventions were included. However, the student's work did begin to improve after these interventions. The standard for a "free appropriate public education" is defined as a program which is "reasonably calculated to enable the child to receive education benefit". The IEPs were incomplete, but there was evidence of benefit.

The IEP proposed after the February meeting, which places the student in the self-contained classroom, addresses all of the student's identified needs. There is reason to believe, based on the testimony of the evaluating psychologist that this placement will provide the setting and adult support he requires to address his need for structure and consistency. The goals and objectives in the IEP describe interventions that address his identified academic and behavioral needs. The placement in a regular elementary school will give him access to non-disabled peers and will provide him an opportunity to participate in extracurricular and mainstream activities. The school housing the self-contained program is closer to the school he would attend if he were not disabled. There is no way to evaluate its appropriateness, but it contains all the elements that would lead the reader to believe that there would be educational benefit.

⁸ The classroom teacher testified that she did not view the student's classroom behavior as a problem. However, her responses on the "Reporting Form for Students on Medication for Learning or Behavior Problems" indicated problematic classroom behavior. Her response on the Connor's Behavior Scales indicated "significant problems in the area of social problems" and "his inattention...at the significant level".

Are the parents entitled to reimbursement for their unilateral placement?

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private...school without the consent of or referral by the public agency, a...hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the...hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment. IDEA §1412(a)(C)(ii)

By the time the February PET convened, it was clear that the focus of the parents was placement in the private school, not public school services. They had reviewed and essentially rejected the programs available in the district because they were not restrictive enough. They had already begun the process to enroll their son in the private school.

The school was not aggressive enough in identifying the student and writing an IEP which met all his needs. However, the PET met almost monthly to review the student's program and modify his program. The parents were active participants in each PET meeting. At no time did they exercise their right to question any of the PET decisions through due process. In fact, they did not bring this action.

The student did struggle, but he began to show improvement after services were initiated. There is indication that there was some educational benefit. In addition, each of the programs offered by the school offered the student the right to be educated with non-disabled peers. Students have the right under special education law to "be involved and progress in the general curriculum...and to participate in extracurricular and other nonacademic activities; and to be educated and participate with...non-disabled children". §1414(d)(1)

The private school chosen by the parents simply does not provide the student that opportunity. The evidence does not support the student's need to be isolated from the mainstream and placed in a private special purpose school an hour from his home. The private school uses content areas as a means to remediate skill deficits. There is no opportunity for the student to have access to the general curriculum while attending school there. The evaluators stressed the need for the student to have access to a social skills curriculum and social skills training. There is no capacity for this at the private school. The service plan for the student does not have a social/behavior goal. There is no opportunity for practice with non-disabled peers for social skills modeling.

The only witness other than the parents who recommended placement for the student in the private school was the private psychotherapist, a part owner of the school. While he may feel that the student will benefit from a small quiet educational setting, there is no evidence to support that the student would fail to benefit from a public school setting.

What remedies are the parents entitled to receive for any violations of law and regulations?

The school failed to identify the student in a timely manner, and failed to write an IEP which contained all the components to meet his identified needs. The parent failed to exercise any due process rights they have on behalf of the student, and moved to place the student without considerations of the student's right to an education in the least restrictive educational environment. Each bears some responsibility for the ultimate outcome. Each should bear some of the cost.

Order

1. Upon being presented with documentation of costs, the school shall reimburse the parent for half of the cost of the student's attendance at the Day School of the Southern Maine Learning Center. That amount, based on the parent's stated claim, will result in a payment of \$3,942.00. Transportation costs shall be reimbursed at a cost of \$5.50 per documented school day from February 22 through June 14, 1999.
2. The PET shall convene before the beginning of the 1999-2000 school year to review and revise as necessary the IEP proposed by the school that places the student in the self-contained classroom at the Pettingill School.

Carol B. Lenna
Hearing Officer