

Special Education Due Process Hearing Decision
Parent v. Union 7, Saco School Department

CASE NO: 99.202

REPRESENTING THE SCHOOL: Amy Tchao, Esq.
Drummond Woodsum & MacMahon

REPRESENTING THE PARENT: Melinda A. Duval

HEARING OFFICER: Carol B. Lenna

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

The case involves the student. He resides with his parents, who live in Saco. The Student is identified as a student with a disability under the category of "other health impaired". The student is diagnosed with Attention Deficit Hyperactivity Disorder.

The parent requested the hearing after a dispute arose concerning the student's attendance at, and transportation to, the Portland Arts and Technology High School (PATHS), a vocational high school outside the Saco region. A limited number of students from Thornton Academy are transported to PATHS to attend morning sessions. The student's parents contend that his attendance at the vocational program must occur in the afternoon in order to leave his morning available for his academic classes when his ability to focus is best. The school contends that The student's program at the vocational school is not a special education program, and transportation to that program is not a supportive service. They were unwilling to make special transportation arrangements to accommodate The student's attendance at PATHS in the afternoon. Unable to resolve this dispute the parents filed for hearing on September 14, 1999.

Both the school and the parents requested extensions of the original dates scheduled for the prehearing conference and the hearing. Extensions were granted by the hearing officer. The parties met in a prehearing conference on Wednesday, October 13, 1999 at the Biddeford District Court, Biddeford, Maine, to exchange documents and witness lists. At the pre-hearing conference the school argued that the hearing officer should dismiss the hearing as the issues were outside the jurisdiction of a due process hearing to resolve. The hearing officer concluded that the issues raised by the parent constituted a legitimate dispute for hearing. The request for dismissal was denied.

The hearing convened on Tuesday, October 19, 1999, also at the Biddeford District Court. Eighty-four documents were entered into the record of the hearing; eight witnesses gave testimony. The hearing record remained open until October 26 to allow the parties time to submit written summaries. Following is the decision in this matter.

I. Preliminary Statement

The student is in his second year at Thornton Academy, a private academy that serves as the public high school for the district. He is identified as a student with a disability under the category of "other health impaired". He is diagnosed with Attention Deficit Hyperactivity Disorder.

At Pupil Evaluation Team (PET) meetings in June and August 1999, a dispute arose regarding the student's schedule for the coming school year. He and his parents wished his schedule to reflect academic programming at Thornton Academy during the morning hours, and vocational programming in horticulture at the Portland Arts and Technology High School (PATHS) in the afternoon. Currently, Union 7 students at Thornton Academy attend PATHS in the morning. The school believed that the student's schedule should conform to the common schedule. Unable to reach consensus at the PET, the school made an administrative decision that the student would have access, including transportation, to the PATHS horticulture class in the morning, and would attend academic classes at Thornton Academy in the afternoon. The parents disagreed and took unilateral action to provide transportation so that the student could attend PATHS in the afternoon.

It is the parent's contention that the student requires an educational schedule that accommodates his disability. It is their position that, as a student with ADHD, he has a greater capacity to focus in the early part of the day. Therefore, academic subjects should occur in the morning, and hands-on programs, such as the horticulture class, should be scheduled in the afternoon. They maintain that this scheduling issue is directly related to the student's disability, and that he is entitled to transportation to the PATHS program as a special education supportive service.

It is the school's contention that the student attends PATHS as part of his regular education program. They argue that the horticulture program is not part of his IEP, and is therefore not a special education placement or program. They dispute that special transportation to PATHS is a supportive special education service.

II. Issues

The issues to be decided by this hearing are:

1. Is the student entitled to transportation as a supportive special education service to enable him to attend the horticulture program at PATHS?
2. If yes, is it necessary for the school to provide transportation to PATHS during the afternoon session to meet the student's special education needs?

No procedural violations are claimed by the parent¹.

¹ The parents stated in their prehearing memorandum that the school failed to follow procedural requirements. After a review of the items listed, the hearing officer determined that the parent's list contained individual elements of the

III. Findings of Fact

1. The student is a xx year old diagnosed with Attention Deficit Hyperactivity Disorder, combined type. He receives special education services under the category of "other health impaired". His IEP provides for monitoring services one hour quarterly. The IEP includes a Transition Plan and classroom modifications for regular classes. His academic day consists of four one-credit academic classes at Thornton Academy in the morning, and one four-credit vocational program in the afternoon. He has a plan to complete high school in three years. (Exhibit: J-16, S-8, S-16, S-24; Testimony: Tinkham, Student, Mother, Wike, Mondor)
2. The student was unilaterally placed by his parents in a private, parochial school for the 6th, 7th and 8th grades. He re-entered public school at the end of the 8th grade. In preparation for his 9th grade year, he was referred for special education consideration on June 8, 1998, by the school². (Exhibits: P-1, S-4)
3. On June 30, 1998 the PET met to consider this referral. He was identified as eligible for services under the category of other health impaired. The team recommended resource services for 80 minutes every other day to support academic classes, and 45 minutes of social work services per week. An IEP for the 1998-99 school year was developed. (Exhibit: J-1, J-6)
4. The PET met again on August 24, 1998 to review the IEP and complete the student's 9th grade schedule. Much of the discussion focused on the student's desire to graduate from high school in three years, and possible alternative schooling opportunities to foster this. At the conclusion of the meeting the PET adopted the services to be provided in the IEP, agreed to the goals for the coming year and developed a morning schedule for the student. The team adopted classroom modifications necessary for the student to benefit in regular education classes. Social work services were declined by the parent, and removed from the IEP. The PET determined that the team would reconvene to discuss the need for social work services and other unresolved issues, if necessary. The PET did not reach consensus on a full-day schedule for the school year. (Exhibit: J-2, J-3, J-4; Testimony: Mondor, Mother, Wike))
5. During September, October and November the parent and the school continued to struggle to complete a full day schedule for the student. The PET convened again on October 20 to resolve issues related to the schedule, and to begin development of the Transition Plan. Neither the student's schedule nor the Transition Plan were completed at the conclusion of this series of meetings. (Exhibit: J-5, J-6, J-7, J-8, J-9, P-9; Testimony: Mondor, Wike)
6. The school notified the parent by letter of an opening in the horticulture program at PATHS on November 12, 1998. The letter stated that the "guidance counselor at PATHS...made it clear that there were no guarantees and that it was the instructor's decision as to whether he would accept another student into the program". The student applied, was accepted, and enrolled in the program in mid-November. No PET meeting

material dispute, and did not identify violations of procedural safeguards as specified in regulations. The parents did not object to this determination.

² The student was an eligible special education student prior to leaving the district in November 1995.

was convened prior to this enrollment. He attended daily in the afternoon³. (Exhibit: P-12, P-44, S-14; Testimony: Mondor, Mother, Wike)

7. PATHS is not the regional vocational school for the district. The district does have access to slots in some programs at PATHS when they have not been filled by students within the PATHS catchment area. In a letter to the student's case manager, the parent wrote that the Associate Headmaster of Thornton Academy stated at the October PET meeting that "if a student was to access the PATHS program that the student has to be identified Special Education and the decision has to be made through a PET process and placement". In a response to this question, and again at a PET meeting, the school stated that only students in special education can access the PATHS program, "but it is **not** a Special Education Placement". [Emphasis original.] At the hearing, the Assistant Director of Special Education, Ms. Wike, testified that special education funds were used to pay tuition costs of all Union 7 students who attended PATHS, and that some received special education services; others did not. The Union 7 Business Manager stated in a letter to the parent that Union 7 pays "full tuition from general funds, and then an additional rate for PATHS from the budget managed by the Director of Special Services... [W]e pay Portland School Department directly for PATHS students, currently from the budget managed by the Director of Special Services". (Exhibits: J-9, J-10, J-11, J-13, S-2, J-26; Testimony: Mother, Wike)

8. The PET met in December 1998. The team determined that direct instructional services were no longer required in order for the student to benefit from his education. The team agreed that the student would receive consultation services to his regular classroom teachers for 15-30 minutes weekly, and all direct instructional services would be terminated. The IEP was rewritten to reflect this change. Determinations of this meeting also state that the student will "attend PATHS for two years in the Horticulture Program". Vocational services generally, nor PATHS specifically were mentioned in the new IEP. (Exhibit: J-10; Testimony: Mother, Wike)

9. At the conclusion of the 1998-99 school year, the student had obtained 9 credits toward graduation. His year-end grades were: 3 B's, an A- and a C+. The grades reflected mastery of the general curriculum material in those classes. (Exhibit: S-4; Testimony: Mondor)

10. The PET met in June 1999 for the student's annual review. Teachers reported on the student's progress, and discussed needs for the upcoming year. Given his success with minimal special education intervention, the PET determined that the student would receive monitoring services for the 1999-2000 school year. A new IEP was written to reflect monitoring services for one hour quarterly in the regular education classroom. The Transition Plan and the Classroom Modifications were reviewed, revised and attached to the IEP. (Exhibit: J-16; Testimony: Mother, Wike)

11. The student's Transition Plan states that "[The student] will be fulfilling requirements/prerequisites for admission to post-secondary education program, including exploring high school vocational programs relating to his goal of employment". He has plans to attend the Southern Maine Technical College to complete a course of study in Soil Technology. The prerequisites for admission are a high school diploma which includes successful completion of biology and algebra credits. Vocational programs

³ The class actually began at 11:00 a.m., but occurred in the last two blocks of the high school schedule.

generally, or horticulture specifically is not a requirement for admission. (Exhibit: J-16; Testimony: Mondor)

12. During the PET discussion, the parent requested that the student's schedule provide for academic classes in the morning and vocational programming in the afternoon, and that transportation services to PATHS accommodate this schedule. The school clarified that historically students from Thornton Academy had attended PATHS in the morning, that the 1998-99 school year had been the exception. The school was returning to the previous schedule to decrease academic class time missed by students attending that program. Unable to resolve the issue, the PET determined that "Mrs. Wike will explore vocational classes and transportation needs in the afternoon" to accommodate the schedule requested by the parent, "and the PET will reconvene". (Exhibit: J-16, P-22, P-42; Testimony: Wike, Mondor, Mother)

13. The PET met again on August 26, 1999⁴. After considerable discussion around the issue of the student's schedule, the PET was again unable to reach consensus regarding the schedule for the student's academic and vocational classes. The parents and the student were adamant that he required a schedule which accommodated his ability to focus on academic work in the morning. The school was equally adamant that the vocational class was a regular education class, not part of the student's IEP, and that there was not an identified need to change the schedule in order for the student to receive educational benefit. The meeting ended with the PET Chairperson making an administrative decision that the school would not provide transportation to an afternoon session at PATHS. (Exhibits: J-18, J-19, J-25; Testimony: Mother, Student, Wike)

14. The parents made a unilateral decision to organize the student's schedule to allow him to attend PATHS in the afternoon, and take academic classes at Thornton Academy in the morning. Transportation to PATHS was provided at parent expense. (Exhibit: J-21, J-22; Testimony: Mother, Wike)

15. The student currently is enrolled in a college preparatory English class, a US History class, an honors level Algebra class, and a Biology class at Thornton Academy. He attends PATHS for the second of a two-year program in Horticulture in the afternoon. He is passing all subjects, with some problems in algebra. Teachers report that he is an active and engaged student. Teachers employ classroom modifications to address his disability, but he receives no specialized instruction in any of his classes, either at Thornton Academy or PATHS. (Exhibit: S-1; Testimony: Mondor, Harvey, Verrier)

16. The student was last evaluated in April 1998. The evaluator holds a Masters degree in School Psychology, a Masters degree in Education, and is a Certified Psychological Service Provider and licensed Counselor. She has extensive background

⁴ A week prior to the meeting the Assistant Director of Special wrote a letter to the parents stating that "I have spent some time reviewing [the student's] file and consulting with other professionals...I do not believe he needs to have his PATHS program in the afternoon..." The minutes of the meeting begin "Mrs. Wike...explained that she had reviewed [the student's] file and researched if [the student] needed to attend Portland Arts and Technology High School in the afternoon to benefit from his education". When parents hear statements and read letters which state "I have researched" and "I have decided", it understandably undermines the consensus-building atmosphere of team planning and decision-making. Parents and schools will disagree from time to time on the program and instruction for students with disabilities, however, it behooves school personnel to be vigilant about the role of the Pupil Evaluation Team – a communication vehicle between parents and school personnel, that enables them, as equal participants to make joint informed decisions. There should not be even a hint of decisions made outside this process.

in Attention Deficit Disorder in both children and adults. Her report of the student's evaluation states that he has "significant difficulties with focused attention, concentration, behavioral regulation, and speed of information processing". She found "weaknesses in auditory processing speed, working memory and impulsivity". She testified that her evaluation results found the student to be very bright with good potential. She felt that college was a realistic goal for him. She testified that she did not find evidence that time of day was a deciding factor in the student's success, but rather motivation for the task at hand. She stated that she continues to feel that the student would benefit from a coaching model designed for a full-day academic schedule, with time-management and mapping techniques included. She supported a program for the student that increased his abilities in self-regulation and executive functions, hence, increasing his ability to sustain effort. (Exhibit: S-24; Testimony: Tinkham)

17. The student testified about his class schedule in 8th grade. Science, reading and English were the last three classes during 8th grade. Year-end grades show no discernible difference in grade performance from the morning to the afternoon. (Exhibit: S-4, Testimony: Student)

IV. Conclusions

Is the student entitled to transportation as a supportive special education service to enable him to attend the Horticulture program at PATHS?

"Special education services" are educational services specially designed to meet the unique needs of a student with a disability provided at no cost to the parent by qualified individuals as defined by the commissioner. All special education services shall be provided by qualified individuals employed or contracted by a school administrative unit, a private special purpose school, or a private general purpose school approved to provide special education and supportive services. [Id., Section 2.23]

"Special education placement" means the instructional setting in which special education services are provided and is a physical location characterized by the enrollment of students with disabilities. A placement is neither a type of service nor a type of program. [Id., Section 2.21 (1999)]

A "special education program" is a full-time or part-time educational program designed to provide a free appropriate public education to students with disabilities through the delivery of special education services by qualified individuals as specified in a student with a disability's Individualized Education Program. [Id., Section 2.22 (1999)]

Any special education or supportive services provided to a student with a disability shall be considered as part of the student's special education program, shall be specified in the student's IEP and shall be provided by an appropriately certified special education teacher or licensed supportive services provider. [Id., Section 5.6 (1999)]

The Pupil Evaluation Team shall include within the Individualized Education Program...a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program). For each student beginning at age 16 a statement [shall be included] of the needed transition services for the student including when appropriate a statement of the interagency responsibilities or any needed linkages. [Id. Section 5.13 (1999)]

Special education transportation shall be specified by the Pupil Evaluation Team in the student's Individualized Education Program when the Team determines that the transportation is necessary in order for the student with a disability to benefit from an education program... If a student with a disability is tuitioned to another public or private school for special education services, the sending unit shall provide transportation consistent with the calendar of the receiving school, [Maine Special Education Regulations, Section 6.17 (1999)]

The dispute centers around the parents' claim that the student's participation in a horticulture program at the Portland Arts and Technology High School (PATHS) constitutes a special education placement in a special education program, and that transportation to that program is a supportive service. They argue that the program at PATHS is "special education" because it appears as part of his Transition Plan. Evidence does not support this conclusion.

PATHS is a regular vocational school which serves students in the Portland area. Through a special arrangement with PATHS, the district makes available a certain number of slots in programs not available in the vocational school that serves the district. The student attends the PATHS horticulture program under this arrangement. His attendance there makes up a portion of his high school day, and is part of his high school credit requirements. At the end of this school year he will have received 8 credit hours toward a high school diploma from attending this program.

No educational services specially designed to meet the unique needs of the student are provided in the program. There is no qualified special education provider in the classroom. In order for a program or placement to be considered "special education", those two elements must be in place. Given the lack of specially designed services provided by a qualified individual, PATHS does not meet the definition of a special education program, nor a special education placement. The only "special education service" described in the student's IEP at this time is the quarterly monitoring by special education staff of his educational progress in his regular classes.

Transition services, or a "Transition Plan", must be part of the IEP. Beginning at age 14, the IEP must include a "statement of the transition service needs of the student...*that focuses on the student's courses of study* (such as participation in advanced-placement courses or a vocational education program)." [Emphasis added.] The "courses of study" may require special education services as part of the student's IEP. However, they do not become "special education" just by virtue of appearing as a transition service. The intent

is to assure that the PET has met and considered the long-term educational goals of the student and planned his or her course schedule accordingly.

The student in question has a stated long-term goal of attending a “2-year post-secondary program”. He has defined that as attending the Southern Maine Technical College to complete a degree in Soils Technology. Transition services in his IEP support this goal. He is pursuing a high school diploma with the requisite courses necessary for acceptance in this institution. “[E]xploring high school vocational programs relating to his goal of employment” is also a stated transition service. He has been given the opportunity to explore vocational programs. When the slot opened in the horticulture program, the student applied to the program and was accepted. If it had not been available, the school could have offered other vocational opportunities which would have allowed to student to meet this goal. The PATHS horticulture program is not a requirement to meet any of the goals listed in the Transition Plan.

Since the student’s program at PATHS is not a special education program, special transportation as a supportive service as described in regulation does not apply. The planning and organization of class schedules is within the school’s jurisdiction. The transportation arrangements currently provided to PATHS for the students who attend is adequate.

The parent expressed confusion about how the PATHS program can be considered regular education. Only special education students from Union 7 are eligible to attend PATHS from Thornton Academy, and special education funds are used to support the students enrolled there. The Assistant Director of Special Education was clear, however, that the program at PATHS was not a special education program, offered no special education instruction for the student, and did not provide any services by a qualified special education provider. If the parents are perplexed about this arrangement, it is understandable. It is unclear why the district limits access to the program to special education students only. It is unclear why, or if, the PET must determine access, when PATHS seems to require application be made directly by the student. It is equally unclear why special education funds would be used to support a regular education program, without special education services such as that described for this student.

If yes, is it necessary for the school to provide transportation to PATHS during the afternoon session to meet the student’s special education needs?

Evidence does not support the parent’s claim that transportation to PATHS is a supportive special education service, either for the morning or the afternoon session. The student does not attend PATHS to meet an identified special education need. There is no way to conclude that special transportation is necessary in order for the student to benefit from an education program.

The student and his parents argue that his attention deficit disorder dictates that he have academic classes scheduled in the morning when his focus for such tasks is better. He

may in fact focus on difficult tasks better in the morning, but there was no evidence that such a schedule is necessary in order for the student to benefit from his education. The school is required by law to provide the student with a free appropriate public education. 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". (*Board of Education v. Rowley*, (3 IDELR 553:656, 667 [1982]) "Educational benefit" is not synonymous with "maximum" benefit. By all accounts the student is benefiting from his education and well on his way to earning a high school diploma and attending the Southern Maine Technical College if that continues to be his goal.

Since returning to the district, the student's program has been dictated more by his desire to complete high school in three years, and attend Thornton Academy for a minimum number of hours each day than by his disability. His IEP has not been structured by the needs identified in his most recent evaluation, nor by the recommendations made by the evaluator. Services in the IEP have decreased over the past year and a half to accommodate the structure imposed by the student. Yet, he has continued to do well in his classes with this minimal support. The student and the parents say it is because of the current a.m/p.m schedule. There may be truth to this, but there was no compelling evidence that he would fail to benefit from an educational schedule in which his academic classes were presented in the afternoon, or from an educational schedule which included a full day of academic classes. The school has not interfered with the student's preference to schedule his day in the way that he feels best meets his needs. They, however, are not obligated by special education regulations to provide special schedules or special transportation to support it.

V. Order

No order is given with this decision.

Carol B. Lenna
Hearing Officer