

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

February 7, 2002

Case # 02.360, *Parent v .S.A.D. #15*

Both Parties were Pro Se..

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

The hearing was requested by Parent, on December 11, 2002. The case involves Student, whose date of birth is xx/xx/xxxx. She resides with her parents in New Gloucester, Maine. Student is diagnosed as having A.D.H.D. and is currently receiving special education services under the category of Other Health Impaired. She is currently in the X grade at Memorial School and is placed in a self-contained classroom, with partial mainstreaming.

A pre-hearing conference was held on January 15, 2003. At that meeting, the issues for hearing were clarified and documents and witness lists were exchanged.

A hearing was held on January 22, 2003. The family submitted 51 pages of documents into evidence and the school submitted 62 pages. Eleven witnesses testified. The record was held open until January 29, 2003 for the submission of closing written arguments and both parties submitted arguments.

Following is my decision in this matter.

I. Preliminary Statement

This matter involves an xx-year-old female student. Student has been diagnosed with A.D.H.D. and receives special education services under the category of Other Health Impaired. She is currently in the x grade at Memorial School and is placed in a self-contained classroom, with some mainstreaming.

The Family requested this hearing. They contend that Student's self-contained classroom placement is not the least restrictive environment and request that she be mainstreamed with a one-on-one aide. Further, they argue that the school has failed to conduct all appropriate evaluations. They also express procedural concerns, involving the scheduling and conduct of P.E.T. meetings and their own levels of participation in the P.E.T. process.

The school denies these contentions. They argue that both Student's placement and program are appropriate and any less restrictive placement would be inappropriate; that the Family has been provided sufficient opportunities to provide input during all P.E.T. meetings.

II. Issues to be Decided by Hearing

- Has the district permitted and encouraged adequate input and involvement by the family in the P.E.T. process?
- Has the district conducted all appropriate, relevant and necessary testing?
- Is student's current program and placement appropriate under the I.D.E.A., including opportunities for support with peers?

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx and she is currently xx years old. (Exhibit: Dispute Resolution Request)
2. Student began receiving special education services in her kindergarten year, when she was identified with a speech and language disability. During that year, Student spent mornings in a special education classroom and in the afternoon she was mainstreamed to the regular education kindergarten, along with an educational technician. During her first grade year, she was in a mixed grade, K-1 program, and during second grade she was again in a mixed grade, 1-2 classroom. In third grade, Student was again placed in a regular education classroom, while receiving resource room assistance in math and language arts. Student has also been receiving speech and language services and occupational therapy since kindergarten. (Testimony: T. Moran, Mother)
3. In January 2001, Student was diagnosed with A.D.H.D. by Dr. Stephen Rioux at Maine Neurology in Scarborough. In a letter dated January 30, 2001, Dr. Rioux states that "Psychometric testing as well as academic testing was performed recently by the school," and he notes W.I.S.C. III scores of 63 verbal, 57 performance and 56 full scale. However, he further notes, "these scores were thought to be significantly below her ability level because of the extreme distractibility she exhibited during the examination." Dr. Rioux's recommendations to the school included "additional one-on-one attention." At some time subsequent to this diagnosis, Student's eligibility category was changed to Other Health Impaired (O.H.I.). (Exhibit: P-10)
4. On February 22, 2001, Dr. Maria T. Somerset, Student's personal physician, wrote a letter to Student's case manager at Memorial School, stating that Student would benefit from "one-on-one attention from a teacher's aid [sic] in a regular

classroom at this point to assist with [Student's] academic performance and assist her to refocus herself and to further evaluate and work with her academic abilities. (Exhibit: P-9)

5. At the beginning of her xx grade year, the 2001 – 2002 school year, Student was placed in a self-contained classroom, due to concerns about her academic progress and how her distractibility was negatively impacting her progress. It had also been noted by various teachers that Student requires [sic] one-on-one assistance in order to make academic progress. (Testimony: T. Moran, Mother; Exhibits: P-1, S-5)
6. Student's last triennial evaluation was completed in March 2002 and discussed at a P.E.T. meeting on March 8, 2002. The testing done at that time included the Diagnostic Achievement Battery – Third Edition (D.A.B.), Key Math – Revised, the Wechsler Individual Achievement Test (W.I.A.T.), a Visual-Motor Processing informal assessment and an extensive speech and language assessment. No cognitive testing was done. Student scored at the third (3) grade level on the D.A.B. writing subtest, at the third (3) grade level on the D.A.B. reading comprehension subtest and at the third grade, fourth month (3.4) level on the D.A.B. word identification subtest. She scored at the second grade seventh month (2.7) level on the Key Math test. On the W.I.A.T., Student's scores ranged from 101 on Written Expression to 71 on Mathematics Reasoning and 72 on Listening Comprehension. Speech and language assessments indicated that Student has a significant receptive language delay and occupational therapy assessments revealed visual-motor integration problems. (Exhibits: S-5, S-6, S-7, S-8, S-9)
7. Student's March 8, 2002 I.E.P placed her in a self-contained classroom for 180 minutes a day, with direct instruction in reading, writing and math, 60 minutes a month [sic] speech and language consultation, 30 minutes a week of occupational therapy and extended school year services. The I.E.P included detailed goals and objectives in math, reading comprehension, word identification, writing and occupational therapy, as well as curriculum and classroom modifications. (Exhibit: S-6)
8. Now in the xx grade, Student continues to receive services at Memorial School under the March 8, 2002 I.E.P. Her placement is in the self-contained classroom with seven other students. Student receives all direct instructional services within that classroom, and she is in the regular education classroom for morning check-in and two subjects, science and social studies, a thirty-minute per day block. She also takes her art, music and physical education with this class and sometimes eats snack with them. Student also receives 90 minutes a week of pre-teaching and reinforcement within the special education classroom to support her in her regular education subjects, as well as occupational therapy and speech and language consultation services. There are fifteen students in the regular education classroom, including some who come in from a self-contained classroom and

some who transit out to the resource room. (Testimony: L. Sivonen; Exhibit: S-2, S-6)

9. The self-contained classroom where Student receives her direct instructional services contains eight students, with ages ranging from 7 to 12 and grades ranging from first to fifth. These students exhibit a range of disabilities, including learning disabilities, A.D.D., A.D.H.D., O.C.D. and emotional disabilities. Four of the students have behavioral plans. The classroom has been the site of numerous behavioral outbursts by some of the other students. Since the beginning of the 2002-2003 school year, the teacher has had to use restrains [sic] sixteen times. During the 2001-2002 school year, there were approximately thirty incidences [sic] of the use of restraints in this same classroom, with a different teacher. There have also been incidences [sic] of significant aggressive behaviors by one student towards another, of cursing, tripping another [sic], and of a student pulling down his pants. Student herself is well behaved and the few timeouts that she has received have been for inattention. (Testimony: R. Loughrey, T. Moran)
10. A P.E.T. meeting was held on October 8, 2002, and at that meeting there appeared to be consensus around placing student into the regular education classroom for two academic classes, science and social studies. However, the administrator in attendance, Principal Bruce Beasley deferred that decision until a future P.E.T., when the Special Education Director would be in attendance. Despite the deferral of that decision, and without another P.E.T. meeting, student's placement was soon changed and she began attending the two regular education classes. (Testimony: Mother, B. Beasley; Exhibits: S-3, P-5, P-6)
11. The next P.E.T. meeting was held on November 13, 2002, with the Special Education Director in attendance. At that meeting, Mother and Grandfather expressed dissatisfaction with the self-contained classroom, stating that they thought it was inappropriate for Student because of the children in the room with special behavioral needs. They also expressed their preference that Student be placed in the regular education classroom with the support of a one-on-one aide. Robert Loughrey, the self-contained classroom teacher, stated that giving Student a one-on-one aide would be more restrictive than the program in which she was currently placed. In addition, it is the contention of Principal Beasley and Director Manikas that Student must be placed in a self-contained classroom since she is receiving special education services for [sic] than 60% of the day. The determinations of the P.E.T. at this meeting included the addition of 30 minutes per week of social work services and adding the mainstream classes that were already being delivered. (Testimony: Mother, Grandfather, R. Loughrey, C. Manikas, B. Beasley; Exhibit: S-2)
12. The next P.E.T. meeting was held on December 4, 2002, ostensibly to review Student's goals. However, the goals and objectives on the I.E.P. had not yet been graded, so it was decided to schedule a P.E.T. meeting for December 16, 2002.

The December 16, 2002 meeting, however, was cancelled at the last minute. (Testimony: Mother, R. Loughrey; Exhibits: P-5, S1)

13. The March 8, 2002 I.E.P. goals were subsequently coded, and Student is making progress towards that [sic]. Of the 14 math goals, student either mastered or made good or adequate progress towards 13. She mastered or made good progress towards 4 of 8 reading comprehension goals, made adequate or good progress towards all 7 word identification goals, mastered or made good or adequate progress towards all 7 writing goals, made good progress towards 2 of the 3 social work goals and mastered or made good progress towards all three occupational therapy goals. (Exhibit: S-4)
14. According to Lauri Morin, the school social worker, Student has progressed during this particular school year, developing a better attention span and decreasing her impulsivity. She has a better outlook on herself and seems to enjoy school. She is also learning relaxation techniques to help with her anxiety. Amy Northrop, Student's long-time occupational therapist, also reports steady progress over time, with gains on visual-motor integration and handwriting. (Testimony: L. Morin, A. Northrop)
15. Student has also made progress in her regular education classes, using a modified curriculum, with third grade level expectations. She has a challenge focusing, a problem remembering information and learning and understanding abstract information. Student's fourth grade teacher also noted that it appears that Student has auditory processing problems. (Testimony: L. Sivonen, T. Moran)
16. The school recently purchased a study carrel for Student to use when she is in the regular education classroom. However, Student has thus far refused to use the carrel, preferring instead to sit amongst the other students. (Testimony: L. Sivonen)
17. There is agreement among the professionals and the family that Student needs appropriate, specially designed instruction, with extensive repetition, in very small groups. However, there is concern among staff that given a one-on-one aide, Student will become overly dependent on the aide and not develop the skills that she needs to be successful in school. There was even some suggestion that Student would "get the aide to do her work for her." (C. Manikas, T. Moran, L. Sivonen, R. Loughrey; Exhibits: S-1, S-2)
18. On December 11, 2002, Mother filed a Dispute Resolution Request. (Exhibit: Dispute Resolution Request Form)

IV. Conclusions

Has the district permitted and encouraged adequate input and involvement by the family in the P.E.T. process?

The Supreme Court has stated that the first question to be addressed when considering the appropriateness of a student's I.E.P. is whether the school has "complied with the procedures set forth in the Act," *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 206 (1982), including the requirement of parental involvement in the P.E.T. process. 20 U.S.C. §1414(d)(1)(B)(i), §1414(3)(A)(1), 34 C.F.R. §300.345. Parents must be notified of P.E.T. meetings at least 7 days prior to the meeting, parents must receive copies of P.E.T. meeting minutes and must be treated as "equal participants" in making joint, informed decisions regarding the student's needs, goals, participation in the general curriculum, participation in regular education and various assessments and the services needed to support that involvement and participation and progress towards the agreed-upon goals. That does not mean, however, that the family can dictate the outcomes of P.E.T. decision-making, as it is the School Administrative Unit (S.A.U.) that determines the final proposal for placement and program. If the family disagrees with that proposal, they have the right to "seek resolution of any disagreement by initiating an impartial due process hearing." M.S.E.R. §8.11 (1999).

The fact that this family disagrees with the outcome of the P.E.T. process does not automatically mean that they were denied their right of participation in that process. They are aware of their recourse when they do disagree with P.E.T. determinations or recommendation [sic] and they have exercised that right by requesting a due process hearing.

There have been, however, a number of procedural violations committed by M.S.A.D. #15. In a technical sense it does not appear that these violations denied the parents their right of participation in the P.E.T. process. Family members were notified of P.E.T. meetings and attended those meeting [sic]. They received copies of minutes. They aired their thoughts and opinions during P.E.T. meetings. Yet, these violations did produce confusion and frustration on the part of the family and most likely were contributing factors to their request for a due process hearing.

Regulations require that each P.E.T. meeting must include a

...representative of the school administrative unit who can ensure the provision of the special education and supportive services specified in the student's Individualized Education Program and who:

1. is qualified to provide, or supervise, the provision of, specially designed instruction to meet the unique needs of students with disabilities;
2. is knowledgeable about the general curriculum;
3. is knowledgeable about the availability of resources of the local education agency; and
4. has written authorization to obligate the unit's human and fiscal resources.

M.S.E.R. §8.6(D) (1999)

Although Principal Beasley, an administrator, was present at the October 8, 2002 P.E.T. meeting, he declined to make a decision about student's placement in a regular education classroom, instead deferring the decision to a future meeting so that Special Education Director Manikas could be present. Either Principal Beasley had authority to make this decision under the above regulation or he did not. And, if he had the authority he did not have to defer to Director Manikas. That he did so is indicative that the October 8, 2001 P.E.T. was lacking the presence of an administrator authorized "to obligate the unit's human and fiscal resources," thereby violating Maine Special Education Regulations. M.S.E.R. §8.6(D)(4)

Compounding this procedural violation was the fact that after deferring the decision about the regular education class, the school went ahead and initiated student's one period a day placement in the regular education classroom without holding another P.E.T. meeting or in any way amending student's I.E.P. Even if the family did support this placement, it was still a violation of the regulations to do so outside of the P.E.T. process, since it is the team's responsibility to revise a student's I.E.P. whenever a change in program or placement is made. M.S.E.R. §8.3(D)

In conclusion, M.S.A.D. #15 committed procedural violations of M.S.E.R. §8.6 in failing to have all required personnel present at all P.E.T. meetings, and in implementing a change of program without developing a revised I.E.P.

Has the district conducted all appropriate, relevant and necessary testing?

The district has conducted extensive achievement testing on Student, as well as speech and language testing and occupational therapy assessments. There was also a W.I.S.C.III administered sometime in 2000, according to Dr. Rioux's letter of February 2001. However, that letter also suggests that these scores were considered unreliable due to student's extreme distractibility during testing.

It is likely that the district did not conduct additional cognitive testing in the belief that such testing was unnecessary, given Student's eligibility as Other Health Impaired, based on her A.D.H.D. diagnosis. However, there is evidence from staff comments and reports that suggests that Student may have an auditory processing deficit, which may also contribute to her academic delays and necessitate changes in teaching methodologies.

The administration of cognitive testing, if considered reliable, could inform the P.E.T. discussion about the possibility of auditory processing deficits as well as the possible presence of other deficits, and may suggest the administration of other more specialized instruments. Given the unreliability of Student's previous cognitive testing, and the possibility that more than A.D.H.D. may be contributing to student's academic delays, the school has failed to conduct all appropriate, relevant and necessary testing.

**Is student's current program and placement appropriate under the I.D.E.A.?
Is student's current placement and program providing her with opportunities and support for interaction with peers?**

The second issue above is in essence a sub-issue of the first, in that peer interaction, or the lack thereof, is only one element in the family's significant dissatisfaction with Student's current placement in the self-contained classroom. They are, however, generally satisfied with Student's program, and the evidence indicates that that satisfaction is justified. Student is receiving significant levels of one-on-one academic support in math, writing skills and language arts. She is receiving pre-teaching and reinforcement to support her in her regular education science and social studies classes. She is receiving social work services and the provider is teaching her strategies to deal with her anxiety and distractibility. And she continues to receive support and services within the areas of speech and language and occupational therapy.

By all standards, progress towards her goals has been good in all areas. Student continues to need a high level of one-on-one support but, given that support, there is no reason to believe that she will not continue to make good academic progress.

The problem, then, becomes where Student's services are delivered. The self-contained classroom includes a number of students who exhibit significant behavioral issues and while not considered a "behavioral" classroom, the presence of some students with learning disabilities does not change the fact that in the last five months the teacher had to use restraints 16 times. There is no evidence that Student exhibits behavioral problems while at school. Quite the opposite, she is usually exceedingly well behaved and happy at school. Her academic problems are attributed to her A.D.H.D. Student is very distractible and needs one-on-one support in a quiet environment, and it is difficult to ascertain how this classroom is such an environment.

Memorial School has only two self-contained classrooms, Student's current room and the Life Skills room. The district contends that Student's current self-contained classroom is appropriate given her significant academic needs. However, having problems learning and remembering concepts bears only a tenuous, if any, relationship to a need for placement in a self-contained classroom. It is the quality of the academic support that matters. The academic support that Mr. Loughrey is providing to student appears to be working. She is making progress. Yet we must question whether she would make even more progress in a more appropriate, less restrictive environment.

The Maine Special Education Regulations state,

...removal of student with disabilities from the regular education environment shall occur only when the nature or severity of the disability of a student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

M.S.E.R. §11.1(1999); *See also* 34 C.F.R. §300.550(b)(2)

The school, however, argues that because Student is receiving special education services more than 60% of the school day she is required to be placed in a special education

classroom. That conclusion is a misreading of M.S.E.R. §11.6. That regulation states that a self-contained placement “is a placement where a student with a disability receives special education and supportive services OUTSIDE THE REGULAR CLASSROOM for more than 60 percent of the school day in a self-contained classroom.” [emphasis in original] However, the school is confusing a necessary condition with a sufficient condition. In order for a student to be placed in a self-contained classroom, she must receive more than 60% of her services outside the regular classroom, but that situation alone is not sufficient for placement in a self-contained classroom. The law and the regulations require a more complete analysis of the severity of a student’s needs as well as a consideration of less restrictive alternatives and the “potential harmful effects on the student or on the quality of services that he or she needs.” M.S.E.R. §11.2 (1999) See *Harwood Union High Sch./Washington West Supervisor Union*, 27 I.D.E.L.R. 908 (VT SEA, January 19, 1998)

Nowhere in the evidence is there any suggestion that the P.E.T. gave any consideration to the potential harmful effects of placing student in this self-contained classroom with its high level of serious behavioral disruptions. Nor does there seem to have been more than a cursory consideration of less restrictive alternatives. Yet there is no question about the intent of the state regulations and the federal statute and regulations on which they are based. Self-contained classrooms are disfavored and any student who can, with aids and supports, be educated in a regular classroom should be. This intent is further highlighted by the fact that the I.E.P. form itself requires a statement of the “extent, if any, to which the child will **not** participate with non-disabled children in regular classes,” strongly suggesting a presumption that children with disabilities are to be educated in regular classes if at all possible.

The family seeks Student’s return to a regular education classroom and they argue that with “supplementary aids and services” student will be able to make appropriate academic progress. The “supplementary aid” that they suggest is a one-on-one educational technician who would work with student. However, some of the professionals who work with Student express concern about Student becoming dependent on a one-on-one aide, and not developing the skills that she needs to be successful in school.

The question, then, is whether or not student can, at this time, be successfully educated full-time in a regular education classroom. She does take science and social studies within the regular education classroom and also takes her specials with that class. However, student’s current special education teacher, and the aides in that classroom, do a significant amount of pre-teaching and skills reinforcement with student. If student were to attend all regular education classes, that pre-teaching and reinforcement support would not be available to her. An aide might be able to assist with cuing student to pay attention or do a minimal level of academic support, but there is only so much one-on-one time that would be available for that if student entered into a full schedule of academic, regular education classes.

Given the level of academic support that student requires, the resource room appears to be the most logical placement for her to receive that support. Director Manikas states in her closing written argument that resource room services support the general curriculum in language arts and math, but not at the level Student requires. However, there is no reason that student could not receive her 180 minutes per day of academic services, and the 90 minutes per week of pre-teaching, from an appropriately qualified teacher in the resource room, as opposed to the self-contained classroom. The only limitation seems to be the school's own definition of what level of services a resource room should provide. In this case, the student's placement has been determined by convenience rather than by her own unique needs.

In summary, while Student's current program is appropriate, her current placement is not, since her needs are not so severe as to require placement in a self-contained classroom. The resource room, rather than the self-contained classroom, is the least restrictive environment in which student can receive her special education services.

With regard to Student's opportunities for peer interaction, no evidence was presented to address this issue. It is probable, however, that Student will find such opportunities when she is placed in a more appropriate setting.

V. Order

1. Within 15 days from receipt of this decision, the Special Education Director will communicate with all special education and regular education administrators, and will instruct them on M.S.E.R. §8.6(D). These communications shall be documented by a written memorandum to each administrator and a log of administrators to whom the memorandum was sent.
2. Within 15 days from receipt of this decision, the Special Education Director will communicate with the special education staff about M.S.E.R. §8.3(D), and the requirement that all changes in program and/or placement must be reviewed and approved by the P.E.T. and a new or amended I.E.P. prepared. These communications shall be documented by a written memorandum and a log of staff to whom the memorandum was sent.
3. Within 10 days from receipt of this decision, a P.E.T. will be convened at which time student's removal from the self-contained classroom will be effected. A new schedule will be prepared for student, with her special education academic services to be delivered within the resource room. Her regular education classes, occupational therapy, speech and language consultation and social work services will remain unchanged. A new I.E.P. will be prepared reflecting these changes.
4. Prior to the next P.E.T. meeting, the school will prepare a consent form for cognitive testing and will request the family's consent to that testing at or before that P.E.T. meeting.
5. Documentation of compliance with this order will be submitted to the Due Process Office and to the hearing officer within thirty days of receipt of this decision.

Lynne A. Williams, J.D., Ph.D.
Hearing Officer

February 11, 2003

Family's List of Documents

- P-1 Summary of Meeting, undated
- P-2 Math Goals and Objectives, dated March 8, 2002
- P-3 Math Practice Sheet, dated November 19 and 20, 2002
- P-4 Goals and Objectives, dated March 8, 2002
- P-5 Contact log, dated October 8, 2002 and December 4, 2002
- P-6 Letter from Parent to Michael Wood, dated October 29, 2002
- P-7 Statement of Issues for Hearing, undated
- P-8 Recommendations for Classroom Services, Date October 8, 2002
- P-9 Letter from Maria T. Somerset, D.O. to Annette Tynes, dated February 22, 2001
- P-10 Letter from Stephen D. Rioux, M.D. to Marie Somerset, D.O., with copy to Memorial School, dated January 30, 2001

Family's Witness List

Mother

Grandmother

Grandfather

School's List of Documents

- S-1 P.E.T. Minutes, dated December 4, 2002
- S-2 P.E.T. Minutes, dated November 13, 2002
- S-3 P.E.T. Minutes, dated October 8, 2002
- S-4 I.E.P. with quarterly (June 2002 and November 2002) progress noted, dated March 2002
- S-5 P.E.T. Report, dated March 8, 2002
- S-6 I.E.P., dated March 8, 2002

S-7 Occupational Therapy Evaluation Report, Dated December 2001

S-8 Speech/Language Evaluation Report, dated January 2002

S-9 Academic Evaluation dated January 2002

School's Witness List

Christina Manikas, Special Education Director

Bruce Beasley, Principal, Memorial School

Laurie Sivonen, Regular Education Classroom Teacher

Robert Loughrey, Current Special Education Teacher

Theresa Moran, 4th grade Special Education Teacher

Lauri Morin, Social Worker

Amy Northrop, Occupational Therapist

Annette Tynes, Speech/Language Therapist