

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

October 6, 2003

Case # 03.095, *Parent and Parent v. Lamoine School Department*

REPRESENTING THE FAMILY: James Munch, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

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 the mother, on July 25, 2003. The case involves the student, whose date of birth is xx/xx/xxxx. He is currently attending the Academy at Cedar Mountain in Kaysville, Utah, having been unilaterally placed there by his mother. Prior to placement at Cedar Mountain, the student attended the School of Urban Wilderness Survival (SUWS) of the Carolinas Program in North Carolina, also under a unilateral parental placement. Prior to these placements, the student resided with his mother in Lamoine, Maine. He is eligible for special education services under the category of Multiple Disabilities – Learning and Emotional Disabilities.

The parties met in a pre-hearing conference on August 18, 2004, at the Department of Human Services in Ellsworth, Maine, to exchange documents and witness lists and to clarify the issues for hearings. A series of hearing dates commenced on September 4, 2003 and continued on September 5, 2003. A conference call on September 9, 2003 was convened in order to allow clarification of some documentary issues. Final written closing arguments were submitted on or before September 17, 2003 and the record was closed on that date.

The parties jointly entered 212 pages of documents. Eleven witnesses testified.

Following is the decision in this matter.

I. Preliminary Statement

This cases involves a xx year-old male student who is eligible for special education services under the category of Multiple Disabilities – Learning and Emotional Disabilities. He is currently attending the Academy at Cedar Mountain, a private boarding school in Kaysville, Utah. His placement at Cedar Mountain is a unilateral parental placement.

The parents requested this hearing. It is their contention that the I.E.P.'s offered by the Lamoine School Department for the 2002-2003 and 2003-2004 school years were not reasonably calculated to provide Student with educational benefit in the least restrictive placement. They further contend that the Academy at Cedar Mountain and a previous unilateral placement, SUWS of the Carolinas, are appropriate placements. They are requesting reimbursement for the costs associated with locating and funding those placements.

The Lamoine School Department contends that it offered appropriate I.E.P.'s for the years in question. They argue that subsequent to receiving notice on February 27, 2003 of parental intent to make a unilateral private placement, they offered an appropriate alternative on March 31, 2002. The District contends that this placement, the Ellsworth KidsPeace day treatment program was, and continues to be, the least restrictive educational setting within which student can make educational progress.

II. Issues to be Decided by Hearing

- (a) Did the Lamoine School Department fulfill its legal obligation to provide a free appropriate public education to Student during the 2002-2003 school year?**
- (b) Is the SUWS of the Carolinas an appropriate placement and, if so, is Student's family entitled to reimbursement of costs related to the SUWS unilateral placement?**
- (c) Was the I.E.P. offered to Student for the 2003-2004 school year reasonably calculated to provide educational benefit in the least restrictive educational setting?**
- (d) If the answer to (c) is yes, is the Academy at Cedar Mountain an appropriate placement? If so, is Student's family entitled to reimbursement of costs related to this unilateral placement?**

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx and he is currently xx years old. (Exhibit: Due Process Request)
2. Student was assessed for learning disabilities when he was in the xx grade (1996 – 1997 school year) and was identified with learning disabilities in the areas of reading, written language and math. He began receiving special education services at this time. (Testimony: Mother)
3. When Student was in the xx grade (1998 – 1999 school year), he began attending school in Bar Harbor and continued to receive special education services. During this period he made good academic progress but teachers reported being

- concerned about his low self-esteem and isolation from regular education peers. (Testimony: Mother)
4. During his xx grade year, Student's mother brought him to see Peter Rees, a mental health counselor, but student refused to engage therapeutically. Student also saw his family physician during this period, regarding sleep and bed wetting problems. He was prescribed a mild anti-depressant that seemed to have a beneficial effect. (Testimony: Mother)
 5. In September 1999, a WISC-III was administered to Student by William E. Davis, Ph.D. He obtained the following scores: Verbal IQ, 101; Performance IQ, 113; Full Scale IQ, 107. Student obtained the following Index Scores: Verbal Comprehension, 106; Perceptual Organization, 114; Freedom From Distractibility, 81; Processing Speed, 104. Dr. Davis also reviewed Student's records, interviewed his special education teacher and conducted a clinical interview with Student. In his report, Dr. Davis noted that Student "manifested very strong failure-set behavioral patterns," and "shuts down when anticipating difficulty – thus avoiding possible embarrassment." His recommendations include "the provision of instructional support and...modifications" as well as help to "gain more confidence in himself and in his abilities." Student continued receiving special education services through the 1999-2000 school year. (Testimony: Mother; Exhibits: 157-160)
 6. While in xx grade, the 2000-2001 school year, student attended Connors-Emerson School and, under an I.E.P dated December 8, 2000, he received resource room services in reading, written language and math. He also received a range of classroom modifications. During the December 8th P.E.T. meeting, Student expressed an interest in attending boarding school and his teacher gave his mother a list of such schools for students with learning disabilities. (Testimony: Mother; Exhibits: 143-154)
 7. During spring of Student's xx grade year, he stopped taking his medication. A major depressive episode transpired, and Student withdrew from his friends and became seriously disrespectful at home. His mother sought counseling services for Student, and in August 2001 Student began seeing a child psychiatrist, Dr. David Hawkins. He refused, however, to meet with Dr. Hawkins without his mother present and never really engaged with Dr. Hawkins. There was an unsuccessful attempt by Dr. Hawkins to do family talk therapy. During this period, Student began sleeping sixteen hours a day and withdrew further from family and friends. (Testimony: Mother)
 8. During xx grade, (2001-2002 school year), Student exhibited serious difficulties with getting out of bed in the morning and extreme antipathy towards school, finally refusing to attend school. Under an I.E.P. dated November 30, 2001, he began receiving in-home tutoring by the Lamoine School District, where he was

then living. The in-home tutoring continued through the school year.
(Testimony: Mother; Exhibits: 103-105, 108-114, 122-125)

9. On November 30, 2001, Student was referred to Dr. Bruce Saunders for an independent evaluation to determine whether his refusal to attend school was disability-based or a result of control issues. Dr. Saunders reviewed Student's records, P.E.T. minutes, prior evaluations and a letter from Dr. Hawkins, as well as conducting clinical interviews with Student and his mother. He also administered the Rorschach Technique and the Millon Adolescent Clinical Inventory (MACI). Dr. Saunders' accepted Student's diagnosis of Major Depression, by history, as well as diagnoses of Adjustment Disorder with Anxiety and Learning Disability. He strongly recommended continuing with in-home tutoring, stating "[f]orcing him to attend a structured public school program would likely result in his breakdown." In acknowledging Student's expressed desire to attend a preparatory school, Dr. Saunders opined that he "would be devastated in a preparatory school. He clearly needs the support of his family." He further recommended ongoing individual psychotherapy and continued services with Dr. Hawkins. (Exhibits: 118-121, 125, 126)
10. In a letter dated November 21, 2001, Dr. David Hawkins noted that Student "suffers severe depression, which impairs his ability to function academically, and has destroyed his ability to attend school." He further states that Student "requires one to one attention to progress in learning." Dr. Hawkins' opinion was that Student's academic program was "derailed by his self-doubt." (Testimony: Dr. D. Hawkins; Exhibit: 131)
11. In a P.E.T. meeting on June 12, 2002, Student's mother stated her intent to enroll Student in Mount Desert Island High School (M.D.I.) in September 2002. School staff offered to schedule meetings with special education staff at M.D.I. and suggested that Student take a tour of the school before school started in September. (Exhibits: 99-100)
12. During the summer of 2002, Student worked in his mother's pottery studio and did well there. He interacted with customers and seemed less troubled than he had been. (Testimony: Mother)
13. A P.E.T. meeting was held on September 9, 2002 and the category of Emotional Disability was added to Student's disability coding of Learning Disability. It was determined that Student would receive Direct Instructional Services in English and Social Studies for 25% of the day. He would also have access to a computer for all writing pieces, would be given editing support and could utilize the option of untimed tests in the resource room. His I.E.P. included goals in English and Social Studies. (Exhibits: 88-96)
14. A P.E.T. meeting was held on September 23, 2002, at the request of Student's mother. Student had frequently been tardy due to his sleep problems, and issues

- with depression and medications. The team recommended that Student's mother request a statement from Dr. Hawkins, discussing Student's diagnosis, medication and sleep difficulties. They further recommended that Student not receive detentions or disciplinary action for his tardiness. Dr. Hawkins discussed these issues in a letter dated September 25, 2002. He noted that the medications cause very deep sleep and difficulty rising in the morning. (Testimony: Dr. D. Hawkins; Exhibits: 81, 83-84)
15. In October 2002, the school made a referral to counselor Jeff McCarthy, L.C.P.C., and Mr. McCarthy met with Student and his mother on October 29, 2002. They met approximately seven more times, but Student was unwilling to engage with Mr. McCarthy or to participate in the therapy. Mr. McCarthy identified Student as having significant oppositional defiant behavior, and moderate to severe depression, basing these diagnoses on Student's low self-esteem, negativity, apathy, isolation and serious oversleeping. At one meeting with Student's mother, he did discuss the severity of Student's symptoms and possible out-of-home placement, stating that Student is "clearly not succeeding in a community-based program." They discussed something more restrictive, up to and including a residential setting. The last session with Mr. McCarthy was on January 7, 2003. (Testimony: Mother, J. McCarthy; Exhibits: 45-46)
 16. As part of his triennial review, an educational assessment of Student was conducted on October 24, 2002, by Gary Burgess, M.S. On the WJR-R, student received the following scores: Broad Reading, 88; Broad Math, 90; Broad Written Language, 90; Academic Knowledge, 102; Basic Reading, 84; Reading Comprehension, 86; Basic Writing, 84; Math Calculation, 85; Written expression, 98; Academic Skills, 81; Academic Fluency, 93; Academic Applications, 91. Mr. Burgess' recommendations include significant work in the areas of word reading/decoding and spelling skills, vocabulary preteaching, ongoing review work, use of a word processor with spell checking capability and math facts review. (Exhibits: 78-80)
 17. A classroom observation of Student in geography class was scheduled to be conducted by Peter Weaver, special education teacher, on November 15, 2002. However, Student failed to show up at the class and the classroom teacher commented "I have only had him in class once or twice since the start of the term." (Exhibits: 75-76)
 18. The P.E.T. met on November 18, 2002, to conduct Student's triennial review. The team was unable to complete the review at this time, and so they reconvened on December 2, 2003 and developed a new I.E.P. for Student. The P.E.T. continued Student's academic program and accommodations without change, and agreed to pay for counseling with a licensed clinician and to conduct an interest survey so Student could begin post-secondary planning. Student was also exempted from the school attendance policy as it pertained to homeroom tardies. The I.E.P included no counseling or social work services. (Exhibits: 49-55)

19. Student stopped seeing Dr. David Hawkins in December 2002. In January 2003, Dr. Hawkins prepared a Treatment Summary, in which he recommended that Student's mother consider residential mental health treatment for Student. He gave her the names of some referrals, including Hampstead Hospital, Brattleboro Retreat and KidsPeace. He did not recommend day treatment, feeling that Student would not attend and that Student's issues with his mother would undermine her effort to get him there. Also at this time, Student's mother learned that Student had again stopped taking his medication. (Testimony: Mother; Dr. D. Hawkins; Exhibits: 47-48)
20. During this time period, Student's attendance at M.D.I. High School was sporadic at best. He was disruptive and disrespectful at home and was completely isolated from peers. In December 2002, Student stopped attending school. (Testimony: Mother, T. White)
21. On January 15, 2003, Mr. McCarthy sent a letter to Harold "Tug" White, of the Cooperative Education Office in Ellsworth. In this letter he states, "[Student] will need to be invested with the academic program chosen in order to be successful. I am not sure that [Student] is able to do this for himself. Consideration should be given for all options including more restrictive options such as a residential program." Mr. McCarthy's opinion regarding day treatment was that Student would probably not be successful in that type of setting because he was incapable or unwilling to attend. (Testimony: J. McCarthy; Exhibit: 45-46)
22. The P.E.T. met on January 17, 2003, to discuss Student's school non-attendance. The discussion centered on possible hospitalization or residential placement, and the names of some possible placements, including Sweetser and Spurwink, were given to Student's mother to investigate. She was informed by personnel at the various placements that she called that Student did not fit the criteria for the placement. (Testimony: Mother; Exhibits: 36, 43-44)
23. In February 2003, Student's mother contracted with Leslie Goldberg, an educational consultant, to assist her in identifying an appropriate placement for Student. Ms. Goldberg reviewed Student's records and evaluations, in anticipation of making a referral to an educational placement. In her research and preparation for recommendations, Ms. Goldberg did not consider any day treatment programs, due to Student's serious resistance to attending school or even getting out of bed in the morning. Her focus was on identifying emotional growth programs that utilized art throughout the program. She also noted Student's prior refusal to engage in individual talk therapy and sought a program that utilized a significant level of group therapy. (Testimony: Mother, L. Goldberg)
24. A P.E.T. meeting was held on February 27, 2003, to discuss Student's program as well as Student's mother's research about alternative placements. She informed

- the P.E.T. that she had contracted with Ms. Goldberg and she had recommended a 4-6 week wilderness program in North Carolinas, SUWS of the Carolinas, during which a recommendation for a subsequent placement would be developed. Student's mother noted that she had concluded, after discussions with Dr. Hawkins and Mr. McCarthy, that hospitalization or therapeutic residential programs were not appropriate for Student. There was some discussion about the Liberty School, the district's alternative high school, but there was a sense that he wouldn't be ready for that placement "until he started acknowledging his issues." The P.E.T. denied the family's request for placement at SUWS "due to [the fact that Student] has not attempted the education at MDI or any high school here," and until a determination was made of whether it is an "approved educational placement." (Testimony: Mother, L. Goldberg; Exhibits: 36-37, 38-41)
25. According to its literature, SUWS of the Carolinas is "designed to be a powerful intervention for students that need structure, supportive counseling, motivational improvement, and the development of self-esteem, self-reliance, and self-respect...students are expected to complete a rigorous course of experiential instruction that addresses [these] fundamental curriculum areas." Those areas include Creative Writing, Healthy Living, Psychology, Physical Education, Social Studies, Outdoor Leadership, English, Environmental Studies, First Aid, Personal Development and Home Economics. (Exhibits: 180180-181)
26. Student attended SUWS of the Carolinas, in Old Fort, North Carolina, from March 7, 2003 to April 23, 2003, under an Individualized Service Plan dated March 11, 2002. This Plan included eight long-term goals, in the areas of Special Interests/Personal Goals, Intellectual/Academic/Vocational Goals, Psychological/Emotional Goals, Physical Goals, Social/Family Relationship Goals, Cultural/Spiritual Goals, Basic Living Goals and Family Time Goals. The short-terms goals included completion of academic assignments, personal goal setting, decreasing negativity and anger, improving peer relationships and participating in therapeutic interventions with his family. (Testimony: L. Madamba; Exhibits: 202-206)
27. Psychological Testing Services, Inc., of Kaysville, Utah, completed a psychological evaluation of student while he was at SUWS. Student's WISC-III scores at this time were significantly lower than on previous WISC-III testing (Verbal IQ, 88, Performance IQ, 89 and Full Scale IQ, 87). As seen on previous testing, his Freedom from Distractibility Index Score, 75, was significantly lower than all other scores. In a report dated March 30, 2003, Michelle Lechman, PsyD, suggests that the lower scores on this administration of the WISC-III were likely due to depression, defensiveness and lack of rapport with the evaluator. She notes that the prior scores are more likely to be [sic] reliable reflection of Student's true cognitive ability. (Exhibits: 188-201)
28. Dr. Lechman also administered the Woodcock-Johnson Tests of Achievement – Third Edition. Student's WJ-III Academic Skills score was 76, and his subtest

scores ranged from 97 in Writing Fluency and 90 in Writing Samples and Reading Fluency, down to 78 in Math Fluency and 73 in Spelling. Student's cluster scores were as follows: Broad Reading, 87; Broad Written Language, 85; Math Calculation, 78; and Written Expression, 95. (Exhibits: 188-201)

29. Personality tests administered to Student included the Minnesota Multiphasic Personality Inventory – Adolescent Version (MMPI-A), the Millon Adolescent Clinical Inventory (MACI), the Rorschach Inkblot Test and the Sentence Completion Test. On the MMPI, Dr. Lechman noted a heightened defensiveness in Student's responses and suggests that the results of this test likely underestimate Student's mental health issues. She concluded that Student could be considered "psychologically naïve"...."responding to stress with somatic problems, withdrawal and depression. Other reactions can include sensory or motor disorders without an organic basis." Personality problems indicated by the MACI include an elevated Dramatizing scale and an elevated Egotistic scale. She notes that Student "may display a pervasively rebellious attitude that could bring him into conflict with parents, school, or legal authorities." Student's responses on the Rorschach Test indicate problems with depression, impulsivity, and problems with emotionally charged situations. He also tends to misperceive events and has heightened alertness. At the end of her report, Dr. Lechman made a number of treatment recommendations, including placement in an emotional growth school following completion of the SUWS program, regular individual psychotherapy, group therapy, family therapy and a school environment that specializes in working with students with a learning disability and ADHD. (Exhibits: 188-201)

30. A P.E.T. meeting was held on March 31, 2002. Laura Sereyko, Director of Special Education, discussed the conversation that she had with SUWS, and noted that the program is not an approved school. She noted that at the end of the program, the SUWS staff will submit a list of activities and classes that Student participated in and the school district can then determine what credits Student will receive. Student's mother explained that Student's program at SUWS involved both a curriculum and an emotional aspect, and that Student is starting to participate with the program. She commented that it is likely that, when the SUWS program is completed, SUWS staff will recommend a "therapeutic boarding school with the emphasis of college prep or learning disabled kids." Laura Sereyko explained that she had researched a possible day treatment program at Kids Peace in Ellsworth. The program was not yet operating, but was going through the certification procedure with the State Department of Education. Student's mother stated that she did not believe that Student's needs were compatible with the needs of the students at KidsPeace. (Testimony: L. Sereyko, Mother; Exhibits: 28-31)

31. Dr. Michael Sheffield, Ph.D., re-administered the WISC-III to Student on April 7, 2003, and his scores at that time were Verbal IQ, 92, Performance IQ, 102, and

Full Scale IQ, 96. Three of the index scores increased to 100 or higher, but his Freedom from Distractibility Score remained very low, at 75. (Exhibits: 183-187)

32. On April 23, 2003, Student completed the SUWS program. Ms. Goldberg knew of no schools near Student's home that could provide the opportunity for emotional growth, utilizing an intensive art program, and that understood the learning needs of students with learning disabilities. She concluded that Student also needed a consistent home-school message. Ms. Goldberg identified three residential programs that would be appropriate – Hidden Lake in California, the King George School in Vermont and the Academy at Cedar Mountain in Utah. She presented the options to Student so that he could have a stake in the choice. Student chose to attend the Academy at Cedar Mountain and transferred there from the SUWS program. He has remained in that placement since that time. (Testimony: Mother, L. Goldberg, J. Tuttle)

33. The Academy at Cedar Mountain is a small, structured boarding school that deals with academic goals and social-emotional intelligence. The students' entire day and evening is fully programmed, including recreational and cultural activities on Saturday and Sunday. Students are accompanied by a teacher or counselor at all times. There is no therapeutic component to the program although families can independently contract for therapeutic services. Cedar Mountain has no special education staff, but does have a special education consultant who develops programs for special education students. The school is accredited by the Northwestern Association of School and Colleges. Cedar Mountain is designed to be a one year program with three phases, or schools: School of Integrity, focusing on friendship, honesty and responsibility; School of Dedication, focusing on cooperation and gratitude; and, School of Excellence, focusing on goals and transition. In addition to a weekly telephone conference with the family, there are four annual parent seminars, with mandatory attendance at three seminars. The program is year-round, with two long semesters and a one-month summer term. Most students are 15 or 16 years old and many have been diagnosed with ADD/ADHD. (Testimony: J. Tuttle)

34. The P.E.T. met on June 13, 2003 to conduct an annual review. The team reviewed the SUWS evaluations. A draft I.E.P. was submitted to the team and discussed in full. Student was no longer taking medication, so the pharmacological regime goal was dropped. There was some disagreement about whether Student has a disability in the area of math, but the team did agree to have a math goal in the I.E.P. The team then discussed the issues of least restrictive educational placement. Mr. White noted that Cedar Mountain is not a special education school and not approved or certified by the state of Maine. Ms. Sereyko described the day treatment program offered by KidsPeace. The program was still not up and running, but will provide special education services, home-school coordinated program assistance, a level system, life space interviews and use of a therapeutic method to address issues as they arise. It will also have art programming and an Outward Bound type program. Student's mother indicated

- that she might be willing to look at the KidsPeace program at a future time, as a transition back home, but felt that Student currently needed 24 hour programming. She stated her intention of keeping Student at Cedar Mountain, where he was doing well. The team developed an updated I.E.P., which contained an emotional goal, a math goal, a written language goal and a reading goal and offered 6 hours a day, 5 days a week direct instructional services, 2 sessions a week counseling and 2 session a week ESY counseling. (Exhibits: 1-5, 6-22)
35. In a report dated June 17, 2003, Leah Madamba, MS, NCC, who is the Field Supervisor at SUWS, recommended that Student “continue his progress in a supportive environment where he can begin to focus on his academics.” She was concerned about how withdrawn Student had been at home and felt that being away from home would force him to take on more responsibility. Ms. Madamba managed Student’s field experience, met with him twice a week for intensive group therapy and had a one-hour per week phone consultation with Student’s mother. (Testimony: L. Madamba; Exhibit: 176-179)
36. The KidsPeace day treatment program has only recently received certification from the state (September 4, 2003). They do not yet have any students enrolled, although they anticipate approximately 20 students with various disabilities, including conduct disorder, oppositional defiant disorder, ADD/ADHD and anxiety disorder. No new personnel have been hired as of yet. (Testimony: T. Novotnak; Exhibits: 161-169)
37. Prior to the hearing, Ms. Goldberg reviewed the material from KidsPeace and was concerned with the KidsPeace setting being a hostile “milieu” that would negatively impact Student. In addition, she felt that Student’s home living situation was not yet conducive to “supporting a seamless connection between home and school.” She also opined that it would be disruptive to Student to remove him from Cedar Mountain at this time. (Testimony: Leslie Goldberg; Exhibits: 161-169)
38. Mr. McCarthy recently reviewed the KidsPeace materials and had a conversation with Theresa Novotnak, Education Director at KidsPeace. He also had a telephone conversation with the Director of Cedar Mountain. Mr. McCarthy expressed concern with Student being placed in a setting with other students who are diagnosed with conduct disorder, due to Student’s tendency to revert to similar behaviors. He had an additional issue with day treatment being unable to provide the 24-hour support that has finally brought Student some measure of educational success. Student is beginning to take a leadership role at Cedar Mountain, is engaging socially and taking responsibility for parts of his program and his daily life. Although Student will eventually need to work on family and community issues, at this time he should work on school and social issues. Mr. McCarthy was very clear that he did not recommend returning Student to his community and a community-based program at this time. (Testimony: J. McCarthy; Exhibits: 161-169)

39. Dr. David Hawkins reviewed the KidsPeace literature and stated that KidsPeace is not an appropriate placement for Student. He had no particular concerns about the KidsPeace population, but felt that a residential setting is necessary, possibly for this entire school year. Student needs to learn and internalize basic coping skills and there could be a risk of relapse if he was removed from Cedar Mountain prematurely. (Testimony: Dr. D. Hawkins)
40. Student's mother submitted figures on the amount she is seeking in reimbursement for her expenses related to the SUWS of the Carolinas program and her costs to date for the Academy at Cedar Mountain, including travel expenses. (Testimony: Mother; Exhibits: 210-212)
41. On July 25, 2003, Student's parents filed for Due Process. (Due Process Request Form)

IV. Conclusions

The parent in this case seeks reimbursement for Student's unilateral placement at the SUWS of the Carolinas and subsequent, and current, placement at the Academy at Cedar Mountain. An award of reimbursement could be made under the *Burlington* and *Carter* line of cases, based on the Lamoine School Department's failure to offer Student a free appropriate public education and the subsequent unilateral placement of Student in an appropriate private placement. (*Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), *Florence County School Dist. Four v. Carter*, 114 S.Ct. 361 (1993)).

(a) Did the Lamoine School Department fulfill its legal obligation to provide a free appropriate public education to Student during the 2002-2003 school year?

The Individuals with Disabilities Education Act (I.D.E.A.) requires that school districts provide those students identified with disabilities a free appropriate public education (F.A.P.E.), through a program described in an individualized education program (I.E.P.). 20 USC §1412(a)(1)(A), §1413(a)(1), §1414(d)(1)(A). The United States Supreme Court has articulated the questions that must be answered when determining whether an I.E.P. meets the F.A.P.E. standard.

First, has the state [i.e. school district] complied with the procedures set forth in the Act? And, second, is the [I.E.P.] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit?

Bd. of Educ. v. Rowley, 458 U.S. 176, 206-7.

There are no alleged procedural violations in this case, so the first question does not need to be addressed.

As to the second question, two I.E.P.'s were developed for the 2002-2003 school year. The first was developed at a P.E.T. meeting on September 9, 2002, and placed Student at Mount Desert Island Regional High School. When this I.E.P. was developed, the team knew that Student had serious school attendance problems during his xx grade year and had been home tutored for a significant portion of the year. Yet the September 9, 2002 I.E.P. failed to include any plan or supports to address these non-attendance issues and did not include any emotional or behavioral goals.

Not surprisingly, Student failed to attend M.D.I. High School on a regular basis, and a new I.E.P. was developed on November 25, 2002. Again, this I.E.P. failed to provide a plan to address the issue of Student's non-attendance at school; nor did it include any behavioral or emotional goals. In fact, an accommodation made at this time was a waiver from the school attendance policy as it pertains to homeroom tardies, certainly a disincentive to regular and prompt attendance.

Student essentially stopped attending school in December 2002. Following receipt of a letter from Mr. McCarthy in early January, in which he suggested a consideration of residential placement, the P.E.T. met on January 17, 2003, to finally discuss Student's non-attendance. At this time, possible hospitalization or residential placement was discussed, and Student's mother was given the names of some possible placements, including Sweetser and Spurwink. Both programs informed Student's mother that Student did not fit the criteria for the placement. No mention was made of KidsPeace, or any other day treatment program, at that time.

There is no indication that the Department did any research of its own on possible placements, but rather relied on Student's mother to locate an appropriate placement for her son. So, she did. At a February 27, 2003 P.E.T., Student's mother presented her research, as well as Leslie Goldberg's recommendations, and requested funding for SUWS of the Carolinas. This funding was denied, "due to [the fact that Student] has not attempted the education at MDI or any high school here." There was still no mention made of day treatment, either at KidsPeace or elsewhere.

There was no real disagreement over the educational components of the 2002-2003 I.E.P.'s. Direct Instructional Services would be provided for 75% of the school day in a resource room placement, along with various accommodations. However, it is inappropriate to isolate the question of academic benefit from the total constellation of student's needs. Congress envisioned that I.E.P.'s developed under the I.D.E.A. would address all of a student's needs – physical, emotional, social, behavioral, academic – as appropriate. *Town of Burlington v. Dep't of Educ., Comm. of Massachusetts*, 736 F.2d 733, 788 (1st Cir. 1984). This is reflected in the Maine state regulations as well. MSER §2.7 (1999)

The Lamoine School Department knew that Student was not attending school and had various psychiatric diagnoses, including depression, and adjustment disorder with anxiety, and was taking medication that impacted his sleep patterns. Yet all the team did was pass along possible referrals to Student's mother, rather than utilize the

psychological and psychiatric reports and available professional expertise to assist the team in developing a plan that might have a chance to work, a plan that incorporated behavioral and emotional supports, rather than simply academic services.

The Lamoine School Department failed to provide an I.E.P. that was reasonably calculated to provide academic benefit for the 2002-2003 school year, due to the failure to address all areas of need, i.e. social, emotional and mental health, all of which had a direct impact on educational benefit.

(b) Is the SUWS of the Carolinas an appropriate placement and, if so, is Student's family entitled to reimbursement of costs related to the SUWS unilateral placement?

Student began attending the SUWS program on March 7, 2002. At that time Student's local program was not achieving its purpose, to educate Student, in that Student was not attending school at all, much less making academic progress.

Confronted with this situation, Student's mother sought an alternative for her son, an educational placement that would provide supports and structure to the maximum extent, with the goal of addressing his school non-attendance issues. The question, therefore, is whether SUWS of the Carolinas is an appropriate educational placement.

It is true that this placement is not a traditional academic environment, but rather a structured wilderness program.¹ Nor is the school approved by the Maine Department of Education. However, the "fact that the private school selected by the parents has not been approved by the State Education Department is not itself a bar to reimbursement." *Bd. of Educ. of the Williamsville Central School Dist. v. New York State Educational Agency*, 37 IDELR 79, 81 (SEA NY, 2001) citing *Burlington School Comm. v. Department of Educ.* [citations omitted].

SUWS clearly provided the structure and incentives to successfully address the major impediment that was preventing Student from making academic progress – his school non-attendance. There was some suggestion by the Department that Student's school attendance issues, and his other emotional issues as well, were home based and were not issues that were within the school's sphere of responsibility. However, Student's poor attendance record appears to have a clear connection to his emotional disability and "combined with ineffective programming....cannot be separated from [that handicapping condition]." *In the Matter of a Child with Disabilities*, 19 IDELR 448 (SEA VT, 1992)

The Department further argues that the SUWS program is not the LRE for Student. However, while the restrictiveness of a placement may be considered when determining whether to award reimbursement, "parents are not held as strictly to the standard of LRE as are school districts." *M.S. v. Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000) Placement at the SUWS of the Carolinas program did not violate the LRE requirement since, at the

¹ Although there are some "wilderness programs" that are overly harsh, restrictive and punitive, there is no evidence that SUWS of the Carolinas is such a program.

time of placement, the Lamoine School Department was unable to locate a placement either less restrictive and/or closer to home.²

It is held that SUWS of the Carolinas was an appropriate placement for Student during the period of his attendance, March 7, 2003 until April 23, 2003. The Family is therefore entitled to reimbursement of costs associated with this placement.

(c) Was the I.E.P. offered to Student for the 2003-2004 school year reasonably calculated to provide educational benefit in the least restrictive educational setting?

A P.E.T. meeting was held on June 13, 2003 and a new I.E.P. was developed. This I.E.P. proposed full time placement in the Ellsworth KidsPeace day treatment program, and included a number of academic goals and an emotional goal.

However it was now June, and the KidsPeace day treatment program was still not operating. In fact, it only became licensed on September 4, 2003. Ms. Novotnak suggested that the licensing could have been sped up if Student was placed there, but there was no actual guarantee that that would have been the case. It is not difficult to understand a parent's hesitation to place a Student in a program that did not yet exist.

Due to the failure to identify an appropriate, and available, placement for Student, it is held that Student's 2003-2004 school year I.E.P. was not reasonably calculated to provide educational benefit in the least restrictive educational setting.

(d) If the answer to (c) above is no, is the Academy at Cedar Mountain an appropriate placement and, if so, is Student's family entitled to reimbursement of costs related to this unilateral placement?

The Department made much ado about the fact that Student has made good progress in two settings (SUWS and Cedar Mountain) that are essentially non-therapeutic settings. It was suggested that perhaps Student might not even have any special educational needs.

This is a specious argument. Certainly Student has made good progress at SUWS and Cedar Mountain. However, if he attends class, and makes any academic gains whatsoever, that is progress since he was previously not attending school at all.

Student is not "cured." He still needs what Cedar Mountain seems to be offering him – a highly individualized program, significant structure, a small setting, small class sizes and the ability to work in his area of great love, visual arts. Those needs do not suggest that Student needs a therapeutic day treatment program, and I am not persuaded that he either needed such a program last March, or that he needs such a program today.

² It was not until March 31, 2003, that the KidsPeace day treatment program was offered to the family. Student had been placed at SUWS of the Carolinas on March 7, 2003, almost a month earlier, and notice of intent to place had been given on February 27, 2003, more than a month earlier. In addition, when the offer was made, the day treatment program was only on paper, and did not yet exist.

However, I am also not persuaded that Student needs to attend a boarding school 2000 miles away in order to make educational progress. As noted above, what he needs is a highly individualized, small, supportive, structured setting that will demand school attendance while providing the supports Student will need to work through his emotional issues and alleviate his previous school avoidance.

The Lamoine School Department has failed to identify such a setting. In the absence of such a proposed placement, Student's mother's unilateral placement at Cedar Mountain is appropriate until such time that the Department identifies and offers an appropriate, less restrictive, day program in or around Hancock County.³

Some creativity is called for here. There is a great divide between what the school has offered, i.e. day treatment, and what has been shown to work for student. I would also suggest that, in some ways, day treatment might even be a more restrictive setting than a non-special education boarding school, particularly since one criteria of LRE is education with non-disabled peers to the maximum extent possible. MSER §11.2(E) (1999).

The second part of this issue concerns parental reimbursement for the costs of the Academy at Cedar Mountain. To answer this we must look towards the equities that are at work in the situation. The School Department failed to identify an appropriate, and available, placement for student upon his completion of the SUWS program. However, neither Student's mother, nor her consultant, Ms. Goldberg, looked into any less restrictive, and more local, educational placements. Ms. Goldberg indicated that the King George School in Vermont was on her short list of possible placements, but that Student chose the Academy at Cedar Mountain. While it is advisable to include Student in the decision making process, it appears that he was given complete authority to choose any one of the schools on this list, with no consideration given to distance and cost. While the tuition and room and board at the King George School might be similar to that at Cedar Mountain, it is certainly closer to Student's home and would reduce the time and cost of travel, while enabling Student's mother to have more involvement with the Student and his school. It is also the case that Student is not receiving any sort of therapeutic intervention at Cedar Mountain.

Granted, Student's I.E.P. for the 2003-2003 school year was not reasonably calculated to provide educational benefit in the least restrictive educational setting, in that the School Department failed to identify and offer an appropriate educational placement for the period beginning at the completion of the SUWS program. And it does appear that Student has made, and probably is continuing to make, some educational progress at Cedar Mountain. In a legal sense, therefore, the Academy at Cedar Mountain is an appropriate placement. However in an equitable sense, I am not persuaded that Student requires a residential setting in order to make educational progress. As noted above, no consideration was given to possible non-residential settings, or to residential settings closer to home. Lastly, it is unlikely that Student no longer needs any sort of therapeutic

³ Some mention was made of the Liberty School in Blue Hill, but nothing more was said about it during the hearing.

intervention, yet he is receiving none at Cedar Mountain. Nor is Student's mother receiving any family therapeutic intervention.

The Family is entitled to some level of reimbursement for the costs related to Student's attendance at the Academy at Cedar Mountain from April 23, 2003 up to such time as the Department offers an appropriate placement that is less restrictive than Cedar Mountain. However, tuition reimbursement is an equitable remedy, (20 U.S.C. §1414(c); *Burlington* at 374) and, as such, is not an "all-or-nothing" award. Although *Carter* referred to courts having the authority to make such determinations, O.S.E.P. has further clarified that this authority extends to the equitable remedial responsibilities of hearing and review officers. *Carter* at 514; 64 Fed. Reg. 12,602 (Mar. 12, 1999).

Both parties bear some responsibility for the fact that Student is not receiving his education in an appropriate setting within his community. The family is therefore awarded reimbursement in an amount equivalent to the amount that the Lamoine School Department would have spent for Student's placement and services if he had attended the KidsPeace day treatment program from April 23, 2003 until such time that the P.E.T. identifies and offers a less restrictive, appropriate educational setting.⁴

Order

1. The P.E.T. shall hold a meeting as soon as possible, but no later than November 17, 2003, in order to discuss possible non-residential placements for Student. Prior to the meeting, staff will identify and research possible placements, as well as related services, such as counseling, therapy and social work services. Staff shall also communicate with the appropriate personnel at the Academy at Cedar Mountain to collect information and recommendations about what factors will contribute to an appropriate, but less restrictive, placement.
2. Upon receipt of appropriate documentation of costs and payments, the Lamoine School Department shall reimburse the family for payments made to Leslie Goldberg and for costs related to Student's attendance at SUWS of the Carolinas.
3. The Lamoine School District shall calculate the amount it would have expended had Student attended the Ellsworth KidsPeace day treatment program from April 23, 2003 until the date that an appropriate, non-residential placement is offered to Student. Upon receipt of appropriate documentation of costs and payments by the family to the Academy at Cedar Mountain, the School Department shall transmit this amount to the family as payment in full

⁴ Student is obviously happy, and making progress, at Cedar Mountain. If and when the Department identifies and offers an appropriate day program in the area, Student's mother might choose to keep him at Cedar Mountain. However, at that point the Department's responsibility for Cedar Mountain tuition will end.

for any reimbursement claims they might have against the Lamoine School Department regarding Student's attendance at the Academy at Cedar Mountain.

4. Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator by December 19, 2003.

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

Date

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FAMILY’S WITNESS LIST

Mother

Leslie Goldberg, Educational Consultant

Dr. David Hawkins, Psychiatrist

Leah Madamba, Counselor/Field Supervisor, SUWS of the Carolinas

Jeff McCarthy, L.C.P.C., Clinical Counselor

Jodie Tuttle, Head of School, Academy of Cedar Mountain

Leah Van de Kieft, Administrative Director, SUWS of the Carolinas

SCHOOL DEPARTMENT’S WITNESS LIST

Laura Sereyko, Director of Special Education

Harold “Tug” White, Licensed Clinical Social Worker

Paige Collins, MDI Special Education Teacher

Theresa Novotnak, Education Director, KidsPeace