

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 15, 2003

Case #03.117X, Parents v. *Richmond*

REPRESENTING THE FAMILY: Richard L. O'Meara, Esq.

REPRESENTING THE SCHOOL: James Schwellenbach, 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 family on September 25, 2003. The case involves Student, whose date of birth is xxx x, xxxx. She resides with her parents at Richmond, Maine. Student is diagnosed with autism and is currently attending the Merrymeeting Child Development Center in Waldoboro, Maine. The family filed a complaint investigation request with the Due Process office in early September 2003 and sought continued placement of Student at Merrymeeting for the pendency of due process. The Richmond School Department declined to recognize Merrymeeting as Student's Stay Put placement and the family seeks a hearing officer decision ordering the Richmond School Department to recognize, and fund, Merrymeeting as Student's Stay Put placement.

The Richmond School Department contends that the Richmond X placement is Student's Stay Put placement.

A prehearing was held on October 10, 2003 at which time documents and witness lists were exchanged. The parties waived the five business days rule pertaining to the exchange of documents and witness lists so that the hearing could be held on October 16, 2003, which it was. The family entered 94 pages of documents into the record and the school entered 46 pages of documents into the record. Five witnesses testified. Final written closing arguments were received on October 21, 2003 and the record was closed on that date.

1. Preliminary Statement

This case involves a x -year-old female student, who is diagnosed with autism. She is currently attending the Merrymeeting Child Development Center in Waldoboro, Maine. She was placed there by Southern Kennebec C.D.S. under an I.F.S.P. dated June 10, 2003.

The family requested this hearing. They disagree with an I.E.P. developed by the P.E.T. at P.E.T. meetings held on August 20 and 22, 2003 and sent to the family on September 23, 2003. Consequently, the family filed a request for a complaint investigation on September 9, 2003, in order to challenge the appropriateness of the Richmond School Department's proposed placement, and they invoked Student's right to Stay Put during the pendency of the complaint investigation. The School Department declined to maintain the Merrymeeting placement and Student is therefore currently placed there under a unilateral parental placement. The family seeks an order designating Merrymeeting as the Stay Put placement.

The Richmond School Department argues that the Merrymeeting Child Development Center was an Extended School Year (E.S.Y.) placement and since Student is transitioning into the public school system, the School Department's proposed X placement is the Stay Put placement.

II. Issues to be Decided by this Hearing

Is the Merrymeeting Child Development Center Student's last agreed upon placement and therefore the Stay Put placement?

If the Merrymeeting Child Development Center is Student's Stay Put placement, is the family entitled to reimbursement by the Richmond School Department for tuition and other costs incurred in maintaining this placement since the start of the 2003-2004 school year?

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx and she is currently x years old. (Exhibits: Due Process Request)
2. Student began receiving services from Southern Kennebec C.D.S. in March 2001, due to a diagnosis of speech and language delay. (Testimony: Father, D. Dunn)
3. During the 2002 –2003 school year, Student attended X in Richmond in a four day per week program, under an I.F.S.P. developed by the Early Childhood Team (E.C.T.) She had the services of a one on one aide while in this program. Her services that year included speech therapy, O.T., and 16 hours per week of developmental therapy. Despite the level of services, Student experienced a very difficult year. At that time, Student was still diagnosed with a communication disability. (Testimony: Father, D. Dunn)
4. An E.C.T. meeting was held in April 2003, in order to discuss transitioning Student into the Richmond School Department for the 2003- 2004 school. (Exhibits: P46)

5. Karen Sundqvist, M.S., CCC-SLP, conducted a speech/language reevaluation of Student on May 14 –16, 2003. In a report dated May 22, 2003, Ms. Sundqvist states “[Student’s] physically impulsive behavior should be considered a significant safety risk factor....[Student] is a strong, agile child who could easily injure an adult who is trying to restrain her.” (Exhibits: P46-50)
6. Anthony Podraza, Ph.D., conducted a neuropsychological evaluation of Student on May 23, 2003 and June 20, 2003, and she was diagnosed with autism. As a result, C.D.S. asked Jonathan W. Kimball, Ph.D., BCBA, from Bancroft Neurohealth, to observe Student and develop new recommendations for placement and services. Dr. Kimball’s recommendations included a functional behavioral assessment, development of a behavioral support system, environmental modifications, explicit practice of social skills and development of a system to monitor progress. (Exhibits: P39-43, P44-45)
7. An E.C.T. meeting was held on June 10, 2003. The purpose of this meeting was to discuss Student’s placement for the balance of the 2002-2003 placement year, and for the 2003 - 2004 school year. During this meeting, it was noted that summer programming would be up to the team but that fall programming would be left up to the Richmond School Department. Ms. Dunn expressed her desire to identify a more structured and appropriate placement for Student. Team consensus was that Student would attend the Merrymeeting Child Development Center and receive individual developmental therapy, speech and language services and O.T. in that setting. This program began immediately, on June 10, 2003, and continued up until the start of the 2003-2004 school year, on or before September 1, 2003. (Testimony: Father; Exhibits: S44)
8. In an I.F.S.P. dated June 10, 2003, Student’s eligibility category was changed to autism. The services to be provided to Student under this I.F.S.P. included developmental therapy at an average of 8 hours per day, 5 days per week; speech and language services, 30 minutes per week; and, O.T. for 30 minutes per week. Placement was the Merrymeeting Child Development Center. (Exhibits: S33-41)
9. A P.E.T. meeting was held on August 20, 2003 and continued over to August 22, 2003, to discuss Student’s transition to the Richmond School Department. During these two meetings, the team developed a proposed I.E.P. for Student for the 2003-2004 school year. The Merrymeeting School staff submitted an I.E.P. that they were prepared to implement at Merrymeeting for the 2003 - 2004 school year. Although there were discussions about the proposed placement and

program at these meetings, no written I.E.P. was forwarded to the family until September 23, 2003. During the August 22, 2003 meeting, the family informed the team that they disagreed with the placement and program that had been tentatively proposed for Student and would be maintaining Student's placement at the Merrymeeting Child Development Center. The family stated that they would be filing a due process request in order to resolve the placement issues. The family's decision was acknowledged by Special Education Director Judith Gove in a letter to the family dated September 5, 2003, in which she also reiterated the School Department's formal offer. (Exhibits: S2, S3-22, S23-25)

10. The family filed a Request for a Complaint Investigation (#03.112C) and asked the Maine Department of Education to enforce Stay Put at the Merrymeeting Child Development Center during the pendency of the complaint investigation. The Due Process Office refused to enforce Stay Put and informed the family that they would need to request that an independent hearing officer enforce the student's Stay Put rights. The family filed a Request for a Due Process Hearing on September 25, 2003. (Exhibits: Due Process Request)

IV. Discussion and Conclusions

The issue in this case is a very narrow one. Maine Special Education Regulations provide that during the pendency of any due process proceeding, including a complaint investigation, the student "shall remain in his or her current education placement." M.S.E.R. §12.12(A) (1999); *see also* 34 C.F.R. SEC 300.514(a) (parallel provision in federal regulations).

The regulations further state that when the proceeding involves "an initial admission to public school, the student, *with the consent of the parents*, shall be placed in the regular public school program until the completion of the proceedings." M.S.E.R. §12.12(B) (1999) [Emphasis added]

The first question to be answered, therefore, is whether the current school year, 2003-2004, is Student's first admission to public school. The School Department makes much of this exception to the general rule, arguing that C.D.S. is not a public school, but rather an "intermediate educational unit." This argument, however, assumes a fact not in evidence. It assumes that the parents *consented* to the public school placement. The regulations require this consent in order to consider the public school placement as the last agreed upon placement. The purpose of this provision is to permit the family, by giving consent, to permit their child to have access to special educational services when they are beginning school. The Parents clearly have not given such consent. Student is attending school at present and it is that placement that the family is seeking to maintain.

Additionally, the proposed public school placement is not an initial public school placement. Student has been receiving services under Part B of the I.D.E.A. for her two years with C.D.S. In most states, children aged 3 to 5 receive Part B services through their school districts. Maine is unique in having a C.D.S. system that provides these services. However, having a unique system of service delivery does not mean that Maine's 3 to 5 year olds are somehow receiving services that are defined differently than those received by 3 to 5 year olds in other states. Special education services are delivered under a Federal statute, the I.D.E.A., and details of delivery systems do not change the Federal nature of the statute.

A New York hearing officer decision ruled in favor of the family in a case very similar to this one. In *Board of Educ. of the Baldwin Union Free Sch. Dist.*, 25 IDELR 661 (SEA NY 1996) In that case, the family of a six-year-old boy sought Stay Put in a preschool placement while they challenged the appropriateness of a proposed Kindergarten placement. The student had received preschool special education services from the "district committee for preschool special education (C.P.S.E.), which had placed him in a provide [sic] school for language and communication development. When the student turned five, the family disagreed with the proposed public school placement and filed for due process. The hearing officer found that the private C.P.S.E. placement was the Stay Put placement for the pendency of the due process proceedings, since

a child who had received pre-school special education services and thereafter became eligible to attend kindergarten was not making an initial application to public school...the [private preschool] was the child's pendency placement, notwithstanding the fact that he had passed from the CPSE's jurisdiction to the CSE's jurisdiction as a school aged child.

Id. at 665. See also *Pardini v. Allegheny Intermediate Unit*, 203 WL 22080730 (W.D. Pa. Aug. 29, 2003).

The Department also argues that the Merrymeeting placement was an extended school year placement (E.S.Y.). They are correct in their statement that if Merrymeeting were an E.S.Y. placement it would not be the Stay Put placement for the academic school year. On the surface, Merrymeeting may appear to be an E.S.Y. placement. However, a closer look reveals that although the bulk of the services under the Merrymeeting I.F.S.P. do occur during the summer of 2003, the placement itself began on June 10, 2003, near the end of the 2002-2003 school year. Although seemingly a minor detail, this fact is indicative of the intent of C.D.S. in making the Merrymeeting placement. As Ms. Dunn's testimony indicates, her intent was to increase the intensity and structure of Student's program and placement in order to remediate what she felt were inadequacies in prior services.¹

One could easily make the logical inference that if C.D.S. previously had the information

¹ These prior inadequacies were mainly due to the fact that Student was misdiagnosed prior to May 2003. (Testimony: Father, D. Dunn)

that it received in April and May 2003, Student would have been placed at Merrymeeting at a much earlier point in time. Clearly, Student was not moved to Merrymeeting because it was the beginning of the summer session, but because she needed the structure and services that Merrymeeting is able to provide. It was clear to Ms. Dunn that she was making little, if any, progress in her previous program. Concerns about Student's safety and her need for significant structure and highly trained staff were also made clear by a number of Student's evaluators.

The purpose of an E.S.Y. placement is worth noting. The regulations require the team to consider whether a student is "at risk of losing skills previously mastered" when discussing E.S.Y. services. The basis for the Merrymeeting placement was far more than the prevention of regression. The C.D.S. director was concerned with Student's lack of progress and her serious behavioral issues and sought to identify a far more structured placement with a higher intensity of services.

A Stay Put placement is not necessarily a long-term placement. The policy goals of Stay Put include providing stability to educational placements, during a period of between 45 and 60 days, while due process runs its course. Requiring that the School Department maintain Student in her last agreed upon placement seeks to prevent unnecessary and disruptive transfers until the placement dispute is resolved. If the Richmond School Department's proposed placement is deemed to be appropriate by the complaint investigator, so be it. The family will then need to either transfer Student into that placement or assume the Merrymeeting tuition costs. However, if the Richmond School Department placement is found to be inappropriate, a premature transfer would unnecessarily disrupt the educational consistency of this student.²

Families who maintain a Stay Put placement in the face of a district's refusal to maintain the placement are entitled to reimbursement whether or not they ultimately prevail in their due process cause of action. *See Henry v. School Admin. Unit #29*, 70 F. Supp. 2d at 52. In the case at hand, C.D.S. placed Student at the Merrymeeting Child Development Center, in a placement decision that was not just an E.S.Y placement. The Richmond School Department failed to maintain the Merrymeeting placement when the family filed for due process, thereby violating state regulations. M.S.E.R. §12.12(A). (1999) The Richmond School Department is thereby liable for tuition and other related costs that the family has expended on behalf of maintaining this placement during the pendency of the complaint investigation.

IV. Order

1. The Richmond School Department is ordered to reimburse the family for tuition and other related costs, including but not limited to transportation, upon submission of proof of payment for all costs, with

² This analysis, however, does not give carte blanche to families to make unilateral placements and then seek to have them declared as Stay Put placements. In this case, the Merrymeeting placement was made by C.D.S. and was not a unilateral parental placement at the time it was initiated.

the exception of transportation. Transportation reimbursement will be made at the prevailing state mileage rate.

2. The Richmond School Department will submit proof of compliance 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.

Dated

PARENTS' DOCUMENT LIST

- P1-20 Draft Transcript of P.E.T. Meeting from Notes and Recording, dated 8/22/03
- P21-32 I.E.P. prepared by Merrymeeting Child Development Center, dated 8/20/03
- P33-34 Positive Behavior Support Plan prepared by Merrymeeting Child Development Center, dated 8/11/03
- P35-38 I.E.P. of Merrymeeting Child Development Center, dated 7/9/03
- P39-43 Neuropsychological Examination Report of Anthony M. Podraza, Ph.D., dated 5/23/03 and 6/20/03
- P44-45 Letter from Jonathan W. Kimball, Ph.D., BCBA, to Southern Kennebec Child Development Services, dated 6/5/03
- P46-50 Speech-Language Reevaluation of Karen J. Sundqvist, M.D., CCC-SLP, dated 5/22/03
- P51-53 Outpatient Pediatrics Neurology Consultation Report of Stuart A. Stein, M.D., dated 4/15/03
- P54-60 Minutes of E.C.T. Meeting, dated 4/10/03
- P61-62 Occupational Therapy Progress Report of Ann Griffin-Carey, OTR/L, dated 4/1/03
- P63-68 Minutes of E.C.T. Meeting, dated 10/30/02
- P69-86 I.F.S.P., dated 8/1/03
- P87-94 Draft Transcript of P.E.T. Minutes from Notes, dated 8/20/03

PARENTS' WITNESS LIST

Father

Lora Perry, Administrative Director, Merrymeeting Child Development Center

SCHOOL DEPARTMENT'S DOCUMENT LIST

- S1 Notice of Proposed Change of Program, dated 9/15/03

- S3 Letter from Judith Gove to Parents, dated 9/5/03
- S3-22 Richmond I.E.P. for Student, dated 8/22/03
- S23-25 P.E.T. Minutes, dated 8/22/03
- S26 Waiver of Prior Written Notice, dated 8/22/03
- S27 I.E.P. Draft Cover Sheet, dated 8/22/03
- S28-30 P.E.T. Minutes, dated 8/20/03
- S31 Waiver of Prior Written Notice, dated 8/20/03
- S32 P.E.T. Written Notice, dated 8/14/03
- S33-41 I.F.S.P., dated 6/10/03
- S42-45 “Significant Notes” of E.C.T. Meeting, dated 6/10/03
- S46 C.D.S. Transition Plan, dated 4/10/03

SCHOOL DEPARTMENT’S WITNESS LIST

Gwenda Hatch, Pre-School Teacher

Debbie Dunn, Director, Southern Kennebec C.D.S.

Judy Gove, Special Education Director, Richmond School Department

PARENTS'