

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

May 25, 2004

Case # 04.055H, Parent v. Palermo (Union #133)

REPRESENTING THE FAMILY : Richard 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.

This due process hearing was requested by the father and mother, on April 14, 2004. The case involves their son, whose date of birth is xx xx, xxxx. He currently attends Averill High School, located on the campus of Good Will-Hinckley, and is presently completing xx grade.

A prehearing conference call was held on May 3, 2004. Present on the prehearing conference call were Richard O'Meara, Esq., counsel for the family; James Schwellenbach, Esq., counsel for the school department; and Lynne Williams, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner.

The hearing was held on May 10, 2004, in Augusta, Maine. The family submitted 67 pages of documents, and the school district submitted 18 pages. Five witnesses testified. Written closing arguments were submitted on May 17, 2004 and the record was closed at that time.

Following is the decision in this matter.

I. Preliminary Statement

Student is a xx year-old male, currently in the xx grade at Averill High School, located on the campus of Good Will-Hinckley. He is eligible for special education services under the category of Emotional Disability.

Student's parents are divorced, and he lives with his father in Palermo. Prior to moving to Palermo, Student's family resided in Augusta. In late 2001, because of behavioral problems relating to his emotional disability, Student was placed in the Glenn Stratton Learning Center by the Augusta School Department. The Glenn Stratton Learning Center is a day treatment center located on the campus of Good Will-Hinckley, and the school department contracted with Student's father to transport him to and from school.

When Student and his family moved to Palermo, both his placement and the transportation arrangements remained unchanged.

In October 2003, Student's clinical team determined that he was ready to transition to a less restrictive education placement, and recommended that Averill High School be Student's next placement. In November 2003, the P.E.T. supported this recommendation and Student gradually transitioned into Averill High School, beginning full-time attendance on January 21, 2004.

After Student's transition into Averill was complete, Student's father was informed that the Palermo School Department would no longer pay the cost of Student's transportation. Student's father and mother then filed a request for a due process hearing. They contend that Palermo continues to be responsible for the cost of Student's transportation to his current placement at Averill High School. The Palermo School Committee denies that they have any continuing responsibility for the cost of Student's transportation, arguing that Student's current placement is a regular education placement, for which the school committee bears no responsibility for transportation.

II. Issues to be Decided by Hearing

- **Is Student's father entitled to reimbursement of the wages and costs associated with transporting Student to school at Averill High School, since January 2004, as well as restoration of Student's prior transportation arrangement, either under Student's November 2003 I.E.P., or pursuant to the I.D.E.A. stay put provision?**

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx, and he is currently xx years old. (Exhibits: Due Process Request)
2. Student is eligible for special education services under the category of Emotional Disability. (Exhibits: P32)
3. In 1996, when Student was xx years old, he was evaluated by professionals, to determine the possible causes of his serious behavioral issues. Following completion of the assessment, Student was identified as eligible for special education services. He was placed in the behavior classroom at Lincoln School in Augusta, and stayed in that program through xx grade. (Testimony: Father)
4. Student began xx grade at Buker Middle School in Augusta, but had a difficult time behaviorally in that placement. A P.E.T. meeting was held in October 2001, at which time the team determined to place Student at the Glenn Stratton Learning Center, a day treatment center on the campus of Good Will-Hinckley. Student was not placed as a residential student, but rather was transported to and from school by his father. The Augusta School Department contracted with Student's

- father, and paid him an hourly rate of \$10.00 per hour, which eventually increased to \$10.75, plus the prevailing federal mileage rate. (Testimony: Father)
5. All of the 30 students at the Glenn Stratton Learning Center have I.E.P.'s and the student to staff ratio is 4:1. Eighteen of the students reside on campus. There is a strong clinical component to the program and a school-wide behavioral system that utilizes a point system and immediate rewards and consequences in order to instill personal responsibility. (Testimony: R. Moody; Exhibits: P49)
 6. When Student began at Glenn Stratton, he exhibited significant problems in his interactions with peers, who would taunt him and elicit a very aggressive response. His self-esteem was very low, he was oppositional defiant and aggressive with staff. He also exhibited these behaviors in his interactions with his mother. (Testimony: B. Walden)
 7. In September 2002, Student's family moved to Palermo/Union #133 and the P.E.T. determined that his placement, as well as the transportation arrangements, would remain the same. The two daily round-trips from Palermo to Good Will-Hinckley total 160 miles. (Testimony: Father, R. Freve)
 8. In October 2003, Student's clinical team at Glenn Stratton held a 90-day review meeting, at which time the team recognized the good progress Student had made in improving his challenging behaviors. Subsequent to the clinical team meeting, Student's counselor, Barry Walden, prepared a memo, dated November 4, 2003, recommending that Student begin transitioning to a less restrictive setting. He forwarded the memo to Brian Cole, the special education teacher at Glenn Stratton, and stated that it was the team's opinion that Averill High School was the most appropriate setting for Student to transition into. His reasons included Averill's small size, both overall and class size; the similarity of the Averill behavior program to the behavior program at Glenn Stratton; the ongoing clinical counseling services, with constant and immediate availability of counselors; the availability of family support services; and, the culture of the sports program, which was more focused on participation and team building than on winning. Mr. Walden considered Averill High School to be a stepping stone to a less restrictive setting. (Exhibits: P14; Testimony: B. Walden, B. Cole)
 9. When Father became aware that the clinical team was recommending a transition, he began to research possible placements, including Erskine Academy, Belfast High School and Averill High School. The Erskine headmaster told him that Erskine could not serve students with behavior problems, only those with learning disabilities. Student's father thought that Belfast High School may be appropriate for a future placement, and he agreed with the clinical team's recommendation of Averill High School. (Testimony: Father)
 10. Averill High School is located on the campus of Good Will-Hinckley and although it is not a special purpose school, 50% of the students have I.E.P.'s.

There are 85 students and the student teacher ratio is 8:1. Only three students are day students. The program that Averill offers is similar to that offered by regular high schools; however, Averill does not offer foreign language classes or lab sciences. Like Glenn Stratton, all Averill students are subject to the school-wide behavioral plan. Behavior cards and a semi-token system are used and the only difference with the Glenn Stratton system is that Averill privileges are delayed rather than immediate. The clinical component is lighter than at Glenn Stratton, but there is still immediate access to clinicians whenever a student might feel the need to speak with one. If a student becomes “out of behavioral control,” he is sent to a behavioral lab, until such time that he can be reintegrated back into the classroom. Somewhere between 30% and 50% of the Glenn Stratton students transition into Averill High School, with the balance moving to regular public high schools. The tuition rate at Averill is approximately \$13,000. (Testimony: R. Moody, B. Walden; Exhibits: P48)

11. A P.E.T. meeting was held on November 17, 2003, and it was determined that Student would begin his transition to Averill on December 1, 2003. There was no discussion of whether any other high school could successfully implement Student’s I.E.P., nor was there a discussion of transportation issues. Ray Freve, Director of Special Services for Palermo/Union #133, stated that it would be “ludicrous” for Student to go anywhere else, because of Averill’s small size and Student’s needs. The I.E.P., which was sent to the family on December 3, 2003, states, in the Transportation section, “[S]chool Union #133 will provide transportation to and from Averill High School.” (Exhibits: P1-13; Testimony: B. Walden, B. Cole)
12. In mid-December, Student began his transition to Averill High School. Over a period of six weeks, three before and three after the holiday vacation, Student gradually increased the number of classes he took at Averill, simultaneously decreasing his class load at Glenn Stratton. (Testimony: B. Walden)
13. A 90-day review meeting was held by Student’s clinical team at Glenn Stratton on January 13, 2004. At this time, the clinical team agreed that Student’s attendance at Glenn Stratton would terminate and he would begin attending Averill High School on a full-time basis. It was also agreed that he would continue receiving outpatient therapy and family support services. (Exhibits: P15-20)
14. Student began attending Averill High School full-time on January 21, 2004. No Prior Written Notice of Change of Placement, regarding either the move to Averill or a change in transportation services, was ever forwarded to the family [sic] At hearing, Mr. Freve stated that he believed that the I.E.P. constituted adequate notice.[sic] (Testimony: Father, R. Freve)
15. Father was paid for transportation services through Friday, January 23, 2004. (Testimony: Father; Exhibits: P41)

16. At some time after the November 17, 2004 I.E.P. was distributed, Ray Freve noticed the statement that Union #133 would provide Student transportation to Averill High School. He spoke with Brian Cole, who did agree that transportation had not been discussed at the P.E.T. meeting. Mr. Cole stated that it was up to the P.E.T. to decide specifics about Student's I.E.P. (Testimony: R. Freve, B. Cole)
17. In a letter to Father, dated January 22, 2004, Superintendent Lyford Beverage stated "I am sure you are aware that the Town of Palermo does not provide transportation for any of its secondary students and transportation falls under the parents' responsibility." Upon receipt of this letter, Father called the school and requested a P.E.T. meeting to discuss the transportation issue. His request was denied and he was told to file for due process. (Testimony: Father; Exhibits: P22)
18. In February 2004, Mr. Freve spoke with Lauren McMullin, a member of Student's team at Good Will-Hinckley, and requested that she revise Student's I.E.P. to exclude transportation. Ms. McMullin subsequently distributed a memo to Student's team, in which she stated that there had been an "inadvertent error" on Student's I.E.P. She further noted that transportation issues had not been discussed at the meeting and "[s]taff assumed that the same transportation plan would stay in effect when [Student] transferred across campus to Averill High School....Ray Freve has informed me that this is not accurate and should not be included in the I.E.P...." (Testimony: R. Freve; Exhibits: S18)
19. After receiving a copy of the McMullin memo, Father filed for due process, but subsequently withdrew the request when he was asked by the chair of the Palermo School Board to come and discuss the transportation issue at the April 13, 2004 school board meeting. He did so, but the board declined to take any action. (Testimony: Father)
20. On April 14, 2004, Father and Mother applied for a due process hearing. (Exhibits: Due Process Request)
21. It is the policy of Palermo/Union #133 to only provide high school transportation if the student is attending a "unique program" or "specialty class," such as a life skills class, and receiving services that cannot be provided elsewhere. Since Palermo has no high school, all families have a choice of high school for their child and it is Palermo's contention that since Averill High School was this family's choice, they are responsible for providing transportation. (Exhibits: P22; Testimony: R. Freve)
22. The cost of sending a student to Averill High School is approximately \$13,000, while the cost of sending a student to most private high schools is typically around \$6800, or \$7500 with what is called the "insured value factor" included.¹

¹ The "insured value factor" is a premium paid to private schools that admit public school students and is designed to recognize the fact that the state pays for public schools' physical plant, but does not provide the same support for private schools.

Private schools can also add in “special education” costs, if they provide special education services. (Testimony: R. Freve;)

23. Following receipt of payment for transportation services during the week of January 19, 2004, Father continued to submit time cards up through April 21, 2004, but did not receive any subsequent payments. (Testimony: Father; Exhibits: P35-41)

V. Discussion and Conclusions

The issue addressed in this hearing is a narrow question of law, whether Palermo/Union #133 is required to provide transportation for a special education student attending an out of district high school, in this case Averill High School, located on the campus of Good Will-Hinckley.

Transportation is a related service that a district must provide if it is necessary in order for a student to benefit from special education. 34 CFR §300.24(b)(15). Transportation includes “travel to and from school and between schools,” and “shall be specified by the Pupil Evaluation Team in the student’s Individualized Education Program when the Team determines that the transportation is necessary in order for the student with a disability to benefit from an education program.” M.S.E.R. §6.17.

Maine regulations also address the responsibilities of school districts when a parent agrees to transport a student who is eligible for transportation services.

If the parent with whom a student with a disability is living has been asked and has agreed to transport the student to and/or from school, or to and/or from a contracted special education service provider, the administrative unit shall reimburse the parent for mileage and necessary travel expenses in accordance with school district employee reimbursement policies and provide such transportation at no cost to the parent. Reimbursement shall be made within 45 days of each trip, unless otherwise mutually agreed. If a student with a disability is tuitioned to another public or private school for special education services, the sending unit shall provide transportation consistent with the calendar of the receiving school.

M.S.E.R. §6.17.

There is no dispute that Student’s father transported him to the Glenn Stratton Learning Center and that the Augusta School Department and Palermo/Union 133, reimbursed him for the provision of transportation services. It was only when Student transitioned to Averill High School that transportation became an issue.

If a school department does not provide transportation for all secondary school students, as in this case, the decision on whether a student must receive transportation as a related

service must be made by each P.E.T. on a case-by-case basis. The U.S. Department of Education has clearly stated this responsibility:

If the IEP team determines that a disabled child requires transportation as a related service in order to receive FAPE...the child must receive the necessary transportation or accommodations at no cost to parents. *This is so, even if no transportation is provided to non-disabled children.* [emphasis added]

64 Fed. Reg. 48 at 12551 (1999) (Rules and Regulations, Analysis of Comments and Changes). See also *Letter to Anonymous*, 38 IDELR 42 (OSEP 2002); *Rochelle Township High Sch. Dist. No 212*, 39 IDELR 58 (Ill. Dep't of Educ. 2003) (School district was obliged to transport disabled student to cosmetology class, even though non-disabled students were not transported.)

When the P.E.T. met on November 17, 2003, there was no discussion of transportation. The staff member who prepared the I.E.P. that was developed at that meeting logically continued the same transportation services that Student had been receiving for over four years, namely transportation by Father.

It is also clear that there has been no change in this service as of the date of this hearing. The school department has not forwarded prior written notice regarding a change in transportation. Nor have they ever called a P.E.T. meeting to discuss the issue of transportation. Therefore, despite Student's move from the Glenn Stratton Learning Center to Averill High School, his transportation services remain the same, until such time as the P.E.T. determines that a change should be made. It was incumbent upon Palermo to raise the issue of transportation at the P.E.T. meeting if they wished to make a change in Student's transportation services.

Although the failure of the P.E.T. to change Student's transportation services at a team meeting mandates that those services remain the same, it is appropriate to comment upon the school department's alternative argument, that Student is not eligible for transportation services because it was the family, rather than the P.E.T., that determined Student's placement. The department alleges that this argument is supported by the fact that Father researched various placements, that it was the clinical team that recommended Averill, that Palermo would have supported any choice that the family made and that Student's needs could be met at any high school since he receives "minimal special education services."

The school department's arguments along this line are factually incorrect. During his time at the Glenn Stratton Learning Center, a day treatment center, Student made excellent progress. However, that progress was made within the constraints of a structured, behaviorally oriented program with a major clinical component. Although Student is now in a less clinically intense setting, it is still a placement with a significant therapeutic component. All Averill High School students are subject to a school-wide behavior plan that utilizes tokens and behavior cards. There continues to be immediate

access to clinicians when the need arises. The most telling difference between Averill and a regular high school is that students who become “out of behavioral control” are removed to a behavioral lab, rather than the assistant principal’s office. While offering more intense behavioral and emotional support, there are regular education classes that Averill does not offer, including foreign languages and lab sciences. Lastly, the tuition that districts pay to send students to Averill is significantly higher than that paid to other private high schools. Even with the “insured value factor,” regular education private high schools receive tuitions of around \$7500. Averill receives \$13,000, and it is reasonable to conclude that the higher cost reflects the significant level of special education services and support that Averill provides, particularly behavioral supports.

The argument that giving a family school choice takes responsibility for placement away from the P.E.T. is also incorrect. The P.E.T. always has the ultimate decision-making power in terms of determining whether a proposed placement could successfully implement a student’s I.E.P. If the family had chosen a school that the P.E.T. believed would be unable to implement Student’s I.E.P., the team could have refused to be supportive of that placement, and the family would have had the option of filing for due process to argue for their preferred placement, or go along with the team’s preferred placement. That scenario did not occur in this matter since the entire team supported the placement proposed by Student’s clinical team. Family choice is not absolute choice, but rather the power to make a choice between those placements that are able to successfully implement a student’s I.E.P., at least if special education services are sought. Given Student’s continuing significant behavioral needs, it was reasonable for the entire team to support the Averill recommendation.

Since there was no P.E.T. decision to change Student’s transportation services, either at the November 17, 2003 P.E.T. meeting, or at any time since, his transportation service continues to be transportation provided by Father. The family is therefore entitled to payment for mileage and time for the period from January 26, 2004 up to such time that the P.E.T. changes Student’s transportation services at a P.E.T. meeting.

V. Decision

1. Upon receipt of appropriate documentation, Union #133 will reimburse Father for mileage at the prevailing federal rate, plus \$10.75 an hour, for the period beginning on January 26, 2004 until such time that the P.E.T. meets and changes the transportation services contained in Student’s I.E.P.
2. Union #133 shall submit proof of compliance with this order to the Due Process Office and to the hearing officer within fifteen days of receipt of this decision.

Dated: _____

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

PARENTS' EXHIBIT LIST

- P1-2 P.E.T. Meeting Minutes, dated November 17, 2003
- P3-13 I.E.P., dated November 17, 2003
- P14 Letter from Barry Walden to Brian Cole, dated November 4, 2003
- P15-21 Good Will-Hinckley 90-day Review Report, dated January 13, 2003
- P22 Letter from Supt. Beverage to Father, dated January 22, 2004
- P23 Letter from Father to Supt. Beverage, dated February 3, 2004
- P24 Letter from Father to Supt. Beverage, dated February 9, 2004
- P25-31 Good Will-Hinckley Evaluation Report, dated October 1, 2003
- P32-34 Good Will-Hinckley Emotional Disability Evaluation Report, dated December 16, 2002
- P35-41 Father's Time Sheets and Mileage Reports, dated January 26, 2004 through April 21, 2004
- P42-47 Good Will-Hinckley Discharge Summary, dated January 16, 2004
- P48 Daily Behavior Card used by Good Will-Hinckley, undated
- P49-53 Good Will-Hinckley Behavior Model Summary, undated
- P54-67 Graded I.E.P. for 2002-2003, dated December 16, 2002

PARENT'S WITNESS LIST

Rob Moody, Director of Operations and Programs at Good Will-Hinckley

Barry Walden, Clinician, Glenn Stratton Learning Center

Father

SCHOOL DEPARTMENT'S EXHIBIT LISTS

- S1-7 90-Day Review Report, dated October 21, 2003

- S8-9 Academic Progress Report, Glenn Stratton Learning Center, dated December 10, 2001
- S10-16 90-Day Review, dated May 13, 2003
- S17 Letter from Supt. Lyford Beverage to Father, dated April 16, 2004
- S18 Memo from Lauren McMullin to P.E.T. members, dated February 25, 2004

SCHOOL DEPARTMENT'S WITNESS LIST

Brian Cole, Special Educator, Glenn Stratton Learning Center

Ray Freve, Director of Special Education, Palermo School Department/Union #133