

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

September 29, 2004

Case No. 04.107H, *Parents v. Maine School Administrative District No.34*

REPRESENTING THE FAMILY: Chad T. Hansen, Esq.

REPRESENTING THE SCHOOL: James C. Schwellenbach, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

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This special education due process hearing has been conducted, and this decision written, pursuant to state and federal education law, 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

The parents of the student requested this hearing on July 23, 2004, when they filed a Dispute Resolution Request Form with the Due Process Office of the State of Maine Department of Education. The student was born on xx/xx/xxxx, and lives with his parents within Maine School Administrative District #34 where he attends the xx grade at the Drinkwater Elementary School. The student has been diagnosed as autistic and is thereby eligible for special education services.

A pre-hearing conference was held on August 18, 2004. The hearing was scheduled for August 25, but was rescheduled to August 31 to allow the parties to discuss an informal resolution of the issues. That discussion was partially successful. The hearing on the remaining issues was held on August 31. At the hearing, the family presented one witness and entered documents identified as Parent's Exhibits 1-6 into evidence; the school presented one witness and entered documents identified as School's Exhibits 1-10 into evidence. The parties opted to submit written closing arguments that were received by the hearing officer on September 15, 2004. The record was closed on that date[sic]

Following is the decision in this matter.

## PRELIMINARY STATEMENT

This case involves a xx year-old boy, currently a xx grade student who has been diagnosed with autism. For all years relevant to this case, the student's IEP has contained a requirement that he be provided each week with a specified number of minutes of direct instruction. The essence of the dispute between the family and the school in this matter is a disagreement about how much of the time the student is at school should "count" as "direct instruction".

The family asserts that only those minutes when the student is actually in class should be counted toward the weekly total of direct instructional minutes specified in the IEP. The parent's argument that the student is not receiving the amount of minutes promised in the IEP is based on a calculation that excludes morning and afternoon recess, lunch-time, the time between classes, the time at school both after and before boarding the school bus, and time on the bus to and from off-campus adaptive physical education activities. For remedy, the family seeks compensatory education in an amount equal to the amount of direct instructional minutes promised but not provided during school years 2002-2003 and 2003-2004, and an order directing the school to provide at least 1475 minutes per week of direct instruction to the student for school year 2004-2005.

The school asserts that the student is receiving special education services prescribed in the IEP from the time he gets off the bus in the morning until the time he gets back on the bus in the afternoon. The school's argument that the student is receiving the amount of minutes promised in the IEP is based on a calculation that includes the time excluded by the parents.

The family and school agree that Monday afternoon from 12:30 to 3:05, when all special education students in the self contained program at the school are sent home so that the special education staff may conduct a staff meeting, should not be counted as direct instructional time.

## ISSUES

There are two issues to be resolved at this hearing:

- I. Did the school provide the student with the amount of direct instructional minutes set forth in his IEP for school years 2002-2003 and 2003-2004?; and,
- II. Does the student's current placement and program provide the student with the amount of direct instructional minutes set forth in his IEP for school year 2005[sic]-2005?

## FINDINGS OF FACT

1. The student was born on xx/xx/xxxx and lives with his parents within SAD 34. He has been diagnosed as autistic and is thereby eligible for special education services. In school year 2003[sic]-2003, his IEP called for direct instruction "100% of the day, special ed setting with mainstreaming and inclusion as appropriate" and had goals and objectives attached. (School's Exhibit # 9, pps.48-57)
2. In school year 2003-2004, the student's IEP called for direct instruction for "1650 minutes a week, special ed setting, unless mainstreamed. Mainstream as appropriate" and had goals and objectives attached. (SE #7, pps.35-45)
3. At the hearing, the parties entered into the following factual stipulation: "The student's IEP for 2004-2005 calls for 1475 minutes of direct instructional services each week to be provided to the student. In all other aspects relevant to this hearing, the 2004-2005 IEP is identical to the 2003-2004 IEP."
4. Each IEP for the student contains goals and objectives for various academic skill areas, such as reading, language arts, and math as well as skills in communication

- with peers and adults, life care, co-operative play activity, and classroom activity. Additionally, each IEP contains goals and objectives in the following domains: behavioral and social skills, such as increasing his independence with interactive exchanges with peers and adults, self care skills, such as learning to tie his shoes, pre-vocational skills, and sensory motor function development. (SE# 1,7, and 9)
5. The special education students at the school are collectively referred to as the “K-team.” Each Monday afternoon at 12:30, at the end of the lunch recess, all the K-team members are transported home by the school for the remainder of the school day. Special education staff, also known as K-team staff, meet on Monday afternoon during the 12:30–3:05 PM time period to plan the week’s activities for the K-team. The K-team staff consists of 2 special education teachers and 5 educational technicians. There are, and have been, approximately 10-12 students in the K-team in the years relevant to this proceeding. (Testimony of Mother, T. Kuzell)
  6. The student arrives at school on a school bus, at sometime between 8:30 and 8:40 AM. He is generally met by a special education staff member, who assists the student with the transition to the school day, helps him change clothes and footwear, and accompanies him to the appropriate classroom. The first activity of the day, circle time, runs from 8:45 to 9:00 AM; it is a group meeting that includes morning greeting, sharing of special information for the day, and reading instructions written on the board. Special education staff is with the student during circle time, whether he is in the special education classroom with the K-team or is mainstreamed in the regular classroom. The morning’s first instructional block runs from 9:00 to 10:05 AM. For the student, that means 10 to 15 minute blocks of “academic instruction” working with special education staff on particular skills, interspersed with short refocusing or transitioning activities. Next is a short morning break from 10:05 to 10:15 AM; again, special education staff accompanies the student whether he is mainstreamed or is with the K-team. The student’s communication skills, appropriate group play and general social

skills are observed and supported by special education staff who are also present to intervene, redirect and refocus the student when necessary. (Testimony of Mother, T. Kuzell)

7. The second morning instructional block runs from 10:15 to 11:30 AM and is very similar to the earlier block. The student works with special education staff on various “academic” skills whether he is with the K-team or is mainstreamed in the regular education classroom. Lunch begins at 11:30; the student is accompanied by at least 1 special education staff member to the cafeteria where he picks his seat with his classroom peers. While the student is currently more independent in the cafeteria than he was in earlier years, he still frequently requires the intervention, redirection and refocusing which is provided by the K-team staff with him at lunch. After lunch, there is a recess period from 12:00 to 12:30 PM. K-team staff accompanies the student to this recess. Again, while the student is encouraged to play, interact and communicate independently with his classmates both in and out of the K-team, K-team staff closely monitor him during the recess period and are able to intervene and refocus him when appropriate. (Testimony of T. Kuzell)
  
8. The first afternoon instructional block runs from 12:30 to 2:00 PM. For the student, this time is very similar to the morning instructional blocks. He is with K-team staff, both in the resource room and in the mainstream setting, working on various academic skills in shorter blocks of time, with little breaks designed to refocus the student, and help him transition to the next task. There is an afternoon recess from 2:00 to 2:15 PM, again similar to the morning break for the student. K-team staff members are with the student to observe and monitor him, to ensure that his behavior on the playground is appropriate and that his communication and interaction with his peers is appropriate. K-team staff members are prepared to intervene when necessary. The second afternoon instructional block is from 2:15 to 3:05, and is the final instructional block of the day. Academic goals are worked on in short blocks. K-team staff works with the student whether he is in the

- resource room or the mainstream classroom. From 3:05 to 3:15 PM , the student must prepared[sic]to get on the bus and go home. He frequently requires assistance and intervention from the K-team staff during this period. (Testimony of T. Kuzell)
9. One morning of the week the student goes swimming at the high school pool with other members of the K-team. The high school is about a 10 -15 minute bus ride from the elementary school. K-team staff accompanies the students on the bus and while at the high school. The K-team staff helps the student change into swimming clothes. The K-team swims for about an hour, doing exercises and practicing “routines”; there is time allowed for free play in the pool. The students change back into street clothes and then go to the high school cafeteria for lunch. K-team staff accompany and assist K-team members, including the student, in all phases of the swimming morning, monitoring the student’s social interaction and behavior on the bus, helping change clothes before and after the swim itself, monitoring the student’s behavior in the pool for appropriateness and safety, and performing the same functions in the high school cafeteria as they do in the elementary school cafeteria. The bus returns the K-team to the elementary school for the afternoon program. (Testimony of Mother and T. Kuzell)
10. On another morning of the week, the student, along with others in the K-team, goes horseback riding. The bus ride to the stable is about 30-35 minutes one way. On the bus, K-team staff members accompany the 3 or 4 K-team members who participate in this activity. Upon arrival at the stable, the K-team members, including the student, change into riding clothes, groom, saddle and bridle the horses, lead them to the riding ring and then ride. After riding, the process is reversed. When the horses are put away, the K-team students change from riding gear to school clothes, get on the bus and head back to school. The K-team staff is with the students throughout this process, monitoring social interaction, communication and behavior to be sure it is both appropriate and safe, and intervening as necessary. (Testimony of Mother and T. Kuzell)

11. There are a variety of areas in which the student needs help at school. He needs to work on his social skills to learn how to interact with his classmates more appropriately; his speech and communication skills are behind his peers and he needs support and prompting frequently. There are safety concerns that accompany the student throughout the school day, particularly during the transitional and recess time periods. He has self-care needs, such as learning to tie his shoelaces, and needs redirection and refocusing daily, but can generally eat his lunch and play relatively successfully with his classmates, both those in the K-team and in the regular education classroom. In those situations, K-team staff monitors the student, redirects self-stimulating behavior, inappropriate communication or behavior with peers and adults, and responds to unsafe behavior when necessary, (Testimony of Mother, T. Kuzell)
  
12. The family filed a complaint with the federal Office of Civil Rights (OCR) in May of 2003, alleging that the school's practice of dismissing from school the special education students, but none of the regular education students, at 12:30 PM every Monday so the special education staff can have a staff meeting, amounts to discrimination against their son. OCR investigated the allegation and found "sufficient evidence to raise a compliance concern under Section 504 and Title II..." The school, without admitting to any violation, agreed to take certain actions to address OCR's concerns. OCR then closed the matter as resolved. (PE 1 and 2, Testimony of Mother)

## **DISCUSSION**

The family contends that the student is not receiving the amount of direct instruction promised to him in his Individual Education Program ("IEP") for the current school year, 2004-2005, and advances the same argument for the preceding two school

years, 2003-2004 and 2002-2003. The family relies upon Maine Special Education Regulation (“MSER”) Ch 2.13, Instructional Time, which states

The term “instructional time” means the period in which a student is provided an opportunity to engage in learning activities. The term does not include lunch, recess, or the time between classes unless the student’s IEP contains specific goals and objectives addressing these periods.

The family argues that the student’s IEP does not contain specific goals and objectives addressing lunch, recess or the time between classes and, therefore, that those periods of time should not be counted when determining the amount of direct instruction the student receives each week. By excluding those periods of time, along with the period of time between 12:30 PM and 3:05 PM each Monday afternoon when the special education students are dismissed<sup>1</sup>, the family calculates that the student is not receiving this year, and has not received for the last two school years, the minutes of direct instruction called for each week in the relevant IEP.

The school contends that the student has received at least the number of minutes of direct instruction per week called for in his IEP in all school years relevant to this proceeding. The school asserts that its argument is supported by MSER Ch 5.5, Direct Instructional Services, which states, in part

(A) Definition – Direct instructional services is instruction provided by an appropriately certified special education professional or an appropriately supervised educational technician consistent with a student’s Individual Educational Program (I.E.P.).

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<sup>1</sup> The school admits that the special education students at the school are dismissed at 12:30 PM each Monday so that special education staff may conduct a staff meeting. The parents of the student complained to the Office of Civil Rights (“OCR”) in May of 2003, alleging that this practice illegally discriminated against their son. OCR investigated the school practice and concluded that “...there was sufficient evidence to raise a compliance concern under Section 504 and Title II...” The school, without admitting any violation, agreed to take certain actions to address OCR’s concerns and OCR closed the matter as resolved. (Parent’s Exhibits 1 and 2)

The family asserts that the school failed to implement the agreement it made with OCR. If that assertion is true, the school’s failure is troublesome to this hearing officer, as is the practice of excluding all, and only, the special education students from any educational opportunity on Monday afternoons. However, this proceeding is not the forum in which to seek enforcement of an agreement between the school and OCR or to pursue federal discrimination claims. The jurisdiction of a special education due process hearing officer is limited to issues arising from federal and state special education laws.



The school argues that the student is receiving direct instructional services from properly credentialed special education staff from the time he gets off the bus in the morning until the time he gets back on the bus in the afternoon. The school further argues that the instruction the student receives throughout the day – including during lunch, the recesses, in the periods of time between classes and on the bus to the off-campus adaptive physical education activities of swimming and horseback riding – is related to and consistent with goals and objectives contained in the student’s IEP. Consequently, the school calculates that the student receives at least the number of minutes of direct instruction per week that is called for in each IEP at issue in this proceeding.

For the reasons discussed below, the hearing officer determines that the student receives, and has received during all school years at issue here, direct instructional services from 8:45 AM, when circle time begins, until 3:15 PM, when the student boards the school bus that takes him home, including the time spent at lunch, during the three recesses each day, moving between classes, and on the bus to and from horseback riding and swimming. The student does not receive any direct instruction on Monday afternoon from 12:30 to 3:05 PM, a period of 155 minutes each week.

#### A.

The primary question to be answered is whether time the student spends at school while at lunch, recess, moving between classes and on the bus to and from adaptive physical education classes should be counted in the calculation of how many minutes of direct instruction the student receives each week. MSER Ch 5.5 states that “direct instructional services” are (1) instruction provided by a properly qualified special educator (2) in a manner consistent with a student’s IEP. The services received by the student in this case clearly fit within that definition. The special education staff at the school consists of 2 certified special education teachers and 5 educational technicians. At least one member of the staff is with, or near, the student from the start to the finish of his day at school, including all the periods of time at issue in this discussion<sup>2</sup>. Often more

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<sup>2</sup> There is no debate as to whether the instructional blocks of time should be counted in the calculation of how many minutes of direct instruction the student receives each week; the parties agree that they should. Consequently, this discussion is focused upon those time periods at issue.

than one K-team staff member is working with the student. During all this time, K-team staff members are aware of the student, aware of the situation he is in, and aware of his behavior in that situation; they are trained and prepared to respond to situations which occur naturally during the day in a manner designed to help the student learn to accomplish one or another of the goals set forth in his IEP.

For example, many of the student's non-academic goals can only be worked on, or can be worked on most directly, in situations that occur most frequently in the relatively unstructured times of the day, such as the cafeteria, on the playground or on the bus. Communication skills are one example of an IEP goal than [sic] can, and is, worked on in the halls between class, at recess, in the cafeteria where the student eats his lunch with his peers, or on a school bus on the way to riding or swimming. Behavioral and social skills are other examples of goals that are being worked on during these periods. One of the goals set out in the 2004-2005 IEP is that the student, "...will increase his independence with interactive exchanges with peers and adults." (SE 1. p.3) One of the objectives attached to this goal states, "Given individual instruction and community programming, (the student) will state how he feels about situations that are difficult for him and act with increased tolerance for buzzers and elevators as recorded anecdotally by the staff." This objective assumes that the student will demonstrate his progress toward this objective in the hallways and elevators of the school, that is, between classes or activities during the school day.

There are other examples. In the area of sensory/motor function, the goal states, in part, that the student "...will pay attention to and participate in playground games with peers...for 10 minutes, with adult supervision" (SE 1, p.6) In addition to being a goal best pursued during recess, it is a clear example where the intention of the goal is for the student to learn to act independently, but where adult supervision is currently required in the IEP, both to support the student's progress, and to redirect and refocus the student if necessary. In the self-care area, the annual goal is for the student to learn to tie his shoes by himself. The short-term objective is, "Given naturally occurring opportunities, (the student) will tie his shoes independently as noted by the staff by June 9, 2005." (SE 1. p.4) While the skill can be and is, in fact, taught throughout the day at anytime the student's shoes come untied, it can most predictably be worked toward in the transition

times of the day, at the beginning of the end of the day or changing footwear upon going out to, or coming in from, recess.

Based on the facts in the testimonial and documentary evidence presented at the hearing, the hearing officer determines that the services provided to the student during lunch, at recess, between classes and on the school bus to adaptive physical education classes amount to direct instructional services as defined by MSER 5.5<sup>3</sup> and should be included in the calculation of the number of minutes of direct instruction received by the student in the school years at issue here.

### **B.**

Given the conclusion reached above, the remaining task is to determine whether the student has received sufficient minutes of direct instruction per week in each of the years at issue. The hearing officer concludes that, for the purpose of the calculation involved here, the school day begins at 8:45AM, when circle time starts, and ends at 3:15PM when the student boards the school bus to go home.<sup>4</sup> That amounts to 6 and 1/2 hours, or 390 minutes of direct instruction per day:  $390 \text{ minutes/day} \times 5 \text{ days/week} = 1950 \text{ min/week} - 155 \text{ minutes (the 2 hour and 35 minute period from 12:30 to 3:05PM on Monday afternoon when the student is dismissed from school)} = 1795 \text{ minutes/week}$  of direct instruction received by the student in each of the three school years at issue.

The student's IEP for school year 2004-2005 calls for him to receive 1475 minutes/week of direct instruction; thus, in the current year the student is receiving more

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<sup>3</sup>The family contends that these time periods should be excluded from the calculation of the number of minutes of direct instruction the student receives each week because MSER 2.13, Instructional Time, excludes lunch, recess and the time between classes from the definition of instructional time unless "the student's IEP contains specific goals and objectives addressing these periods." While this regulation is somewhat unclear, the hearing officer determines that, under the facts of this case, the goals and objectives of the student's IEP sufficiently refer to the time periods at issue to pass muster. The reality here is that many of the goals and objectives in the student's IEP are in fact being pursued, and some are best pursued, in the time periods the family argues should be excluded. Further, witnesses for both parties testified that the student has been making good progress under the program he has received at the school during the years in question.

<sup>4</sup> While the school bus carrying the student generally arrives before 8:45AM, the testimony on this point was so unclear that the hearing officer cannot include the 8:30 to 8:45 time period in the calculation of minutes of direct instruction.

minutes/week of direct instruction than called for in his IEP. The student's IEP for school year 2003-2004 calls [sic] for him to receive 1650 minutes/week of direct instruction; thus, in school year 2003-2004 the student received more minutes/week of direct instruction than called for in his IEP. The student's IEP for school year 2002-2003 called for him to receive direct instruction for 100% of the school day. Since 100% of the school day amounts to 1950 minutes/week, and the student received 1795 minutes/week of direct instruction, the student did not receive 155 minutes/week of direct instruction to which he was entitled under his IEP for the 2002-2003 school year.

### **ORDER**

For the reasons set forth above, the school shall provide the student with appropriate compensatory education services in an amount equal to 155 minutes for each week of the 2002-2003 school year.

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Peter H. Stewart, Esq.                      Date  
Hearing Officer

**WITNESS LIST**

For the family:

Mother of the student

For the school:

Terri Kuzell, student's special education teacher

**DOCUMENTS**

Parent's Exhibits 1-6

School's Exhibits 1-10