

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

August 4, 2005

Case No. 05.014H, Parents v. Child Development Services, Androscoggin County

REPRESENTING THE FAMILY: Chad Hansen, Esq.

REPRESENTING [sic] THE SCHOOL: Dale Denno, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

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

The family initiated this hearing by filing a Dispute Resolution Request Form with the Due Process Office of the Maine Department of Education on February 1, 2005, on behalf of their daughter. The student lives with her parents within the catchment area served by Child Development Services, Androscoggin County (CDS-AC). CDS-AC is the agency that provides IDEA services to eligible children from birth to six [sic] years of [sic] that live within its catchment area. The student is diagnosed as having an Autism Spectrum Disorder (ASD) and is therefore eligible for those services. She has received those services, primarily, at the Margaret Murphy Children's Center (MMCC) in Auburn, Maine.

In the fall of 2004, the parents and CDS-AC staff began discussing the possibility that the student was ready for more exposure to typically developing preschoolers in a preschool setting in order to provide her with an opportunity to observe how typically developing children behave in a school setting. The theory was that the student would benefit from the exposure and experience in a regular education environment and would

learn to model her behavior after that displayed by those children; thus, she would be better prepared to enter kindergarten in a regular elementary school.

The parents requested, and CDS-AC convened, a meeting of the student's Early Child [sic] Team (ECT) on January 13, 2005, to discuss this issue and to develop an Individualized Family Service Plan (IFSP) that reflected the determinations made by the ECT. While there is much about this meeting which is in dispute, the parties agreed that an appropriate program for the student would include an opportunity for her to have more exposure to typically developing peers in a preschool setting, with 1:1 Developmental Therapy provided by MMCC staff in that setting. There was also agreement that the student should be introduced to her typically developing preschool peers gradually, starting with about one-half hour per day twice a week and increasing the time as appropriate toward two or two and one-half hours per day twice a week.

The Early Learning Center (ELC) in Auburn and the Bright Side Nursery School in Monmouth, two preschools that (1) include some typically developing students for some part of the day and (2) have contractual arrangements with CDS-AC were suggested by CDS-AC as possible placements for the student. The parents believed both were inappropriate, essentially because neither had enough typically developing children¹. CDS-AC told the parents that it does not pay the tuition for a typical preschool; tuition costs for such a school were the responsibility of the parents. The ECT did not specify the particular placement where the student would receive the "exposure to typically developing peers in a preschool setting" the ECT had agreed was appropriate for her at the January 13th meeting.

At some point after the January 13 ECT meeting, the family made private arrangements for the student to attend the Vineyard Christian School (Vineyard), a regular education preschool with only typically developing students. The Vineyard does not have a contractual relationship with CDS-AC. A MMCC teacher, who is a developmental therapist, drives the student from MMCC to the Vineyard and accompanies her throughout her time there. On February 8, 2005, CDS-AC sent a "Prior Written Notice" letter to the parents in which CDS-AC proposed to provide the student

¹ The parents also believed that Bright Side was too far from the student's home to be in compliance with the regulations.

“Free and Appropriate Education Services (FAPE) in a contracted mainstreamed preschool”, either the Early Learning Center or the Bright Side Nursery School, with a MMCC staff member providing one-on-one support in the preschool. There was no change in the student’s program as a result of this letter. The student’s primary placement is still MMCC and she still attends the Vineyard as before.

The hearing officer conducted a pre-hearing conference on February 24, 2005. The hearing was held on March 4 and 14, 2005. The family presented four witnesses and entered documents identified as Parent’s Exhibits 1 and 2 into evidence. CDS-AC presented four witnesses and entered documents identified as CDS Exhibits 1-32 into evidence. The parties opted to submit written closing arguments, the last of which was received by the hearing officer on April 2, 2005.

ISSUE

The parties agreed that the issue in this matter is:

Whether the program and placement offered to the child by CDS Androscoggin [sic], after the Early Childhood Team meeting on January 13, 2005, provides the student with a free and [sic] appropriate public education in the least restrictive educational alternative, as required by the IDEA and Maine special education law?

FACTUAL FINDINGS

- 1) The family initiated this case by filing a Dispute Resolution Request Form with the Maine Department of Education on February 1, 2005, on behalf of their daughter, (DOB: xx/xx/xxxx) who lives with her parents in Androscoggin County. Child Development Services, Androscoggin County (CDS-AC) is the public agency that provides IDEA services to eligible children from birth through 5 years of age that live within its catchment area. The student has been diagnosed with an Autism Spectrum Disorder and is therefore eligible for services under the sections of the IDEA and Maine

special education law and regulations that provide for services for eligible children from birth to age 6 [sic]. The student attends and receives most of her services, up to 30 hours per week, at the Margaret Murphy Children's Center ("MMCC") in Auburn. Those services include developmental therapy (ABA model), speech therapy, occupational therapy, and psychological/social work services (Testimony of Mother, Fournier:[sic] Dispute Resolution Request Form; CDS-17))

- 2) In the fall of 2004, the parents and staff of MMCC and CDS-AC began to discuss the possibility of providing the student with some experience in a typical preschool setting with typically developing preschool children. In such a setting, the student would have the opportunity to be exposed to and interact with her chronological peers without disabilities. The idea was that the student would begin to model her behavior upon the behavior of those typically developing preschoolers and thereby learn something about how to behave in a regular education setting as preparation for her own kindergarten experience. These discussions led to the Early Childhood Team meeting held on January 13, 2005. There, the ECT agreed that the student was ready for more exposure to typically developing peers in a preschool setting. The ECT determined that such a placement would be appropriate for her, and suggested that she be introduced to it gradually, with 1:1 support provided by an MMCC staff member/developmental therapist. The ECT discussed two preschool programs: Bright Side Nursery School and the Early Learning Center. These programs, characterized by CDS-AC as "contracted mainstream preschools", enroll both typically developing and special needs children and "meet CDS-AC standards for contracted providers." CDS-AC told the parents that it could fund tuition costs only for such "contracted providers" but could not pay or reimburse parents for tuition costs at a typical preschool program. At the January 13 ECT meeting, CDS-AC admitted that a typical preschool program could provide the student with the opportunities for interaction with non-disabled peers recommended by the ECT. CDS-AC has approved five preschools in its catchment area as eligible for "contracted mainstream

preschool” status; none of those preschools are [sic] regular education preschools. (Testimony of Mother, Fournier; Record, CDS-25A, 25B, 27)

- 3) The parents rejected both “contracted mainstream preschool” placements for a variety of reasons. One reason that applied to both programs was that each had too many special needs children as compared to typically developing children. The Early Learning Center (ELC) operated a morning program that had a total of 14 children in it, 5 of whom were typically developing and 9 of whom were special needs children. ELC also operated an afternoon program that had a total of 10 children in it, 4 of whom were typically developing and 5 of whom were special needs children. Bright Side Nursery School also offered morning and afternoon programs. The morning program was referred to as a “mainstream” program and enrolled both typically developing and special needs children, with a current ratio of 8 typically developing children to 5 special needs children. The afternoon program at Bright Side was referred to as a “special purpose” program and enrolled only special needs children. At MMCC, the student had been receiving developmental therapy from Leela Lord as part of her program. In addition, Ms. Lord drives the student from MMCC to the Vineyard and remains there to provide 1:1 support and more developmental therapy. Bright Side is in Monmouth Maine, about a 25-minute drive from the student’s home. (Testimony of Mother, Boclair, Packer, Lord)
- 4) The student has been doing well at the Vineyard. She has been very successful in the regular preschool with 1:1 support and is benefiting from the increased exposure to typically developing peers afforded her at Vineyard. (Testimony of Mother, Little, Lord)

DISCUSSION

The issue to be resolved in this hearing is whether the program and placement offered by CDS-AC to the student after the ECT meeting on January 13, 2005, provided

her with a free and [sic] appropriate public education in the least restrictive environment, as required by the IDEA and Maine special education law and regulations.

A.

The family argues that the programs offered by CDS-AC, a placement at the Bright Side Nursery School or the Early Learning Center, for 1-2 hours per week to start, with a 1:1 aide/developmental therapist from MMCC with her, do not provide their daughter with FAPE in the LRE.² In essence, the family's position is that (1) at its January 13th meeting, the ECT determined that a free and [sic] appropriate education for the student included the opportunity for her to have more exposure to typically developing peers in a preschool program; (2) under the IDEA, the student, is entitled to receive those FAPE services in the least restrictive environment (LRE) which, for children her age, means "to the maximum extent appropriate to the needs of the child, with children of comparable ages without disabilities..."; and (3) for the student, the least restrictive environment for her to be exposed to typically developing peers is in a regular preschool. Because CDS-AC refused to offer or fund a placement for the student in a regular preschool program, and instead offered a program in a "contracted mainstreamed preschool"³ with both typically developing and special needs children, the family contends that the student is not receiving the education guaranteed to her by the IDEA and Maine special education law and regulations.

CDS-AC argues (1) that the Bright Side program it offered to the student in the February 8, 2005, Prior Written Notice letter to the family provides the student with a free and [sic] appropriate public education as required by federal and state special education law and (2) that the case should be resolved in its favor on that basis. CDS-AC advances an argument that is focused more upon the FAPE aspect of the IDEA guarantee

² The contested part of the student's IFSP is limited to the nature and setting of the increased exposure to typically developing peers that the ECT determined is appropriate for her at this time. There is no issue between these parties about the other aspects of the student's program, which she would continue to receive at the MMCC.

³ The family, however, has expressly stated that it is not asking the hearing officer to order reimbursement for any costs associated with the placement of the student at the Vineyard. At the hearing, the attorney for the family stated that no monetary remedy was being sought in this proceeding because of the expressly sectarian nature of the Vineyard Christian School, and the constitutional issues that such affiliation would likely raise.

than upon the LRE component. In essence, CDS-AC directly contends that the programs offered to the student in the February 8, 2005 “Prior Written Notice” letter – a placement at Bright Side or the Early Learning Center beginning with one to two hours per week, with 1:1 support from an MMCC staff member/developmental therapist, with the student’s hours of attendance increased as the ECT determines appropriate – meet the FAPE/LRE requirements of the law.⁴

For the reasons discussed below, the hearing officer does not find either party’s position fully persuasive and remands this matter to the Early Childhood Team for further proceedings consistent with the terms of this decision.

B.

The family presents a strong argument in support of its position in this special education due process hearing. The hearing officer agrees with the family that the IDEA and implementing state special education regulations require that the student, like children eligible for IDEA services, is entitled to receive her special education in the least restrictive environment. 34 CFR 300.550 -552; MDOE Regulation, Ch 180, II (23) and IX (5). Both state and federal law require that an eligible child receive services “to the maximum extent appropriate to the needs of the child, with children of comparable age without disabilities...” and that “removal of children with disabilities from the regular educational...environment” is permitted only in limited circumstances when a child cannot be satisfactorily educated, even with supplementary aides [sic] and services.⁵ These regulations impose an unambiguous mandate upon agencies such as CDS-AC to provide services to eligible children “to the maximum extent appropriate” in settings with

⁴ In its post-hearing written closing statement, CDS-AC concedes that the Bright Side Nursery School is “better suited” to the student’s needs than the Early Learning Center program.

⁵ In its written closing argument, CDS-AC asserts that the placement at Bright Side that it offered to the student provides her FAPE in the LRE. The hearing officer cannot agree with that argument. In the least restrictive environment available at Bright Side, the student would be in a program with 13 other children, 8 of whom are typically developing children and 5 of whom are special needs children. Almost by definition, this program is more restrictive than her current program at the Vineyard, where the student is the only special needs child in the class. The program offered by CDS-AC does not provide FAPE in the LRE. *T. R. v. Kingwood Twp.*, 205 F. 3d 572 (3rd Cir. 2000)

children who are chronological peers without disabilities, unless the nature of the child's disability makes such a placement "unsatisfactory".

This mandate seems even more compelling in the circumstances present in this case, where both the purpose of the LRE requirement in the law and the nature of the service the ECT added to the student's program are the same. The LRE principle in the law and regulations requires that the student receive her services "to the maximum extent appropriate" with her chronological peers without disabilities; the ECT determined that the student should have more opportunities to observe and interact with her chronological peers without disabilities. The family quite convincingly argues that there is an easy way both to comply with the LRE requirement and to implement the ECT's determination, and that is to enroll the student in a typical preschool program⁶ with chronological peers without disabilities, while providing supplementary aides [sic] and services as appropriate. However, CDS-AC, even while admitting that a typical preschool could provide the student with the services the ECT had determined appropriate for her, told the family that it could not "pay or reimburse parents for the cost of tuition at a typical preschool program." (Record, CDS-25) CDS-AC maintained that payment was available only for costs for preschool programs that CDS-AC had already approved as "contracted mainstreamed preschools" and offered the student a placement at either the Bright Side Nursery School or the Early Learning Center, two such "contracted mainstreamed preschools". In explanation, CDS-AC stated that, under current CDS-AC and statewide CDS payment policies, it was simply not allowed to pay for tuition costs at typical preschools that were not approved to provide special education services.

The parents argue that CDS-AC payment policies cannot be applied so as to amend or erode the statutory mandate imposed by the IDEA that eligible children receive a FAPE in the LRE. They refer to both administrative and judicial authority to support that argument. In *Letter to Nevelidine*, 20 IDELR 181 (1/29/93), the Acting Director, Office of Special Education Programs, US Department of Education, states, in part, that "when a public agency places a child in a private preschool program for the purpose of

⁶ In this decision, the phrases "typical preschool program" and "regular preschool program" refer to the same kind of preschool program, one that generally serves typically developing children.

receiving FAPE, the entire educational program during the time the child is placed by the public agency, including tuition, must be at no cost to parents, and not just the specially designed instruction and related services.”⁷ Id at 182. The same principle is found in *T.R v. Kingwood Township Board of Education*, 205 F. 3d 572, 579-580 (3rd Cir. 2000), a case that recognizes the possibility that a school may place preschool “children with disabilities in private school programs for nondisabled children”, even in a state that does not offer publicly funded preschool education to typically developing children⁸. On this point, the hearing officer agrees with the parents and concludes that neither state nor regional payment policies can be drafted or applied so as to alter the LRE mandate contained in the IDEA and state special education law.

C.

In many ways, this case is structured as most unilateral placement/ tuition reimbursement cases present themselves. Here, the parents rejected a proposed program as inappropriate and then made, and paid for, a unilateral placement which they believed was appropriate for their daughter. Parents in this situation are entitled to seek reimbursement from the school for such a unilateral placement, either informally or through the due process mechanism, and many parents pursue one or the other of those avenues of relief. However, here, the parents are not seeking reimbursement.⁹ Instead, the parents seek an order from the hearing officer directing CDS-AC to offer the student “a fully funded placement in a regular preschool program.”

The hearing officer declines to issue such an order. Under the IDEA scheme, the responsibility for making eligibility, program and placement decisions resides with the

⁷ Later on in the letter, the Acting Director states, “To the extent that [New York’s] policy will operate not to require the public agency placing the child...to pay all costs associated with...providing FAPE...in the least restrictive environment, [that policy] is inconsistent with [the IDEA] and must be modified.” *Nevelidine*, at 182.

⁸ School administrative units in Maine are not generally required to offer publicly funded preschool services. However, Maine has accepted federal grant funds earmarked for the provision of special education and related services to 3-5 year olds with special needs and has thereby become obligated to provide IDEA services to eligible children of that age. 20 USC 619, 20-A MRSA 7724.

⁹ Their attorney stated at the hearing that family was not asking for reimbursement to avoid triggering a constitutional inquiry about the sectarian nature of the Vineyard Christian School.

Early Childhood Team for children from birth to 5 and with the Pupil Evaluation Team for children from 6 to 20. Under the circumstances presented here, the hearing officer should not usurp that responsibility. The ECT should meet and should bring together the family, teachers, staff and specialists who know the child best, should assemble the current evaluations and reports from the child's most recent tests and reports, as well as gather information about the current state of programs and placements available across the full continuum of "...placements...available to meet the needs of children with disabilities for special education and related services..." The regulations provide that the continuum must include "instruction in regular classes, special classes, special schools, home instruction..." and must provide for "...supplementary services...to be provided in conjunction with regular class placement." 34 CFR. 300.551. The ECT should review all current information available about the student and create a program for her that is "designed to meet [her] unique needs and prepare [her] for employment and independent living." 20 USC 1400(d)(1)(A). That program, of course, should be provided to her in the least restrictive educational environment available which means, *inter alia*, that she receive her education "to the maximum extent appropriate given...[her]... needs, with children of comparable age without disabilities..." MDOE Regulations, Ch. 180(II)(23) (Emphasis added). When the ECT has designed a program for the student that provides her with FAPE in the LRE, that program should be provided to the student at no cost to her family.

ORDER

For the reasons discussed above, the hearing officer remands this matter to the Early Childhood Team to develop a program for the child that provides her with a free and appropriate education in the least restrictive environment in a manner consistent with current federal and state special education law and this decision.

Peter H. Stewart
Hearing Officer

Date

WITNESS LIST

FOR THE FAMILY:

Mother of the student

Leela Lord, MMCC staff, Teacher and Developmental Therapist

Jaime Shaw, MMCC staff, Case Manager for the student

Amy Littell, MMCC staff, Clinical Psychologist

FOR CDS-ANDROSCOGGIN COUNTY:

Amy Bocclair, Director and Developmental Therapist, Bright Side Nursery School

Alfreda Fournier, Director, CDS-Androscoggin County

Joel Packer, Director, Pathways, Early Learning Center

Kathryn Adams, CDS-AC staff, Service Coordinator for the student

DOCUMENTS

FOR THE FAMILY:

Parent's Exhibits P-1 and P-2

FOR CDS-ANDROSCOGGIN COUNTY:

CDS Exhibits CDS 1-32