

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

April 20, 2005

Case # 05.019H, *Parent v. Biddeford School Department.*

REPRESENTING THE FATHER: The father appeared *pro se*.

REPRESENTING THE SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

This special education due process hearing has been conducted pursuant to state and federal special education law, 20-A MRSA 7207 *et seq.*, and 20 USC 1415 *et seq.*, and the regulations accompanying each.

The father filed a request for this special education due process hearing on February 8, 2005, on behalf of his son, an xx-year-old student in the xx grade of the Biddeford Elementary School. The father lives in New Hampshire and is divorced from the student's mother, who lives in Massachusetts. Pursuant to an order of the New Hampshire family court that is adjudicating post-divorce custodial matters, the student has lived in Biddeford with his paternal aunt since mid-October of 2004.

Upon the student's arrival in Biddeford, his aunt enrolled him in the Biddeford Elementary School. Shortly thereafter, the school and the student's aunt decided that it was appropriate to evaluate the student to determine his eligibility for special education services. The student's aunt consented to a series of evaluations proposed by the school and those evaluations were completed in the fall of 2004. In early December, the school gave notice of a pupil evaluation team ("PET") meeting to be held on January 11, 2005 to discuss the evaluations. Later in December, upon learning of the addresses of the student's biological parents, the school sent out notice of the PET meeting [sic] to them. The PET was rescheduled to February 1, 2005. Both of his [sic] student's parents attended the meeting.

At the PET meeting, school staff discussed their conclusion, based upon the recent evaluations, that the student was eligible for special education services as a learning disabled student and recommended that he be placed in a “diagnostic placement” to see which interventions were most effective. The student’s mother agreed both to his identification as eligible for special education services and to the diagnostic placement recommended by the school. The student’s father did not sign the identification form, nor did he sign the consent form for the diagnostic placement. He requested that more testing be done, and also requested that “outside” evaluators do that testing. The student’s aunt agreed with the school’s identification of the student as eligible for special education and consented to the school’s recommendation that he be placed, initially, in a diagnostic placement.

On February 8, 2005, the student’s father filed a request with the Maine Department of Education seeking a due process hearing. That filing triggered the “stay-put” provisions of the IDEA and Maine special education law. Consequently, the student remains unidentified as eligible for special education services and has not yet received any such services.

While there are other issues to be resolved in this hearing, the student’s father[sic] primary argument is that the school cannot evaluate, identify or provide special education to the student without first obtaining his consent, as the student’s biological father. The school contends that it can proceed to identify and serve the student without the father’s consent under the circumstances present here, where both the student’s mother and the student’s aunt have given consent to his identification and placement.¹

A pre-hearing conference was held on March 8, 2005. The hearing was held on March 21, 2005. The father testified on his own behalf, and presented no other witnesses. The school presented one witness. Documents identified at School Exhibits pages 1-65 and Hearing Officer Exhibit 1 were entered into evidence at the hearing. The parties elected to make written closing arguments. The hearing officer closed the record

¹ The school also asserts argument that the consent of either the student’s aunt or the student’s mother is sufficient consent to permit the school to evaluate, identify, or provide special education to the student.

in this case on April 9, upon receipt of the last the written closing argument from the parties.

ISSUES

The issues to be resolved at this hearing are:

- 1) Whether the school was correct when it determined the student's aunt to be "a person acting as a parent" of the student within the meaning of state and federal special education law;
- 2) Whether state or federal special education law requires the school to obtain the consent of both of the student's biological parents prior to determining the eligibility or initial placement of the student, under the circumstances presented here²; and.
- 3) Can the school determine the eligibility or initial placement of the student prior to receiving the results of an independent educational evaluation currently being arranged by the student's father?

FINDINGS OF FACT

1. The student (DOB: xx/xx/xxxx) lives with his paternal aunt in Biddeford, Maine pursuant to an order from a New Hampshire Family Court that gave the aunt joint legal custody, shared with the biological parents, of the student. The student moved to [sic] into the aunt's home in Biddeford in mid-October, 2005. The aunt performs the full range of responsibilities associated with being the parent of a xx grader, from the time he gets up until he goes to sleep at night. The father has not visited the student since he moved to Maine. The aunt enrolled the student in the xx grade of the Biddeford Elementary School. Shortly thereafter, the aunt consented to the school's recommendation that the student be tested and

² When parties agreed to this statement of the issue at the pre-hearing conference held on March 8, the hearing officer was not aware that the student's father was challenging the school's right to "evaluate" the student without his consent, as well. Since he advanced that argument in his written closing statement, the hearing officer will include the question of the school's right to evaluate the student without the father's consent when deciding this issue.

evaluated to determine if he was eligible to receive special education services. The school did not obtain consent from either of the student's biological parents before evaluating the student. (Hearing Officer Exhibit 1; Testimony of father; School Exhibit 31-33: and Testimony of Marecaux)

2. In early December, the school gave notice of a pupil evaluation team ("PET") meeting to be held on January 11, 2005 to discuss the results of the student's evaluations. Later in December, the school learned the addresses of the student's biological parents and sent notice of the PET meeting to them. The PET was rescheduled and held on February 1, 2005. Both of the student's biological parents attended the meeting. At the meeting, school staff members discussed their conclusion that, based upon the recent evaluations, the student was eligible to receive special education services as a learning disabled student and recommended that he be placed in a diagnostic placement to see which interventions were most effective. Both the student's biological mother and the student's aunt agreed with the school. Each gave her consent to the identification of the student as eligible for special education services, as well as to the school's recommendation for an initial placement. The student's biological father did not consent to either the identification or placement recommended for the student. He requested that more testing be done prior to resolving the identification or initial placement issues. (Testimony of father and Marecaux; SE 52-59)

3. During the hearing process, the school agreed to reimburse the father for certain costs associated with the independent educational evaluation the father sought for the student. The father was still in the process of arranging that evaluation when the hearing ended. If the evaluation occurred as planned, the results would not be available for the PET to review for approximately five to six months. (Testimony of father and Marecaux.)

4. On February 8, 2005, the father filed a Dispute Resolution Request Form with the Maine Department of Education, initiating the process that has lead to this hearing. That filing triggered the "stay-put" provisions of state and federal special education law. Consequently, the school did not act on its determination that the student was eligible for special education. The student remains

unidentified and unserved, pending the results of this due process hearing.
(HOE-1; Testimony of father and Marecaux.)

DISCUSSION

I.

Whether the school was correct when it determined the student's aunt to be a person acting as a parent of the student within the meaning of state and federal special education law? [sic]

The central issue in this case involves the question of which individuals are empowered by state and federal special education law to give consent to the evaluation, identification or initial placement of a student. Both state and federal special education schemes require the school to obtain "parental consent" prior to taking any of those steps toward the provision of special education services. The Maine Special Education Regulations ("MSER"), Ch 101, Section 2.14, define "parent", in part, as "a natural or adoptive parent, a guardian, a person acting as a parent of a child (such as a grandparent or step-parent with whom the child lives, or a person who is legally responsible for the child's welfare)...".³ The specific question here is whether the student's aunt fits within Maine's definition of "parent" as set forth in the MSER.

For the reasons that follow, the hearing officer concludes that, given her current role in the life of this child, the student's aunt fits comfortably within the regulatory definition of "a person acting as a parent of a child" as set forth in Maine's Special Education Regulations. The student is living with his aunt pursuant to an order of a New Hampshire Court, Family Division that issued an Ex-Parte Order on October 13, 2004 stating, in part, that the student⁴ would "be placed into the custody of the [student's aunt], pending further order." (SE 33) On October 15, 2004, the New Hampshire Court affirmed that conclusion in a two page Decision stating, in part, that the student "shall be

³ Maine's regulatory scheme is consistent with the federal regulations on this point. *See*, 34 CFR 300.20. For the purposes of this decision, the hearing will hereinafter refer only to Maine's special education law and regulations.

⁴ The student has a sibling who also was placed with the student's aunt.

placed with the student's aunt. The parents shall have no unsupervised visitation." (SE 32) As recently as March 15, 2005, the same Court expanded upon its decision placing the student with the student's aunt in another Order that stated, in part, "...those orders (regarding the placement of the children) are hereby reaffirmed...the parties (father and mother) and the paternal aunt [student's aunt()] appear to have joint legal custody...there have arisen disputes between... (father and mother).. and aunt about counseling and medical care...Given the legal status of the children, this Court finds that major health related decisions must be made in consultation with one another..." (SE, 65-66)

It is clear that the New Hampshire Family Court established, re-examined and expressly re-iterated its conclusion that (1) at the present time it was in the student's best interest to live with his aunt in her home in Biddeford and (2) the student's aunt shares joint legal custody of the student with his biological parents. The aunt is the one who cares for the student on a daily basis, gets him to school and back, feeds him, puts him to bed at night, and takes care of him in all the ways parents take care [sic] children of the student's age. These considerations make it clear to the hearing officer that the aunt is "a person legally responsible for the...(student's) welfare".⁵ Given this, the hearing officer concludes that the school correctly determined that the student's aunt was a "person acting as a parent of a child" and therefore properly considered her to be a "parent" as defined in Maine's Special Education Regulations.⁶

II.

⁵ The hearing officer notes that the aunt is carrying out her court-imposed responsibilities to care for the student and his sibling in a competent and caring manner. All witnesses who testified to this issue, including the student's father, agreed that the student was in good hands with his aunt and was doing well in her home. The hearing officer also notes that the current custodial relationships were created by the family courts of New Hampshire; the current situation is subject to change upon the order of the New Hampshire courts or any other court of competent jurisdiction.

⁶ Nothing in this conclusion detracts from the parental status of the student's biological parents. As a "parent" within the meaning of the MSER, the student's aunt simply shares parental status with the student's biological parents. At least in the context of being able to give consent for the student to be evaluated, identified as eligible for special education services or put into an initial placement to receive special education services, the student's aunt has the same set of rights that belong to anyone else who fits the definition of "parent" set forth in the MSER.

Whether state or federal special education law requires the school to obtain the consent of both of the student's biological parent's prior to evaluating the student, determining his eligibility or making his initial placement, under the circumstances presented here? [sic]

The parties do not dispute the facts surrounding this issue. Shortly after the student was enrolled in the xx grade at last fall, the school and the student's aunt decided it was appropriate to test and evaluate the student in order to determine his eligibility for special education services. His aunt gave her consent to the testing and evaluation suggested by the school; the school did not have, nor did it seek, the consent of either of the student's biological parents. On 12/3/04, the school sent notice of a PET meeting to be held on 1/11/05 to discuss the evaluations. Later in December, upon learning the addresses of the student's biological parents from the student's aunt, the school immediately sent notice of the PET to both biological parents. The PET meeting was rescheduled.

On February 1, 2005, the PET convened to review the results of the completed evaluations, determine if the student was eligible for special education and discuss an initial placement for the student, if necessary. The aunt, both of the student's biological parents, school staff and consultants attended the meeting. The school staff and consultants discussed their conclusion that the evaluations of the student demonstrated that he was eligible for special education services under the category of "learning disabled" and recommended that he be placed in a diagnostic placement in the school to determine which interventions were most effective. The student's aunt and the student's mother agreed with the school's recommendations about the student's eligibility and initial placement, and each gave her consent for the school to proceed. The student's father did not accept the school's conclusions or recommendations. He did not give his consent but requested that more testing be done before the student was either identified or provided any special education services. Shortly after the PET meeting, the father filed a request for this due process hearing, thus triggering the "stay-put" provisions of the IDEA and Maine special education law. To date, the student remains unidentified and unserved.

The father asserts that, without his consent, the school can neither evaluate the student to determine if any learning disability exists, nor identify him as eligible for special education nor make an initial placement into a situation where he would receive special education services. The father argues that his refusal to consent to these actions regarding his son prevents the school from proceeding with any of the actions described above, notwithstanding the fact that both the student's biological mother and his aunt have consented to the school's plan. The school disagrees with the father's argument and submits two theories in response. First, the school asserts that, under the facts present here, when both the student's biological mother and his aunt have expressly consented to the school's proposals regarding the student, the father's consent is not required for the school to evaluate, identify or serve the student. Second, the school argues that the student's aunt, because she is a "parent" of the student as defined by the MSER, can give full consent on her own to the same extent that any other parent is authorized to give consent under the law and regulations. For either or both of these reasons, the school asserts that it may proceed with the evaluation, identification and initial placement of the student without the father's consent.

The father's argument on this issue is without merit. The Maine Special Education Regulations speak directly to the issue of what happens when one parent with joint custody gives consent, while the parent with joint custody refuses to consent.

MSER section 12.11(C) states, in part:

Generally, either parent may grant consent. In the case of divorced parents with joint custody either parent may grant consent. However, in the event that one parent grants consent and the other parent refuses, then the school is obligated to initiate the action for which consent has been granted.

The meaning of the regulation as applied to this case is clear: because the student's mother, a divorced parent with joint custody, has given her consent, the school is not only allowed to proceed with the evaluation, identification and initial placement of the student, it is obligated to do so. The hearing officer concludes that the school not only may but

also, in fact, must proceed with the evaluation, identification and initial placement of the student.⁷

III.

The third issue to be resolved is:

Whether the school can determine the eligibility or initial placement of the student prior to receiving the results of an independent educational evaluation currently being arranged by the student's father? [sic]

The father requested an independent evaluation at public expense; the school, during the course of the hearing process, agreed to that request. The father is in the process of arranging the evaluation, and the school has agreed to reimburse him for certain costs associated with the evaluation. Under normal circumstances, the evaluation being arranged by the father should take approximately six months to obtain, though cancellations at the testing center might shorten the time period. The father's position appears to be that, since the state and federal regulations require that an "...independent educational evaluation (IEE) shall be considered by the Pupil Evaluation Team in developing an Individualized Education Program (IEP) for the student..." MSER, section 12.5(F), the student cannot receive services until after the results of his independent educational evaluation have been considered by the PET. The consequence of this argument, if accepted, is that the student could not begin to get the services the PET has already concluded he needs until (1) the IEE arrives in six months or so, and (2) the PET convenes, considers that evaluation and designs an IEP based on the new IEE.

The hearing officer finds no support for this argument in the authorities referred to by the father. While the father is correct in asserting that the PET has to "consider" the

⁷ While it is not strictly necessary to reach the school's second argument – that the student's aunt, as a "parent" within the meaning of the MSER, is authorized by the regulations to give the consent discussed above on her own, without either biological parent giving consent – in order to decide this case, the hearing officer concludes that the school's position on this point is supported by and consistent with the MSER. Here, the student's aunt is a "parent" with "joint custody" of the student. The hearing officer sees no statutory or regulatory reason to interpret her ability to consent in [sic] way that differs from any other "parent" with joint custody of a student.

results of the evaluation he is currently in the process of scheduling when those results become available, nothing in state or federal regulations requires the PET to await the results of this evaluation before developing and implementing an IEP for the student. To the contrary, as the school points out, the MSER impose timelines on the PET, directing it for example to develop an IEP and make an offer of services in accordance with that IEP within 45[sic] days of receipt of parental consent for an initial evaluation. MSER, section 9.17. Further, the school properly refers to the federal regulation that requires the PET to make its initial identification decision based on a consideration of “existing evaluation data.” 34 CFR 300.533(a). The regulations simply cannot be read to require the PET to wait for the development of new data before acting, particularly when – as here – the delay would be approximately six months. Six months is a very significant period of time in the academic life of a xx grader, especially one who has already been described as struggling with a learning disability.

The hearing officer concludes that the school may determine whether the student is eligible for special education services, based upon a consideration of the “existing evaluation data”, and does not need to delay the process until the results of the pending IEE are available. Further, if the PET determines that the student is eligible for special education, the PET may proceed to develop an appropriate IEP, make an initial placement for the student and begin to provide the student with the special education services that are appropriate for him.⁸ When the results of the IEE the father is currently arranging become available, those results should be provided to the school. The school should then convene a PET meeting to consider those results and take action consistent with state and federal special education law and regulations.

⁸ On page 10 of the faxed copy of his written closing argument, the father appears to have consented to the initial placement recommended by the PET. Even if he withdraws this consent, the PET may proceed to make the initial placement because, as discussed above, both the student’s mother and his aunt have already consented to the evaluation, identification and initial placement for the student.

ORDER

For the reasons discussed above, the hearing officer finds that none of the school's actions at issue in this matter violate [sic] either state or federal special education law. As discussed above, the school may proceed to evaluate, identify, make an initial placement, and provide special education instruction and services to the student, as appropriate under state and federal special education law and regulations.

Peter H. Stewart
Hearing Officer

Date

LIST OF WITNESSES

FOR THE FATHER:

Father of the student

FOR THE SCHOOL:

Dorothy Marecaux, Director of Special Education, Biddeford School Department

LIST OF DOCUMENTS

School Exhibits 1-66

Hearing Officer Exhibit 1 – Dispute Resolution Request Form, 2/8/05
