

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

August 1, 2007

Case No. 07.096, *Parent v. Whitefield School Department.*

Representing the Family: Diane Smith, Esq.

Representing the School: Eric R. Herlan, Esq.

Hearing Officer: Peter H. Stewart, Esq.

INTRODUCTION

This special education due process hearing has been conducted, and this decision 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 father of the the Student involved in this case, filed a Hearing Request Form on April 9, 2007 with the Maine Department of Education, thus initiating the process that has lead to this decision. He filed the hearing request on behalf of his son, The Student (D.O.B.: XX/XX/XX), who then was attending the xx grade at the Chelsea Elementary School. The Student lived, and lives, with his father in the town of Whitefield, Maine, has been diagnosed with Post-Traumatic Stress Disorder (PTSD) and Attention Deficit Hyperactivity Disorder (ADHD), and has been determined eligible to receive special education services under the category of Emotional Disability (ED). The Student attended the Whitefield Elementary School from his entrance into xx in September of 2004 until September 26, 2006, when his father removed him from school after an incident that is the central event in this dispute. In October of 2006, he was enrolled in the xx grade at Chelsea Elementary School with the consent of his family, Whitefield and Chelsea Schools, and the Superintendent of School Union #132.¹

¹ The towns of Whitefield and Chelsea each operate elementary schools as members of School Union 132 and, as such, share costs for certain administrative officials including the superintendent and special education director.

While there are ancillary issues involved here,² the family's central argument is that the principal of the Whitefield Elementary School applied an inappropriate physical restraint to the Student at school on September 26, 2006, thereby violating the Student's rights under the IDEA, Maine special education law and regulations, and other Maine law and regulations establishing standards on the Student restraint. The school responds that the restraint applied to the Student was appropriate given the circumstances and, indeed, necessary under the circumstances to protect the Student and others from being harmed. Thus, the restraint did not violate any of the Student's rights arising from state or federal special education law. Further, the school argues that the due process hearing officer does not have the jurisdiction to decide whether the incident of restraint violated state standards on therapeutic restraint set out in state law and regulations on the Student restraint.

The pre-hearing conference was held on May 10, 2007. The hearing took two days, May 24 and 31, 2007. The family presented two witnesses and exhibits 1-7 of documentary evidence. The school presented 7 witnesses and 299 pages of documentary evidence. Hearing officer's exhibit 1 was also admitted. The parties submitted written closing arguments. The hearing officer received those arguments on June 27 and the record was closed on that date. While writing this decision, it became apparent that the testimony of Ronald Cote, the principal of the Whitefield Elementary School who applied the restraint in question, was crucial to the resolution of the central factual issue in this case. Consequently, the hearing officer requested a transcript of that testimony. The record was reopened to admit that transcript, and then closed again, on July 14, 2007. This decision is being issued on July 31, 2007.

² The family made a series of claims intended to support their argument that the student was not receiving a FAPE from the school. The family asserted that a 2005 OT was both untimely and inadequate, that the school did not provide enough adult supervision and support for the student, that the IEP did not contain a behavior intervention plan, that a functional behavioral analysis was not done and that the student was entitled to compensatory education award because of time lost from school between 9/26 and 10/17, 2006. All these arguments are subsumed under Issue 1 below, as discussed at the hearing.

ISSUE

The issues to be resolved in this hearing are:

- (1) Did the Student's IEP, as written and implemented by the school from April 2006 until October 17, 2006, provide him with a free and appropriate public education as required by state and federal special education law and regulations? If so, what is the appropriate remedy?

- (2) Did any incident of physical restraint of the Student by school staff members violate the provisions of 20-A MRSA 4009 and pursuant regulations:
 - a. Does the hearing officer have jurisdiction to interpret and enforce 20-A MRSA 4009 in this special education due process hearing;
 - b. If so, did any incident of restraint of the Student by the school violate 20-A MRSA 4009; and
 - c. If so, what is the appropriate remedy?

FACTUAL FINDINGS

1. The Student involved in this hearing is the Student ([sic](D.O.B.:XX/XX/XX) who lives with his father and other family members in the town of Whitefield, Maine. He has been diagnosed with Post-Traumatic Stress Disorder, arising from events that occurred when he was not in his father's care, and possible Attention Deficit Hyperactivity Disorder. He has been determined eligible for special education services under the category of Emotional Disability. He has a full scale IQ of 72. The Student attended the Whitefield Elementary School from September 2004, when he entered xx, until September 26, 2006, when he was removed from school by his father after an incident there that is the central event in this proceeding. On October 17, 2006, the Student was enrolled in XX grade at the Chelsea Elementary School at the request of his family and with the consent of both the Whitefield and Chelsea schools. The father initiated this proceeding on April 9, 2007, by filing a Hearing Request Form with the Due Process Office of the Maine Department of Education. (Testimony of father and Boynton; School Exhibit 158-170; Hearing Request Form)

2. The towns of Whitefield and Chelsea each operate an elementary school as members of Maine School Union 132. A “school union” is one of the several forms of a “school administrative unit” described in Maine law and, as members of a school union, the two towns share costs for certain administrative services and officials, including the superintendent and special education director.

3. The family asserts that the Student did not receive a free and appropriate public education under the IEP that was in effect from April of 2006, in the spring of his xx grade year, until October 17, when he enrolled in the xx grade at Chelsea. There are two IEPs that cover that period, one dated 3-29-06 and another dated 6-5-06. (Family pleadings; School Exhibits 153-156, 121-124)

4. The 11-9-05 IEP, developed by the PET in the fall of the Student’s xx grade year, provided that he would receive special education services for one hour and fifty minutes each day in Mrs. Karass’ resource room where the focus would be on behavior and math. The move to the resource room was planned to come after a one and one half hour class in structured literacy, during which the Student had to sit still; part of the reason was to give him an opportunity to move around and relax a bit, but in a situation where his behavior could be observed by school staff, who could intervene when necessary. At this PET, the Student’s father was generally pleased with how much better his son was doing in school this year; he reported that the Student liked his xx grade teacher, Becky Roper (Testimony of father, Karass, Roper; School Exhibits 152-153)

5. A PET convened on 3-29-06 in response to changes in the Student’s behavior in school. He seemed increasingly angry, somewhat confused and frustrated at times and, in general, seemed to regress. These changes in behavior occurred after, and seemed to be related to, the enrollment of a new the Student with behavioral difficulties not unlike the Student’s into the regular education xx grade class. In an attempt to protect The Student and to keep him feeling safe and being successful at school, this PET increased his time in the resource room to three hours per day, explaining that the Student “requires small

group interaction with behaviors taught, practiced and reinforced in this setting.” All members of the PET, including the Student’s father, agreed that the additional time in the resource room was a good idea. (Testimony of father, Karass, Roper, Capen; School Exhibit 139-145)

6. A PET convened on 6-5-06, near the end of his xx grade year, to develop an appropriate educational plan for his xx grade year. The father wanted him to be educated full-time in the resource room for [sic] next year; the PET acceded to his wishes and agreed to place the Student in the resource room full-time except for specials, lunch and recess. The PET ordered that a psychological assessment be done early in the fall by Thomas Wright, Ed.D., a certified school psychological services provider and licensed psychological examiner. This IEP also provided for 36 hours of summer school, including transportation to and from school. The IEP was to be in effect only until 10-30-06. A PET meeting was scheduled for 10-29-06 to review the Student’s situation and needs after (1) approximately two months of being educated full-time in Mrs. Karass’ resource room and (2) receipt of Dr. Wright’s report. The Student was removed from the Whitefield Elementary School by his family on September 26, 2006, the day of the restraint incident, and never returned to school. (Testimony of father, Karass, Wright; School Exhibit 117-122)

7. Susan Karass is a certified special education teacher at Whitefield who runs the K-2 resource room. She holds a master’s degree (exceptionality) from the University of Southern Maine, has taught in the Whitefield Elementary School for 17 years and had more than a decade of teaching experience prior to coming to Whitefield. She has known and worked with the Student since he entered xx. During the Student’s xx and xx grades, the resource room had from five to seven the Students and three to four adult staff members. She describes the Student as likeable, affectionate, fond of hugs and praise, anxious to please, and comfortable with her and her staff (“he loved the staff”). He liked to do what he wanted to do and could be non-compliant, and had poor social skills and difficulty establishing appropriate relationships with his peers. He responded well to de-escalation techniques such as role-playing and modeling. The resource room had a

“quiet” space where the Student could go to calm down; he had a big teddy bear that he could hug when he felt the need. The Student struggled with the academic part of school. He received individual help in the resource room and made some progress. He responded well to little prizes such as 5 minutes of free or computer time as a reward for 25 minutes of staying “on task”. One focus was on helping him manage his behavior, helping him build relationships both with individuals and his group. Mrs. Karass used interventions such as time-outs, role-playing, wait-time, and quiet time as well as frequent expressions of praise and affection, including hugs, to work toward these goals. Another major focus was helping him to build self-esteem and a sense of his own competence in the context of his academic work. The Student responded well to a reward system that was used in the classroom. Good behavior would be recognized and reinforced by small benefits such as free time on the computer, food, marbles in a jar, or a visit to a nearby sheep farm. The program worked “very well” for the Student who “did sustained good work for two years” while at the Whitefield Elementary School. Mrs. Karass was highly aware of the Student’s sensitivity to confrontation and physical restraint and her policy was to avoid both when dealing with the Student. (Testimony of Karass)

8. Thomas Wright has a bachelor’s degree in School Psychology and an Ed.D. in School Administration. He is a certified school psychological services provider and a licensed psychological examiner; he works for School Union 132 and serves as a consultant for the Whitefield Elementary School, working frequently with Mrs. Karass in the special education program there. He has known and observed the Student since xx. In xx grade, the Student was in a social skills group run by Dr. Wright in the resource room. The children played games, learned play skill such as how to take turns, how to win and lose appropriately. The adults would participate and “model” good behavior for the children, including the Student. The group met once a week for about 45 minutes. In addition, Dr. Wright is in the school regularly and visits and observes the resource room once or twice a week. He attended the PET meeting held on 6-5-06 and was asked by the PET to do a psychological evaluation of the Student early in his xx grade year, school year 2006-2007. A PET meeting was scheduled for 10-29-06 to review both Dr. Wright’s report and the Student’s experiences in the resource room for the first two

months of xx grade. The plan was to see if the Student, who at the request of his father began xx grade in the resource room full time, was responding well to that placement. Dr. Wright had worked with Mrs. Karass and Ms. Capen for years at Whitefield and has enormous respect for their abilities in the classroom; both are supportive and nurturing presences in the classroom and have created a safe environment where it is permissible to make mistakes. He has observed the Student in the resource room where the Student is safe, has a sense of belonging, and was “making really nice academic progress”. Dr. Wright found the program “really well calculated to benefit [the Student]”. (Testimony of Wright)

9. John Salvato, M.D., is a pediatrician who examined the Student when he was XX years old. Part of that report was made available to the school in the spring of 2006. The report stated, in relevant part, that

[The Student] is the sort of person that will not do well if people try to grab, restrain or hold him. There may be circumstances in which one needs to do this for his safety, however; in general every effort needs to be made to come up with strategies to allow [the Student] to de-escalate on his own.

(School Exhibit 126)

10. The Parent is the father of the Student. In general, the Parent was comfortable with the program that the Student was receiving at school, though he did question an incident involving magic markers that the Student used on himself at school. His only major complaint was the physical restraint that occurred during Mr. Cote’s intervention on September 26, 2006. At the 3-29-06 PET meeting, the Parent asked that he be called at home if the Student ever escalated beyond voice control at school; he would then come to school and get him. The PET included this in the IEP. He also asked that Sue Karass and Helen Capen be involved if the Student becomes [sic] difficult at school “because [the Student] will usually listen to them.” This PET increased the Student’s time in the resource room to 3 hours each day; the father agreed with this decision. At the 6-5-06 PET, the Parent requested that the Student be placed in the resource room full-time to

start xx grade because he needed the additional support that was available there. The PET agreed with this suggestion and ordered that placement. This PET also scheduled a PET meeting on 10-29-06 to revisit the placement decision. After September 26, when he took the Student home after the incident of restraint at school, the father kept the Student out of the Whitefield program. At the Parent's request, the superintendent of School Union 123 agreed to and arranged for the Student to transfer to the Chelsea Elementary School, where he enrolled on October 17, 2006. (School Exhibit, 140-144; Testimony of father)

11. The Student entered xx grade as a full-time the Student in Mrs. Karass' resource room as one of 6 or 7 the Students with Ms. Capen as the Ed Tech II. There were two other adults [sic] staff members assigned there as well. On the morning of September 26, 2006, the Student was supposed to make an early morning visit to a nearby sheep farm, something arranged by Mrs. Karass that he enjoyed doing, but was not allowed to go because he had not finished an assignment he had to complete in order to "earn" the trip. The others waited and gave him some time to finish his work, but he wouldn't do it; he just began yelling in a very loud voice, "I WILL go, I WILL go." The others left for the sheep farm. He became more upset and began kicking chairs around the classroom. Mrs. Karass and Ms. Capen "role played" in an attempt to quiet the Student down but that technique did not succeed in calming him; he continued yelling and throwing chairs around. Mrs. Karass called his father and told him the Student was out of control and to come get him.³ The Student continued kicking chairs and screaming. Unable to calm him at all, Mrs. Karass called Mr. Cote, the principal of the school and asked for his help. He quickly got to the resource room and began trying to "talk" the Student down from his highly agitated state, saying something like. "[Student], I like you but I need you to be safe, to start acting in a safe way...you are not being safe now". Mr. Cote sat in a beanbag chair not far from the Student and continued talking in this manner, waiting and hoping he would comply or calm down. The Student wouldn't engage with Mr. Cote, nor would he calm down. Rather, he continued to escalate, kicking and throwing things around, such as clocks, books and papers. After about 5 minutes of this, the Student

³ The Parent said he could not come immediately to school, but he that he would be there as soon as he could. The intervention occurred before the Parent arrived at school.

grabbed a wheeled, folding partition or room divider approximately four feet high, folded it up and began to push it quickly across the room, slamming it into the panic-bar of a fire-door that opened to the outside. Mr. Cote told him that he had to stop doing that, that he wasn't being safe. The Student looked at Mr. Cote, looked back at the door, then grabbed the folded divider and slammed it into the panic-bar of the fire door again. The door opened a little, then closed as the Student rolled the divider back away from the door. The Student then did it again, slamming the rolling divider into the door, this time opening it far enough so Mr. Cote could see outside to the school grounds.

At that point, Mr. Cote, who had continued to talk in an unsuccessful attempt to bring the Student back into control, decided to intervene. His primary concern was safety: the safety of the other the Students in the resource room, the safety of the Student himself, and the safety of Mrs. Karass and Ms. Capen. He was also concerned that there were students outside the fire door who could be hurt if the Student succeeded in pushing the divider out the door. Mr. Cote walked over to the Student, took the Student by the wrists and walked him over to the beanbag chairs. He laid the Student on a beanbag chair on his stomach holding him between his wrists and elbows. Mr. Cote was on his knees, a little to the side and the rear of the Student; his body was touching the Student. The Student was lying on his chest, stomach and lower body; his face was not touching the chair. The Student was yelling at Mr. Cote, saying something like, "Let go of me, let me go...", during the time Mr. Cote had him by the arms. Mr. Cote continued to tell the Student that he would let him go when he could calm down and was ready to sit in a chair. After 3 or 4 minutes, the Student said he was ready to do that. Mr. Cote let him go. The Student sat in the chair. No further acting out occurred. Shortly after, the Student's father arrived and took him home.

His family never allowed the Student to return to the Whitefield Elementary School. On October 17, 2006, he was enrolled in the xx grade of the Chelsea Elementary School where he completed his xx grade year as a full-time the Student in the resource room. The transfer was at the request of the Student's father and was arranged by the superintendent of School Union 132. (Testimony of Karass, Cote, Capen. Boynton)

DISCUSSION AND CONCLUSIONS

1.

The initial question presented in this matter is whether the Student's Individualized Education Plan (IEP), as developed by the Pupil Evaluation Team (PET) and implemented by the Whitefield Elementary School from April, 2006 through September 26, 2006, provided the Student with a free and appropriate public education, as required by state and federal special education laws. It has long been established in this jurisdiction that the applicable standard on this issue is whether the IEP is reasonably calculated to enable the Student to receive educational benefit. *Rowley v. Board of Education*, 102 S.Ct. 3034, 3051 (1982). Neither federal special education law, the Individuals with Disabilities Education Act (IDEA), 20 USC 1400 *et seq.*, nor Maine state special education law, 20 MSRA 7202 *et seq.*, obligates a school to create an IEP that provides a the "highest attainable level (of benefit) or even the level needed to maximize the child's benefit", *Rowley* at 3047. However, the benefit must be more than trivial or insignificant, and must be "a great deal more than a negligible benefit", *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d. 171, 182 (3rd Cir 1988) and *Roland M. v. Concord School Committee*, 910 F. 2d 983 (1st Cir. 1990). In Maine, it is also clear that "parental preferences alone cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child.". *Brougham v. Town of Yarmouth*, 823 F.Supp 9 (D. Me. 1993). Finally, the family, as the party seeking relief, carries the burden of proof on the issues in this hearing. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005).

At the hearing, the parties agreed that the specific question to be resolved in this case is whether the program the Student received while attending the Whitefield Elementary School from April 2006 through September 26, 2006, was reasonably calculated to enable The Student to receive educational benefit.⁴ After consideration of

⁴ The April-September 26th time period reflects the family's assertion that one incident of restraint of the student had occurred in April, and another on September 26th. While it is

the evidence produced in this case, the hearing officer concludes that the IEP was reasonably calculated to enable this the Student to receive educational benefit during the relevant time period⁵ and, therefore, the school has met its obligation to provide The Student with a free and appropriate public education as required by state and federal special education law and regulations.

The Student has been diagnosed as having Post-Traumatic Stress Disorder (PTSD) as well as Attention Deficit Hyperactivity Disorder (ADHD), and has a full scale IQ of 72. He is eligible for special education services under the category of Emotional Disability. This particular set of challenges means that he came to xx at Whitefield having behavioral difficulties intertwined with academic needs. He could be non-compliant with his teachers and difficult with his peers. He also was particularly sensitive to confrontation, a sensitivity probably arising from his PTSD. Further, his cognitive problems lead to difficulty and frustration when attempting his academic work. The school developed a series of IEPs, including those which cover the period at issue here, designed to respond to both those facets of the Student.

The evidence produced at the hearing shows that school staff members and consultants who developed the Student's IEPs are highly experienced, well-trained and caring individuals who have worked with the Student since he entered xx. Susan Karass is a certified special education teacher with a master's degree in exceptionality with nearly thirty years of teaching experience, the last seventeen of which were at the Whitefield Elementary School. She is the lead teacher in the K-2 resource room and was deeply involved in the design, development and implementation of the Student's educational program throughout his attendance at Whitefield. For the last ten years, Helen Capen, who is currently an Educational Technician II, has assisted Mrs. Karass. She has worked with Mrs. Karass in the resource room in which the Student spent three hours each day toward the end of his xx grade year and his entire day during the part of

not contested that the September restraint occurred, there was no evidence produced at the hearing to support the family's allegation that the student was also restrained at school in April. The hearing officer finds that the family did not carry its burden of proof with regard to that issue.

⁵ Indeed, the programs the school provided to the student during each of his years at Whitefield appear to be far more than minimally appropriate, though it is not necessary to reach that conclusion to decide this case.

his xx grade year he was at Whitefield. Mrs. Karass and Ms. Capen worked together every day as two of the three or four adults in the resource room, which had 5-7 the Students in it. After ten years of working together, Mrs. Karass and Ms. Capen shared an educational philosophy and applied it consistently when working with their the Students, including The Student.⁶ In addition to the faculty, Thomas Wright, Ed. D., was involved in developing the IEP for the Student. He is a certified school psychological services provider and a licensed psychological examiner in Maine since 1991. He worked closely with Mrs. Karass and Ms. Capen and was in the school frequently to observe the Student in the resource room. He served as a consultant and advisor, often attending the Student's PET meetings. In addition to the obvious qualifications that these professionals brought to their work with the Student, each of them also displayed knowledge, genuine concern and affection for him; they are not only competent and experienced, they displayed real commitment to the Student and his development. They were highly credible witnesses.

As a child with PTSD and ADHD, the Student presented academic, attentional, social and behavioral issues. Mrs. Karass and the resource room staff employed a number of interventions designed both to help the Student deal with these issues, and to demonstrate to him better ways to express himself and behave in school. Staff members were assigned to help the Student make the transition into his school day; someone would meet him in the morning, explain his day to him and get him started. Later in the day, Ms. Capen volunteered to help him make the transition back to class from lunch and recess. In the classroom, "role playing" was a successful method with the Student; one staff member would act out some bad behavior that the Student had displayed, while another would explain, in front of the Student, just why the behavior was inappropriate. It was a way of correcting him in a non-confrontational way, without pressure or embarrassment. Another technique was modeling good behavior, a gentle way of showing the Student how to behave. The resource room had a quiet space where the

⁶ At the hearing, Mrs. Karass described her general philosophy as based upon the belief that whatever the specific set of characteristics that a child brought with them, all children needed three things to succeed and grow in school: to be safe, to have a sense of belonging, and to feel a positive sense of self-esteem. Classroom decisions and techniques were made and applied with those goals in mind.

Student could go if he needed to calm himself; there, The Student could listen to music when he became upset or sit in his bean-bag chair and hold his stuffed animal, all calming and comforting experiences for him. The staff avoided direct confrontation as much as possible and relied on praise and hugs to change his mood.⁷ A system of rewards was used to recognize and encourage good behavior, with the Student able to earn free time, time on the computer, donuts, marbles or a visit to the sheep farm when he did something well. For example staying “on task” for 25 minutes doing his math work might earn him 5 minutes free time. He seemed to respond to this tangible and in-the-moment recognition of a job well done. As another example, he would be allowed to visit a nearby sheep farm to help feed the sheep, but only if he had finished his assignments.

In the 3-29-06 PET meeting, which was convened because the Student was displaying increasing amounts of anger and frustration after a new student who also had behavioral issues joined his xx grade class, the team decided to increase his time in the resource room to three hours per day. The team also granted the Parent’s request that he be called should the Student ever get “out of voice control”; should that happen, the Parent would come to school and get the Student. At the 6-5-06 PET meeting, the Parent, who felt that the Student need the additional attention and support offered in the resource room, asked that he be placed in the resource room on a full-time basis when he began xx grade in the fall; the PET acceded to his request. The PET also ordered that Dr. Wright do a psychological evaluation of the Student early in his xx grade and decided to hold a PET meeting on 10-29-06 with the understanding that his report would be available.⁸

After reviewing the evidence, the hearing officer concludes that the program the Student was receiving from April 2006, in the spring of his xx grade year, through

⁷ When asked if she had ever restrained the Student in her classroom, Becky Roper said, “[The Student] wasn’t ever restrained in my classroom, he was hugged...”

⁸ By this time, the school had received at least part of a report from John Salvato, M.D., a pediatrician who had examined the Student. In relevant part, his report contains the following: “[The Student] is the sort of person that will not do well if people try to grab, restrain or hold him. There may be circumstances in which one needs to do this for his safety, however, in general every effort needs to be made to come up with strategies to allow [the Student] to de-escalate on his own.” (School Exhibit 126)

September 26, 2006, early in his xx grade year when the incident of restraint occurred, was reasonably calculated to provide him with educational benefit as required by the IDEA and state special education law. Further, the hearing officer finds that the Student's educational program was far more than minimally adequate. It was a good and effective program, skillfully designed by experienced professionals and implemented by those professionals in a caring and thoughtful manner. His special education teacher, Mrs. Karass, noted that the Student responded "very well" to his program during his time at school and did that he did "sustained good work for two years."⁹ It is useful to note that the Student's father fully participated in the several PET meetings that produced the IEPs at issue here. He made a series of requests and suggestion at the PET meetings that were incorporated into the IEP by the PET and did not criticize any major aspect of his son's program prior to September 26. While the incident that occurred on September 26 was difficult for everyone involved, that single incident does not render the rest of the Student's individualized educational program inappropriate under the IDEA.¹⁰ The hearing officer determines that the IEPs in effect during the time at issue in this matter provided the Student with a free and appropriate public education, as required by the IDEA and state and federal special education law.¹¹

⁹ Mrs. Karass was a completely credible witness.

¹⁰ The hearing officer finds that the September 26 incident of restraint does not violate any rights of the student that arise from state or federal special education law. One reason for this is that the principal's decision to intervene when he did appears to be a reasonable choice in light of the circumstances that existed at the time. That choice also seems consistent with the advice of Dr. Salvato, to the effect that physical restraint of the Student should be avoided whenever possible but that there may be times when such restraint is necessary to prevent harm. Finally, the Parent was called when it became clear that the Student was out of voice control; it was not the school's fault that his arrival at school was somewhat delayed.

¹¹ The record in this matter did not support the family's other claims, advanced in support of their argument that the Student did not receive FAPE. The evidence did not support their claims that a 2005 OT evaluation was both untimely and inadequate; neither was the claim that the school provided insufficient adult support and supervision. Further, the record and testimonial evidence in this case clearly show the Student's behavior was a major concern and that the Whitefield staff had developed a series of interventions to be used throughout his day. The claim to compensatory education for the period 9/26/06-10/17/06 fails as the family chose not to allow the Student to participate during that period in a school program that this decision finds was providing him with a FAPE.

2.

The second question presented here is whether the special education due process hearing officer has the jurisdiction to interpret and enforce the provisions of 20-A MRSA 4009, a section of the Maine education law that states, in part, that a

Teacher or other person entrusted with the care or supervision of a person for special or limited purposes may not be held civilly liable for the use of a reasonable degree of force against the person who creates a disturbance if...(he/she) ...reasonably believes it is necessary to: **A.** Control the disturbing behavior; or **B.** Remove the person from the scene of the disturbance....

20-A MRSA 4009(1), as well as the Maine Department of Education regulations discussing, *inter alia*, therapeutic restraint¹². The family urges the hearing officer to review the September 26, 2006 incident in light of Section 4009 and the regulations on therapeutic restraint and to conclude that the events of that day violated the state standards on the restraint of students contained therein. Further, as remedy for that violation, the family asks the hearing officer to order the school to take a series of actions including a ban on prone restraint, as well as additional training and certification to instruct its staff on how to respond to students in situations such as are presented here. For the reasons stated below, the hearing officer declines to do so.

The jurisdiction of a special education due process hearing officer is created, described and, therefore, limited by state and federal special education law and regulations. Pursuant to those statutory and regulatory provisions, parents¹³ are entitled to a due process hearing only to challenge a school's proposal or refusal to initiate or change the identification, evaluation or educational placement of the Student or for the provision of a free appropriate public education to the Student. MSER, 05-071, Ch 101, Section 12.7. Federal regulations essentially mirror this language. While it is clear that other kinds of harm can befall students in a school situation, harms cognizable under tort,

¹² See, Maine Department of Education Regulations, 05-071, Ch 33.

¹³ In some circumstances not present in this case, both students and schools, in addition to parents, are able to initiate a due process hearing. See e.g., MSER Ch. 101, Sections 9.19 and 12.7 (C).

criminal or civil rights law, for instance, a special education due process hearing officer is without power to remedy any injury except that arising from a school's failure to provide special education services in compliance with state and federal special education law and regulations. Contrary to the family's assertions on this point, a special education due process hearing officer is without jurisdiction to interpret or enforce the law and regulations that establish standards for therapeutic restraint in Maine.¹⁴

ORDER

After consideration of the evidence presented in this due process hearing, the hearing officer concludes that school did not violate any rights of the Student that arise from state or federal special education law. Finding no violation, no order is required.

Peter H. Stewart, Esq. Date
Hearing Officer

¹⁴ It should be noted that the conduct the family seeks to challenge here, the incident of restraint that occurred on September 26, 2006, has not eluded review under the relevant federal and state special education laws. In Section 1 above, the hearing officer, after a review of the evidence produced in this hearing, concluded that the restraint did not violate any rights the student has to a FAPE.

WITNESSES

Family: Parent, The Student's father
Susan Moody, LSW, the Student's case manager

School: Francis Boynton, Superintendent, School Union 132
Helen Capen, Educational Technician II, Whitefield Elementary School
Ronald B. Cote, Principal, Whitefield Elementary School
Susan Karass, Special Education Teacher, Whitefield Elementary School
Ralph Newbert, Director, Special Education, School Union 132
Becky Roper, XX Grade Teacher, Whitefield Elementary School
Thomas Wright, Ed. D., Certified School Psychological Services Provider

DOCUMENTS

Family: Family Exhibits 1- 7

School: School Exhibits Pages 1 - 299

Hearing Officer Exhibit 1 – Transcript of the testimony of Ronald Cote.