

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

October 1, 1997

CASE # 97.147

parent vs. Saco School Department (Union #7)

Counsel for the Parents: pro se

Counsel for the School: Amy K. Tchao, Esq.

Hearing Officer: Dr. Jeannie M. Hamrin

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, CHAPTER 303, SECTION 7207-B; TITLE 20 USC, SECTION 1415; AND TITLE 29, SECTION 794, AND IMPLEMENTING REGULATIONS.

A Special Education Due Process Hearing was held on September 15 and 16, 1997 to resolve a conflict between the parent and the Saco School Department on behalf of her son [d.o.b.]. The record was left open until September 22, 1997 for the submission of closing statements. In preparation for this hearing a pre-hearing conference was held on September 5, 1997. Three-hundred and ninety-two pages of documentation was entered into the record and six witnesses presented testimony.

This hearing was requested by the mother to resolve the dispute regarding:

I. PRELIMINARY STATEMENT

The student is a child with Down syndrome, verbal apraxia, and mental retardation. Student has been identified as multi-handicapped. The student presently attends Waban Child Development Center in Sanford, Maine as a result of a settlement offer made in August of 1996 by the Saco School Department. Last year, the student was school-age x. Waban Child Development Center is a special purpose program with approval from the Maine Department of Education to offer a kindergarten program. Waban remains as the stay-put placement until this dispute is resolved.

There is no dispute with the goals and objectives listed in the 1997-98 IEP, with the services provided, or the length of the school day. There is conflict over placement [segregated vs. integrated], methodology [skill-based vs. play-based], and peer group [age and size]. Parent alleges many procedural and substantive violations. The parent represented her case well.

II. ISSUES

[1] Is Saco's 1997-1998 IEP and placement in a kindergarten program reasonably calculated to provide the student with educational benefit in the least restrictive environment?

[2] If not, is continued placement at the Waban pre-school program for another year appropriate to meet the student's needs?

[3] May the parent choose specific individual service providers to carry out the services in the student's IEP?

III. STIPULATIONS

1. The parties accept the goals and objectives of the 1997-98 IEP as written.
2. The parties agree to the handicapping condition.
3. The parties agree that all personnel offering services are duly licensed and certified by the appropriate boards.

IV. FINDINGS OF FACT

- 1-3. The stipulations, numbers one through three, are hereby Findings of Fact.
4. The student was school-age x for the academic year 1996-97 which made the student eligible for kindergarten and all the special education services provided by the Saco School Department. [Testimony of mother and exhibits]
5. The student has been identified as a child with Down Syndrome since birth. Student has been served by York County Child Development Services. During student's first four years, the student received speech and language therapy,

occupational therapy and a home-based developmental therapy. Student was unable to attend a classroom environment until September of 1996 due to parent's battle with a life-threatening illness and student's own history of upper-respiratory infections. [Parent's post-hearing memo, P-159]

6. The description of Initial Placement stated that the student would attend Waban for three and up to five days/week from September 1996-August 1997 because of student's unique needs. Student was to receive two hours of speech and language therapy and one hour of occupational therapy services each week. [S-176]
7. Waban was approved by the Maine Department of Education for kindergarten only [S-201]. Waban served three kindergarten-aged students last year of which the student is the only one remaining at Waban. [Testimony of Ms. Phillips] The participating schools provided ten hours/week of supervision [S-199]. School approval was received after the academic year had begun. [S-200]
8. The student's initial IEP was developed on 8/19/96 [S-179]. It was sent to parents on 9/10/96 [S-182]. It was amended on 10/7/96 [S-169] It is the school's position that this IEP is valid for one year or until there is an annual meeting to alter it.
9. The summary of the PET discussion from 10/7/96 indicates that "Another issue to be looked at when the PET reconvenes is transitioning the student back to Saco Schools for the 1997-98 school year." A determination of the PET was to reconvene in January 1997 to "look at the issue of transitioning back..." [S-173]
10. Six PETs have been held since August 1996. [S-25; S-64; S-114; S-S-144; S-172; S-179]
11. On October 3, 1996, mother was notified that Ms. Laurel Tinkham, Special Education Consultant, would be the Saco administrator for the student. [S-178] Ms. Tinkham also provided supervision of the Waban program. [Testimony of Laurel Tinkham; S-83; S-97; S-147]
12. Four PET meetings were held to discuss program change and transition back to Saco. PETs consisted of administrators from Saco, Special Educators from Saco, Waban kindergarten teacher, speech therapist, occupational therapist, personnel from DMHMRSAS, recreation/developmental therapist, and parent. No regular education teacher from Saco attended any meeting. [S-25; S-64; S-114; S-144; Testimony of mother; P-155; P-158; P-159] The regular education teacher was Ms. Garnett from Waban.
13. Parents have augmented the student's program by providing extra speech and language therapy and developmental therapy. [Testimony of mother; S-173; S-116]

14. Parents, Child Development Services [CDS] and/or Department of Mental Health, Mental Retardation & Substance Abuse Services [DMHMRSAS] have paid for and provided many evaluations. [Testimony of mother; P-1; P-6; P-12; P-16; P-19; P-22] The school has not conducted any evaluations but has accepted the evaluations provided by the parent and other agencies for program planning. Parents have not requested reimbursement. Parents did request that the PET provide for an re-evaluation by Mark Hammond which was refused. Parents went ahead with the evaluation and submitted it to the school. [Testimony of mother; S-66; P-155] The last publicly-funded CDS evaluations were conducted on 3/18 & 29, 1996 [S-189], 5/95 [S-190], 4/1 & 4/11/96 [P-1], 5/20/96 [P-12].
15. Some portions of some PET meetings were characterized by a win-lose mentality where the sides became hostile, determined not to hear each other, stubborn, ego-invested. [Testimony of mother; Ms. Phillips; Ms. Garnett; Ms. Ficcardi; P-103; P-141; P-149; P-151-153; P-158] Laurel Tinkham did limit the amount of time to 90 minutes for the June 10, 1997 PET meeting and she did limit the discussion to programming and placement. The minutes state that "Consensus regarding development of the IEP, however the parent disagrees. Consensus regarding public school placement in a Kindergarten program ..." [S-28; P-149; P-151-153] There was much conflict regarding how to express current educational levels, developmentally appropriate vs. age appropriate, play-based vs. skill-based, Mark Hammond evaluation vs. Mark Hammond consultation. [In essence parties were saying "similar" things but were too locked into their own perspective to hear the other side.] There was no consensus about placement.
16. Saco has proposed alternatives as to which public school placement, program duration and intensity and teacher. [Testimony of Ms. Tinkman and Ms. Faust] Saco presents a public school based program that is identical to Waban's program with the exception of size of classroom and ages of peers. The Waban class size is currently 9 children but is licensed for 12. The average age is 4 and 1/2. There is one typically developing peer. There are two kindergarten age children this year. The kindergarten is integrated into the pre-school with a focus of kindergarten readiness. The focus is on the 3-5 year old child with most referrals coming from CDS. Waban is not a substitute for school. [Testimony of Ms. Phillips; Ms. Garnett; S-29] Saco believes they can provide all the services in the public school setting and their IEP is reasonably calculated to enable the student to achieve success. Mother. would not speak to whether the IEP [S-29] could be implemented in a public school kindergarten. She stated that the student "thrived" at Waban but it's not the only environment. Student would receive educational benefit if in a small group. Fifteen-seventeen children is not optimal. She had not observed Saco's kindergartens or any other kindergarten classes.
17. Saco is not considering any placement other than a public school placement.

Documentation supports that this was a determination of the PET as early as October 7, 1996. [S-173] The consent for placement indicated that the student would be at Waban from September 1996-August 1997. [S-176]

18. The student learns best through imitation, exploring a play environment. Student is easily distracted, beginning to verbalize and enjoy social relationships with peers. [Testimony of Ms. Phillips] Ms. Garnett, the student's kindergarten teacher is certified in regular [k-8] and special education [k-12]. She sees the "key" to the student to be a small class size, play-based environment with humor, nurturing and gentle actions. There is nothing that is unique about Waban. All services can be received in the public school. She could not say whether student would receive educational benefit at Saco. It is the Waban setting that is appropriate because it is where the student is at developmentally. The student is not toilet trained but it is "emerging." [Testimony of Ms. Garnett]
19. Saco has made a number of observations of the student and the student's program at Waban. It was observed that student exhibited some negative behaviors that could get in the way of learning. However, most of the reports contain examples of emerging skills, learning routines, and developmentally three year old behavior. [Testimony of Ms. Tinkham; S-83; S-85; S-97; S-137; S-147; S-174]
20. Saco's proposed placement would be in a kindergarten class using a functional life skills curriculum. The regular curriculum would be adapted to the student's level of development. For example, hand-over-hand cutting would be substituted for independent cutting, if appropriate. Student would follow the same curriculum. Student would have a one-to-one aide throughout the day. The day would be five hours long with two and one-half spent with kindergarten peers. Student would have lunch with a small group of young children in the cafeteria, classroom or special education room, depending on student's level of control and socialization. The kindergarten class size is 15-17 children but they are often learning in small groups. The methodology is both play and skill based. The developmental ages of the children would be varied. Chronologically, all would have turned five on or before October 15, 1997. [Testimony of Ms. Ficcardi; S-202]

V. DISCUSSION

This case relates solely to the issue of whether the student can be educated in the mainstream or whether student needs to be protected from the mainstream and the mainstream from student. The mother has phrased the argument as to whether least restrictive environment [LRE] overrides free appropriate public education [FAPE] when the child's needs demand a small, developmentally-appropriate setting and LRE is in a larger public school setting with CA-age peers.

As a preliminary matter, the school clearly has the burden of proving that it has complied with the **IDEA** in providing FAPE. Mother, as the party challenging the school's decision, bears some burden of proof as to why the student needs a segregated placement in order to receive educational benefit.

In deciding this case, basic standards established in the inclusion case law were reviewed by the hearing officer. Parties were instructed to become familiar with these cases at the pre-hearing conference.

The district court in Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) made the following interpretation of the substantive requirements imposed by **IDEA**.

The purpose of the Act was to open the door of public education to handicapped children by means of specialized educational services rather than to guarantee any particular substantive level of education once the child was enrolled. The Act does not require a state to maximize the potential of each child commensurate with the opportunity provided to non-handicapped children.

In an action such as this a court must first determine whether the responsible agencies have complied with the statutory procedures and then must determine whether the individualized program developed through such procedure is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the responsible authorities have complied with the obligations imposed by the Act, and the court can require no more. [my emphasis]

Courts must avoid imposing their view of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.

Clearly, the consultation requirements of the Act have been met in this case. Careful, impartial consideration has been given to the student's individual educational needs. A full, free appropriate public education has been offered to the student. Mother, because of the student's success in the Waban program, with support from her experts, asserts that this is the only proper placement with the only proper play-based methodology and only proper peers for the student at this time. The school's witnesses gave equal credence to their proposed placement with their skill and play based methodology with chronological age peers.

This hearing officer has determined through analysis of the IEP and proposed placement that the student has not been denied FAPE. FAPE is a mandate and LRE is a preference. The standard for inclusion is:

To the maximum extent appropriate children with disabilities are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational

environment occurs only when the nature or severity of the disability is such that education and regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [20 U.S.C. para 1412(5)(B)]

A placement decision must be made on an individual basis. There is a burden to prove why a child cannot receive a FAPE in the regular classroom. The educational benefits of mainstreaming are not measured purely by academic progress--but also by communication and social skills gained from interaction with typically developing peers.

In **Roland M.**:

An IEP may not be the **only** appropriate choice, or the choice of certain selected experts, or the child's parents' **first** choice, or even the **best** choice [citations omitted], yet still provide a free appropriate public education. Our review of the record assures us that the program offered by Stow struck a suitable balance between the goals of mainstreaming and [providing educational benefit]. We need go no further. [982 F.2d at 651 (emphasis in original)]

The factors set forth in Oberti are:

- n **What are the options for inclusion of the student in the Regular Classroom?** [modification of curriculum, use of teacher aides, consultation with special educators, behavior modification programs, training for regular teacher, language and speech therapy...]
- n **Compare the educational benefits (academic and social) the student will receive in the two settings.** [what are the unique benefits the student may obtain from integration with typically developing peers that cannot be obtained in a segregated environment, i.e., the development of social and communication skills from integration with non-disabled peers?]
- n **What are the possible negative effects that the student's inclusion may have on the education of the other children in the regular classroom?** [Is the student disruptive? Will the student's "disruptions" significantly impair the education of the others or will it be detrimental to the student? the student is not disruptive but it is a fact that he will require more attention than the student's non-disabled peers. The courts have found that this is not sufficient cause to find that this significantly impairs the education of the other children. **[Daniel R.R.]**
- n **If after weighing these factors, the school concludes that a special classroom is the appropriate placement, the school should include the student in other school programs with typically developing children whenever possible.** [recess, lunch, extra-curricular activities]

There is nothing in the IEP and proposed placement of the student in a public school kindergarten class with an aide, curriculum modifications, regular consultations, regular therapies and support/training for student's regular education teacher that would demand a segregated placement. Even Waban staff did not say the student would not receive educational benefit.

Although research with just Down Syndrome children is scanty, the few studies of full inclusion [1988], one involving 36 Mental Age [MA] matched Down Syndrome children, indicate that over a two year period, the mainstreamed group had a significantly greater mean MA gain of 19.0 months, compared with 14.2 months for the special school group. It appears that the presence of more able peers may have facilitated language comprehension for the mainstreamed children.

The record indicates that the student is not disruptive, but developmentally young with some behaviors, such as flopping on the floor and sucking student's thumb, that will require a behavior plan consistently carried out by student's one-on-one aide and all other teachers and staff. The record indicates that student is a loving, charming and wonderful little child that should be a delight for any teacher and classroom.

Waban has only one typically developing peer in the student's class. There is no significant integration of the student's with other classes of typically developing peers at Waban. Therefore Waban is not an appropriate placement for the student who learns through imitation.

Alleged procedural violations.

Mother has alleged numerous procedural violations. This hearing officer reviewed them all as well as the case law cited in her post hearing memo, and will now list the conclusions:

- n **Equal parent participation** [Appendix C to 34 C.F.R. Part 300] This hearing officer finds no violation of paragraph 300.345. Mother was offered the opportunity to participate and did so on many occasions. However, the school's facilitator was not always polite or skilled in pulling out the real issues for discussion. The parties simply refused to hear one another. Mother would say "X" which had been heard many times before by the school but not resolved. The school could have said, "I hear you and I have considered your comments but I cannot agree with them and there is a mandate to educate the student in a public school setting. Where is the documentation that (the student) can not receive educational benefit, etc..." Instead, the school ignored mother's comments which made her feel unheard, devalued and unappreciated. It is apparent that the mother is a very savvy parent who is very invested in her child's development. It is difficult for any parent to be objective.

In listening to the tapes, it appeared to me, as an impartial being, that the mother and Waban controlled the PET except for the decision-making. The real differences between the parties were not ever resolved. There were numerous examples of Ms. Tinkham accepting mother's suggestions and the final IEP reflects her input. Ms. Tinkham and mother did get centered on "winning" rather than focus of the goal of win/win and appropriate programming. One study by Lizbeth Vincent (1989) showed that the average IEP meeting lasted 36 minutes, professionals did 75-80% of the talking and made 80-90% of the decisions, 90%

of all IEPs were written before parents arrived and only 50% of the parents raised questions. Saco's IEP meetings lasted considerably longer than 36 minutes, mother submitted a Draft IEP which was considered and parts were adopted and some of her suggestions were accepted. She did raise questions. The school must develop an IEP and when discussions become bogged down in "smoke," they must go forward and develop a program which the parent then may take to hearing. This is the process that Saco followed.

- n **Continuum of alternative placements** [34 C.F.R. Part 300.551] There is no violation of this paragraph. The placement in a public school with instruction in a regular class with aides, instruction in special classes, special therapies and supplementary services are available.
- n **Discussion of educational methodology** [Letter to Anonymous, 21 IDELR 573 (OSEP 1994)] This reference could not be accessed through LRP's IDELR DAILY. In Rowley, the Supreme Court warned against interference with educational methodology and defers to the school. There seemed to be some confusion at the hearing over what is methodology. Functional Life Skills is a curriculum and not a methodology. Schools use lots of "play-based methods"-- example enhancing speech and language through games, doll corners, trip to fire house, etc.
- n **Placement pre-determined before 1997-98 IEP developed** [Appendix C to 34 C.F.R Part 300] the student's IEP was finalized after student was placed at Waban in 1996 but there was an interim IEP in place and parents agreed with the placement. The student's IEP from 10/96 is in effect until 10/97 or an annual meeting is held to review progress. This IEP was available for planning. Saco has the mandate to educate the student in the public school with typically developing peers first and then work back to more restrictive and segregated environments. Placement must not exclude children but include them. The Waban placement was for one year only and the PETs reflected the unflinching desire for Saco to include the student in their school from 10/7/96 to present. That is not pre-determination but following the federal mandate.
- n **Categorical placement and programming--predetermination of allocation of federally funded financial resources** [34 C.F.R. Part 300.533] The school did draw upon information from a variety of sources, did consider the information and did make a decision by a group of persons knowledgeable about the student, the meaning of the evaluation data and placement options, did ensure that LRE was conformed with. There was no consensus, but Ms. Tinkham representing Saco Schools did find that Saco could educate the student in the LRE.
- n **Inadequate and inappropriate IEP**
 - a. Present levels of educational performance incomplete. This section is complete, using both parent provided information and test scores.
 - b. Facilitator of PET disallowed discussion of related services Saco School Department does not offer. Saco schools are responsible for the student's

education during the school day. Other agencies are responsible financially and programmatically for student's activities outside of the school day. It is Saco's responsibility to bring the agencies together at a PET and discuss what services the student might benefit from and include them in student's IEP.

c. Placement described on 1997-98 IEP vague. This hearing officer certainly understands the placement and services from the description in S-29. It could have been made clearer by adding the number of hours of inclusion in the kindergarten setting. This is certainly something that can be handled by reasonable persons through discussion. Once again, the overall hostility at the PET may have prevented this suggestion from being made. It is not a violation.

d. Extended school year not discussed nor listed on the 1997-98 IEP. This is not a violation. It is expected that extended school year issues be resolved in May or June when data is gathered as to progress and programming needs to prevent regression. If Saco refuses to consider extended school year services in May or June, then the parent may go to hearing.

e. Facilitator limited the length of IEP meeting to one 90 minute meeting. The facilitator did limit the length of the June 10, 1997 IEP meeting and this is a violation. However, there had been previous PET meetings and discussions, some of which were not task oriented. Much time was spent on side issues rather than the real issue of why eight four and one-half year old developmentally delayed peers are more "appropriate" than 15-17 five and one-half year old mostly typically developing peers and why a segregated environment is more appropriate. This was a violation but it did not prevent FAPE.

f. Facilitator wrote portions of the IEP ignoring some participants including parent. The school has the responsibility to be pro-active and move forward in making an IEP as the right to FAPE belongs to the student and not student's parents. It is the school that is liable if the IEP is not completed. This hearing officer would have felt ignored by some of the treatment at the PET, but the overall IEP indicates that parent and her experts had lots of input into the process.

g. Saco School Department did not properly evaluate the student. There was an abundance of current evaluations supplied by CDS, parent and DMHMRSAS as well as numerous classroom observations of the student while at Waban. CDS is part of the "seamless" system and the evaluations were valid. This hearing officer found that Saco accepted all evaluative data, even from non-educational sources, and used the data to make an IEP. There was no violation.

h. Missing modifications. See S-204. This has been taken care of through discussion with Ms. Faust.

n **No prior written notice** [ME Regulations 10.3 and 34 C.F.R. Part 300.505] The purpose of the written notice is to keep parents informed before any action regarding a change in program or placement. The parent did show up at each PET meeting where determinations about program and placement were made for the subsequent PETs. Proof of documentation of written notice of some PET

meetings was lacking.

- n **Stigma and harm not considered by Saco School Department** [ME Reg. 9.2 (G)] This is not understood by the hearing officer. What harmful effect can possibly result from such an engaging young child being allowed to attend and being fully included with typically developing peers? This hearing officer is unaware of any legitimate example of "harm."
- n **Trivial consideration of two independent evaluations and one classroom observation/assessment by professionals.** There were no evaluations that meet the requirements of an independent evaluation. An independent evaluation is a response to the need for a truly "independent" look by an "impartial" evaluator. Parent's evaluations were performed at her request by her people. Her evaluators did not review the school's program or have access to the "other side." ME Reg 8.14 lists the qualified evaluators and these are the only persons qualified. There is no violation.
- n **Amendment to PET minutes denied.** S-60 and S-204 invited mother to submit a statement to be attached to the PET minutes. There is no violation.
- n **PET determinations inaccurately reflected.** See above. Mother has every right to give her side and have them attached. She has been invited to do so.
- n **Refusal to authorize augmented language re-evaluation.** Saco did refuse the evaluation but not a consultation. This is an example of being so centered on the need to prevail that both parties became blind to everything except their desire to be right and for the other side to lose. This is a true philosophy of adversarial conflict or the philosophy of war. It takes both sides to listen, to consider and to modify their views and reach agreement. This did not happen. It is an issue for hearing if parent wants to pursue it. It is not a violation. If the issue goes forward to a hearing, school would need to document why the previous evaluation was valid and appropriate to program for the student's needs.

Although the tone of the June 10 PET was unnecessarily adversarial, there have been no procedural violations serious enough to have denied the student a FAPE in the LRE.

VI. DECISION

[1] Saco's 1997-1998 IEP and placement in a kindergarten program is reasonably calculated to provide the student with educational benefit in the least restrictive environment.

[2] the student does not require continued placement at the Waban pre-school program for another year to meet the student's needs.

[3] The parent may not choose specific individual service providers to carry out the services in the student's IEP.

VII. ORDER

Saco is to provide the program and placement within a public school as stated in the 1997-98 IEP.

Saco must not limit the length of PET meetings but must allow for a full discussion of the real issues. If PET meetings become overly repetitive, it needs to be so stated, and then a decision should be made.

Saco shall make sure that parents always receive a notification of each PET.

So ordered,

Jeannie M. Hamrin, Ed.D.
Hearing Officer