

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

May 25, 2000

Case #00.088, Parent v. Westbrook School Department

REPRESENTING THE SCHOOL: Amy Tchao, Esq.
REPRESENTING THE PARENTS: Richard L. O'Meara, Esq.
HEARING OFFICER: Lynne A. Williams, Ph.D., J.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 USC §§1415 et. seq., and accompanying regulations.

The Parent requested this hearing, on March 27, 2000. The case involves Student. He resides with his mother. The Student is eligible for special education services under the category of learning disabled. Until his expulsion in April 1999, student was attending classes at the Westbrook Alternative Education program. The parties conducted a pre-hearing conference call on April 11, 2000, and clarified the issues for hearing. Witness lists and evidentiary documents were subsequently submitted in a timely manner.

A series of hearing dates commenced on May 1, 2000 and continued on May 2, 2000, at the law offices of Drummond Woodsum & MacMahon, Portland, Maine. The parent entered 75 pages of documents into the record; the school district entered 239 pages into the record. Four witnesses testified. The record was left open until May 12, 2000, allowing for submission of written final closing arguments, which were submitted by both parties.

I. Preliminary Statement

This case involves a xx year old, male student who is eligible for special education services under the category of Learning Disabled. He attended the Fred C. Westcott Junior High School in Westbrook, Maine, until November 1998. At that time, he began to attend the Westbrook Alternative Education program, until April 1999, when he was expelled. If he were currently attending school, student would be in the 8th grade. Subsequent to expulsion, student received some tutoring services, but is not currently attending the tutoring sessions.

II. Issues

- **Did the Westbrook School Department violate the Individuals with Disabilities Education Act and/or Maine special education law by suspending, and then expelling, student from school during the 1998-1999 school year, without following procedures mandated under the I.D.E.A., specifically 20 USC §1415(k)(8), due to the Department's failure to treat student as a student with a disability, despite having knowledge of his disability, or failing to identify him as a student with disability in February 1999.**
 - (a) **Did Westbrook act appropriately under IDEA and/or Maine special education law when it determined that student was not eligible for special education services in February 1999?**
 - (b) **At the time of student's expulsion from school in April 1999, did Westbrook have the obligation to treat student as a student with a disability under 20 USC §1415(k)(8) and 34 CFR §300.527(c)?**
- **If the answer to 1(b) is yes, then was the behavior for which student was expelled in April 1999 a manifestation of his disability?**
- **Did the Department fail to provide student with a free appropriate public education during the 1998-1999 and 1999-2000 school years, during the time he was excluded from educational services or provided with limited tutorial services as a result of IDEA procedural violations?**
- **Is student entitled to relief, including an order removing him from expulsion status and returning him immediately to an appropriate program (including a positive behavior intervention plan and all elements required under the IDEA) and placement in the least restrictive environment appropriate to meet his unique educational needs, and/or an award of compensatory education due to violations of his right to a free appropriate education during the 1998-1999 and 1999-2000 school years?**

III. Findings of Fact

1. Student's date of birth is and he is dob and he is xx years old. He is currently under an expulsion order from the Westbrook School Committee, dated April 5, 1999, and is not attending educational tutoring. Student has not received educational services since January 2000, although tutoring services are available to him if he chooses to access them. (Testimony: Mother, D. Peck)
2. Student initially experienced some educational difficulties while in kindergarten and was identified as a student with learning disabilities and in need of special education services in summer 1992, between kindergarten and first grade. His learning deficits were in the areas of math, written language and reading, and his

- June 15, 1992, IEP listed resource services in math, reading and self-help. He also received occupational therapy twice per week. (Exhibit: P-60-63)
3. Student continued to receive these services until the end of second grade, when he was placed on monitoring status. A K-TEA done in March 1995 shows a Math Computation score of 93, a Reading/Decoding score of 86 and a Spelling score of 76. (Exhibit: S235-239, S211-213)
 4. Monitoring status continued until an April 13, 1995 PET meeting, at which time student was demitted from special education. This was the end of student's third grade year. It was determined that he would receive Chapter One reading assistance, beginning the following school year. The minutes from that PET meeting state, "[Student appears] to be working within his ability in all areas except for spelling. Processing skills for information presented orally is below average. [Student] has written language abilities that are below average but not to a significant level. (Exhibit: P54-55)
 5. Student appeared to make some progress during the fourth and fifth grades, school years 1995-1996 and 1996-1997. However, signs of academic difficulties were beginning to emerge, such as standard scores that were in the first percentile on the Total Reading battery of the California Achievement Test, given in June 1997. (Testimony: Mother; Exhibit: P52)
 6. Student entered sixth grade at Fred C. Wescott Junior High School in September 1997. During this school year, student's grades, as well as his behavior, began to deteriorate. His sixth grade report card, final quarter, showed D's and F's, with one B. Mother indicated that the B was in a course for which he received another student's notes. In addition, student was staying late on most days so that he could complete his work, and he was receiving extra assistance from his teacher at this time. Student's behavior also began to worsen, and anger and frustration with school began to be evident. Student received numerous disciplinary referrals and in school suspensions for behavior on the school bus and in the school. This behavior included swearing and other inappropriate language, writing inappropriate song lyrics and drawing inappropriate pictures. (Testimony: Mother; Exhibits: P51, S104-110)
 7. During the beginning of the seventh grade year, student continued engaging in these inappropriate behaviors, resulting in additional in school suspensions. On October 14, 1998, it was noted on a disciplinary referral form that student was "pending alternative ed" and Mother and student agreed to this placement in November 1998. The alternative education placement was located at the local teen center, and was a shortened day placement, two hours less than the regular school day. (Testimony: Mother; Exhibits: S111-113)
 8. On December 10, 1998, student engaged in threatening and intimidating behavior against three other students, and received an out of school suspension until January 4, 1999. (Testimony: Mother; Exhibit: S115)
 9. Student returned to school on January 4, 1999 and had a reentry meeting with the Principal, Mr. Zito. At this meeting, Mr. Zito was heard to ask student if he had ever been to jail. When student responded in the negative, Mr. Zito stated, "maybe that's what we'll do with you." (Testimony: Mother)

10. The next day, January 5, 1999, student was again suspended for copying violent song lyrics onto a piece of paper and for threatening to kill another student. This resulted in a ten-day suspension. In addition, student was referred by the vice principal for a special education assessment, due to his increasingly troubled behavior, which was of concern to staff. (Testimony: Mother; Exhibit: S116, S. 97, S98, S99)
11. Dr. James Moran, Westbrook's Consulting Psychologist, conducted a psychological evaluation of student between January 19, 1999 and January 26, 1999. His assessment included a clinical interview with student, interviews with Mother and Grandmother, records review, interviews with school personnel and various projective, objective and self-report instruments. In his report, Dr. Moran notes that student "has little ability to integrate his emotions in an adaptive fashion and he appears not to have effective coping strategies." While he concludes that student does not appear to be seriously emotionally disturbed, nor dangerous to himself or others, Dr. Moran does list some factors pertaining to student that may increase his potential for acting out. These include escalating inappropriate behaviors, his difficulty in empathizing with others, his impulsivity, his low tolerance for frustration, his resentment of authority figures, his lack of long term goals, and his negative peer group influence". Dr. Moran recommended individual counseling for student. (Testimony: Dr. Moran; Exhibit: S85-90)
12. Catherine Kelso, Westbrook's School Psychological Services Provider, completed a psychoeducational assessment of student on January 13, 1999, administering a WISC and WIAT. Full scale IQ was 95, Verbal IQ was 94 and Performance IQ was 98. Scores on the Verbal subtests ranged from 11 on Information and Similarities down to 3 on Digit Span. Regarding the Digit Span, Ms. Kelso noted, "[h]is responses during the digit span subtest were frequently not even close to the correct response." Likewise, Performance subtests ranged from 14 on Object Assembly down to 7 on Picture Arrangement. In addition, student's Freedom from Distractibility score was 67. Ms. Kelso states, regarding this score, that "[h]is poor performance in this area is suggestive of attentional difficulties, anxiety, or, specific delay in development of auditory memory. (Exhibits: S80-84)
13. On the WIAT, student's Total Composite was 79 (8%). Here too, his scores showed wide scatter, ranging from 114 (82%) on Reading Comprehension and 112 (79%) on Listening Comprehension, down to 78 (7%) on Numerical Operations, 75 (5%) on Spelling, 74 (4%) on Basic Reading, and 64 (1%) on Written Expression. Student's Writing Composite score was 67 (1%). Ms. Kelso does note that student did not work for the full time allowed on the Written Expression subtest and responded very quickly to items on the Basic Reading subtest. She also noted that student stated that he did not know fractions or decimals, and later on that his "his numerical operations subtest was affected by his inability to perform problems involving fractions or decimals. (Exhibit: S80-84)
14. At some time prior to the February 10, 1999 PET meeting, Mother met with Dr. Moran to discuss his assessment. At this meeting, Dr. Moran suggested that she

- might want to investigate the possibility that student might have ADD or ADHD. (Testimony: Mother)
15. A PET meeting was held on February 10, 1999 to consider the Moran and Kelso assessments. The PET minutes note that student's "Freedom from Distractibility scale score was low and that his short-term memory score was below average." However, despite the low scores on the WIAT and the wide scatter among those scores, the minutes state "[o]n the WIAT reading was average to above average. On the written expression he did not complete the task. He had a hurried approach on the achievement test." Neither the minutes, nor Mother's testimony, indicate that there was any consideration or discussion of what the underlying reasons for these deficits might be, much less what the most appropriate way to address these learning issues would be. Ms. Kelso states, "[t]est scores are consistent with testing done 3 years ago." However, the K-TEA done in March 1995 (no WIAT was done at that time), as noted above, indicates a Math Computation score of 93, a Reading/Decoding score of 86 and a Spelling score of 76. Only the Spelling score is within reach of student's February 1999 test scores. When the Mother questioned student's low WIAT scores at this meeting, she was told not to be concerned regarding his test scores. (Testimony: Mother; Exhibits: S76-77, S211)
 16. The February 10, 1999, PET meeting continued with a consideration of Dr. Moran's assessment. Dr. Moran stated that he had found no signs of depression, anxiety, or thought disorders in student. He did note that student needed counseling and did seem lonely and had difficulty relating to people. (Testimony: Dr. Moran; Exhibit; S76-77)
 17. The PET concluded by stating that "this is not reflect (sic) of a student with a learning disability or emotional disturbance," consequently finding student ineligible for special education services. The PET did not complete a Learning Disability Evaluation report at this time. Ms. Peck indicated that the reason this report was not completed was that the team was not really considering the possibility of student being eligible for special education as learning disabled, but rather as Behaviorally Impaired. (Testimony: Mother, D. Peck. Dr. Moran; Exhibit: S77)
 18. Following this PET meeting, student returned to the Alternative Education setting with a Behavior Contract that had been prepared on February 5, 1999. This contract included the following: "No swearing, no use of inappropriate words, no use of inappropriate sexual references, quotations from published songs which contain offensive, threatening or otherwise inappropriate language may not be written or spoken in school, no written, verbal, or implied threatening of any person." Consequences for engaging in these behaviors included warnings, being sent home for the remainder of a day and an in school suspension the following day, out of school suspensions and referral to the principal for possible further disciplinary action. No consideration was ever given to developing a plan for positive behavioral interventions or a Section 504 plan. (Testimony: Mother; Exhibit: S118)

19. According to a memo written by Mr. Zito, dated March 25, 1999, after signing the contract on February 22, 1999, student received in school suspensions on eight days, and was sent home on two of those days. In school suspensions consisted of sitting in a corner of the room and writing down the rules of the school. (Testimony: Mother; Exhibit: S122, P39-41)
20. In March 1999, Mother became aware that the School Department would be seeking to expel student due to multiple violations of his behavior contract. On March 29, 1999, Mother faxed a letter to the Principal, Mr. Zito, inquiring about these violations, as well as stating "[t]he school system has been aware of his learning disabilities, speech problems, abilities to follow directions, etc. for years...." This same letter was typed and mailed on March 30, 1999. On April 5, 1999, the Westbrook School Committee voted to expel student for thirty days, beginning April 5, 1999 and ending May 21, 1999. A letter to this effect was sent to Mother on April 6, 1999. (Exhibits: P36, P37, S75)
21. On March 30, 1999, Mother made a mediation request to the Department of Education. Mediation was held on May 17, 1999 and an agreement was reached. This agreement stated that Mother would meet with the Superintendent and the Middle School principal, with the purpose of arranging for student's reentry into the Middle School. The intent was that the Superintendent would then present the plan to the School Committee on May 26, 1999, for their consideration and final action. The agreement also stated that the school would convene a PET meeting within 15 days to consider the issue of student's eligibility as a student with disabilities and possible programming needs. Ms. Peck and Mother signed this agreement. (Exhibit: P32, P23)
22. The PET meeting was held on May 27, 1999, and the PET agreed to do more testing, to consider a learning disability and to then have another PET prior to the August 5, 1999 School Committee Meeting. Mother also met with the Superintendent, Stan Sawyer, and the principal, Mr. Hall, who stated that they would recommend reentry at the August School Committee meeting. (Testimony: Mother; Exhibits: S61, 62)
23. On May 28, 1999, the School Committee voted not to readmit student, but to provide him with two hours of tutoring per day. Student had received no services since his April 1999 expulsion. As a result of this School Committee meeting, he received two weeks of tutoring in June 1999, and some tutoring in August 1999, in preparation for his September 1999 return to school. (Testimony: Mother; Exhibit: S60)
24. Between June 11 and June 14, 1999, Catherine Kelso administered a Woodcock Johnson battery (WJR), as well as the Wide Range Assessment of Memory and Learning (WRAML), to student. On the WJR, student received scores in the 4th percentile in dictation, writing samples and broad written language. On the WRAML, his scores ranged from 13 in design memory, down to 3 in verbal learning. Ms. Kelso notes in her report, "[t]here is a significant weakness in processing and...recalling verbal information compared to visual information....This suggested that [student] performs poorly on tasks requiring more spontaneous organization demands combined with short-term memory demands". She further notes in her Recommendations that student needs to learn

- organization skills, particularly aids to organize his input of new information. (Exhibit: S53-57)
25. Student's 7th grade report card, dated June 15, 1999, showed D's and F's at the beginning of the school year, all F's in the last quarter. (Exhibit: P21)
 26. Gayle Robinson and Dr. Stephen Rioux, at the Pediatric Center, Maine Neurology, in Scarborough, evaluated student on June 15, 1999. In a June 15, 1999 letter to Mother, Dr. Britton stated that student's "neurological examination is grossly within normal limits. Information provided by the mom and past school behavior records are certainly indicative of a diagnosis of attention deficit/hyperactivity disorder". (Exhibit: S58-59)
 27. During the summer of 1999, Westbrook a new Middle School principal, Susan Lolley. Unaware of this change, Mother wrote an August 19, 1999, letter jointly addressed to Mr. Sawyer and Mr. Hall, inquiring about student's September 1999 reentry to the Junior High School. On September 7, 1999, mother met with Mr. Sawyer, Ms. Lolley and Ms. Peck, and a reentry plan was developed. This plan included 60 hours of community service, to be arranged by student and approved by the reentry coordinator; adherence to a behavior contract to be developed by the SAT; preparation of an essay regarding his behaviors, which must show remorse for those behaviors. Mother was informed that student would not be readmitted until he completed all parts of the plan, met with the reentry coordinator, met with the SAT, and made a presentation to the School Committee. However, the final decision would remain with the School Committee. (Testimony: Mother; Exhibits: P19, S44-45)
 28. A PET meeting was held on September 9, 1999, in order to consider the June Kelso and Moran evaluations, and the Maine Neurology report. The PET found that student qualifies as a student with a learning disability in the area of short-term memory, which is impacting his writing and math skills. They determined that due to student's expulsion status, student would receive two hours of tutoring per day to address these needs. At this meeting the team did complete the Learning Disability Evaluation Report. The IEP included two goals, one in grammar, writing, and spelling skills, and one in assignment completion. Math needs were not addressed. Mother signed this IEP and consented to placement. (Exhibit: S34-43)
 29. Student attended tutoring sessions fairly regularly and all seemed to go well until November 1999. At this time, student exhibited frequent absences and Mother had a difficult time getting him to attend. He also began showing depressive behavior at home around this period of time. In January 2000, student stopped attending tutoring altogether. (Testimony: Mother; Exhibits: S29-32A)
 30. Dr. C.D.M. Clementson met with and evaluated student in early December 1999. In a December 12, 1999 letter to Stan Sawyer, he noted that student "is quite depressed and very obviously is suffering from attention deficit hyperactivity disorder". He went on to opine that student's [WISC] subtest scores of 5 in arithmetic, 3 in digit span, and 8 in coding are "extremely poor and as any physician knows, are indicative of attention deficit disorder hyperactivity disorder and require that this be looked into." (Exhibit: S19)

31. In a January 31, 2000, letter to Mother, Mr. Sawyer states, "I...wish to refer [student] to the School Committee for them to re-evaluate his situation for reentry into school. As we have stated from the beginning, once [he] completes the reentry plan I will follow through on our part with the School Committee". (Exhibit: S8-9)
32. On February 1, 2000, Mother filed with the Due Process office, and requested an expedited hearing. A prehearing conference was held, followed by a settlement agreement between the parties, dated March 2, 2000. In summary, this agreement stated that a PET meeting would be held on March 6, 2000, to "order evaluations and begin the process of a functional behavioral assessment...". Based upon the results of these assessments, the PET would develop a new IEP for student with, "as warranted, a behavioral intervention plan consisting of positive behavioral supports and interventions." In addition, the agreement states that "[f]ollowing the second PET meeting, the School Committee shall convene a meeting in executive session to consider [student's] readmission to school", said meeting to be on March 22, 2000. The agreement further states that student will not be required to sign a behavioral contract or meet any other reentry plan requirements as a condition of being considered for readmission. Lastly, student's IEP will be implemented at Westcott Junior High School, not in the alternative education program. Mother agreed to withdraw her due process hearing request when these conditions were met. (Exhibit: S227-229)
33. The March 6, 2000 PET was held and student met with Dr. Moran on the following day. In his March 7, 2000, report, Dr. Moran states, regarding the functional behavioral assessment, that "we identified two target behaviors that have impacted [student's] ability to access his education", the first being swearing and using inappropriate sexual references, the second, non-completion of classroom and homework assignments". The goals, as Dr. Moran states, are that "[student] will engage in appropriate behaviors and will not engage in any of the other inappropriate behaviors", and that he will "complete his homework and classroom assignments on time...[Student] will have access to resource services to assist him in organizing his work, and will also have study skills intervention and assistance in alternative ways for writing out his assignments." Dr. Moran also stated "it is my view that his learning disability did not meet the conditions outlined in the Manifestation Determination. That is to say, it is my understanding that his behavior was not caused by his learning disability. Rather, his behavior was a result of anger at his treatment by peers at school in which he claims to have been harassed for a period of time. His anger was further fueled by what he viewed as an invalidating response by the Principal, who according to [student] refused to entertain the thought that the other students might have been harassing him. (Testimony: Dr. Moran; Exhibit: S14-15A)
34. A PET meeting was held on March 15, 2000, to address the Moran report. The PET concurred with Dr. Moran's conclusions and developed a Draft IEP, to be implemented upon student's return to school. This IEP stated that student would receive 400 minutes per week of Direct Instructional Services in the Resource Room and 5 weeks of Extended School Year services. The goals and objectives (two) were essentially the same as those in the September 1999 IEP. No mention

- was made of a Behavioral Plan or positive behavioral supports, as stated in the March 2, 2000 Settlement Agreement, except to state that student had no behavioral needs “related to disability. Regular disciplinary procedures apply. (S7-15A)
35. The Westbrook School Committee voted on March 22, 2000, not to readmit student to Westcott Junior High.
 36. Prior to the hearing dates, Mother requested that DebraLee Hovey, a special education consultant, conduct a review of student’s records and proposed IEP. Ms. Hovey opined, in her testimony, that student’s IEP needed to address student’s areas of deficit in sequential/organizational skills, critical thinking, spelling, work completion, problem solving, coping skills, as well as the social/emotional issues that surround his behavior. (Testimony: Ms. Hovey)

IV. Discussion and Conclusions

- **Did the Westbrook School Department violate the Individuals with Disabilities Education Act and/or Maine special education law by suspending and then expelling student from school during the 1998-1999 school year, without following procedures mandated under the I.D.E.A., specifically 20 USC §1415(k)(8), due to the Department’s failure to treat student as a student with a disability, despite having knowledge of his disability, or failing to identify him as a student with disability in February 1999.**
 - (a) **Did Westbrook act appropriately under IDEA and/or Maine special education law when it determined that student was not eligible for special education services in February 1999.**
 - (b) **At the time of student’s expulsion from school in April 1999, did Westbrook have the obligation to treat student as a student with a disability under 20 USC §1415(k)(8) and 34 CFR §300.527(c)?**

In January 1999, student was referred for a special education assessment, following increasingly serious misbehaviors at school. He had previously been identified as learning disabled and received services during first and second grades. He was on monitoring status during third grade, and was found no longer eligible at the end of third grade.

Dr. James Moran and Ms. Catherine Kelso did testing in January and February 1999, and the results were presented at a PET meeting on February 10, 1999. The conclusion of the PET at that meeting was that student was not eligible for special education as Behaviorally Impaired.

However, documentary and testimonial evidence indicates that there was little discussion of student's possible learning disabilities at that meeting. Likewise, even though Dr. Moran had previously suggested to Mother that she investigate a possible ADD or ADHD diagnosis for student, there was no discussion at the PET meeting of this issue. In fact, even the discussion of eligibility under the category of "Behavioral Impairment" did not appear to warrant a full and complete discussion. Rather, Dr. Moran stated that student showed no signs of danger to himself or others, nor was he seriously emotionally disturbed, the PET accepted these statements with little discussion and found student ineligible as Behaviorally Impaired.

Yet, there was abundant evidence available to the PET to indicate that student did have a learning disability and could have been eligible under that designation. At the time of this testing, Maine special education law stated:

A student with a learning disability exhibits a disorder in one or more of the basic psychological processes (such as auditory, visual, kinesthetic or other psychological process) involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations and the disorder adversely affects the student's educational performance.

MSER §3.10 (1995)

Student's scores on the WISC, performed by Ms. Kelso, showed extensive scatter between subtest scores, as well as an extremely low score in the Freedom from Distractibility scale. This pattern is traditionally indicative of weaknesses in one or more processing areas, such as those listed above. Further, Ms. Kelso herself states in her report, "His poor performance in this area is suggestive of attentional difficulties, anxiety, or, specific delay in development of auditory memory."

The School Department argues that these scores were not clearly indicative of a learning disability, due to student's lack of engagement with the testing process, and because of the 1.5 standard deviation requirement, which was in the regulations at that time. However, even the special education regulations in operation at the time of this assessment stated:

To be eligible for special education services the student shall demonstrate a severe discrepancy of *approximately* 1.5 standard deviations between the student's achievement and ability as determined by individualized assessment...in one or more of the following areas: Oral expression; Listening comprehension; Written expression; Basic reading skill; Reading comprehension; Mathematical calculation; or Mathematical reasoning.

The severe discrepancy standard of approximately 1.5 standard deviations shall be used *only as a guideline* to assist the Pupil Evaluation Team in identifying a learning disability. It shall be considered in conjunction with other relevant

criteria including, but not limited to, classroom observations and evaluations.

[Italics added]

MSER §3.10 (1995)

The operative words in the above section are *approximately* and *only as a guideline*. The formulation of 1.5 standard deviations is an *approximation*, not a fixed number.

Likewise, this standard was to be used as a guideline, in conjunction with other relevant criteria, including a classroom observation. However, no classroom observation of student was ever performed as part of this assessment. Likewise, no Learning Disabilities Evaluation form was completed, nor were the items on this form discussed at the February 10, 1999 PET meeting. (The [PET] shall require a written evaluation report on each assessment of a student identified or referred as possibly learning disabled.

MSER §8.18 (1995)

The School Department failed to consider all of the relevant criteria at the February 10, 1999 PET meeting. They ignored the pattern of student's WISC subtest scores, they failed to conduct a classroom observation of student, they gave no consideration to the possibility of student having a learning disability, by failing to consider the WIAT scores in the context of MSER §3.10 (1995), even though they knew that student had previously been identified with learning disabilities and was currently having severe problems with academic work, indicated by his failing grades.¹ In light of this evidence, I find that student should have been identified as a student with learning disabilities at the February 10, 1999 PET meeting.²

Since student should have been identified as a student with a disability in February 1999, and since there is no indication that anything changed in student's profile between February and April 1999, it follows that student should have been treated as a student with a disability at the time of his expulsion from school in April 1999.

Following a disciplinary change in placement such as a suspension in excess of ten days, a school is required to convene a PET to determine what, if any, relationship exists between the student's conduct and his disability. *See* §1415(k)(4). This manifestation determination was not completed in a timely manner. Although Dr. Moran did state in his March 7, 2000 report that student's behavior was not a manifestation of his disability, this finding was almost one year too late, as was the evidence on this topic that was offered at the hearing. I am unwilling to engage in ex post facto speculation of this nature.

¹ The School Department argues that even if the decision to find student not eligible for special education was the "wrong" decision, it was made in good faith and therefore should have no consequences. I reject the notion that the PET determination was in good faith, considering that the PET **purposely** failed to address the possibility of learning disabilities or other health impaired categories, and focused only on a very narrow question of risk and dangerousness.

² In view of this holding, there is no need to reach the question of whether student should have been identified as a student with a Behavioral Impairment or tested for and/or identified with ADD or ADHD at the February 1999 PET.

In addition, the School Department failed to conduct a Functional Behavioral Assessment (FBA) and develop a Behavioral Intervention Plan (BIP), as required by §1415(k)(1)(B). Following a disciplinary suspension, a school is required to conduct an FBA and implement a BIP to address the behavior that resulted in the suspension. Since we all recognize that the School Department was treating student as a student *without* a disability, I will not speculate on what they would have done if student had been appropriately identified, only to note that I hope that the continuing pattern of student's suspensions would have been responded to in a much more appropriate, and legal, manner.³

The Department argues that it acted pursuant to 20-A MRSA §1001(9) when it expelled student and that a special education hearing officer does not have the authority to overturn such a suspension. However, if the Department violated federal law, ie. the Individuals with Disabilities Education Act, the hearing officer not only has the authority, but also the responsibility, to annul that suspension. One cannot utilize a legitimate state law to violate a superior Federal law.⁴

- **Did the Department fail to provide student with a free appropriate public education during the 1998-1999 and 1999-2000 school years during the time he was excluded from educational services or provided with limited tutorial services as a result of IDEA violations?**

This student has essentially been without educational services for sixteen months and it is time to return him to an appropriate educational placement. Since I have now held that student should have been identified as a student with a disability and in need of special education services, it is not difficult to show that the minimal services provided to student for the last sixteen months have been a denial of a free appropriate public education. At the beginning of this period, student was placed in the Alternative Ed setting. During this time he received all D's and F's. No special services were provided to him. Despite repeated behavioral infractions, no behavioral plan was developed for student. Rather, an ineffective Behavioral Contract was created, a document that enumerated rules and punishments rather than assisting student in developing positive behavioral replacement strategies.

³At the hearing, and in his March 2000 report, Dr. Moran repeatedly stated that it was his opinion that student responded with a death threat against another student following months of taunts and harassment by that student, as well as by others. I find this very troubling, and hope that the School Department will develop more effectual, and positive, ways of dealing with student-on-student harassment, when it begins, not when it has continued to point of expulsion of one or both students.

⁴ Although this question has not been directly addressed in Maine, several hearing officers in other jurisdictions have annulled expulsions that were ordered in violation of IDEA. *See, Richland Sch. Dist.*, 32 IDELR 55 (WI SEA March 3, 2000); *Hacienda La Puente Unified Sch. Dist.*, 30 IDELR 105 (CA SEA March 5, 1999); *Northeast Indep. Sch. Dist.*, 32 IDELR 51 (TX SEA April 23, 1999). *See also Colvin v. Lowndes County, Miss. Sch. Dist.*, 32 IDELR 32 (N.D. Miss. 2000) (student was not receiving special education at the time of expulsion and preliminary injunction to reinstate was granted, due to violation of IDEA).

Subsequent to April 1999, student was on expulsion status, and received minimal and sporadic tutoring services. Granted, after some months under the expulsion order, student began refusing to attend tutoring. However, it is questionable whether the tutoring, as configured by the School Department, would have even met the minimal standards expressed in the IDEA, for *expelled students*.⁵

A free appropriate public education is available to all children with disabilities...including children with disabilities who have been suspended or expelled from school.
§1412(a)(1)(A).

This education must “enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child’s IEP.
34 CFR §300.121(d).

When student was finally identified as a student eligible for special education services in September 1999, an IEP was created. Since student was under an expulsion order, albeit an illegal one, it is not surprising that the IEP created at the September 9, 1999 PET meeting did not address what services and supplementary aids student might need while in the school environment. Nor did it address his behavioral needs, which in reality were the reasons he was first re-referred for special education in January 1999. However, given that student had been improperly expelled, it is clear that this IEP is inappropriate in terms of placement, and therefore I will refrain from enumerating its weaknesses regarding goals, objectives and services. Suffice it to say, this IEP was a denial of FAPE on every level, from placement to amount of services.

On March 15, 2000, a PET meeting was held, ostensibly in order to complete a much overdue FBA, and an even more overdue manifestation determination. In view of the fact that the School Department failed to properly identify student as a student with disabilities, and consequently violated the IDEA by expelling him, I will just state here that it was impossible for the School Department to somehow rectify the procedural violations by belatedly conducting these activities.

The March 15, 2000 PET also developed a Draft IEP for student, which would take effect upon his reentry to school. This Draft IEP fails to address many of student’s needs, nor does it consider his behavioral needs, except to state that student has no behavioral needs related to his disability and that regular disciplinary procedures apply. This statement is a clear violation of IDEA, since the PET could not possibly know in advance whether any future behavioral incident engaged in by student is, or is not, a manifestation of his disability. To state that student’s behavior will never be a manifestation of his disability and that regular disciplinary procedures always apply is tantamount to refusing to ever conduct a manifestation determination of student’s behavior and is an impermissible violation of the IDEA. (“If an action is contemplated involving a removal that constitutes a change in placement under §14.1 for a student with a disability who has engaged

⁵ I must note here, of course, that student was illegally expelled at the time.

in...behavior that violated any rule or code of conduct of the S.A.U. that applies to all students...a review must be conducted of the relationship between the student's disability and the behavior subject to the disciplinary action". MSER §14.6(A) (1999).) This refers to any student with a disability, not just one with a behavioral impairment.

Likewise, this IEP fails to consider the full range of student's academic needs. As Ms. Kelso's June 1999 WJR and WRAML testing indicates, student has more than just written language weaknesses. She noted that student experiences organizational problems, difficulties with short-term memory and with remembering verbal information. She makes a number of recommendations regarding student's need to learn various organizational skills, as well as suggesting that learning and utilizing "verbal mediators" such as mnemonics, would assist student academically. However, this IEP lists only two goals, one for grammar, writing and spelling and the other for work completion, and fails to address Ms. Kelso's recommendations.

Nor does this IEP address the fact that student has been out of school for thirteen months. The transition back to school would be difficult for any student who had been out for so long, more so for a young man who has developed significant behavioral and social-emotional issues. Yet this IEP makes no mention of a plan to transition student back to school in a manner that would most likely be successful.

Finally, as noted above, the School Department is on the wrong track with its out of hand denial of student's behavioral needs. As the Maine Special Education Regulations state, when developing or revising a student's IEP, the PET shall "in the case of a student whose behavior impedes his...learning or that of others," consider "if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." MSER §10.3(D) (1999). Given student's history and current social/emotional issues, it is appropriate, and necessary, for the PET to heed this regulation.

It is true that this IEP is just a draft, as Ms. Peck indicated at the hearing. However, it must be rewritten as soon as possible, to take into account the broad range of student's academic, social/emotional and behavioral needs. As Ms. Hovey testified, there are many areas, such as organizational skills, critical thinking and coping skills, which remain unaddressed in the Draft IEP. The IEP must specify not only goals and objectives in these areas, but also the aids, supports and services that are going to assist student to achieve those goals. In addition, it must include a transition plan designed to successfully transition student back to whatever placement he will be attending in September. And lastly, as I have repeatedly stressed, the PET must develop a behavioral intervention plan, based on informed professional input, which will provide the positive behavioral supports and incentives that student will need to be successful in the school setting.

- In conclusion, it is my decision that the Westbrook School Department has failed to deliver a free appropriate public education to student for the 1998-1999 and 1999-2000 school years. **Is student entitled to relief, including an order removing him from expulsion status and returning him immediately to an appropriate**

program (including a positive behavior intervention plan and all elements required under the IDEA) and placement in the least restrictive environment appropriate to meet his unique educational needs, and/or an award of compensatory education due to violations of his right to a free appropriate education during the 1998-1999 and 1999-2000 school years?

The Westbrook School Department failed to follow appropriate legal procedures, under §1415(k)(8) and 34 CFR §330.527 (c) when it expelled student in April 1999. Therefore, that expulsion is annulled, effective immediately.

Due to an extended, and continuing, failure to provide FAPE to student, he is entitled to an award of compensatory education under *Burlington*. (*Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359 (1985)) The Mother, however, did not identify the specific type and duration of the compensatory education that she is requesting. Therefore, the parties must convene a PET to specify in detail those educational services that will compensate student for the period of missed services and inappropriate placement, February 1999 until the present time.

The compensatory education plan shall be part of student's IEP and must indicate the ways in which the services will assist student to accomplish his goals and objectives. Services should occur during summer 2000, and may be either direct services by district personnel or funded services by non-district personnel. The PET must also recognize that it is likely that more than a year of missed services cannot be remedied in one summer, and develop the plan accordingly, by continuing the compensatory education services past this summer.

Mother also requests an interim, small, special purpose school placement for student. Although it is clear that student needs extensive special services and supports, as well as a transition plan designed to reintroduce him to school, no specific evidence was presented at hearing which would enable me to make a specific placement order. I am not rejecting the possibility that student may need a private, special purpose school placement, nor am I suggesting that the Westbrook School Department is unable to develop and implement an appropriate IEP. Rather, I have insufficient evidence to reach either conclusion. Therefore, the PET must develop an IEP for student, and then, after considering the full continuum of possible placements, identify the most appropriate placement in which student can meet his goals and objectives.

V. Order

1. The order of expulsion against student is immediately annulled and student shall immediately be readmitted to school with no further reentry conditions.
2. The PET shall meet on, or before, June 5, 2000. The team shall develop a new IEP for student, considering his needs as outlined above and in the various reports available to them, including the ADHD diagnosis and current possible depression. If additional evaluations are deemed necessary, the PET shall order them. This

IEP shall include a behavioral intervention plan, incorporating positive behavioral interventions and supports.

3. Mother shall decide whether she wishes for student to attend school for the very brief period of time remaining in this school year. If student does not return this year, he is to immediately begin receiving services in excess of the two hours per day previously offered. These services shall allow him access to the general curriculum as well as addressing his behavioral and social/emotional needs.
4. After completing the IEP, the PET shall consider the full continuum of placements and decide on an appropriate placement for student for September 2000.
5. The PET shall develop a transition plan, in order to assist student in his reentry to school.
6. The PET shall determine the amount, frequency and duration of compensatory education to be provided to student. The services shall begin immediately, continue throughout summer 2000, and into the 2000-2001 school year. They shall be of a frequency and intensity that would most effectively compensate student for 16 months of missed educational services.
7. If a second PET meeting is required in order to complete any of the above, that meeting shall be held on or before June 15, 2000.
8. Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator.

IV.
V.
VI.

Lynne A. Williams, Ph.D., J.D.
Hearing Officer

Date

PARENT EXHIBITS

- P01 Summary by Parent (2/00)
- P03 Memo from I. Cyr, School Resource Officer (1/25/00)
- P04 Fax from Parent to E. Heitz, guidance counselor (1/6/00)
- P11 Letter from S. Lolley to Parent (12/16/99)

- P12 Letter from D. Peck to Parent , with revised evaluation summary by Catherine Kelso (9/14/99)
- P18 Parent's "Changes/concerns for evaluations summary dated 6/15/99 by Catherine Kelso"
- P19 Letter from Parent to Superintendent Hall or Sawyer (8/19/99)
- P21 Eighth Grade Report Card (6/15/99)
- P22 Minutes of School Board Meeting (5/26/99)
- P23 Mediation Agreement (5/17/99)
- P24 Letter from Parent to Principal Zito (5/5/99)
- P25 Second fax of 3/30/99 request for mediation (4/27/99)
- P26 Minutes of School Board Meeting (4/5/99)
- P27 Handwritten Notes for School Board Meeting (4/5/99)
- P32 Fax from Parent to M. Opuda requesting mediation (3/30/99)
- P36 Typed Letter from Parent to Principal Zito (3/30/99)
- P37 Handwritten Fax from Parent to Principal Zito (3/29/99)
- P39 Student Handwritten Behavioral Expectations (undated)
- P42 Attendance Record for Student (9/2/98-4/1/99)
- P44 Summary of Student Behavior (3/25/99)
- P45 Signed Behavior Contract for Student(2/22/99)
- P46 Psychoeducational Report by Catherine Kelso (Updated 2/10/99)
- P47 Parental Notice (1/7/99)
- P49 Consent to Conduct Individual Evaluations (1/7/99)
- P51 Seventh Grade Report Card (6/18/98)
- P52 California Achievement Test Results (6/97)

- P53 MEA Results (2/96)
- P54 PET Meeting Minutes (4/13/95)
- P56 Learning Disability Evaluation Report (6/15/92)
- P59 Consent for Placement (6/15/92)
- P60 PET Meeting Minutes (6/15/92)
- P64 Letter from S. Hollinger to Parent(5/7/99)
- P66 Dr. Mullarky's Psychiatric Report (10/20/99)
- P70 Dr. Clemetson's Psychiatric Report (12/2/99)

PARENT'S WITNESS LIST

Mother

DebraLee Hovey, Special Education Consultant

SCHOOL DEPARTMENT'S EXHIBITS

- S1-3A Letter from Superintendent Sawyer to Parent (including Findings and Conclusions) (March 27,2000)
- S4A Letter from Superintendent Sawyer to Parent(March 16, 2000)
- S5-6A Letter from Superintendent Sawyer to Parent (including Readmission Hearing Guidelines) (March 10, 2000)
- S7-13A PET Meeting Minutes, including Draft IEP (March 15, 2000)
- S14-15A Letter from Dr. Moran to Ms. Peck (March 7, 2000)
- S16-17A PET Meeting Minutes (March 6, 2000)
- S18-19A Consent to Conduct Individual Evaluation(s) (March 6, 2000)
- S20A PET Notification (March 3, 2000)
- S1-5 Request for Due Process Form submitted by Parent (February 1, 2000)
- S6-7 Memo to file by Deborah Peck (February 3, 2000)

- S8-11 Letter from Superintendent Sawyer to Parent (including Re-Entry Plan) (January 31, 2000)
- S11A Memo from Ms. Lolley to Superintendent Sawyer and Ms. Peck (January 24, 2000)
- S12 Letter from Parent to Superintendent Sawyer and Principal Lolley (January 20, 2000)
- S13-14 Letter from Superintendent Sawyer to Dr. Clemetson (January 19, 2000)
- S15-17 Letter from Parent to Ms. Lolley (January 14, 2000)
- S18 Memo from Ms. Peck to Superintendent Sawyer (January 11, 2000)
- S19 Letter from Dr. Clemetson to Superintendent Sawyer (December 12, 1999)
- S20-28 Memos from Ms. Peck to Dr. Heitz regarding community service hours (November 1, 1999)
- S29-32A Tutoring Progress Report by Michael Plaisted from September through December 1999
- S33 Memo from Ms. Peck to Mr. Plaisted (September 15, 1999)
- S34-37 IEP (September 9, 1999)
- S38-39 PET Meeting Minutes (September 9, 1999)
- S40-42 Learning Disability Evaluation Report (September 9, 1999)
- S43 Consent for Placement Form (September 9, 1999)
- S44 Minutes from meeting with Superintendent (September 7, 1999)
- S45 Re-entry Plan for Student (September 7, 1999)
- S46-51 Unsigned Behavioral Contract (including applicable Student Handbook Regulations) (undated)
- S51A-51B Student's Story of Why He Got Kicked Out of School and His Goals (undated)
- S51C Notes of Inger M. Cyr's Meeting with Student (January 25, 2000)

- S52 Letter from Principal Lolley to Parent (September 1, 1999)
- S53-57 Evaluation Summary prepared by Catherine Kelso (June 11, 14, 1999)
- S58-59 Letter from Gayle Robinson, of Maine Neurology to Dr. Russell Britton (June 15, 1999)
- S59A Memorandum from Mr. Zito to Mr. Hall (June 10, 1999)
- S59B Letter from Ms. White, LSW, Case Manager to Mr. Zito (June 3, 1999)
- S60 Letter from Superintendent Hall to Parent (May 28, 1999)
- S61-63 PET Meeting Minutes (may 27, 1999)
- S64-65 Orders for Protection against Student (including writing samples) (May 14, 1999)
- S66-68 Writing Samples by Student (1999)
- S69-72 Letter from Commissioner of Education, Duke Albanese to Carol Lenna (including Mediation Request) (May 4, 1999)
- S73-74 Letter from Parent to Michael Opuda (April 14, 1999)
- S75 Letter from Superintendent Hall to Parent (April 6, 1999)
- S76-78 PET Meeting Minutes (February 10, 1999)
- S79 Behavioral Contract for Student (February 5, 1999)
- S80-84 Psycho-educational Report by Catherine Kelso (January 13, 1999)
- S85-93 Psychological Evaluation by James Moran (January 19-26, 1999)
- S94-95 Achievement Test Results by Mary Libby (January 8, 1999)
- S96 Letter from Randall Zito to Parent (January 11, 1999)
- S97 Case Summary submitted by Beth Carmody (January 6, 1999)
- S98 Letter from Mr. Zito to Parent (January 5, 1999)
- S99 Special Ed. Referral Form (January 4, 1999)

- S100-103 Handwritten Summary of Student' disciplinary problems (undated)
- S104-130 Disciplinary Records prior to Fall 1999
- S131-207 Student's Tutoring Noted (1999-2000)
- S208-210 Learning Disability Evaluation Report (April 13, 1995)
- S211-213 Psychoeducational Report by Cathy Kelso (March 23, 1995)
- S215-217 Evaluation Summary by J. Palubinskas (March 19, 1995)
- S218-221 Miscellaneous Resource Room – Monitor Check Reports (1994-1995)
- S222-226 Grades (1994-1995)
- S227-229 Settlement Agreement (March 2, 2000)
- S230-234 PET Meeting Minutes (April 13, 1995)
- S235-236 PET Meeting Minutes (March 31, 1994)
- S238-239 IEP (March 31, 1994)

SCHOOL DEPARTMENT'S WITNESSES

Deborah Peck, Special Education Director

Dr. James Moran, School Psychologist