

**STATE OF MAINE**  
**SPECIAL EDUCATION DUE PROCESS HEARING**  
June 26, 2000

**Case No. 00.144 Parent v. South Portland**

|                                  |                     |
|----------------------------------|---------------------|
| <b>REPRESENTING THE PARENTS:</b> | Parent              |
| <b>REPRESENTING THE SCHOOL:</b>  | Eric Herlan, Esq.   |
| <b>HEARING OFFICER:</b>          | Toni H. Rees, Ph.D. |

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

On May 9, 2000, the Maine Department of Education received a request for a Due Process Hearing from Parents. The case involves Student. Student graduated with a regular education diploma in June 2000. He had previously been identified as eligible for special education under the category of Speech and Language Impairment.

The parties met in a pre-hearing conference on May 24, 2000, to exchange documents and lists of witnesses, and to clarify the issues for hearing. Additional evidence was received and hearing issues clarified until June 7, 2000.

The hearing began on June 15, 2000, and continued on June 16, at the Department of Human Services in Portland, Maine. The School entered 193 pages of documents into the record; the Parents entered 223 pages into the record. In addition to this documentation, the Hearing Officer asked the School to provide information about the Student's class ranking. After the final day of hearing, the School's attorney sent to Hearing Officer and to the Parents a copy of the Student's high school transcript dated June 19, 2000, two letters dated June 19 and June 21, 2000, and containing graduation data, and a Post Hearing Summary. These items are appended to the School's documents. The Parents submitted a written closing statement consisting of a letter dated June 23, 2000 and 12 additional pages. These items are appended to the Parent's documents. Eleven witnesses testified at the hearing.

For the purposes of the written hearing decision, Parents will be referred to as the Parents. Student will be referred to as the Student. South Portland School Department may be referred to as the School.

## I. Preliminary Statement

This case involves a xx year-old male student who had received special education services under the category of Speech Language Impairment. He graduated from South Portland High School with a regular education diploma in June 2000.

The Parents requested this hearing and their son, who was an adult, documented his agreement that the hearing should proceed. The Parents contended that the Student was not provided with an appropriate education and that the School failed to follow special education procedures. The School terminated the Student from special education when he was in seventh grade. The Parents contended that the School improperly de-identified their son and failed to identify him for necessary special education services during his eighth through eleventh grade years (1995-1999). The Parents believed that the Student may find college work difficult and need private tutoring because the School had not provided an adequate education. The Parents requested compensatory educational services or other relief, including reimbursement for attorney fees, for the alleged violations.

## II. Issues to be decided by the Hearing

1. Did the South Portland School Department improperly terminate the Student from special education services in violation of Maine Special Education Regulations, Chapter 101, including Sections 9.4, 10.4, and 12.3 ?
2. Did the South Portland School Department fail to identify the Student for special education and fail to provide a Free and Appropriate Public Education (FAPE) during school years 1995-96 (8<sup>th</sup> grade), 1996-97 (9<sup>th</sup> grade), 1997-98 (10<sup>th</sup> grade), and 1998-99 (11<sup>th</sup> grade), in violation of Maine Special Education Regulations, Chapter 101, including Sections 1.3 and 9.1?
3. In the September 1999 IEP, did the South Portland School Department fail to develop and implement a transition plan in violation of Maine Special Education Regulations, Chapter 101, Sections 2.31, 5.13 and 10.5?
4. Did the South Portland School Department fail to provide the Parents with PET minutes within 21 days of a PET meeting in September 1999, in violation of Maine Special Education Regulations, Chapter 101, Section 8.9?
5. Did the South Portland School Department fail to provide written evaluation reports of a Functional Behavioral Assessment and Interest/Aptitude testing no later than 45 days after the September 1999 PET decision to evaluate and prior to a PET meeting scheduled to review the evaluation in violation of Maine Special Education Regulations, Chapter 101, Section 9.13, 9.14, 9.17, 10.3D, and 10.5?
6. Did the South Portland School Department fail to provide the Parents with access to records in violation of Maine Special Education Regulations, Chapter 101, Section 15.3?

7. Did the South Portland School Department fail to have a regular education teacher at PET meetings on 9/2/99 and 9/16/99 in violation of Maine Special Education Regulations, Chapter 101, Section 8.6B and 8.7?
8. Is the Student entitled to compensatory educational services or other relief as a result of any of the above violations?

### III. Findings of Fact

1. The Student's date of birth is dob and at the time of the hearing he was xx years old [Exhibit: S34].
2. Test scores showed that the Student has overall average cognitive functioning, but has a speech/language disability. There were significant deviations between sub scores indicating weaknesses in areas of language development. For example, in May 1999, the Wechsler Adult Intelligence Scale-III Edition (WAIS-III) evidenced a 12 point discrepancy between the Student's Verbal and Performance profiles showing that his learning was likely to be impacted by difficulty with processing and recalling verbal stimuli [Exhibit S44]. Speech /Language reports also reveal discrepancies in language skills. For example, in May/June 1999, the Peabody Picture Vocabulary Test and Test of Adolescent and Adult Language (TOAL-3), in five subtests (Listening/Grammar, Speaking/Vocabulary, Speaking/Grammar, Reading/Vocabulary, and Writing/Vocabulary) the Student scored only in the 25<sup>th</sup> percentile. On the Reading/Grammar subtest he scored in the 16<sup>th</sup> percentile. In the Peabody Picture Vocabulary Test the Student's receptive vocabulary skills were in the 19<sup>th</sup> percentile. Kathy Fries, Director of Special Education, testified that School personnel agreed that the Student had a disability [Exhibit: S49-51; Testimony: Fries].
3. Evaluation reports and testimony revealed that the Student learned more effectively through visual and motor based activities, or a "hands on" approach, rather than a listening, writing, and reading approach [Exhibit: S42-46; S49-53; Testimony: De Angelis, Devroy].
4. The Student received special education under the category Speech and Language Impairment from the end of 4<sup>th</sup> grade to near the end of 7<sup>th</sup> grade (May 1992 to March 1995) and again during his entire 12<sup>th</sup> grade year [Exhibit: S142-143; S78-83; S34-38].
5. From December 1994 to December 1995, during the Student's 6<sup>th</sup> and the beginning of 7<sup>th</sup> grade, an IEP required a Speech Language Clinician to consult with regular education teachers for 15 minutes every two weeks to ensure that teachers made modifications when necessary, such as seating the Student near the teacher, reviewing vocabulary prior to reading, highlighting texts, etc. No direct instruction by special educators was provided. Teachers provided similar

modifications for students who were not identified as eligible for special education [Exhibit: S113 – 115; S116-118; Testimony: Towle]

6. A PET was convened December 14, 1994, while the Student was in 7<sup>th</sup> grade, and determined that the Student was making satisfactory progress with minimal consultation services, and so in the future the Student would be provided with only monitoring services once each quarter [Exhibit: S103; S104-108; S109 – 111].
7. Kathy Germani, Middle School Principal and former special education teacher, testified that a) the Student was evaluated for course grades using the same criteria as students in regular education who were not identified for special education and b) he did very well in middle school and did not need special education to benefit from the education provided by South Portland Schools. [Testimony: Germani].
8. Michael Towle, 7<sup>th</sup> grade Social Studies Teacher, reported that in his class, the Student was “an extremely hard worker, always prepared....a terrific student”. Mr. Towle reported that he used the same approach with the Student as he used with regular education students and that the Student was evaluated using the same criteria as regular education students. The student received A grades in his class [Testimony: Towle].
9. In 7<sup>th</sup> grade (1994-95), during four quarters in regular education with consulting service and then monitoring service, the Student received the following grades: Language Arts: B, A-, C+, B+; Science: A-, A-, A, A-; Mathematics: A, B+, B+, B+; Social Studies: A, A, A+, A; and Physical Education: A+, A, A+, A+. During some quarters the Student also took Home Economics, Technical Education, Foreign Language, Quest, and Art. For these subjects the Student received one B grade and the remaining grades were one A-, two A grades, and five A+ grades [Exhibit: P213].
10. On March 28, 1995, after approximately three months of monitor service, a PET reviewed evaluation data including a) reports from math, social studies, science, and language arts teachers, b) a classroom observation by the speech language clinician, c) a report from a psychological examiner, and d) a report from the speech language clinician. The team determined that the Student was no longer eligible for special education, as his disability did not adversely affect his educational performance and so he did not need special education to benefit from his education. Copies of evaluation reports were provided to the Parents. At the PET in March 1995, the Parent heard the oral testimony of teachers explaining that the Student was progressing well [Exhibit: S78-83].
11. On March 29, 1995, a day after the PET meeting, a notice was sent to the Parents informing them that the team had determined that the Student’s disability was not adversely impacting his education and so he would be dismissed from special education services. The notice described the basis for de-identification and procedural safeguards

were attached. Copies of reports had previously been provided to the Parents and at the PET the Parent had heard the oral testimony of teachers explaining that the Student was progressing well [Exhibit: S77].

12. During 8<sup>th</sup> grade (1995-96), 9<sup>th</sup> grade (1996-97), 10<sup>th</sup> grade (1997-98), and 11<sup>th</sup> grade (1998-99), the Student passed from grade to grade. Report cards show all grades were received in regular high school classes. In 8<sup>th</sup> grade [Exhibit: P212] the Student received B's and A's with good or outstanding effort, and some "inconsistent" conduct. In 9<sup>th</sup> grade [Exhibit: P131] three C's, two B's, one A. In 10<sup>th</sup> grade [Exhibit: P118] four B's, three C's, one A grade. In, 11<sup>th</sup> grade five B's, one C, one A, one D. Grades mean the following: A = Excellent progress, B= very good progress, C= average progress, D = minimum progress [Exhibit: P71].
13. The Student played basketball all four years of high school, including two years of varsity. He played two games each week and practiced basketball the other three weeknights for one and a half hours each night. He also played AAU on weekends in summer and fall [Testimony: Mother].
14. The Student testified that in his opinion "I did alright in school, but I had to work really hard". He testified that he usually completed most of his homework during school time and saved his reading to do at home quietly after basketball practice. The Student reported that schoolwork was easier in 12<sup>th</sup> grade with special education assistance and that he wished such assistance had been available earlier in his high school career [Testimony: Student].
15. Testimony was heard from two regular education high school teachers who had taught the Student. Frank Spencer, 10<sup>th</sup> grade College Biology teacher, stated that the Student was a typical regular education sophomore who the teacher had never considered as needing referral to special education. The Student was graded using the same criteria and standards as the other 23 regular education sophomores in the class and he earned the final grade of 86, Honors level work. Keli Martin, 11th grade English teacher, stated that the Student was a very successful, conscientious student. The Student was graded using the same criteria as the other 24 regular education students in her class and he earned a final grade of 87 that was considered Honors level work [Testimony: Spencer and Martin].
16. The Student's high school transcript shows subjects taken and grades received in 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> grade. He met the regular education graduation requirements with no failing grades. Most grades earned were B's [Exhibit: S1].
17. The Student graduated in June 2000. There were 219 students in his graduating class. The Student ranked 105 out of 219. His cumulative grade point average was 85.477 that fell in the Honors range. Of the 219 students in his class, 113 graduated with Honors, which is a grade

point of 85 or above [Transcript dated 6/19/2000 and letters from the School's attorney dated June 19 and June 21, 2000].

18. The Student has been accepted at the University of Maine in Farmington (UMF) and plans to begin his studies at UMF fall 2000 [Testimony: Mother].
19. At the beginning of the Student's 12<sup>th</sup> grade year, after four years of not receiving special education services, a PET met on September 2 and 16, 1999 and determined that the Student would once again receive special education under the category Speech/Language Disability. Dominic Pistone, the Special Education Coordinator who was also a Psychological Examiner, and Kathy Fries, the Director of Special Education, stated that the student was identified for special education in 12<sup>th</sup> grade in order to be pro-active even though the Student's disability did not negatively impact his educational progress [Testimony: Pistone, Fries].
20. Gail Devroy, School Psychological Services Provider, stated that the Student did not need special education to benefit from his education, but that during the PET meeting in September 1999, the "team lost sight of the educational benefit piece" and so identified the Student for special education even though he was not eligible [Exhibit: S25 – 28; Testimony: Devroy].
21. Four witnesses testified that although the Student could have benefited from special education services while in High school, in their opinions, any student could benefit from the additional attention and modifications provided by special education, but the Student did not need special education to make reasonable academic progress [Testimony: Fries, DeAngelis, Pistone, Devroy].
22. In September 1999, a PET met on two occasions. After determining that the Student would receive special education services under the category of speech and language, the team determined that an IEP would address advocacy skills, oral and written language, and reading comprehension. Classroom modifications would be implemented by regular education teachers, a Functional Behavioral Assessment (FBA) would be conducted, and a behavior plan would be developed. In the minutes, no mention was made of conducting an "Interest/Aptitude" test [Exhibit: S25-28],
23. The IEP dated September 2, 1999, contained two goals, one focusing on oral and written language and one goal focusing on increasing the Student's understanding of his language disability and increasing self advocacy skills. There was no transition plan and although the IEP contained the notation "Classroom Modifications Attached" no modifications were attached. [Exhibit: S34-38].
24. A transition plan was developed and is dated December 3, 1999. Most of the transition services were to be initiated in January 2000. Under the heading "Coordinated activities" the transition plan indicates that an Interest Inventory would be conducted [Exhibit: P205].

25. Kathy Fries, Director of Special Education, stated that because the Parents took the lead in pursuing college plans, School personnel did not carry out all the activities noted on the transition plan. School personnel checked that the Student has completed a college application, arranged at least one job shadowing experience, and contacted the special services office of the University of Southern Maine to arrange for the Student to talk with another student with a disability about university expectations. At the time of the hearing in June 2000, negotiations were continuing but the Student had not actually met another college student with a disability [Testimony: Fries and Mother].
26. Parent's witness Heidi Cameron, Resource Services/Guided Study Teacher, stated that she taught self-advocacy skills to the Student as required in the September 2000 IEP. The transition plan called for "Job shadow/ elem. ed/ sports mgmt./ business ". Ms. Cameron reported that the Student job shadowed an elementary school PE Teacher on one occasion [Exhibit: S193, Testimony: Cameron].
27. The transition plan dated December 3, 1999, noted that an Interest Inventory would be conducted. An Interest Profile: Choices Career Area Interest Checklist (8 pages) was conducted January 27, 2000 [Exhibit: S193 and P19-P26].
28. The Parents stated that they did not receive a copy of a transition plan until June 1, 2000 [Testimony: Mother].
29. Following the September 2 and 16 PET meetings, the Director of Special Education sent a copy of the minutes to the Parents who requested changes. On November 3, 1999, the Director sent a copy of the amended minutes to the Parents and asked whether further revisions were needed. The copy of PET minutes presented in the School's evidence was signed by the Director of Special Education on November 22, 1999 [Testimony: Mother & Fries; Exhibit: P58, S28].
30. A Functional Behavioral Assessment (FBA) was determined necessary by the September 1999 PET [Exhibit: S25-28]. The FBA was not dated although evaluations necessary for the development of the FBA were conducted November 17, December 1, and December 6, 1999 [Exhibit: S10-17].
31. The purpose of conducting a FBA was to have the basis for the development of a proactive behavior plan to reduce frustrations for the Student and thus prevent behavior problems in academic settings [Exhibit: S26].
32. The September 1999 PET determined that a behavior plan would be developed. A draft behavior plan dated November 29, 1999, was sent to the Parents in the fall. Approximately two pages of the FBA containing the behavior plan with the notation "Jan 2000 – June 2000 Feb 28 2000", were presented in evidence [Exhibit: P210 and S3-4].

33. Parent's witness Heidi Cameron testified that during 1999-2000, the Student was "a role model in the class....no behavior problems...an exemplary student" [Testimony: Cameron].
34. Parent's witness Rosemary De Angelis testified that because of his speech/language disability, the Student did not understand the social implications of some of his behaviors. In January 2000, Ms De Angelis reviewed the behavior plan with the Student's high school teachers [Testimony: De Angelis].
35. Kathy Fries, Director of Special Education, testified that during fall 1999, before a behavior plan was developed, there were no significant behavior incidents involving the Student [Testimony: Fries].
36. A number of School disciplinary reports and notes were submitted in Parent's evidence. Documents were dated when the Student was in 9<sup>th</sup> grade in 1996-97, 10<sup>th</sup> grade in 1997-98, and 11<sup>th</sup> grade in 1998 [Exhibit: P121-144, P113-116]. No disciplinary documentation was provided for the period January 1999 to December 1999 during which time there was no behavior plan in place.
37. On March 8, 2000, the Parent went to School to copy some of the Student's educational records and to compare certain documents in the School files to the copies they possessed at home. The Parent alleged that one or more drawings by the Student, a form concerning administrative discipline, and possibly other documents were missing from the Student's School file. The Parents asked Kathy Fries for the allegedly missing documents [Exhibit: P122; Testimony Mother].
38. On March 12, 1999, Kathy Fries e-mailed the superintendent of South Portland Schools asking him if he had any documents from the Student's files but he did not [Exhibit: P99].
39. On March 12, 1999, Kathy Fries telephoned the Student's guidance counselor to try to locate any missing documents and made notes of her telephone conversation. In testimony Ms. Fries pointed out that as the Student had been terminated from special education in March 1995, there was no reason that she, as the Director of Special Education, would have accessed the Student's file recently. To the best of Ms. Fries' knowledge, all educational records were made available to the family [Exhibit: P100; Testimony: Fries].
40. The Parents did not explain the educational significance of a possibly missing drawing or suggest that harm had been caused by the possible absence of any other documents.
41. PET meetings were held on September 2 and September 16, 1999. PET minutes list the names and positions of individuals who attended the meetings. No regular education teacher was listed as present on September 2. On September 16, the individual listed as attending in the role of regular education teacher (noted as "Classroom Teacher") held regular education certification, but was not a practicing regular education teacher [Exhibit: S23 and S24].



## IV. Conclusions

### (a) Introduction

The Student received special education services in the South Portland School Department from the end of 4<sup>th</sup> grade to near the end of his 7<sup>th</sup> grade year (1992 to 1994-95) when he was de-identified for services. The Student received regular education while in 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> grades. At the beginning of 12<sup>th</sup> grade he was again identified under IDEA under the category Speech Language Impairment and continued to receive services until he graduated with honors with a regular education diploma in June 2000.

The Parents seek compensatory educational services in the form of tutoring, if necessary, while the Student attends the state university. They contend that the South Portland School Department improperly terminated the Student from services, failed to identify the Student as needing special education during most of his high school years, and so failed to prepare him adequately for post-secondary education.

Conclusions are presented for each of the alleged violations in (b) through (g) below. The question of compensatory education or other relief is addressed in Section V. Discussion and Decision.

### (b) Did the South Portland School Department improperly terminate the Student from special education services near the end of his 7<sup>th</sup> grade year?

During 6<sup>th</sup> and 7<sup>th</sup> grade the Student received no direct instruction, but was provided with minimal special education services consisting of modifications made by regular classroom teachers. Similar modifications were made for regular education students who needed them. Testimony from the middle school teaching principal and the 7<sup>th</sup> grade social studies teacher showed the Student to be a good student who was evaluated for grades using the same criteria as regular education students. During 7<sup>th</sup> grade, prior to de-identification from special education, the Student received mostly grades of A, with some B grades, and only one C.

An IEP team, with the Parent as a member, reviewed the Student's progress and determined that the Student was not eligible for special education as his disability did not adversely affect educational performance. A written notice was sent to the Parents explaining that the Student was being dismissed from special education services, the reasons why he was being de-identified, and the basis for de-identification.

Before determining that the Student was no longer an eligible student with a disability, the School evaluated the Student in accordance with Maine Special Education Regulations, Section 9.4,. The School provided the Parents with written notification of a change in program that described the action, explained why, explained the basis for the action, and provided the Parents with a statement of procedural safeguards.

Section 12.3 requires Parents to receive at least seven days prior written notice before changing identification. Although the date of de-identification was not specified, the suspension of special education services did not change the education the Student was receiving as he was already in regular education on monitor status and not receiving services that were particular to special education. Teachers testified that modifications deemed important for the Student were also typically used for students in regular education. South Portland School Department acted in accordance with Maine Special Education Regulations, Sections 10.4 and 12.3.

I find that the South Portland School Department properly terminated the Student from special education services in 1995, near the end of his 7<sup>th</sup> grade year.

**c) Did the South Portland School Department fail to fulfill its obligation to identify the Student as needing special education and so fail to provide a Free and Appropriate Public Education during his eighth through eleventh grade years (1995-96 to 1998-99)?**

The Individuals with Disabilities Education Act (IDEA) requires public schools to provide students with disabilities who need special education to benefit from their schooling to be identified and served. The landmark case that interprets the law and determines whether or not a student is eligible for special education services is Board of Education v. Rowley, 458 U.S. 176, 206-7 (1982). In the judgment of the United States Supreme Court the standard to be met by public schools is that a) Schools must comply with procedures set forth in IDEA and b) must provide an appropriate education, described by the Court as a basic floor of opportunity for students with disabilities.

In determining whether the Student was eligible for special education services, the School reviewed objective test data combined with the Student's actual performance as evidenced by written reports and teachers' commentary. The School followed appropriate procedures in de-identifying the Student.

During 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup>, grades, the Student attended only regular education classes, passed from grade to grade and his course grades were awarded using the same criteria as other students in regular education. The Student maintained mostly B grades and met regular graduation requirements with no failing grades. The Student not only made academic progress, he played basketball all four years of high school, including two years of varsity.

After four years of not receiving special education services, the Student was again identified as eligible because of a speech/language disability, and received services while in 12<sup>th</sup> grade. School personnel testified that he was identified as a pro-active measure even though the Student's disability did not adversely impact his education to the extent that he needed special education. At the end of his 12<sup>th</sup> grade year, in June 2000, the Student graduated with honors and ranked 105 out of a class of 219.

The Parents contended that the Student needed special education services in order to prepare for college level work. Four educators (The Director of Special Education, a Speech/Language clinician, the Special Education Coordinator/Psychological Examiner, Psychological Examiner) testified that any student could benefit from additional attention, but the Student did not need special education to make progress.

Maine Special Education Regulations, Section 1.3 guarantees a Free and Appropriate Public Education (FAPE) to each student with a disability who needs special education in order to benefit from their education. Maine Special Education Regulations, Section 9.4 states that FAPE shall be preceded by an identification and evaluation procedure which focuses on the student's individual needs and determines if the student qualifies as a student with a disability. Documentation and testimony showed that the Student made academic and social progress throughout high school. He graduated with honors with a regular education diploma and was accepted by the State University to begin fall 2000. The Student may have been more prepared for college level work with four additional years of special education, but there can be no doubt that the Student benefited from his education at South Portland High School. The State of Maine does not require the provision of special education services to maximize the potential of students with disabilities.

I find that the South Portland School Department did not need to identify the Student for special education during 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup>, grades.

**(d) Did the South Portland School Department fail to develop and implement a transition plan as part of an IEP?**

Maine Special Education Regulations, Section 2.31 describe the content of a transition plan. Section 5.13 requires that, beginning at age 16, a transition plan must be part of an IEP. Maine Special Education Regulations, Section 10.5 specify that the IEP must be implemented no later than 30 days following the PET meeting.

In September 1999, when the IEP in question was developed, the Student was aged 18. A transition plan dated December 3, 1999, was submitted into evidence. That was more than two months later than the 9/2/99 date on the IEP. Most of the transition activities were dated to begin January 2000, that was well beyond the 30 day limit specified in Maine Regulations.

I find that the School failed to develop and implement a transition plan within regulatory timelines.

**(e) Did the South Portland School Department fail to provide the Parents with PET minutes within 21 days of a PET meeting?**

Pupil Evaluation Teams convened on September 2 and September 16, 1999. According to testimony by the Director of Special Education and the Parent, the

Parents disagreed with the first version of PET minutes and requested revisions. On November 3, 1999, a second edition of minutes was sent to the Parents who requested further revisions. A final version of PET minutes was not developed and dated until November 22, 1999. This was approximately 44 school days after the September 16 IEP meeting. Maine Special Education Regulations, Section 8.9, specify that PET minutes must be provided to the Parents within 21 school days of the date of the PET meeting.

I find that the South Portland School Department failed to provide the Parents with a copy of PET minutes within 21 days.

**(f) Did the South Portland School Department fail to provide a written evaluation report of a Functional Behavior Assessment (FBA) and Interest/Aptitude testing no later than 45 days after a September 1999 PET determination to order these services?**

In September 1999, a PET determined that a Functional Behavior Assessment (FBA) would be conducted. An undated, eight page FBA was included in the School's evidence. The date of the final evaluation used to complete the FBA was 12/6/99. An abbreviated, three page version of the FBA containing a behavior plan was presented in School's evidence and dated "Jan 2000 – June 2000 Feb 28 2000".

Maine Special Education Regulations, Section 9.13, require that when a PET makes a referral for an evaluation, a written evaluation report must be submitted no later than 45 school days of the decision to evaluate. The FBA was not completed until more than three months after the PET determination to conduct the evaluation.

Neither the September 1999 PET minutes, nor the September 1999 IEP contained reference to conducting an Interest/Aptitude test. The transition plan dated December 3, 2000, was developed as a result of the September PET. The transition plan stated that an interest inventory would be conducted. This suggests that both the FBA and an Interest/Aptitude test were conducted as a result of the September 1999 PET. As the FBA was not completed until at least December 1999 and the Interest/Aptitude test was not conducted until the end of January 2000, the 45-day time limit was clearly not met.

I find that the South Portland School Department did not comply with the 45 school day time limit for conducting evaluations determined necessary by a PET.

**(g) Did the South Portland School Department fail to provide the Parents with access to records?**

In March 2000, the Parent went to the School to review the Student's records. The Parent alleged that some pages were missing including one or more drawings made by the Student and a record of discipline. The Parents already had copies of the allegedly missing documents at home. The Director of Special Education attempted to

track down any missing documents, but believed all records had been made available to the family. The Parents did not explain the educational significance of the allegedly missing documents and did not suggest that harm had been caused by the possible absence of documents.

**(h) Did the South Portland School Department fail to have a regular education teacher at PET meetings on 9/2/99 and 9/16/99?**

On September 2, 1999, a regular education teacher was not present at the PET meeting. On September 16, 1999, although a regular education teacher was listed as attending the PET meeting, and although the person listed held regular education certification, he was not employed by the School in the capacity of a regular education teacher. Maine Special Education Regulations, Section 8.6B, clearly specify "At least one regular education teacher for the student (if the student is, or may be, participating in the regular education environment)".

I find that the South Portland School Department did not ensure that a regular education teacher was present at a PET meeting.

**IV. Discussion and Decision.**

In this case, the Student received special education while in 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and part of 7<sup>th</sup> grade and all of 12<sup>th</sup> grade. In their closing statement, the Parents acknowledged that they had their son's best interests at heart and contended that he should have received special education during 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> grades. They alleged that the Student was not taught fundamental skills in reading, writing and self-advocacy and so was not adequately prepared for transition to post secondary education and adult life.

The Parents also alleged that the South Portland School Department committed a number of procedural violations. They asked for compensatory education or other relief as a consequence of the alleged violations and failure to provide special education throughout the Student's high school years.

The Parents sincerely believe that the School failed to provide an adequate education for their son. The Parents spent considerable time, energy, and money in preparation for a hearing. It is unfortunate that they were not well informed about the legal standards used to evaluate whether a student has benefited from his educational experience.

In order to determine whether the education provided to the Student was adequate we turn to the case of *Henrick Hudson School District v. Rowley* (US Supreme Court, 1982). This case provides us with the standard to use in measuring when a student has been provided with an appropriate education. There are two parts to the standard. The Individualized Educational Program is appropriate if:

1. it is "reasonably calculated to enable the child to receive educational benefits"; and

2. it was developed in accordance with the procedures required by statute [458 U.S. 176, EHLR 553:656].

The Hearing Officer has concluded that procedural violations occurred. These violations included:

- more than 30 days delay in the development of a transition plan;
- more than 21 days delay in sending PET minutes to the Parents, although some of the delay was the result of making revisions requested by the Parents;
- more than 45 days delay to complete a Functional Behavioral Assessment, although the purpose of the FBA was to facilitate the development of a behavior plan, but the Student did not exhibit behaviors that impeded his learning during 12<sup>th</sup> grade;
- possible incomplete documentation in the Student's School records, although the Parents did not indicate how that might have harmed the Student; and
- failure to ensure the attendance of a practicing regular education teacher at the September 1999 PET meetings, although the Parents did not claim that the IEP developed by the PET was inadequate.

The question for the Hearing Officer is what harm did the Student experience as a result of procedural violations on the part of the South Portland School Department. Whether **not** following procedures harms a student depends on whether "procedural inadequacies compromised the pupil's right to an appropriate education...or caused a deprivation of educational benefits" *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990).

The law does not require achievement or progress commensurate with a student's full potential. Instead, the school district is legally obligated to provide the student with meaningful educational benefit (*Rowley*, 458 U.S. at 199). We learned that the Student received passing grades and was promoted from year to year on route to a bona fide high school diploma. The Student has been successful in gaining entry to a four-year college. Academically the Student has some weaknesses resulting from his disability, but there is no question but that he received meaningful benefit from his schooling.

The U.S. Department of Education's summary of IDEA '97 requires that special education emphasizes the importance of three core concepts: (1) the involvement and progress of each child with a disability in the general curriculum including addressing the unique needs that arise out of a child's disability; (2) involvement by parents, students, and teachers in making decisions; and (3) the preparation of students with disabilities for employment and other post-school activities [34 C.F.R. Part 300, Appendix A, Introduction].

In this case we have seen that the Student's education followed the requirements of the general curriculum. During the time periods when he was identified as eligible for

special education, individualized programs were developed for him. PET minutes reflect that a team of educators, together with the Parents attended and participated in decision-making, and the Student was consulted about his education. The fact that the Student was been successful in his application to a four- year college is evidence of progress through school and preparation for adult life.

I find that the Student was not deprived of educational benefits as a result of the procedural violations identified in this report.

**VI. Order**

No order is made as a result of this hearing. Although procedural violations were committed by the South Portland School Department, they did not cause harm to the Student.

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Toni H. Rees, Ph.D.

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Date

