

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

September 20, 2000

Case # 00.184, *Parent v. Lisbon School Department (Union 30)*

REPRESENTING THE FAMILY: Family represented self.

REPRESENTING THE SCHOOL: Amy Tchao, Esq.

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.

This hearing was requested by the mother on June 15, 2000. The case involves the student, whose date of birth is dob. She resides with her mother, in Lisbon, Maine. The student is currently ineligible for special education services. She attends first grade at Lisbon Elementary School.

The parties met in a pre-hearing conference on June 29, 2000, to exchange documents and lists of witnesses, and to clarify the issues for hearing. Because of summer hiatus and the parties' schedules, the hearing was rescheduled for September 5, 2000, at the West Bath District Court. The family entered 79 pages of documents and the School District entered 188 pages of documents. Seven witnesses testified.

**I. Preliminary Statement**

This case involves a xx year-old female student, who has Type I diabetes mellitus. Student attended Kindergarten at Lisbon Elementary School during the 1999-2000 school year, and currently attends first grade at the same school. Due to issues surrounding her medical needs, student had a Section 504 Plan for most of the 1999-2000 school year, and continues to have a similar plan for the 2000-2001 school year. In March 2000, a PET found student ineligible for special education.

The family requested this hearing. It is their contention that student should have been found eligible for special education, under the category of "Other Health Impaired (OHI)."

The District contends that the PET's determination of ineligibility was appropriate, and that student does not, at this time, qualify for special education services.

**II. Issues to be Decided by the Hearing**

**Did the PET make an appropriate decision when it concluded that student did not qualify as a student with a disability and in need of special education services?**

### **III. Prehearing Issues**

At the prehearing conference, it became apparent that the family had significant dissatisfaction with the School and their implementation of the Section 504 Plan, and had already filed a Federal Office of Civil Rights (OCR) Complaint. This hearing officer advised the mother that she was also entitled to a Section 504 hearing, to address the issues surrounding the Section 504 Plan, but that the Due Process Hearing was for the sole purpose of addressing special education issues. To further clarify the relevant parameters, this hearing officer forwarded a memo to the Mother, dated August 4, 2000, which stated, in part, "I still intend to exclude hearing testimony regarding your daughter's Section 504 Plan. The appropriate forum for a discussion of the appropriateness of that plan, and the alleged failure of the District to comply with the plan, is a Section 504 hearing. You were informed of your right to request a Section 504 hearing, which would be presided over by an impartial hearing officer, and you were further informed that your request for this hearing would in no way limit or impact your rights to a due process hearing under the I.D.E.A." (Exhibit: S187-188)

### **IV. Findings of Fact**

1. Student's date of birth is dob. (Due Process Request)
2. In May 1998, student was diagnosed with Type I diabetes mellitus. Student is insulin dependent, and needs to have her blood tested, for low and high blood sugar, frequently throughout the day. Student also is on a strict diet. According to her pediatric endocrinologist, student's adjustment to having diabetes has been excellent, and it is in good control, as long as student's diet, exercise level and insulin needs are strictly adhered to. (Exhibit: P6-7; Testimony: Mother)
3. Because of student's medical needs, a Section 504 Plan was developed in November 1999, and revised in March 2000. A Section 504 Plan for the 2000-2001 school year was developed in May and June 2000, and revised during the summer of 2000. (Exhibits: P37-41, P3; Testimony: B. Hasenfus)
4. Student also has an Individualized Health Care Plan, dated September 8, 1999, which is designed to address her medical needs while at school. (Exhibit: S82-92)
5. In November 1999, the Mother expressed dissatisfaction with the implementation of student's Section 504 Plan, and requested a special education referral for student. A Referral Form was completed on November 29, 1999 and the Mother signed the Permission/Notification for Multi-disciplinary Team Evaluations Form on the same day. (Exhibits: S47, S48-50)
6. Allan Northup, SPSP, conducted cognitive testing of student on January 13, 2000. Student's scores on the Wechsler Primary Pre-School Scales of Intelligence are as follows: Performance IQ, 84; Verbal IQ, 94; Full Scale IQ, 88. Mr. Northup

- testified that during the testing the student was engaged with the test materials, and showed energy, persistence and focus, thereby suggesting that these scores were an accurate representation of student's ability. He noted that even the 10 point gap between the Verbal and Performance IQ scores is very often seen in young children, although student's subtest scores do show some weakness in fluid reasoning ability and higher order reasoning. Because of this weakness, Mr. Northup concluded his report with recommendations around visual/motor skills. (Exhibit: S44-46; Testimony: A. Northup)
7. Mr. Northup also conducted two one-half hour classroom observations, one during a time when student was tested as having a normal blood sugar level, and one at a time of high blood sugar. At both times, he reported observing behavior that presented as similar to the other children in the classroom, although at the time of high blood sugar, student did eat rather slowly and occasionally gazed off. Exhibits: S22-24, P30; Testimony: A. Northup)
  8. Barbara Morris, Educational Evaluator for the School District, conducted achievement testing of student in January 2000, and prepared a report dated January 18, 2000. Ms. Morris reports having conducted the Test of Early Reading Ability-2 (TERA-2), and the Test of Early Math Ability-2 (TEMA-2). Student received a reading quotient of 94 and a math quotient of 89, very consistent with her cognitive ability scores. Testing was done during a time of normal blood sugar level, and student appeared to be engaged with the test materials. (Exhibits: S41-43; Testimony: B. Morris)
  9. Ms. Morris also conducted two classroom observations of student, one during a normal blood sugar time, and the other when student's blood sugar was below average. Following her first 45-minute observation, done in December 1999, Ms. Morris reported that student's behavior was no different than the other students. She was observed to be on-task and appropriately behaved, completing tasks that were given to her. During the second observation, done during a period of low blood sugar, student was observed to be less focused during a circle activity, but becoming better focused during seat work. Ms. Morris also reviewed six samples of coloring done by student while at school, and on which the Mother had indicated student's blood sugar level. According to Ms. Morris, only one of these samples seemed out of the ordinary for student, "somewhat off," as Ms. Morris termed it. This was done on a day when student had an above average blood sugar level. However, it is unclear what the time differential was between the coloring and the blood test. (Exhibits: S-36-38, S27-28; Testimony: B. Morris, Mother)
  10. According to Mr. Northup, a comparison of student's cognitive scores and her achievement scores fails to indicate a discrepancy between these scores, and thereby fails to support a finding of adverse educational impact. He stated that student seems to benefit from classroom instruction, presents similarly to her peers and appears to have no need for specially designed instruction. He further

- noted that any special needs that she has are around medical, as opposed to educational, issues. Mr. Northup did suggest that personnel should be flexible, and alert to changes in student's physical presentation. (Exhibit: S44-46; Testimony: A. Northup)
11. The PET met first on February 17, 2000, to consider student's evaluation results. Student's teacher had to leave the meeting early, due to an emergency. Therefore, the meeting was adjourned and a new date was scheduled. Allan Northup did meet informally with the family following this PET meeting, and at that time he discussed the student's evaluation results with them. (Exhibit: S29-33; Testimony: B. Hasenfus, A. Northup)
  12. The second PET meeting was held on March 23, 2000. Student's Father was present at this meeting, although student's mother was unable to attend. At this time, Mr. Northup and Ms. Morris summarized their findings, and the classroom observations were reviewed. Ms. Traister, student's teacher, reported on student's classroom progress, and noted her good quality work and excellent penmanship. According to Ms. Traister, "[student] is at the top of the class....[and] is an active learner at school." The PET concluded that student does not qualify for special education services, and that her needs can best be met through a Section 504 Accommodation Plan, a decision with which student's Father concurred. The Father further stated that the parents' desire is for student "to have an aide to monitor her eating patterns and blood sugar levels." (Exhibit: P23-24; Testimony: Father)
  13. The family did not further pursue the issues of eligibility with the Special Education Director, although they did meet with the Interim Superintendent in May 2000, to discuss their dissatisfaction with the implementation of student's Section 504 Plan. It is unclear what steps the Interim Superintendent took to address the family's issues. (Testimony: B. Hasenfus, Mother)
  14. On June 15, 2000, the Family filed a Request for Due Process. (Exhibit: Due Process Request)
  15. At some time prior to the prehearing conference on June 29, 2000, the family filed a Complaint with the Federal Office of Civil Rights, regarding student's Section 504 Accommodation Plan.
  16. At the June 29, 2000, prehearing conference, the mother was advised about the availability of a Section 504 hearing as a remedy for dissatisfaction with student's Section 504 Accommodation Plan. At that time, she requested such a hearing, but later withdrew her request. (Testimony: Mother, B. Hasenfus)
  17. Throughout the prehearing conference and the hearing itself, the Mother made it clear that it was her dissatisfaction with the implementation of student's Section 504 Accommodation Plan that was the motivating factor in her request for

reconsideration of student's special education eligibility determination.  
(Testimony: Mother)

#### IV. Conclusions

There is no dispute that student is a child with a disability, in this case Type I diabetes mellitus, and that she requires regular insulin shots, blood glucose monitoring and, in the case of either high or low blood sugar, remediation in the form of the ingestion of food or glucose. Nor is there any dispute that this type of diabetes may at times exhibit itself through some sort of physical manifestation, such as inattentiveness and an inability to concentrate.

Neither party argued that student should be eligible under a category such as Learning Disabled or Emotionally Disabled, but rather that Other Health Impaired (OHI) would be the appropriate eligibility category, were student eligible for special education services.

It is also agreed that student is in need of, and has, a Section 504 Accommodation Plan. Such a plan was developed in October 1999 and revised several times, most recently during the summer of 2000. It is apparent from the Mother's testimony that she takes issue with the implementation of this plan, and it was for that reason that she filed a due process hearing request, asking for reconsideration of the District's March 2000 finding that student was not eligible for special education services. However, it was explained to the family that the appropriate forum for discussion of the implementation of a Section 504 Accommodation Plan was a Section 504 hearing and/or a complaint investigation by the Federal Office of Civil Rights (OCR).<sup>1</sup>

There is no question as to whether diabetes is included in the list of health conditions that **may** qualify a student for special education services. Both the Maine Special Education Regulations, as well as the Federal regulations, state that children with diabetes may fit within the category of "other health impaired" if the condition causes "limited strength, vitality, or alertness" which adversely affects the student's educational performance and if the student is in need of special education services in order to benefit from her education. *See* MSER §3.10; 34 CFR §300.7(a)(9).

However, the fact that a student has Diabetes Type I or, for that matter, one of any number of medical disabilities, does not automatically make that student eligible for special education services. *See, e.g., Jefferson County Board of Education*, 29 IDELR 690 (SEA AL 12/14/98) (finding that student with asthma did not qualify for special education services under IDEA under the OHI label); *Mobile County Board of Education*, 3 ECLPR 90 (SEA AL 8/11/97) (finding that child's condition of spina bifida did not have an adverse effect on student's educational performance). The condition must also cause an adverse effect on student's educational performance and student must be in need of special education services in order to progress educationally.

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<sup>1</sup> At the prehearing conference, the Mother was advised about her right to a Section 504 hearing, and did request such a hearing. However, she subsequently withdrew this request. She had, however, previously filed a complaint with the Office of Civil Rights (OCR).

The Federal Office of Special Education Programs (OSEP), in response to an inquiry about the education of children with diabetes, has stated

“It is clear that diabetes is a condition that may qualify a child for special education and related services if, after conducting an educational evaluation pursuant to 34 CFR §300.530-300.543 of the Federal regulations, it is determined that the child *requires* special education and related services.”

*OSEP Letter*, 24 IDELR 853 (OSEP 4/5/96) (emphasis added)

Although student’s disability may at times make her inattentive, and at times she misses classroom activities due to blood sugar testing or the administration of glucose, there is no indication that she is suffering any adverse educational effect. Her Kindergarten Report was exceptional. According to her Kindergarten teacher, student was one of the top students in the class. When observed in the classroom, student was seen to be interacting and attending in a manner no different than the other students. Student’s TERA-2 and TEMA-2 scores are clearly consistent with her level of cognitive ability.

This is not to suggest that diabetes has no negative effect upon student’s life. However, it is that effect on one or more of her life activities that makes student eligible for a Section 504 Accommodation Plan, designed to accommodate her needs within the school setting. In the absence of evidence of an adverse effect on student’s educational performance, which cannot be addressed through modifications and accommodations under Section 504, student has not demonstrated a need for special educational services.

## **V. Decision**

Student’s current educational needs<sup>2</sup> can be best met through the appropriate implementation of her Section 504 Accommodation Plan.<sup>3</sup> Although student may well need a revised Section 504 Accommodation Plan, or the District might need to insure more consistent implementation of the Plan, those are not issues for this decision to address. Likewise, this decision is in no way meant to minimize the seriousness of student’s health condition, but rather to emphasize that the appropriate means to address student’s special medical needs in the school setting is through ensuring necessary accommodations and modifications.

## **VI. Order**

Since the School District appropriately found student to be ineligible for special education services at this time, no order is issued.

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<sup>2</sup> The District commented during testimony that they are not stating unequivocally that student will never need special education services and if, in the future, such a need is indicated, student will be evaluated and provided the appropriate services.

<sup>3</sup> Noting that this family has significant reservations regarding the implementation of student’s Section 504 Accommodation Plan, I would urge the District to address those reservations as promptly as possible, so that the “adverse effect” discussed above does not become a reality.

### Family's List of Documents

- P1-2 Brief Statement from mother (June 28, 2000)
- P3 Memo from Sharon Hole to 504 Team (March 31, 2000)
- P4 Telephone message from mother to Maine Center for Endocrinology & Diabetes (September 27, 1999)
- P5 Insulin and Food Schedule (September 27, 1999)
- P6-7 Letter from Alan Morris, M.D. to Lawrence Losey, M.D. (June 16, 1999)
- P8 "The Law and Diabetes" (undated)
- P9-10 Care Plan for student (September 8, 1999)
- P11-19 Journal kept by mother (May 1999 through May 2000)
- P20 School Updates (May 5, 2000)
- P21 Letter from the School Nurse to mother (May 12, 2000)
- P22 Letter from Vance Keene, Principal, to mother (April 25, 2000)
- P23-24 PET Summary (March 23, 2000)
- P25-27 PET Minutes (February 17, 2000)
- P28-29 Psychological Evaluation conducted by Allan Northup, SPSP (January 17, 2000)
- P30-31 Classroom Observation (undated)
- P32-33 Findings of Katherine Morgan, Administrative Law Judge (December 27, 1999)
- P34-35 Article from *The Times Record*, (June, year not indicated)
- P36 Memo from Laurie Pitcher to mother (March 15, 2000)
- P37-41 Section 504 Plan (November 23, 1999)
- P42-45 Journal kept by mother (June 29, 2000)

- P46 “Your School and Your Rights” (undated)
- P47 “Care of Children with Diabetes in the School and Day Care Setting (undated)
- P48-49 “Section 504: An Introduction for Parents” (February 1997)
- P50-52 “Student Placement in Elementary and Secondary Schools and Section 504 and Title II of the Americans with Disabilities Act” (August 1998)
- P53 Target Range of Blood Sugar Chart (March 13, 14, 15, 16, year not indicated)
- P54 OCR Coalition Quarterly (undated)
- P55-60 Maine Special Education Regulations (November 1, 1999)
- P61-64 “The Rights of Individuals with Handicaps Under Federal Law” (undated)
- P65-74 Code of Federal Regulations, Part 104 (July 1, 1997)
- P75 Your School and Your Rights
- P76-79 Lisbon Police Department, Witness Statement Form (April 29, 2000)

**Family’s List of Witnesses**

Mother  
 Father

Nancy Chizmar, Family Friend

**School District’s List of Documents**

- S1 Letter to father from Ms. Hasenfus, (June 26, 2000)
- S2 Letter to mother from Ms. Hasenfus (June 26, 2000)
- S3-10 Section 504 Accommodation Plan (May 10 – June 1, 2000)
- S11-14 Kindergarten Progress Report, 1999-2000 School Year
- S15-16 Reading Profile (May 2000)
- S17-18 Writing Score Sheet (May 2000)



- S19-21 PET Meeting Minutes (March 23, 2000)
- S22-24 Classroom Observation (March 20, 2000)
- S25-26 Invitation to Attend PET Meeting (March 15, 2000)
- S27-28 Classroom Observation (March 13, 2000)
- S29-33 PET Meeting Minutes, including Northup Psychological Evaluation (February 17, 2000)
- S34-35 Invitation to Attend PET Meeting (February 8, 2000)
- S36-38 Classroom Observation (February 7, 2000)
- S39-40 Invitation to Attend PET Meeting (February 3, 2000)
- S41-43 Individual Multi-Disciplinary Evaluation Team Report by Barbara Morris (January 18, 2000)
- S44-46 Psychological Evaluation by Allen Northup (January 17, 2000)
- S47 Referral Form (November 29, 1999)
- S48-50 Permission/Notification for Multi-Disciplinary Team Evaluations (November 29, 1999)
- S51-58 Section 504 Accommodation Plan (dated October 19, 1999, Signed by parents on November 23, 1999)
- S59-72 Parent's proposed Section 504 Accommodation Plan, which was not implemented (September 8, 1999)
- S73-77 Language Processing Assessment (September 7, 1999)
- S78-79 Note from Vance to mother and Louise (September 1, 1999)
- S80-81 School's Proposed Section 504 Accommodation Plan, which was not implemented (June 18, 1999)
- S187-188 Letter from Lynne Williams, Hearing Officer, to mother (August 4, 2000)

**Medical Records**

- S82-92 Individualized Health Care Plan for Student (September 8, 1999)

- S93-97        Permanent School Health Record (undated)
- S98            Diabetes Care Plan, 1999-2000 School Year
- S99-101       An Overview of Diabetes Care in the School Setting
- S102-186      Miscellaneous Notes from student's Medical Records

**School District' s List of Witnesses**

Barbara Hasenfus, Special Education Director and Section 504 Coordinator

Allen Northup, School Psychological Services Provider

Barbara Morris, Educational Evaluator

Sharon Hole, Guidance Counselor