

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

March 14, 2001

Case #01.029, Parents v. EUT/SAD #58

REPRESENTING THE PARENTS: The parents represented themselves

REPRESENTING THE SCHOOL: Donald Kopp, Esq.

REPRESENTING EDUCATION IN THE UNORGANIZED TERRITORIES: Sarah Foster, Esq., Assistant Attorney General

HEARING OFFICER: Stephen Ulman

This hearing was held and the decision was written according to the provisions of 20-A MRSA 7201 et seq., 20 USC 1400 et seq. and the regulations enacted pursuant to both.

Student resides with his parents in the Unorganized Territories of Maine. It is the responsibility of the State of Maine, Division of Education in the Unorganized Territories (EUT) to provide the student with a Free and Appropriate Public Education (FAPE) [Maine Special Education Regulations (MSER) Section 1.3] in the Least Restrictive Environment (LRE) [MSER Section 11.1].

The State Commissioner of Education designated MSAD #58 as the receiving school for this student from the Unorganized Territories. The student has been tuitioned by the State to MSAD #58 for 3 years.

In a letter to the hearing officer, dated February 14, 2001, MSAD #58 asked to be dismissed as a party in the hearing. At the pre-hearing conference held February 15, 2001, the hearing officer asked the attorneys for the EUT and MSAD #58 to file briefs on the issue prior to the start of the hearing. On February 21, 2001, the hearing officer received notification that the parties had agreed that MSAD #58 should

remain involved in the hearing, however, any order resulting from the hearing would be directed to EUT. The hearing officer agreed.

The hearing officer exercised his prerogative under MSER 13.13

Expedited Due Process Hearings.

Expedited due process hearings shall:

Meet the hearing procedures specified in 13.1 except that the hearing officer may elect to limit the hearing to a single day for presentation of evidence, direct and cross-examination of witnesses, and rebuttal.

and limited the expedited hearing to one day, March 1, 2001. The record was closed 5:00 p.m., March 1, 2001.

The decision is attached.

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I. Preliminary Statement

The findings of facts and conclusions are detailed later in this decision; however, a factual review is presented at this time to provide the reader with an overview of the dispute.

The student is a xx year old, 3rd grader. Prior to October 2000 he was tutioned by Education in the Unorganized Territories of Maine (EUT) to the Strong Elementary School in Strong, Maine, which is part of School Administrative District #58 (MSAD #58). He started kindergarten at the Strong School in the fall of 1997 and was first referred to special education as a first grader in 1998. The student was identified as Learning Disabled and held that classification until it

was changed to Emotional Disability in September of 2000. On October 20, 2000 the student's Pupil Evaluation Team (PET) changed the student's placement from a self-contained classroom with supportive services to home tutoring. This change was made because of aggressive behavior and only until a day treatment or residential placement could be found. The parents challenged this change of placement.

The student is currently identified as needing special education services because of an Emotional Disability, [Maine Special Education Regulations (MSER)Section 3.5].

A student with an emotional disability has a condition, which exhibits one or more of the following characteristics over a long period of time, and to a marked degree that adversely affects the student's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behaviors or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression;
5. A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to students who are "socially maladjusted," unless it is determined that they have an emotional disability.

The parents contend that the student should be returned to public school and would prefer a transfer to the Kingfield Elementary School in Kingfield, Maine, which is also part of MSAD #58. EUT concurs with that placement and has offered to finance the addition of supportive services at the Kingfield Elementary School. MSAD #58 strongly disagrees and argues that Kingfield Elementary is an even less appropriate public school placement than the Strong Elementary School because of space restraints and staff training.

II. Issue for Hearing

What is a Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) for the student and how can Education in the Unorganized Territories (EUT) provide FAPE in LRE?

III. Findings of Fact and Stipulations

Stipulations:

1. The student resides with his parents in the unorganized territories.
2. The student is identified as a student in need of special educational services.
3. The student has been identified as emotionally disturbed.
4. "Stay Put" is tutorial services.
5. There are no claims of procedural violations.

Facts:

1. The student started kindergarten 1997-98 in Strong School.
SW-2
2. The student was first referred to Special Education in September 1998 in 1st grade. SW-2
3. The student was first diagnosed as Learning Disabled (LD) at the September 29, 2000 PET. SW-2, MSAD 58, pg 59

4. In January 1999 the student was placed by the PET in the self-contained program. SW-2
5. In the spring of 1999 home visits were started to support student's mother in dealing with the student's oppositional behavior. SW-2
6. Suspension has been used as part of management since the spring of 1999 (1st grade year). SW-2
7. By November of 1999 (2nd grade year) the student was threatening to kill teachers with a gun. SW-2
8. Oppositional behavior which has been seen at school for some time has recently started at home and includes physical resistance, verbal attacks, threats of great physical harm to others including the use of guns to kill people. PW-1, PW-2, PW-3
9. Oppositional behavior at home is not as bad as at school. PW-1, PW-3
10. Oppositional behavior occurs when the student is asked to do something he doesn't want to do both at home and at school. PW-1, SW-1
11. The school administration used a management plan in addition to the behavior intervention plan and which was more comprehensive than the behavior intervention plan (which only

included rewards) in that it included reward, punishment, and sending the student home. PW-1, SAD 58-19, SAD 58-20

12. The parents agree to day treatment if it does not send the student home when he acts up. PW-1
13. The student's parents are willing to consider residential placement if it includes home visits on weekends. PW-1, PW-2
14. The parents have visited several regional day treatment programs. PW-1, PW-2
15. The parents report that the student wants to go to Kingfield and has relatives at Kingfield. PW-2, PW-1
16. The Kingfield and Strong schools are equal distance from the student's home. PW-1
17. The student is not acceptable for any area day treatment because he is too young and/or he lives too far away.
PW-3, P-1, P-2
18. The student needs a comprehensive therapeutic day program that is not available. EUT-1, PW-1, PW-3
19. If the student were assigned back to any interactive educational setting, medication would be started. EUT-1, P-4, P-8

20. The school has modified the student's academic requirement without success in controlling the oppositional behavior. SW-1, SAD #58-19, SAD #58-20
21. Behavior programs using rewards have been used and modified over time without success. SW-1
22. The student has an emotional problem that precludes his ability to control his behavior. SW-1
23. The Kingfield School program is primarily for academic difficulties and students with behavioral problems are sent to the Strong School. SW-1, SW-3
24. Well-trained and skilled teachers staff the Strong School Behavior Program. SW-1, SW-3
25. The Strong School Program that the student was in is essentially a day treatment program and has individual counseling and physical restraints. SW-1
26. The student has been admitted to St. Mary's Hospital for suicidal inclinations. SW-1, MSAD 58, pg 008, SW-2
27. The student's only coping skill when challenged or aroused is anger. SW-1
28. The student's behavior is not willful and not in control of the student and therefore behavior plans fail. SW-1

29. The student needs a 24-hour environment with consistent rules where escape from the rules is not an option and other behaviors are taught. SW-1, SW-2, SW-3
30. Academic skills have suffered as demonstrated by a reduction of the level of performance on standard tests. SW-1, SW-2, SAD 58-1
31. The student's behavior was interrupting the learning of other students. SW-1, SW-2
32. Repeated suspensions for violent behavior was an administrative action and not part of the behavior plan. SW-1
33. If the student is put under any academic pressure at all he is not able to control himself. SW-1
34. The student is not working to age level or grade placement and is not making progress. SW-1, SAD-58-38, SAD 58-43
35. Early intervention is desirable before the negative behavior becomes habit. SW-1
36. In April 2000 (2nd grade year) the student was threatening to kill himself. The school referred the student to a hospital based Crisis Center. SW-2
37. The student was sent home only when his violent oppositional behavior became an issue with other students. SW-2

38. The student threatened to kill teachers with a gun, would call to other students and say “fuck you” or say to people entering the room “You’re a fucken slut”. SW-2
39. The student has picked up objects such as yardsticks and bathroom plungers and threatened other students and adults.
SW-2
40. If a day treatment program were available, EUT would have enrolled the student several months ago. EUT-3, P-1, P-2
42. Kingfield has a space problem which is being addressed by the construction of a new addition, but which will not be completed for some time. SW-3

IV. Conclusions

What is a Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) for the student and how can Education in the Unorganized Territories (EUT) provide FAPE in LRE?

MSER defines FAPE as:

1.3 Free Appropriate Public Education

The guarantee of equal educational opportunity entitles each student with a disability residing in the State, including students with disabilities who have been suspended or expelled, to be provided with a free appropriate public

education that emphasizes special education and supportive services designed to meet their unique needs and prepare them for employment and independent living. This education includes special education and supportive services ...

MSER defines LRE as:

11.1 Least Restrictive Educational Alternative, Generally

To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, shall be educated with students who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

All parties agree that the current placement of home tutoring is too restrictive and needs to be changed. It is further generally agreed that day treatment, were such a program available, would be a possible option. With the day treatment placement not available because of the student's young age and/or travel distance the parties turn in opposite directions. The parents and EUT promote a placement even less restrictive than the recently abandoned self-contained classroom at the Strong School and request a modified regular classroom placement at the Kingfield School.

It is the conclusion of this hearing officer based on the evidence that even with medication and classroom modification (assuming

physical space could be found) this placement is most likely to fail. The MSAD #58 staffing patterns has the Kingfield staff primarily trained and equipped to handle learning disabled students in a Resource Room setting with the bulk of the ED students attending the Strong Elementary School where the staff is specifically trained to handle behavioral issues. Given the student's past behavior which includes threats of shooting people with guns and using yardsticks and bathroom plungers as weapons such a placement at this time could be dangerous to the student and others. To train and equip the Kingfield staff, assuming space could be found, would take a significant amount of time and would only replicate what has already been tried without success at Strong.

MSAD #58 clearly prefers the Residential Treatment option. Dr. Rogers, Ph.D., School Psychologist, Linda Kemp, Special Education Teacher, and Susan Koob, MSAD #58 Special Education Director, all agree that 24 hrs/day intervention is necessary at this point in time.

In order to determine the least restrictive environment appropriate for the placement of a student a PET must use the criteria given in Regulations at Section 11.2

- 11.2 Criteria – Least Restrictive Educational Alternative:
Each Individualized Education Program shall be developed in accordance with the principle of the least

restrictive educational alternative. Criteria for the determination of the least restrictive educational alternative shall include the following:

- A. A special education placement shall be based on the student's Individualized Education Program and shall be reviewed at least annually;
- B. A student with a disability shall be placed in the school the student would normally attend unless the Individualized Education Program requires a different placement. In such a case, the placement shall be as close as possible to the student's residence;
- C. A student with a disability shall be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily;
- D. The facilities and accommodations available at a proposed placement shall be comparable to those available at the school the student would typically attend;
- E. A student with a disability shall be educated with non-disabled peers and be provided an opportunity to participate in non-academic and extracurricular activities to the maximum extent appropriate; and
- F. In selecting the least restrictive educational alternative, consideration will be given to the potential harmful effect on the student or on the quality of services that he or she needs.

11.3 Continuum of Special Education Placements:

Each administrative unit shall ensure that a continuum of special education placements is available to meet the needs of students with disabilities and shall ensure that special education services and support services are available in conjunction with a continuum of special education placements.

A continuum of special education placements shall include regular classes, resource classes, self-contained classes, public separate day school classes, private separate day school placements, public residential placements, private residential placements, and housebound/hospital placements.

Comparable Facilities – Facilities in which special education services are provided to students with disabilities shall be comparable to those in which regular education is provided to regular education students and located in chronologically age appropriate settings.

11.4 Regular Class Placement:

A Regular Class Placement is a placement where a student with a disability receives a majority of their educational program with non-disabled students, receiving special education and supportive services OUTSIDE THAT CLASSROOM for less than 21 percent of the school day. This may include students with disabilities placed in regular class with special education/supportive services provided within the regular class, or regular class with instruction within the regular class and with special education/supportive services provided outside the regular class. Students receiving monitoring services are included in this category.

11.5 Resource Class Placement:

A Resource Class Placement is a placement when a student with a disability receives special education and supportive services OUTSIDE THE REGULAR CLASSROOM for 60 percent or less of the school day and at least 21 percent of the school day. This may include students with disabilities placed in resource rooms with special education/supportive services provided within the resource room, or resource rooms with part-time instruction in a regular class. Resource classes shall be located in chronologically age appropriate settings and the facilities shall be comparable to those in which regular education is provided to regular education students.

11.6 Self-Contained Class Placement:

A Self-Contained Class Placement is a placement where a student with a disability receives special education and supportive services OUTSIDE THE REGULAR CLASSROOM for more than 60 percent of the school day in a self-contained program. This may include students with disabilities placed in self-contained special classrooms with part-time instruction in a regular class, or self-contained special classrooms full-time. Self-contained classes shall be located in chronologically age appropriate settings and

the facilities shall be comparable to those in which regular education is provided to regular education students.

11.7 Public Separate Day School Placement:

A Public Separate Day School Placement is a placement where a student with a disability receives special education and supportive services for greater than 50 percent of the school day in public separate day school facilities. Public separate day school facilities shall be comparable to those in which regular education provided to regular education students.

11.8 Private Separate Day School Placement:

A Private Separate Day School Placement is a placement where a student with a disability receives special education and supportive services for greater than 50 percent of the school day in private separate day school facilities. Private separate day school facilities shall be comparable to those in which regular education is provided to regular education students.

11.9 Public Residential Placement:

A Public Residential Placement is a placement where a student with a disability resides and receives special education and supportive services for greater than 50 percent of the school day in public residential facilities.

11.10 Private Residential Placement:

A Private Residential Placement is a placement where a student with a disability resides and receives special education and supportive services for greater than 50 percent of the school day in private residential facilities.

11.11 Homebound/Hospital Placement:

A Homebound/Hospital Placement is a placement where a student with a disability receives special education and supportive services at home or in a medical treatment facility. Home instruction is usually appropriate for only a limited number of students, such as students who are medically fragile and are not able to participate in a school setting with other students.

In choosing between the available educational options this hearing officer considers several factors. They include, but are not limited to:

1. Given the gun threats the safety of all staff and students must be of greatest concern.
2. How quickly the program can be implemented.
3. The amount of time the various experts have actually spent testing and/or observing the student.
4. In what environments the experts' have observed the student (i.e., clinical, home, school) with greatest importance given to in-school observation because that appears to be the most troublesome environment.

It is, therefore, the conclusion of this hearing officer based on the evidence and MSER criteria that a significant safety issue exists for students and staff which cannot be addressed by the addition of supplementary aids and services in the public school setting. Therefore, the student cannot at this time be educated with his peers in a regular class placement, resource class placement, or self-contained class placement. Testimony by several witnesses was convincing that such a placement could lead to physical injury to the student, peers and/or staff. Private separate day school placement is not currently an option because of age and distance. Therefore, private residential placement is the LRE available in which this student may receive FAPE.

V. Order

EUT will within 10 school days convene a PET which will develop an IEP which places the student in a residential treatment program designed to provide Special Educational Services to children with emotional disabilities. Residential treatment programs located within close proximity to the student's home will be given preference. All actual transportation cost to the parents to and from the residential treatment program will be paid by EUT at the frequency recommended by the Residential Treatment Program.

STEPHEN G. ULMAN
Hearing Officer
March 14, 2001

SAD #58 Witnesses

- SW-1 Tim R. Rogers, Ph.D. – School Psychologist
- SW-2 Linda Kemp – Special Education Teacher
- SW-3 Susan Koob – SAD #58 Special Education Director

EUT Witnesses

- EUT-1 Tim McMann
- EUT-2 Laurie Ferrari
- EUT-3 Dan Field

Parent Witnesses

- PW-1 Father
- PW-2 Mother

List of Exhibits

- SAD 58-1 September 21, 2000, Psychological Evaluation by Tim R. Rogers, Ph.D. – 9 pages
- SAD 58-2 October 20, 2000, Summary of Functional Behavior Analysis – 4 pages
- SAD 58-3 October 18, 2000, Functional Assessment Interview – 9 pages
- SAD 58-4 April 10, 2000, Functional Assessment Interview – 9 pages
- SAD 58-5 Example of Functional Assessment Observation Form – 2 pages
- SAD 58-6 October 3, 2000, Occupational Therapy Screening by Erica Englemann, OTR/L – 1 page
- SAD 58-7 October 15, 1998, Psychological Evaluation by Tim R. Rogers, Ph.D. – 5 pages
- SAD 58-8 October 23, 1998, Special Services Evaluation Report by Cindy Richards, Special Education Teacher – 6 pages
- SAD 58-9 December 8, 2000, PET Minutes – 6 pages
- SAD 58-10 October 20, 2000, PET Minutes – 4 pages
- SAD 58-11 September 29, 2000, PET Minutes – 5 pages

- SAD 58-12 September 15, 2000, PET Minutes – 6 pages
- SAD 58-13 August 21, 2000, PET Minutes – 4 pages
- SAD 58-14 May 17, 2000, PET Minutes – 4 pages
- SAD 58-15 November 18, 1999, PET Minutes – 2 pages
- SAD 58-16 April 13, 1999, PET Minutes – 3 pages
- SAD 58-17 January 28, 1999, PET Minutes – 2 pages
- SAD 58-18 October 20, 2000, IEP – 2 pages
- SAD 58-19 November 18, 1999, IEP and Behavior Plan – 15 pages
- SAD 58-20 November 12, 1999, IEP and Behavior Plan – 14 pages
- SAD 58-21 January 11, 2001, Letter from Parents to Due Process
office – 1 page
- EUT 1-5 Psychological Evaluation – dated 9/10/98,
10/8/98, 10/15/98 – by Tim Rogers
- EUT 6-10 St. Mary's Regional Medical Center
Psychological Evaluation dated 5/2/2000
- EUT-11 Summary of services letter from Cheri Brackett dated
August 21, 2000
- EUT 12-13 Summary of Functional Behavior Analysis dated
- EUT 14-20 Daily point charts from the tutor, Val
Tucker, dated 10/23/00, 10/27/00, 11/1/00, 11/2/00,
11/2/00, 11/8/00, and 11/9/00

- EUT 21-23 Pediatric Behavioral Medicine Clinic Parent
Conference summary dated November 28, 2000 and
written by Michael Nurick, Ph.D
- EUT-24 Letter from Michael Keys, Clinical Coordinator, Renaissance
School (St. Mary's) dated 12/6/2000
- EUT-25 File notes pertaining to an informal meeting held with
Parents, Betsey Polland, Tim McMann, and Dan Field dated
1/9/01 and 1/19/2001 (Phone call from Betsey Polland to
Dan Field)
- EUT-26 Copy of a letter from Dan Field to Parents dated 1/25/2001
- P-1 Letter to Parents from Renaissance School 12/19/00
- P-2 Letter to Polland from Keys 12/6/00
- P-3-5 Evaluation 11/28/00 Nurick, Ph.D
- P-6-8 Evaluation 1/20/01 Sytsma, MD