

State of Maine
Special Education Due Process Hearing Decision

Parent v. MSAD 49, Case No. 01.159

REPRESENTING THE SCHOOL: Eric Herlan, Esq., Drummond Woodsum & MacMahon

REPRESENTING THE PARENT: Richard O'Meara, Esq., Murray Plumb & Murray

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to 20 USC §1415 et seq., and Title 20-A, MRSA, §7207-B et seq., and accompanying regulations.

The case involves Student, whose date of birth is xx/xx/xx. She resides with her mother, in Fairfield, Maine, and is currently a xx-year-old eighth grade student who recently attended Lawrence Junior High School. She was suspended on March 26, 2001 following a behavioral incident at the school. She has not been permitted to return to school.

Student has not been identified as a student eligible for special education services. Her mother referred her to the Pupil Evaluation Team on March 21, 2001. The PET met on April 23 to consider the parent's referral, and to order out-of-school placement with tutoring until the special education referral process was completed. Evaluations were conducted in April and May. The PET met again on June 22 to consider the results of testing and to determine eligibility. The PET determined that the student did not qualify for special education services as a student with an emotional disability. The parent disagreed with this determination.

The parent originally requested an expedited hearing on June 8, 2001, since the student was out of school and an expulsion hearing had been scheduled. After the parent and the school reached an agreement setting aside the expulsion hearing until the conclusion of the due process hearing, the parent requested the hearing be transferred to a regular due process hearing. She then requested an extension of the dates scheduled for hearing. The school subsequently requested a continuance as well. The parties met in a prehearing conference on Wednesday, June 27, 2001. The hearing convened on July 25 and 26. Nine witnesses testified at the hearing. One-

hundred-nineteen pages of documents were entered into the record.

Following is the decision in this matter.

I. Preliminary Statement

The student is a xx-year-old, eighth grade student, most recently attending Lawrence Junior High School. In mid-March 2001, after two years of increasing truancy, oppositional behaviors, substance abuse and failing grades, the student's mother made a special education referral. On March 26, before the referral process had begun, the student was suspended as a result of an incident in which she assaulted a teacher. The PET met to order evaluations and later to consider her eligibility for special education services as a student with a disability. The PET determined that she was not eligible. The student has not been permitted to return to school since the March 26 incident.

The parent disagrees with the PET determination. She argues that the student is eligible for services as a student with an emotional disability given a current diagnosis of bi-polar disorder, and her increasingly inappropriate behaviors both in and out of school. It is the parent's position that the school acted inappropriately during the suspension process, failing to conduct either a functional behavioral assessment or to convene a manifestation determination PET. She wishes the hearing to find that the student is a student with an emotional disability who requires special education services, and that the behavioral incident that resulted in her removal was a manifestation of her disability. She seeks compensatory education for the improper long-term exclusion from school.

It is the school's position that, based on current testing, the student does not meet criteria as a student with a disability. They argue that she is angry and oppositional with active substance abuse issues, and is most appropriately described as socially mal-adjusted. It is their contention that the suspension was an appropriate response to the student's assault on a staff member.

Issues

The issues to be decided by this hearing are:

1. Is the student eligible as a student with a disability under the category of emotional disability?
2. If so, was the behavior of the incident that led to the student's removal from school a manifestation of her disability?
3. Did the school commit procedural violations following the incident?

Findings of Fact

1. The student is a short, slightly built xx-year-old who did not complete her 8th grade year in school. She has a history over the past two and a half years of increasingly rude, oppositional and inappropriate behavior, school truancy, school failure, trouble with the law and arrests, drug and alcohol abuse, running away, and, most recently, assault. (Ex: 93, 92, 88, 64, 74; Testimony: Parent, Long, Cooper)
2. The student's grades through 6th grade were B's and C's. Her conduct and interest in her schoolwork fell slightly during the last quarter of 6th grade, but she ended the year, again, with B's and C's in all subjects. (Ex: 97, 100, 107-113; Testimony Parent)
3. The student completed group achievement tests in 4th and 6th grade. Scores on the Comprehensive [sic] Tests of Basic Skills fell across all subjects from 4th to 6th grade, with the "total battery" score falling from the 54th to the 35th percentile. Test scores on the Terra Nova group achievement battery completed in the middle of 7th grade show a further decline in all areas tested with a "total score" falling in the 26th percentile. (Ex: 90, 103-105)
4. Throughout 7th grade the student exhibited a pattern of cutting classes for which she served 11 days of in-house suspension and one day of out-of-school suspension. The student's final grades at the conclusion of 7th grade were: one C-, two D+'s, one D and one F. She was absent a total of 36 days and tardy 33 days. (Ex. 89, 92-94)
5. This behavior continued in 8th grade. The student was absent or suspended from classes for 129 days during the school year. She flunked all subjects for the year. (Ex: 15, 14)
6. The student was detained at the Northern Maine Juvenile Detention Facility on charges of theft during September and October 2000. She returned to school briefly in November then was returned to the facility until Christmas vacation. During her incarceration, on October 7, 2000, a court-ordered psychological evaluation was conducted by P. Kent Louscher, Ph. D. The evaluation was ordered in preparation for a judicatory hering [sic]. The assessment consisted of a clinical interview, review of records, a Multiaxial Diagnostic Inventory: Adolescent Clinical Scales (AMD), Shibley Institute of Living Scale, and the Minnesota Multiphasic Personality Inventory – Adolescent. While Dr. Louscher concluded that the evaluation did not "find evidence that [the student] is experiencing a "psychological or characterological [sic] disorder" he did note that her "responses on the AMDI met diagnostic criterion on the Dysthymia, Suicidal Ideation and Over-Anxious Scales. [She] reported one symptom on the Psychosis Scale indicating that she feels a force taking control of her mind

when she 'flips out' in anger." Responses on the Shipley Scale led him to conclude that while she has good verbal skills "[h]er abstract reasoning skills are a relative source of disability" raising "the suspicion that an underlying neurological impairment may be inhibiting her ability to make judgments based on abstract information". The evaluator concluded that the student's "substance abuse problems have contributed to acting-out impulses and disinhibited [sic] her underlying anger. Her resultant behaviors have become intensely oppositional to all authority figures..." He recommended to the court that she be placed in a substance abuse treatment program. (Ex. 15, 16, 74-80)

7. The parent met with the guidance counselors at the junior high school, Ms. Pohlman and Mr. Spiegel, in January and February 2001. The parent was concerned about the student's behaviors and school failure, and wanted a referral to special education. Notes from her meeting with Mr. Spiegel show that on February 7 a referral to the PET was requested. A formal referral form was not completed until March 21, 2001 when the parent again asked about special education assistance. From that point the student was considered a student "not yet eligible" for special education services, but entitled to all of the disciplinary protections available to students with disabilities. (Ex. 60, 66-70; Testimony: Parent, Rich)
8. On March 26 the student was involved in a disturbance with the teacher who supervises the in-school suspension classroom. The incident ended in the student being escorted from school in handcuffs by the local police, and the teacher filing assault charges. The student was suspended for 10 days, beginning that day. Subsequently, the Superintendent elected to suspend the student indefinitely until testing was completed and a decision could be made on an expulsion hearing before the school board. The student was not allowed to return to school for the balance of the school year. (Ex. 19, 57, 62, 63-65; Testimony Underwood, Haney, Rich, Parent)
9. The school convened the student's initial PET meeting on April 23. Tutoring was offered to the student at her home, pending the completion of testing. The student attended tutoring on May 10 and 11, but declined to attend any other scheduled tutoring sessions. On May 25 the tutoring was suspended until such time as the student indicated an interest in attending. (Ex. 36, 50, 55, 57, 62; Testimony: Rich, Parent)
10. At this the team determined that: "1) [the student] is eligible to receive tutoring services for two hours daily while she is suspended from school and remains in the special education referral process, 2) [the student's] program will change from in school regular education to in home instruction two hours daily, 3) [the student] will be assessed on Wednesday, April 25... The examiner will be testing [the student's] ability, achievement, and danger factor before the PET reconvenes to make any program decisions". Achievement testing was never completed because the student failed to appear at scheduled testing appointments. (Ex. 24, 9, 33, 34, 50-51; Testimony: Rich, Parent)
11. The PET-ordered psychological evaluation was initially scheduled for the week of April 9, but rescheduled when the student failed to appear for testing. The evaluation was conducted on April 25 and May 9, 2001, by Richard A.

Kauffman. The requested purpose of the evaluation was to determine “her emotional status and her risk of further assaultive behavior” and “the possible presence of educational disability”. The evaluator administered the Wechsler Intelligence Scale for Children – Third Edition (WISC-III), the Rotter Incomplete Sentences Blank-High School Form (RISB-H), the Minnesota Multiphasic Personality Inventory – Adolescent (MMPI-A), the Rorschach Inkblot Technique. Four of the student’s teachers completed the Conners’ Teacher Rating Scale – Revised: Long Version (CTRS-R:L), and the parent completed the Child Behavior Checklist (CBC). Review of records and an interview with the student and the parent were also part of the evaluation. The student obtained a Full Scale IQ score of 92 on the WISC-III. Subtest scaled scores all fell within the average range. The evaluator concluded that “there is no indication that severe mental illness or emotional disturbance was present...” He recommended that the “PET should consider all the available information to determine the possible presence and nature of educational disability”, but determined that the student’s primary problem was substance abuse and social maladjustment. (Ex. 42-49, 55; Testimony: Kauffman)

12. The student has been under the psychiatric care of Dr. Yvonne Taylor for medication management since March. As a working diagnosis the psychiatrist has determined the student suffers from Bi-polar Disorder-Early Onset, and has prescribed Lithium as a mood stabilizer. She sees the student as responding positively to the treatment, thereby supporting her diagnosis. In her opinion, because of this condition the student exhibits inappropriate behaviors under normal circumstances, has an impaired ability to control aggression, is highly impulsive, and exhibits Dysphoria with mood swings and sometimes depression. She has seen the student five times since March in medication review sessions. She is of the opinion that the student meets the criteria as a student with an emotional disability. (Testimony: Taylor)
13. The student’s history is positive for family violence, family members who are diagnosed with bi-polar disorder and depression, and drug and alcohol abuse. (Testimony: Parent, Long)
14. The student has actively participated in a court-ordered Drug Court Treatment Program since March 2001. Her case manager observes positive changes in behavior and affect. Periodic, random screening is a requirement for continued participation in the program. Results have remained negative for all substances tested since February 2001. Successful participation has resulted in the student moving from phase one to phase two in the program. (Testimony: Cooper)
15. The student participates in individual and family counseling sessions as part of her treatment program. She has seen her therapist, Mr. Robert Long, weekly since March. He supports Dr. Taylor’s diagnosis of Bi-polar Disorder, and thinks she suffers from Conduct Disorder and Substance Abuse as well. The focus of therapy has been mental health issues, family history stressors, and substance abuse issues. Mr. Long is of the opinion that the student began and continued to use substances in an attempt to “self-medicate”. He has found her to have unsatisfactory interpersonal relationships, extreme behaviors under

- normal circumstances and long term dysthymia. He has no doubt that she meets the criteria as a student with an emotional disability. (Testimony: Long)
16. The student's mother has become increasingly concerned about the student over the past 18 months. Based on her reports the student has been unhappy for a long time, with talk of suicide on more than one occasion. The student has had increasing behaviors that are extreme and oppositional. On one occasion in January 2001 she took the student to the hospital because her behavior had become so out of control. Over the past 12 months she has requested assistance for the student from the courts, the school, the local mental health center, and the local hospital. She has observed positive responses to the treatment regimen with Lithium. (Testimony: Parent)
 17. The PET convened to consider the student's eligibility for special education on June 22. In addition to the parent and the student's 8th grade math teacher, the PET members were a psychological services examiner who did not know the student and had never evaluated her, a special education teacher who did not know the student, and the director of special education who had never met the student. (Exhibit: 1-3; Testimony: Rich)
 18. The school proceeded to schedule a hearing before the school board to consider the student's expulsion from school for the March 26 incident. The hearing has been rescheduled twice, but has not yet occurred. (Ex. 26, 27, 37-41; Testimony Rich, Parent)

Conclusions

Is the student eligible as a student with a disability under the category of emotional disability?

This hearing offered an unusual set of circumstances regarding a not-yet-identified 8th grade student who has exhibited increasing school failure, drug abuse, juvenile detention and finally an assault on a teacher that resulted in her suspension from school. During the current school year her mother met with the school's guidance counselors to inquire about possible assistance from the school. It is unclear when the parent actually requested a referral to special education, but, without doubt, notes from the meeting with Mr. Spiegel on February 7, 2001 show that she inquired about PET involvement at that meeting. It was not until the end of March, however, that a formal referral was made. Before the referral process could be completed, the student was suspended for assault and not allowed back into school for the remainder of the school year.

An evaluation was initially scheduled for early April. When the student failed to attend the testing session, the evaluation was rescheduled for April 25 and May 9. The PET met on June 22 to consider the issue of the student's eligibility as a student with a disability under the definition of *emotional disability*.

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:

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors;*
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;*
- C. Inappropriate types of behaviors or feelings under normal circumstances;*
- D. A general pervasive mood of unhappiness or depression;*
- E. 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.

[Maine Special Education Regulations, §3.5, Also 34 CFR § 300.7(c)(4)]

The PET did not come to consensus regarding the eligibility question. School personnel contend that the student is not a student with a disability. The district views the student as a student who is socially maladjusted, but without an emotional disability, and thus expressly exempt from a determination of eligibility as a student with an emotional disability. They also assert that the student actively abuses illegal substances, which contributes to inappropriate behaviors. To support this decision the school points to conclusions of evaluations conducted by Dr. Kauffman and Dr. Louscher and teacher reports.

The parent disagrees with this conclusion. Parent witnesses Mr. Long and Dr. Taylor, and to some extent Ms. Cooper, using their personal knowledge of the student together with the parent's observations, lead them to assert that she meets one or more of the criteria in the definition. While they also agree that the student is socially maladjusted, they believe that the student has an emotional disability as described in regulations. Both parties build strong arguments for their positions, but a preponderance of the evidence supports the parent's position that the student meets the criteria given in regulations and can thus be considered eligible for special education services as a student with a disability.

The student's treating psychiatrist, Dr. Taylor, became involved with the student when the student was referred to the Kennebec Valley Mental Health Clinic by her mother. Dr. Taylor began treating the student for Bi-polar Disorder-Early Onset in early March.

While she admits this is a “working diagnosis” at this stage, Dr. Taylor feels reasonably comfortable with the diagnosis, and until there is sufficient evidence to rule it out, she considers it a condition that affects the student’s educational performance. She points to the quick deterioration of the student’s behaviors, the time of onset and her responsiveness to a prescription regime with first Tegretol, and presently Lithium, as supporting her conclusion. The student’s therapist, Mr. Long, has met with the student weekly since March 2001. In his opinion the student meets the criteria as a student with an emotional disability. He supports Dr. Taylor’s working diagnosis of Bi-Polar Disorder and believes the student also carries a diagnosis of Conduct Disorder both of which he feels adversely affect the student’s educational performance.

There was no discussion or disagreement that the student exhibited *an inability to learn or a tendency to develop physical symptoms or fears*. Witnesses for both the school and the parent focus their testimony on item B. *an inability to build or maintain satisfactory interpersonal relationships*, C. *inappropriate types of behaviors or feelings under normal circumstances*, and D. *a general pervasive mood of unhappiness or depression*.

Beyond her immediate family, Dr. Long does not see evidence that the student has the ability to maintain satisfactory interpersonal relationships with peers. He rejects the school’s notion that she just makes poor choices in friends, but instead describes the student’s peers as people she takes on that need help, not friends. The parent testified that the student’s friends have a high turnover rate with no long-term friendships. Even Mr. Kauffman, who testified that the student was not a ‘student with a disability’ reports in his evaluation that [the student] “seems to have considerable difficulty interacting with her peers...” Two of the four teachers who completed behavior-rating scales for his evaluation indicated that the student had moderate to severe problems with social relationships. Dr. Louscher’s report from earlier in the year states that “[the student] reported that her ‘best friend’ is Max, her German Shepard dog... She stated that she does not like any of her teachers because she doesn’t get along with them”. Taken individually none of these observations is remarkable, but as a pattern, the student exhibits problems with building and maintaining *satisfactory* relationships.

The school embraces Mr. Kauffman’s conclusion that the “Rorschach provided no indication of a depressive disorder...no indications of thought disorder, psychotic functioning”, and therefore maintains that since the student does not exhibit bizarre, or psychotic behaviors she is ineligible for consideration under item C. It is true that the student’s behaviors have never been described by anyone as “bizarre” or “psychotic”, but regulations do not require such a narrow view of the student’s behaviors before making a positive finding of eligibility. *Muller v. Comm. On Spec. Educ.. Of East Islip Union Free Sch. Dis.*, 28 IDELR 188, 192 (2nd Cir 1988) Rather, regulations use language that directs schools to view the student within the context of his or her environment. Does the student exhibit inappropriate behaviors under normal circumstances?

Mr. Long was clear that the student often over-reacts in normal circumstances and can easily go to extremes. She seemingly hasn't the ability to discriminate between private and public environments as evidenced by her intensely oppositional behaviors and impulsively voicing whatever comes into her mind, without any consideration of the consequence. He holds the opinion that her reaction around the events that led to her suspension showed an impaired understanding of the consequences of her behaviors, which he thinks is very relevant to an emotional disability. Dr. Taylor supported the opinion that the student exhibits "inappropriate types of behaviors or feelings under normal circumstances" when she reacts in an extreme way with little provocation. She describes the student as exhibiting the Dysphoria, irritability, impulsivity, inability to control aggressions and other physical symptoms of someone exhibiting Bi-Polar Disorder.

The events of the March 26 assault as described by the parent and school personnel present a picture of extremely inappropriate behavior under normal circumstances. Her behavior escalated and quickly became out of control for reasons that seem unjustified. When she began swearing at the teacher, he told her to go to the office, and then started to escort her there when she refused to leave his classroom. The student, in her words, "flipped out". This slightly built 5' 2" girl was able to overpower and injure a 6' 2" athletically-built ex-Marine who had to "pick her up and carry her the last 20 to 30 feet". The principal testified that she had never seen another event like this in her years as an educator. "I was also very upset when I went home that night having witnessed this thirteen year old girl being handcuffed and yet she showed no emotion," she writes in her prepared statement for the Superintendent.

The student's mother is perhaps the most consistent observer of the student's behaviors. She described a series of inappropriate behaviors which have been exhibited by the student over the past 18 months such as running away, cutting herself, getting in trouble with the law, extreme irritability, impulsivity and anger. In early March the student called her from school saying, "Something is very wrong with me", which led to the parent's seeking the assistance of Dr. Taylor. After a short course of Tegretol the parent saw definite improvements in the student's mood, impulsivity and irritability. When the student stopped taking the Tegretol because of adverse reaction, she saw the behaviors re-emerge. She described the extreme reaction the student exhibited as she "flipped out" when the student's brother tried to restrain her from running away. She sees this event as similar to the student's behavior the day she was suspended from school.

Even Mr. Kauffman's descriptions of the student's observed behaviors and responses during testing would seem to support that the student demonstrates inappropriate behaviors under normal circumstances: "[the student's] interactions with the examiner were verbal with statements that ranged from the assertive to the aggressively confrontational"; "when discussing her assault against the school staff-member, [the student] expressed absolutely no remorse"; "she insisted that the sole reason for her poor performance at school was her failure to do schoolwork because she found it to be boring"; "even after experiencing the considerable consequences that have thus

far resulted from her actions, she was unwilling to conclude that she had acted badly”.

While no witness described the student as meeting the criteria for clinical Depression, parent witnesses were convincing that the student has exhibited an invasive mood of hopelessness and sadness for some length of time. Mr. Long perceives her as having low self-esteem with an overlying mood of unhappiness. He declares that she has a history of Dysthymia. Therapy discussions with him revealed long-term feelings of hopelessness around her life. She doesn't think that her life will ever get any better. The parent testified that the student has been unhappy and depressed for a long period of time and close to suicide on more than one occasion. Dr. Louscher reported that “[the student's] responses on the AMDI met diagnostic criterion on the Dysthymia, [and] Suicidal Ideation...Scales. Even Dr, Kauffman reported that “[the student] wonders about the purpose of life and feels little hope for the future”, and reasoned from her responses on the Rorschach Inkblot Technique that the student has limited self-esteem and “she feels quite incapable of caring for herself... [S]he is sometimes quite overwhelmed by her emotions and her difficulty coping with those emotions” and “employs fantasy as a coping mechanism”. As individual statements or concerns, these may not meet the criteria as a *pervasive mood of unhappiness* but taken as a whole the give a picture of a student who is struggling with her sense of well-being.

Whatever the position on the student's eligibility for special education, there is no disagreement that the student has exhibited problems over a *long period of time and to a marked degree that adversely affects the student's educational performance*. The student is described as having done well in school until late 6th grade, when work completion and conduct began to deteriorate. This pattern continued into 7th grade when she began exhibiting outrageous behaviors both in and out of school and earning D's and F's in her school work. These behaviors reached a peak in 8th grade when the student was put out of school for assault and failed to pass any subject. By any standard the there has been an adverse affect on the student's educational performance. *Johnson v. Metro Davidson County Sch. System*, 33 IDELR 59 (M.D. Tenn. Aug. 8, 2000)

It is the school's position that the student does not qualify as a student with an emotional disability because she is primarily *socially maladjusted*. They argue that her behaviors are driven by, and are a direct consequence of, her illegal drug and alcohol abuse. There was no dispute that the student is socially maladjusted. But, Dr. Taylor, Mr. Long and Ms. Cooper all testified that the student also has an emotional disability. Dr. Long testified that he felt the student's substance abuse came about as a result of emerging mental health issues and was an attempt to self-medicate. Dr. Louscher wrote in his report that the student's “emergent conduct disorder appears to be a reaction to severe and prolonged stress in her home, life exacerbated by her substance abuse”, not because of it. As to her present abuse of illegal substances, parent witnesses testified that random testing as part of the Drug Court, collateral reports from the parent, “check-ins” by the case manager, and observations and

discussions in therapy support her claim of abstinence since sometime in March 2001.

School personnel contend that the student's emotional status and demonstrated behaviors do not fit the criteria for her to be identified under Section 3.5 of the Regulations. Whether school personnel are in a better position to judge the severity of a student's behaviors than outside service providers is perhaps an open debate. However the PET cannot ignore valuable and reliable information in its deliberation. The PET made its decision on June 22, almost three months after the student left school, based on the conclusions of one evaluator. Of the five participants at the PET meeting, outside of the student's mother, only one other person had any personal knowledge of the student, and none had seen her since April 23. Neither the student's therapist, psychiatrist nor case manager attended the PET and their opinions and conclusions were not consulted. Each of them has seen the student multiple times in individual and group situations. They had valuable information to add to the discussion.

This student does not present a clear-cut picture of a student with an emotional disability, but there is sufficient evidence to conclude that she meets the criteria in the definition. Determination of eligibility is not an exact science. The definition in the regulations is a somewhat amorphous one, perhaps for such reasons as this. It is a guide to include students who may be in need of assistance, not a template to exclude them. If we are to err in our efforts to decide who is in need of special education, let us err on the side of the student.

Did the school commit procedural violations in the actions surrounding the March 26 event?

The event that led to the student's suspension occurred on March 26, 2001. Initially, the suspension was to be for 10 school days, but in a memo dated April 2, it is clear the Superintendent was moving forward with an expulsion hearing. Subsequently, the Director of Special Education, Ms Rich, informed the Superintendent that the student was afforded protections under the Individuals with Disabilities Education Act (IDEA) as a student which the district had previous knowledge might be a student with a disability.

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency...may assert any of the protections provided for in this part if the LEA had knowledge...that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. An LEA must be deemed to have knowledge that a child is a child with a disability if...the parent of the child has requested an evaluation of the

child...

[34 CFR §300.527]

There is no dispute. The district had knowledge that the student had, and was asserting, the protections afforded her under section 300.527. While the actual referral was not processed until March 29, three days after the incident that caused the suspension, the referral and evaluation had been requested at least as early as February. It is not clear why the school did not provide these protections provided the student by IDEA.

The student was suspended from school for more than 10 school days, thereby triggering regulations governing the change of placement for disciplinary removal of a child with a disability. The Parent was then notified that the student would not be allowed to return to school and that an expulsion hearing was being scheduled. This action by the school constituted a change of placement without notice and without benefit of a determination of relationship between the student's behavior and a suspected disability.

[A] change of placement occurs if the removal is for more than 10 consecutive school days...

[MRSA, §14.1]

If an action is contemplated...involving a removal that constitutes a change of placement under § 14.1 for a student with a disability who has engaged in other behavior that violated any rule of code of conduct of the SAU that applies to all students, not later than the date on which the decision to take that action is made, the parents must be notified of that decision and provided the procedural safeguards notice described in § 12.11; and immediately, if possible but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the student's disability and the behavior subject to the disciplinary action.

[Id. § 14.5]

The parent received a letter from the Superintendent dated April 6 stating his removal of the student until "I have made a determination about whether or not to proceed with expulsion hearings against her". The PET did not meet until April 23 to discuss a change of placement as defined in §14.1, and at no time was a review conducted of the "relationship between the student's disability and the behavior subject to the disciplinary action". Instead the PET at that meeting ordered an evaluation to test the student's "achievement, ability and danger factor".

It is true that the whole process was hampered by the student's failure to appear for the scheduled evaluation on April 9, thus delaying even further the PET's determination of

eligibility. And, it is equally true that without a determination of disability any manifestation determination would have been inconclusive. However, the school had an obligation to at least convene the PET within 10 days and review the information available to the members at that time. Failing to convene such a meeting then, or subsequently, was a violation of procedure.

Letters from the Superintendent and testimony of Ms. Rich make it clear that the school would not allow the student to return to school until a “danger assessment” had been completed. Neither Regulations, nor the courts give schools the right to unilaterally exclude students from the educational setting, and especially not based on a “danger assessment”. Regulations direct school personnel to conduct manifestation reviews to determine if a student’s behavior was, or was not, a manifestation of his disability. If it is determined that the behavior was *not* a manifestation of the student’s disability, the district may employ the relevant disciplinary procedures applicable to students without disabilities. Only if a student is involved with weapons or drugs at school does the district have the authority to remove the student to an interim educational placement. Beyond that,

A hearing officer may order a change in the placement of a student...to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing, determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

[Id. §14.4]

The removal of the student from the school for the balance of the school year without parent approval or benefit of an expedited hearing to remove her to an interim alternative educational setting, was not only a violation of procedure, but a violation of the student’s right to be afforded the protections due her as a student “yet to be identified”.

We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to “self-help” and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts. [Emphasis in original.]

Honig v. Doe, 108 S. Ct. 592, 609 (1988)

If the student is a student with an emotional disability, was the behavior of the

March 26, 2001 incident related to her disability?

The parties asked the hearing officer to address the manifestation issue if it is determined that the student qualifies as a student with an emotional disability in order to save the parties the need for a separate meeting and possible second hearing to resolve the issue. Given the determination by the hearing officer that the student qualifies as a student with an emotional disability, and the discussion of the conclusions leading to that decision, the hearing officer determines that the student's conduct on March 26 was a manifestation of her disability.

On March 26, 2001, the student assaulted a teacher who was attempting to take her to the office for inappropriate behavior exhibited in the hallway as she was leaving his classroom. The situation quickly escalated and ended with the student "so out of control I had to pick her up and carry her the last 20 to 30 feet". In the process the student kned the teacher in the groin. The student was escorted from school in handcuffs by the police. The teacher filed charges against the student. At this stage the student had been referred to the Pupil Evaluation Team for consideration as "a student with a disability", but she had not yet been identified as eligible. Students in this status in the referral process are considered a student "not yet eligible", but a student for whom the district "had knowledge". As discussed above, students in this situation may "assert any of the protections" afforded a student with a disability.

Regulations direct schools to *immediately, if possible, but in no case later than 10 school days after the date on which the decision [to remove the student from school] is made* to conduct a review of the relationship between the student's disability and the behavior subject to the disciplinary action.

*In carrying out a review...the Pupil Evaluation Team and other qualified personnel...may determine that the behavior of the student was **not** a manifestation of the student's disability **only** if the Pupil Evaluation Team and other qualified personnel first consider...all relevant information including evaluation and diagnostic results...the results or other relevant information supplied by the parents of the student; observations of the student; and the student's IEP and placement; then determine that in relationship to the behavior subject to disciplinary action, the student's IEP and placement were appropriate...the disability did not impair the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action; and the student's disability did not impair the ability of the student to control the behavior subject to disciplinary action. [Emphasis added.]*

[MSER, §14.6]

The school may determine the behavior (that was the subject to disciplinary action) **not** a manifestation of the student's disability **only** if they have considered evaluation and diagnostic results, including information supplied by the parents; observations of

the student; and the IEP and placement before they move to the next phase. They must then determine that, in relationship to the behavior, the IEP and placement was appropriate; the student's disability did not impair her ability to understand the impact and consequences of the behavior; and her disability did not impair her ability to control the behavior.

The school maintains that there was no basis upon which to conduct the review described in Section 14.6. They reasoned that the student had no current educational evaluation, no disability determination, and no IEP or placement to consider in making a determination whether the student's "behavior subject to disciplinary action" was a manifestation of the student's disability.

I have some sympathy for the dilemma facing the school. Clearly there was no IEP and placement to consider for this student. Certainly, there is more information available about the student now than was available in April 2001 when the manifestation review should have been conducted, or June when the eligibility determination PET was held. But, that does not discharge the obligation they held for the student as a "student not yet eligible".

The district owed this student no less consideration to assemble whatever information was available at the time, and to, at least, attempt to determine a relationship between the event of March 26 and the student's reasons for referral. The school did not convene any PET until April 23, and there was no consideration at that meeting of whether the event of March 26 was a manifestation of the student's disability. Both Dr. Taylor and Mr. Long had begun to work with the student. Had they been asked to consider the question of "manifestation" they might have offered comments such as those made at the hearing. "She has a tendency to display extreme behavioral reactions to seemingly minor events." (Long and Taylor) "As her stress curve goes up, her understanding about the consequences goes down." (Long) "Her condition makes her prone to lack of control" (Taylor) "She has an emotional blackout, loses control and impulsively strikes out. Touching her is a trigger. She has an impaired ability to control her behavior within the event." (Long) "She has an impaired understanding of the appropriateness of her reaction." (Long) "Intellectually she has the ability to understand, but her condition would impair her ability to control aggression." (Taylor)

The student, of course, is still without an IEP or placement, and educational evaluations are incomplete. However, the behaviors described in evidence that led the hearing officer to conclude the student's disability eligibility, are the very behaviors exhibited during the event. The student was wrongfully excluded from her educational environment.

Order

1. The PET shall convene within 15 days of the receipt of this decision for the purpose of developing an interim IEP for the student until such time as achievement testing shall be completed. Dr. Long, Ms. Cooper, Dr. Taylor shall be invited to attend. If they are unable to attend, their input shall be solicited, in writing, and shall be shared with other PET members.
2. The school shall schedule further educational evaluations, including educational achievement testing, as deemed appropriate by the PET. The school shall employ the assistance of the Court, the student's therapist or psychiatrist, as appropriate, to compel her attendance at scheduled testing dates.
3. The PET shall consider, and provide as necessary, compensatory services required by the student to assist her to complete, and gain credit for, her 8th grade curriculum.
4. Upon completion of any additional assessments ordered by the PET, but in no case later than October 31, 2001 the PET shall finalize the student's IEP. The IEP shall include a behavior intervention plan as deemed necessary by the PET.
5. The school shall provide to the Department of Education confirmation of compliance of this order by providing the following:
 - o By September 30, 2001, copy of the PET minutes and the interim IEP.
 - o By October 31, 2001 copy of any evaluation reports regarding the student ordered for PET review.
 - o By September 30, 2001 a description of the plan developed to provide the student with assistance to complete the 8th grade curriculum.
 - o By November 15, 2001, a copy of the IEP developed for the student for the 2001-2002 school year.

Carol B. Lenna
Hearing Officer

August 24, 2001