

State of Maine  
Special Education Due Process Hearing Decision

**Parent v. Sabattus School Department, Case No. 02.130**

REPRESENTING THE SCHOOL: Amy Tchao, Esq., James Schwellenbach, Esq.  
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REPRESENTING THE PARENT: Verne E. Paradie, Jr, Esq.  
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HEARING OFFICER: Carol B. Lenna

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

The case involves Student, whose date of birth is XX/XX/XX. He resides with his mother in Sabattus Maine. Student currently attends Oak Hill High School where he is in ninth grade. He is eligible for special education services as a student with multiple disabilities due to diagnoses of a learning disability and an emotional disability.

This hearing is brought by Student's mother who argues that he is currently being denied a free appropriate public education. She asserts that Student's needs cannot be met in the Oak Hill High School and that he requires placement in a residential treatment facility to address his aggressive, violent and destructive behaviors.

The hearing was originally requested as an expedited hearing but changed to a regular hearing by Parent's attorney. Extensions to the original dates set for the pre-hearing conference and the hearing were requested by both the school and the parents and granted by the hearing officer. The parties met in a pre-hearing conference on May 8, 2002 to exchange documents and witness lists. Documents numbered Page 3 through Page 431<sup>1</sup> were entered into the record by the school, and P1-P19 by the parent. The hearing convened on May 14 and May 22, 2002. Seven witnesses gave testimony. The hearing record remained open until May 30, 2002 for the submission of closing arguments.

Following is the decision in this matter.

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<sup>1</sup> Pages 1 and 2 were objected to by the parent. She argued that the documents contained unsubstantiated remarks about her that were irrelevant to the issues at hearing. The hearing officer agreed and removed the documents.

## **I. Preliminary Statement**

The student is a xx-year-old student who presently attends 9<sup>th</sup> grade at Oak Hill High School. He is eligible for special education services as a student with multiple disabilities due to diagnoses of a specific learning disability and an emotional disability.

The hearing was brought by the student's mother. It was her position that the student's needs cannot be met at the Oak Hill High School because of his history of aggressive, violent and destructive behavior. She asserted that he is a danger to his peers and the adults in the public school setting. She argued that he requires placement in a day treatment or residential treatment facility for his educational and behavioral needs to be met, because he requires therapeutic intervention in a secure, tightly regulated institution that can provide more intense supervision and structure that [sic] can be made available in a public school.

The school argued that Oak Hill High School can meet the student's special education and related needs based on the academic gains he made during his 9<sup>th</sup> grade year. They reported that the student has not exhibited dangerous and unsafe behaviors in the school setting. In addition, the school argued that the student's past placements in residential facilities have been made for other than educational reasons. It was their contention that, except for relatively minor disciplinary problems, the student's [sic] has met with success in the program described in his 2001-2002 IEP.

## **II. Issues**

1. Can the student receive a free appropriate public education at the Oak Hill High School?
2. If not, does the student require placement in a more restrictive setting for educational reasons?

## **III. Findings of Fact**

1. The student moved into the district during the student's fifth grade school year where he entered Sabattus Elementary School. His prior school found him eligible for special education services as a student with a speech and language disability. That disability category continued until he was found to meet criteria as a student with a specific learning disability in May 2000. Later, while at Oak Hill High School, the PET changed his special education designation to multiple disabilities to incorporate specific learning disability and emotional disability. (Exhibits: 27, 219, 225)

2. The student attended Sabattus Elementary School from fifth through seventh grade. The PET met on May 23, 2000, during the student's 7<sup>th</sup> grade year, to review the student's program and recent evaluations and to write a new IEP. While discipline referrals for rude behavior, harassing comments to a peer, and inappropriate language increased in 7<sup>th</sup> grade, teachers noted that the student's behavior was still within normal limits. He was suspended for 3 days for threatening a student. On April 27, 2000, he was hospitalized for 15 days for reported self-injurious and homicidal ideation, unrelated to the school suspension. He returned to school after the hospitalization. The re-entry PET on May 10 notes that "no significant behavioral concerns have been seen at school (sole issue has concerned interpersonal issues between [the student] and one peer..." He returned to school and resumed his previous IEP. (Exhibits: 242, 243-247, 248-253, 257-263, 287-291)
3. In July 2000, after the student's 7<sup>th</sup> grade school year, the school obtained a psychological evaluation of the student. This evaluation was completed by Dr. George Shekart, a local licensed psychologist who has known the student since January 1994 when he was referred for individual therapy and support. He has evaluated the student on one other occasion. His evaluation included an extensive review of the student's educational and social history, as well as his conclusions from standardized tests administered as part of the evaluation. He concluded that the student is "a young man with a significant language-based learning disability" whose "primary defensive system and his ability to respond to demanding social circumstances is more primitive, simplistic and basic". He disagreed with the diagnostic profile of "Conduct Disordered" as well as "attentional concerns". "[T]here may be a Mood Disorder present." His recommendations included "educational supports for his Learning Disability; clinical supports for mood-related issues...; and the development of supportive resources within the family..." (Exhibits: 223-235)
4. The student was placed at KidsPeace in Ellsworth, Maine on July 31, 2000 for a 30-day diagnostic placement. The placement was made by the Department of Behavioral and Developmental Services (BDS) in conjunction with the court and the student's parent. The presenting problems and circumstances surrounding admission are listed as "history of physical aggression (toward mother and younger brother), opposition, defiance, manipulation, stealing (from mother), verbal threatening, property destruction, fascination with weapons and violence, angry outbursts, suicidal and homicidal ideations, and allegations of abuse (not substantiated)". There were two pending charges of criminal threatening toward his mother and peers. Evaluations conducted included an educational evaluation, psychological evaluation, biopsychosocial [sic] assessment, psychiatric assessments and "milieu" observations. Evaluators report reviewing some school records, however, school staff were not listed as having provided any information in the assessments. The KidsPeace evaluation was completed on September 12, 2000. (Exhibits: 157-218, 219; Testimony: Howe, Parent)

5. The PET met on August 23, 2000, to review the results of the psychological evaluation by Dr. Sheckart. Based on this evaluation and reports from school staff, no changes in the IEP were recommended. The PET determined to reconvene after the conclusion of the KidsPeace diagnostic placement to make any changes to the student's IEP. The district was prepared to have the student return to the public school. (Exhibit: 219-222)
6. The Sabattus PET met on October 24 to review the KidsPeace evaluation in relation to the student's IEP. There was no consensus on the issue of severity and pervasiveness of the student's behaviors, and no consensus on the student's eligibility as a student with an emotional disability. The school did not agree that the student required placement in a residential treatment facility for educational reasons. At the conclusion of the diagnostic period, the student became a state agency client and was no longer a student of the district. On October 10, 2000, he was placed at KidsPeace in a long-term placement, funded by the Department of Education and BDS (previously the Department of Mental Health, Mental Retardation and Substance Abuse Services). His placement at KidsPeace was very tumultuous. He was discharged on April 21, 2001 because staff felt he was no longer appropriate for the program. (Exhibits: P 17; 110-120; 127-130; 131-132, 137, 140-145; Testimony: Howe, Burrow)
7. On May 3, 2001, the PET met to consider plans for the student since his discharge from KidsPeace. The student's mental health Case Manager, Joshua Howe, informed the team that other placement options had been explored but that the student had been rejected by all of them. At the time, the school had received no discharge information from KidsPeace or recent evaluations from his stay there. The team determined to set up individual tutoring for the short term and to complete achievement testing. (Exhibits: 98-99)
8. During the summer of 2001, the student was hospitalized as a result of an in-home crisis when he threatened his mother. The local BDS crisis unit recommended and facilitated an inpatient stay at the Brattleboro Retreat, a psychiatric facility in Vermont. The student remained there until August 8, 2001 when he checked himself out against medical advice. The school was not involved in this placement. (Exhibit: P 1; Testimony: Howe, Burrow)
9. The PET met on August 30, 2001 to develop a transition plan for the student to enter Oak Hill High School. The team developed a specific plan for the student's attendance at Oak Hill. Concurrently, the student's mental health Case Manager pursued treatment facilities outside the PET process. (Exhibit: 67-69; Testimony: Howe, Burrow)

10. The PET met on October 11, 2001 to review the student's first few weeks of school. Teachers reported that generally he was doing well in his classes. Few issues with behavior or inappropriateness had been seen. The IEP was completed continuing his placement in the public school. The team concluded that he should remain in the resource room for English, math and social studies. He was to return to a regular homeroom and continue in regular technical courses and art. Placement in the Intensive Services Program for study and social management class was also continued. (Exhibit: 50-58; Testimony: Fisher, Jacobs, Burrow)
11. On September 19, 2001, the Special Education Director asked the student's teachers to maintain a record of the student's inappropriate behaviors using a "0 to 5" rating scale with "0" being "none", and "5" being "continuous". During the two weeks between September 26 and October 15, only October 15 is notable for target behaviors. The student was suspended for five days on October 15, 2001 for threatening another student, being disrespectful to teachers and disrupting a class. The PET met on October 16 in response to the suspension. The PET developed a behavior plan and reviewed it with the student. The student returned to school after the five days. (Exhibits: 35-37, 45-48, 59-60, 62-66, 323A; Testimony: Burrow, Fisher)
12. The student passed all academic subjects during the first two grading terms of the 2001-2002 school year. The Mid-term Progress Report for the spring term shows that he is currently passing all subjects except for physical education, where he has a current grade of 69. (Exhibits: 3, 4)
13. Incident notes of the student's behavior reported by his Case Manager/Special Education Teacher between February 5 and May 8, 2002 showed that on March 26 he was suspended for three days. On April 2 he was suspended for one day for "vulgar language and dangerous acts" when he tried to take scissors from the teacher and threatened to tip over a tall bookcase. No other serious behavioral event was recorded during that period except for February 5 when his mother was called to come to school at the end of the day. (Exhibits: 5-8, 22, 323, 323A; Testimony: Jacobs, Doyle)
14. The student's resource room teacher conducted behavioral observations of the student on a class trip to Portland on April 26, 2002 and a science class on May 6, 2002. In both observations, the student was appropriate to the setting with no disruptive behavior noted. (Exhibit: 8A, Testimony: Jacobs)
15. In a summary of her contact with the student during 9<sup>th</sup> grade, the school social worker indicated that she was unable to work successfully on anger management with the student during scheduled sessions. She described his behavior as "quite rude" and "verbally aggressive" on occasion, but no physically aggressive or dangerous behaviors were noted. (Exhibit: 10)

16. The student's Health teacher during winter term of the 2001-2002 school year reported that the student was not particularly engaged in her class. She noted that he isolated himself and did not participate in group activities, but that he was not disruptive. No behavioral incidents were noted. (Exhibit: 11-12)
17. The PET met on March 28, 2002 after the student was suspended for three days following an incident in English class that resulted in the student trying to poke the teacher with a pencil and calling her names. Teachers noted there had been no problems early in the day. After a discussion of the student's medication regimen and triggers to behavior events at school, the PET determined to develop a crisis plan for the student. (Exhibits: 24-27, 29, 30; Testimony: Jacobs, Fisher)
18. Recent evaluations of the student's cognitive ability and educational achievement were completed in March 2000, September 2000, April 2001, and May 2001. Scores on both ability and achievement scales have varied, but evaluators generally agree that the student's "actual abilities seem to cluster near 80". The most recent achievement scores were obtained from the Wechsler Individual Achievement Test (WIAT) administered by the school. Standard scores obtained were: Reading Composite 60, Math Composite 68, Writing Composite 59. All of these scores fell in the "Well Below Average" range. These are considered to be an accurate representation of the student's current achievement levels. The evaluator recommended: that the student have access to assistive technology to strengthen reading comprehension, such as the Kurzweil 3000; that he have use of a calculator for math operation problems; and that he use a computer with spell-check for written work. (Exhibits: 85-87, 121-125, 183-193, 283-285, 287-291)
19. The Assistant Principal describes the student as generally quiet within the school setting with disciplinary events that required her intervention to be "not in the top 10%" of the school population. The school's behavior strategist, who is the teacher in the Intensive Services Program, found the student's behaviors to be "under instructional control" for most of the school year. She finds the student to exhibit intense episodes, but the frequency is not on the high end as compared to other students in the program. She finds the student appropriately placed in the high school program. (Testimony: Doyle, Fisher)

#### IV. Conclusions

**Can the student receive a free appropriate public education at the Oak Hill High School? If not, does the student require placement in a more restrictive setting for educational reasons?**

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a “free appropriate public education” which is described in the student’s “individualized education program” (IEP). 20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)

To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*20 USC § 1412 (a)(5)(A)*

The parent did not claim that the goals and objectives of the IEP were inappropriate. Rather, through her attorney she asserts that the student cannot be educated in the public school because of his significant emotional and academic needs. She maintains that the student’s threatening and aggressive behavior makes him a danger to the school staff and the other students. She poses as an alternative that the school place the student in either a day treatment facility or a residential treatment facility arguing that only in such a setting can his educational needs be met. It is difficult to draw this conclusion from the evidence presented.

The school does not minimize the serious concerns raised by the parent regarding the student’s behaviors. Likewise, the school does not dispute that these behaviors occur. But, they make a convincing argument that, based on prior history, the student does not pose a danger to himself or others within the school setting. His aggressive behaviors in public school have been episodic and have only three times escalated to the degree that the student was suspended<sup>2</sup>. The suspensions were meted out based on the policy defined in the district’s code of conduct, as it applies

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<sup>2</sup> The letter accompanying the parent’s closing argument in this hearing stated that the student had been suspended that day, May 28, 2002, for five days (for a total for of 14 days for the school year) for a physical altercation with another student. No further information was given. The hearing officer was not asked to reopen the hearing to consider this matter. There was no allegation that the school failed to follow appropriate steps in conjunction with this suspension.

to all students. On three other occasions the school called the mother to come get him early. On these occasions the school complied with the student's behavior plan. These represent the only events when the student's behavior has been unmanageable within the school setting.

The parent relies on evaluations from St. Mary's Hospital, KidsPeace, Brattleboro Retreat, and a neuropsychological evaluation conducted by Anne Hess, Ph.D. while the student resided at KidsPeace to support her argument that the student required placement outside the public high school. None of these evaluators solicited any input or opinions from public school teachers in the conduct of these evaluations or the development of their conclusions.

Dr. Hess had "no current information from his teachers" when she conducted her evaluation. Her recommendations and conclusions begin with the statement that the student's "behavior has been virtually impossible to control in the home, and has been difficult even in the KidsPeace residence. His behaviors have escalated there, and he *may* need to be in a more secure, tightly regulated institution that can provide more intense supervision and structure. In such a facility his medication regime can be adjusted to get more effective control". (Emphasis added.) It is not until the second paragraph that she addressed his educational needs. She notes that he "is far behind where he should be in acquiring academic skills, partly due to limited intellectual ability, attention problems, and inconsistent attendance. He needs intense, one-on-one instruction in all areas... [He] needs to receive his education in a small class where distractions can be minimized... His assignments should be short... His work needs to be greatly simplified...". Dr. Hess draws no correlation either in her recommendations or in the body of her report that the student's need for a "tightly regulated institution" is required to meet his educational needs. In fact, the educational recommendations she makes describe much of what currently occurs in his program at Oak Hill High School.

The St. Mary's evaluation was conducted while the student was an inpatient on the hospital's adolescent unit having been admitted for concerns around self-injurious threats and threats to others (unspecified). This evaluation did not include any educational assessment and draws no conclusions about the student's educational needs except to say that "his level of cognitive ability in the verbal domain shows him to be dramatically delayed when comparing him to his age peers." The evaluator makes no educational recommendations.

The educational evaluation performed by KidsPeace is the most extensive look at the student's recent educational status. While the evaluation recommends that the student "would benefit from participation in a highly structured educational environment which addresses behavioral concerns, emotional needs, and academic needs within a small group setting", the second recommendation states there "should be close coordination between home and school". There is no recommendation that the student be placed in a day treatment or residential treatment facility for educational reasons. There are a number of excellent



educational and behavior management strategies recommended, but none of them is unique to a residential or day treatment facility. Again, many of these recommendations are incorporated into the student's current program at the high school.

The last evaluation referred to by the parent is the Discharge Summary from the student's stay at Brattleboro Retreat from late June to early August 2001. This document for the most part discusses the student's past history with hospitalizations, psychiatric findings and his medication history. There is no consideration of his educational status or needs. Discussion of a referral to the Spurwink<sup>3</sup> program made no mention of the student's educational needs, but rather their frustration of "the inability of [the Department of Human Services] to come up with an adequate disposition". The district had no involvement or input into the placement at Brattleboro.

In contrast, two psychological evaluations that were performed in 2000, one in March and one in July do solicit the input of the student's educational staff. The March 2000 evaluation was performed while the student was attending 7<sup>th</sup> grade at Sabattus Elementary School. As an addendum to her report, the evaluator notes that results from the Teachers Report Form, a behavior rating scale that assesses a child's emotionality and behavior at school, "are quite positive in that all three staff members have scored [the student's] behavior within a normal range in all areas".<sup>4</sup> The PET used this information to develop the 200-2001 IEP.

The second evaluation in 2000 was conducted by Dr. George Sheckart at the request of the parties in an earlier dispute. The purpose of this evaluation was to make recommendations on the student's current educational, emotional and behavioral status. Dr. Sheckart, who has had an evaluative and therapeutic relationship with the student, gave an extensive review of the student's background. He solicited current input from the student, his mother and the student's teachers, as well as administering intelligence and projective tests. The evaluator gave a thoughtful analysis of what he thought had been strengths and weaknesses in the student's life. He noted in his conclusions that the "features of the naturally occurring educational system worked well for [the student]". But, given other stressors in the student's life he went on to opine "he needs the structure of a regular and consistent routine, and that cannot be afforded in a more regular classroom setting". He did not recommend a day treatment facility, but did make it clear that he thought there needed to be "blended together" educational and clinical services. He made it clear that he did not recommend a residential facility.

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<sup>3</sup> The Brattleboro Retreat Discharge Summary states that the student was referred to KidsPeace. Given the timing and the Case Manager's memory of the events of this time, it is more likely staff meant the referral that was made to Spurwink. The student was not accepted because the family would not commit to the level of family therapy required by Spurwink.

<sup>4</sup> The evaluator also states in this addendum that two teachers noted that the student "often 'talks about killing self'. This, of course is of serious concern". Evidence shows that this information was shared with the student's parent and appropriate professionals at the time. Similar comments have not been observed during the current school year.

The parent asserts that the student has failed to make academic progress in the public school, stating that he continues to function well below 9<sup>th</sup> grade in all academic areas. There is no dispute that the student functions well below the 9<sup>th</sup> grade level. However, standardized tests have consistently shown the student to score in the Below Average range in Broad Cognitive Ability. Evaluators have concluded that he will likely have considerable difficulty completing academic work and that his cognitive profile predicts significant academic delays.

In its reasoning of what defines a “free appropriate public education” the Supreme Court found that

...a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction... Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.

*Board of Education v. Rowley*, 3 IDELR 553:656, 662 (1982)

The parent did not present compelling evidence that only in an out-of-district treatment facility can the student benefit from his education. In contrast, school staff were convincing in their descriptions of the student as a student with significant learning deficits who receives personalized instruction in a combination of self-contained and supported regular classes. His IEP sets goals to address his need for special education and behavior management. He receives individual instruction in math, science, English, reading and writing. A behavior plan has been incorporated into his IEP. School staff showed familiarity with the plan and demonstrated that they relied on it when behaviors warranted. The program offers a high degree of structure and routine while allowing the student access to a more normal adolescent experience. He has been able to successfully attend a regular technical education class and has successfully negotiated the mainstream lunch and break times with his high school peers. His teachers testify that he is making progress commensurate with his cognitive ability. There was no evidence offered to dispute that the student has failed to benefit from his education.

The student’s school program has thus far proven to provide him with educational success, while his residential treatment placement at KidsPeace did not<sup>5</sup>. The student should have the opportunity to remain within the public school unless and until he presents a clear danger to himself or others in that setting. His fundamental

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<sup>5</sup> While no one argued that the student should return to KidsPeace, it is noteworthy that the current school year has had less upheaval than his year at KidsPeace.

right to be educated with his non-disabled peers must be the driving force in decisions about his educational placement.

It follows from Rowley that the Act does not authorize residential care merely to enhance *an otherwise sufficient* day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress.

*Abrahamson v. Hershman*, 701, F.2d 223, 227 (1<sup>st</sup> Cir. 1983) (emphasis in original) See also *Oberti v. Clementon School District*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993) (IDEA includes a "strong congressional preference" for integrating children in regular classrooms.) *El Paso Independent Sch. Dist. V. Robert W.*, 898 F.Supp. 442, 451 (W.D.Tex. 1995) ("Residential placement is a viable alternative in some cases; but it is to be treated as a "last resort" when no other environment can provide educational benefits. There must be a balance between the child's educational benefit and the restriction of his liberty.")

The school in no way debated that the problems exhibited by this student are not serious, nor did they attempt to minimize the seriousness of his behaviors. They simply assert that, at this time, they are able to provide the student with an appropriate education within the public high school setting. They see him maintaining his ability to function within this setting and gaining educational benefit from the experience. Until such time as the student can no longer be educated in a public setting and requires placement in a more restrictive setting *for educational reasons*, the law requires no more of them.

The Court recognizes that Joshua's behavior, particularly outside the structure of his school programming, is often unpredictable and sometimes dangerous. This, by itself, is not enough to compel a residential placement under the IDEA, as long as the student is receiving an educational benefit from his placement.

*Ciresoli v. MSAD No. 22*, 901 F. Supp. 378, 386 (D. Me. 1995) [Internal citations omitted.] See also *Board of Education of Oak Park v. Illinois State Bd. Of Educ. And Kelly E.*, 29 IDELR 52 (E.D. Ill. 1998) (court found 24-hour placement was primarily for non-educational reasons including substance abuse, runaway behavior, defiance of home rules), *Rome I*, 32 IDELR at p. 11, *Rome II*, 32 IDELR 61 (D. Me. Mar. 8, 2000) ("Rome I") and 32 IDELR 33 (D. Me. Mar. 8, 2000) (" Rome II"), *aff'd*, 247 F.3d 29 (1st Cir. 2001) (Only when out-of-school behavior reaches such a point that the student becomes "uneducable" in school, even with a full panoply of special education supports, would a residential treatment be appropriate.) *Board of*

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*Education of Montgomery County v. Brett Y.*, 28 IEDLR 460 (4<sup>th</sup> Cir. 1998) (court concluded that the school need not fund a residential placement if it is required to address “medical, social, or emotional problems that are segregable from the learning process”.)

**V. Order**

**No instructions are ordered in conjunction with this decision.**

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Carol B. Lenna  
Hearing Officer