

Complaint Investigation Report
Parent v. SAD #9
Date: June 15, 2006

Complaint: #06.030C
Complaint Investigators: Susan Lockery & Sheila Mayberry
Date of Appointment: April 11, 2006

I. Identifying Information

Complainant: Mother
Respondent: Dr. Michael Cormier
Superintendent
11 School Lane
New Sharon, ME 04955
Special Education Director: Edward Ferreira
Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Maine Department of Education received this complaint on April 11, 2006. The complaint investigators were appointed on April 12, 2006. The complaint investigators received 81 pages of documents from the mother and 21 pages of documents from the school district. Interviews were conducted with the following people: Dr. Richard Rau, Clinical School Psychologist; Laura Seck, Principal of Meadowland Elementary School; Edward Ferreira, Special Education Director S.A.D.#9; Darlene Paine, Principal of the Academy Hill School; the Student's mother; Eric Rutberg, Clinical Counselor at PROTEA; and Kirsten Fisher, Principal of Mountain View Elementary School. The complaint investigators determined that a complaint investigation meeting was not necessary.

III. Preliminary Statement

The Student is xx years old and attends xx grade at Academy Hill School in Wilton, Maine. He receives special education services under the exceptionality of Specific Learning Disability. This complaint was filed by the Student's mother, alleging that the School Administrative District #9 ("District") violated the Maine Special Education Regulations ("MSER") failing to provide a Free Appropriate Public Education (FAPE) by not following the Student's Behavioral Intervention Plan as written in the Student's Individualized Education Program (IEP). (MSER § 1.3).

IV. Allegations

1. Failure to provide a FAPE by not following the Student's Behavioral Intervention Plan as written in the Student's IEP. MSER § 1.3

Ancillary Issue #1: Failure of the PET to review whether the Student is a student with a disability in all areas of suspected disabilities. MSER §§ 3, 8.3, 9.5

Ancillary Issue #2: Failure to develop an appropriate BIP. MSER § 10.3

V. Summary of Findings

1. The Student is xx years old and lives in Wilton, Maine with his mother. His half-brothers visit on the weekends. His father lives in Brewer, Maine. The Student is in xx grade at the Academy Hill School in Wilton, Maine.

2. The Student was referred for services in September 1997, as a xx, for speech and language issues through the CDS system.

3. A Pupil Evaluation Team (PET) meeting was convened on April 7, 1999 to address issues relating to the Student's transition from CDS to public school. The minutes from this meeting noted that the Student qualified for special services as a student with a speech and language disability. He demonstrated speech articulation and receptive and expressive language problems. The PET determined that speech therapy should be provided 40-60 minutes weekly. At that time, the PET determined that his behavior did not impede his learning or that of others.

4. On September 13, 2000, the Student's xx grade teacher, Diane Kyes, submitted a Pre-Referral form for special services. She documented the Student's academic and behavioral struggles. In terms of behavior, she described the Student as follows: "hot- temper, off-task 85 percent of the time, threw pencil, mouthy, negative content in writing, low tolerance for frustration." A possible diagnosis of ADHD was noted. A behavior modification program, small group work, and work with an educational technician were interventions that she checked off on the list of available interventions.

5. A PET was convened on September 15, 2000 to review the Student's progress on speech/language goals and to plan for the upcoming year. The determination of the PET was to continue speech services for 40-60 minutes per week and to work on speech articulation and reduction of distracting noises in his speech. During the meeting, the Student's classroom teacher, Mrs. Kyes, expressed concern about the Student's behavior. She noted that the Student "argues and sometimes gets mad and throws things when he does not get his way."

6. The September 15, 2000 IEP noted that the Student had a speech articulation problem

and had difficulty with sentence structure. The IEP indicated that the Student needed an individualized program in a quiet, small group in order to improve his speech.

7. On May 23, 2001, the Student was given a full psychological evaluation at the behavioral clinic at Maine General Medical Center. The results included a diagnosis of ADHD and Learning Disorders.
8. On September 24, 2001, October 1, 2001 and October 12, 2001, while the Student was in xx grade, a new set of evaluations were administered as part of his triennial review. The Test of Language Development, the Test of Word Finding, and the Goldman Fristoe Test of Articulation were administered. A summary of the results showed a mild speech articulation problem and language skills which were generally in the average range for his age. The report recommended that the PET consider that the Student may need to continue speech therapy services in order to improve his speech articulation skills and word finding strategies.
9. On October 16, 2001, a psycho-social evaluation was done by the District's Social Worker, Steven R. Brod, as part of the Student's three year evaluation. The report indicated that the Student was receiving special education services through the exceptionality of Speech and Language. The Student was being tested to determine if he still qualified for this exceptionality and for any other exceptionality that might apply.
10. The report summarized the Student's significant history of behavioral problems. The report stated, "It was noted in the March 2001 PET that the Student continued to need constant management both in and out of the classroom setting. When the Student was not provided with immediate attention when he was frustrated, his behavior escalated quickly." The Student had, at that time, fifteen behavior forms filled out on him for that year. The report stated, "in the past the Student had been quite explosive and would physically assault other children, however, this year he was able to control his anger more effectively."
11. The report further stated that, "although the Student does not qualify for the exceptionality of Emotional Disability, his diagnosis of ADHD has significant implications. Given his ADHD diagnosis and this disability's impact on his learning, an Other Health Impairment exceptionality may be appropriate."
12. A PET was convened on October 22, 2001. The Student was in xx grade at the Cushing School in Wilton, Maine. The Student continued to qualify as a student with a speech/language disability and continued to receive 40-60 minutes per week of speech therapy. In addition, the PET determined that the Student would receive 30-45 minutes of direct services and or consultation for behavioral/social skills. The minutes discussed behavioral issues noting that the Student did not take discipline well. PET minutes also stated "that the Student was sent home one time for two incidents in a single day. The Student had said he was going to kill a child, and would not let it go." The minutes concluded, "that anger issues had been fewer and less distractible, but not gone entirely." The Student was also separated at lunch so he could have his own space. Mr. Brod, who

conducted the student's psycho-social evaluation, noted that while the Student did not qualify as having an Emotional Disability they should consider the possibility of OHI due to ADHD.

13. An IEP was developed on October 22, 2001. It noted that the Student showed marked distractibility and low frustration tolerance (ADHD), and had difficulty expressing anger in acceptable ways. Direct instruction was to be provided by the resource staff for 30-45 minutes weekly to work on behavioral issues and speech/language services were to be provided by a speech clinician for 40-60 minutes weekly.

14. The Student received help from Care and Comfort, a community based program, from March 2002 to August 2003. As part of the Care and Comfort program, counselors came to the Student's home to work with him on behaviors he struggled with including: following adult directions at home and in the community and interacting with peers/adults in maintaining socially acceptable boundaries.

15. In an interview with the complaint investigator, the Student's mother stated that the Student began taking Adderall in April 2002 as a means to control his anger in the school environment. She slowly took the Student off Adderall in June 2003 because she claimed he was able to manage his anger without it.

16. In xx grade, the Student left Maine on November 17, 2006 to live with an aunt in Virginia while his mother was being deployed to Iraq. The remainder of the Student's xx grade year was spent at Meadowland Elementary School in Sterling, Virginia. Towards the end of his xx grade year, the Student's aunt put him back on Adderall medication.

17. On January 29, 2004, the Student was observed by Susan Williams, the Educational Diagnostician at Meadowland Elementary School, in response to a referral from the Student's teacher. Ms. Williams observed an activity in which the Student was partnered with another child and both were asked to take turns reading out loud to one another. The Student pretended to hit his partner throughout the activity. It was noted that he was "easily distracted" and "off-task" most of the time.

18. An IEP, dated March 18, 2004, noted that a Child Study was administered in conjunction with a review of the Student's IEP. The Student was tested and the following weaknesses were found: decoding of multi-syllable words, vocabulary, comprehension, spelling, writing (use of proper punctuation and editing skills) and attention to task. The IEP noted that the PET concluded at its February 19, 2004 meeting that the Student qualified for special education under the category of Specific Learning Disability.

19. In the March 18, 2004 IEP under the section entitled "Communication (Strengths and Weaknesses)" it noted "Sometimes [the Student] has trouble saying what is on his mind and getting thoughts out. He does get into verbal confrontations with peers that he does not get along with. He has difficulty with ignoring their behavior."

Accommodations/Modifications listed in the IEP included: small group testing;

preferential seating to minimize distractions; assistance with directions; teacher allowed the Student to go to another designated area when he needed a break.

20. At the beginning of the 2004-2005 school year, the Student and his aunt relocated to Haymarket, Virginia where the Student attended Mountain View Elementary School. During the year, the Student's aunt fell on hard times, and the Student was sent to live with his maternal grandmother for three months (November 2004 through January 2005). The Student's mother noted in her letter to the complaint investigator that the Student received one-on-one help with tests at school while he was in Virginia.

21. In an interview with the complaint investigator, Kirsten Fisher, Principal of Mountain View Elementary School, described the Student's problematic behavioral issues throughout his time at Mountain View Elementary. The Student expressed rageful behavior towards the principal. The Student poked other children with pencils and acted aggressively with staff and students. Principal Fisher noted that had the Student not moved out of their district, they would have assessed him for an Emotional Disability.

22. The Student returned to his aunt's house in February 2005 where he remained for the remainder of his xx grade year. In March 2005, the Student's mother returned to the States and stayed with the Student at her sister's house in Virginia from April 2005 through June 2005.

23. On March 14, 2005, the Student received an in-school suspension at Mountain View Elementary School in Virginia. The reason for the in-school suspension was listed as disruptive behavior and disrespect (walking away, talking back, etc.)

24. In an interview with the complaint investigator, the student's mother stated that from April 2005 until June 2005 the Student received counseling (approximately five sessions) while living with his aunt in Virginia.

25. The Student and his mother returned to Maine at the end of June 2005 and the Student entered xx grade at the Academy Hill School in Wilton, Maine. The Student's mother contacted Eric Rutberg to provide counseling for the Student.¹ The Student was no longer taking Adderall medication.

26. A PET was convened October 4, 2005 for the Student's transfer back into the District for his xx grade year. The determination of the PET was that the Student continued to qualify for special education services as a student with a Specific Learning Disability. It was further determined that the Student would receive 60 minutes of language arts in the special education setting with goals in reading, writing and spelling. Classroom teacher

¹ The Student saw Clinical Counselor, Eric Rutberg on July 13 & 20 and August 17 & 31, 2005. Mr. Rutberg then started group counseling with two other workers. The Student stopped individual counseling and went to six weeks of group therapy for the following dates: October 7, 14, 21, 28 and November 11, 2005. The November 4th session was cancelled due to inclement weather. This was the last time the Student was seen by Mr. Rutberg until his suspension in January. The Student then saw Mr. Rutberg on January 31, 2006. The Student continued to see Mr. Rutberg weekly from January 31, 2006 through April 18, 2006, at which time Mr. Rutberg moved into another area of counseling.

Mrs. Alexander stated that “the Student is behaving very well in her program and has demonstrated strengths.” Another teacher, Mr. McShane, stated the Student “is a willing worker with good behavior and is redirectable.”

27. An IEP dated October 4, 2005, stated that the Student continued as a xx grader who qualified for special education services as a student with a Specific Learning Disability. His specific learning disability adversely affected his performance in spelling, written expression and reading. The IEP also stated that, with respect to the least restrictive alternative setting, the Student, “will be allowed reinforcement contact with familiar Resource teachers as needed for keeping him in a positive frame of mind.”

28. On December 13, 2005, a Student Behavior Referral (SBR) form was submitted due to a non-compliance incident. The Student did not want to work and instead wanted to go into the “cubbies,” small 10 foot by 15 foot enclosed rooms used for study or in-school suspensions.² He thought they were fun to be in. His teacher, Mrs. Pierce, denied his request but he went to the cubbies anyway. The consequence imposed as a result of his actions was to make up the time in the office by either staying after school or staying in for recess.

29. In a letter to the complaint investigators, the Student’s mother reported that on January 9, 2006 she was told by the District that the Student had punched another student on January 6, 2006. There was no SBR form filed based upon this incident.³

30. On January 9, 2006, an SBR Form was filed after the Student showed “poor sportsmanship” by yelling, using inappropriate language and “storming out” of the gym. The Student was sent to the office where he yelled profanities and called Principal Paine a liar and made fists saying he would not mind hitting someone. He also kicked and punched the walls. As a result of this behavior, the Student served an out-of-school suspension on January 10, 2006.

31. On January 11, 2006, an SBR form was submitted after another incident. The Student got into a verbal altercation with another student and when the classroom teacher, Mrs. Alexander, attempted to talk to them both, the Student would not allow her to speak. The Student was asked to leave the classroom. Another classmate commented on this and the Student threatened to punch him. As a result of his classroom misbehavior, the Student was sent to the office. The Student calmed down enough so that the principal felt

² In a interview with the complaint investigator, Principal Paine gave a description of the cubbies. The room is approximately 10 by 15 and has 3 doors which are often open, but the one to the teachers' room and the office are sometimes closed due to confidentiality of conversations in those two rooms. The cubbies are used for a variety of reasons: taking make up tests, quiet time to do school work (students request to use them for this purpose.), recess detention, in school suspension, a place to sit when sent from class for misbehavior. There is adult supervision through 3 windows. The secretary turns around periodically and looks in order to check on students. She can also hear them. The lights are left on unless, on a very rare occasion, a student prefers them off.

³ In an interview with the complaint investigator, Principal Paine explained that when teachers handle behavioral incidents themselves, they do not go on a SBR Form. However, when incidents warrant the intervention of the Principal, the form is utilized.

he could be sent home regularly on the bus. Before a consequence could be determined for this misbehavior, however, the Student got in trouble again.

32. On January 13, 2006, an SBR form was filed against the Student. The Student's misbehavior included making fun of other students and calling them offensive names such as "queer." When sent to the office, the Student was disrespectful to the principal, argumentative and pounded on walls. He was unable to calm down. School Principal Paine, was unable to reach the Student's mother. As a result, she called the police because she could not reach the Student's mother and she could not calm the Student down. Principal Paine informed the mother that the Student would not be allowed back into the school until a PET meeting was held.

33. A PET was convened January 23, 2006 to discuss the Student's recent behavioral incidents. Minutes of the meeting reflected that the PET knew he was diagnosed with ADHD and was no longer taking medication. The minutes indicated that the Student "needs anger management." The minutes also included an acknowledgement that the Student had behavioral problems in Virginia. The PET minutes noted that the Student put a wall up when he was angry and exhibited rage. The Principal reviewed behavior reports that the Student had punched a student, kicked walls, slammed doors, made fun of other students' writing and reading skills; he threatened the Principal once, and used inappropriate language. The minutes of the meeting reflected that the PET agreed to implement a behavior plan with supports for anger management. The minutes stated, "The Teachers and other staff will try to help the Student recognize the antecedent feelings to his anger/rage, in a positive climate. We will allow him to go to Mr. Mc Shane if he needs to have a change of setting to diffuse anger. We will set up a weekly 'reward' for week's {sic} when he has managed his anger appropriately."

34. An IEP implemented on January 23, 2006, included an addendum entitled "Modification Supports Page" which stated "behavior plan to support positive behavior-added January 23, 2006." The Behavior Intervention Plan, dated January, 23, 2006, noted that the Student was strong-willed, quick to anger and tested boundaries. Modifications included: a) participation in the Positive Aspirations for Children in Education (P.A.C.E.) program⁴; b) a weekly behavior chart from the Resource Room; c) counseling to be pursued by the parent; d) availability of a tutorial with an educational technician in P.A.C.E.; e) Student accountability for academic work missed; and f) after school program. Under the category entitled Behavioral Skills, it listed: a) the Student will learn to recognize the internal feelings behind the feelings of anger, then learn to make a good choice; (b) teacher may use a signal to student to intervene early before student's anger gets out of control- (touch finger to side of nose) . Rewards included: a) token economy in the resource room in the form of "auction dollars"; b) deny

⁴ In an interview with the complaint investigator, Mr. Ferreira discussed the goals of the P.A.C.E. program: (1) Enhance maturity and self-esteem; (2) Help the student achieve academic success and (3) Help the child achieve his full potential. The program is designed for students who learn differently and need more individualized instruction and a modified curriculum. The program ensures that students have the same teacher for two years and classroom size is limited to approximately fifteen children per class. In addition, there is an educational technician in every classroom.

participation in field trip experiences if rageful behavior continued.

35. On March 8, 2006 an SBR form was filled out on the Student. The Student was argumentative after having been asked not to talk to a student who was taking a test. He made hissing sounds and cat claws to the teacher. He was sent to the office where he proceeded to argue with Principal Paine. He called her a “jerk” and refused to sit in the cubbies. He kicked walls and threw a tantrum. The Student settled down for a while but he needed to be reminded about sitting quietly without banging and talking loudly. The Student spent the remainder of the day in “in-school suspension.” Since the Student was uncooperative during this time, he received a day of out-of-school suspension for March 9, 2006.

36. On March 10, 2006, the Student’s mother sent a letter to Principal Paine and classroom teacher Alexander concerning the Student’s behavior on March 8, 2006. The Student’s mother requested that the Student not be sent to the cubbies if he misbehaved in the future.

37. Another behavior incident took place on March 16, 2006. Although no SBR form was filled out regarding the incident, according to the Student’s mother, the Student was sent to the cubbies for approximately 20 minutes for not doing his work in Mrs. Pierce’s classroom.

38. On March 17, 2006, the Student’s mother contacted the Principal regarding the Student having been sent to the cubbies and the Student’s PET not being followed. A meeting was planned to deal with these issues.

39. On March 21, 2006, an informal meeting was convened to discuss mother’s concerns regarding recent disciplinary measures imposed on the Student. The Student’s mother, the Student’s father, the Student, Principal Paine and Special Education Director, Edward Ferreira were all present at the meeting. Mother expressed a concern that the Behavior Plan discussed at the January 23, 2006 PET was not followed on March 8 & 16. Mr. Ferreira and Principal Paine expressed the view that it was not always possible to send the Student to Mr. McShane’s room especially when he was in an agitated state. The Student’s family and school officials seemed to come to a consensus that in the future, the Principal would send the Student to Mr. McShane’s room, if at all possible. They also discussed other means of disciplining the Student including: (1) sitting outside the cubbies in a chair (if no other student was in cubbies at the time), (2) if the Student was calm, he could be sent with work to another classroom. Although the mother requested that the Student never be placed in the cubbies as a time-out mechanism, Principal Paine stated that sometimes cubbies might be her only option but in the future she would utilize it as a last resort. Furthermore, the mother discussed her preference for the Student receiving an in-school suspension as opposed to an out-of-school suspension. The Principal stated that although she would try to honor that request, in situations where the Student might become very angry and she might be unable to diffuse his anger, she could not have him in school all day in that frame of mind. The Principal suggested, and the mother agreed to this, that the principal could try in-school suspension on the premise

that the mother would be accessible by phone on that day and would pick the Student up if he began having tantrums or refused to settle down. As a result of this meeting, a consensus seemed to be reached. However, none of the agreements reached were referenced in the Student's IEP.

40. Richard Rau, clinical school psychologist, performed an evaluation of the Student in March/April 2006 at the request of the Student's mother. Dr. Rau re-tested the Student to determine if he still qualified as having ADHD. In a Children's Apperception Test (a personality projection test) Dr. Rau determined that the Student was suffering from anxiety, insecurity, fear of abandonment and was extremely worrisome. In an interview with the complaint investigator, Dr. Rau discussed how the Student reacted to his insecurities by acting macho/brazen. Dr. Rau further discussed that excessive time out periods were extremely harmful for the Student and that he was likely to experience significant anxiety as a result of imposed isolation. Dr. Rau noted that for a child his age, the Student should not be in a time-out room for longer than a 10-15 minute time frame. If the Student had a conflict with another classmate, Dr. Rau recommended separating the Student from the conflict in the classroom and engaging him in a physical activity such as wiping the board for the teacher or anything which would mentally distract him from the conflict at hand. He also recommended that school staff implement a positive reinforcement system where the Student would earn certain privileges when he exhibited positive behaviors.

41. In an interview with the complaint investigator, the Student's mother said the Student received another SBR form for an incident on May 25, 2006. During gym class, the Student threw a hackysack at another child which caused a reddish welt mark to appear on his classmate's leg. Principal Paine contacted the Student's mother and then sent the Student to Mr. McShane's room. The Student's mother also described another incident in May in which the Student was not doing his work in the resource room and was sent to the office. The Principal contacted the Student's mother and the Student stayed after-school to make up the work he missed.

VI. Conclusion

Allegation #1: Failure to provide a FAPE by not following the Student's Behavioral Intervention Plan as written in the Student's Individualized Education Program. (IEP). (MSER § 1.3) **Violation Found**

The School District's actions on March 8 and 16, 2006 denied the Student a free appropriate public education. The Individuals with Disabilities Education Improvement Act, (IDEA) 2004 and Maine law (20-A M.R.S.A. Chapters 301 and 303) entitles all school-age students with disabilities to an equal educational opportunity/free appropriate public education. Regarding free appropriate public education entitlement, Maine Special Education Regulations (MSER), Section 1.3 further states:

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 which are appropriate to the special needs of the student as defined in an Individualized Education Program.

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 Educ. v. Rowley*, 458 U.S. at 189, 102 S.Ct. 3034. The checklist includes requirements that the education is provided at public expense and under public supervision, meets the standards of the state education agency, and is provided in accordance with the requirements of 20 USCS § 1414(a)(5). The instruction and services provided by the state must "approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id.* at 203, 102 S.Ct. 3034.

The IEP is the basis for educational programming for a student with a disability and must be linked to the general education curriculum. MSER § 10.1. The development of an IEP is the responsibility of the Pupil Evaluation Team (PET). MSER § 8.2.

Under the MSER, positive behavior intervention is defined as, "... an intervention system individually designed by the PET to assist a student to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors." MSER § 2.15. These interventions are based upon the results of a functional behavior assessment (FBA). A primary goal of positive behavior supports and interventions is to teach educationally and socially appropriate behavior as a replacement for problems behavior. *Id.*

If a school district elects not to include a student's behavior intervention plan (BIP) in the IEP, the management of that student's behavior then falls within the broad discretion of the school. *Oakley (KS) Unified School District 274*, [24 IDELR 393](#) (OCR 1995), (in an ADA context, the school district did not discriminate against a student with a disability when it failed to discipline the student in accordance with her IEP; the IEP did not address discipline and the school district did not discipline the student because of her disability).

In this case, the Student's IEP included a BIP. The PET minutes, dated January 23, 2006, discussed implementing a behavior intervention plan with supports for "anger management". The minutes stated that teachers and staff, "will try to help the Student recognize the antecedent feelings to his anger/rage, in a positive climate." Furthermore, the minutes stated, "We will allow him to go to Mr. McShane if he needs to have a change of setting to diffuse anger." Lastly, the PET agreed to "set up a 'reward' for week's {sic} when he has managed his anger appropriately." The PET, however, failed to include the option of sending the Student to Mr. McShane's room in the BIP.

While the BIP did not expressly preclude Principal Paine from implementing disciplinary procedures when deemed necessary, it does call for “collaborative problem solving where the Student will be involved in setting up positive strategies.”

On March 8, 2006, the Student was sent to the Principal’s office after being disruptive during classroom MEA testing. While in the Principal’s office, the Student became verbally abusive to the Principal and began to act out in a fit of anger, kicking walls and uttering insulting language. During an interview with the Complaint Investigator, the Principal stated that she utilized her authority to impose an in-school suspension on the Student for the remainder of the day. The Student was sent to the cubbies for approximately three hours to serve his in-school suspension.

On March 10th, 2006 the Student’s mother wrote a letter addressed to Principal Paine and classroom teacher Mrs. Alexander addressing the Student’s disruptive behavior on March 8th. In the letter, she requested that the Student not be placed in cubbies as a disciplinary measure. “It is abusive to have a child in a closet for the three hours you placed him in on Wednesday. Especially a child with ADHD for they don’t sit well in the same spot for long periods of time.” Despite Principal Paine’s receipt of and perusal of the letter, on March 16th, the Student was again sent to the cubbies for approximately 20 minutes. On this occasion, he was not doing his work for Mrs. Pierce and was sent to the office for causing trouble.⁵ According to Principal Paine, she was unable to send the Student to Mr. McShane’s room on at least one of the incidents in question since Mr. McShane was busy conducting testing with another student at that time. In the future, there will inevitably be other days in which Mr. McShane may be absent or busy with his own classroom. Although being sent to Mr. McShane’s room is one such option when the Student is in a fit of anger, the District needs to have alternative positive interventions in place. That is what the PET minutes, the IEP and the BIP stated.

When the Student’s Mother contacted the school to notify them of her displeasure with how his behavior plan dated January 23, 2006, was being enforced, a meeting was convened on March 21, 2003 [sic] to discuss these issues and to implement the plan in a way more amenable to the Mother’s concerns. During this meeting, Principal Paine acknowledged that the BIP was unintentionally violated. She had not reviewed the document in the file and conceded that this was her mistake. As a result of this meeting, the Mother and school officials were able to reach an agreement to send the Student to Mr. McShane’s room in the future. They also discussed other corrective measures including sending the Student to sit outside the cubbies (if he is calm and no other student is inside cubbies) or sending him with work into other classrooms. The Principal stated however, that she reserved the right to send the Student to the cubbies if no other option was available at the time. At the conclusion of the meeting, a consensus seemed to have been reached on how to more effectively deal with the Student’s behavioral issues in the future. However, none of the agreements were then referenced in the BIP or put into any written documentation.

⁵ No SBR form was filled out regarding the March 16th incident. The information received regarding this incident was obtained through interviews with the Student’s mother and school principal Mrs. Paine.

In conclusion, the District's action in sending the Student to the cubbies on two occasions is a violation of the BIP, which was part of the Student's IEP. Because the IEP is the basis for the provision of a FAPE, a substantive and/or significant procedural breach of the BIP is a failure to provide a FAPE. In this instance, the District failed to provide the positive interventions specifically called for in the BIP. The District did not have an alternative positive intervention available when the Student was unable to go to Mr. McShane's room. Placement in the cubbies was a form of negative intervention, which contradicts the strategies discussed during the PET and implemented in the subsequent BIP. Furthermore, although the District conceded to this failure, it did not do so in the context of a PET meeting or in any amendments to the IEP. Therefore, it did not formally obligate itself to remedy the failure to abide by the IEP.

Ancillary Issue #1: Failure of the PET to review whether the Student is a student with a disability in all areas of suspected disabilities, as defined in MSER § 3. MSER § 8.3, 9.5
Violation Found

MSER § 9.5 guarantees that a student shall be assessed in all areas of suspected disability or disabilities. MSER § 8.3 sets out the responsibilities of the PET, including its duty to determine the present levels of performance and educational needs of a student in all affected both academic and non-academic. MSER § 8.3(B). It must also determine any necessary modifications and/or adaptations in the student's regular education program if existing data is insufficient to identify the student as eligible for special education services. MSER § 8.3(C). If a child whose behavior impedes his or her learning or that of others, the PET is required to consider, when appropriate, strategies, including positive behavioral interventions and supports to address that behavior. Individuals with Disabilities Education Improvement Act (IDEA) 2004, 20 USCS § 1414(d)(3)(B)(i), MSER § 10.3. In Maine, positive behavior interventions are based upon the results of FBAs. MSER § 2.15.

The Student has a significant history of behavioral issues in the school setting beginning as early as xx grade.⁶ In 2001, a psycho-social evaluation was conducted which discussed the Student's aggressive behavior towards other students. The evaluation referred to a 2001 PET which noted that the Student had fifteen behavior write-ups for that year. The social worker who performed the evaluation, recommended a consideration of the diagnosis of Other Health Impairment (OHI) in light of the student's diagnosis of ADHD and the impact of that diagnosis on his learning. Although the PET briefly

⁶ In the past, the Student was prescribed Adderall to help him more effectively manage his anger in the school setting. The Student also received in-home behavioral support through Care and Comfort and group and individual therapy with a clinical counselor. At present time, the Student has been off his medication for the duration of this current academic year and is no longer seeing a counselor or receiving in-home therapy.

discussed this recommendation in a 2001 meeting, it subsequently decided against an OHI designation.

Since the Student returned from Virginia in 2005, it is apparent that the PET has not considered whether he should be evaluated for additional disabilities. The October 2005 PET minutes reflected that the Student seemed to be behaving well at the Academy Hill School; however, the October 2005 PET failed to consider or discuss the Student's behavioral struggles which occurred throughout his time at Mountain View Elementary School. All of this information was documented in the Student's file and should have been reviewed and discussed at this October 2005 PET. In an interview with the complaint investigator, the Principal at Mountain View articulated that the Student's behavior was of such concern that if he had stayed at Mountain View they would have tested him for a possible diagnosis of Emotional Disability.⁷ None of this information was discussed at the October PET meeting. Two months later, in December 2005, the Student's behavior started to deteriorate rapidly. He had four behavioral incidents in January 2006 alone. The Student's behavior became so extreme that after an incident on January 13, 2006, the Principal informed the Student's mother that he could not come back to school until a PET meeting was convened.⁸

In recognition of the Student's deteriorating in-school behavior, the PET convened on January 23, 2006. Without discussing the need for further clinical evaluations or a functional behavioral assessment, the PET designed a BIP, "to help the Student recognize the antecedent feelings to his anger/rage in a positive climate." Clearly the BIP failed to allow the Student to manage his behavior after other incidents arose requiring action on the part of the District. Without understanding the underlying causes for his behaviors or convening a PET, the District further agitated the Student by confining him to the "cubbies" for a three hour in-school suspension on March 8th, 2006. This disciplinary action was clinically damaging, according to Dr. Rau, who stated that any length of time exceeding 15 minutes would only further agitate the Student and exacerbate his negative behaviors. Thereafter, instead of convening a formal PET, the District informally discussed various strategies to deal with the Student's behavior. However, it still did not consider further evaluations or assessments.

The District, therefore, violated its duty to require the PET to consider additional behavioral assessments and evaluations to determine whether the Student's recent extreme behavior was a result of a disability and, if so, whether the disability adversely

⁷ In an interview with the complaint investigator, Kirsten Fisher, Principal of Mountain View Elementary School noted a serious concern with the Student's behavior while at Mountain View. She explained that all information pertaining to his behavior at that time was documented and included in his Category 2 file and was sent to their school's copy center where SAD #9 was able to order the file sent back to them when the Student came back to the Academy Hill School in September, 2005.

⁸ In essence, this was an indefinite removal of the Student. This disciplinary action alone should have warranted the consideration of a manifestation determination, as defined in MSER § 14.2(B).

affected the Student's academic or nonacademic performance, and what services might have been warranted if his performance had been affected due to a disability.

Ancillary Issue # 2: Failure to develop an appropriate BIP. MSER § 8.3 Violation Found

MSER § 10.3 requires that the PET must consider various strategies, including positive behavioral interventions and supports, to address problematic behavior. Since the Student's BIP is part of the IEP, it must be custom tailored to address the Student's specific unique needs in a way reasonably calculated to enable him to receive educational benefits. *Rowley*, supra, 458 U.S. 176, 206-207. The Student's BIP was not reviewed to determine if it was appropriate after it became apparent that it could not be enforced and was not flexible enough to allow for varying circumstances. The absence of the option of Mr. McShane's room during a critical time and the omission of other positive interventions when the Student's negative behavior was escalating should have been a red flag for the PET to convene. Without other positive alternatives available, the BIP was clearly not reasonably calculated to address his specific needs when they arose.

As stated above, evidence of the Student's severe behavior in Virginia and his recent outbursts at school were significant enough to warrant the PET to decide that a FBA was necessary in order to design an appropriate BIP.

VII. Corrective Action Plan

Based on the violations of Maine Special Education Regulations determined above, the following corrective action measures shall be taken:

1. A PET meeting must be convened by June 30, 2006 in order to consider all areas of disability and whether the Student is a student with a disability in one or more of those areas of disability. Dr. Rau must be in attendance at the PET meeting along with the District's psychological services provider. Copies of the PET notice, the PET minutes, the Prior Written Notice and an amended IEP shall be provided to the Due Process Office, the parent and the complaint investigators.
2. In conjunction with the above considerations, if the PET determines that the Student has a disability requiring a BIP, the BIP must include details specifically outlining what behavioral modifications, positive behavioral supports and interventions they will utilize in dealing with the Student's behavioral issues. In conducting its review of the BIP, the PET must conduct a FBA in order to aid in the development of an appropriate BIP. Copies of the amended BIP and the FBA must be attached to the Student's IEP and shall be provided to the Due Process office, the parent, and the complaint investigators.
3. If the PET determines at the above PET meeting that the Student qualifies as a student with a disability which would require psychological and/or social work services, the PET shall provide these services during the summer 2006 at the

District's expense. This discussion will be reflected in the PET minutes. Copies of the documentation regarding summer services shall be provided to the Due Process Office, the parent and the complaint investigators. The documentation shall be a signed log (initialed by the provider) and shall include the name of the provider(s), the type of services provided, and the number of hours of services rendered.

4. The District shall schedule training for all appropriate staff members in order to:

- a) Review state and federal regulations with respect to PET responsibilities, the use of existing evaluations, and the proper sequence for seeking additional evaluations.
- b) Review the criteria used in assessing suspected disabilities of students, standards for eligibility, and how disabilities may adversely affect all areas of educational performance.

The training will be provided by an out-of-District trainer. The District will submit to the Due Process Office, the parent and the complaint investigators the following documentation:

- A biography of the trainer;
- The date of the training;
- A copy of the agenda;
- Copies of all handouts;
- A copy of the list of attendees and their job titles;
- Copies of anonymous evaluations of the training.