

**Special Education Due Process Hearing Decision**  
**Parent v. Portland**

May 13, 1997

CASE NO. 97.026

COUNSEL FOR PARENT: Beth V. George, Esq.

COUNSEL FOR SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Carol B. Lenna

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, §7207, et. seq., 20 USC, § 1415 et. seq., AND IMPLEMENTING REGULATIONS.

On February 11, 1997, the Department of Education received a request for a Due Process Hearing from Beth V. George, Esq., on behalf of Mother and her son . Student turned 18 on dob, and participates in this hearing on his own behalf. Mother resides in Portland, Maine. Student currently resides as a student at the Hyde School, Woodstock, Connecticut.

The hearing was initially scheduled for March 10, 1997. At the request of attorneys for both school and parent the hearing and pre-hearing conference were rescheduled. The Pre-hearing Conference convened on March 31, 1997. The Hearing convened on April 7, 14, 15 and 16. Fifteen witnesses gave testimony at the hearing; 385 documents were entered into the record. The parties waiver oral closing statements and requested an opportunity to submit written summations. The record remained open until April 29 for that purpose. Following is the decision in this matter.

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· Counsel for the Family also asserted their rights under the Americans with Disabilities Act and Section 504 of the Regulation Act of 1973. This Hearing Process has no authority or jurisdiction to conduct due process hearings under the Americans with Disabilities Act. Issues reserved by the parents under Section 504 were not argued directly at Hearing, but were listed in the parent's closing written summation. They were addressed in the body of this decision.

## I. Preliminary Statement

Student is an xx year old student who is currently enrolled in a private high school, the Hyde School, in Woodstock, Connecticut. He was placed there by his parents in the fall of 1996. Prior to that time he had been a student in the Portland Public Schools, most recently Deering High School. He has not been identified as a student eligible for special education services under the Individuals with Disabilities Act or Maine Special Education Law.

Student had a relatively uneventful school career through 8<sup>th</sup> grade making mostly A's and B's in all academic subjects. In 9<sup>th</sup> grade his grades began to fall. During his 10<sup>th</sup> grade year he failed two subjects and performed poorly in his other subjects. His record is remarkable for the number of discipline referrals and absences he accrued. During his 11<sup>th</sup> grade year his academic performance continued to decline, discipline referrals and absences were again remarkably high. In the spring of that year, 1996, he was transferred to the Alternative Credit Option program to give him the opportunity to earn sufficient course credits to be reinstated in his graduating class. By the end of the school year he had insufficient credits to be a member of the senior class for the 1996-97 school year. Student's mother had become increasingly concerned about his behavior and school grades. With the insistence of his mother and help from his grandfather, Student applied to and was accepted to, the Hyde School. He entered that program in August 1996. At that same time the family made a referral to the Deering PET to request that Student be identified as a student in need of special education.

It is the position of the family that Student suffers from a behavioral impairment that severely affected his educational performance. They argue that the school failed to identify student as a student with disabilities eligible for special education and related services, and thereby failed to provide him a free appropriate public education. They further argue that the decision for student to enter the Hyde School was in response to these failures on the part of the school and they are therefore entitled to reimbursement for the cost of placement at the private school.

It is the position of the school that student performed well in school through elementary school and into high school. They acknowledge that he began failing courses in his 10<sup>th</sup> grade year, but point to his high absenteeism. They argue that the vast majority of the disciplinary referrals assigned to him are for smoking and cutting class and are not indicative of any behavioral impairment. It is their contention that, when student attended school and did his work, he did quite well and that his grades suffered only because of his failure to complete course work.

They disagree that student meets the standard of a student with disabilities. They take the position that the school had no reason to refer student for special education and only did so at the family's request in August 1996.

## **II. Issues for Hearing**

1. Is student eligible to receive special education services as defined by the Maine Special Education Law, Title 20-A, MRSA, §7001 et. seq.
2. If yes, does the school's failure to provide special education and related services entitle him to receive compensatory damages, including reimbursement for placement at the Hyde School for the 1996-97 school year, and compensatory educational services beyond the 1996-97 school year?
3. If student is found eligible as a student with disabilities, what special education services are required in order for him to receive a free appropriate public education?

In addition to the substantive claims cited above, the family claimed the following procedural violations to have been committed by the school:

1. Failure to refer student for evaluation resulting in a failure to identify student as eligible for special services.
2. Failure to evaluate student within 60 days of consent of evaluation. (Refers to evaluation of March 5, 1995)
3. Failure to meet with parent to review and explain evaluation.
4. Failure to convene a PET to consider results of an evaluation.
5. Failure to convene a PET at the request of parent to consider educational needs.

## **III. Findings of Fact**

1. During his 9<sup>th</sup> grade year, 1993-94, Student received eight Discipline Referrals from teachers. Six of these were for disruptive behavior, two for cutting classes. Several resulted in in-school suspensions. student's homeroom teacher in 9<sup>th</sup> and 10<sup>th</sup> grade testified that student's behavior that year was immature and attention-seeking, but that she did not ever observe his behavior as aggressive,

violent, or out of control. She never thought of him as a potential special education student. His honors math teacher testified that student didn't seem as motivated as other students and didn't work as hard, but that his behavior was not extraordinary in any way. (Exhibits: 181, 182, 183, 186, 190, 195, 196, 198; Testimony: Morrison, Crocker)

2. During 10<sup>th</sup> grade student received 18 Discipline Referrals from his teachers. Five of these referrals cited incidents which were behavior-related. The balance were for smoking on school grounds and cutting classes. There were a number of in-school suspensions and two out-of-school suspensions related to these events. In addition there were two incidents related to possession and consumption of alcohol and one incident of abetting a theft off school grounds.<sup>2</sup> (Exhibits: 125-150, 152-163, 166, 168, 169, 171-179)

4. Student's 10<sup>th</sup> grade honors English teacher testified that he remembers student as a capable student with good thinking skills but some problems with writing. Student owed him a lot of work which was never turned in so he did not get a passing grade for the year. He noted that during class discussion student might interrupt inappropriately or talk loudly. He described student's behavior as within normal range, but admitted that student's behavior did not compare that well with the behavior of other honors class students. He related that he had several teacher/student conversations with student regarding the quality and quantity of his work. He found student's response to these conversations to be focused and appropriate. Student never exhibited any aggressive behaviors. He never considered student as a candidate of special education. (Testimony: Blouin)

5. At the conclusion of 10<sup>th</sup> grade student failed Biology and Honors English. Absences ranged from 9 in physical education to 47 in French 1. Conduct marks by teachers were "satisfactory" or "excellent" during all marking periods with the exception of the last quarter of French 1 where the teacher gave him an "unsatisfactory". His final grade in French was 91. (Exhibit: 206)

6. During 11<sup>th</sup> grade student received 22 Discipline Referrals and 8 out-of-school suspensions. The Discipline Referrals were for smoking on school grounds or for cutting class. The suspensions were given for failure to attend assigned detentions for the discipline referrals. (Exhibits: 75, 82, 94-97, 99-111, 113-123).

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<sup>2</sup> No evidence was presented relating to this event except a letter from the school to the parent stating their awareness of the event. There was no indication in the record of further action taken by the school, the store, or of involvement by the juvenile justice system.

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7. Daily attendance summary from 9/4/95-3/4/96 indicates that student was marked absent 26 times, not counting out of school suspensions. Four of these absences were excused. A letter from the school to student's mother dated February 12, 1996 states that student has been absent in English 22 times to date, 13 of those unexcused. student was absent from the Alternative Credit Option program 8 times from March to June. (Exhibit: 88-91, 98; Testimony: Duffet)

8. On March 5, 1996 student's mother met with the high school principal, at her request, to discuss student's failing grades, discipline problems and school absences. At this meeting student was transferred to the Alternative Credit Option program "because of his academic record and his need for continuing focus on his studies." Also at that meeting the parent signed an "Early Intervention Permission Form" which gave the school permission for the special education staff to "do observations, interviews and whatever testing (achievement, intellectual, personality, vocational) may be necessary." The permission remained valid for 60 days. (Exhibits: 85, 86; Testimony: Mother)

9. Student began attending the ACO program immediately after that meeting .The program is not a special education program, but is designed to comply with state alternative education statutes, Title 20-A, Chapter 211, §5001-A-§5153. The student population is mostly juniors and seniors who are bright, underachieving students who are failing to cope with school life. Student's success there was erratic. He continued to receive discipline referrals for smoking and cutting class. While there he completed enough course work to earn 7 course credits. His teacher at ACO did not observe any aggressive behavior from Student. She felt his behavior was typical of other ACO students. She never saw student as a candidate for special education. (Exhibit: 205, 81-83, 79, 71, 74, 75; Testimony: Duffet, Shapiro)

10. On March 14, 1996, the assistant principal completed an "Early Intervention Referral Form" describing student as an "exceptionally intelligent student" who "has underachieved in high school". The form notes that student has "been involved with substance abuse to an extent, and...has been oppositional on occasion in class. He has received an increasing number of administrative consequences for cutting class and refusing to serve detention." The "specific referral questions" to be addressed were "to what extent is his behavior in his control" and "what is his self-ideation." (Exhibit: 84; Testimony: Shapiro)

11. One of the school's psychological examiners, Mr. Ferreira, received the Early Intervention Referral from the high school. In response to the referral he conducted a review of student's school record, spoke with student's ACO teacher, middle school guidance counselor, and several of his elementary school

teachers. On May 8, 1996 he conducted a psychodiagnostic interview with Student. A report of this process was written on May 24. In the report the examiner notes that the referral was being made because “[s]taff are concerned as to what extent [student’s] behavior is under his control and is he experiencing a disturbance in his thinking.” The examiner testified that this review and interview were conducted under the “early intervention” process and was not a special education referral or assessment. He states that he did not administer formal test instruments because it was not necessary to address the questions posed in the referral, and his psychodiagnostic interview did not reveal a need, in his opinion, to make a referral to special education for formal assessment under those guidelines.

The examiner concluded that in his view “student appears to be prone to a classic profile and cycle of vulnerability to alcohol and depression. One appears to feed on the other mediated by difficulties associated with developmental stress or challenges and relationship difficulties.” He recommends that student seek and receive “psychiatric support and/or counseling” and “alcohol related counseling and relationship oriented counseling.” He concludes by saying that none of “these possible conditions are viewed at this time as releasing student from taking responsibility for his behavior... They may serve as impediments or obstacles to his school success, but in the examiner’s view student is aware of his choices and realizes the consequences of his actions.” The examiner testified that he found in student no thought disorder or illogical or confused responses. In his opinion ’s depression was situational and exacerbated by his alcohol use, but did not reach the level to meet the criteria of a behaviorally impaired student. Both from his interview and from his conversations with student’s teachers he did not conclude that student’s behaviors were bizarre, illogical or unrealistic. He does not feel student’s behavioral profile meets the standard presented in the definition of *behaviorally impaired*<sup>3</sup> (Exhibit: 76; Testimony: Ferreira)

13. On June 17, 1996, Mr. Ferreira and the mother met regarding the findings and conclusions in his report. According to the mother she initiated this meeting because she had not received any results from student’s referral to the early intervention process. The parent stated that the discussion was very frank and a recommendation for a community referral to get help for student was discussed. She wanted the school to develop a specific plan for student at that time to provide him with assistance. During the summer she contacted the school to ask what plans were in place for student for the coming year. She was informed by

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<sup>3</sup> During the hearing the term seriously emotionally disturbed, the IDEA definition, and behaviorally impaired, the Maine definition were used interchangeably. Although the Maine definition gets its authority from IDEA, it is worded slightly differently. For the purpose of this decision, the Maine definition of behavioral impairment, defined in Chapter 101 at Section 3.3, is used.

the school that there were no specific plans, but that student was welcome to return to Deering High School or the ACO program. She and her father then began exploring other schooling options and whether the school had any responsibility to assist student in his continued education. (Testimony: Grandfather, Mother)

14. On August 21, 1996 student withdrew from the Portland Schools and entered the Hyde School, Woodstock, Connecticut. On August 29 a referral was made to the Pupil Evaluation Team at the parent's request. The PET met October 9, 1996. The PET determined that student would be tested by Portland to determine "whether depression is an issue which adversely affects his education." The PET also agreed to conduct assessments to address areas of "substance use, intellectual ability, personality and attention." (Exhibits: 69, 63, 53)

15. On January 10 and 11, 1997 another of the Portland's psychological examiners, Ms. Finkelstein, traveled to the Hyde School and conducted an assessment of student to determine if student qualified as a student eligible for special education services under the category of *behaviorally impaired*. She administered the Wechsler Adult Intellectual Scales-Revised (WAIS-R); Wide Range Achievement Test, Revision 3 (WRAT); Rorschach; Sentence Completion Test; Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A); a Clinical Interview, classroom observation and interviews with student's teachers at Hyde.

She concluded that "[t]here is no indication of any learning disability" and "[t]here is no indication in any of the interview, projective or objective material that [student] suffers from an identifiable emotional disorder." She did note that student scored in the "low average range" on the Picture Arrangement subtest of the WAIS-R. She states that this subtest measures not only sequencing skills, but also the ability to respond to nonverbal cues in social situations. She remarked that this is not an area of strength for student, but in her opinion, not low enough to be a cause for worry. She testified that as a result of her testing and interview with student she does not see him as a student eligible for special education services under the category of *behavioral impairment* or any other category. (Exhibits: 243-248, 249-273; Testimony: Finkelstein)

16. The results and conclusions of the psychological examiner were presented to the PET and discussed on March 19, 1997. It was the conclusion of the school that student did not meet the criteria of *behavioral impairment* and was therefore not eligible as a student in need of special education and related services. (A brief discussion of his eligibility as a student with a learning disability was raised

by parent's attorney, but it was concluded that student does not meet the criteria for that diagnosis). There followed a discussion of student's eligibility for services under Section 504. School personnel determined that currently student did not meet the criteria for a "physical or mental impairment that substantially limited a major life function". Reaching no consensus the PET adjourned. (Exhibits: 1-5; Testimony: Plamondon, Crocker)

17. After the PET meeting the parents contracted with an independent psychologist, Dr. Avery. She interviewed student's grandfather and spoke on the phone to the Dean of Students at Hyde. She reviewed school records, evaluation reports, and the protocols from the recent school assessment. She rescored the Rorschach completed by the school's evaluator. She submitted a report to the family in which she concluded that the school did not "in March and May 1996 appropriately and accurately assess [student]'s eligibility for special education services" and in January 1997 did not "accurately assess and interpret [student]'s current level of personality and intellectual functioning and achievement." Prior to writing this report she did not talk with student's mother, did not talk with student and did not herself administer any testing instruments with student. She did not observe student in his current school placement. She did not interview any of student's previous teachers. She concludes that "[w]hile [student] currently does not demonstrate a profile of an adolescent in an acute phase of a major mental illness, specifically Major Depression, there are indices of significant emotional difficulties in the area of anger management, vulnerability to aggressive impulsivity and substance abuse." (Exhibits: 280-325; Testimony: Avery)

After the completion of her report, but prior to the hearing, Dr. Avery interviewed student and his mother. She administered a second Rorschach to student. No other test instruments were administered at that time. (Testimony: Avery)

18. Student testified that everything began to go wrong for him after his return from Europe and the break up with a girlfriend in the summer between 9<sup>th</sup> and 10<sup>th</sup> grade. He began using alcohol and drugs regularly, smoking and cutting school. His current friends were getting upset with him, so he started hanging out with kids who also abused drugs and alcohol. He described himself as depressed, "not there" and out of control with his drinking.; he didn't like himself very much and wanted to change but did not feel able to do that alone. In contrast, he describes himself as doing well in his courses at Hyde. He feels good about his work and the results of his work. He still has up and down moods, but overall he is okay. He appreciates what Hyde has done for him. He likes his teachers and is close to many of them. His mother is involved in the required



family learning center where they work on internal family problems. He feels a lot better emotionally than when at Deering. (Testimony: E)

19. The Director of Psychological Services at Portland Public Schools, Dr. Sansone, testified that as their direct supervisor he reviewed the evaluations and subsequent reports of both psychological examiners who evaluated student. He felt Mr. Ferreira's clinical interview and its conclusions were appropriate given his charge under the early intervention process. Mr. Ferreira was not asked to conduct a special education evaluation, but to make assessments and recommendations for student who was considered at risk of dropping out of school. Likewise he felt that Ms. Finkelstein's evaluation was correctly administered, and that the conclusions drawn were supported by the test data. In his opinion, student does not meet the criteria for a student who is behaviorally impaired, but that many of the behaviors identified fall into the category of "socially maladjusted". (Testimony: Sansone)

20. The grandfather testified that he had been very close to student until the last few years. He related family history that in his opinion has had negative emotional impact on student. He feels student has been depressed. He has had no involvement in student's school life until recently. During the summer of 1996 when he realized the extent of student's school failure, he took the initiative of finding an alternative school option for student. He visited Hyde School and insisted student apply and go there when accepted. He initiated the special education process in August to explore whether Portland would pay for the placement. Portland informed him of the referral process and his rights to a hearing if eligibility was denied. (Testimony: Grandfather)

21. The mother described student as having had a troubled school life since about 6<sup>th</sup> grade, with some discipline problems and social insecurity. She feels he suffers from depression. She also testified that she suspected by his 10<sup>th</sup> grade year that student might be using alcohol and drugs, but not to the extent that he was. She was unaware of the degree of his difficulties in high school. Student later admitted to her that he was going through the mail and removing school notifications of his problems. She works nights and was unaware of his activities late at night. She had had little involvement with the school until March 1996 when she realized the extent of student's problems and requested a meeting with the school. She had never considered referring him for special education, nor had she asked the school for help until March 1996. She was under the impression that the "early intervention" process would provide him some special help. (Testimony: Mother)

#### IV. Conclusions

“...[A]ll school administrative units shall provide equal educational opportunities for all exceptional students” [Title 20-A, MRSA, §7201(1)] and...shall “[p]rovide special education for each exceptional student within its jurisdiction.[§7205(5)]. An “exceptional student” is an individual who... requires special education because of an impairment in one or more of the following: 1) vision, 2) hearing, 3) speech and language, 4) Cerebral or perceptual functions, 5) physical mobility functions, 6) behavior, or 7) mental development or maturation.” [§7001 (2) (C )] “Special education services are educational services provided by qualified individuals as defined by the commissioner. Special education services shall be provided by qualified individuals employed or contracted by the school...” §7001 (10) student’s family has concluded that student requires special education services because of an impairment in behavior, and that the school’s failure to provide those services has denied student with a free appropriate public education.<sup>4</sup>

Chapter 101, Maine Special Education Regulations, defines students with disabilities as individuals “who...ha[ve] a disability which adversely effects the student’s educational performance and requires the provision of special education services in order that the student may benefit from an elementary or secondary educational program” and has “one or more of the disabilities listed in sections 3.2 through 3.14 of this part.” [Section 3.1 ( C)] “A student with a behavioral impairment exhibits one or more of the following behaviors: A. an inability to learn that cannot be explained by intellectual, physical, or health factors; B. an inability to build or maintain satisfactory interpersonal relationships with peers or teachers; C. behaviors or verbalizations inappropriate to the setting; D. a general pervasive mood of depression or unhappiness; E. a history of physical symptoms or anxiety associated with personal or school problems. These behaviors shall have been demonstrated over a long period of time and to such a marked degree that the behavior(s) adversely affect the student’s educational performance. NOTE: The term does not include students who are ‘socially maladjusted’, ‘truant’, ‘disaffected’ or ‘chemically dependent’ unless it is also determined that the student is behaviorally impaired. the PET shall make this determination after appropriate evaluations have ruled out other disabilities as the basis for these behaviors.” [Section 3.7]

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<sup>4</sup> The Individuals with Disabilities Education Act (IDEA) from which state special education law draws its authority uses the term “free appropriate public education.” Maine Special Education Regulations, Chapter 101, implementing regulations for §7001 et. seq. uses the terms interchangeably. [Chapter 101, “Summary”, page 1)

Beginning in late 9<sup>th</sup> grade and gathering momentum through most of 11<sup>th</sup> grade student began a pattern of disciplinary referrals which resulted in in- and out-of-school suspensions for cutting classes and smoking on school grounds and failing to serve assigned detentions. Student admitted to frequent and significant abuse of drugs and alcohol. Teachers testified that he failed to complete school work and had high absenteeism in his classes. By spring of 11<sup>th</sup> grade he was failing a majority of his classes. the mother contacted the school for help in March 1996 because student had virtually stopped going to school. The school reassigned him to the Alternative Credit Option program so he could earn enough high school credits to be eligible to graduate with his class the following year. In addition, the school made a referral for the student to be assessed through what the school calls the “early intervention process”.

By May when the early intervention assessment was conducted he was making only token efforts at ACO and was attending only sessions in the morning. He earned 7 credits in the 3 and ½ month he attended there. By the summer, the mother was critically worried about student’s future. When she contacted the school to find out what plans were in place for him for the coming year, she was told that he could resume the ACO program or return to Deering. Student made it clear to her that he would not accept either of the options. She and the grandfather then set out to find an alternative program for him.

The grandfather discovered the Hyde School in his research and felt it could offer the type of program which student needed. “As soon as I stepped on the campus I knew this was the place for student”. Student began the program in August 1996. It was after that decision that the family came to the school for financial assistance to help support this placement.<sup>5</sup>

The family initiated the referral process at that time so that student could be designated a special education student and be eligible for protections under the special education statute. The PET was convened on October 9, 1996 and an evaluation ordered. This evaluation was completed by the school in January 1997<sup>6</sup> at the Hyde School. Using this evaluation, the previous early intervention assessment, and a review of his recent high school career, the PET determined that student did not qualify as a special education student. The family requested a hearing to dispute this decision.

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<sup>5</sup> The grandfather testified that he pursued this request because a student at Hyde told him that his tuition there was paid by his home school district. No documentation was presented as to accuracy of this student’s statement or if it related to a special education placement.

<sup>6</sup> Parents allege a violation of the timelines for convening a PET and for completing an evaluation. These allegations were made in response to their claim that the student should have been referred in March 1996. The parents did not raise these claims around this series of events as they agreed that their schedules impacted on the school’s ability to meet timelines.

In preparation for the hearing the family secured the assistance of a clinical psychologist. Through this expert witness, Dr. Avery, the family assert that student qualifies under the behaviorally impaired definition in that he exhibited a “general pervasive mood of depression or unhappiness”, “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers” and that he has exhibited “behaviors or verbalizations inappropriate to the setting.”

Dr. Avery went to great lengths to discredit the school’s evaluations and their subsequent conclusions. She reviewed the school examiner’s testing protocols, reinterpreted them and rescored the Rorschach using a computer generated model. She submitted a 24 page report for the hearing record. In the opening paragraphs of this report she asserts that the “Portland Public Schools...continue to misrepresent [student’s] right to reparative services and damages for a past failure to identify his eligibility. This failure...ultimately constitutes a significant violation of [student’s] right to an appropriate and free education. Further, this violation should be considered as an act of neglect associated with measurable loss of potential, unnecessary emotional deprivation and possibly cumulative damage...”

Dr. Avery did not do an assessment of the student, and her attempts to draw different conclusions than the school’s evaluators, using the data administered by those evaluators, is not convincing. In addition, in opening statements of her report she asserts an hypotheses and then goes to great lengths to make the data conform with the definition of *behavioral impairment* given in regulations to fit that hypotheses. Her position lacks objectivity. She has assumed a role as advocate for the student and his family. I cannot conclude that her findings of student’s eligibility for special education services under behavioral impairment outweighs the conclusions of the school.

Dr. Avery did not evaluate student, did not talk with his teachers or observe him at either Portland or Hyde schools. She concluded that student suffered from Major Depression, Single Episode. She agreed under cross-examination that her rescoring of the school’s Rorschach and her administration of the Rorschach did not constitute a diagnosis of depression at this time, but that her examination of Mr. Ferreira’s assessment in May 1996 and her inferences of student’s mental state during that period, coupled with the “vulnerabilities” of depressive indicators in the Rorschach, show that, in her opinion, student would have tested as having Major Depression, Single Episode in May 1996 and continues to exhibited the characteristics of a person suffering from depression.

Mr. Ferreira met with student for about an hour, used a standardized interview instrument which he worked with other professionals to develop and which he

testified had been found to be reliable in clinical interviews such as that conducted with student. He testified that he has confidence in his assessment and the conclusions he drew in May 1996. His report acknowledges that student is suffering from depressive episodes and that student's current behaviors are having a significant impact on his educational success. He concluded that student showed signs of depression, and he makes note of that in his report. He made clear during testimony that he concluded that the depression was "situational" and not pervasive. He observed no thought disorders or illogical or confused thought patterns. He concluded that student's current choices, as destructive as they were to his present success and happiness, were his choices. He did not refer student to special education because he did not view student as a candidate for "specialized instruction and related services in order to benefit from his education." However, he concluded that student and his family were in need of family counseling and alcohol related counseling.

Dr. Avery states that student's mental health problems are mitigated now and that depression did not show up as clinically significant at the time of Finkelstein's evaluation because he is in the therapeutic milieu of the Hyde School with its highly structured setting and psychotherapy support. There is no dispute that student is doing well at the Hyde School. It is hard not to be impressed with the obvious change in his approach to his education and future. Student presented himself at the hearing as a young man with impressive verbal skills who is able to talk openly and objectively about himself and his past problems. He clearly is, and should be, proud of the success he has achieved at Hyde.

However, contrary to Dr. Avery's assertion that Hyde is virtually a special education treatment program where he receives psychotherapy, Hyde is not an approved special education facility in either Maine or Connecticut, nor does it advertise itself as a treatment facility for behaviorally impaired students. In Dr. Stoup's affidavit (Ex. 341) he makes it clear that Hyde "focuses much more on attitudes than behavior". The "work crew" discipline is intended "to give students the sense that 'you are a good kid who made a bad choice'" The "Discovery Group" that student participates in weekly appears to be a supported discussion group; its leader has no stated credentials or certifications as a psychotherapist (Ex. 349, 351; Bartrum) It is also impossible to conclude that student could meet the criteria for behaviorally impaired while being so consistently regarded by his teachers at Hyde as performing "excellent to good" in "attentiveness", "insightfulness", "critical judgment" "independence" and "responsibility". (Ex. 355-359)

The family argued that student exhibited depression and possibly need for special education as early as kindergarten, possibly by 9<sup>th</sup> grade, and certainly by March 1996 of the 11<sup>th</sup> grade. I cannot ignore the fact that not one teacher or other individual contemporaneously expressed concern that student exhibited behaviors which were outside the norm for elementary, middle or high school students. There is nothing in the record nor did any of student's teachers testify that student exhibited an "inability" to learn that cannot be explained by intellectual, physical or health factors". As long as he attended school and completed work he got passing grades. The standard expresses an inability to learn, not an inability to achieve up to his intellectual potential.

There is nothing in the record nor did any of student's teachers testify that student exhibited an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. The family argued that his interpersonal relationships were not satisfactory, that his peers and companions were drinking buddies, that he did not have close friends, and that he never had a mentoring relationship with a teacher. There are more positive relationships student could have formed, but the standard in the regulation is not that relationships be positive. student testified that when he began drinking and using drugs, regularly his friends were upset with him so he sought out a new peer group. He also related to Ms. Finkelstein that he has friends at Hyde and has a girlfriend with whom he has a very positive relationship, not based on a sexual involvement. Teachers who taught student testified that student's relationships with them were appropriate and within normal teacher/student standards of behavior.

There is nothing in the record and none of student's teachers testified that student exhibited behaviors or verbalizations inappropriate to the setting. He was sometimes rude, disrespectful and obnoxious, but these behaviors were never described as being outside the range of normal for high school students. The family continuously referred to student's having burned himself on the forearm with cigarettes as an example of his inappropriate behavior. This is upsetting behavior, and could be considered inappropriate, however, student stated that it was done while he was drinking, and that it was behavior that was done during a discrete period of time. This does not fit the criteria that behaviors "shall have been demonstrated over a long period of time and to such marked degree that the behavior adversely affect[s] the student's educational performance."

There is nothing in the record and none of student's teachers testified that student exhibited "a general pervasive mood of depression or unhappiness". Mr. Ferreira found in his report that student suffered situational bouts of depression. Ms. Urbans noted she observed mood swings. Other teachers described him as being too talkative and exhibiting too many attention-getting behaviors. None of them saw him as being depressed or unhappy to a marked degree over a long period of time. Even the mother and grandfather who now describe student as being depressed and unhappy all the time did not view this behavior as significant

enough at the time to refer him for psychiatric, psychological or other medical or mental health treatment.

There is nothing in the record and none of student's teachers testified that student exhibited a history of physical symptoms or anxiety associated with personal or school problems. Student's mother noted that he sometimes suffered from headaches but it was treated with over the counter drugs, and no medical follow-up was ever done.

There is no question that, during student's 10<sup>th</sup> and 11<sup>th</sup> grade his educational performance was adversely affected by his behavior. However, it appears that it was his behavior associated with cutting class, getting detentions and abusing drugs and alcohol which resulted in his failure to engage in his education and not the result of behaviors over which he had no control. Students who are considered "socially maladjusted" or "chemically dependent" are expressly prohibited from being included as eligible under regulations, unless they are also behaviorally impaired. I do not find student to fit the definition of *behavioral impairment*. He certainly described himself as chemically dependent. Whether he is also socially maladjusted is open to debate. Dr. Sansone testified that he felt student fit the working definition used in the Portland Public Schools as a student who failed to conform to social norms and exhibited behaviors of someone who has yet to "grow up" socially.

Educators must react to and make decisions about students contemporaneously using the information available at the time. The fact that none of student's teachers found his demeanor or behavior outside the normal range for high school students is significant. Educators see students every day who fall outside of the limits of what is considered normal behaviors. It is most often teachers who first detect and refer students to be tested for possible inclusion in special education as behaviorally impaired. A student who qualifies for the label of *behavioral impairment* is not generally a student whose behaviors are so subtle that they could only be discovered after exhaustive testing and review of this data by psychologists or psychiatrists. If educators do not express concern that behaviors are severe enough as to make acquisition of mainstream education unattainable without specialized instruction and related services, it is reasonable to assume that in most cases the student does not meet the criteria set out in the regulation.

I do not disregard the family's convincing account of student's troubled adolescence. It is clear that he was having problems during his 10<sup>th</sup> and 11<sup>th</sup> grade years. But, nothing in the record supports the family's contention that this means he required special education services. I believe that student suffered

bouts of depression . Certainly his educational performance was affected. However, I am not persuaded that he, at any time, met the criteria for *behavioral impairment*.

## **V. Claims of Procedural Violations**

I do not find that student is eligible for special education services. I do not find that the school failed to refer student as a student in need of special education services. At no time did the school have reason to believe that student was a student in need of specialized instruction and related services. Any procedural protections afforded student and his family extend from the time when the family made their referral in August 1996 until the conclusion and disposition of this hearing.

The school did not convene a PET in a timely manner from the referral on August 9 until the PET meeting on October 10, 1996. Likewise, the evaluation ordered at the PET was not completed until February 1997, far outside the 45 day time limit specified in regulations at Section 8.16. In both instances, however, the family acknowledged that they bore part of the responsibility for the school's inability to comply with timelines. Therefore, no substantial procedural violation is found.

Other claims of procedural violations dealt with the period in the spring from March 1996 through June 1996. All actions which occurred between the school and student's family occurred under regulations governing "alternative education" and have no bearing in this special education hearing. However, the parent raises valid concerns in her description of her involvement with that process. It is the intent of the "early intervention" process to identify students who are at risk of school failure, they should have been alerted and intervened much sooner on student's behalf. The mother should not have had to make the initial contact with Deering. There was sufficient evidence from the number of discipline referrals and absences to have initiated that process much earlier. Likewise, after completing the early intervention assessment with student in May, the school should have made every effort to contact the family and review the findings. Finally, personal assistance could have been offered to the family to connect them with community resources. Student may not have been a special education student, but he was a student in crisis. The school was in a position to provide more active support and didn't.



**VI. Claims under Section 504 of the Rehabilitation Act of 1973**

By his own admission, student actively abused drugs and alcohol while a student at Deering High School from 9<sup>th</sup> through 11<sup>th</sup> grade. A student who is "...currently engaging in the illegal use of drugs..." is excluded from the definition of an "individual with handicaps" under Section 504 and makes any claim for protection and accommodation under Section 504 during this period inappropriate.

However, there is sufficient evidence in the record to indicate that student might fit the definition as an "individual with handicaps" because of his prior abuse and the "elevated tendency for abuse" observed in the MMP1-A and his documented family history. Should student decide to reenter Deering High School, the school shall address his claim for protection and accommodation. [See OCR Staff Memorandum, 17 EHLR 609, (1991)]

**VIII ORDER**

No order is given.

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**Carol B. Lenna**  
**Hearing Officer**