

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

April 13, 1998

CASE # **98.036**

Governor Baxter School for the Deaf [GBSD] v. Student and MSAD #75

Counsel for GBSD: Dennis M. Doiron, Assistant Attorney General

Counsel for School System: Peter Lowe, Esq.

Counsel for the Parents: pro se

Hearing Officer: Jeannie M. Hamrin, Ed.D.

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, CHAPTER 303, SECTION 7207-B; TITLE 20 USC, SECTION 1415; AND TITLE 29, SECTION 794, AND IMPLEMENTING REGULATIONS.

An Expedited Special Education Due Process Hearing was held on April 7, 1998 to resolve a conflict between the Governor Baxter School for the Deaf [GBSD] and Student [d.o.b.] & School System. In preparation for this hearing a pre-hearing conference was held on April 3, 1998. One-hundred and fifty-one pages of documentation was entered into the record and twelve witnesses presented testimony.

This hearing was requested by GBSD to resolve the dispute regarding: [1] Whether Student should be permitted to return to the residential program at the Governor Baxter School for the Deaf on April 17, 1998 in accordance with his Individualized Education Program, or whether the Governor Baxter School for the Deaf can demonstrate that the grounds exist under §1415 (k)(2)(a)-(d) for continuing Student's interim alternative program after April 17, 1998; and [2] the date when the 45-day suspension under §1415(k)(2) begins.

I. PRELIMINARY STATEMENT

Student is an almost xx-year-old residential Student at the Governor Baxter School for the Deaf [GBSD]. Student's handicapping condition is Hard of Hearing. He has attended GBSD since November 1997. Prior to re-entering GBSD he was successfully attending classes in the School System. Student wished to return to GBSD so he could learn more through a total communication approach. He also longed for friends who were also deaf and/or hard of hearing. Student was suspended from school for possession of a knife on February 27, 1998. On March 3, 1998, a PET met to review the incident. Student was suspended with tutoring until GBSD decided whether to pursue expulsion. The PET met again on March 12, 1998, a manifestation decision was made which indicated that the behavior was not related to his handicap. There was no consensus regarding his return to the residential setting. On March 16, 1998, Student returned to the day program where he has been since without incident. Student would like to return to the residential setting and GBSD does not want him to return at the end of the 45-day alternative interim placement because of safety concerns. The questions are [1] whether allowing Student to return to the residential program is likely to result in injury either to himself or to others, and [2] whether the GBSD has done all that it *reasonably can to reduce the risk* that Student will cause injury.

II. ISSUES

- [1] Whether Student should be permitted to return to the residential program at the Governor Baxter School for the Deaf on April 17, 1998 in accordance with his Individualized Education Program, or whether the Governor Baxter School for the Deaf can demonstrate that the grounds exist under Section 1415 (k)(2)(a)-(d) for continuing Student's interim alternative program after April 17, 1998?
- [2] What is the date when the 45-day suspension under para. 1415(k)(2) begins?

III. STIPULATIONS

1. The case title should read ***Governor Baxter School for the Deaf v. Student and the School System.***

IV. SUMMARY OF TESTIMONY

1. Student is a nearly xx- year-old male Student who is hard of hearing. The fact that Student is hard of hearing was not discovered until 1990 when he was evaluated for articulation. He did not say his first word until he was four years old. Student's hearing levels have remained stable in the moderate to profound range with hearing for the important speech frequencies in the severe to profound range. He can understand some speech through audition only, but needs the visual information in order to communicate effectively through speech.

[School System-4] Student has never demonstrated any violent, unpredictable,

aggressive or impulsive behaviors that would make him at risk for being "substantially likely to cause injury." [Testimony of Patrick Moore, Jacqueline Oliveri, Frank Wickes]

2. For the 1997-98 school year, Student was enrolled in the Therapeutic Alternative Program [TAP]. He first entered that program in February 1997 after not meeting with success in the mainstream. Mr. Wickes described Student as "a breeze, a great Student who did quality work, a model for others, respectful and cheerful" He was sorry he left for GBSD but Student couldn't always be involved with peers in the hearing world and he wanted a peer group that understood and communicated with him. He was seen as gentle, caring and concerned and never a behavior problem or dangerous. He came to TAP because he was not succeeding in the regular education classes and was becoming anxious and depressed. He never had a behavior plan [Testimony of Frank Wickes; Exhibit School System-7]
3. In November of 1997, Student was enrolled in the GBSD, a public school devoted to educating children who are deaf or hard of hearing and need ASL to access their education. Student learns best in a sign environment. [School System-5A]
GBSD is open to children from anywhere in the state who need this type of setting in order to learn. Requests for enrollment are made to the superintendent of GBSD as a result of a decision the sending school's PET, and with the parent's consent, based on an inability to meet the Student's needs locally. **[MSER, Chapter 101, 15.2]** Residential Students range in age from 6-19 years and all live in one dormitory with girls on the first floor and boys on the second. The dorms are overseen by RAs during two shifts. During the third shift the dorms are vacant as the children are at school. There is one RA for the boys and one for the girls, making a ratio of 15-20 Students of various ages to one RA. All Students of all ages must move in a lockstep pattern. [Testimony of David Gaul]
4. Student's present IEP lists five nights per week residential services as a supportive service, or a service required to assist Student to meet the goals and objectives and benefit from his special education program. The reason for the change of placement from the School System was to allow Student access to the curriculum through direct instruction in ASL by the teaching staff. A behavior plan was developed for the dormitory. The behavior plan is a Behavior Contract which deals with issues of tobacco, drug, and alcohol and concerns that Student

may find the no smoking rule difficult. *The dorm and all dorm activities are considered to be part of the school and school life.* One measurable annual goal states: *Student will identify and verbalize [ASL/written] the natural consequences*

*of his personal choices in school and dorm settings 80% of the time without cues. Objectives are: **Given support** and a system of accountability Student will self monitor his behavioral choices [getting up on time, getting to school on time, choosing an appropriate diet, planning and caring for his hearing aids] 100% of the time as measured by incident reports. **Given support** Student will follow school and dorm rules 100% of the time, including off campus school related activities, as measured by incident reports. His Transition services state: *Dormitory living will help to provide more self reliance.* [Exhibit School System, GBSD 1, GBSD 3]*

5. The current IEP was developed by a team of educators and administrators who were knowledgeable about Student. Both Student and Parent were unable to attend but asked that the PET go forward without them. There was no discussion around dangerousness" or any concerns, aside from Student's habit of smoking. A Behavior contract was to be written together with Student. The Behavior Contract is related to the IEP in that it is the part that addresses personal choices to be sure the Student knows about the school rules around smoking. The contract did not contain any supports to maintain positive behavior although the IEP states "**Given support...**". [Testimony of Ray Olson, Paige Coville; Exhibit GBSD 3]
6. Student's behaviors were appropriate until around the middle of January. At that time, it was reported that Student was having difficulties getting up on time. [Testimony of Larry Morse, Ray Olson, Anne Potter, Mike Wallace] There are eight written memos and reports regarding Student's behaviors, however four reports all deal with the February 6, 1998 incident of getting up late, swearing at the RA, threatening to kill the RA if he followed him. [GBSD 8, GBSD 9, GBSD 12, GBSD 14] One of the remaining reports is by an RA about another RA threatening Student by saying "I will kill you if it happens again!" and using both hands toward Student in an angry gesture like he was going to choke him. This angry RA was also the basketball coach and was upset with Student because he had not turned his work in. This report goes on to mention more negative and inappropriate behavior by the RA toward another Student. "What MM did to them is so wrong. If he really do care about the kids, he better do right way by give some positive advises than do the yell thing. I want to inform you that there are several Students who are being careful and discomfort around MM because of his negative attitudes if they get into trouble." [GBSD 17]
7. Wally Bowling, a teacher at GBSD offered testimony around incidents of Student "picking on" another student and generally being a nuisance. A three page unsigned written summary of the incidents was submitted by GBSD on the morning of the hearing. The written document does not totally agree with Mr. Bowling's oral testimony. Mr. Bowling uses words like "terrorizing" and

"terrorism" in his written summary. When asked about the word "terrorizing," Mr. Bowling said that was the student's word and that he would use the words "picking on." He stated that he would write a letter to Mr. Wallace about the behaviors on Monday, February 9, 1998. Mr. Bowling also said that he did not like the way MM coached, he wanted his team to win and could be intimidating. Mr. Bowling has never witnessed any aggression by Student and only from MM when he was coaching. Mr. Bowling stated that student no longer picked on the other student after he had an in-house suspension on February 9, 1998. He stated that student was very polite after he returned from February vacation. [Testimony of Wally Bowling; Exhibit GBSD 17]

8. There was one incident of student being caught smoking, dated January 26, 1998. [GBSD 15] There have been no proven incidences of aggressive behavior, with the exception of the reported verbal threat that student was going to kill Larry Morse if he followed him. [Testimony of Larry Morse; GBSD 12, 13 & 14] Mike Wallace, Principal, testified that student said "I have a way to get back at you" which was changed to "I have a gang who can do something against you." There was confusion around the interpretation of what Mr. Wallace reported. Student states that he said "You don't know what it means when I hate people.:" Ray Olson, the one witness to the incident was not in a position to read student's sign/words but did respond to Mr. Wallace's request to "stay with him while they waited for the police." [Testimony of Mike Wallace, Ray Olson & student]
9. The knife was found after Mike Wallace was told by Paige Coville to check on student's vibrating alarm clock. It is not a part of Mr. Wallace's responsibility to go into the dormitory. Ms. Coville and Mr. Wallace went to student's room where they found the knife under the mattress while searching for the alarm clock. The knife was put back and Ray Olson was called. Student came back to the room and they asked him about the alarm clock and he replied that he didn't have one. They said where would you put one if you had one. He lifted the mattress and exposed the knife. Mr. Wallace asked; "Is it was yours?" and he responded that it was. He then refused to give it to Mr. Wallace and just sat quietly on the bed. Mr. Olson asked for the knife and student asked if he would get it back on Friday? He refused to give it to him. Later student told Mr. Olson that he did not remember that he asked for the knife because he was so angry. Ms. Coville was sent to call the police and Mr. Olson needed to show her where the phone was.

At that time, student allegedly threatened Mr. Wallace verbally/with sign [?] Mr. Olson was asked to remain until the police arrived. All parties agree that student never threatened Mr. Wallace in any physical way, that he was very calm. [Testimony of Paige Coville, Ray Olson & Mike Wallace]

10. Larry Morse, RA, testified that he was unaware of student's IEP, behavior contract or any strategies or positive supports. [Testimony of Larry Morse] Mr.

Wallace stated that the RAs are made aware of behavior strategies and supports. [Testimony of Mike Wallace]

11. Anne Potter, Dean of Students, oversees the dormitory program. She supervises Mr. Olson who then supervises the RAs. She stated that she gave student a vibrating alarm clock around January 21, 1998 after he had been having trouble getting up on time. student was suspended from the dormitory on February 9, 1998 [GBSD 8] based on the incident reports, especially the "written complaint from Wally on 2/7/89. This decision was discussed by Mr. Wallace, Ms. Coville and Ms. Potter. Parent was not made a part of the decision. Student chose not to remain at GBSD for the in-house suspension and called his mother. He remained home until the week of February vacation when he traveled to Massachusetts with the basketball team. He then returned to the dorm on Sunday evening, but was not supposed to be there. He did remain at the dormitory without any problems until the knife was found on the 26th of February. Ms. Potter sent an email to Student dated 1/23/98 where she writes about "Dorm Privileges." Student did not have email so he never received the message until March 20, 1998. There was a meeting on February 12, 1998 which Ms. Potter thought was a PET. Parent had asked that it be canceled and Ms. Oliveri asked to use the time as a Case Conference Meeting. At this meeting Ms. Potter suggested that student consider returning to Mt. Ararat's program and reconsider entry into GBSD next fall. She also noted that student cannot return to the dorm at this time. There was no discussion around dangerous behaviors. [Testimony of Anne Potter; Exhibit School System 5-8, GBSD 4]
12. Parent states that she was unaware of the incident reports until this hearing, that student frequently received "mixed" messages from GBSD. The 2/9/98 communication states he is grounded for a week, then he plays basketball 2/19-22, returns to the dorm on the 22nd and is told he is out but is allowed to remain. She states that student needs residential programming to be with peers that are deaf or hard of hearing to learn social ASL, that this is an integral part of his IEP and not a "privilege." According to his triennial, student needs to access ASL The GBSD is an enculturation process. If the dormitory life is part of the IEP process, a PET must decide whether it is to be changed, and not an administrator. Parent does not feel her son is dangerous, but that he acted inappropriately because there were no positive behavioral supports in place and the IEP was not properly carried out. Parent also told about a deal made between MM and student around a pocket knife. [Testimony of Parent]
13. Student stated that he had the knife because he was afraid of Larry Morse. He did not like it when Larry just walks into his room and doesn't use the light switch. He freely admitted that he has told him to: "Get the f--- out of my room!" [GBSD

12, 13] and he admits he told Ginger to: "Shut up and get out!" and when she kept opening and shutting the door, he told her to "F... off!" He denies that he ever threatened Mr. Wallace but said: "You don't know what it means when I hate people." He claims that Mr. Wallace said: "I don't want you here." and "I don't ever want to see your face." He admitted that he knew the rule about no weapons but he had a reason which was protection from Larry. He said he was afraid that Larry would do something against him in his room. [Testimony of Student]

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulation is hereby a Findings of Fact.
2. GBSD is a public school. Students from Maine may attend the school free of tuition and room and board expense. Funding for these students is provided based on the amount necessary to satisfy the individualized education programs. **[Chapter 304, §7404]** Students are enrolled as a result of a decision by the sending school's PET, and with parental consent, based on *an inability to meet the needs of the student locally or regionally*.
3. Student's misconduct, as described by all parties, does not meet the standard of "substantially likely to result in injury to the student or others" that would allow for a change of placement. Verbal improprieties do not constitute a danger, particularly if no physical injury results. Having a knife is certainly a dangerous behavior. Prior to asking for an order to remove student, GBSD must make every effort to minimize that risk. The burden is on GBSD to demonstrate to the Hearing Officer that such a removal or change in placement should occur to avoid injury, in spite of all the measures GBSD has taken.
4. GBSD acted appropriately in suspending student for 10 days. They further acted appropriately in their behavior manifestation determination and 45-day alternative interim placement as they believed he was dangerous. However, as student's change in placement was for "dangerousness," GBSD should have used this 45-day period to thoroughly evaluate the issue of dangerous behavior in order to make a decision about his IEP and placement after the 45 days.
5. GBSD did not act appropriately by not addressing the initial instances of misconduct by determining what services may be appropriate in the dormitory and whether dorm staff needed training in conflict management and/or behavior management strategies, proposing modifications to the IEP.

6. There are attitude, understanding, and communication problems at GBSD around Special Education requirements, adolescent developmental needs, correct lines for reporting misbehavior in a timely fashion, and communication with the parent. These are exacerbated by the misinterpretation between aural hard of hearing communicators, lip readers, and ASL communicators. There is confusion by GBSD administrators about special education law and about developmental needs of adolescents.
7. The Dormitory related service is an integral part of student's IEP. It is not a privilege that can be easily taken away. There were objectives that were not implemented. At least one RA was unaware of student's IEP and Behavior Contract.
8. Given the record regarding the 2/9/98 in-house suspension that escalated into a full blown suspension without a PET underscores GBSD's desire to eliminate student from the dormitory because he had difficult behaviors and not because he was dangerous.
9. Student was suspended on February 27, 1998 for possession of a knife. A PET meeting was called for 3/3/98. The PET met again on 3/12/98 and made a manifestation determination and a positive supports contract. Student was allowed to return to the day placement but not the dormitory. This was an alternative placement because of dangerousness. This hearing is to determine whether student is "substantially likely to cause injury" if he is allowed to return to his placement after the 45 days or whether GBSD has demonstrated that he should remain out of the dorm for an additional 45 days.

VI. DISCUSSION

School safety and the guaranteeing of the rights of students with disabilities are compatible. Clearly, school safety starts with the commitment of every student and staff member to take full responsibility for his her own safety and the safety of others both in and out of school. For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a student who is hard of hearing, this decision may need to take into account his disability by assuring communication is clear and understood. GBSD must also take into account student's developmental level when making corrective actions. It must be underscored that parents and school must work together cooperatively and that parents must be informed about all misbehavior and punishments. First and foremost, student needs a behavior management plan that is positive and preventive of poor behaviors and the RAs and teachers need to be

trained in implementing conflict management strategies.

A simple vibrating alarm clock may have eliminated much of the "waking up on time" difficulty. It is inappropriate for a RA to walk into an adolescent's room without permission. It also appears that the dormitory is short staffed given the range of ages and needs of the students. If student could benefit from the provision of more specialized services in the dorm, then they must be provided. Prior to seeking to expel or remove a student for dangerousness, GBSD must *have made every effort to reduce the risk*. GBSD has not presented any evidence that they made any effort to minimize the risk of his dangerous behavior. On the contrary, GBSD seems to want to get rid of student because he exhibits some of the typical irritating behaviors that many adolescents demonstrate. They have taken a knee-jerk reaction which was to place all the blame on the student and suspend him without looking at the "environmental factors" that contributed to the misbehavior.

This is not to say that student is blameless. He is not and he certainly bears responsibility for his actions. There is a "world of stuff" behind the verbal and signed words. Certainly the need for safety, the need for love and belonging and the need for self-esteem motivate all behaviors. It is very legitimate for the school to fear student, but it is also very legitimate and real for student, given his prior history at GBSD, to be afraid of an RA entering his room without permission. The parties must get beyond their intractable positions and see what their common interests of safety, love and belonging, and esteem are. How can student receive fulfillment of his needs for safety, belonging and esteem, and just as importantly how can teachers and administrators feel that they have been heard, understood, valued and held in esteem? These are issues which must be discussed in an open atmosphere where there are no miscommunications because there is no interpreter available or because the parties feel threatened and afraid.

Another compounding problem is the whole communication issue. On two instances there were important miscommunications during the hearing. These happened not because of intent, but just because one can never be sure of the understanding and meaning of certain words/signs. The unsigned written report [Exhibit GBSD 16] by Wally Bowling which was submitted during the hearing, and not read by me until after, raises questions. When the document was entered into the record an assumption was made that it was one of the affidavits that GBSD's counsel was to submit. There is a marked difference between the quality of Mr. Bowling's spoken language and his written language as well as his testimony. There is also a difference between Exhibit GBSD 16 and other written documents submitted by persons who are deaf or hard of hearing. For this reason, this document is not viewed as genuine. If this document is a forgery, then it certainly supports Parent's claims that GBSD just wants to be rid of student and has set him up. By Anne Potter's testimony, this document played a big role in the administrative decision to suspend student on February 9, 1998.

At present, there is a huge issue of mistrust that will not be alleviated by this hearing. Public schools are about community, morals, and democracy. A public school that rewards privilege, devalues decency, fairness and justice--all essential components of a democratic community.

VII. ORDER

1. Student shall be permitted to return to the GBSD residential program the evening of April 26, 1998.
2. A PET shall convene prior to his re-entry and craft an *individualized* behavior plan that is age appropriate to meet the challenges he faces within the dormitory. Additional supports such as a mentor shall be considered. If student should act out, he must be a part of the consequences decision and an interpreter must be present to assist with communication.
3. GBSD shall submit to me a certified written statement about the authenticity of Exhibit GBSD 16. If it is found to be a forgery, then appropriate steps must be taken to ensure that student's [and other students'] civil rights are protected.
4. This is a recommendation and not an order. It is strongly recommended that GBSD shall ask the Department of Education for in service training around special education law and developmental psychology. It is also recommended that GBSD have a policy that ensures that an interpreter is present for any serious disciplinary actions.
5. GBSD shall submit to me all PET minutes, letters to the Department, policy actions, and clarification of the authorship of GBSD 16 within 45 days of receipt of this decision.

So ordered,

Jeannie M. Hamrin, Ed.D.
Hearing Officer