Special Education
Due Process Hearing Decision
***Parents* v. MSAD 34**

CASE NO: 98.159

REPRESENTING THE PARENT: Martha Temple, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Carol B. Lenna

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

The parents filed a request for due process hearing on behalf of their son, *the student* on October 13, 1998. The *parents and their child* reside in Belfast, Maine. The *Student* is enrolled in the MSAD 34 school district, currently at the Middle School.

The parties met in a prehearing conference on November 5, 1998, to exchange documents and lists of witnesses and discuss the issues for hearing. The hearing convened on November 13 and 16. One hundred and three documents were entered into the record. Nine witnesses gave testimony.

The dispute centered around the school's removal of *the Student* from his public school placement. Because of written threats made by *the Student* on a harassment claim form, the PET removed him from school on September 25, 1998, and ordered an evaluation to determine his psychological status. *the Student* began home-based tutoring on that date. The parents were not in agreement with the removal. The hearing officer ordered *the Student* back in school, effective November 10. On that date, the school requested an expedited hearing to have *the Student* remain out of school because, in their view, it was dangerous for him to be maintained in school.

With the agreement of the parties, the hearing officer simultaneously heard evidence on the issues raised in the expedited hearing, held pursuant to §1415(k)(7), and evidence on the issues raised in the original hearing. A summary of the hearing officer's decision on the expedited portion only was sent to the parties on November 20, 1998. A copy of that decision is appended to this decision. Following is the decision on the matters raised by the parent in their original request for hearing.

I. Preliminary Statement

The case involves a xx-year-old student who is eligible for special education services under the category of "behavior impairment". His most recent IEP places him in regular 8th grade classes at the Junior High School, with the assistance of an educational technician in all academic subjects, and 135 minutes weekly of "directed study". In addition, the plan calls for social work services 30 minutes weekly and occupational therapy consultation. The student was mainstreamed without supportive assistance for the balance of the school day. "Tech Ed" was one of the classes he attended without support.

On September 24, after complaining to his Tech Ed teacher that he had been the subject of harassment by fellow students, the student went to the office to fill out a harassment claim form. On this form, he made threats to kill certain students. On the following day, the PET met and removed the student from school. Home-based tutoring was provided two hours per day.

It was the position of the parents that the school improperly removed the student from school. They argued that they were not given appropriate notice as to the purpose of the September 25 PET, and that procedural safeguards were not followed. They made clear their objection to his removal from school. They argued that the school improperly relied on 20 USC §1415(k) to remove the student.

The school contended that they did not rely on §1415(k) to remove the student from school. They argued that the PET, on September 25, ordered "that [the student]'s program should shift to an out of school arrangement until his evaluation is complete", and that this change was made with the parents' approval. They further argued that there is sufficient evidence that the student is substantially likely to cause injury, and that the student should remain out of school until a "safety assessment" can be performed by qualified professionals.

In a letter to the parties on November 7, the hearing officer ordered the student to be returned to school on November 10, pending the resolution of the hearing. Evidence supported the parents' position that they did not agree with the student's removal from his current placement in the public school. The school had not requested a ruling from a hearing officer or a judge to consider the issue of the student's need to be removed because he presented a danger. The hearing officer reasoned that if the school had not relied on 1415 (k), either properly or improperly, to remove the student from school, and had not requested an expedited hearing to have a hearing officer determine that his continued placement in school was substantially likely to result in injury to the student or other students, then the student must remain in his "current placement" during the pendency of the hearing. To address safety issues raised by the school, and harassment issues raised by the parent, the hearing officer ordered additional supervision be provided to the student.

Immediately after that ruling, the school requested an expedited hearing to consider their claim that the student presented a danger to others because of his written threats. That issue was considered during the hearing, in conjunction with the issues raised by the parent. The decision on that issue only was forwarded to the parties on November 20, 1998. It is appended to this decision.

II. Issues

- Did SAD 34 improperly remove the student on September 25, 1998, after he made threatening statements in a school harassment claim form, and, as a result, violate his right to a free, appropriate public education?
- Was the interim setting - home-based tutoring - appropriate to meet his needs?
- Was the IEP in place prior to September 24 appropriate to meet the student's special educational and related needs, as known at that time?

III. Findings of Fact[1]

1. The student is identified as behavior impaired. His most recent IEP places him in the public middle school where he attends mainstream classes. He has an educational technician available for academic subjects only (four of his five classes). He receives directed study for organization and work completion. His current behavior plan addresses his problems with work completion. (Exhibit: 30-36)
2. On September 24, after an incident in a non-academic class, the student went to the office to file a harassment claim about certain other students in his class. (Testimony: Drapach, Mailloux, Cummings; Exhibit: 18)
3. The student made written threats[2] in the harassment form to kill specifically named students. (Exhibit 23)
4. The assistant principal contacted the parents to notify them of the events surrounding the written threats, and to set up a PET. He notified the student's mother that the student was being suspended for two days for this event. With agreement from the parent, the PET was scheduled for the next day. (Testimony: Mailloux, Parent)
5. The PET met the next day, September 25. The PET discussed the incident of the written threats in the harassment form. The minutes of the meeting state that the PET concluded that the student "cannot return to school property until the PET reconvenes and makes that determination". A psychiatric evaluation was ordered "to determine whether [the student] presents an ongoing risk of serious violence to the school". Further determinations of the PET state that a

[1] The exhibits for both the expedited hearing and this hearing are the same. Many of the "findings of fact" listed in the expedited hearing decision are pertinent to the conclusions in this decision. They are repeated here.
[2] Subsequently, one of the students alleged that the student had made verbal threats to kill her. She did not testify. No one heard the threat. She did not report the threat until several weeks after the incident in this case.

"functional behavior assessment will be conducted", and a "manifestation determination PET will determine whether or not the incident is a manifestation of [the student]'s disability". No change in his IEP was proposed. His behavior plan was not revised. The parent was asked to, and did, sign a waiver of the requirement for 7-day notice of a PET meeting. No written or verbal review of parent's procedural safeguards was given at the meeting. (Testimony: Marden, Bosk, Drapach, Parent; Exhibit 21)

6. The student's teachers and special education staff completed a functional behavioral assessment. This information was presented to the PET on October 9. The assessment notes that the student does not "mix well with other students"; "[h]e feels he is being picked on very, very often". "This has been a school issue for many years". "[L]arge group unstructured situations…worsen his behavior." The assessment notes that negative behaviors are least likely to occur "when an adult is within 5' of [the student]", or in classrooms with special education support or in small groups. His special education teacher stated that he feels safer when there is more adult support and fewer students in a situation. (Exhibit 13; Testimony Dymowski, Drapach)
7. On October 9, the PET met again. Minutes of the PET state that the parents disagreed with the continued exclusion of the student from the public school. No decision was made regarding the relationship of the student's disability and the behavior that led to his removal from school. (Exhibit 10; Testimony Parent)
8. The student received home-based tutoring two hours per day from September 26 until November 9. The school social worker met with the student at home on a weekly basis. (Testimony: Parent, Drapach, Hess)
9. A child psychiatrist met with the student within 10 days of the student's removal from school. He conducted a clinical assessment of the student. No standardized testing was performed . In a conference call with school staff, the psychiatrist was unwilling to conclude whether or not the student presented an "ongoing risk of violence to himself or the school". He recommended the school contract with a psychologist to have a complete battery of tests completed. He filed no written report on his meeting with the student. (Testimony: Parent, Drapach, Bosk; Exhibit: 8, 17)
10. The parent contracted with a local clinical counselor soon after the student's removal from school. After interviewing the student, and reading the written threat, he concluded the student has the internal restraints that are necessary to make a distinction between threat and action. The counselor has met with the student, in clinical sessions, three times in approximately 6 weeks. (Testimony: Edelston)
11. The student has no history of violence at school. The student has had minimal disciplinary events at school. (Testimony: Parent, Drapach, Bosk, Dymowski, Marden)
12. While the PET did not conclude whether or not the student's behavior was a manifestation of his disability, school staff stated that they feel that the written threats resulted from behavior that is related to his disability. (Testimony: Drapach, Marden, Hess)

13. Before his removal, the student was achieving passing grades in all subjects. All agreed that the year had started off well and that he has shown improvement from the previous year. (Testimony: Dymowski, Hess, Marden, Parent)
14. Since returning to school on November 10 the student has a full-time individual aide assigned to him. There have not been any behavioral events of consequence. He appears to have reintegrated well into the school routine. Staff note that he is interacting well with his aide. (Testimony: Drapach, Mailloux, Hess)

III. Conclusions

Did SAD 34 improperly remove the student from school?

The parties did not dispute the facts surrounding the threats written by the student in the harassment claim form. The parties did not disagree that the writing of these threats was a matter to be taken seriously. The parties did not disagree that a comprehensive evaluation was needed. However, the parent's were clear that they did disagree with his removal from school.

There are limited circumstances in which a student with a disability can be removed from school when the parties do not agree to a change of placement. Recent change in federal law gives schools the authority to remove students with disabilities from public school if the student brings a weapon to school, or knowingly possesses or uses illegal drugs at school. The schools may remove the student for up to 10 days, and have the authority to place the student in an "appropriate interim alternative educational setting" for a maximum of 45 days. *See* §1415(k)(1) If a hearing officer determines that it is dangerous for a student to remain in school, he or she has the authority to remove the student from school and order a change of placement to an interim setting for not more than 45 days. *See* §1415(k)(2) In either case, this removal may be done without parent approval, but is subject to a parent's right to due process. *See* §1415(k)(7)

If a student with a disability violates any rule or code of conduct of the school, the school may suspend the student or place him or her in an alternative setting for up to 10 days. During those 10 days the school must convene a PET to determine what, if any, relationship exists between the student's conduct and his disability. If it is determined that the student's conduct was a "manifestation" of his disability the school may initiate a change in placement, but may not remove him from school long-term. If no relationship exists, the school may remove the student, but must provide services consistent with his IEP. *See* §1415(k)(4) Again, any action taken by the PET without consensus is subject to the parent's right to due process.

Initially, it appeared that the school relied on some part of §1415(k) to remove the student from school. The minutes of the September 25 PET use the language of the law in setting out the procedural steps to be followed. Although the body of

the minutes do not reflect a discussion of those procedural requirements, the determinations state that: "a functional behavior assessment will be conducted", "a manifestation determination PET will determine whether or not the incident is a manifestation of [the student's] disability", and "[the student] will be tutored…up to 45 days". It was clear that the student would not be allowed to "return to school property until the PET reconvenes and makes that determination based on "a psychiatric evaluation [to determine] whether he presents an ongoing risk of serious violence to the school".

The school argued that it did not rely on §1415 (k) to remove the student, but rather changed the student's placement, pending evaluation, with the approval of the family. The school contends that the parent agreed with the decision to provide home-based tutoring until a psychiatric evaluation could be completed. The parent is adamant that they did not agree. They contend there was no discussion at the September 25 PET about program options; the student was being removed to his home until a professional assured the school that the student was not a danger to other students at the school. Regardless of the positions of the parties at that point, the school had the right to remove the student for 10 days for a violation of school conduct[3].

By October 9, however, the school had an obligation to return the student to his current program. The 10-day allowance had expired. The parents' objection to the student's continued removal from school was indisputable. There was no consensus that the student's program should be changed to a home-based tutoring program for two hours per day. The PET did not determine that the student's behavior in the threatening incident was <u>not</u> a manifestation of his disability, and therefore subject to expulsion. The PET did not request a ruling from a hearing officer or a judge to remove the student because he posed a risk. In addition, when the parents requested a hearing four days later, the school was in violation of the "stay put" provision. "During the pendency of any due process or judicial proceeding…unless the [school] and the parents agree otherwise, the student…shall remain in his…current educational placement". *Chapter 101(10.12)* By this point, the school determined unilaterally that the student would not be returned to school in violation of statute. The school had an obligation to either return the student to school or request that a hearing officer remove him to an alternative setting for up to 45 days because maintaining him in his current placement was "substantially likely to result in injury" to the student or others. The student's right to a free appropriate public education was compromised by the school's continued action to keep the student out of school.

The school argued that the risk of keeping a student in school who has threatened to kill other students is a grave risk to the safety of the school community, and that the school has a responsibility to protect the life and safety of those students. They maintained that school staff acted appropriately to bar the student from school until a

[3] See also Title 20-A MRSA §1001(9-B): "[T]he school board may authorize…[the suspension of] an exceptional student up to a maximum of 10 days…for infractions of school rules."

mental health professional could evaluate him and determine his mental health status.

There is no question that any threat by a student should be considered as a serious matter. There is no question that schools are charged to protect the safety of the students in its care. However, it has an equal charge to protect the rights of the students in its care as well. There is a process for removing students with disabilities from school. The school did not apply this process. The school was in violation of the student's right to a free appropriate public education when it relegated him to 45 plus days of home-based tutoring.

Was home-based tutoring appropriate to meet the student's needs?

The school improperly excluded the student from receiving a free appropriate public education in the lease restrictive environment. Whether this setting was appropriate to meet his needs is moot at this point.

Was the IEP in place prior to September 24 appropriate?

The current IEP[4] was written in the spring of 1998 prior to the student's return to school. The plan described services to meet those needs that had been identified by the PET at that point. Special education instruction and related services were provided to support his academic and social needs. School staff and parents agreed that the student was performing well in his academic subjects. He appeared to have started the new school year well.[5] Work completion, which had been a problem in past years, was improving and was reflected in his grades. Peer relationships continued to be problematic, but his participation with the social worker showed progress. By all accounts, the IEP resulted in his achieving educational benefit and was therefore appropriate.

The parents had repeatedly voiced concerns to school administrators about what they saw as a pattern of peer harassment toward their son. There continued to be claims by the student of harassment and teasing from other students. It may be argued at this point that he should have had more comprehensive support during the less structured periods of his day and that this might have prevented the incident that led to the student's threats. However, the school was not remiss in providing that additional intervention prior to the incident. The school was aware that the student exhibited certain behaviors that are atypical for average adolescents, and acknowledged that he had poor social strategies for normal adolescent peer behaviors. However, they were accepting of these behaviors, and provided a

[4] The student's IEP has not changed since the student's suspension. The parties agree that the PET will wait for the competed evaluation before any changes are made. This was not an issue for hearing.

[5] The student was home-schooled for the last two months of the previous school year. He reentered school at the beginning of the 1998-99 school year.

supportive environment for him for a majority of his day. For the most part, he was doing well before the incident that led to his removal. There were no specific events of note in the early part of the year.

V. Order[6]

1. The school shall convene the PET before November 27, 1998 to develop a change in program within the public school for the student pending the outcome of the evaluation ordered, and shall remain in effect until the PET changes the program. That change shall be designed to minimize the risk that the student will carry out any threat of violence toward himself or other students. That change shall include at least one weekly session with the student's counselor[7] paid for by the school. The student's case manager shall devise a plan for coordination between the counselor and the school program.
2. The school shall complete the evaluation process no later than December 10, 1998[8]. The school shall notify the Pediatric Center in writing that they are under a hearing officer's order to complete the evaluation by that date. If the Center is unable to commit to complete the major portion of the evaluation by that date, the school shall locate another qualified evaluator who can complete the evaluation by that date.
3. The PET shall convene within 10 days of the beginning of school after the December vacation to consider the evaluation. The Pet shall make changes as necessary in the student's IEP.
4. The school shall assess the student's current academic standing to determine schoolwork negatively affected by the student's absence from school. Individual support, outside the normal school day, shall be provided two and ½ hours per week for 4 weeks, to compensate for missed class time and any missed assignments.

Carol B. Lenna
Hearing Officer

[6] This order includes those items listed in the expedited hearing order.

[7] Whether the student continues to see Mr. Edelston or not will be a matter left to the agreement of the parties. If the parties are unable to agree, the parent shall choose the counselor based upon the student's prior relationship with the counselor.

[8] By letter from the school, the hearing officer was informed that the Pediatric Center notified the school that the evaluation would be completed by December 7, but a written report will not be available until late December. After consideration, the hearing officer ordered the school to continue with this evaluation.