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STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

December 29, 1998

Case # 98.168, Yarmouth v. Parent

Counsel for the School: Don Kopp, Esq., Drummond Woodsum & MacMahon

Counsel for the Parent: Richard O'Meara, Esq., Murray Plumb & Murray

Hearing Officer: Katherine A. Neale, M.Ed., J.D.

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

On October 28, 1998, the Department of Education received a request for a Due Process Hearing from the Yarmouth School District to resolve a dispute between the school and the parents regarding placement for their son.

The pre-hearing was held on November 19, 1998 at the law offices of Drummond Woodsum & MacMahon. Exhibits submitted by the school are numbered 1 through 577 and exhibits submitted by the parents are numbered P-1 through P-6; P-6A through P-6C; P-7 through P-92. The hearing was held on December 8 & 9, 1998 at the Cumberland County Probate Court in Portland, ME. The record remained open until December 14, 1998 for parties to submit closing arguments.

I. PRELIMINARY STATEMENT

The student is a xx year old male who was initially referred for special services while in kindergarten (1988) and was identified under the exceptionality of Behavioral Impairment. He entered the Yarmouth school system in December, 1989 during the first grade and continued receiving special services. Following the March, 1993 triennial re-evaluation, the student was also identified as having a Learning Disability. Over the next two years, the student's behavior intensified until the PET determined that the public school could no longer effectively

educate him. Beginning June, 1993 and for the next five years, the student attended a number of Sweetser settings, including its short-term residential placement.

In January, 1998, the mood stabilizing drug, Depakote was administered with reported success in helping the student cope with his emotions and resultant behaviors. The parents no longer believed the program was appropriate and the Sweetser staff felt their efforts were futile without parent support, so the student was discharged from Sweetser on April 10, 1998. While the parties attempted to resolve their differences over an appropriate program and placement, Yarmouth Schools provided tutoring until October, 1998 when the tutor quit due to the student's behavior. Attempts to hire another tutor have been unsuccessful.

The school brings this issue to hearing to resolve the impasse over placement. The parent alleges that the school has provided inappropriate programming for the past six years. They view the student's primary disability as a Learning Disability with behavior as a secondary issue, especially now that he is taking Depakote. The parent argues that the appropriate placement for the student is a residential school principally devoted to students with learning disabilities. The school views the student as both learning disabled and behaviorally impaired with the behavior significantly interfering [sic] with the remedial academic instruction. The school argues that the least restrictive environment in which to educate the student is a day treatment program, which focuses primarily on behavioral disabilities.

II. ISSUES

1. A.) Were the IEPs from 1993 through 1998 inappropriate?
B.) Was there a violation of procedural rights following the student's discharge from Sweetser?
C.) If yes, is the student entitled to compensatory educational services?
2. Is the school's proposed IEP (7/17/98 PET) appropriate to meet the student's various educational needs and provide him with meaningful educational benefit in all areas of disability?
3. What is the appropriate educational placement in which to implement the student's educational program?

III. SUMMARY OF THE RECORD AND TESTIMONY

1. The student was initially referred for special services while in kindergarten in South Portland due to noncompliant and aggressive behavior, poor interpersonal skills and academic deficits. The student was identified in need of special services under the exceptionality of Behavioral Impairment. He entered the Yarmouth School system in the middle of 1st grade (December, 1989). The PET met to review his program on January 16, 1990 and increased his time in the resource room. At that time, cognitive testing indicated that he was functioning in the Low Average range of intellectual ability. Psychological testing indicated that the student was experiencing stress and low self esteem with neurological and environmental stressors contributing to his behavioral difficulties. Language tests showed delays in receptive and expressive language development and Occupational Therapy (OT) testing found weaknesses in sensory processing. He received Composite Room, OT, and Social Worker services to address his academic, behavioral and motor needs. The student repeated first grade. In March, 1991, a neurological evaluation was conducted at Maine Neurology, Portland, ME by Dr. James Riviello, M.D. which included an EEG in waking and sleep states. The report states, "This EEG is indicative of minimal posterior cortical dysfunction....There are no epileptiform features present that would suggest an epileptiform etiology to the patient's symptoms." [Exhibit: 37-48; 566-577; 106-109]

2. A review of the PET minutes during 2nd and 3rd grades (1991 - 1993) reveals continual descriptions of noncompliant behavior, assaultive behavior, and general disruptive behavior in the classroom. In the March 30, 1993 minutes, the Director of Special Services stated that the student's behaviors "seem to be interfering with learning, social skills and any remediation efforts to compensate for the learning disability." [Exhibits: 551-561]

3. In March, 1993, a triennial evaluation was conducted. The psychological evaluation results from the WISC-R indicated Average range cognitive functioning (Full Scale IQ - 97) with a significant discrepancy between verbal and performance abilities, in favor of performance abilities. The achievement testing results (K-TEA, TOWL) found Reading and Math levels in the Borderline range and Writing Skills in the Low Average range. OT testing indicated significant delays in gross and fine motor development, and speech/language testing indicated Borderline range receptive and expressive language skills. The student was re-identified as needing special services under the designations of Behavioral Impairment and Learning Disability. [Exhibits: 37-48; 542-551]

4. On June 4, 1993, the PET met to discuss the student's placement in a more restrictive setting. The minutes state the following:
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During May, [student's] behavior became more aggressive than at any previous period in this school year. He broke the MAC computer mouse and Apple computer disk, hit teachers, threw class materials off shelves and desks, knocked over chairs, tried to throw a table at a teacher, swore a lot, spit at teachers, yelled, refused to come in the building, and was uncooperative about everything. [Student] also began withdrawing from all academic instruction. He refused to participate in his reading and life skills groups.

The PET recommended that the student receive extended school years services at Sweetser's Children's Services in Saco, ME and that he attend the Windham Sweetser Day Treatment Program in September, 1993. [Exhibit: 542-543]

5. The IEP (10/93-10/94) developed for the student's first academic year at Sweetser (4th grade) contains goals and objectives in reading (present level of performance on K-TEA at 2nd grade); math (present level of performance on K-TEA at 3rd grade); written expression (present level of performance limited in spelling, processing and motor skills); social and behavioral skills (expectations of the school's Full Value Community); and speech/language goals. There was also a Treatment Plan to coordinate program efforts between home and school. Quarterly progress reports indicate that the student was making progress in some content areas, such as math and encoding skills, but still required one-on-one assistance for all academic work. While qualifying that there were still significant concerns, the Social Worker noted progress in the areas of relationships with peers, lessening of aggression and a lessening in tantrums. In October, 1993, the student was diagnosed as having Oppositional Defiant Disorder with Attention Deficit Hyperactivity Disorder by Dr. Andrew Hinkens, M.D. Between December 1993 and July, 1994, trials of Ritalin and Clonidine were administered with unstabilizing and adverse effects. [Exhibits: 398-413; P-1; Testimony: Parent]

6. In January-February, 1994, a neuropsychological evaluation was administered by Dr. Beverly Strzok along with the Sweetser Diagnostic Review Team. The report offers numerous educational recommendations, including the student's need for a highly structured, multi-modal teaching approach to language arts. [Exhibit: 63-71]

7. The 10/94-10/95 (5th grade) IEP indicates that minimal academic progress was made as many of the goals and objectives are the same as the previous year's. A year's growth appears to have been achieved in math, but reading and written language skill growth appears minimal at best. At the 4/28/95 PET meeting to review the program, the classroom teacher reported that the student had made significant progress on his behavioral objectives. While there

continued to be high distractibility, the anger and explosions appeared to be gone. Further, the teacher reports that despite the student's sporadic attention and frequent need for redirection, he was progressing in the Wilson program in reading and writing. The parents reported that they did not see the behavioral improvements at home and were concerned about the lack of progress. The PET recommended a comprehensive triennial review to be conducted. The parent testified that they began requesting additional medical evaluations around this time. [Exhibits: 391-387; 535-537; Testimony: Parent]

8. During October, 1995, the triennial evaluations were administered. The evaluator, Dr. Scott Davidson, Psychologist, notes that the WISC-III scores and profile are very similar to the pattern of scores in previous years. He concludes that the student has a significant learning disability that is largely language-based with some additional problems in areas of fine motor organization and processing speed. Additionally, attention and concentration problems were apparent across all administrations of the test. Dr. Scott concludes the following:

Psychologically and academically, [student] appears to benefit from, and continue to need, the structure and limits provided by Sweetser's therapeutic day school. His internal disorganization requires an external environment that can offer immediate, individual reinforcement in a culture of mutual support and belonging. The level system at Sweetser effectively reduces the size of [student's] environment as an empathic response to his ability to manage a larger arena.

The achievement testing using the Woodcock Johnson Achievement Battery indicated the following standard scores:

Broad Reading	67 (1-3%ile)
Basic Reading	79 (5-13%ile)
Reading Comprehension	70 (1-4%ile)
Broad Math	70 (1-4%ile)
Basic Math	71 (3-5%ile)
Broad Written Language	48 (.1-.1%ile)
Basic Writing Skills	64 (.4-2%ile)
Written Expression	41 (.1-.1%ile)

The report indicates that the student's reading level ranged from mid second grade in comprehension to the mid third grade level in word attack skills. His greatest deficit area was in written language which remained at a first grade level. The speech/language evaluation indicated the greatest difficulty in receptive language skills and the evaluator recommended continued speech and

language therapy. The PET met on November 3, 1995 to review the evaluations and recommended revisions to the IEP. [Exhibits: 58-62; 13-20; 532-534]

9. The PET met on January 12, 1996 for the annual program review. The special education teacher reported that the student's work habits and time on task had improved as his behavior had increasingly come under control. His participation in math activities had increased, writing assignments had increased in length, and his independent functioning in all areas had shown improvement. While continuing to have difficulty with timely compliance of requests, his behavioral responses were more positive and he was handling transitions more successfully. The staff further reported that the student appeared to have an increasing awareness of peer relationships and had shown measurable improvement regarding appropriate behaviors (rating increase from 2.6 to 3.3). The minutes reflect that the family continued to request additional testing to determine an accurate diagnosis for their son. The PET determined the Director of Special Services (interim Shirley Willis) would explore options for additional evaluations. [Exhibit: 530-531]

10. During the fall of 1996, the student's behavior began to regress. In the January 7, 1997 PET minutes, the teacher reports that the student has made no progress toward complying with requests without verbal or physical confrontations; requires an increasing amount of time outs; frustration tolerance has decreased; decreased self control; and increasingly requires physical restraining. The Social Worker saw some improvements: last year he was far more abusive to peers and this year he was only annoying other kids; he is much more able to give an accurate accounting of incidents and assess what happened; and knows the difference between fantasy and reality. The teacher and Social Worker noted that the student had a successful summer program, made gains with the tutoring, and was currently making steady progress in reading. Parents reported having no authority with him at home. The PET recommended Sweetser's short term residential program in Saco, which he began attending in January, 1997. [Exhibit: 528-529]

11. From January through March, 1997, Dr. James Maier, M.D. conducted a psychiatric evaluation with the student. He recommended a trial use of an anti-epileptic mood stabilizing drug such as Depakote or Tegretol, family therapy, and "continued application of systematic behavioral contingencies [to help the student] become progressively more skilled in meeting his emotional needs in less dramatic and ultimately self-defeating ways." Dr. Maier testified at the hearing that he saw the student needing a small specialized setting with a trained staff who understands the students disabilities and can help him develop appropriate strategies, ex. using Life Space Interviews. Further, the student needs appropriate peers, as he is a follower. For this reason, he expressed

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concern about the peer group at institutions such as Sweetser and Spurwink. Dr. Maier favors residential treatment as it is more comprehensive. [Exhibits: 99-105; 81; Testimony; Maier]

12. On March 27, 1997, the PET reviewed Dr. Maier's report. The minutes reflect that the student was responding to the short term residential program. Typically, it is a 60 day program, but he stayed for an additional 30 days. The PET recommended that he attend the Sweetser Day Treatment Program in Saco which he started in April, 1997. The parents were pursuing a neurological evaluation at Children's Hospital in Boston. The PET met again on May 28, 1997 to review the student's progress at the new placement. Staff reported that he was working well in the school component and pre-vocational component. Although requiring one-on-one assistance to complete academic assignments, he had completed 80% of his work. Behaviorally, he was described as having more good days than bad, although he had been verbally abusive to staff, spitting at and fighting with another student and stealing property. The Sweetser psychologist expressed concern that the family had not participated in the "family work" component of the program. Both parents expressed frustration and anger at the demands made on them by the child and the school. The Boston neurological evaluation was conducted in August, 1997 and the report was received in November. Dr. Maier testified at hearing that the study indicated an abnormality, a mild encephalopathic delay and he recommended Depakote. [Exhibits: 526-527; 82-98; 524-525; Testimony: Maier]

13. In January, 1998, the student began taking Depakote (nearly one year after it was initially recommended) and the dose was gradually increased in March and again in July. The PET met on February 3, 1998 for the annual review. The school and parents report noticeable change following the drug therapy, i.e. more focused, anger outbursts not as long, more under control, and more able to work. The school recommended continuing current program at the Sweetser placement to assess if the drug therapy would make a difference in the student's ability to acquire skills. The parents disagreed with the school, did not support the Sweetser placement, and wanted to place the student in a school for students with learning disabilities. The parent had explored the REAL School, Hyde, and Pine Ridge School in Vermont, which he believed had the most appropriate program. Due Process rights were explained to the parents. [Exhibit: 522-523; Testimony: parent; Maier]

14. On March 31, 1998, the PET met to discuss the student's increasing aggressive and destructive behaviors. The minutes indicate that he destroyed another student's art work, destroyed a cart, was assaultive toward staff, refused to do school work, was scratching and biting, was not responding to time outs, and was in a fair amount of distress. Sweetser discharged the student effective #98.168 p.8

April 10, 1998. The parent reported that his behavior at home was OK. The school and family were continuing to visit other placements. [Exhibit: 520-521]

15. The PET met on April 9, 1998 to determine placement following the discharge from Sweetser. An IEP was developed based on the existing goals and objectives for reading, writing and math, and tutoring for two hours per day at Yarmouth High School was ordered by the PET. Current academic assessments were recommended to assist the tutor, and in the interim the school and parent continued to visit other placements. [Exhibit: 518-519]

16. On April 15, 1998, the Woodcock Johnson Psych-Educational Battery-Revised was administered with the following standard score results:

Broad Reading	76 (6%ile)
Basic Reading	74 (4%ile)
Reading Comprehension	79 (8%ile)
Broad Math	65 (1%ile)
Basic Math	63 (1%ile)
Broad Written Language	49 (.1%ile)
Basic Writing Skills	63 (1%ile)
Written Expression	51 (.1%ile)

His overall achievement levels are significantly lower than same-age peers, with written language being the greatest deficit area. His Broad Reading and Math were at the 4th grade level, with writing at the 2nd grade level. [Exhibits: 49-51]

17. On June 11, 1998, the PET met to review the achievement evaluation and make recommendations for the summer program. The parent reiterated his belief that the student's primary disability is a Learning Disability, not Behavioral Impairment, and he believes the Pine Ridge School in Vermont offers the most appropriate program. The tutoring program remained in place over the summer while the parties attempted mediation to resolve their impasse over program and placement. The PET recommended a comprehensive evaluation to assess the Learning Disability and the Behavioral Impairment. [Exhibit: 515-517]

18. On June 25 & 26, 1998, Suzanne Jones, M.Ed., C.A.E.S. conducted psychoeducational assessments. Her cognitive results were similar to the 1995 WISC-III results. She recommends individualized and specialized programming to meet the student's academic needs, i.e. a multi-sensory approach to reading (ex. Wilson or Spire). The report contains two pages of specific educational recommendations. Ms. Jones testified at hearing that the student's behavior is more extreme and he exhibits more aggression and difficulties with authority,

than would be seen in a student with only a learning disability. [Exhibit: 37-48; Testimony: Jones]

19. On July 6 & 8, 1998, Dr. James Moran, Psychologist, administered a psychological evaluation and found no signs of a major psychiatric illness, i.e. no signs of an underlying thought disorder, nor crippling levels of anxiety or tension. Rather, he describes the student as “a young man with many unmet needs for attention, underlying resentments, poor social skills, suspiciousness and distrustfulness of others, resentment of authority figures, and maladaptive coping strategies.” Dr. Moran recommended a “highly structured, comprehensive treatment program that can meet not only the needs of a learning disabled student, but also deeply imbedded and entrenched emotional and behavioral issues.” His recommendations include, a comprehensive educational program which involves individual therapy, family therapy, coping strategies, and instruction and modeling in social skill development. He also supports the academic recommendations in Suzanne Jones’ report. Dr. Moran testified at hearing that a learning disability (LD) only placement would not meet the student’s needs and would set him up for failure. He stated that the student’s behaviors are more severe than the behaviors of a typical learning disabled student. [Exhibit: 8-12; Testimony: Moran]

20. The PET met on July 17, 1998 to review the evaluations and develop an appropriate program. Fourteen people knowledgeable about the student participated in the meeting, including all five evaluators (achievement, cognitive, psychological, speech/language and OT). The meeting lasted approximately five hours and was reportedly comprehensive and productive. The IEP developed contains goals and objectives in the areas of reading, written language, math, social studies, science, understanding and use of vocabulary (speech/language), written communication skills viva-vis [sic] keyboarding (OT), pro-social values, social skill development, appropriate handling of emotions, increased self esteem, coping strategies, a behavior intervention plan, and modifications. Following the development of the IEP, the parties discussed placement. The parent stated his desire for Pine Ridge School in Vermont. As part of an earlier agreement, the Director of Special Services, Ms. Nunery had called the Pine Ridge School and reported to the PET that she had been told that Pine Ridge was a residential school for students with learning disabilities and they screen out students with behavior impairments. She further stated that a residential placement was not the least restrictive environment for the student. Ms. Nunery stated that Spurwink School could implement the IEP just developed and meet the student’s needs. The parent rejected Spurwink as a placement. At this point in the discussion, the minutes reflect that Ms. Nunery stated that she was willing to explore and consider other day treatment programs. The school’s Social Worker, Adele Brainard was at the PET meeting and following the meeting, crafted the IEP

language based on the team's discussion of the student's needs. For the present level of performance section of the IEP, she called the Social Worker at Sweetser. That section of the IEP described the student's current level as, "...demonstrates angry outbursts by becoming verbally and physically abusive, destroying property, and stealing from others." [Exhibit: 510-514; Testimony: Bainard [sic]]

21. The tutor, Wendy Burr reported to the PET (7/17/98) and testified at the hearing about some of the behavioral incidents that occurred during the summer and into the fall. On 7/9 - he ran away, shut and locked doors hiding from tutor; 7/10 - arrived unnoticed at school, hid under table in hall, refused to begin tutoring, ran out of building; 7/13 - locked tutor out of classroom, taped paper on door window, threw tape dispenser at a window, slammed door breaking window, left building, disturbed tennis game of other children; 9/16 - (tutoring now provided at student's home) angry, agitated, yelling, knocking things off table, grabbed math paper and went to his room, anger escalated, kicked refrigerator, swore at parents; and 10/13 - (tutoring now provided at public library) stopped working, hid around the book cases, tutor and bus driver looked for 20 minutes before the student appeared. Following this incident, the tutor resigned. The record also reflects an incident on the bus back on 3/10/98 involving hiding a knife. Despite advertising and interviewing applicants, the school has been unable to hire another tutor for this student. He has gone without an education since October, 1998. [Exhibits: 510-514; 140-144; Testimony: Burr; Testimony: Nunery]

22. Pursuant to a mediation held in September the parties agreed to have Dr. Moran contact the Pine Ridge School in Vermont. At a PET meeting on October 19, 1998, Dr. Moran reported that he had reviewed the literature from Pine Ridge, viewed the video tape, reviewed the student's IEP and school records, and spoke with the director of admissions at Pine Ridge. The director had also reviewed the student's records and stated that Pine Ridge was not capable of meeting the student's needs. Pine Ridge provides remediation of learning disabilities only and does not provide psychological services. The parties remained at an impasse and the school filed for hearing on October 28, 1998. [Exhibit: 508-509]

IV. CONCLUSIONS OF LAW

1. A.) Were the IEPs from 1993 through 1998 inappropriate?

The Individuals With Disabilities Education Act (IDEA) provides that "all children with disabilities have available to them...a free appropriate public education
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which emphasizes special education and related services designed to meet their unique needs....” 20 U.S.C. § 1400(c). The United States Supreme Court in Board of Education v. Rowley, 102 S. Ct. 3034 (1982) concluded that the law imposes a two-fold obligation on the school in developing an appropriate program: the program developed must meet the procedural requirements of the law and regulations; and the program developed must be reasonably calculated to provide the student with educational benefit. Rowley, 102 S. Ct. at 3051. The Court concluded that IDEA does not require schools to maximize a student’s potential in developing the IEP. Rowley, 102 S. Ct. At 3049.

In addressing the first prong of the Rowley test, the Court ruled that the procedural requirements of IDEA are as important as the substantive requirements of the law. The First Circuit Court of Appeals noted that a school’s program may be found in violation of the law on procedural grounds when the “procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parent’s opportunity to participate in the formation process, or caused a deprivation of educational benefits.” Roland M. v. Concord School Department, 910 F.2d 983, 984 (1st Cir. 1990). However, it should be noted that where the school’s procedural violation has been technical and non-prejudicial, it may not, per se, defeat an individualized education program. Doe by Doe v. Defendant I, 16 EHLR 930 (6th Cir. 1990).

In addressing the second prong or substantive issue of “educational benefit,” the Supreme Court stated that for a student with a primarily mainstream program, the standard is likely met if the program “is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Rowley, 102 S. Ct. At 3049, 3051 n. 28. It is clear from the law that the standard is more than minimal benefit or slight academic gains. The First Circuit Court in Roland M. stated that educational benefit would require “demonstrable improvement.” Roland M. 910 F.2d at 991.

In the present case, counsel for the parents argues that the student’s IEPs and placements at Sweetser’s Windham and Saco facilities during his fourth through eighth grade years were all inappropriate. Counsel argues that the school failed to provide a timely evaluation of the student’s underlying disability (neurological in nature) and instead, identified him as a student with a behavioral impairment, thus limiting his program to the behavioral modification programming offered through Sweetser.

A review of the extensive evaluative data regarding this student finds repeated references to a student with serious learning, emotional, and behavioral deficits. Between 1993 and 1998, the record reflects nine educational evaluations, two behavioral/emotional evaluations, three psychiatric/neurological evaluations, two

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speech and language evaluations and four OT evaluations. The IEPs developed between 1993 and 1998 all contain goals and objectives in the areas of reading, written language, math, receptive and expressive language skills, in addition to behavioral and social interaction goals. Relative to the 1993 through 1998 IEPs, the PET met eighteen (18) times, and one or both of the parents attended and participated in all of the meetings. While the record reflects that there were periods of behavioral and academic progress, the general consensus from the record and the testimony of witnesses is that the student made minimal gains over the years toward his goals, both academically and behaviorally. A comparison of standardized achievement testing (Woodcock-Johnson - Revised) administered in the fall of 1995 and again in April, 1998 indicates improvement in the area of Broad Reading (from 67 to 76), a decrease in the area of Broad Math (from 70 to 67) and remaining the same in the area of Broad Writing (from 49 to 49). The school and family shared confusion and frustration over the student's failure to show meaningful progress, and at times showing significant regression. While not having a clear understanding of how to reach this student, the evidence shows that the school continued to evaluate and look at models of programming that would provide desired results.

The student's initial out of district placement was in July, 1993 for extended school year services at Sweetser's Saco program. During the school year (1993-94), he attended Windham Sweetser Regional Day School Treatment where he remained until January, 1997. A review of the record, including quarterly progress reports and PET minutes, during this period indicates minimal gains towards goals with continued need for one-on-one support and re-direction. At a meeting on April 8, 1994, the Sweetser Social Worker reports that the student "has made significant progress in the areas of relationships with peers, lessening of aggression towards females, less reliance on male staff and a lessening in tantrums." The record is replete with evidence that academic progress is made during periods when the behavioral outbursts are under control, but there was a lack of consistency in his behavioral progress. During the fall of 1996, there was an escalation of aggressive behavior, i.e. severe tantrums, developmental delays, and increasingly antisocial and assaultive behaviors. The PET recommended a placement change to the Sweetser short-term residential program in Saco. The student attended this program from January to April, 1997. During this time period (early 1997), a psychiatric evaluation was conducted by Dr. James Maier, M.D. In his reports, Dr. Maier's recommendations included systematic behavioral contingencies, drug interventions (ex. Depakote or Tegretol) and family therapy. Reports indicate that the student responded to the structure of the short-term program. Following the short-term residential placement, the PET recommended placement at the Sweetser Day Treatment Program in Saco which he attended from April, 1997 until his discharge in April, 1998. In August, 1997, the student went to Boston

Children's Hospital for a neuropsychiatric evaluation. Dr. Maier testified that the results of the tests indicated an abnormality, i.e. a mild encephalic[sic] delay, for which Depakote would be prescribed. In January, 1998, the student began taking Depakote. This is nearly one year after Dr. Maier first recommended Depakote. The parents were increasingly unhappy with the student's placement and frustrated by the lack of progress both at home and at school. At the March 26, 1997 PET meeting, they requested additional neuropsychological testing in Boston (testing occurred in August with results arriving in November). Minutes from the May 28, 1997 PET meeting evidence the growing frustration of all the parties, i.e. the parents resent the demands made on them from Sweetser, coupled with the student's lack of progress, and the Sweetser staff experience a lack of investment from the parents. At the annual review meeting on February 3, 1998, the PET minutes reflect that the student was responding positively to the Depakote both at school and at home, i.e., he is more able to focus; anger outbursts are not as long; he is more under control and able to work. At this time the parents are dissatisfied with the Sweetser placement and were exploring other placements, such as the REAL School, Hyde School and Pine Ridge School in Vermont. By the end of March, 1998, the student's behavior was again regressing and Sweetser discharged him effective April 10, 1998.

The Individuals With Disabilities Education Act and supporting regulations do not guarantee educational benefit. The school's obligation is to conduct comprehensive evaluations, consider the results relative to the student's educational needs, develop a program that is reasonably calculated to benefit the student, and place the student in the least restrictive educational environment. By its nature the process is one of trial and error based on best educated guess. The record reflects that the school considered a plethora of evaluations conducted over the course of the student's academic history dating back to 1988, including, nine educational evaluations, five behavioral/emotional evaluations, five psychiatric/neurological evaluations, and forty-two behavior reports and observations. The PET minutes reflect active discussions regarding the evaluative data with the evaluators present at the meetings. The programs developed and the placements made have been based on the relevant data and recommendations of those with knowledge of the student. The IEPs in question contain goals and objectives in all areas of the student's disability, i.e. reading, written language, math, behavioral/emotional and social. In conclusion, there is no evidence of procedural inadequacies which compromised the student's right to an appropriate education, hampered the parent's opportunity to participate in the formation process, or caused a deprivation of educational benefits. Further, the IEPs developed from 1993 to 1998 were reasonably calculated to meet the student's needs in all areas of his disability, i.e. learning, behavioral/emotional and social.

B.) Was there a violation of procedural rights following the student's discharge from Sweetser?

Counsel for the parents argues that following the student's discharge from Sweetser on April 10, 1998, the Yarmouth School Department committed procedural violations in connection with the development of the 1998 IEP. Specifically, the parents claim violations regarding the provision of tutorial services following the discharge [MSER § 5.11]; the school's pre-determination of placement at the Spurwink School; and the drafting of certain social/behavioral present levels of performance, goals and objectives outside the PET process.

The record reflects that the PET met five times following notice from Sweetser of its intent to discharge the student. In order to assess the student's needs and to develop an appropriate program, the PET ordered comprehensive evaluations, effectively moving the triennial review up by approximately five months. In the interim, the PET ordered and the school provided the student with tutorial services following the academic portion of the current IEP, i.e. reading, spelling, writing and math. Maine Special Education Regulations, Section 5.11 states, "Tutorial services shall not be conducted for more than 60 calendar days without prior approval by the Commissioner [and] [t]utorial services in excess of 60 calendar days shall be provided by a certified special education teacher." Sixty calendar days from the beginning of tutoring on April 13th was June 11th which was approximately seven days short of the school year. Technically, the school exceeded the 60 calendar day rule, but this procedural inadequacy is found to have caused no harm to the student. The tutor, Wendy Burr, is an Educational Technician III with experience as a substitute teacher, however, she is not a certified special education teacher. Again, the approximate seven days of violation is found to be non-prejudicial. The tutoring that constituted the extended school year services as ordered by the PET (6/10/98) is separate and distinct. PET determinations to provide special services beyond the school's normal school year are made on an individual basis and are based on the probability that the student is at risk of losing skills previously mastered and unable to recoup within a reasonable period of time. [MSER § 5.12]

In addressing the allegation that the school pre-determined the student's placement at Spurwink, the record reflects that at the March 31, 1998 PET meeting where Sweetser announced its intention to discharge the student, the plan was for the parents and school to visit other placements, which they did. Some of the schools visited include, Future Builders, Spurwink, the REAL School, Hyde, Aucocisco, Southern Maine Learning Center and the parent contacted approximately thirteen schools throughout the northeast serving learning disabled students. The parent concluded that Pine Ridge School in
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Vermont offered the most appropriate program. As there was a clear difference of opinion regarding this student's primary disability and his educational needs,

the PET ordered comprehensive evaluations. In the interim, the Director of Special Services called the Pine Ridge School and was told it is a residential school for students with learning disabilities and does not serve students with behavioral impairments. The minutes from the July 17, 1998 PET meeting reflect an extensive review of the evaluations conducted relative to the student's needs, the development of the IEP and a discussion regarding placement. The parent rejected all the placements he had visited in Maine and clearly favored the Pine Ridge School in Vermont. The Director of Special Services stated that a residential placement would not be the least restrictive educational environment for the student and stated that she felt Spurwink School was able to implement the current IEP (just developed) and meet the student's needs in the least restrictive environment. Again the parent rejected Spurwink and the Director replied that she was willing to explore and consider other day treatment programs. Following this meeting, the parties attempted to mediate their impasse and agreed that Dr. James Moran would contact the Pine Ridge School. At the October 19, 1998 PET meeting, he reported his findings. After reviewing the literature from Pine Ridge, viewing its video tape, and reviewing the student's IEP and school records, he spoke with the director of admissions at Pine Ridge. She also had reviewed the student's record and stated that Pine Ridge School was not capable of meeting his needs. There is no evidence of the school pre-determining a placement. Rather the record reflects enormous efforts by all the parties to find an appropriate placement for this complex student and finding themselves at an impasse over honestly held beliefs.

The third allegation of procedural violations involves the drafting of five social/behavioral present levels of performance, goals and objectives outside the PET process and without the participation of the parents. The school Social Worker, Adele Brainard, worked with the student for four years (1989 - 1993) while he was in the Yarmouth School system. She attended the July 17, 1998 PET meeting where the student's evaluation results were discussed and the IEP was developed. Ms. Brainard took the information discussed at this meeting regarding the student's social and emotional needs, and drafted the social skills and self esteem goals and objectives for the IEP. The section for present level of educational performance contains the following for each of the five goals, "[Student] demonstrates angry outbursts by becoming verbally and physically abusive, destroying property, and stealing from others." This information was reportedly obtained from the Social Worker at Sweetser and is substantiated in the written record as well. For example, in the minutes from the March 31, 1998 PET meeting, the classroom teacher and Program Manager at Sweetser described the student's recent behavior as "very aggressive and destructive." They went on to report that the student destroyed another student's art work, #98.168 p.16

destroyed a cart, assaulted staff, was scratching and biting, refused to do school work, and did not respond to time-out. The parents are primarily concerned about the description of the student's present level of performance (not the goals

and objectives) because this IEP was apparently sent to the Pine Ridge School and is most likely part of the record upon which Pine Ridge found it was not an appropriate placement for the student. While the law clearly mandates that the parents participate in the development and formation of the IEP, there is no requirement that the actual word smithing of the final document take place at the PET meeting. In the present case, the IEP was sent to the parents on July 30, 1998, long before it was shared with the director of admissions at Pine Ridge School. If the parents objected to the description of their son's present performance or any other part of the IEP, they had an obligation to contact the school, discuss their concerns and request a change. The description in question is an accurate statement of his performance when he was last in an educational setting, i.e. Sweetser. No procedural violation is found following the student's discharge from Sweetser.

C.) If yes, is the student entitled to compensatory educational services?

For the reasons stated above, the student is not entitled to compensatory education services for the period from 1993 to 1998 when he was discharged from Sweetser.

2. Is the school's proposed IEP (7/17/98 PET) appropriate to meet the student's various educational needs and provide him with meaningful education benefit in all areas of disability?

The proposed IEP developed at the July 17, 1998 PET meeting is based on current comprehensive evaluations in the following areas: cognitive, academic, psychological, speech and language, and OT. Fourteen people knowledgeable about the student participated in the meeting. All five evaluators were present. The IEP contains goals and objectives in reading, written language, math, social studies, science, use and understanding of vocabulary, written communication vis-a-vis keyboarding, appropriate social behavior and interactions, improved self esteem, strategies for effective coping skills, a behavior intervention, and modifications.

Counsel for the parents argues that the proposed IEP is not reasonably calculated to confer meaningful educational benefit on each area of the student's disability. Counsel goes on to argue that the IEP continues to focus on the student as a behaviorally impaired student and does not recognize the great strides he has made (with the Depakote) in controlling his emotions and being able to focus on academic learning.

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The student began taking Depakote in January, 1998 and it was gradually increased in March and again in July. In March, the student's behavior had regressed evidenced by increasing assaultive and destructive behavior. In April, the student was discharged from Sweetser and received one-on-one tutorial

services for the remainder of the academic year. While the parties attempted to resolve the dispute over placement, the student continued to receive tutorial services as his extended school years program during the summer months, as well as, into the fall semester. Following an incident on October 19, 1998 (which was preceded by incidents on 7/9, 7/10, 7/16 & 9/16), the tutor resigned and the student has received no education since that time. The school has been unable to hire a tutor who will work with the student. Despite the reported benefits derived from the Depakote, no evidence was presented to indicate that the student no longer has a behavior impairment, and only has needs relative to his learning disability. This student has not been educated in a classroom with peers since April 10, 1998, over eight months ago. There is no way to predict how he will respond to the structure and demands of an academic program. Hopefully, the Depakote is indeed tempering some of the emotional and behavioral impulsivity, as reported, however, it is inappropriate to conclude that this student could succeed in a placement principally designed for learning disabled students at this time. There is insufficient data to support the claim that the severe behavioral issues previously exhibited have disappeared due to the Depakote. On the contrary, the record indicates that even after nine months of Depakote, the student still experiences raging tantrums, ex. the tutors report of September 15, 1998. Further the parents have presented no evidence that the student could or would be accepted by any of the primarily LD placements they are proposing.

The proposed IEP addresses all areas of the student's disability, i.e. academic, behavioral/emotional and social, and is reasonably calculated to provide educational benefit. In balancing the hierarchy of needs, when last in school, the student's exhibiting behaviors made his academic needs secondary. If the Depakote controls the incidents of angry outbursts, assaults on staff and peers, destruction of property, and impulsivity, then the focus and emphasis on academics will be possible.

3. What is the appropriate educational placement in which to implement the student's educational program?

The IDEA requires that each state must establish procedures that assure "to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in #98.168 p.18

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...." 20 U.S.C. § 1412(5)(A).

Regarding placement in the least restrictive environment (LRE), the First Circuit concluded that a student who might make more educational progress in a residential placement is not entitled to that placement if it is established that the student could make educational progress in a day program, as the day program allowed the student to live at home with the support of the parents, to interact with members of the community, and to have the opportunity to be educated with nondisabled [sic] peers. Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

Factors to be considered in determining a student's placement in the least restrictive environment include, but are not limited to, the following: severity of the disability, age of the child, ability to benefit from the placement, opportunity for interaction with nondisabled [sic] peers, any disruptive behaviors, the effect of the placement on the education of the other students, the training of staff, testimony of teachers and evaluators knowledgeable about the student, the cost of supplemental aids and services, and private versus public placement.

In the present case, the extensive evaluative data in this student's file describes a complex child with significant needs across all areas of development, i.e. academic, behavioral, emotional and social. In her recommendations following the June 25 & 26, 1998 psychoeducational evaluation, Suzanne Jones, M.Ed., C.A.E.S. identifies the need for individualized, specialized programming in the areas of academic deficits with individualized or small group instruction, and where structure, expectations and organization are clear and consistent. The report contains two pages of specific instructional recommendations for the student. This evaluator's conclusions are consistent with previous evaluation assessments.

The evaluator, James Moran, Psychologist, found no signs associated with a major psychiatric illness, i.e. no underlying thought disorder and no crippling levels of anxiety or tension. In his July, 1998 psychological evaluation report, Dr. Moran describes the student as "a young man with many unmet needs for attention, underlying resentments, poor social skills, suspiciousness and distrustfulness of others, resentment of authority figures and maladaptive coping strategies." He concludes that a program whose sole focus is in assisting learning disabled students would not be sufficient to meet the student's needs. Rather, he concludes that the student "needs a highly structured, comprehensive treatment program that can meet not only the needs of a learning disabled student, but also deeply imbedded and entrenched emotional and behavioral issues." Dr. Moran recommends a social skills group designed to teach and

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model appropriate social interactions with peers and adults, as well as, individual therapy to learn to deal with emotions and learn appropriate coping strategies. Dr. Moran concurs with the academic recommendations contained in Suzanne Jones' report noted above.

Following a psychiatric evaluation conducted between January and March, 1997, Dr. James Maier, M.D. recommended the mood stabilizing medication, Depakote and family therapy. At the hearing, Dr. Maier recommended a small specialized setting with staff who understand the complexities of the student's needs and who can help him develop coping strategies, for example, the use of Life Space Interviewing. He also expressed the need for the student to have association with appropriate peers as the student is a follower.

The most disturbing aspect in this case is the fact that the student has received no educational services since October, 1998 and has been out of a school setting since April, 1998. The parent's argument that the appropriate program for the student is a residential school principally devoted to the remediation of learning disabilities is unfounded in the facts of this case. Until the student's disruptive behaviors are under control, he will be unable to attend to the demands of remedial instruction. If the student is responding positively to the Depakote and he is able to focus his attention and energy on academic tasks, then a specialized placement for learning disabled students may be an appropriate placement. At this point in time, there is no evidence that the student's disruptive behaviors have been controlled.

The most immediate need is to return the student to an academic setting to begin remedial instruction and assess the effects of the drug therapy on his behavior. The student's behavioral/emotional needs require a highly structured setting with trained staff to assist him in processing his emotions and developing appropriate strategies for responding to stressful situations. Several experts have recommended Life Space Interviewing as an appropriate intervention for this student. He also needs individual therapy. His reading and writing deficits are significant and will require highly structured programming following the recommendations of the 1994 Strzok evaluation and 1998 Jones evaluation. Staff working with the student in the areas of reading and writing need to prioritize this remedial instruction and to have regular consultations with a specialist in learning disabilities and reading deficits. As Dr. Moran stated, the social skills need to be both taught and modeled. As is common with learning disabled children, the student does not intuit appropriate social behaviors simply by seeing them in others. He needs specific instruction in all areas of social interaction. The student also requires opportunities to interact with nondisabled [sic] peers.

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VI. ORDER

1. For an initial three month assessment period, the school shall immediately enroll the student in a small, highly structured, therapeutic day treatment school designed to meet the needs of students with behavioral impairments and learning

disabilities. The whole milieu of the placement must be designed to address the academic, behavioral, emotional and social needs of the student. Staff need to be knowledgeable in remedial reading, writing, and math instruction, as well as, Life Space Interviewing and dealing with students who exhibit assaultive and destructive behaviors. Detailed record keeping shall be kept regarding progress toward behavioral goals and reading/math/written language goals. The person(s) providing remedial reading instruction shall have regular consultation time with a reading/LD "specialist," so as to maximize the collaborative effort of providing an intensive reading and written language program. Spurwink's Roosevelt School should be strongly considered.

2. After three months, the PET shall meet to evaluate the progress made and reassess the appropriateness of the placement with current data. If the Depakote has in fact minimized the behaviors to such an extent that the student can effectively participate in the remedial instruction, then the PET needs to balance the benefits of maintaining the consistency and stability of the current placement for the remainder of the year versus the benefit of transferring him to a program where the focus is primarily the learning disabilities.

3. The school shall provide individual counseling for the student in the areas of anger management, processing emotions, coping strategies, etc.

4. The school shall provide extended school day programming for approximately two hours per day, two or three days per week for the next three months (or longer). The short term goal for this time is to provide specific, guided instruction in the area of social skills and appropriate social interactions. It could occur out in the community, at a YMCA or Boys & Girls Club, through Yarmouth's after school programs or through any context that the PET feels is appropriate. The person working with the student should consult with a guidance counselor or Social Worker regarding the plethora of videos and materials designed for the student's age group on the topic. The long term goal is to have him interact appropriately with age appropriate peers and nondisabled [sic] peers without adult supervision.

Katherine A. Neale, M.Ed., J.D.
Hearing Officer

LIST OF WITNESSES

Witnesses for the School:

Ann Nunery, Director of Special Services
James Moran, Psychologist
Suzanne Jones, Psychological Examiner
Adele Brainard, School Social Worker
Donna Mrowka, Sweetser Coordinator
Wendy Burr, Tutor
James Whelan, Psychologist (at Spurwink)

Witnesses for the Parent:

James Maier, Psychiatrist
Parent

INDEX OF DOCUMENTS

School production:

1 to 577 (attached)

Parent production:

P-1 thru P-6 Timeline Summary prepared by parents; student work product
P-6A thru P-6C Two letters from Dr. Urion at Children's Hospital dated 8/25/97
P-7 thru P-36 Pine Ridge School catalogue
P-37 thru P-58 Eagle Hill School catalogue
P-59 thru P-92 The Gow School catalogue