

**Special Education Due Process  
Hearing Decision**

**"Parent v MSAD # 68"**

**March 11, 1999**

**Case No:** #99.017

**Counsel For The Parent:** Parent represented self

**Counsel For The School:** School was represented by Amy Tchao  
Drummond Woodsum & MacMahon,  
Portland, ME

**Hearing Officer:** Stephen Ulman

**THIS HEARING WAS HELD AND DECISION WRITTEN PURSUANT TO TITLE 20-A, @7207, et. Seq., 20 USC, @ 1415 et.seq., AND IMPLEMENTING REGULATIONS.**

On January 21, 1999 the Department of Education received a request for a Due Process Hearing from Parents on behalf of their son. The family live in Dover-Foxcroft and student attends Foxcroft Academy.

The Pre-hearing Conference was held February 10, 1999 and the Hearing was held February 22-23 and March 1, 1999 at Dover-Foxcroft.

Documents were accepted into the records until 5 days before the hearing and were numbered as agreed to at the pre-hearing.

Six witnesses gave testimony at the hearing. The record was held open until March 11, 1999 at which time it was closed.

The hearing was open to the public at the parents request.

Official Notice was taken by the hearing officer of the Maine Certification Requirements for Educational Technicians.

### **I. Preliminary Statement**

Student is a xx year old special education student identified as Other Health Impaired (OHI) who is enrolled as a junior at Foxcroft Academy (FA). His parents are residents of Maine School Administrative District (SAD) # 68 which does not have a high school but rather contracts for high school services from Foxcroft Academy.

The parents unilaterally removed student from Foxcroft Academy on January 20, 1999 following a disagreement at a January 19, 1999 Pupil Evaluation Team (PET) meeting . Student has been out of school and receiving no SAD # 68 educational services since that date.

### **II. Issue for Hearing**

The issues for hearing were:

- a. Has MSAD #68 implemented the IEP's of 1/19/99 and 8/13/98?
- b. Was the Fall of 1997 removal from Special Education done in accordance with Special Education Regulations?
- c. Should Student have the identification of LD rather than OHI?

### **III. Finding of Fact and Stipulations**

#### **Stipulations**

- The hearing will be open to the public at parents request.
- Agreed to remove Appendix A from record.
- Agreed to waive 5 day notice on the schools recording of 1/19/99 PET.

#### **FACT**

- Student. has a disability in the area of written expression. PW1, W1,PW3,PW5
- Student's mother signed a document authorizing change in identification from LD to OHI. PW1
- Student has consistently been removed from sports teams because of poor grades beginning in the 6<sup>th</sup> grade. PW1
- Student earned 5.5 credits during 96-97, his 9<sup>th</sup> grade year. PW1, pg. 249

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- The mother asked to have student removed from the Resource Room (August 28, request) beginning in his 10<sup>th</sup> grade year. SW1, PW1, pg. 252, PW2
- MSAD #68 removed student. from Special Education on August 28, 1997, based on a request by the mother's to have student removed from the Resource Room. (Sept. 3, 1997 PET) PW1, pg. 253, 254, 252, SW1, PW2, PW3
- Student was removed from sports teams in 10<sup>th</sup> grade because of poor grades. PW1
- Student suffered a set back in academic motivation during the period of time immediately following his removal from the team in 10<sup>th</sup> grade. PW1
- The mother took student. off medication during his 8<sup>th</sup> grade year after consulting student's doctor and because of side effects. PW1
- Student was failing three of his six 11<sup>th</sup> grade classes and getting low D's on the others on 10/29/98. PW1, pg. 383, PW2
- Student's IEP (8/13/98) called for oral testing which was offered, but often refused by student because he had not read the material and had nothing to add. pg. 123, 182, PW2, SW1, PW3, PW5, pg. 309
- Student's IEP (8/13/98) calls for the breakdown of lengthy assignments into smaller parts and this was done. pg. 123, SW1, PW2, PW3, PW4, PW5
- Student's mother believed that if student was not in resource room he could not be in special education. PW1
- Student's 8/13/98 IEP calls for 1hr/week consulting services and this was done. pg. 123, PW2, SW1, PW3, PW4
- Student does not meet the approximately 1.5 standard deviation between achievement and ability in any area. The greatest standard deviation found was 1. SW1, PW2, PW3, pg. 132
- Student's 8/13/98 IEP calls for 4 hr/week tutorial services and these services were delivered. pg. 123, PW2, SW1, PW3, PW4, SW2
- The notebook was used as called for in the 8/13/98 IEP. PW1, pg.123, SW1, PW2, PW3, PW4, Appendix B
- Duplicate notes were done as called for in the 8/13/98 IEP. PW1, pg. 123, SW1, PW2, PW3, PW4, SW3
- Extended time for tests was provided but not often needed. pg. 123, PW2, PW4, PW5
- MSAD #68 provided the Special Education services called for in the 8/13/98 IEP. PW1, pg. 123, SW1, PW2, PW3
- Student has problem with short term memory even when motivated as evidenced by his not learning the plays in football. PW1, SW1
- MSAD #68 did not have a pre-designed form for withdrawal of parental permission for placement in Special Education. SW1

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- The Director of Special Services created the letter signed by the parent requesting the termination of resource room services. SW1, pg. 252
- Student wanted to stop being part of the resource room during his 10<sup>th</sup> grade year. PW1, SW1
- The rescinding of placement form was based on the original permission for placement form. SW1
- Student was referred back to Special Education by Foxcroft Academy in the spring of 1998 and testing was done. SW1, pg. 109, 110, 114, PW2
- The evaluation done in summer of 1998 found student to perform within the expected range. SW1, pg. 35-51, pg. 129-149
- Student has difficulties which are associated with ADHA, speed and accuracy and visual motor. SW1, pg. 130-154
- Speech and Language evaluation found no significant issues. SW1, pg. 131-154
- No emotional problems were found. SW1, pg. 131-154
- Student did not qualify for special services under any identification except possibly OHI. MSAD #68 wanted to provide special services to student. so they identified student as OHI. SW1, PW2
- MSAD #68 designed unusual services because the resource room would have been the normal placement, but was not available because of parents refusal. SW1, pg. 123, PW2
- The modifications in the 8/13/98 IEP were directly related to the testing done. SW1, pg. 123-154
- MSAD #68 purchased a computer for student to provide a spell check and grammar check as part of his IEP. SW1, pg. 123, PW5
- Weekly progress checks were provided to the Special Education Director and later to the parents. SW1, pg. 182-188, 307-323, PW2, PW3, PW5, SW2
- Of the six classes student took first semester 1998-99 he passed two. PW4, 195
- Student worked on schoolwork every school night for several hours. PW4
- Student's teachers met Aug. 26, 1998, to review the implementation of his 98-99 IEP. SW3, SW2, 155
- Student did not need community experience because he has and can participate in sports and school activities. SW1, pg. 126
- Participating in sports and school activities were referenced to in the 8/13/98 IEP, but were not part of the goals and objectives. SW1, 123, PW2
- Assignment sheets referenced in IEP @ Modification #2 were faxed to Special Education Director by Foxcroft Academy for his review and then they were sent on to the parents. SW1, Appendix B

- When modifications were not needed in a particular class it was noted on progress report. SW1, pg. 182-188, 307-323, PW2
- The 1/19/99 IEP provided an opportunity for teachers to report on implementation of the 8/13/98 IEP. SW1, pg. 172-174
- MSAD #68 has continued to pay student's tuition at Foxcroft Academy even though he has not attended since 1/20/99. SW1
- File review is part of the process used to discontinue Special Education Services. (9/3/97 IEP) SW1, pg. 254
- The triennial evaluation used at the time of dismissal from Special Education was current. SW1
- Seven days elapsed between signing of the request for removal from the Resource Room and the 9/3/97 PET. SW1
- Student was removed from Foxcroft Academy by parents on January 20, 1999 and has not returned to date. SW1, PW1
- The Special Education monitoring was not done by Special Education staff, but was done by 504 coordinator. Special Ed monitoring was offered by Foxcroft Academy, but refused by the parents. PW2, 88
- Student did participate in sports during fall of 98 and was eligible throughout the fall. PW2
- Change in personnel does not represent a change in the IEP. PW2
- The goals and objectives in the 8/13/98 IEP were worked on by a tutor who was certified as an Educational Technician II under the supervision of a certified Special Education teacher. 189, SW2, PW3, Appendix C
- Student did not want to continue in Resource Room during the fall of 1997. PW1, PW4
- Student's mother was aware of student being removed from Special Education at the 9/3/97 PET meeting and did not protest. PW1, SW1

#### **IV. Conclusions**

ISSUE # 1 Has MSAD # 68 implemented the IEP's of 1/19/99 and 8/13/98?

The IEP of 1/19/99 has not been implemented by MSAD # 68 because student was removed from school at Foxcroft Academy by his patents on 1/20/99 and has not returned to school to this date.

The 8/13/98 IEP has three service components: 1) special education services, 2) modifications to the regular education program, and 3) transitional services.

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There is clear testimony , exhibits, and agreement between the parties that the special education services have been delivered as called for in the IEP.

What is not agreed to is if the Educational Technician (ET) who delivered the tutorial services was properly certified and supervised at the time the services were delivered. The Technician held a ET II level from the State of Maine at the time she worked with student as called for in student's 8/13/98 Individualized Educational Program (IEP). Maine State Certification Regulation at 14.2 C-3 allow ET II's to "Conduct one-on-one or small groups with indirect professional supervision." Testimony was clear and consistent that supervision of the ET took place regularly and by Special Education Personnel as called for in the regulations. The issues raised around the 60 day limit placed in "Tutorial Services" as described at 5.11 of the Maine Special Education Regulations (MSER) does not apply in this instance because the Tutorial Services called for in the 8/13/98 IEP were services that were supplemental to his educational program and not the "Tutorial Services" described at 5.11 of MSER which are used as the only educational services received by a student.

There were questions about the 100 percent implementation of the regular education modifications called for in the 8/13/98 IEP. It is very possible that occasionally the school failed to provide the regular education modifications called for in the IEP, however it was very clear that the vast majority of the regular educational modifications were in fact in place with rare exception. There appears to be clear evidence and testimony that duplicate notes, assignment notebook, teacher checks, breakdown of lengthily assignments, daily/weekly reports to the Special Education Director, and other modifications were made as called for in the IEP. The largest area of contention appears to be in the area of oral testing. The parents contend that oral testing was done only once and that one time was in a Spanish class where the whole class was tested orally. The issue is that WP has great difficulty with written expression and that oral testing would have lead to much improved grades and possible eligibility for team sports. Testimony reveled that student does have difficulty with written expression but in the case of most of his recent classes oral testing would not have lead to significant if any improvement in grades because student had not prepared for the tests. On many occasions it was reported in testimony and through teacher progress reports that student was given an opportunity to add information orally at or immediately after the written testing but student reported that he had nothing to add because he had not read the material. It is possible that had oral testing been used correctly throughout student public education he could have scored better all along the way and even been more motivated toward education at this time, however, at this time it is my belief that the evidence and testimony supports the schools position which is that oral testing was offered at or near the level called for in the 8/13/98 IEP.

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The Transitional Service Plan which is part of the 8/13/98 IEP references the IEP goals and objectives as the primary transitional service. There was little if any disagreement that the goals were worked on as prescribed in the IEP.

The disagreement centered around the provision of an opportunity for WP to participate in school athletic programs such as fall football. Academic eligibility has long been a problem for student. His grades have disqualified him from sports throughout his school years. In the case of the fall of 1998 (the time in question) student was permitted to play football through special circumstances worked out between the family, MSAD# 68, and Foxcroft Academy. The 8/13/98 IEP does not mandate participation in sports because the activity was not part of the goals, objectives, regular education modifications, or special education services, but rather mentioned only as a reason community experience was not necessary as a part of the IEP.

**ISSUE # 2** Was the fall of 1997 removal from Special Education done in accordance with Special Education Regulations?

The chain of events which lead to the removal from Special Education during the fall of 1997 were initiated by student's wish to no longer participate in the Resource Room. Several of the Resource Room students were more educationally involved than student and he wanted out of Resource Room. Student's mother asked the Special Education Director to remove student from Resource Room and he agreed, asked the mother to sign a withdrawal of parental permission letter, and scheduled a PET to review student's IEP. The PET was held 7 days after the withdraw of parental permission and ended with student being dismissed from Special Education and reclassified as needing services under section 504. Student's mother understood the process and did not protest at the time of dismissal. Student received services under 504 until the fall when he was referred back to Special Education by Foxcroft Academy because he was not doing well educationally under his 504 monitoring plan. Special Education monitoring was not carried out as prescribed in the Special Education regulations, however, it is clear that Foxcroft Academy was in fact keeping track of student as shown by his 504 monitoring and the fact that Foxcroft Academy made the referral back to Special Education when student's performance failed during the 97-98 school year. Although there may have been some technical minor procedural mistakes in the chain of events it is clear that there was never a denial of a Free and Appropriate Public Education, (FAPE).

**ISSUE #3** Should student have the identification of Learning Disabled (LD) of Other Health Impaired (OHI)?

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The evidence presented at the hearing is in agreement with the PET's decision to reclassify student as OHI at the 8/13/98 PET meeting. The MSER are very specific at 3.10 and the test scores do not support the classification

under LD. The regulations refer to a Standard Deviation of approximately 1.5 as a guideline. There is no question that student has a weakness in written expression, but it does not rise near the leave needed to qualify as LD under the current MSER. In order to receive Special Education services the school was left no choice but to qualify student as OHI or dismiss him from services. Having tried unsuccessfully to program for student outside of Special Education it is understandable why SAD #68 reestablished his eligibility under the only classification (OHI) which was available to them.

## **V. ORDER**

There is no order

## **VI. RECOMMENDATIONS**

It is recommended that MSAD # 68 review student's IEP through the PET process on a regular bases as prescribed in MSER and notify student and his parents of his eligibility for Special Education services until student graduates from High School or ages out of eligibility.

## **WITNESS LIST**

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### **School Witnesses**

- SW1 1. John Costello, Director of Special Services, MSAD #68  
2. Gerald Prutsman, Coordinator of Special Education, Foxcroft Academy  
3. Brad Ashley, Headmaster, Foxcroft Academy  
4. Roxanne Chase, Special Education Teacher
- SW2 5. April Wohlfeil, Tutor
- SW3 6. Thomas McKee, Classroom Teacher  
7. Thomas Lyford, Classroom Teacher

### **Parent Witnesses**

1. John Costello Director of Special Education Services for MSAD #68
- PW2 2. Gerald Prutsman Director of Special Education Services for Foxcroft Academy
- PW3 3. Roxanne Chase Special Education Teacher Foxcroft Academy  
4. Patrisha Mullis Classroom Teacher at Foxcroft Academy  
5. Beth Postlewaite Classroom Teacher at Foxcroft Academy
- PW5 6. Tom Lyford Classroom Teacher at Foxcroft Academy
- PW4 7. Student
- PW1 8. Father  
9. Mother

