

**Special Education Due Process Hearing Decision  
Parent v. SAD 35**

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CASE NO: 99.059

REPRESENTING THE SCHOOL: Eric Herlan, Esq.  
Drummond Woodsum & MacMahon  
REPRESENTING THE PARENT: Louis McIntosh, Beth Crowell  
Merrywing Corporation

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.

This hearing was requested by the Parents on March 19, 1999. The case involves the Student. The Student is eligible for special education services under the category of "behavior impairment". The student is currently in a home-based program where he receives 10 hours a week of tutoring and one hour of counseling. The student spends the balance of the week in a non-educational setting. This placement was made by the PET, with the parents' involvement, following an incident on March 29, in which the Student assaulted a staff member. As part of this placement the school agreed to assume the cost of daycare during the non-educational hours of the school day.

The initial request for hearing filed by the parents was for an expedited hearing. Prior to the hearing, the parties requested a regular hearing format. However, after an incident which occurred on March 29 in which the Student assaulted a staff member, and was suspended, the school requested an expedited hearing. They argued that the Student should be removed to an interim alternative educational setting because the student presented a danger to others in the school setting. The parties met in a prehearing conference on March 30, 1999 to exchange documents and lists of witnesses, and clarify the issues for hearing. By agreement of the parties, the expedited hearing was set aside and a PET was scheduled to meet on March 31 to develop an alternative education placement for the student during the pendency of the hearing. An extension was then requested by the parent, and granted by the hearing officer, to allow time for a previously scheduled medical evaluation to be completed prior to the hearing.

The hearing convened on April 29 and 30. Nine witnesses gave testimony. Four hundred and seventeen documents were entered in evidence. Items numbered 1-390 were entered as joint documents. In addition, parents entered documents numbered P.1-P.15.

Following is the decision in this matter.

## **I. Preliminary Statement**

The case involves an x-year-old student who is eligible for special education services under the category of "behavioral impairment". The student is diagnosed with Attention Deficit Disorder. Test scores show that his intellectual functioning is in the average range. The student's initial placement in October 1998 was in a regular second grade classroom with supportive assistance. Increasingly aggressive incidents of disruptive and non-compliant behavior led the PET to change the student's placement over the school year to more restrictive placements in the elementary school. The PET met on March 8, 1999, and recommended that options for out-of-district placement for the student be explored.

The parents requested the hearing to dispute the PET determination. It was the parents' contention that the school had failed to implement the IEP written in October 1998 and this contributed to the student's increased episodes of non-compliant behaviors. They argued that, with the supports identified in the initial IEP, the student would have been provided the intervention necessary to be successful in public school. They contended that effective behavioral consultation with school staff and an effective behavioral plan would allow the student to benefit from a public school setting.

It was the school's contention that the PET met throughout the year to modify the student's program as necessary. The school argued that the student's IEP was modified over the school year to reflect movement through a continuum of special education placements within the elementary school from the regular classroom to a self-contained classroom. They insist that those efforts were unsuccessful in controlling the student's behavior, and that placement in an out-of-district day treatment program is necessary in order for the student to benefit from the student's education.

The student is currently out of school. The student was suspended from school following an incident in which the student assaulted a staff member and the behavior consultant. The school requested an expedited hearing, arguing that the student posed a danger to others and should be removed to an interim alternative educational setting until a more restrictive placement could be arranged. By agreement of the parties, the PET met on March 31 and developed an alternative education placement for the student during the pendency of a regular due process hearing. The expedited hearing was then set aside.

## **II. Issues to be Decided by this Hearing**

- Did the school develop and implement an IEP for the student, which was reasonably calculated to allow the student to benefit from a free appropriate public education in the least restrictive educational environment?

- Did the school exhaust all in-school placement options for the student, making placement in a therapeutic day treatment program the least restrictive educational environment in which the student can receive educational benefit?
- Are the parents entitled to actual costs incurred during periods when the student was out of school due to suspensions?

The parent claims no procedural violations.

### III. Findings of Fact

1. On September 19, 1997 the student was referred for special education consideration by the student's parents, teacher, and guidance. The reason stated on the referral form indicated poor behavior and social skills. Interventions by the classroom teacher were not effective in modifying the behaviors. (Exhibit 180-181)
2. The PET met on September 30, 1997, to consider the referral. Discussions at the meeting reveal that the teacher expressed concern that the student exhibited behaviors indicating a lack of age-appropriate social skills and self-control. The student's behaviors were "very disruptive to the learning process". The PET ordered "Academic testing, Intellectual testing, Psychological evaluation, Observation, Learning development testing, Motor development [assessment], and Additional assessments". Consent was signed by the parent on that date. (Exhibits: 173-174, 176-177; Testimony: Parent)
3. The special education teacher conducted three classroom observations<sup>1</sup>. She stated in her conclusions that the student "appears to respond well to structure... The student's social skills do not appear to be getting better, however, if an adult is not around to channel and guide [the student], [the student's] self-control could lead to outbursts. If things do not go the [student's] way, [the student] continues to lose control with disruptive behavior". The psychological examiner administered the Wide Range Achievement Test – 3, Beery Developmental Test of Visual Motor Integration, Kinetic Family Drawing, House Tree Person, Task of Emotional Development, Rorschach, and the Achenbach Checklist.<sup>2</sup> The evaluator concluded that the student's performance academically was appropriate for the student's age and grade level, but that the student "has a tendency to deal with frustration in an aggressive way". She also noted that "[I]nterpreting social situations correctly was difficult for [the student] at times". (Exhibits: 163-168)
4. The PET met on November 13, 1997 to review the results of these evaluations. PET minutes reveal that the team, which included the parents, concluded that the

<sup>1</sup> The report of these observations states that the student was observed on three separate occasions, however only two observations are discussed in the report.

<sup>2</sup> The results of this testing are contained in a document entitled "Preliminary Report". No document was submitted to indicate that a final report was written. The report does not discuss several of the tests administered, especially the Achenbach Checklist. There is no indication that an assessment of intellectual functioning was performed.

- student was not eligible for special education at that time, but that the student should be included in a social skills group through guidance<sup>3</sup>. (Exhibits: 161-162)
5. After a significant behavioral incident at school on September 24, 1998, the student was referred for special education services on September 30 at the parents' request. The referral form notes that the student's "behavior and social skills interfere with [the student's] ability to participate in school activities". (Exhibits: 156-159; Testimony: Keene, Mazeika)
  6. An emergency PET met on September 30. The minutes indicate that the parents expressed their objective to have the school provide appropriate behavioral interventions for their child so that the student might benefit from the student's education. School personnel shared the parents' concerns. Again, the PET ordered evaluations to assess the student's social-emotional and intellectual functioning. (Exhibits: 146-150; Testimony: Smith, Mazeika)
  7. Members of the school staff met on October 6, 1998, to consider the student's "continued outbursts". As a result of this meeting, an educational technician was hired to provide one-on-one adult supervision for the student during school hours. The parents did not attend the meeting. There is no evidence that the parents were invited to the meeting, or consulted about the decision. (Exhibits: 108, 123; Testimony: Mazeika, Smith)
  8. A neuro-developmental assessment was completed in October 1998 by an independent developmental/behavioral pediatrician. The testing revealed that the student showed difficulty sustaining attention and a marked pattern of impulsivity "pointing to Attention Deficit Disorder, perhaps without hyperactivity; and a companion deficit involving the efficiency of fine motor writing". In a hand-written note on the testing summary, the evaluator states that he "explained to the parents that [the student] is at high risk educationally even though 'bright' because of confirmed ADD/ADHD characteristics and vulnerable learning style". (Exhibits: 124-128)
  9. An evaluation conducted on October 8 and 9, 1998 by the school psychologist included the following instruments: Wechsler Intelligence Scale for Children – III (WISC-III), and Conners Teacher Rating Scale – Revised. In addition, the evaluator conducted a clinical observation, a classroom observation and consulted with the student's teachers. Results of assessment of intellectual functioning reveal scores in the average range with a Full Scale IQ of 92. A significant difference between Verbal IQ of 102 and Performance IQ of 82 was demonstrated. "Observation of [the student] and teacher ratings indicate that [the student] presents with a constellation of behaviors consistent with the diagnosis of Attention Deficit Hyperactivity Disorder, combined type. At the present time, [the student's] impulsivity – i.e. [the student's] difficulty regulating or controlling [the student's] behavior is the primary impediment to [the student's] learning." A number of recommendations were made including the initiation of a behavior plan in the school setting, and an occupational therapy evaluation. (Exhibits: 139-142)
  10. An educational assessment was conducted on October 19, 1998. Test scores revealed that the student's academic achievement is "within expectancy. [The

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<sup>3</sup> There is no evidence that this did or did not occur.

- student's] strengths are in science, social studies and reading". The student "has difficulty with visual motor activities". (Exhibits: 108-114)
11. The PET met on October 23 to consider these various assessments and to determine the student's eligibility for special education services. The student was found eligible for special education services under the category of Behavior Impairment. An IEP was written which placed the student in the regular second grade classroom with the assistance of an educational technician full time. Psychological counseling for an hour a week was listed as a supportive service. The parents provided transportation. The regular class placement was to be supported by the development and use of a "comprehensive support plan that consists of: 1) Consistent and planned activity schedule, 2) Direct interventions that focus on clearly highlighting situational expectations through pre-rehearsal and proactive social skills training, 3) A planned and consistent intervention protocol that assures the safety of [the student] and others at all times, and 4) Direct training and assistance relative to the plan be provided to [the student's] teacher and educational technician. Achievement of the annual goal was based on the implementation of this plan. (Exhibits 92-107; Testimony: Smith)
  12. On November 13, 1998 psychological counseling was included as part of the student's program. (Exhibit: 88)
  13. On November 3 and November 30 an occupational therapy assessment was conducted. Assessment results showed the student to have weaknesses in fine motor skills and visual motor integration which affect written output. Direct occupational therapy services were recommended. (Exhibits: 84-87)
  14. The PET met on December 11 to review the results of the occupational therapy (OT) evaluation. Minutes indicate the IEP was modified to reflect the following changes: "1) incorporate OT services one hour per week, 2) change the classroom placement to the resource room, 3) continuation of art, music, and physical education, lunch and recess in the mainstream with the support of the educational technician". (Exhibits: 65-73)
  15. The behavioral consultant identified in the student's IEP consulted with school staff on October 5, November 14, and December 14. He observed the student and interviewed one of the student's teachers on October 20. His report, dated October 20, 1998, recommends the development of a "comprehensive support plan". A "crisis intervention plan" was to be developed at the December 14 meeting, although no copy of this plan is present in the record. He did not meet with parents. He did not attend any PET meetings. (Exhibits: 66, 117-118; Testimony: Smith, Parent).
  16. The PET met again on January 11, 1999, to review the student's program needs. At this meeting, the team incorporated the "20 behaviors" chart developed by the staff and the behavior consultant into the student's IEP. The minutes state that the "chart" was to be used to develop a baseline on the student's behavior. (Exhibits: 75-76; Testimony: Smith)
  17. The PET met on February 22, 1999, to review sensory integration and memory test results, and to review in-school progress. Summary of the discussion at the PET indicates that the student's classroom work and work completion is becoming more problematic; the student's behavior in school is becoming more

- non-compliant. Determinations reached by the PET included the inclusion of a daily behavior plan as part of the student's IEP. The student's IEP was further modified to decrease the amount of time in the mainstream to the "rate and degree that behavior allows" (Exhibits: 39-52; Testimony: Smith)
18. The student was suspended on March 3, 1999, for three days after hitting two staff members. The PET met on March 8 to review the incident and make changes in the student's program. A re-entry plan was developed to begin to reintegrate the student back into the school environment. Behavior planning with the inclusion of an "integration specialist" was added to the student's IEP. Transportation was changed to indicate that the student would participate in regular transportation to and from school. In addition, the PET made a determination to explore "out-of-district" placement options for the student, over the objections of the parent. The Principal is quoted as stating that "school personnel attempt to accommodate [the student's] needs because we lack the tools to create the situation where we can impact upon [the student's] ability to learn appropriate behavior management skills". (Exhibits: 3-19; Testimony: Mazeika)
  19. The student was suspended from school on March 15, 1999 for one day as a result of an incident which occurred on March 11. Major behavioral episodes occurred on March 26 and March 29. The student was removed from school by the student's grandfather on the first occasion, and by the child's father on the second. (Exhibit 20; Testimony: Grandfather, Father, Keene, Mazeika, Bissell)
  20. The school contracted with a behavior integration specialist from Sweetser Children's Program, on March 1, 1999, to observe the student across settings and assist staff to implement the IEP. The specialist met with both school and parents and observed the student on four separate occasions. She intervened in one of the student's more intense behavior episodes. She developed a behavior intervention and crisis plan for staff use, but the student was suspended before it could be put in place. The consultant testified that she felt the student could benefit from a public school placement, but that currently the student has learned to escalate behaviors until the student gets the response the student wants. She predicted that the intervention strategies necessary to interrupt the student's disruptive behaviors will initially create an escalation of those behaviors, and may require therapeutic restraint to prevent the student from harming the student or others. The student has obtained control and gained power in the school setting from the student's behaviors. She testified that, while she believes that the student can be successful in the public school in the future, presently a public school is not equipped to provide the interventions and therapeutic restraint necessary to break the increasingly dramatic spiral of behavior. (Exhibit: 2, 25, P.1; Testimony: Bissell, Smith)
  21. As part of the student's IEP, the student received weekly therapy with a private psychologist. The primary focus of the therapy has been anger management strategies for the student. In addition, the psychologist has worked with the parents to devise appropriate behavior management techniques. The student attended three PET meetings and has been available by telephone to school staff as a liaison to facilitate communication between school and home. In a

letter to the record, the psychologist made clear that a program with clear consistent consequences, which sets limits across all settings, was vital to the student's success in developing control over the student's disruptive behavior. He testified that over the school year he has observed the student's increased success at gaining power in the school setting with the student's explosive behavior. The psychologist worries that the student's success at being non-compliant with those in authority will make the student's ability to be placed in a public school unlikely for the immediate future. He reiterated that a highly structured program with consistent expectations and consequences in both the school and the home, provided by trained staff was required to meet the student's behavioral needs. (Exhibits: 337-338; Testimony: Foley)

22. The school maintained a daily journal on the student. The journal chronicles the student's behavior episodes. Screaming, yelling and crying behavior, as well as aggressive behavior toward adults and other children, were observed on a regular basis. There is a pattern of increasing intensity as the year progresses. The daily entries were not shared with parents. (Exhibits: 183-214, 255-335, 350-353, 341-344; Testimony: Smith, Mother)
23. The PET met on March 31, 1999 to review the episode which led to the student's current suspension and to develop an interim program for the student pending the outcome of the due process hearing. Discussion at the meeting centered around the student's increasingly aggressive behavior at school. The behavior integration specialist noted great concerns regarding the student's violence. She stated at the meeting that the student has no accountability for time or work missed during aggressions; the student has gained a lot of power and behavior will escalate because the student has learned that the student's behavior will get the student what the student wants. The PET agreed that the student will be maintained in an interim educational setting for 45 days in which the student will be provided 10 hours of tutoring each week, occupational therapy one hour a week, and psychological services one hour a week. Additionally, the school agreed to "assume responsibility for childcare remuneration for the school days during which the interim plan is being implemented". The behavior specialist will continue to be involved. (Exhibits: 377-390)
24. The student's father and grandfather testified that the student does not exhibit violent, aggressive behaviors at home or in the community. They describe the student as being easy to control and reasonably compliant. They observe the student behaving in appropriate ways in team sports. The behavior specialist observed the student to be mildly aggressive in the student's current day care setting, but testified that behavior did not escalate when the day care provider intervened. (Testimony: Father, Grandfather, Bissell)
25. Report cards from first and second grade indicate that the student's academic performance is "satisfactory" or "very good" in all academic subjects. (Exhibit: P.9, P.10)
26. The student is under the care of a developmental/behavioral pediatrician who prescribes and monitors a medication regime for the student. The student has been referred for further psychiatric-medical evaluation. (Exhibit: P.5)

#### IV. Conclusions

**Did the school develop and implement an IEP for the student which was reasonably calculated to allow the student to benefit from a free appropriate public education in the public school, or is placement in a therapeutic day treatment program the least restrictive educational environment in which the student can receive educational benefit?**

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a “free appropriate public education” which is described in the student’s “individualized education program” (IEP). [20 USC §1412(a)(1)(A), §1414(d)(A)] The IDEA further requires that:

[t]o 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 education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USC § 1412 (a)(5)(A)

Special education law is clear in its preference for children with disabilities to be educated with non-disabled peers, unless there is a compelling reason for the student to be removed to special classes or separate schooling. The evidence in this case supports the removal of the student to separate, more intensive programming. The student is unlikely to receive a free appropriate public education in a public school classroom.

Testimony at the hearing from both the behavior specialist and the student’s psychologist make it clear that, while a public school placement is desirable for the student, it is not in the student’s best interest at this time. They were convincing in their observations that the student has learned to use the student’s behavior to the student’s own end. The student has gained a sense of power from the student’s disruptive and aggressive behavior, and will continue to use that power, escalating the violence if required, to get what the student wants. They went on to describe the interventions which, in their opinion, are necessary to break this cycle. They both warn that the behavior may be even more dramatic, initially, requiring the assistance of staff trained in therapeutic restraint. They do not support the student’s return to the public school until the student has developed anger management strategies that will de-escalate the student’s violate actions. There was no evidence to support that the public school staff has, or will have, the training and expertise to implement the required behavior interventions suggested by the experts.

The parents did, however, raise valid concerns that the school was not resolved enough in the implementation of the IEP developed in October. Testimony and documentary evidence indicate that the school put a significant amount of energy into keeping the student in the elementary school. However, much of that energy



was unproductive. The IEP written in October 1998, and modified throughout the year, stated that a “comprehensive support plan” would be developed, and direct training and assistance provided to the staff. While the school contracted with a behavior consultant, he only met with the staff on three occasions. There was no consultation with staff after December 14, the period when the student’s behavior was most aggressive and suspensions were occurring more often. A written behavior plan did not become part of the IEP until the February PET. There was no “planned and consistent intervention protocol that assure[d] the safety of [the student] and others” other than to call the parents to come remove the student. During the periods of the most intense non-compliant behavior, there was no staff support or training. The daily journal of the student’s behaviors makes clear that the student’s episodes were becoming more frequent and more intense, and that the staff was becoming increasingly accommodating to prevent behavior episodes from escalating. According to the psychologist, the resulting message to the student was that the student simply had to escalate the behavior to get what the student wanted.

It is unfortunate that the relationship between the parent and the school disintegrated over the school year. It was evident that both the school and the parent have the student as their primary focus. For whatever reason, the student did not exhibit the non-compliant behaviors in the family setting that were seen at school. Rather than using that fact to explore positive ways of influencing the student’s behavior at school, it became a source of conflict between the two. The record makes clear that a program, consistent across all settings, was lacking and had a direct negative effect on the escalation of disruptive behaviors. As the psychologist pointed out, “[m]ore rapid change will occur when [the student] realizes that parents and educational personnel are unified in their response to [the student’s] misbehavior and are working together to help [the student]”.

It is impossible to conclude that the student can be returned to the student’s public elementary school program in the immediate future. The student’s current needs are specific and will require the development of a highly structured program in an environment in which limits are consistently placed on the student’s disruptive behavior, with professionals trained in therapeutic holding to intervene if necessary. It is feasible to expect that reintegration into the student’s elementary school program is a goal of this program. With the involvement of family and the school using the expertise available to them, it is feasible to expect this goal to be met.

However, testimony at the hearing revealed that there is currently not a placement available in which such a program can be implemented. At the conclusion of the hearing the parties agreed that the current interim alternative education setting has succeeded in providing the student with a certain stability in behavior, and provides the student the opportunity to receive the services described in the student’s IEP. The student receives tutoring in the home with the father present. No behavior episodes have occurred. The student completes assigned school work with the tutor. The student is maintaining academic pace with second grade peers. The student continues to receive occupational therapy for an hour a week. The student

continues the student's weekly therapy sessions with the psychologist. The parties agreed that, in the absence of an appropriate placement, the student should continue with this arrangement until the end of the school year.

**Are the parents entitled to actual costs incurred during periods when the student was out of school due to suspensions?**

"School personnel may order...the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules..." [34 CFR 300.520 (a)(1)] "[A] change of placement occurs if the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year". [300.519 (b)] "During any period of suspension...the administrative unit shall provide the student with educational services consistent with the student's Individualized Education Program." [Maine Special Education Regulations, Section 10.10]

The student's suspensions over the school year did not exceed the 10-day limit. While the school must offer services to the student, consistent with the student's IEP, during any period of suspension, any additional costs related to the suspension is not the responsibility of the school. The parent is only entitled to actual costs incurred as a result of the provision of a free appropriate public education as defined in the student's IEP.

The suspension, which occurred on March 29, 1999, exceeded the student's 10<sup>th</sup> day of suspension. The school had determined that the student was a danger to others in the school setting and requested that the hearing officer issue such a ruling and remove the student to an interim alternative educational setting for 45 days, until the resolution of the long-term placement issue. However, by agreement of the parties, the PET met and recommended a change of placement. The PET modified the IEP and defined an interim placement for 45 days to include 10 hours of tutoring, occupational therapy, and psychological therapy. In addition, the school agreed to reimburse the parent for childcare expenses for the balance of the school day. The parents are entitled to reimbursement for those costs, and any transportation costs related to the implementation of this program.

**V. Order**

- 1. The PET shall meet before June 15, 1999, develop an IEP for the student which describes the interventions necessary to address the student's aggressive and non-compliant behaviors. The IEP shall include a comprehensive behavior plan which describes clear expectations, positive reinforces and logical consequences, accountability, and anger management training. The plan shall include both home and school components. The IEP shall include a crisis plan, which describes any therapeutic restraint required.**

2. **The PET shall determine the placement appropriate to deliver this IEP before August 30, 1999.**
3. **The student shall remain in the student's current interim placement until June 15, 1999, or until the PET meets to change that placement. The school shall provide tutoring up to 10 hours a week, 1 hour of occupational therapy a week, 1 hour of psychological counseling per week, and regular consultation by a behavior integration specialist to staff working with the student in this placement. The school shall reimburse the parents for any costs incurred by them as a result of this placement, including transportation costs.**

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Carol B. Lenna  
Hearing Officer