

**State of Maine**  
**Special Education Due Process Hearing Decision**

**Parent v. Augusta, Case No. 01.149**

REPRESENTING THE SCHOOL: Amy Tchao, Esq., Drummond Woodsum & MacMahon  
REPRESENTING THE PARENT: Richard O'Meara, Esq., Murray Plumb & Murray  
HEARING OFFICER: Carol B. Lenna

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

The case involves the student whose date of birth is dob. He resides with his mother in Augusta, Maine. The student has just completed seventh grade at the Buker Middle School, a local public middle school in the district.

The student is eligible for special education services as a student with an emotional disability. Testing results have shown, attention deficits and cognitive processing deficits related to an Attention Deficit Hyperactivity Disorder and Conduct Disorder, complicated by underlying Chronic Dysphoria. Both the school and the parent considered the 2000-2001 school year to have been unsuccessful for the student. Unable to come to agreement on a program for the coming school year, the parent requested a due process hearing on June 5, 2001.

Extensions to the original dates set for the prehearing conference and the hearing were requested by both the school and the parents and granted by the hearing officer. The parties met in a prehearing conference on July 9, 2001 to exchange documents and witness lists. Five hundred and twenty-eight pages of documents were entered into the record. The hearing convened on July 16, 17, 20 and 23. Eight witnesses gave testimony. The hearing record closed on July 31, 2001.

Following is the decision in this matter.

**I. Preliminary Statement**

The student is eligible for special education services as a student with an emotional disability. Recent evaluation results show that he struggles with significant attention deficits and a variety of cognitive processing deficits related to an Attention Deficit Hyperactivity Disorder. Intellectual testing shows high average verbal capabilities, but significantly lower nonverbal reasoning skills. Previous assessment has given a diagnosis of Conduct Disorder complicated by underlying Chronic Dysphoria. His

academic achievement has been uneven, but teachers state that he is a student with the ability to complete grade level coursework.

The parent argued that the school failed to provide a free appropriate public education for the student during the 2000-2001 school year. It is her position that appropriate programming was not in place for the student for a majority of the school year, and that the school's attempts to address the student's social/behavioral issues toward the end of the year failed because of poor design and improper implementation. She maintained that the school's failures denied the student access to a normal school day for much of the year and therefore entitles him to compensatory educational services. She further argued that the school failed to begin transition planning in a timely manner for the 8<sup>th</sup> grade program, thereby jeopardizing the success of that program.

The school argued that the student's long history of serious behavioral problems, both in and out of school, has made it difficult for him to participate in a regular public school setting. They argued that despite their programming efforts he met with little success during the past school year. They maintain that the student's shortened school day was, in large part, a result of the parent's insistence that he not be involved with the behavior alternative program at the Middle School. They argued that the student's behaviors have become pervasive and serious enough that he may need the more structured environment of an out-of-district behavioral treatment program.

## **Issues**

1. Did the Augusta School Department deny a free appropriate public education to the student during the 2000-2001 school year by:
  - ⊖ failing to provide a full-day program and placement for the majority of the school year;
  - ⊖ failing to develop and implement a positive behavioral intervention plan in a timely fashion;
  - ⊖ failing to provide him with extended school year services; and
  - ⊖ failing to properly and effectively transition him to an appropriate educational placement for the 2001-2002 school year?
2. If so, to what relief is the student entitled?
3. Is the IEP proposed for the 2001-2002 school year reasonably calculated for the student to receive educational benefit in the least restrictive educational environment?

## **Findings of Fact**

1. The student is a student with a disability under the category of emotional disability. Recent scores achieved on the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) were in the average range, giving a Full Scale Score of 101, with wide variations in subtest scores ranging from the second to the ninety-fifth percentile. Academic functioning, as determined by the Wechsler Individual Achievement Test, is at or above grade level, with reading and language arts scores higher than math. Academic skills are judged by his teachers to range from slightly below average to average level. Work

- completion and quality of work performed impact his grades significantly. (Exhibit: P.12-30; Testimony: Doiron, Haley, Eaton)
2. The student was first identified in need of special education services as a preschool student, but was dismissed from services during third grade. During the 1997-1998 school year in 4<sup>th</sup> grade he was reinstated as a student in need of special education services, again under the category of behavior impairment (now emotional disability). The student's therapist, Dr. Hughes, advised the PET that the student would not benefit from being in a self-contained class for children with behavioral problems, as the setting was likely to encourage his inappropriate behaviors. He also noted that the student does worse when he sees he is "getting under the skin of the adult in charge". The school's evaluator advised the PET to consider the student's needs and his current placement to assure a good teacher/student match. (Ex. 307-312, 313, 314-323, 325; Testimony: Hughes, Parent)
  3. As behavior problems continued, the parent requested the PET meet again to refine program expectations and develop a behavior plan. A behavior plan was developed a plan, which began March 2, 1998. An educational technician was hired to implement the plan. (Ex: 299, 303-304, 305-306; Testimony: Parent)
  4. School documents show that classroom disruptions declined to an acceptable level during the late winter and spring, but that the year ended badly with the student being suspended the last days of school. (Ex: 285-286, 295-296, 299-300, 301-302)
  5. In a letter dated August 19, 1998, the parent requested a meeting with the director of special education, pointing out that she had requested the PET meet in a timely manner before the beginning of the new school year to plan for the 5<sup>th</sup> grade year. The PET did not meet until October 1, 1998. (Ex: 276-279, 289)
  6. At the beginning of 5<sup>th</sup> grade (1998-99 school year) the parent enrolled the student at the Evergreen school, a local general-purpose private school. The PET met October 1, 1998 to discuss programming for the year. The IEP developed at the meeting placed him in the Behavior Alternative Program, a self-contained behavior program, for all academic classes, with group psychological services one hour per week. The IEP contained two goals: "student will demonstrate improvements in self-responsibility...related to academic progress", and "be able to interpret and relate to his environment using appropriate social interactions with peers and adults..." There was no behavior plan developed as part of the IEP. The parent declined the program and left the student at Evergreen School. (280-284, 276-277, 278-279; Testimony Parent)
  7. The student returned to the district in March 1999. The PET met March 22, 1999, for the purpose of transition from Evergreen School back to the district. The IEP provided 2 hours of off-site tutoring daily for four weeks, with a plan to transition to the self-contained behavior room and some mainstream classes. The goals did not change from the October 1998 IEP, except a math goal was added. The IEP contained no behavior plan. (Ex. 263-272)
  8. The PET convened May 12, 1999. The student's behavior was inconsistent across settings, but generally his behavior was deteriorating. The student's therapist viewed the student's then-current problems to be more extreme than he had witnessed here-to-fore. The PET placed the student in the summer day treatment program at Spurwink School. (Ex: 254, 256-262; Testimony: Hughes, Parent)
  9. Ms. Whitfield, the school psychologist, conducted a Functional Behavioral

Assessment in June 1999. She noted antecedents to the student's inappropriate behavior include change in schedule or routine, transition from large to small groups, being confrontational, telling him he must follow through on a task without prior explanation or choices. She found that aggressiveness and refusal to work were the consequent behaviors. She counseled the school to set behavioral goals and design a behavior management plan with positive incentives and consequences. She made clear that the student needed to be involved in the planning. "Frequent communication between home and school needs to continue, and the team of professionals and the family who support the student needs to be ongoing." (Ex. 251-255)

10. The PET met twice in July 1999 to discuss progress and programming at Spurwink and decided the student would continue his placement there for the coming school year. The discussion summary shows that the student had a difficult adjustment to the program and that he was struggling with the program concept and having limited success initially. (Ex. 246-247)
11. A neuropsychological assessment obtained by the parent in August 1999 found the student's performance on tests "strongly suggestive of ADHD..." He strongly advised against the student's placement at Spurwink for the school year. (Ex. P.97)
12. The IEP for the Spurwink placement, dated October 1999, is comprehensive, but progress toward meeting the goals and objectives is not scored. A narrative report dated March 1, 2000 shows that the student made progress in behavioral expectations and academic work, and that "therapeutic holds" decreased from 28 in October to 0 as of February 15. The student moved into a new classroom at Spurwink soon after this report. Behavior events and therapeutic holds again increased significantly after the move. (Ex: 163-178; 202-210; 211-235; Testimony: Parent)
13. The PET met on April 24, 2000 to discuss the parent's concern about the increased use of therapeutic holds as part of the student's behavior management. Unable to come to agreement on the behavior management plan, the PET determined that the student would no longer participate in the Spurwink Day Treatment Program. The student wrote to the principal of Buker Middle School asking to be admitted for the balance of the 6<sup>th</sup> grade. The PET reconvened on May 12 to consider this change of placement and determined that the student would return to Buker in the mainstream on "consultation" status, with the resource room teacher as the case manager. A new IEP, for the period May 2000-June 2000, was written to reflect this decision. No behavior plan was written. The program continued until the end of the school year. Behaviors were inconsistent. A behavioral event during the last week of school resulted in the student being suspended during the last days of school. (Ex: P. 55, 137-145; Testimony: Parent, Carville)
14. The PET convened on September 12, 2000, in preparation for the student's 7<sup>th</sup> grade program. The team decided that the student would be on the caseload of the Behavior Alternative Program, the in-school self-contained behavior program. The teacher of that program was to meet with him at least twice weekly to organize uncompleted work and upcoming work. Beyond that he would be expected to comply with school rules in a full-time mainstream 7<sup>th</sup> grade curriculum. No new IEP was written. No behavior plan was written. The student's behavior began to be problematic; work completion was poor. The behavior program teacher was not meeting with the student. At a meeting among the parent, the principal and the director of special education on September 29, the parent suggested a shortened day for "a period of time". She intended this period to last 2-3 weeks with the purpose being to relieve

- pressure and thus assist the student to manage his behavior during the school day. No one is sure when the shortened day option began, exactly. (127, 131, 133-140; Testimony Parent, Strobel, Carville)
15. The student was on an abbreviated-day program beginning on or about October 2, 2000 until May 8, 2001. During that period, his day began at 7:45 a.m., and ended at 10:05 am. When inappropriate behavior issues dictated, he was sent home earlier, or he left on his own initiative. Attendance records from September through January show the student was dismissed, tardy or suspended for a total of 38 out of a possible 91 school days. (Ex: 12-14, 85, 40; Testimony: Parent; Carville)
  16. The PET met November 2, 2000. A new IEP was written which stated that the student would attend classes 4 periods out of 7, and be sent home if he was sent out of class due to inappropriate behavior. The goals in this IEP state that he will: "maintain passing grades...", and "improve assignment completion..." No behavior plan was developed as part of the IEP. The team determined they would meet again on December 1 to reassess adding period 5, but no plan for reintegrating him into a full day was discussed or written as part of the IEP. (120-121, 122-126; Testimony Parent, Carville)
  17. As early as November 29 the parent began requesting that the student's full day be reinstated. The PET met again January 9, 2001. At this meeting, the student's school day was extended to add 5<sup>th</sup> period, or until 10:45 a.m. The PET met again on January 24. Several school staff at the meeting were adamant that the student be placed in the alternative program. Teachers shared anecdotal events involving the student but no objective information was presented on the frequency or intensity of his behavior episodes in school. The team was unable to reach consensus. The team determined he would remain in his current program and that the parent, the principal and the director of special education would meet to discuss alternative programming. They requested that objective data be gathered to share with the PET. (Ex, P. 47, 110, 111-112, 113-115; Testimony: Parent, Carville)
  18. On February 27 the student's teachers began to complete a "daily report" sheet that "[the student] designed". Dr. Keegan was consulted to incorporate this reporting mechanism into a behavior plan. There is no indication that a behavior plan was written, or that Dr. Keegan met with the student's teachers, the student or the parents for this purpose. The data reported by the teachers was not compiled nor was the information used to make program decisions for the student, however it is clear that generally the student's performance was markedly better for some teachers than others. These "daily reports" did not result in achieving the student's goal to return to a full-time schedule. Dr. Moran did not use this information in the development of his behavior plan. (Ex. 108, 109, 86; Testimony Strobel, Moran, Haley, Parent)
  19. On March 16 the PET met again. The parent requested the school conduct a Functional Behavior Assessment and involve a Behavior Consultant in the student's program. In addition, the parent requested a number of compensatory educational services to address subjects not included in the student's curriculum during the year. The parent again requested that the student's full school day be reinstated immediately. The meeting summary states that "[t]he PET stated that if [student] were to have a full day at Buker it would need to be in the Alternative program". Since the parent would not agree to this placement, the student continued on his abbreviated day schedule. The determinations direct the school to complete a functional behavior assessment and involve the behavior consultant in the student's program. The determinations also direct the school to begin transition planning

- for 8<sup>th</sup> grade. (Ex. 96-97, 105-107)
20. The Functional Behavior Assessment was conducted by a behavior consultant, Dr. Moran, under contract to the district. The assessment consisted of two days of direct classroom observation (March 20 and 28, 2001), interviews with teachers, parent and the student, and the analysis of functional behavioral assessment records completed by two teachers. He made a number of educational recommendations that he incorporated into a program design with a detailed behavior plan. (Ex. 88-95; Testimony Moran)
  21. The PET met on April 24 to review the consultant's assessment and recommendations in order to develop a new program for the student. A new IEP was written to reflect a full-day program as well as staffing for the program. The behavior plan was incorporated into the IEP. (Ex. 66-75, 79-87; Testimony Strobel, Parent)
  22. An educational Technician (ed tech) was hired to implement the program, which began May 8, 2001. The student's teaching team did not meet with the consultant and the ed tech prior to the implementation of the program. Between May 8 and May 17 the student achieved the behavior goals 4 out of 10 days, with one major event that led to a three-day suspension on May 17. (Ex. 61-62, 65, 85, 57-60, 54, 55, P37; Testimony: Eaton, Moran, Strobel, Parent)
  23. The PET convened on May 22. Revisions were made to the behavior plan in an attempt to provide greater incentives for success. From May 23, when he returned after the suspension, until June 7 the student achieved the behavior goals 3 out of 15 days. The student left school June 7 after a major behavior incident involving the behavior room teacher. The student was suspended for three days. The teacher filed formal charges against the student alleging harassing behavior. When the school would not provide a buffer between the student and the teacher for the remainder of the school year, the student did not return for the balance of the school year. From May 8 through the end of school he was dismissed, suspended or choose to leave school 12 out of 25 days. (Ex. 52-53, 85, 30, P32, P34; Testimony Eaton, Strobel, Parent; Carville)
  24. The ed tech hired to implement the student's program is certified as a Level I Educational Technician. She holds a high school diploma and has worked with a number of service agencies, but had not previously worked in a school setting with adolescents with emotional disabilities. Her supervisor, the teacher of the alternative behavior program, had no previous experience working with adolescents with emotional disabilities. Her teaching experience prior to the 2000-2001 school year is confined to four months of supervised student teaching in a classroom with mildly mentally retarded and learning disabled students and 14 months as a district-wide substitute teacher. (Ex. 329; Testimony Eaton, Strobel)
  25. A neuropsychological evaluation was conducted in April and May, with an assessment report completed on June 14, 2001. The evaluator, Dr. Doiron, concluded that the student has developmental problems of personal regulation that have become especially problematic with the increasing executive demands of middle school. He found the student to have high verbal intelligence with neurodevelopmental problems affecting cognitive efficiency, working memory and processing speed. Cognitive scores show he functions in the average range, having some abilities in the superior range. He concluded that the student has an immature nervous system that is easily stressed by sensory interference, which results in difficulties in self-regulation and self-control. He made a number of program recommendations that have yet to be reviewed by the PET. He felt placement in a program for behaviorally impaired students was not the best solution for the student, but favored a faculty advisor/

mentor model. (Ex. P12-30; Testimony: Doiron)

#### IV. Conclusions

**Did the Augusta School Department deny a free appropriate public education to the student during the 2000-2001 school year by:**

- ⊖ **failing to provide a full-day program and placement for the majority of the school year?**
- ⊖ **failing to develop and implement a positive behavioral intervention plan in a timely fashion;**
- ⊖ **failing to provide him with extended school year services; and**
- ⊖ **failing to properly and effectively transition him to an appropriate educational placement for the 2001-2002 school year?**

The student was denied a free appropriate public education (FAPE) during the 2000-2001 school year. From early October until early May the student was denied access to a full school day, and his abbreviated day began without benefit of an IEP. He received no direct special education services during this period. Classroom modifications, recommended by several evaluators, were never appended to the IEP. An appropriate IEP, with an appended behavior plan that addressed the behaviors that impeded his learning, was not developed until May.

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), §1413 (a)(1), §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)

A review of the chain of events which led to the student's removal from a full school day shows that this action was not the result of a thoughtful decision by the PET based on the student's need to be removed to a more restrictive environment, but rather a response to the parent's suggestion that a shortened day might assist the student to be more successful by relieving academic pressure to perform. The previous school year had ended badly with the student being suspended the last few days. The PET did not meet prior to the beginning of the new school year to review the student's needs, and revise the program accordingly. When the PET did meet, about three weeks into the new year, the parent and school did not come to agreement about placement. The school wanted the student to be placed in the behavior alternative program for at least some portion of the day; the parent was adamant that placement in that program would be counterproductive to the student's success. A compromise plan was developed to have the behavior teacher “check in” with the student twice a week. No new IEP was written, and there is no evidence that the behavior teacher met with the student. No behavior plan was discussed or developed.

Problems with work completion and disrupting behaviors, which were causing the student to be excused from class, were already evident by late September. The parent met with the principal and the director of special education on September 29 for a "brainstorming session". As part of that meeting the parent suggested they "...end the day after fourth period for a period of time to allow [the student] to gain control over the expected behaviors". This suggestion was implemented immediately. The PET did not meet again until November 2. A new IEP was written at that time. The shortened school day, the "modified day", is included in the IEP as an "intervention, strategies and supports" in consideration of the "student's behavior which impedes his learning". No additional behavior goals, behavior strategies or interventions are included in the IEP.

*In developing or revising each student's IEP the PET shall...in the case of a student whose behavior impedes his or her learning that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies [sic], and supports to address that behavior...*

[MSER, 10.3D. Also 34 CFR 300.346(a)(2)(i)]

*This means that in most cases in which a child's behavior that impedes his or her learning or that of others is, or can readily anticipated to be, repetitive, proper development of the child's IEP will include the development of strategies, including positive behavioral interventions, strategies and supports to address that behavior... A failure to...consider and address these behaviors in developing and implementing the child's IEP would constitute a denial of FAPE to the child. ...[I]f short suspensions that are included in a child's IEP are being implemented in a manner that denies the child access to the ability to progress in the educational program, the child would be denied FAPE.*

34 CFR Part 300, Appendix A, 64 Fed. Reg. 12479, Q & A, No. 38 (March 12, 1999)

Arguably, using the student's desire to be a "regular" student and participating in a full middle school day as a positive incentive, could be part of a larger behavior plan. However, to send a student home after half his academic day with no support system and no plan for reintegration for seven out of a nine-month school year is a denial of service. This student had a history of being removed from class because of inappropriate classroom behavior. There is no evidence that the action of the PET was a part of a plan of strategies and behavioral interventions to address that behavior. The IEP did not include behavior goals, nor was there a behavior plan appended. In fact, the student was, for the most part, expected to comply with school rules on his own initiative in the regular classroom without special education services. Evidence is clear that the student does not have the capacity for self-regulation in the school setting.

The school's argument that the abbreviated day schedule was at parent request and therefore somehow relieves them from any liability is unconvincing. *The Pupil Evaluation Team, which includes the parent as an integral part, is responsible for... the development of an individualized Education Program appropriate for the student...* [Maine Special Education Regulations, 8.1] It is the responsibility of the PET to make determinations, based on objective data and discussion, of the needs of students, with parent participation. They are not to give up that responsibility in deference to parent's



suggestions. In this case, the parent and the principal discussed a course of action and a month later the PET met and wrote an IEP to incorporate the action into the student's program. The IEP was not the basis for this decision, and there was no plan for reintegration into the full school curriculum. It is admirable that the school wished to be responsive to the parent and flexible in its programming considerations. However, the school cannot defer to the parent's wishes when it is contrary to the needs of the student, and then later make a claim that they were hindered from meeting the student's needs because they did so. Again, to deny a student access to a full school day, in absence of any plan, denies a student the free appropriate public education they are entitled to by law.

It is clear that both the school and the parent were becoming increasingly frustrated by the student's school situation as the year progressed. In late January 2001 the PET actually voted on placing the student in the behavior room, with the school members supporting that option and the parent disagreeing. When the parent requested objective data to support this placement, the school had the student design a report form on daily work completion and behaviors to be completed by his teachers. This data was never compiled and used for program planning. In March the school again posed to the parent the option to accept placement in the behavior room or continue on the abbreviated day. This discussion around placement in the behavior room also was not accompanied by objective data, new assessment information, nor even new goals and objectives. The one time the school developed a draft IEP that placed the student in the behavior program, it was never offered to the parent. If the school felt this was the appropriate program for the student at this time, they were obligated to make that decision, over the objections of the parent if necessary.

The school's argument that the continuation of the abbreviated day was due to the parent's refusal to accept their suggestion that the student be placed in the school's behavior alternative program is troubling. Both testimony and documentary evidence support the parent's claim that this offer was more in the nature of a *quid pro quo*: the school would reinstate his full-day program if she would consent to his placement in the alternative program, rather than an actual offer of specific goals and objectives to address his behavior needs.

The parent continued to reject placement in the behavior alternative room over the school's recommendation. Evidence shows, however, that the parent's position, from her perspective, was based on reliable past information. The student's therapist, Dr. Hughes, who has a long-term relationship with the student, felt it was not in the student's best interest. He testified that a self-contained program with only behaviorally impaired students would be contrary to meeting the student's needs as he has the tendency to feed off the inappropriate behaviors of others. A previous evaluator, in an evaluation obtained by the parent in August 1999, strongly opposed the student's placement in a special school for behaviorally impaired students and opined that "placing him in a special school at this point in time, particularly in light of the fact that his difficulties are likely treatable, communicates to him that his problems are largely insurmountable, and is likely to have a deleterious effect on his self-esteem". The parent's statement that she ignored that recommendation and continued the student at Spurwink against what she described as her better judgment, coupled with the student's adamant opposition to placement in the program or any association with it, makes it clear that she was consistent in her position for what she considered to be sound educational reasons, and that she advocated for her son accordingly. However, notwithstanding the parent's position, if the school felt strongly that the behavior room was the appropriate placement for the student, they should have moved forward with that placement, thus giving the parent the opportunity to exercise

her due process rights if she objected. To state that they would have appropriately served the student, but for the parent's position, is unpersuasive. The parent's position regarding placement does not permit the school to disregard what they believe is their responsibility to provide the student with a free appropriate public education.

It is, on the other hand, impossible to evaluate whether the alternative room placement would have provided an appropriate program for the student. Both documents and witnesses most often described the placement as a place. School staff testified that the student needed to have the support of "the alt room", or "the alt teacher". They did not suggest what supports would have been provided there, or what strategies would have been employed. No evidence was presented at the hearing to describe what behavior interventions, services, or outcomes would have been expected from placement in that program. The teacher of the program was not called to testify, so there is no way to know how she might have envisioned the student benefiting from the program.

In addition to the abbreviated day program, the student left school on an increasingly regular basis. By the end of the school year the student had, by estimate, missed close to half of his 7<sup>th</sup> grade class time. The school argues that they were powerless to prevent this because the parent requested it. The evidence shows that, once again, the parent offered a suggestion to provide immediate consequence for inappropriate behavior. This suggestion became institutionalized into the program, and again without intervention, the school points to it now as another cause for their inability to provide a successful program for the student. Regardless of how, or why the suggestion came about, the school did not intervene to change it. No new services were offered, and the program did not change between September and May.

It is clear that by March both the parent and the school were desperate to change the student's current arrangement. He was still not in school full-time and his behavior was becoming more problematic. His work completion and work mastery were significantly below his capability. It was also clear that the parent was not changing her position regarding the alternative program. The school was only offering the alternative program. The claim by the parent that the school never initiated other options to address the student's behavior needs is borne out by the evidence. "Ms. Strobel stated that all the programming that has been tried with [the student] has mostly been [the parent]'s suggestions". (Ex. 96) That theme is continued at the March PET meeting. It is the parent that requested further assessment and the involvement of the school's behavior consultant, Dr. Moran. Although Dr. Moran had been under contract with the district since the beginning of the year, he had never been invited to one of the student's PET meetings nor had he been involved in the student's programming.

Between March 16 and May 8 the school did design a new IEP with Dr. Moran's involvement. This IEP included a detailed behavior plan outlining expectations of the student in the regular classroom, with consequences and outcomes when he failed to comply. The program required the hiring of an educational technician to have primary responsibility for implementation. The program was designed for the ed tech, if necessary, to be responsible for major unsupervised teaching time with the student. When the student's behavior resulted in his losing points, the plan called for him to be taught by the ed tech in a separate setting, using removal from the mainstream as a negative re-enforcer, and requiring him to earn the privilege to return to the regular class.

The school hired a Level I Educational Technician (ed tech I) who began the program on May 8. While the person hired was recommended by Dr. Moran, and may be a talented individual, she was not appropriate for the position as described in the IEP. An ed tech I does not hold the credentials to perform such duties. *The Level I Educational Technician may be assigned instructional duties directly supervised by the classroom teacher or appropriate content specialist in the classroom...* [Maine Department of Education Regulations, 115-39, 40]

School staff testified that the teacher of the alternative program was always intended as the supervisor for the ed tech. But, the plan specifically directed the ed tech to work with the student in a space other than the behavior classroom. The plan does not list the alternative program or the teacher of the alternative program, nor is the alternative program or the alternative teacher mentioned anywhere in the IEP. The parent's claim that she was surprised and unsettled by the increased intrusion of the alternative program's teacher into the student's program is supported by these facts. The only teacher's name listed in the IEP or the behavior plan is Ms. Eaton, the ed tech I.

There were problems with implementation of the program from the beginning. Dr. Moran testified that he was surprised that things began to deteriorate so quickly. The school takes the position that the parent's insistence on changes in the plan, and her lack of support for the alternative room teacher, undermined the stability of the program. Evidence shows that Dr. Moran agreed with her suggestions for the plan modifications. And, the parent had made no secret that she thought that any involvement by the alternative teacher would have negative impact on the program given the student's negative feelings about any association with that program. What seems more apparent is that the staff was not properly prepped to anticipate problems that were likely to occur. Dr. Moran did not meet with the 7<sup>th</sup> grade staff and the ed tech to prepare for the implementation of the new plan and to set up contingencies when behavior events occurred. The ed tech was not properly trained to know what to expect or how to react to the student's challenging behaviors, and had little experience to draw on. She quickly turned to the alternative program teacher who had, prior the current school year, no experience working with behaviorally impaired students. Dr. Moran stated that he did not meet regularly with the school staff, but was available by cell phone. However, when the two most significant behavior events occurred he was not called until after the fact. He agreed that he might have advised the staff to react differently on one notable occasion.

There was no discussion of the student's need for extended year services (ESY) and little evidence to either confirm or deny the need for such services. The determination to provide ESY services to a student *...shall be made on an individual basis and based on the probability that the student is at risk of losing skills previously mastered and unable to recoup those skills within a reasonable period of time.* [MSER, 5.9] While it is true that the student missed a substantial amount of academic instruction over the school year, there was no evidence to support a claim that the student was in danger of losing skills or unable to recoup skills previously mastered. In fact, the discussion of ESY services over the past several years seems to have its foundation more on the student's lack of success in his regular school year rather than a concern he would regress. This seems to be the case for the most recent year.

There is a pattern to this student's school experience. For the past four years, he has ended the school year in a chaotic fashion, most often with suspensions and tense relationships between him and the teaching staff. After a summer break, he begins the new school year with no firm plan in place. This year was no exception. The student

has well-identified and well-defined behaviors which impede his learning. A number of educational and behavioral recommendations designed to address these needs are part of his record. The PET recommended in March that planning for the student's transition into 8<sup>th</sup> grade begin in the spring of 2001, and determined that the director of special education and the principal meet with eighth staff to begin this process. There is no evidence that any planning has begun. The director stated that the teacher of the alternative program met with 8<sup>th</sup> grade staff, but she was unsure who was involved, or the nature of the discussion. Neither she, nor the principal, has convened a planning meeting around the student's eighth grade program, nor has the PET met to discuss the eighth grade program. The cycle is set to begin again.

There is no reason to believe that, even with the most perfectly designed program, that the student's school day will be without incident. However, it is reasonable to assume that he will continue to improve if there is a well-designed behavior plan in place with consistent implementation by skilled and trained professionals.

**The school is found to have denied the student with a free appropriate public education. To what relief is the student entitled?**

There is no way to reach back and regain lost educational time. The student missed a significant number of hours of instructional time, and for this he has suffered. But, there was a remedy available to the parent much earlier in the school year than she chose to exercise it. Had the parent initiated due process proceedings earlier, arguably program issues would have been resolved long before the end of school. For this she bears some responsibility for his loss of instruction. However, the school denied the student a free appropriate public education and therefore owes the student some compensation for the loss of instruction. For that reason I find the parent's claim of reimbursement for the summer program she provided at her expense to be a reasonable compensation.

Access to computer was listed on the student's IEP as a "required assistive technology" service. Evaluators found that formulating written responses to classroom work is hard for the student. The abbreviated school day denied the student access to the computer program which would have assisted him to increase his computer skills, and thus be able to utilize the assistive technology. The PET discussed the need for the student to have an alternative method of gaining these skills, but no program was located or offered. The student is entitled to compensation for this lost service.

**Is the IEP proposed for the 2001-2002 school year reasonably calculated for the student to receive educational benefit in the least restrictive educational environment?**

The proposed 2001-2002 IEP is the one developed in April 2001, and implemented during May and June 2001. In the upcoming school year the IEP places the student in the regular 8<sup>th</sup> grade mainstream. A behavior plan, appended to the IEP, sets up a system of earned points for complying with classroom rules. Failure to earn the minimum points results in the student being removed to a separate setting with an

educational technician who provides the student's instruction for the day. Appropriate behavior in the separate setting earns the student's return to the mainstream classes the following day.

Neither the school nor the parent feel the program as implemented in May and June was completely successful. Each maintained at the hearing that the program is in need of revision. There was minor disagreement around the elements that need to be included in any revisions, but major disagreement in the proposed implementation.

The school proposes that this IEP be implemented at the Buker Middle School with the same staff who implemented the IEP in seventh grade. The educational technician would be on hand in the class with the student, and the alternative behavior program staff would be an integral part of the program. Dr. Doiron and Dr. Hughes suggested using an advisor/mentor model when the student was unable to comply with classroom behaviors. The parent proposed the student be moved to the Hodgkin's Middle School for the implementation of the IEP.

Dr. Moran and Dr. Doiron both suggested revising the IEP to include goals and objectives for writing output and organization. Dr. Moran proposed the increased use of positive re-enforcers in the behavior plan to increase the likelihood that the student would remain in school when problems occurred and strengthen its chance of success. Dr. Moran, Dr. Doiron, and Dr. Hughes all agree that the student wants to be a "regular" kid, and is motivated to comply with school rules in order to be part of the mainstream. All agree with the use of a cognitive model that helps the student work through and understand that regulating his behaviors is in his best interest. All agree that the primary person who implements the behavior plan must be a person with whom he has a relationship, and someone whom he trusts and respects. And, finally, all agree that the plan will only be successful if the student is part of the plan.

Evidence regarding the student's need to buy into the program in order for it to be successful cannot be ignored. He has been clear that he will not be part of the alternative room, and the parent advocated this position on his behalf. Expert witnesses have advised against placement in a "behavior classroom". The April PET discussion around the proposed program and the resulting IEP, set up false expectations for both the student and the parent. Based on the written document and discussions with school personnel, the parent and the student developed the inaccurate impression that a certified teacher, or at least a Level III Educational Technician (ed tech III), had been hired. This staff would act independently to implement the program, with Dr. Moran as back-up support when necessary. When the person hired was only qualified as an ed tech I, the school needed to provide her with supervision. While they did allow her to operate outside her regulatory boundary, they posted her under the supervisory structure of the alternative room teacher. However, they did not revise the written plan and did not discuss the implications of that decision with the parent. As the year progressed and the ed tech began having problems with the student, her supervisor, the teacher of the alternative program, became more actively involved in his program by necessity. Not only did this create a schism between the parent and the staff, but allowed the student to feel he had been lied to, thus triggering an increase in the disrespectful attitude he exhibited toward the ed tech and the teacher. The end result of this chain of events ended in the teacher filing harassment charges with the local police against the student. Those charges are still pending. Her participation in any future programming for the student has been compromised.

While Dr. Moran opted for the involvement of the alternative program in the students

IEP, even he agreed that events at the end of the year between the alternative program teacher, the educational technician and the student had the potential to damage their relationship. The program designed by the PET in April was organized for implementation by an ed tech III. The program had the promise of success, but the last few days ended in the student finishing the school year in chaos once again. It is difficult to imagine at this point that the student can buy into a program in which the alternative teacher is involved in any significant way.

There is dispute around the location in which the student's 8<sup>th</sup> grade program should be implemented. The parent prefers the student be transferred to the Hodgkin's Middle School, another middle school in the district, the school argues for his continuation at the Buker School. Both proposals have merit, and each has its disadvantages. The student is known by the Buker staff and seemingly has a good relationship with the principal and several of his 7<sup>th</sup> grade teachers. He has good friends there, which is important to him. It is his neighborhood school. However, there is a negative history that follows the student into 8<sup>th</sup> grade. There are the unsettling events with the alternative program teacher. At the Hodgkin's School he enters 8<sup>th</sup> grade with a relatively clean slate. That school is introducing a new Learning Center concept, which is to be available for all students who require additional academic assistance. The student could take advantage of this assistance as part of his program without the stigma of a "special education" program, which is an important consideration for the student. On the other hand, he would be separated from his friends and be in a school farther from home. He would have no adult relationships to draw on initially. Evidence does not support one placement over another. Given that the start of school is so close, barring consensus of the PET to the contrary, the student will continue his placement at Buker School.

## **V. Order**

1. The PET shall convene within ten days of the receipt of this decision for the purpose of revising the student's IEP and behavior plan as necessary. Dr. Moran shall be included in this meeting, in addition to the school staff, the student and the parent. Drs. Hughes and Doiron shall be invited to attend, and if unable to do so shall be invited to provide specific programmatic suggestions for the PET discussion. The following items shall be incorporated into the program:
  - o The inclusion of goals and objectives in the IEP to address written language deficits, including computer access,
  - o The inclusion of goals and objectives to address organizational deficits,
  - o The inclusion of any modifications required by the student in the regular classroom, i.e. un-timed test-taking, repetition of work to mastery level, etc.
2. The district shall hire staff to implement the program. The person hired shall have, at a minimum a certification of a Level III Education Technician. The PET shall give careful consideration, with the input of Drs. Hughes, Moran and Doiron, to the structure of the program as it relates to the daily input of the ed tech. His or her presence in the regular classroom shall be discussed with

contingency plans for interventions in the student's non-compliant behaviors. Dr. Moran (or another equally qualified behavior consultant if he is unavailable) is to have weekly meetings with the ed tech and the parent together. The student and regular class teachers should be invited as deemed appropriate. These weekly meetings shall continue until the participants feel they are no longer necessary.

3. The PET shall determine the location for the implementation of the IEP. If the PET is unable to reach consensus on the location, the student shall remain at Buker Middle School.
4. The student is not to be a student of the behavior alternative program unless there is consensus of the members present at the PET to make this placement. If the student is not a student of the behavior program, a case manager shall be identified for the student.
5. Upon presentation of receipts, the school shall reimburse the parent for the tuition and travel costs of the program the student attended during the summer. Personal items of clothing and camping/outdoor gear are excluded.
6. The school shall locate and fund a computer course for the student. This program shall be in addition to his regular school day and shall continue until the student has covered roughly the curriculum covered in the 7<sup>th</sup> grade computer class.
7. Compliance data shall be forwarded to the Department of Education no later than September 30, 2001 and shall consist of:
  - ⦿ A copy of the PET minutes and new IEP
  - ⦿ A copy of the letter of hire for the Ed Tech III
  - ⦿ A copy of the check to the parent
  - ⦿ A copy of the invoice funding the computer program

Carol B. Lenna  
Hearing Officer

August 14, 2001