

Complaint Investigation Report
Parents v. SAD # 54
7/19/2006

Complaint # 06.035C
Complaint Investigator: Sheila Mayberry
Date of Appointment: April 12, 2006

I. Identifying Information

Complainant: Parents

Respondent: Brent Colbry
Superintendent
SAD #54
196 West Front Street
Skowhegan, Maine 04976

Special Education Director: Erica Thompson

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

On April 11, 2006, the Maine Department of Education received this complaint. The complaint investigator was appointed on April 12, 2006. On or about May 4, and May 16, 2006, the complaint investigator received 89 pages of documents from the Respondent. On or about May 9, 2006 the complaint investigator received 174 pages of documents from the parents. Interviews were conducted with the following people: Erica Thompson, Co-Coordinator for Special Education; Ann Belanger, Co-Coordinator for Special Education; Sharon Lovell, home/school coordinator; Ellen Smith, social worker; Maryanne Bernier, teacher; Kathleen Conway, teacher; Kris DuBois, teacher; Gabrielle McCahan, teacher; Debra Clark, behavior consultant; the student's aunt, former special education case manager; and the Student's mother. The complaint investigator determined that a complaint investigation meeting was not necessary.

III. Preliminary Statement

This complaint was filed by the Student's parents, alleging that the School Administrative District 54 ("District") violated the Maine Special Education Regulations ("MSER") by failing to identify the Student as eligible for special education and related services.

Because of extraordinary circumstances resulting in the availability of only one complaint investigator, an extension of the sixty-day time limit was necessary.

IV. Allegations

1. Failure to identify the Student as a student with a disability eligible for special education and related services. MSER §§ 1.2, 8.3(D), 10.1.
2. Ancillary Issue: Failure to comply with time limitation for acting upon referrals to the PET to determine eligibility for special education and supportive services. MSER § 9.17

V. Summary of Findings

1. The Student, born on xx/xx/xxxx, is xx years old and attends Skowhegan Area Middle School in Skowhegan, Maine. He lives with both parents and younger brother in Norridgewock, Maine.
2. Medical reports indicated that the Student was two weeks overdue and had prenatal complications with foot deformities.¹ As a young child he wore orthopedic braces. Evaluations in 2002 suggested that he continued to need the orthotic supports. He was prescribed an exercise program in 2002. He was also diagnosed with asthma and was prescribed Albuteral.
3. Occupational therapy evaluations were performed in 1999 and 2001 due to parental concerns about the Student's fine motor skills. Although he fell within the average range in terms of his development, it was noted in 2002 that he had some difficulty with handwriting and scissor control. Use of a pen grip and adaptive scissors was recommended.
4. In March 2003, the Student received an initial assessment for in-home support services due to volatile, hostile behavior at home. He was diagnosed with generalized anxiety disorder by Eric Rutberg, LCPC. Mr. Rutberg noted in his assessment of the Student that, although he did not exhibit any problematic behavioral or academic issues in school, he had a high level of "explosive noncompliance" at home. He was easily agitated in chaotic environments. He reported that the Student had few friends and that he was in need of social skills development. Mr. Rutberg recommended that the Student receive in-home support to facilitate a less chaotic and more cooperative atmosphere among family members, as well as a "great deal of work in areas (sic) of social skill development; empathy, interpretation of body and social cues. Will also benefit from time away from his brother so he develop (sic) a sense of Self (sic)."
5. In March 2003, an evaluation of the Student's academic achievement was performed at the request of the PET.² The evaluation report, written by Nancy Gordon, M.S. Ed.,

¹ The actual diagnosis was Cavovarus feet with plantar fasciitis and tendo-Achilles contractures right worse than left. Also, Osgood-Schlatter's-type disease, an inflammation of the patellar tendon, where the knee meets the top of the tibia (shinbone), was diagnosed in July 2003.

² No PET summary was provided to the complaint investigator.

noted that the referral to perform the assessment was based upon reports that the Student was performing below grade level in all areas, concerns about noncompliance, and difficulty with work completion. In a summary of the result, Ms. Gordon stated that the Student scored within the average to high average range, as compared to age level peers, on all areas assessed. She stated, "His grade equivalent scores range from high xx grade levels in word reading, pseudoword decoding, math reasoning, and spelling to a low xx grade level in reading comprehension." Her recommendations included the possibility of a behavior plan or work contract.

6. Starting in April 2003, the Student started receiving support services from Assistance Plus, a nonprofit service agency, to help manage the Student's behavior at home. An individual treatment service plan (ITSP) was implemented with the goal of having the Student learn to control his anger and complete daily living tasks without defiance. A service provider was assigned to work with the Student at home for three hours a week.
7. In January 2004, a neuropsychological evaluation was performed by Dr. James D. Thomas, a clinical neuropsychologist. The Student's pediatrician, Dr. Jennifer Pribyl, M.D., made the referral to Dr. Thomas to determine his neurocognitive status. The Student's history included sleep problems, hypercoaguability and lead poisoning at the age of one, declining reading skills and poor vocabulary. Dr. Thomas noted that the Student's medical history included orthopedic problems with his left leg. It was also noted that he was physically hostile toward his mother and had attempted suicide. Dr. Thomas reported that previous diagnoses included depression and oppositional defiance disorder. He had been prescribed Zoloft and Albuteral. He noted that both parents had significant illnesses and his younger brother suffered psychiatric problems, including rage attacks. He reported that academically, the Student's grades had declined from A's to F's. He was on grade level in most areas; however, he was below grade level in reading and far below grade level in writing.
8. Dr. Thomas used a variety of testing tools, including: the Wechsler Intelligence Scale for Children-III; the Phonological Processing, Comprehension of Instructions, Faces Immediate and Delayed, Sentence Repetition and Verbal Fluency subtests of the NEPSY; the California Verbal Learning Test-C; the Story Memory I and II subtests of the Children's Memory Scale; and the Basic Reading, Reading Comprehension, Spelling, Written Expression, Numerical Operations, and Math Reasoning subtests from the Wechsler Individual Achievement Test-I. Dr. Thomas determined that the Student's general intellectual ability was in the average range, with a Full Scale I.Q. of 102. Verbal ability I.Q. was 118, in the high average range. Nonverbal ability was in the low average range, with a Performance I.Q. of 84. He stated that the difference between the verbal and nonverbal scores was statistically significant. He reported that there was some evidence of "frontal lobe/executive system dysfunction, primarily affecting attention." However, he found that, generally, the Student had no evidence of learning or memory impairments. He stated that, "Overall, verbal learning was in the high average range. His rate of learning was in the superior range and the consistency of his recall was in the high average range. His immediate and delayed

recall were in the high average range.” He noted that there was some evidence of attention impairment for auditory information. There was no evidence of language, visual, or spatial impairments and limited evidence of motor and sensory impairment. Academically, the Student’s reading and math skills were consistent with his verbal intelligence and with his current grade placement. His writing skills were statistically poorer than his verbal intelligence and were below his current grade placement. The student’s general math skills were at grade level. Dr. Thomas noted that there were clinically-significant personality problems, noting that his teacher described the Student as being sad and tired. Dr. Thomas opined that family stressors at home, including recent deaths of relatives and health problems with both parents, may have exacerbated the Student’s level of depression.

9. Dr. Thomas recommended that the Student’s medication for depression be reviewed by his physician. He also recommended individual psychotherapy, as well as work in anger management and social problem solving. With respect to the Student’s school performance, Dr. Thomas stated: “(The Student’s) difficulties at school are likely to reflect performance problems, not learning problems per se. This probably reflects his depression and may improve greatly when the depression is better treated. In the meantime, there probably will be considerable benefits in designing a behavioral program at school to reward his effort, not only his work product, and to provide incentives for his efforts.” He concluded by stating, “Although (the Student) cannot currently be diagnosed with a learning disability, he clearly needs help in developing his expressive writing skills. This work is likely to focus on teaching him to write in a structured manner, by presenting a theme sentence or paragraph, then building an argument supporting the major theme by presenting additional facts, and then closing with a summary sentence or paragraph.”
10. In a letter, dated April 2, 2004, to the parents, Norridgewock Central Grade School Principal, Herbert Oliver, reported that the Student’s program had been “modified” for seven days due to “aggression and disruptive behavior” towards a teacher, noting that he struck the teacher. The modification was a seven-day suspension. The Student’s father expressed concern in an email to Mr. Oliver, also dated April 2, 2004, that they had been informed during a school visit that the Student had been sent home and suspended for seven days after striking his teacher during an argument. He expressed concern that the Student’s behavior had become serious and that they had requested help from the school in the form of a behavior program, citing Dr. Thomas’ recommendations. He also pointed out that the Student played aggressively with other children, according to his teacher, and that other children did not want to play with him.
11. An informal meeting was held on May 4, 2004 to discuss the Student’s behaviors. Parents, teachers and administrators were present. It was agreed that a behavior plan would be drafted. There was no agreement to perform the Functional Behavior Assessment requested by the parents. Notes from the meeting, taken by the Student’s parents, stated that they had been called by the District to pick up the Student from

school on two occasions after the April 14, 2004 incident due to his aggressive behaviors in school. Debra Clark, the District's behavior consultant attended the meeting. The notes reflected that she stated that the parents should not be called to pick up the Student unless there was an act of violence. The participants agreed that a Behavior Intervention Plan or a Behavior Modification Plan would be developed by Ms. Clark. The parents inquired whether an Individual Education Program (IEP) should be developed, citing Maine Department of Education Regulations.

12. A draft behavior intervention plan, dated May 10, 2004, to target the Student's behavior with incentives was submitted to the parents.
13. On or about May 13, 2004, the Student's teacher, Jim Cook, emailed a note to the Student's parents. He stated that the Student had difficulty completing work and refused to obey directives to stay in at recess to finish his work. Mr. Cook also reported that the Student was angry at several classmates when they did not allow him to join in a group activity, and said that he wanted to kill the classmates and himself.
14. A PET meeting was held on May 14, 2004. The team reviewed the evaluations performed by Ms. Gordon in March 2003, and Dr. Thomas in January 2004. The PET acknowledged that the Student was diagnosed with ADHD, ODD, and depression. In reviewing Dr. Thomas' report, the team concluded that no learning disability was found. In reviewing Ms. Gordon's assessments, the team discussed whether the Student needed a behavior plan or work contract, even though he had performed at grade level in all areas. The team agreed that the Student would benefit from a behavior plan. However, it also determined that, since his diagnosis of ADHD and ODD did not adversely affect the student's academic performance, no special services were needed.
15. On or about May 19, 2004, the Student's teacher, Mr. Cook, emailed the Student's parents. He reported to them that the Student was angry and had called him a "jerk" and said that he wanted to commit suicide. Mr. Cook noted that he reported this to Sharon Lovell, the District's home-school coordinator. Mr. Cook stated that he calmed the Student down. However, the Student felt sick later on in the day and was sent home by the office.
16. In a summary review of the Student's progress in the home-based Assistance Plus program, dated June 10, 2004, it was reported that the Student continued to need help building social skills. The report noted that the Student bullied his peers and needed to learn how to be more polite to adults and peers. The report also noted that the Student needed to engage in more physical activities and be able to stretch his ligaments in his feet, calves and wrists.
17. In a letter dated September 17, 2004, the Student's teacher, Kathleen Conway, reported to the parents that the Student had engaged in noncompliant, angry behavior, had received several warnings, and had recess taken away.

18. In a letter dated October 12, 2004, Ms. Conway reported to the parents her observation about the Student's poor personal hygiene. She stated he had been coming to school with dirty clothes, that he was hesitant to wash his hands, and that he had body odor. She reported that other classmates made comments about this and that she was concerned about his social acceptance.
19. In a letter dated November 4, 2004, Principal Oliver reported to the parents that, due to physical aggression, the Student was being suspended from November 4, 2004 until November 8, 2004. No further information was given.
20. In December 2004, the Student was seen for a physical examination at Franklin Memorial Hospital. The medical report noted that at 188 pounds, the Student was obese, and had been previously diagnosed with ODD, obesity, and Acanthosis Nigricans³. He was counseled regarding the importance of dietary modification and the prevention of diabetes, and was cautioned with respect to snacking and the importance of physical activity.
21. A second progress report, submitted in January 2005 by the Student's teacher, Ms. Conway, indicated that he was failing all subjects.
22. On January 26, 2005, the Student argued with a classmate and tripped him with a hockey stick. He made a gesture indicating that he would slash the other student's throat. In an incident report, he wrote his own version of the events, stating that he got angry at the student, tried to trip him, made a slashing mark across his own throat and said to the teacher that the student deserved to die. He lost one week of recess as a result of this behavior.
23. On January 27, 2005, an incident report was written describing the Student's behavior for that day, including refusing to stand for the pledge of allegiance, telling a teacher to "just leave me alone," interrupting a teacher's class during instruction after he was told to go to the office, yelling at staff, and throwing a pencil across the nurse's desk. He acknowledged that he was angry about an issue at home.
24. In a note dated January 27, 2005, the Student's teacher, Ms. Conway, reported to the parents that the Student was not passing his subjects and would be placed on a primary retention list.
25. A PET meeting was held on March 3, 2005. The PET reviewed the Student's grades. His third quarter grades were: math 25%, language 20%; science 19%, social studies 56%, reading 38%, and spelling 56%. The PET noted his poor behavior and lack of social skills. He was also assigned to a Friday social group in order to help him

³ Acanthosis Nigricans is a disorder that may begin at any age. It causes velvety, light-brown-to-black, markings usually on the neck, under the arms or in the groin. Acanthosis nigricans is most often associated with being overweight. American Osteopathic College of Dermatology, www.aocd.org.

develop social skills. The PET agreed that the Student had the ability to perform current grade work. However, they agreed that they needed more information regarding his diagnoses (ADHD, ODD, and depression) in order to determine if they interfered with his ability to learn. Debra Clark, the District's behavioral consultant, stated to the team that, having observed the Student for three years, she believed that a strong behavioral plan with support and follow through at home could be successful. She stated to the team that the Student's difficulty at school was due to the choices he made and not because he could not do the work. The parents gave consent for new evaluations. The PET minutes noted that the parents were not willing to have the Student receive counseling and were not participating in family counseling. However, in a document submitted as an amendment to the PET minutes, the parents clarified that the Student did receive in-school counseling and had in-home support through Youth and Family Services and Assistance Plus.

26. In a letter dated May 5, 2005, Ms. Conway related to the parents an altercation the Student had with classmates over football. The Student was willing to talk about it with her. He told her that he was going to commit suicide, that he had no friends, except for three that he named, that he hated his life, and that school was the enemy. He recounted that some of his family members had died recently, and that his house had been robbed. She stated, "He said it would be one less mouth to feed if he killed himself, and that he thinks about it every day."
27. On May 11, 2005, Ms. Clark, submitted a report of her observations, on four occasions, of the Student during recess. She reported that his poor social skills interfered with his interactions with peers and that he came across as being argumentative and too bossy at times. She stated that she thought he was making progress and suggested that role play demonstrating how he comes across to others would be helpful.
28. The Student's behavior plan was modified on May 12, 2005. It included earning stickers for extra time with Ms. Lovell, the ability to remove himself from the classroom when he felt it was necessary to talk to an administrator, and extra time after school on Tuesdays and Wednesdays to complete school work with Ms. Conway.
29. A PET meeting was held on May 27, 2005. Discussion focused on the Student's transition to middle school. The team agreed that the Student was to be placed on the "Spruce" team. The minutes of the PET meeting stated, "This team will work on behavior and academics. It has small classrooms with a built-in incentive behavior program. There are twelve xx graders on this team. They have daily activity time. It has a structured study hall. (The Student) will be promoted and be placed on the Spruce team at Skowhegan Middle School." The PET also discussed the District's request for a comprehensive evaluation by Dr. Christine Fink. The evaluation was to include cognitive, brain functioning, executive functioning, achievement, and social/emotional evaluations. The parents gave their written consent for the evaluation on May 27, 2005. The team also noted that the behavior plan used in the

Student's program had not been needed since May 12, 2006. Ms. Conway reported that staying after school to complete his school work had helped improve his performance. It was agreed that an independent evaluation would be performed by Dr. Christine Fink.

30. In August 2005, a neuropsychological evaluation was performed by Dr. Fink. Many assessment tools were used, including: the Wechsler Intelligence Scale for Children - 4th Edition (WISC-IV); behavioral observations; and assessments to establish levels of attention and concentration functions, sensory-motor abilities, language functions, visual-spatial and visual-motor functions, memory and learning functions, abstract reasoning abilities, executive capabilities, and behavioral and emotional functions. Dr. Fink concluded that the Student continued to function intellectually in the average range of overall abilities with comparable verbal and nonverbal intellectual abilities. However, she stated that, "The data suggests more significant difficulties with pragmatic language and social problem solving. He is also quite attuned to the discrepancy between his ease of verbal expression and written expression. When organizational difficulties do not hamper his recall, he has average or better verbal and nonverbal memory functions."
31. Dr. Fink went on to note that, "Significant difficulties are also noted with eye-hand coordination, manual dexterity and motor programming; whereas, (the Student) has above average grip strength and fine motor speeds. His visual acuity and sensory-perceptual abilities are generally within normal limits, with a mild enduring difficulty processing numeric tactile stimuli (i.e. dysgraphesthesia)." She also stated that, "Significant difficulties are noted with sustained attention regulation and inhibiting his responses to auditory stimuli." She summarized that, "His pattern of difficulties with sustained attention regulation, impulsivity, disorganization and executive dysfunction are interpreted as being consistent with an Attention-Deficit/Hyperactivity Disorder, Combined Typed (sic) (ADHD; DSM-IV 314.01). While (the Student) does not present with a specific learning disability, these areas of challenge, coupled with his low frustration tolerance, reduced risk taking and dislike for school put him at risk for continued academic difficulties."
32. With respect to the student's behavior, Dr. Fink reported that:

"(The Student) also presents with a long-standing pattern of social, emotional and behavioral challenges. His persistent features of negativity, irritability, moodiness, unhappiness, low self-esteem and affected sleep are interpreted as supporting a *Major Depressive Episode* (DSM-IV 296.32). When compared to the 2004 evaluation, these depressive symptoms appear to have gotten worse with increased environmental expectations and pressures. There also appears to be a strong anxiety and stress component to his presentation that may contribute to his need for control. (The Student's) long-standing pattern of peer interactional

difficulties, pragmatic language delays, restricted interests, inflexible thought processes and fine motor/handwriting delays are interpreted as supporting Aspergers' Disorder (DSM-IV299.80) Importantly, many of these areas of challenge were evident throughout today's data sampling as well as in the information shared during the clinical interview. (The Student) is feeling ill-equipped to meet the expectations set forth at school, and he does not have the skills to bring about meaningful change at this stage in his development. In turn, he is likely to rely on understanding, adult-imposed, environmental and behavioral supports until he can begin to generate and apply such strategies himself. He is at a critical juncture in his development, and it will be important for him to have a combination of home, school and community based supports if he is to make meaningful change."

33. Dr. Fink made 19 separate recommendations for the Student's programming.

They included, among others:

- Occupational therapy screening for handwriting and keyboarding
- Review of the Student's medication for Major Depression
- Therapeutic supports to address anger management, self esteem, affective regulation, and social skills development
- Group social skills/pragmatic language instruction
- Positive behavior plan
- Change in seating arrangement to a low stimulation environment and away from distractions
- Provision of computer-assisted technologies when possible, such as voice-activated software and word processing programs to complete writing tasks
- Reduction in the number of items to do at any one time
- Strategies to reduce the amount the Student needs to handwrite by providing copies of lecture notes, cueing to written details (underline, use of color, boxing)
- Use of a daily planner and adult mentor or/and organization coach to help him track assignments and develop organizational and self-regulatory skills
- Limiting of homework to a predetermined amount of time or certain number of pages per night
- Simple checklist of activities to accomplish within a given work period to promote independent work habits
- Test-taking in a distraction free setting, away from classmates, and use of a scribe for more stress-laden tests (e.g. essays)
- Participation in at least one structured, competency-based activity designed to promote self-esteem and peer relations.

34. During the 2005-2006 school year, the Student was placed in the District's Middle School "Spruce Community." It is also referred to as the "Spruce Team." A written description of the program states that, "The Spruce Community is comprised of two teachers, two educational technicians and up to thirty students. Focus will be placed on organization, responsibility, citizenship, and academic excellence. The classes are highly structured and are based on individual learning styles of the students. Spruce has a built-in incentive program, including weekly community activities and rewards, and conduct policy for all of its students that will encourage them to become motivated learners and responsible citizens. Placement on the Spruce Community is determined through teacher recommendations and parental requests." For the 2005-2006 school year, one of the two teachers was a special education teacher.
35. Erica Thompson, the District's Co-Coordinator for Special Education, stated that the Spruce Community is designed for students with special needs. Ms. Thompson stated that approximately 50 percent of the students in the Spruce Community do not qualify for special education. The students have a curriculum similar to the general education classes. There are a total of twenty students in the program, in two classes. They are placed into the program when they need more intensive instruction. Incentive programs are designed to help them complete homework. There are also "built-in" discipline and behavioral incentives to keep the students in school. The "red card" warning system includes in-school suspensions within the classroom and the loss of other privileges. Ms. Thompson stated that, although the students are in separate classrooms, the rooms are not considered resource rooms. Instruction is done in the classroom, in small groups, with supplemental materials. Ms. Thompson stated that the program is not funded as a special education program.
36. A PET meeting was convened on November 1, 2005. The PET reviewed the results of Dr. Fink's evaluation and determined that the Student was not in need of special education services. The basis for this decision was that, although he was diagnosed with ADHD and Asperger's Syndrome, these disabilities did not adversely affect his learning since he was performing at grade level in written expression and was in the low average range for spelling and numerical operations. The minutes state that, "Final diagnosis shows that his difficulties with pragmatic language delays, controlling emotions and behavior during frustration and past difficulties dealing with peers, and the past major depression episode showed that Asperger's Syndrome may be likely. The PET discussed these results and determined that (the Student) is making huge gains in the area of social relationships, academic work, attention to task, dealing with frustration in socially appropriate ways. The Asperger info came from (sic) last year when (the Student) was demonstrating difficulties making peer relationships." Based upon the team's current perception of the Student's progress, it concluded that, "no adverse effect is observed at this time." The PET agreed to have an occupational therapy screening and language screening performed. The parents gave their written consent for these assessments.

37. An occupational therapy screening was done on December 7, 2005 due to the Student's poor penmanship. Mirela Sasuclark, MS, MOT, OTR/L, found that his handwriting was neat and legible and, although his speed was slower for copying, he took time for greater accuracy in spelling and punctuation. She also found that he was able to keep appropriate spacing between the letters and words independently. She recommended that additional time should be given to complete assignments requiring copying, use of a ruler or cardboard guide, and the use of a keyboard. However, she stated that it did not appear that he required occupational therapy services.
38. A screening test of Adolescent Language was made on December 8, 2005 to measure the Student's general use of receptive and expressive language. He scored 100% on all items in vocabulary, auditory memory, language probe, and explanation proverbs. The evaluator, Leona Sinclair, stated, "One observation that could be significant is that he spoke to this examiner about his ability to see specters, demons, and devils. His explanation is that he is telepathic and that is probably why he can see them and others can't."
39. In a letter, dated February 22, 2006, to Ann Belanger, the District's Co-Coordinator for Special Education assigned to the middle school, Dr. Susan Sanders, licensed psychologist, stated that she had reviewed all documents regarding the Student's previous evaluations, as well as the diagnosis of Asperger's disorder concluded by Dr. Fink. Dr. Sanders indicated that she believed that the Student did not have Aspergers; she stated that her diagnosis was "Early Onset Bipolar Disorder, exacerbated by psychosis." She reported that the Student had started medications to treat his "mood dis-stabilization (sic) and his psychosis." She stated that since no medication would completely erase all symptoms of Bipolar Disorder, the Student would continue to have special educational needs and suffer from social and emotional problems. "(The Student) presented with suicidal ideation when he was mainstreamed in the classroom, which is a concern. He has improved in mood significantly since being placed in the special education setting. Further, he has periodic 'melt-downs,' which occur much less often when over-stimulation is managed. Violence is a potential when he is over-stimulated; although this is being managed for the most part, environmental management is imperative." Dr. Sanders made several recommendations including continued placement in the "Special Education department"; psychological services during school hours; provision of a quiet space as needed; and collaboration between the school and Dr. Sanders for continued educational management solutions.
40. A PET meeting was held on February 27, 2006. The PET determined that special education services were not needed since the Student had made some progress in his school work and peer interactions. The team members discussed his academic progress in reading, science, and math. The team also discussed a game of

- dodgeball when the Student broke rules while allowing his anger to escalate. It was reported that he mishandled peer interaction and threatened a few classmates in the heat of the argument. The Student's parents informed the team that he had been diagnosed with Bipolar Disorder and expressed their concerns about the side effects of his new medication. The minutes of the meeting stated, "The PET discussed whether the diagnosed disability (bipolar disorder) has adverse affect (sic) on (the Student's) academic performance, and the Pet agreed that the disorder does not currently adversely affect (the Student's) performance in school and therefore he does not qualify for special education services."
41. The Student's report card for the second trimester indicated that he was receiving one A, four Bs, and two Cs. His third trimester progress report indicated that he was receiving Cs in social studies, science and math; a D+ in physical education; an F in art; and two incompletes in language arts and skills due to missing assignments. He was receiving 3s (fair), 4s (needs improvement) and a 5 (unacceptable) in effort. He was receiving a 1 (outstanding) and four 2s (good) in conduct. The report indicated that he had been absent five times during the trimester.
 42. During the 2005-2006 school year, up until May 15, 2005, the Student was absent a total of 24 days.
 43. In an interview with the complaint investigator, Ms. Thompson stated that the Student always exhibited odd behaviors. She noted he was reclusive and more immature than his peers. She believed that his body odor affected his interaction with his peers. She stated that he was not active in after-school activities due to transportation problems between home and school. She stated that the Student played video games at home. She knew that the family had in-home supports to deal with problems at home. She stated that the Student's academic performance was affected by his decision not to do his homework, as well as substantial dysfunction in the home.
 44. In an interview with the complaint investigator, Ann Belanger, the District's Co-coordinator for special education services, reported that she was responsible for the District's middle school program. She stated that during the 2005-2006 school year, the Student did well in the Spruce Program. She stated that he made the honor roll for the first trimester. She stated that socially, he seemed to be getting along well with classmates. He sat with other students at lunchtime and appeared to be well liked. He had not "lost control" during the school year. However, she reported an incident in gym class when he lost his temper. She stated that after he had calmed down, he wanted to talk about the incident and apologized to the principal. Academically, his second trimester grades consisted of an A in math; Bs in language arts, reading, social studies, and health; and Cs in science and physical education.

45. In an interview with the complaint investigator, Ellen Smith, the District's social worker at the middle school, stated that the Student was on the Spruce Team and seemed to be doing well. With respect to his social development, she did not have anything to compare it to, since she had not known him in previous years.
46. In an interview with the complaint investigator, Kris DuBois, the Spruce Team leader, and the Student's 2005-2006 language arts and social studies teacher, stated that the Student had an excellent 2005-2006 school year. He stated that the Student was capable of doing anything his peers were doing; however he was not always focused. Spelling took him longer to finish and he had missed turning in many assignments. Mr. DuBois did not penalize the student for turning in late assignments. Furthermore, Mr. DuBois stated that the Student had not turned in a book report despite the fact that he had two months to complete it. At the end of the year, he struggled with many absences. Since the Student did not do any work outside of school, he used the structured study hall setting to complete his work. Because he was missing assignments at the time of the interview, the Student was receiving incompletes in language arts and in reading. During the second semester he was frequently absent on Fridays, which were scheduled makeup days for students who needed to finish assignments.
47. Mr. DuBois stated that socially, the Student had done well during the year. He played card games with classmates and was engaged in gym class. He stated, however, that the Student was immature in dealing with conflict and was encouraged to speak to his peers. He recounted an incident when the Student became very upset over a dodgeball game. He became frustrated over a certain call made and became angry in the hall. Mr. DuBois called his parents and suggested that he stay at home the following day, a Friday, since it was a field trip day and someone would have to stay in the classroom with him. He had earned a "red card" which meant that he needed to be in detention for that day. He noted that the Student did not have a well-developed sense of personal space. He also discussed the Student's problem with personal hygiene and body odor. He opined that, although middle school classmates were somewhat forgiving, the Student may be ostracized in high school due to this problem.
48. In an interview with the complaint investigator, Gabrielle McCahan, the Student's 2005-2006 math and science teacher, stated that she understood the Student did poorly during the 2004-2005 school year, even failing some classes. She stated that he had done well in math and science during the 2005-2006 year. She stated that he participated in class and was active in doing labs. Furthermore, she reported that group work was a struggle for the Student; he needed to learn to compromise and overcome his desire to be the leader all of the time. She also stated that, due to the Student's three weeks of absenteeism during the last semester, he missed many assignments, increasing his frustration level. She stated that she would meet one-on-one with the Student and give him shorter assignments in order to catch up. She stated that he had no behavior problems in the classroom during the year. She mentioned that his poor hygiene was noticeable: he wore dirty clothes

- 40 percent of the time or more, and his hair was usually dirty. She described that the long term goal for students in the Spruce program was to have them go back into the larger classroom and be ready for high school.
49. In an interview with the complaint investigator, Sharon Lovell, L.M.S.W., stated that she acted as the home-school coordinator for the Student and his brother. She stated that the Student's social skill and peer interaction problems began in xx or xx grade. She stated that he had poor self-esteem, and felt that other students did not like him. She observed that he did not care for athletics and limited his extracurricular activities almost exclusively to video games, Pokemon cards, and Yu-Gi-Oh cards, his play with others centering on these activities. Ms. Lovell stated that prior to the 2005-2006 school year, his behavior at school included non-compliance and refusal to do or hand in homework. In xx grade, he was disciplined several times with detentions and suspensions. She stated that his actions were impulsive, not intentional or malicious. In xx grade, the Student was easily frustrated with work expectations. He had a "three strikes" behavior plan, in which he earned points for good behavior. Ms. Lovell stated that the plan worked "on and off" during the year. She stated that since he had become part of the Spruce Team in the 2005-2006 school year, he seemed to progress both academically and socially. The PET also agreed to provide social work services for him. She saw him on an average of once a week for scheduled weekly meetings and more if needed. The 30 minute-sessions were with a group. She would meet with him individually if needed.
50. In an interview with the complaint investigator, the student's aunt, the Student's former case manager, stated that she was concerned the District was attributing the Student's difficulties to his home environment. She was concerned that District administrators believed that the Student's parents were "creating" an unhealthy situation for the Student. She noted that she was concerned when the Student was assigned to the Spruce Team, but not identified as eligible for special education services.
51. In an interview with the complaint investigator, the Student's mother stated that the Spruce Team was the only place where the Student could function during the 2005-2006 school year. She stated that the program was set up like a special education program. There were students of different ages, the curriculum was modified so the Student had less homework to do, and there was a "meltdown" area. She did not consider the program to be a mainstream placement. She reported that the Student had been absent due to illness during the last part of the year, and had trouble making up assignments. She stated that he could not stay after school on Fridays because they did not have the finances to drive to the school and pick him up. She reported that he was failing during the third trimester. He had one F, two D's, and two C's. She had not been notified that the Student was far behind on some assignments. She stated that, socially, the Student had done well at the beginning of the year. He had two good friends. However, one of them moved away. She said that he did not do well in maintaining social

- relationships. He was involved in two “fights” during the year. In the first one, he threatened to kill himself and the entire class after he was hit in the head with a ball. In the second, in January 2006, he confronted his teacher, Mr. DuBois, after which Mr. Dubois told her that the Student should stay home the next day. She reported that the Student’s class went to the Camp Kieve in April 2006 for a week. She said that the Student felt alienated from his classmates and wanted to go home. She said that other classmates told him to “grow up.” She acknowledged that he is emotionally delayed and did not grasp social cues.
52. The Student’s mother told the complaint investigator that the Student’s history of emotional and social delays existed from the time he was very young. In xx and xx grades, he had frequent outbursts and “meltdowns.” She said that he had no friends and threatened to harm himself, classmates and teachers. During the 2004-2005 school year, he struck a classmate with a hockey stick. She reported that he would pull his skin on his arms and legs until he bled.
53. During an interview with the complaint investigator, the Student’s xx grade teacher, Kathleen Conway, reported his academic progress was not good due to his failure to complete and turn in homework, as well as a lack of motivation. She said that he would rarely take responsibility for his actions. She stated that, with respect to his behavior, he was consistently frustrated, angry and sad. He had few friends and threatened to commit suicide twice. She noted that he would tell her he hated being poor. She said that, socially, he was a loner and would seek out adults at recess. He had few friends, and would get easily frustrated with his classmates. She stated that she was worried about his mental stability.
54. In an interview with the complaint investigator, Debra Clark, the District behavior consultant, stated that she became involved in the Student’s program during the 2004-2005 school year. She said that the Student had threatened to commit suicide and had been suspended a few times. She developed a behavior plan that was implemented at school. She also noted that he had poor personal hygiene and that she had discussed this with the parents. She reported that he had few friends and was abrasive towards his classmates, preferring to spend time with adults. Although he was capable of performing well academically, he failed to turn in homework. She reported that during the 2005-2006 school year, the Student had improved greatly by being on the Spruce Team. He began interacting with his peers, he was engaged in class, and he was more enthusiastic and happier at school. She believed that due to the smaller number of students in the classroom, fewer changes in the daily routine by having only two teachers, creative curriculum to prove competency, and less homework helped the Student’s ability to cope in school. She believed that he was bright enough to learn new concepts and move on without doing as much homework. She stated that her impression of the Student’s status was that his parents had difficulty with his emerging adolescence.

VI. Conclusions

1. Allegation #1: Failure to identify the Student as a student with a disability eligible for special education and related services. MSER §§ 1.2, 8.3(D), 10.1. **VIOLATION FOUND**

States accepting federal funding must assure all learning disabled children the right to a free appropriate public education (FAPE), 20 U.S.C. § 1400(d)(1)(A), by providing "access to specialized instruction and related services . . . individually designed to provide educational benefit to the handicapped child," *Board of Educ. v. Rowley*, [458 U.S. 176](#), 201, MSER § 1.2. Identification of a student with a disability for special education services is based both on whether the student has a disability, as enumerated and defined in MSER § 3, and whether the disability adversely affects a student's educational performance. Maine defines "educational performance" in broad terms. Under MSER § 2.7 the term "educational performance" includes academic areas (reading, math, communication, etc.) and non-academic areas (daily life activities, mobility, etc.). Purely academic progress is not the only indicia of educational benefit implicated by the IDEA. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). "Adversely affects educational performance" is not defined in either IDEA, accompanying federal regulations *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2nd Cir. 2000) or Maine Statutes and Regulations. While a child's impairment need not necessarily manifest itself in academic failure, if it interferes with the child's ability to learn, then special education and related services must be provided under the IDEA. *Rome Sch. Comm., supra*, 247 F.3d 29, 33 n.3 (1st Cir. 2001) ("The question is whether these behavioral disturbances interfered with the child's ability to learn."). It is the responsibility of the Pupil Evaluation Team (PET) to determine whether a student meets the eligibility criteria for the provision of special education instruction and supportive services. MSER § 8.1. The PET is also responsible for determining the present level of performance and educational needs of a student in all affected academic and non-academic areas and for deciding if additional evaluations to determine eligibility are needed. MSER § 8.3(A)(B). In addition, the District is also required to offer the Student a program which educates him in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the disabilities is such that education in regular classes and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5)(A); MSER § 11.1.

The issue is whether one or more of the Student's disabilities adversely affected his educational performance, including non-academic performance, resulting in a need for specialized instruction or related services. The District acknowledged at the May 14, 2004 PET meeting that the Student was diagnosed with ADHD, ODD, and depression. It further accepted the Student's diagnosis of Bipolar Disorder at the February 27, 2006 PET meeting. All three of these conditions, while not designated specifically as a disability in and of themselves, can come under the designation of an Emotional Disability or Other Health Impairment if the symptoms adversely affect a student's educational performance. MSER §§ 3.5, 3.10. There was no argument that the Student's behavior at school was unacceptable. He expressed suicidal thoughts, stated his desire to harm other students, and was involved in actual physical violence in the 2003-2004 and

2005-2006 school years. Numerous evaluation reports indicated that his social development was delayed and that he needed psychological services during the school day. He also lacked a daily personal hygiene routine, coming to school with body odor and dirty hair. Comments made by other students about this have worried the Student's teachers. These are clearly non-academic areas of the Student's educational performance that the District failed to address with special education and related services in an appropriate IEP. Each time the PET met to discuss whether the Student qualified for special education or related services, it determined that his disabilities caused no adverse effect on the Student's educational performance. The PET's focus on academic performance, i.e. grades and achievement test results, was the sole criterion in their deliberations. Although it acknowledged that the Student failed to turn in homework assignments, this factor was never addressed in any formal way. His grades remained good until the end of 2005-2006 school year.

Despite the denial of special education or related services, the PET decided that the Student should be placed in the "Spruce Community" in the 2005-2006 school year. Although it was described by the District's Co-Coordinator for Special Education as a mainstream classroom placement, it was designed for students with special academic and behavioral needs. About half of the students in the program needed special education services. The class size was limited to only 12 students, and separated from other classes in the same grade. The curriculum was modified for the Student by reducing the amount of homework required. He was not penalized for turning in late assignments. A "built-in" behavior plan was utilized in the program. The Student was also provided social services during the school day, once a week, in group sessions and individually if needed. The goal of the program was to have the students re-enter the larger classes before they go on to high school. Both staff and parents reported that the Student thrived in the program during the 2005-2006 school year. He learned to cooperate with his classmates and was able to control his anger.

Once a student has been identified as a student with a disability which adversely affects educational performance, either academic or nonacademic, the educational program deemed appropriate for him must be defined in a written IEP. MSER § 10.1. The decision to place the Student in the Spruce Community was tantamount to providing special education and related services to the Student without the benefit of having an eligibility determination and formal, written IEP.⁴ In addition, there was no determination about whether the Spruce Community was considered the least restrictive educational environment for the Student. By providing the Student with a modified curriculum, a

⁴ Although the District considers the Spruce Community classroom to be a "regular class placement," it must be considered either a "resource class placement," a "self-contained class placement," or a "public separate day school placement," as defined in MSER §§ 11.5, 11.6, 11.7, since it is designed to provide special education and related services by special education teachers for those students with special needs, including individualized programming for students with disabilities, and "built in" behavior incentives. Also, the goal of the Spruce program is to gear students toward regular class placements by the time they reach high school. Those students who are placed in the Spruce Community are intentionally placed in this more restrictive environment based upon their special educational needs. Therefore, it cannot be considered a regular class placement.

separate classroom with smaller numbers of students, a behavior plan, and social work services, based upon symptoms related to the Student's disabilities, the District was obligated, via the PET process, to design and implement an IEP. By not doing so, the District failed to provide a FAPE under the IDEA.

2. Ancillary Issue: Failure to comply with the time limitation for acting upon referrals to the PET to determine eligibility for special education and supportive services. MSER § 9.17. **VIOLATION FOUND**

Each school administrative unit in Maine shall ensure that evaluations are completed, an eligibility determination completed and an offer of services in accordance with an IEP is made to parents within 45 school days of the agency's receipt of parental consent to an initial evaluation. MSER § 9.17. In this case, the District received consent to perform a neuropsychological evaluation on May 27, 2005. A PET meeting was not held until November 1, 2005 to review the evaluation. This is more than 45 school days from when consent was granted. Therefore, the District violated MSER § 9.17.

In addition, the District received parental consent to perform an occupational therapy screening and language use screening on November 1, 2005. A PET was not convened until February 27, 2006 to review the evaluation reports. Again, the District violated the 45-day time frame for the completion of the report and eligibility determination.

VII. Corrective Action Plan

1. The District shall reconvene a PET meeting prior to August 30, 2006. The District shall confer with the parents to determine what other health care professionals and therapists with knowledge of the Student should be invited to the PET. All reports and evaluations from both school personnel and outside providers shall be discussed. The PET shall identify the Student as being eligible for special education and supportive services under the exceptionality of Emotional Disability, Other Health Impairment, or Multiple Disabilities. The PET shall develop an IEP at the meeting. Minutes of the PET and a copy of the IEP shall be sent to the Due Process Office and the complaint investigator
2. The District shall provide appropriate social services and other family support and/or counseling to the family.⁵ A determination of the types of services to be provided to the family shall be made by the PET. The services shall be included in the Student's IEP.
3. The District, upon receipt of this report, shall provide the Student with compensatory education services for up to nine months during the 2006-2007 school year. When the IEP is written, it must include a make-up plan that addresses the fact that the Student was not provided special education and other related services between November 1, 2005 and June 15, 2006. The PET shall consider and determine the types of instruction and related services to be provided, including, but not limited to, the recommendations made by Dr. Christine Fink, and Dr. Susan Sanders. The calculations for compensatory education shall

⁵ See MSER §§ 6.5, 6.10, 6.11 and 6.15.

be as follows: the number of hours of each special education and/or related services to be provided per week, multiplied by the number of school weeks between November 1, 2005 and June 15, 2006 (the last day of the school year). Once the compensatory education plan has been determined, a detailed service log shall be kept; the log shall include the hours of service, the name of the person providing the service, and the activities covered, with each entry initialed by the provider. Upon completion of the compensatory education, the record and plan shall be sent to the Due Process Office and the complaint investigator.

4. The District shall schedule training for all appropriate staff members in order to:
 - a) Review the criteria used in assessing suspected disabilities of students, standards for eligibility, and how disabilities may adversely affect all areas of educational performance.
 - b) Review the differences and similarities in criteria for meeting eligibility requirements under both the IDEA and Section 504 of the Rehabilitation Act.
 - c) Review time limitations for securing evaluations. Also, develop an action plan to implement when it appears that time limitations may not be met. A copy of the action plan shall be sent to the Due Process Office, the parents and the complaint investigator.
 - d) The training shall be provided by an out-of-District provider. It shall occur prior to the December 2006 vacation break. The District shall submit to the Due Process Office, the parents and the complaint investigator the following documentation:
 - A biography of the trainer;
 - The date of the training;
 - A copy of the agenda;
 - A copy of all handouts;
 - A copy of the list of attendees and their job titles;
 - Copies of anonymous evaluations of the training.