

**Stephen G. Ulman  
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December 23, 1997

TO: Supt. of Schools, William H. Richards  
Parent

FROM: Stephen G. Ulman  
Hearing Officer

SUBJECT: Hearing Decision #97.190  
Parents vs. Scarborough"

This is to provide you with my decision in the Special Education Due Process Hearing on behalf of Student.

Either party may appeal this decision by filing a petition for review in Maine Superior Court or Federal District Court within 30 days of receipt of the decision. The petition for review in Superior Court must be filed in the county in which the student resides or the county in which the Administrative Unit is located.

The Administrative Unit shall submit to the Commissioner of the Department of Education, with a copy to the Due Process Consultant, documentation that the Unit has either complied with this decision or that an appeal is pending. Such documentation shall be submitted no later than 45 days after the completion of the order in this decision. The parent may request the Department to review the Unit's compliance with this decision by filing a written complaint with the Commissioner of the Department of Education.

Any questions regarding this decision or the record of the hearing should be directed to: Due Process Consultant, Division of Special Education, Department of Education, State House Station 23, Augusta, Maine 04333.

cc: Richard O'Meara  
Eric Herlan  
Michael J. Opuda, MDOE

**Special Education Due Process  
Hearing Decision  
“Parents v. Scarborough School Department”**

December 23, 1997

CASE NO. #97.190

COUNSEL FOR THE PARENT: Richard O'Meara

COUNSEL FOR THE SCHOOL: Eric Herlan

HEARING OFFICER: Stephen G. Ulman

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

On October 29, 1997, the Department of Education received a request for a Due Process Hearing from Parents on behalf of their child. Parents and their family reside in Maine. Student attends Scarborough schools.

The Pre-hearing Conference was conducted on November 20, 1997, by telephone conference call. The Hearing convened on December 2, & 3, 1997, in Scarborough. All documents were entered into the record and numbered.

Fourteen witnesses gave testimony at the hearing. The Hearing was held open for submission of additional information until December 15<sup>th</sup>, 1997, at which time the record was closed.

## **I. Preliminary Statement**

Student is a third grade student who is attending her first year in Scarborough school. Student attended the Saco schools last year.

Student was referred to the Pupil Evaluation Team (PET) by the student's parents following privately obtained evaluations. The student has been considered for identification as a student in need of special educational services because of a learning disability and/or other health impaired. The PET did not identify Student in either category and the parents filed a request for a Due Process Hearing.

## **II. Issues for the Hearing**

Does Student qualify under IDEA or 504 as a student in need of special education services in order to receive benefit from her education?

## **III. Finds of fact and stipulations**

- Stipulation, Dr. Frazier's contact with the school has been participating for ½ hour in the October 23, 1997, PET meeting.
- Fact, Student is a youngster diagnosed as having a biological (neuro-developmentally) based disorder. PW-2, (E-80)
- Stage is set for difficult problems down the road if significant intervention not done at this time. PW-2
- Student is achievement oriented and has good school attitude. PW-2
- Student has been able to "hang in there" educationally to this point due to hard work. PW-2
- Student's parents are very concerned about the student's problems. PW-2
- Student is in a family where achievement is important. PW-2
- Peer interactions are difficult for Student because of the student's learning difficulty. PW-2
- Student has a great fear of embarrassment. PW-2
- Student does not qualify for services as Learning Disabled L.D. PW-2
- Student's verbal performance and achievement (student has a solid foundation of academic skills) testing are all in average range. PW-2, E-80-91
- Student has difficulty with visual attention. PW-2
- Student has an anxiety disorder with obsessive compulsive disorder. PW-2
- Student is currently taking medication to control anxiety issues. PW-2
- The people working with Student at school are caring people. PW-2

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- Student has profited from the student's educational experiences. PW-2
- Student is an adopted child and that impacts the student's social interactions. PW-2
- If Student were not on medication the student would be in a far different situation, no question about the student's identification, the student would be identified as behaviorally impaired. PW-2
- The tutoring, one hour per week, helps Student have confidence in self and take advantage of learning opportunities. PW-2
- If Student was not on medication the student would be fighting and resisting with her teachers. PW-2
- Student scored average on all standardized testing done by speech & language therapist. PW-3
- Student has been tutored outside the school with the Wilson Reading Program. PW-5
- Tutoring has been about one hour per week. PW-5
- Student has a great deal of physical activity in learning environments. PW-5, PW-4
- Retrieval time is the issue with correct words being the end results. PW-5, PW-4
- Slow word retrieval is very frustrating for Student. PW-5
- Student will have increasing educational difficulty because of the student's slow processing time. PW-5
- There were no speed requirements for virtually all the standardized testing. PW-5
- Student is benefiting from school now. PW-5
- The tests provide the structure Student needs to be successful. PW-5
- Student had very active earliest years sleeping only 5 hr/day. PW-6
- Student received Chapter one help in kindergarten because of letters. PW-6
- Due to difficulty learning to read in 1<sup>st</sup> grade, Student got tutoring help. PW-6
- Wilson reading and spelling program were used in tutoring. PW-6
- Student is on medication to help her sleep, be better organized and control depression. PW-6
- Student is unable to sit through meal, TV show or movie. PW-6
- Student has temper tantrums often at home, but only once at school. PW-6
- Student does not show the frustration and opposition behavior at school that the student shows openly at home. PW-6
- Student's parents are proactive in their children's education and do not allow failure. PW-6
- Student would receive some benefit from education without one hour of tutoring. PW-6
- Every test and report card has shown Student to be average or above. PW-6

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- There would be adverse educational effect if Student received no educational support. PW-7
- Drug and behavioral therapy is very effective in controlling explosive behavior at home. PW-7
- Student's family see the adverse effect of OCD & ADHD at home and report that the student is able to "keep it together" at school. PW-6, PW-7
- Student scored within the normal range in the Woodcock-Johnson R subtest of written skills. SW-1, E-65
- Student does not show limited vitality or alertness. SW-1, E-94 & 95
- Student is not experiencing an adverse effect in school because of any learning difficult the student may have. SW-1, SW-2
- Student's homework pattern is a hardship on the family. SW-1, PW-7, PW-6
- Student appears from all reports to have energy, vitality and attention appropriate for her age. SW-2, SW-3
- Student's report cards are consistent with the student's classroom functioning and test results. SW-2
- Student does not meet the requirements for other health impaired in MSER @ 3.9. SW-2
- Student is not presently having any adverse educational effect in school. SW-2
- Student is not presently having significant social problems in school. SW-2
- Student gives an initial impression of being shy. SW-2
- Student functions socially within the average range. SW-2
- Student is careful, focused and the student's sometime ambient motion seems to help the student focus. SW-3
- Student needs to exhaust resources of regular classroom before referral to special education. SW-1.
- Student is an eager learner, comes ready to learn, gets along well with other children, likes to share, has done very well in quizzes, middle to higher range, pretty successful and happy in class. SW-4
- Student is benefiting from the student's education in math class. SW-4
- Student gets chosen by other students and has average or above average social skills. SW-4
- Student has not demonstrated limited vitality, alertness, or strength in math class. SW-4
- Student's math teacher allows the parents to modify the length of math assignments. SW-4
- Student is a wonderful little child with low self-esteem. SW-5
- Student often sits by self. SW-5
- Student is a quiet child who minded the student's own business. SW-5
- Student is able to communicate well. SW-5
- One boy made racial remarks which were devastating to Student. SW-5

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- Student is well liked by other students. SW-5

- It took Student a lot longer to do the student's writing. SW-5
- Student benefited and learned in the student's 2<sup>nd</sup> grade year. SW-5
- Student's mother is a very concerned parent. SW-5
- Tutoring at Learning Center helped Student. SW-5
- Student received help from a LD teacher in Saco once a week as part of a group of regular and special education students. SW-5
- The color of Student's skin did bother the student. SW-5
- Student would have benefited from the student's education at Saco even without tutoring, but more slowly. SW-5
- Student carries a diagnosis of ADHD, Major Depression and OCD. PW-8, E-159
- Student threw a tantrum in clinic which was very intense even for the clinic. PW-8
- Student is using both medication and behavior plan. PW-8
- Student has made a lot of progress with outburst and depression as a result of medication. PW-8
- Student is a perfectionist and has low self-esteem. PW-8
- Student puts a lot of energy into covering up problems in school, but then falls apart at home. PW-8
- Student feels safe at home and will therefore express student's strong emotions. PW-8
- Student is a child at risk and will have increasing problems holding it together at school. PW-8
- Diagnosis for OCD consists of an interview with the parents and then a diagnostic report is written. PW-8
- Student has a strong family who is very supportive. PW-8
- Student is positive, happy, works cooperatively, participates willingly, ask for help and has been a positive addition to class. SW-6
- Student is doing fine with the student's behavior. SW-6
- Student plays with other students at school. SW-6
- Other children are positive with Student. SW-6
- Student's writing skills are labored, but not totally out of the ordinary for x years old. SW-6
- Student is not limited in strength, vitality, and alertness. SW-6
- Student is benefiting from the student's education. PW-6
- Student would be ok without tutoring. PW-6
- Student has fallen asleep twice in class this year. PW-6
- Student has had a tantrum in school. It lasted one or two minutes and Student got back into control after getting a drink of water. PW-6

#### **IV. Conclusion**

Student is a child who has a neuro-developmentally biologically based disorder which has been medically diagnosed as Attention Deficit Hyperactivity Disorder

(ADHD), Major Depression and Obsessive Compulsive Disorder (OCD). The student has most difficulty in settings with little structure.

Student's family is very supportive of the student both academically and socially. Both parents are successful professionals who hold high social and educational standards, are forward thinkers and work hard to achieve their goals. These characteristics and values have carried forward to Student who works very hard in school and to date has a reputation among teachers as perfectionistic, hard working and successful both socially and academically. Without exception the teachers report that the student is having a beneficial educational experience and does not require any educational modifications to access or benefit from the student's regular educational program.

Student's parents and many of the professionals who have been working with the student privately describe a very different situation. They see a child who needs weekly private tutoring, two hours plus of parent supported daily homework, medication, help with socialization, and who has frequent temper tantrums.

Maine Special Education Regulations (MSER) define a student with a disability at 3.1 as:

3.1 Student with a Disability; General Definition

This rule addresses the duty to provide a free appropriate public education to a "student with a disability."

- A. Has reached the age of 5 years on or before October 15;
- B. Has neither graduated from a secondary school program nor reached 20 years of age at the start of the school year; and
- C. Has a disability which adversely affects the student's educational performance and requires the provision of special education services in order that the student may benefit from an elementary or secondary educational program.

A student with a disability shall have one or more of the disabilities listed in sections 3.2 through 3.14 of this part.

The disability in question is described at 3.9 and reads:

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3.9 Other Health Impairment

A student with a health impairment exhibits limited strength, vitality or alertness due to chronic or acute health problems which adversely affect the student's educational performance.

It is clear from the facts presented by the educational experts that Student is not currently experiencing educational difficulty which requires the provision of special educational services in order for the student to benefit from the student's educational programming. Nor is the student displaying limited strength, vitality or alertness at school.

Two significant questions remain. First, what educational impact would be felt if the approximately one hour of tutoring per week and the supportive counseling sessions were discontinued. Given the solid performance and progress which Student continues to make in school, with no current suggestion that the student won't move with the student class from grade to grade, it is reasonable to believe that the tutoring and counseling is beneficial, but not critical to her success. Without these services Student might not do as well as the student is, but would continue to benefit from the student education.

The second unanswered question is what future impact will Student's ADHD, OCD, and depression have on the student's education. Much testimony suggest that as school work becomes more complicated and demanding Student's ability to be competitive and successful will diminish. It is very understandable and appropriate for Student's parents to be concerned about what lies ahead for Student. MSER, however, look only at present and past functioning and to date in the structure of the educational setting Student is functioning within normal limits.

Section 2 (b)(1) of The Rehabilitation Act of 1973 as amended by The Rehabilitation Act Amendments of 1993 state the purposes of the act are: "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society..."

Section 8 (A) "individual with a disability means an individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services..."

(B)(1) "has a physical or mental impairment which substantially limits one or more of such persons major life activities..." such as Student's learning.

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Although the facts support a medical diagnosis of ADHD, OCD, and depression the results of these diagnosis must raise to the level of "substantial impediment,



substantially limits“ to Student ’s learning and or school work. The testimony and exhibits did not support a finding of substantial limitations at this time.

The most compelling testimony was that which predicted future difficulty for Student. It is to this prediction that careful attention will need to be addressed by the school personnel. As school work becomes more complicated and demanding, Student may well see the student current difficulties rise to the level of substantial impediment/limits and adverse effect which may then prohibit access to and or beneficial from education.

## **V. Order**

As Student is presently not eligible for special education under IDEA’s or Section 504 there is no order.

## **VI. Recommendations**

Testimony established that the student is spending more time on homework than is normal for the student’s grade level and that regular education programming routinely adjusts the volume of homework to control time spent on homework. It is recommended that the regular education teachers and administrator monitor time spent by the student on the student’s homework to be certain it is appropriate for the student’s age and grade level.