

**BEFORE LINDA McCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA**

* * * * *

IN THE MATTER OF [THE STUDENT]	)	OSPI No. 01-01
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
	)	ORDER

* * * * *

A request for an impartial due process hearing was made by counsel for [the student] and his parents pursuant to 10.16.2403(2), A.R.M., when [the student] was determined to be ineligible for services under the IDEA as emotionally disturbed or other health impaired. The request was received by the State Superintendent of Public Instruction on January 4, 2001.

As a result of conflicts in scheduling, the parties stipulated to an extension of the initial hearing time line and a waiver of the 45-day period for issuance of a final order specified by Section 10.16.2417, ARM.

The impartial due process hearing in this matter was held on April 25 and 26, 2001. Petitioner ***** and his parents were present and represented by attorney *****. ***** School District was present through the School District's attorney, *****.

Prior to the hearing, ***** offered the record from a prior due process hearing held on March 10, 2000. This record contained the decision of hearing officer Allen Chronister dated August 9, 2000. His conclusion that [the student] was not eligible for services is currently on appeal in the Federal District Court. ***** School District agreed to the admission of this record but reserved relevancy objections for the hearing; and the record was received, subject to the reserved

objections. This record of the prior due process hearing contained [the student]'s exhibits numbered A through P, and ***** School District exhibits numbered 1-6.

During the due process hearing on April 25 and 26, 2001, the hearing officer took witness testimony and accepted the following additional exhibits into evidence:

[The student]'s Exhibits:

Q. Dr. Blodgett's file containing notes, testing and other documents compiled on [the student]

QQ. Dr. Blodgett's progress report on [the student] dated 4/9/01

R. Court Summons dated March 16, 2001

RR. Report to Court/Release Order revocation dated April 19, 2001

T. Administrative Rules of Montana 10.16.3007, 3008, 3015, and 3018

U. ***** school file documents

V. DSM-IV provisional diagnosis definition

W. Affidavit of John Blodgett

***** School District Exhibits:

7. DSM-IV "not otherwise specified categories" definition

8. Findings of Fact and Conclusions of Law by hearing officer Allen Chronister

9. ***** school file documents re November 27, 2000 Child Study Team Meeting

10. 504 Plan Meeting notes dated 4/12/01

A certified court reporter made a record of the proceedings.

[The student] and his parents submitted the following statement of the issue to be addressed

at the due process hearing: Whether [the student] is entitled to special education services under the new and amended Montana administrative rules, including ARM 10.16.3007, 3008, 3015, and 3018.

Having considered the documents submitted, the statutes and laws applicable to this matter, and the evidence presented at the due process hearing as well as in the post-hearing briefs, the hearing officer makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. [The student] was born on February 9, 1985 and is sixteen years old. At the time of the hearing, he was a freshman at ****High School. He moved to the **** School District in fifth grade. [The student] is one of three children. He has an older brother who is 17 and a younger sister who is 14.

2. [The student] was the subject of a prior due process hearing which concluded on May 22, 2000. The decision, dated August 9, 2000, concluded that [the student] does not qualify for special education services as a child with an emotional disturbance. (Exhibit 8). That decision has been appealed and the case is currently pending before the U. S. District Court.

3. On October 6, 2000, [the student]'s parents requested a Child Study Team meeting. (Exhibit U, p. 84; Exhibit 9, p. 1). [The student]'s parents submitted a psychiatric evaluation and affidavit from Dr. John Blodgett for consideration by the Child Study Team (CST).

4. Dr. Blodgett is a psychiatrist whose practice consists primarily of adolescents and children. (Tr. 67). Dr. Blodgett first saw [the student] on March 29, 2000 because [the student] was being compelled to seek an evaluation by the school and his probation officer. (Tr. 75, 121;

Exhibit Q, p. 17). At that first meeting, Dr. Blodgett noted that [the student] described his mood as generally pretty good. (Tr. 76; Exhibit Q, p. 19). Dr. Blodgett's diagnostic impression at the time was mood disorder not otherwise specified, probable ADHD, and conduct disorder, early onset. He also noted that the parents declined medication on the belief that [the student] did not need medication and that the evaluation was unnecessary. No follow-up was scheduled. (Tr. 75; Exhibit Q, p. 83).

5. Dr. Blodgett recommended that counseling with Donna Langston be continued. (Tr. 76, Exhibit Q, p. 83). No ongoing counseling has occurred. [The student] stopped counseling with Donna Langston at the end of the prior school year. His parents did not believe she was addressing his problems. (Tr. 54-55, 167).

6. The next time that Dr. Blodgett saw [the student] was on August 9, 2000. (Tr. 79; Exhibit Q, p. 13-16). Dr. Blodgett diagnosed cyclothymic disorder, ADHD (provisional), and conduct disorder as a result of this second visit, and prescribed Welbutrin. (Tr. 85-88, 96-99; Exhibit Q, p. 12). Dr. Blodgett explained his provisional diagnosis of ADHD, stating that the prior diagnosis was equivocal and that [the student] can pay attention when he is interested. There was also a problem historically with substance abuse. (Tr. 83-84).

The term provisional is defined by the DSM-IV as enough information to make a "working" diagnosis but the clinician wishes to indicate a significant degree of diagnostic uncertainty. (Ex. 7, Tr. 129)

7. Dr. Blodgett met with [the student] twice more before the November 2000 Child Study Team meeting, on September 29, 2000 and November 19, 2000. (Tr. 146). [The student]

reported he was generally doing well and the transition back to school was a good one; but [the student] had a continuing problem of incomplete assignments and not turning his work in on time. (Tr. 145-147).

8. Dr. Blodgett was not aware that [the student] had an applicable 504 plan in place. (Tr. 183). Dr. Blodgett believes, from his perspective as a psychiatrist, that [the student] meets the criteria for identification of a student as having emotional disturbance. (Tr. 105, 111).

9. A Child Study Team was convened on November 27, 2000 pursuant to the request by [the student]'s parents. (Exh. 9, pp. 48-61).

10. Dr. Blodgett has participated in many Child Study Teams on the request of either the school or the parents. However, he did not attend the Child Study Team meeting convened for [the student]. (Tr. 69-70). Dr. Blodgett was not contacted by the school district and has had no contact with any school personnel concerning [the student] up through the date of the hearing. (Tr. 70, 110). Dr. Blodgett did not request information from the school regarding [the student]'s disciplinary record or request input from the school for his evaluation. (Tr. Vol. 2, p. 59). Dr. Blodgett's letter to the Child Study Team did not render an opinion that [the student] is eligible for services under the IDEA under the label of Other Health Impairment. (Tr. 171, Exhibit Q, p. 194).

11. While [the student] and his family reported a good initial response to Welbutrin, [the student] reported that he stopped taking it regularly in December. (Tr. 88). Dr. Blodgett saw [the student] on February 21, 2001, at which time he observed that [the student]'s mood still seemed fairly good. [The student] reported he had continued to be mostly noncompliant in taking the medication. (Tr. 89, Exhibit Q, p. 8). [The student] did not take the Welbutrin for a period of

eight to ten weeks, during which time his mood deteriorated. Dr. Blodgett cannot attribute the deterioration to the medication, as there were other variables. (Tr. 89).

12. Dr. Blodgett again saw [the student] on March 21, 2001 subsequent to [the student]'s being charged with felony assault. (Exhibit Q, p.5; Exhibit R, Tr. 90). Dr. Blodgett saw [the student] a week later on a urgent basis, after the chief of police and ATF agent questioned [the student] about some bomb-making material he got from the Internet. (Tr. 90-91). [The student] believed he would be sent to Pine Hills as a result of the assault, and had given up in school. (Tr. 150-151). His express desire was to be held back so that he could be in his sister's class and could protect her. (Tr. 90, 92; Exhibit Q, p. 1; Tr. 151-152).

13. When Dr. Blodgett saw [the student] in March of 2001, Dr. Blodgett believed [the student] had a conduct disorder with growing anti-social tendencies. (Tr. 152). Dr. Blodgett had growing concerns that family problems were affecting [the student]'s behavior and causing behavioral problems. (Tr. 155-156). Dr. Blodgett believed there were more issues in the home than he knew about, and was concerned that he was not getting the complete history. (Tr. 156-157).

14. Dr. Blodgett feels that [the student] would best be served, educationally, in a more restrictive environment, and that [the student] needed to be out of the home. (Tr. 119, 161).

15. ***** is the special education director for the ***** Cooperative, and has held that position for 11 years. (Tr. 215). Mr. ***** is trained in special education and the applicable regulations, and has participated regularly in Child Study Team meetings. (Tr. 216). Mr. ***** was involved in the November 2000 Child Study Team convened by the ***** School District to consider

whether [the student] qualified for special education services.

16. The CST meeting notice was sent to [the student]'s parents and indicated the school personnel who could be present. This list included required personnel as well as all of [the student]'s regular education teachers for that quarter. (Tr. 221; Exhibit 9, pp. 2-3). The Child Study Team consisted of some individuals and classroom teachers who had not participated in the prior meeting. However, Dr. ****, ****, ****, and **** had participated in the previous meeting. (Tr. 259, Exhibit H, pp. 39, 52, 78).

[The student]'s parents did not ask that Dr. Blodgett be invited, although the notice reflected that they should feel free to bring a friend or advisor to the meeting. (Tr. 221-222; Exhibit 9, pp. 2-3).

17. At that CST meeting, [the student] stated the school year was going well and that he had good relationships with peers and teachers. (Tr. 223; Exhibit 9, p. 4). [The student] had not had any discipline reports prior to the November CST meeting. (Tr. 236; Tr. Vol. 2, p. 51). He had trouble in one academic class. (Tr. 223, 241). [The student]'s teachers and the counselor all stated that behavior, participation, and interaction were good with no problems. (Exhibit 9, p.59).

18. The Child Study Team considered information from Dr. Blodgett, including an evaluation based on his August 9, 2000 visit with [the student]. Dr. Blodgett's diagnosis was cyclothymic disorder, Attention Deficit Hyperactivity Disorder, predominately inattention type (provisional); rule out bipolar disorder, not otherwise specified, conduct disorder, early onset, and mixed substance abuse by history. (Exhibit 9, p. 10). Dr. Blodgett concluded that these significantly impact [the student]'s academic and social functioning negatively and qualify him for

services as emotionally disturbed. (Exhibit 9, p. 11). Dr. Blodgett's letter dated November 24, 2000 was faxed to the Child Study Team but not until after the CST meeting had ended. (Exhibit 9, p. 13; Tr. 228-229). The letter essentially restates the conclusions in the evaluation and would not have changed the decision that [the student] was not eligible for services.

19. A copy of Dr. Blodgett's evaluation was not provided to each member of the team, but was reviewed paragraph by paragraph, and discussed with the team's members by school psychologist ****. (Tr. 267-268; Tr. Vol. 2, pp. 101, 142).

20. [The student]'s I.Q. is 86; and he was performing, at that time, at 90. He was performing above his ability. (Tr. 101, 241).

21. **** is the superintendent of the **** School District. (Tr. Vol. 2, pp. 3-5). [The superintendent] was a special education teacher and special education director for nearly 20 years prior to becoming a superintendent, and continues to be involved in special education issues in [the district]. (Tr. Vol. 2, p. 5). [The Superintendent] has attended thousands of Child Study Team meetings over the course of her career and had attended the prior CST meeting for [the student] and the November 27, 2000 CST meeting. (Tr. Vol. 2, p. 6).

22. [The Superintendent]'s knowledge of [the student] comes from personal interaction and observation of him in the [district's] Schools, as well as from information in written and oral reports from teachers, information from his parents and medical providers, and from his school record. (Tr. Vol. 2, pp. 66-68). Subsequent to the end of the prior due process hearing and the November CST meeting, there had been no discipline issues with [the student], and [the superintendent] felt that [the student] was getting along very well. (Tr. Vol. 2, pp. 7-8).

23. At the CST meeting, [the superintendent] concluded [the student] is not “unable to build and maintain satisfactory relationships with peers and teachers”. He has two circles of friends at school and is quite a leader within the freshman class. (Tr. Vol. 2, p. 12). The teachers in the school really like [the student]. (Tr. 236, 237; Tr. Vol. 2, p. 13). According to [the student]’s brother, [the student] has friends that he is with every day at school and after class. They go out and have fun. (Tr. 210).

[The student]’s behaviors are very appropriate. He laughs and is social with friends. He interacts with adults in the school setting in a normal way. [The superintendent] has not seen depression or inappropriate feelings for an adolescent boy. (Tr. Vol. 2, p. 15). [The superintendent] has never seen [the student] exhibit a general or pervasive mood of unhappiness or depression. She has seen him angry, but those instances were situational and have been infrequent in school. (Tr. Vol. 2, p. 17).

Subsequent to the November CST meeting and the hearing, these relationships with his peers and teachers had not changed, and her opinion remained the same as of the date of the hearing. (Tr. Vol. 2, p. 13).

24. At the CST meeting, [the superintendent] concluded [the student] did not qualify for special education services under the Other Health Impairment criteria because of ADHD. (Tr. Vol. 2, p. 18). [The superintendent] has dealt with children diagnosed with ADHD over the years and has been involved with Child Study Teams in which the issue of Other Health Impairment and ADHD has come up. (Tr. Vol. 2, pp. 18, 20).

[The superintendent] testified that not every child with a firm diagnosis of ADHD qualifies for

special education services. Sometimes they remain in the regular classroom and sometimes they are provided accommodation under a 504 plan. (Tr. Vol. 2, p. 19). Teacher input is significant to qualify a student for special education because of ADHD. (Tr. Vol. 2, p. 19). There was no information provided by teachers which indicated to [the superintendent] that [the student] exhibited behaviors in class that would deem him qualified under “Other Health Impairment” because of ADHD or any information that would lead her to investigate the issue further. (Tr. Vol. 2, pp. 19, 20).

No ADHD check sheets, which are often provided for students that are suspected of having ADHD, were passed out at the CST meeting because there was no indication in the classroom of ADHD and none of the school staff had any suspicion of it. (Tr. Vol. 2, pp. 44-46).

25. [The student]’s conduct disorder was discussed at the CST meeting, which was based on Dr. Blodgett’s evaluation and his statement that he had a growing concern about the conduct disorder. (Tr. Vol. 2, p. 52). Dr. Blodgett’s opinion that [the student] exhibited inappropriate behavior triggered by cyclothymia was discussed by the CTS. (Tr. Vol. 2, p. 53).

26. ***** is the health and physical education teacher at [the district] High School, and has been [the student]’s physical education teacher during [the student]’s freshman year and previously when [the student] was a middle school student. He has known [the student] for four years. (Tr. Vol. 2, pp. 75-76, 89). Prior to teaching health and physical education, [the health and PE teacher] was the elementary resource room teacher for 13 years. (Tr. Vol. 2, pp. 75-76).

27. [The health and PE teacher’s] class is a combination of physical activities and learning about health. [The student] has maintained a B to A- level in the class. [The health and PE

teacher] testified that [the student]'s behavior is good and that he participates in class without any problems. (Tr. Vol. 2, p. 77).

[The health and PE teacher] was a member of the November 27, 2000 Child Study Team (Tr. Vol. 2, p. 78). [The health and PE teacher] completed a classroom-based assessment in which he reflected that [the student]'s class ranking was in the middle and that there were no problems. Class participation was good and there were no missing assignments. The assessment reflected self-control as a weakness; but that is not an issue for [the student] in class and not unlike other kids [the student]'s age. (Exhibit 9, p. 63; Tr. Vol. 2, pp. 80-82).

28. [The health and PE teacher] was aware that [the student] had been the subject of a CST meeting the previous school year. However, [the health and PE teacher]'s knowledge of [the student] comes from his observations of [the student] as his student, the information that he learned in the CST meeting, and his personal observations and interactions with [the student] (Tr. Vol. 2, pp. 85-86).

[The health and PE teacher] has seen [the student] mature and has not seen any significant inability on [the student]'s part to build or maintain relationships with peers or teachers. (Tr. Vol. 2, pp. 86-87). He has not observed [the student] exhibit any inappropriate type of behavior or feelings under normal circumstances or a general or pervasive mood of unhappiness or depression. (Tr. Vol. 2 pp. 87-88).

[The health and PE teacher] had had experience dealing with students with ADHD and did not observe those symptoms in [the student] (Tr. Vol. 2, p. 103).

29. ***** is employed at the [district] High School as a vocational agriculture education

teacher. (Tr. Vol. 2, p. 110). [The voc-ed teacher] has participated in other CST meetings. (Tr. Vol. 2, p. 116).

[The student is in [the voc-ed teacher]'s class. [The voc-ed teacher] testified that [the student] is a likeable kid and that they get along pretty well. [The student] sometimes came in after class to shoot the breeze and, until the CST meeting in November of 2000, [the voc-ed teacher] did not know there was a problem at all. (Tr. Vol. 2, pp. 111, 125).

[The voc-ed teacher] filled out a classroom-based assessment for the meeting, in which he noted that [the student] takes part in class and there were no behavioral concerns. [The student] had a C grade in the first quarter and a B for the second quarter. He had no missing assignments. (Exhibit 9, p. 62; Tr. Vol. 2, p. 113-114).

30. At the CST meeting, [the voc-ed teacher] did not learn anything from the other teachers participating that their opinions or perceptions about [the student] were different from his. (Tr. Vol. 2, p. 115). [The voc-ed teacher] felt that [the student] related well with him and observed him relating well with other students. [The student] would stop and talk to [the voc-ed teacher]. On one occasion they talked about [the student]'s pierced lip. [The voc-ed teacher] teased [the student] that he was going to swallow it. [The student] stopped by later to tell [the voc-ed teacher] he had swallowed part of it, just like everyone told him he was going to. (Tr. Vol. 2, pp. 117, 119-120).

[The voc-ed teacher] filled out the criteria sheet for emotional disturbance. He concluded that [the student] did not have any of the characteristics necessary to meet the criteria. (Exhibit 9, pp. 20-21). He filled out the criteria sheet based primarily on his observations and experiences with

[the student]. [The voc-ed teacher] never saw behavior out of the norm in [the student] and never observed anything that would make him think that [the student] was depressed. [The student] was usually upbeat. (Tr. Vol. 2, p. 116).

31. Dr. *** has been a school psychologist for 22 years and attends Child Study Team meetings as part of his responsibilities as a school psychologist. (Exhibit 11, Tr. Vol. 2, p. 130). The role of the school psychologist is to interpret psychological information that has been generated on the child for the benefit of the Child Study Team. (Tr. Vol 2, p. 132). Regular education teachers present information regarding the student's behavior within the classroom and their observations of the child in the school. (Tr. Vol 2, p. 133).

32. [The school psychologist] did not have documents or reports of the previous Child Study Team, although he was aware of the earlier CTS meeting and the conclusion that [the student] was not eligible for services. He had been given oral information about the psychometrics performed by Mr. ***** and Dr. ***** and the disciplinary events leading up to the prior Child Study Team meeting. (Tr. Vol 2, pp. 138, 169, 172).

33. The purpose of the second Child Study Team meeting was to examine evidence gathered subsequent to the first Child Study Team meeting and determine whether or not there was any information available that would lead the team to decide differently than what the initial team determined. (Tr. Vol 2, p. 140).

34. A diagnosis of cyclothymia is inconsistent with a diagnosis of dysthymia, and is not a diagnosis of major depression. (Tr. Vol 2, p. 146). There was no information which indicated that [the student] exhibited a general and pervasive mood of unhappiness or depression or irritability

which is equated with depression in adolescents. (Tr. Vol 2, pp. 147-148).

35. [The school psychologist] discussed Dr. Blodgett's provisional ADHD diagnosis with the CST, noting that it was not a firm diagnosis but, noting further, that more important than that fact was what evidence in the education setting existed of ADHD types of behaviors and the consequences of these behaviors. (Tr. Vol 2, p. 149).

[The school psychologist] also discussed the conduct disorder which Dr. Blodgett diagnosed. To the extent associated behaviors are social maladjustment, this is specifically excluded as an emotional disturbance under the regulations. The behaviors discussed reflecting the conduct disorder were reported by [the student]'s father and did not occur in the educational setting. From the information presented at the CTS meeting, any conduct disorder was not interfering with [the student]'s ability to function in school. (Tr. Vol 2, pp. 153-154).

36. The information provided to the Child Study Team by the teachers reflected that [the student] was well accepted by his peers and regarded as a leader in his class. Every teacher indicated they had no problems with [the student]; and there was no indication that [the student] had an inability to build and maintain satisfactory relationships with peers and teachers. (Tr. Vol 2, p. 156).

There was no information of inappropriate types of behaviors or feelings under normal circumstances. There were no school or teacher reports to indicate unusual, bizarre, or atypical behaviors. Information presented from the teachers indicated [the student] is generally happy. (Tr. Vol 2, pp. 157-159).

37. Each member of the Child Study Team filled out forms which delineate the criteria for

identification as emotionally disturbed. (Tr. 230, Exhibit 9, pp. 14-43).

38. With the exception of [the student]'s father, each of the members of the study team marked **No** to the first characteristic criteria of emotionally disturbed: "An inability to build or maintain satisfactory relationships with peers and teachers".

39. With the exception of [the student]'s father, each of the members of the study team marked **No** to the second characteristic criteria of emotionally disturbed: "Inappropriate types of behavior or feeling under normal circumstances, including behaviors which are psychotic or bizarre in nature or behaviors which are atypical and for which no observable reason exists".

40. With the exception of [the student]'s father, each of the members of the study team marked **No** to the third characteristic criteria of emotionally disturbed: "A general pervasive mood of unhappiness or depression, including major depression and dysthymia, but excluding normal grief reactions".

41. With the exception of [the student]'s father who left this criteria blank, each of the members of the study team marked **No** to the fourth characteristic criteria of emotionally disturbed: "A tendency to develop physical symptoms or fears associated with personal or school problems, including separation anxiety, avoidant disorder and overanxious disorder".

42. Each of the members of the study team marked **No** to the fifth characteristic criteria of emotionally disturbed: Schizophrenia. (Exhibit 9, pp. 14-56).

43. Each member of the Child Study Team filled out forms which delineate the criteria for identification as Other Health Impairment. (Tr. 234; Exhibit 9, pp. 44-56).

44. With the exception of [the student]'s father, each of the members of the study team

marked **No** to the first criteria for Other Health Impairment: “The student has limited strength, vitality or alertness including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia or tuberculosis; ...”

45. With the exception of [the student]’s father, each of the members of the study team marked **No** or left blank the second criteria: “The condition adversely affects the student’s educational performance”.

46. With the exception of [the student]’s father and school counselor ***** (Exhibit 9, pp. 51, 56), each of the members of the study team marked **No** or left blank the third criteria: “The student has a medical diagnosis of a chronic or acute health problem”.

47. [The school counselor]’s response to the above criteria was based on the diagnosis from Dr. Blodgett. However, this response, read in context, does not affect the conclusion that there was no eligibility under Other Health Impairment.

48. Any information before the team was that which arose or was obtained subsequent to the prior due process hearing. The teams specifically considered information obtained from the beginning of the school year through November 27, 2000, the date of the CST meeting. The Child Study Team that convened on November 27, 2000 was not provided with any of [the student]’s disciplinary record that had been considered by the first Child Study Team which met the previous spring. (Tr. 236, 258).

During the four-month period which was reviewed by the Child Study Team, there were no reports of inappropriate behaviors in the school setting. (Tr. Vol 2, p. 191).

49. This Child Study Team concluded that [the student] did not qualify for special education services. (Tr. 226; Exhibit 9).

50. [The student]'s sister has been in foster care since November of 2000 and is scheduled to return home in June of 2001. (Tr. 51-52). [The student]'s sister has problems stemming from a sexual assault committed by another juvenile. (Tr. 51). This incident, and his sister's removal from the home, have greatly disturbed [the student] (Tr 52).

On March 5, 2001, [the student] was involved in an assault on another student who [the student] believed was involved in the sexual harassment of his sister. This occurred on a weekend. (Tr. 51). This assault led to felony charges being filed. (Exhibit R). On April 17, 2001, [the student] assaulted another student who allegedly accused [the student] of having sex with his sister. This assault took place during school. (Tr. 62-64). As a result of this assault, [the student] was remanded to the Youth Detention Center, where he currently remains. (Tr. 64).

51. The two assaults in which [the student] was involved subsequent to the November CST meeting were related to his efforts to protect his sister. (Tr. Vol. 2, p. 14). ***** told Dr. Noland this after the first assault, and she understood that is what he told the police after the second assault. (Tr. Vol. 2, pp. 15-16).

52. Nothing that occurred subsequent to the November Child Study Team meeting, including the assaults in which [the student] was involved, would lead [the school psychologist] to conclude that the CST needs to re-examine information regarding [the student]'s eligibility. (Tr. Vol 2, p.

161).

53. There was a 504 plan in place from the preceding spring which was reviewed at mid-term when [the student] was failing Science. (Tr. 251). During the 504 meeting, [the school superintendent] asked [the student] why he had stopped working and was doing so poorly. [The student] and his father stated that he wanted to be held back so he could be in the same class as his sister next year. (Exhibit 10).

CONCLUSIONS OF LAW

[The student] is not eligible for special education services under the IDEA as either having an emotional disturbance or other health impairment.

Memorandum

Under IDEA and implementing regulations, the Montana Superintendent of Public Instruction has jurisdiction to hold an impartial due process hearing with respect to complaints about the identification, evaluation, or educational placement of an eligible child with a disability or the provision of a free appropriate public education to that child. 20 U.S.C. § 1415(b)(1)(E); see also 34 C.F.R. § 300.506, incorporating § 300.504(a)(1) and (2), and §§ 10.60.102 and 10.16.2402, ARM.

The hearing officer has jurisdiction under IDEA to hear and decide the issue that [the student] has presented for decision: Whether [the student] is entitled to special education services under the new and amended Montana administrative rules, including ARM 10.16.3007, 3008, 3015, and 3018.

The Individuals With Disabilities Education Act provides qualified disabled children access

to a “free appropriate public education” that includes an Individualized Education Plan tailored to each such child’s unique needs. See 20 U.S.C. §§ 1400(c) and 1401(a)(20).

On March 10, 2000, the **** School District evaluated [the student] under the IDEA and Section 504. The CST meeting concluded that [the student] was not eligible for services under the IDEA as a result of an emotional disturbance or other health impairment. The parents requested a due process hearing. The hearing officer ultimately concluded that [the student] was not eligible and that decision has been appealed.

As a preliminary matter, the hearing officer concludes that the record of the initial CST meeting and due process hearing submitted by [the student] in the present hearing is not relevant to this proceeding and will not be considered. That evidence and the decision of hearing officer Allan Chronister are currently before the United States District Court, which is the proper forum of review.

Further, the hearing officer concludes the Montana regulations control this proceeding. Montana regulations under §10.16.3007 ARM, et seq., contain the adopted criteria for identifying eligible Montana students under the Individuals with Disabilities Education Act. The hearing officer does not read the additional language of the state regulation as creating a more stringent requirement or to be in conflict with the federal statute. The language at issue simply amplifies the criteria; it does not create a contrary or more stringent criteria than contained in the statute.

At the hearing, [the student] attempted to argue that the CTS should have been informed of and considered all of the evidence, including medical diagnosis and conclusions, testing results, and disciplinary issues that had been presented at the March 2000 meeting, and that they had no

notice the evaluation at issue would be limited to the period subsequent to the last CTS.

Counsel for [the student] subsequently argued in his memorandum that the regulations require a full review of all existing evaluation data, and interpreted this to mean all of the information considered by the earlier Child Study Teams, which concluded that [the student] was not eligible.

The School District, conversely, took the position that the request for a CTS meeting specifically requested an evaluation of eligibility based on Dr. Blodgett's evaluation and affidavit, which was what was done.

The School District has a duty under the IDEA and the Administrative Rules of Montana to identify and evaluate children with disabilities regardless of the severity of the disability. This duty is not limited to the extent that any request by a parent for evaluation is limited. The hearing officer concludes that there may be circumstances in which such a comprehensive "re-evaluation" may be indicated.

However, that is not the case here. Although it is true that [the student] had moved from middle school to high school since the first CST meeting, which meant that different individuals were involved as members of the CST, the evidence reveals there were no school behaviors or problems occurring which would cast doubt on the original findings or indicate that another comprehensive evaluation was necessary. Because the evidence had been considered at a hearing and is currently included in an appeal, [the student] and his parents had no reasonable or logical basis on which to expect that the same information would be considered yet again at this Child Study Team meeting, particularly in light of the fact that during the relevant time period, [the

student] had not been having discipline problems at school.

A school district has the burden of proving that its evaluation and proposed student placement complied with the IDEA requirements. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1443, 1501 (9th Cir. 1996) quoting *Clyde K. v. Puyallup School*, 35 F.3d 1396, 1397-98 (9th Cir. 1994).

This is a very difficult case, in that [the student] is a troubled young man whose family is desperate to find an avenue for help. However, the hearing officer concludes that the school met its burden; the evaluation conducted by the November 2000 CST was sufficient; and [the student] is not eligible for special education services under the IDEA as either having an emotional disturbance or Other Health Impairment.

Section 10.16.3007, ARM, provides that:

(1) To be eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA), a student must meet the criteria for one or more of the disabling conditions listed in 34 CFR 300.7(a)(1) and as a result of that condition the student is in need of special education as defined in 34 CFR 300.26.

(2) “In need of special education” means the student must need specially designed instruction delivered or directed by a qualified special educator, either alone or in collaboration with other qualified personnel.

The criteria for identification of a student as having emotional disturbance is set out in Section 10.16.3015, which states:

(1) The student may be identified as having emotional disturbance if a condition which includes one or more of the following characteristics is present:

- (a) An inability to build or maintain satisfactory relationships with peers and teachers;
- (b) Inappropriate types of behavior or feelings under normal circumstances including behaviors which are psychotic or bizarre in nature or behaviors which are atypical and for which no observable reason exists;

(c) A general, pervasive mood of unhappiness or depression including major depression and dysthymia but excluding normal grief reactions;

(d) A tendency to develop physical symptoms or fears associated with personal or school problems including separation anxiety, avoidant disorder and overanxious disorder;

(e) Schizophrenia.

(2) For each of the conditions in (1), the condition shall meet the criteria of having been present to a marked degree, over a long period of time and adversely affecting the student's educational performance.

(3) The student may be identified as having emotional disturbance when:

(a) The student has been observed in more than one setting within the educational environment; and

(b) The local educational agency has planned and implemented one or more positive behavioral interventions specific to the individual student. Interventions shall not unnecessarily delay appropriate identification when it can be shown through a student's social or developmental history, compiled directly from the student's parents or from records when the parents are not available, the existence of characteristics that clearly identify emotional disturbance.

(4) The student may not be identified as having emotional disturbance if delays in educational performance are primarily due to visual impairment, hearing impairment, orthopedic impairment, cognitive delay, health factors, or limited educational opportunity.

(5) Common disciplinary problems may exist in conjunction with emotional disturbance, but cannot be used as the sole criteria for determining the existence of an emotional disturbance.

(6) The term emotional disturbance does not apply to students who are socially maladjusted, unless it is determined that they meet the criteria herein for emotional disturbance.

There is no evidence that [the student] exhibited the characteristics which would qualify him

for special education services as a student with an emotional disturbance. [The student] has problems that need to be addressed. However, the regulations are clear that, while a student may meet clinical criteria under the DSM-IV for some form of disturbance which may require counseling or other psychological services, that alone does not constitute eligibility under the IDEA.

Dr. Blodgett's conclusions regarding [the student]'s eligibility for special education were based on his training and experience as a psychiatrist and not on the regulations that are followed for identification of a student entitled to services. Critical to a conclusion on eligibility is the information from school personnel and classroom teachers regarding behaviors and problems which adversely affect academic achievement; that is absent here.

The evidence does not support the finding that [the student] is unable to build or maintain satisfactory interpersonal relationships with peers and teachers. Testimony from the family, as well as school personnel, reflect that [the student] has friends with whom he has ongoing relationships and that [the student] is perceived as a leader among other students. While some of the friends may not be desirable, there are other friends with whom [the student] spends time on a consistent basis. Additionally, [the student]'s teachers and the superintendent all indicated that they liked [the student] and felt that they had good relationships with him. The fact that [the student] would stop by the classroom to joke with his Voc-Ag teacher about having swallowed part of his lip ring, as the instructor testified, reflects that a relationship existed between them, a fact to which [the voc-ed teacher] testified and to which [the student], by his behavior, concurs.

The evidence reflects that [the student] has not exhibited inappropriate types of behavior or

feelings under normal circumstances including behaviors which are psychotic or bizarre in nature or behaviors which are atypical and for which no observable reason exists. There is no argument that [the student] exhibited bizarre or psychotic behaviors.

While there is evidence that [the student] was involved in an assault of another student on two occasions, this does not alter the above conclusion that [the student] has the ability to build and maintain relationships with peers and teachers. He is not eligible for special education services as emotionally disturbed under this criteria. While petitioners argue that the assaults for which [the student] is facing criminal charges meet this criteria, the evidence does not support this.

Since the assaults occurred subsequent to the Child Study Team meetings, they were not part of the information considered by the CST. However, the evidence of the assaults was admitted and considered, because it is relevant to [the student] and to conclusions by members of the CST, who testified that such events would not have changed their decision.

The assaults were related to [the student]'s perceived defense and protection of his sister. There is no evidence which reflects anything atypical or bizarre about this motivation. There is significant evidence that the problems and issues relating to his sister were quite stressful for [the student]. [The student] apparently had concluded that he would be held back for the next school year so that he could be in her grade to protect her next year. [The student]'s actions were not the result of inability to control behavior, but were based on what he perceived as necessary and were purposeful. The evidence reflects that it was this decision which provided the nexus to the deteriorating grades he was receiving during the second semester, not an emotional disturbance.

While the assaults are in themselves inappropriate behavior, this can be the behavior of a

socially maladjusted student. Fighting or having a disciplinary record is not sufficient to qualify a student for special education services. The identification of emotionally disturbed does not apply to students who are socially maladjusted, unless it is determined they meet the criteria for emotional disturbance.

Finally, there is evidence that, even if this information about the assaults had been before the CST, the conclusions that [the student] did not have an emotional disturbance that adversely affected his educational performance would not have changed. [The student] was working above his ability level and, at the time of the November CST meeting, was passing all of his classes except one. There were no school discipline problems.

While it is undisputed that [the student]'s assaultive behaviors are problematic, there is no evidence that the behaviors are sufficient to establish the types of inappropriate, atypical, or bizarre behaviors necessary to meet the criteria for special education eligibility.

There was no evidence that [the student] exhibited a pervasive mood of unhappiness or depression including major depression and dysthymia.

Evidence from school personnel indicated that [the student] does not appear to be pervasively unhappy or depressed. All of the testimony indicted that his behavior in school was typical for someone his age. He has friends and he socializes. Dr. Blodgett saw [the student] three times before the November CST meeting and noted that the transition back to school was good and that [the student] was doing well.

As the year progressed, Dr. Blodgett became concerned about [the student]'s growing anti-social tendencies and family problems which were affecting his behavior. However, the evidence

does not establish that he meets the criteria of this category or is eligible for special education services.

The petitioners did not assert that [the student] was eligible for special education under the remaining characteristics, sections (d) and (e).

While there is no dispute that there is a clinical diagnosis from Dr. Blodgett, that alone does not support a legal finding of special education eligibility under the criteria. The regulations themselves require that the student's educational performance be adversely affected as a result of the condition. See *Bonita Unified School District*, 32 IDELR 273 (2000). Further, the regulations state that, while common disciplinary problems may exist in conjunction with emotional disturbance, they cannot be used as the sole criteria in determining the existence of emotional disturbance. Finally, emotional disturbance does not apply to students who are socially maladjusted unless they otherwise meet the criteria.

The hearing officer concludes that, although Dr. Blodgett could provide a clinical diagnosis for [the student], such diagnosis could not, without any evidence from the educational setting, be extrapolated to a conclusion that [the student] was seriously emotionally disturbed within the context of eligibility in the educational setting. *Los Angeles Unified School Dist.*, 31 IDELR 71 (1999).

[The student] is not entitled to services under Other Health Impairment. There was much discussion over the meaning of the qualifier of "provisional" in Dr. Blodgett's diagnosis of ADHD. A provisional diagnosis does not negate the possibility of eligibility for special education services. Conversely, the diagnosis of ADHD does not conclusively lead to a

determination of eligibility for special education services, and a child with ADHD may be determined to be not eligible. See, e.g.; *West Bend School District*, 34 IDELR (2000).

Section 10.16.3018, ARM, provides that:

(1) The student may be identified as having other health impairment if:

(a) The student has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia or tuberculosis; and

(b) The condition adversely affects the student's educational performance.

(2) A medical diagnosis of a chronic or acute health problem is required.

The ADHD must in addition cause limited alertness with respect to the educational environment that adversely affects the child's educational performance.

There is no evidence from any of the classroom teachers that [the student]'s behavior or performance in school gave any indication or warning of an ADHD condition or that such a condition was affecting educational performance.

Again, while Dr. Blodgett's diagnosis has great significance in the clinical setting, that diagnosis alone, without evidence from the school regarding educational performance, does not substantiate an opinion that [the student] qualifies for services under the IDEA as a result of his ADHD. *West Bend School District*, 34 IDELR 134 (2000).

During the relevant period, there was no evidence that ADHD may have had an adverse effect on [the student]'s educational performance. The school district was not required to deem

[the student] eligible for services under the IDEA based simply on Dr. Blodgett's provisional diagnosis.

In the event that [the student] returns to [the district] High School, the hearing officer recommends that the 504 plan in place be reviewed again and any adjustments necessary to assist [the student] be made.

DATED this 25th day of July, 2001.

/d/ Dee Ann G. Cooney .
DEE ANN G. COONEY
Hearing Officer

Certificate of Service

I hereby certify that, on this 25th day of July, 2001, a true and correct copy of the foregoing was deposited in the United States mail, postage prepaid, addressed to the following:

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