

State of Maine  
Special Education Due Process Hearing Decision  
Case No. 02.088, Portland v. Parent,

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

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

The case involves Student, whose date of birth is xx/xx/xxxx. He resides with his mother, at Street, Portland, Maine. Student has been a student in the Portland Schools since he and his mother moved there in 1994. He currently attends the Aucocisco School, having been placed there by his mother in August 2001. Student is eligible for special education services as a student with a Learning Disability.

In August 2001, as Student was preparing to enter sixth grade, parent made a unilateral decision to place him at the Aucocisco School. In November 2001 she informed the school that she intended to request reimbursement for this action. The PET continued to meet throughout Student's sixth grade year to adjust the program proposed by the district. Parent continued to reject these offerings. On March 20, 2002 the district requested a hearing arguing that the program developed for Student was reasonably calculated to provide him educational benefit and that the district was not responsible for the cost of the placement made by the parent at the Aucocisco School.

Extensions to the original dates set for the pre-hearing conference and the hearing were requested by both the school and the parents and granted by the hearing officer. The parties met in a pre-hearing conference on April 12, 2002 to exchange documents and witness lists. The school entered 239 pages of documents into the record and the parents entered 194 pages of documents. The hearing officer entered one document into the record<sup>1</sup>. The hearing convened on April 30, 2002 and continued on May 2, May 7, May 8, and May 16. Twelve witnesses gave testimony. The hearing record closed on May 23, 2002. Following is the decision in this matter.

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<sup>1</sup> Just prior to the last day of hearing the parties and the hearing officer received a letter from the student's father. The father was not a party to the hearing, and the mother argued that he had no custodial rights and therefore no standing in this hearing. A copy of the couple's divorce decree was produced. The hearing officer entered the document into the record. The school subsequently entered the father's letter into the record. The hearing officer allowed it, over the objection of the mother's attorney.

## I. Preliminary Statement

The hearing was held on behalf of a xx year old student who is eligible for special education services under the category of "multiple disabilities" due to diagnoses of learning disabilities and attention deficit hyperactivity disorder. He is currently attending the Aucocisco School in Portland, having been placed there by his mother in August 2001.

The hearing was brought by the Portland School Department to defend the program offered to the student by the school. It is the School's position that the programs provided to him over the years have provided him educational benefit, and that the IEP offered for the current school year is reasonably calculated to provide him a free appropriate public education in the least restrictive educational setting as required by state and federal regulation.

The parent put the school on notice that it was her intention to request reimbursement for her unilateral placement of the student in the Aucocisco School in November 2001. She asserted that the Portland Schools had been unable to offer the student a meaningful level of educational benefit for a number of years. In addition to her request for reimbursement for the 2001-2002 school year placement at the Aucocisco School, the parent requested compensation for the 1999-2000 and 2000-2001 school years.

## II. Issues

1. Is the IEP proposed for the student's 6<sup>th</sup> grade school year, 2001-2002, reasonably calculated to provide him with a free appropriate public education in the least restrictive educational alternative?
2. If not, is the program offered the student by the Aucocisco School appropriate to meet his special education and related education needs?
3. Is the parent entitled to reimbursement for her unilateral decision to place the student at Aucocisco?
4. Is the parent entitled to further compensation for the school's failure to provide a free appropriate public education for the fourth grade, 1999-2000, and the fifth grade, 2000-2001, school years?
5. Did the school violate procedures around the parent's request for an independent educational evaluation conducted in February and March 2001?

### III. Findings of Fact

1. The student was identified as eligible for special education services as a student with a “specific learning disability” at the end of first grade<sup>2</sup>. Testing was completed in May 1997. His cognitive ability determined from test scores using the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) revealed a Verbal IQ score of 111, a Performance IQ of 102 with a Full Scale IQ of 107. Results from teacher-completed behavior rating scales showed the student “exhibiting consistently very high levels of hyperactivity, inattention and impulsivity” and “high levels of aggressivity [sic] toward his classmates”. The evaluator concluded that the student “should...be considered to evidence an attention deficit hyperactivity disorder...” Achievement was determined using the Woodcock-Johnson Revised Battery. The student obtained standard scores on that assessment of: 71 in Broad Reading; 90 in Broad Math; 77 in Written Language; and 112 in Broad Knowledge. The PET met in May 1997 to review this assessment data. They determined that the student met criteria as a student with a learning disability given the significant discrepancy between his ability and achievement in reading and written language. (Exhibits: 220-223, 224, P 53-55, P 56, P 57-59, P 60-61)
2. The PET developed an IEP for the student’s second grade school year. That IEP provided the following services: 1.5 hours per week of speech and language services and 6.5 hours per week of resource services. Goals in the program included: increase organizational skills and attention; increase independent work skills; increase language arts skills to an initial stage; improve phonological processing skills; and improve expressive language skills. (Exhibit P 62-67)
3. In May 1998, the PET met for the student’s annual program review. The team reviewed progress reports and diagnostic information from special education staff and the speech and language therapist. The Progress Report, dated May 1998, notes that of the three goals in the IEP the student met his ‘language arts’ goal, and made significant progress on the ‘work completion’ goal and ‘organizational skill and attention’ goal. PET minutes from May 1998 state that the speech therapist reported great improvement in speech and language goals. The student’s special education teacher reported to the team that the student had made many gains, but both staff and the parent voiced concerns about his continued struggles with reading and writing. The IEP developed for third grade increased services. Services in that IEP are as follows: 1 hour per week of speech and language services and 10 hours per week of instruction in the resource room of which 5 hours were devoted to

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<sup>2</sup> The student had been identified as eligible for special education services under the category “speech and language” in his previous school district. His mother specifically rejected special education services for him when he transferred to Portland. She did not consent to further consideration of services until the spring of 1997.

- reading instruction and 5 hours for writing instruction. Goals included: increase language arts skills to a beginning transitional level, increase work habits and school behaviors to an age appropriate level, improve phonological processing, and improve expressive language skills. (Exhibits: 207-208, 209-213, 217, 219-220)
4. In May 1999, the PET met for its annual review of the student's program. PET minutes summarize the third grade teacher's opinion that the student had shown growth in academic and social skills with excellent work habits in individual and small group settings. An observation by the special education teacher noted that the student needed assistance to decode correctly and to read comprehension questions in content area material. The classroom teacher informed the group that the student was struggling with math computation. Regression of skills after vacations and weekends was noted. The team determined the need for extended year services for reading and writing was determined.[sic] (Exhibit: 199; P 82)
  5. The PET developed the student's fourth grade IEP at the May meeting, but determined that the student's triennial evaluation would be moved up to the fall of 1999 instead of waiting until May 2000. IEP revisions would be made based on this data. The then-present IEP described the following services: special education resource services 12 hours per week with 5 hours for reading, 3.5 hours for writing and 3.5 hours for math instruction; and speech and language services for one hour per week. (Exhibit: 200-206; Testimony Parent)
  6. In July 1999, the student's physician referred the student to St. Mary's Medical Center for a speech and language evaluation. Results on the Clinical Evaluation of Language Fundamentals (CELF-3) showed the student to have low average skills in receptive language areas and his overall ability to process information was considered to be within the low average range. On this same test, the student was found to have low average expressive language skills. Results using the McGinnis Language Processing Assessment, Revised showed the student did not possess the precursors for reading development. The tester recommended that the student's program "incorporate daily phonemic awareness activities to increase reading skills". (Exhibit: P 87-90)
  7. Results from an informal reading inventory administered at a summer reading workshop noted that the student was at the "initial stage" in reading and "an emergent stage" in writing. (Exhibit: 198)
  8. In August 1999, the school administered the Gallistel-Ellis Test of Coding Skills, a criterion-referenced reading assessment. Scores revealed the student was below mastery in all areas except for Giving Sounds for single consonant sounds where he earned a 95%, and in the transition range for

- Giving Sounds for short vowel sounds at 67% and long vowel sounds also at 67%. He scored below 40% on all other items tested except for Reading Words of closed syllables, single consonants where he achieved 48%. The tester opined that the student would benefit from "direct phonemic awareness instruction...such as Wilson or SPIRE". (Exhibit 192-194)
9. In September 1999, the student's cognitive ability was again assessed using the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). Test scores revealed a Verbal IQ score of 104, a Performance IQ of 111 with a Full Scale IQ of 107. His then-current achievement was determined using the Woodcock-Johnson Revised Battery (WJ-R). The student obtained the following standard scores on the WJ-R: 69 in Broad Reading; 92 in Broad Math; 72 in Written Language; and 101 in Broad Knowledge. The achievement scores led the evaluator to conclude that the student demonstrated weak decoding skills, lacked fluency in phonological skills and strategies to derive meaning from text, and that he scored in the low average to average range in math. (Exhibit 184-188)
  10. The PET met in October 1999 to review the evaluation results. After a discussion of the various evaluations and classroom progress the IEP was revised. Services were increased to: 14 hours per week of resource services, with 8 hours devoted to Language Arts and 6 hours for content support in the classroom. The annual goals and objectives were rewritten. A writing goal was added, and the language goal was deleted. Extended school year services were included for the summer of 2000 at 2 hours per day, four times a week for reading and writing. The IEP noted that the student was "instructionally reading at the end initial stage". His annual reading goal was to increase his instructional reading skills to the "mid transitional stage". The student's writing was assessed to be at the "initial stage". His annual writing goal was to increase writing skills to an "early transitional stage". The impact of the student's impulsivity and distractibility on his classroom performance was discussed. An annual goal to increase "on task behaviors to an age appropriate level" was included in the IEP. It was also noted that the student was scheduled for a medical evaluation of attention deficit hyperactivity disorder. Speech and language services were not continued. Reading, spelling and written expression instruction occurred in the resource room. Content area subjects were taught in the regular classroom. The student had access to support from an educational technician assigned to the classroom. Math was taught first in the resource room and later in the year in the regular classroom with support. (Exhibit P 94-100, 180; Testimony: Lewis, Nilsen)
  11. During the student's fourth grade year, he began receiving instruction in the Wilson reading program, a multi-sensory phonemic awareness reading program. Pre- and post-testing using the Wilson assessment materials showed progress toward decoding and encoding skills. The teacher reported that at the conclusion of the school year the student had improved in his

- ability to sequence sounds and see phonological patterns. She recommended that he continue in the Wilson program. (Exhibit: 235-236; Testimony: Lewis)
12. During the summer of 2000, the student did not attend Extended Year Services offered by the school, but was enrolled by the parent in a summer reading program. (Exhibit: 96, 169; Testimony: Parent)
  13. The student entered fifth grade in the fall of 2000. The PET met in November 2000 for his annual review. The parent's brother accompanied her to the meeting and presented a list of concerns she had regarding the student's program. The Progress Report from the resource room teacher and anecdotal and curriculum based information from his classroom teacher regarding the student's progress were shared. The resource room teacher noted that the student's goal was to increase instructional reading skills to the mid-transitional stage by October 2000 and that he "is now reading instructionally at the mid-transitional stage", that he met the math goal to increase skills to the third grade level, and met his goal to participate in content area studies by demonstrating understanding and participating in classroom activities. The student made progress toward meeting the writing goal, and made progress toward his goal to increase on-task behaviors to an age appropriate level. The classroom teacher reported that he was engaged in both science and social studies and was an active participant in class activities and discussions. The IEP was revised. Based on parent concerns and the student's severe learning disability, the team agreed to increase services for the remainder of the year. The IEP included: 19 hours per week of special education services with 3 hours devoted to math, 10.75 hours to language arts, and 5.25 hours to support in content areas. An educational technician was available in the fifth grade classroom to assist in content area subjects. The goals and objectives were rewritten to reflect the PET discussion. The parent presented the PET with a lengthy statement of concerns regarding the student's special education program. The team agreed to meet again to consider these concerns. The PET also began discussion of the student's transition to sixth grade. (Exhibits: 157, 158-164, 165-166; Testimony: Nilsen, Carrigan)
  14. From October 2000 until August 2001, the student received individual tutoring for 3-4 hours per week in the Wilson Reading program from a Wilson certified instructor. The student's father paid for the tutor. (Testimony: Nordstrom, Carrigan, Lewis, Parent)
  15. In January 2001, the PET met again to continue discussion of the student's 2000-2001 program and the parent's list of concerns. In addition to her brother, an advocate accompanied the parent to the meeting. At the parent's request the team agreed to suspend the student's art and music and increase his special education services from 19 to 20.5 hours per week. The additional

- 1.5 hours was used for pre-teaching in content areas. In addition it was agreed that the student would arrive at 8:00 a.m. to complete homework assignments in his regular classroom with assistance from his teacher as needed. As part of the discussion the team noted that the student had demonstrated regression after the summer of 2000, and that generally he demonstrated regression of skills following weekends and vacations. They reaffirmed his need for summer services. (Exhibits: 146, 148-149, 150-151,156; Testimony: Nilsen, Carrigan, Lewis, Parent)
16. In a letter dated January 17, 2001 the parent requested, in writing, an independent evaluation of the student. She stated in the letter that she did not believe that the school's evaluation was appropriate. (Exhibit 147)
17. In February 2001, the PET met to continue discussions about the student's program and progress. Again, the parent's brother and the advocate assisted her at the meeting. Objectives under the content and behavior goals in the IEP were modified. The parent's request for an independent evaluation was discussed but the school did not accept or deny the parent's request. (Exhibits: 134-135, 136-142; Testimony: Carrigan, Parent)
18. In February and March 2001, the student participated in a neuropsychological evaluation conducted by Laura Slap-Shelton, Psy. D. The evaluator reviewed school records, conducted a clinical interview with the mother and administered the following standardized test instruments: the WISC-III, the WIAT, and the Woodcock Diagnostic Reading Battery (WDRB). In addition, the evaluator administered the Halstead Reitan Neuropsychological Battery and personality and behavior tests: Rorschach Inkblot Test and the Behavioral Assessment System for Children, Parents Form<sup>3</sup> (BASC).

The student obtained the following scores on the WISC-III: Performance IQ 99, Verbal IQ 105 with a Full Scale IQ of 102. His scores place him in the upper end of the Average range of overall intellectual ability. The student obtained the following standard scores on the WIAT: Reading Composite 69, with decoding skills in the 5<sup>th</sup> percentile and reading comprehension in the 4<sup>th</sup> percentile; Mathematics Composite 90, with math reasoning in the 66<sup>th</sup> percentile and numerical operations in the 5<sup>th</sup> percentile; Language Composite 115; and Writing Composite 70. The evaluator concluded from these scores that the student had a significant learning disability in reading and writing, and, based on the student's scores on the WDRB, that he reads at the second grade level. Neuropsychological testing indicated mild neurological dysfunction or "soft signs". Based on the mother's response on the BASC, the evaluator concluded that the student was At Risk for anxiety

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<sup>3</sup> The evaluation report states that both the student's mother and his teachers provided responses on the BASC. Testimony revealed that the evaluator did not have teacher responses to review. The school testified they were not asked to respond; the parent testified that the forms were delivered to the school. Either way, the evaluator did not have teacher responses to consider.

- and attentional problems and in the Clinically Significant range for adaptability. In her conclusions, the evaluator states that the student “despite early intervention from preschool on and appropriate reading tutoring...[he] has not been able to progress in reading. Given this, it is unlikely that he will make rapid progress in reading in the coming years. (Exhibits: 104-118; Testimony: Slap-Shelton)
19. The PET met on April 13, 2001 to consider the parent’s request for an independent evaluation. By phone the day before the meeting the parent informed the school she would not attend the meeting since the evaluation had already been completed and paid for by private insurance. The team met without the parent and denied her request for an independent evaluation at public expense. They did not request a due process hearing to prove that the school’s evaluation was appropriate. (Exhibit: 133; Testimony: Carrigan)
20. On May 1, 2001 the parent completed an application to enroll the student at the Aucocisco School. She did not inform the school of this action. (Exhibit: 131; Testimony: Carrigan, Nilsen, Lewis, Dee)
21. On May 9, 2001, the PET convened to review the results of the neuropsychological evaluation. Team members included the evaluator, Dr. Slap-Shelton, two psychologists from the school, the student’s special and regular education teachers, a representative from the middle school and the parent, her brother and her advocate. A summary of the meeting indicates a lengthy discussion of the student’s needs including his need for a “high degree of orally presented instruction and assignments, and a high degree of reading instruction”, a “need for significantly modified production presentation (keyboard access, note taking), and support to address his emotional needs”. A discussion of goals for the student included: increase his independent reading level to a mid-4<sup>th</sup> grade; increase his writing skills to a beginning 3<sup>rd</sup> grade level; develop social pragmatic skills appropriate for a 6<sup>th</sup> grader; and, access appropriate social problem solving skills for a 6<sup>th</sup> grader. The team agreed to reconvene in June to continue discussions about the student’s program needs. The parent did not inform the PET that she had made application to the Aucocisco School. (Exhibits: 102-103; Testimony: Carrigan, Nilsen, Kaufman; Parent)
22. On June 13, 2001, the PET reconvened to continue discussion of the student’s program and transition to sixth grade. The parent attended with her brother, her advocate and at the parent’s invitation, Dr. Slap-Shelton. After a review of the discussion from May, the team proceeded to discuss the student’s proposed program for sixth grade. The following services were recommended: 8 hours co-teach in the regular classroom for math; language arts; science and social studies for the 6-day cycle<sup>4</sup>; 2 hours of support in the resource room for the 6-day cycle; Wilson reading instruction for 2 hours per

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<sup>4</sup> King Middle School uses a 6-day instead of a 5-day cycle of instruction.



- 6-day cycle; and, 1 hour per week social work services in a small group, individualized or in a classroom-based setting. Following was a lengthy discussion around how this program would be implemented at the King Middle School. The parent expressed concern that this plan would not meet the student's needs, but did not reject the program. The team decided to reconvene the PET in early September to make any program adjustments that arose and to revise goals and objectives. Later in the summer this meeting was scheduled for September 12, 2001<sup>5</sup>. The team recommended extended school year services for 8 hours per week, 2 hours per day to address the student's regression during summer vacation. (Exhibits: 92, 97-98, 99-101; Testimony: Parent, Carrigan, Lynch, Verhoeven)
23. The student attended 12 out of a possible 20 days of extended year services during the summer of 2001. In addition he received 20 days of Wilson tutoring. (Exhibit: 95; Testimony: Nordstrom)
24. On August 15 and 17, 2001, the deposit and initial tuition payment to the Aucocisco School were made by checks signed by the student's uncle for \$1855, and the student's father for \$7440, respectively. In December 2001, the balance of the tuition was paid by checks from the student's uncle for \$1851 and by the student's paternal grandmother<sup>6</sup> for \$7404, respectively. The student's father signed the Enrollment Contract on August 15, 2001. The school was unaware that the student would not be returning to the public school at the beginning of the school year. (Exhibit: 131, P-111, P 146-147; Testimony: Lynch, Dee)
25. The parent did not reject the IEP proposed for the student at the June 13 meeting. She did not send a letter to the district 10 business days prior to the student's enrollment at the Aucocisco School. In a handwritten letter dated September 11, 2001, the parent informed the school that the student had been placed privately at the Aucocisco School and that she would not attend the PET meeting scheduled for the next day. The meeting was subsequently cancelled. On November 20, the parent sent a second letter to the school informing them that the student was attending the Aucocisco School and that she intended to seek reimbursement from the school for denial of FAPE. The parent did not file a due process request to press her claim. (Exhibit 90, 91; Testimony: Lynch, Dee)
26. The school scheduled a PET meeting for December 19, 2001. The parent attended with two advocates. After a lengthy discussion of the proposed program at King Middle School and the present program at Aucocisco, the team came to no resolution about the student's placement in the public

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<sup>5</sup> Barbara Dee the Director of Special Services testified that she offered to convene the PET during the summer to continue these discussions, but did not receive a response to messages left with the mother.

<sup>6</sup> While the student's grandmother signed this check, the parent testified that the money actually came from the student's father.

- school. The IEP goals and objectives were modified. The team agreed to obtain additional information including, observation of the student at Aucocisco and standardized testing, and meet again to review the IEP. The student's category for eligibility was changed from "learning disability" to "multiple disabilities" to incorporate his attention deficit hyperactivity disorder diagnosis<sup>7</sup>. (Exhibits: 73-77, 83-84, 85, P 152-156; Testimony Lynch, Parent, Verhoeven)
27. In January 2002, the WIAT was administered by the school special education staff to assess achievement. The student obtained the following scores: Reading Composite 73, Mathematics Composite 97, Writing Composite 67. A classroom observation was completed of the student in his reading tutorial at Aucocisco. (Exhibit: 45-48; Testimony: Lynch)
28. The PET met on February 26, 2002. The parent attended with her advocate. The team reviewed the recent assessment information, the student's current program at Aucocisco and the student's needs. A lengthy discussion of the proposed IEP ensued. Some revisions to the program offered in January were made. The school reviewed the program being proposed at the King Middle School. The revised IEP offers for every 6-day cycle: 8 hours of academic support in the regular classroom for math, language arts, science and social studies; 2 hours of resource support; and 4 hours of individualized reading instruction. In addition, the program offers 1 hour per week of speech and language support for pragmatic language and 1 hour per week of social work services, either individual or small group. Modifications for the student to participate in his math, science, social studies and language arts in the regular classroom are listed in the IEP and include among other things: assistance for reading and understanding math problems, reduced homework, cues to attend, assistive technology in language arts, testing modifications, and modifications on required school-wide educational assessments. Goals and objectives were finalized to reflect recent assessment data. The parent neither accepted nor rejected the IEP. The school requested a due process hearing on March 20, 2002 to defend this program. (Exhibit: 35-38; 39-40; 41-44: Testimony: Lynch)

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<sup>7</sup> Parent's closing argument states that the student also carries a diagnosis of 'depression'. This diagnosis was not incorporated into the student's disability determination and is, in fact, in dispute. Dr. Slap-Shelton stated in her evaluation report that the student "can be considered as having Dysthymia". She testified that she based this conclusion on the student's responses on the Rorschach, and the parent's response on the Behavioral Assessment System for Children: Parent Form. Dr. Kaufman made a convincing argument that the Rorschach was notably unreliable in diagnosing depression in children. By Dr. Slap-Shelton's report the BASC results did not show elevated scores for depression.

#### IV. Conclusions

**1. Does the IEP proposed for the student's 6<sup>th</sup> grade school year, 2001-2002, provide him with a free appropriate public education in the least restrictive educational alternative? 2. If not, is the program at the Aucocisco School appropriate to meet his special education and related education needs?**

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a "free appropriate public education" which is described in the student's "individualized education program" (IEP). *20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)* "To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *20 USC § 1412 (a)(5)(A)*

This case presents a clear-cut struggle of the parties' disagreement over whether the school can provide an appropriate education for the student in the public school or whether the nature and severity of the student's disability requires that he be removed to a separate school. The student has a severe language-based learning disability. Standardized tests measure the discrepancy between his cognitive ability and his current achievement as more than two standard deviations.

The 2001-2002 IEP, which drives this dispute, began at the PET in May 2001 with a review of the parent's independent educational evaluation, and continued until February 2002. The PET met a total of four times in its effort to complete the IEP. The parent and her representatives attended each of the meetings. Before the process was completed the parent placed the student in a private, special purpose day school that specializes in educating students with learning disabilities. The school convened two more PET meetings after the parent's unilateral placement. She and her representatives continued to participate in the process. The meetings were lengthy, with significant discussion around the student's needs. The parent continued to voice concerns about the final IEP and the student's ability to succeed in the program, however she neither accepted nor rejected the IEP. The school filed for hearing to defend its proposed program as an offering of FAPE.

In its reasoning of what defines a "free appropriate public education" the Supreme Court asked two questions. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Board of Education v. Rowley*, 3 IDELR 553:656 (1982) *The* court went on to say:

...a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

(*Id.* 662)

The parent asserts that the IEP is flawed because the district failed to comply with procedures in its construction. She argues that the school pre-determined the placement for the student's 2001-2002 program, by failing to consider any placement other than the King Middle School, the student's neighborhood school, in its deliberation of the IEP. While this was not articulated as an issue at hearing and little evidence was presented to support this allegation, the parent now alleges that the IEP should be rejected out of hand because of this alleged procedural error.

In light of the preference of IDEA for educating students in the least restrictive environment and this student's educational history, it is difficult to fault the school for making the logical assumption that the student would begin his sixth grade year much as he had ended his fifth grade year. "Each Individualized Education Program shall be developed in accordance with the principle of the least restrictive education alternative..." *Maine Special Education Regulations* §11.2 The student had been educated in his neighborhood school in the mainstream for the previous five years. While there was a growing dispute around the parent's concern of the student's limited progress in reading and writing, there was no discussion that the student's program should be removed from the mainstream.

A review of testimony and exhibits surrounding the PET discussions does not support a 'take it or leave it' attitude from the school as the parent seems to imply. There were two lengthy PET meetings prior to the end of the fifth grade school year. The parent alleges that there was not a full discussion of the neuropsychological evaluation, because her evaluator was not given ample time to discuss her recommendations<sup>8</sup>. It is true that the evaluator's lengthy list of 28 recommendations

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<sup>8</sup> The parent, the parent's brother, the parent's advocate, and Dr. Slap-Shelton all testified that they felt disrespect from some school staff during the PET meeting on May 9 when the neuropsychological evaluation was being presented. They noted that body language, "rolling the eyes", and comments such as "you're lucky we gave you as much time as we did" diminished their faith in the PET decision-making process. School members who also attended the meeting testified that they did not observe this behavior, but clearly the parent

was not reviewed in its entirety, but there is no disagreement that the PET considered the assessment data in the evaluation, gave the evaluator ample time to present the data, and that the full report including the recommendations, was available to the team. This information along with teacher reports resulted in a full discussion of the student's needs and strengths as evidenced by the PET minutes. The discussion did not generate data to suggest that the PET needed to radically rethink the placement for the student. No other placement option or setting was put forth by any team member, even though evidence shows that the parent had already begun the enrollment process at Aucocisco.

It was only at PET meetings after the private placement, and notice of a claim for reimbursement, that the parent's preference for a private special purpose school for learning disabled students even became part of the discussions. Disagreement with the parent's preference by the school does not equate to pre-determination of placement. In fact, the record is quite clear that the PET, including the parent, participated in extended discussions around the student's needs and how to meet those needs within the context of a public middle school. It is the law's preference to educate students with disabilities in the least restrictive environment. The school did not then, nor does it now, believe that the student requires placement outside the public school. In fact, even late in the process when the school offered a self-contained classroom in the middle school as a placement option, they were clear that they felt this placement would not be appropriate for the student. The student's placement was not pre-determined. Ultimately, there was simply no agreement between the parent and the school that the student's needs could be met in the public middle school.

Since no procedural violations are found, the question must focus on whether the IEP was reasonably calculated to provide the student with educational benefit in the least restrictive educational alternative. Such an analysis requires a look at the student's past programs.

The IEP at issue was developed at four PET meetings over a 9-month period. The completed IEP provides the student with 8 hours per 6-day cycle of special education instruction to support content classes in the regular classroom, 4 hours per 6-day cycle of individual instruction in the Wilson Reading program, 2 hours per 6-day cycle of resource room support for classroom organization and assignment completion. In addition, the IEP provides 1 hour per week of speech and language support for pragmatic language instruction, and 1 hour per week of social work services.

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and those attending the meeting with her perceived it to be happening. Any such behavior, or perceived behavior, on the part of school personnel is highly inappropriate. It does not invalidate the actions of the PET, nor does it rise to a procedural violation, but IDEA is clear, parents are to be considered an equal and active participant in the decision-making process and should be accorded the respect due that role.

It is the parent's position that this IEP does not offer the hours of services previously provided the student. It is true that the frequency and amount of services listed in this IEP are less than the previous year. However, the amount of individual reading instruction offered, the Wilson reading, is similar to the 3-4 hours per week the student received during fifth grade from the private tutor. The tutor testified that the student struggled with his reading but continued to progress through the levels in the program and made over a year and a half year gain in his reading. In addition, the program offers the student an opportunity to participate in a small group reading support class for literature. While not a special education service, it was convincingly described as an appropriate directed reading opportunity with a small group of age appropriate peers. The two hours per instructional cycle of resource room pullout support for pre-teaching and re-teaching in content areas is not significantly less than the 1.5 hours per week of pullout support offered the student in fifth grade. The social pragmatics support from the language therapist and the social work services are an increase in services to the fifth grade IEP.

The biggest area of difference in hours of support offered the student between the fifth and sixth grade IEPs are the support provided by special education staff in the regular classroom. The parent asserts that, given his reading and writing deficits, the student would not succeed in the content areas in a public middle school without a full-time, individually assigned, aide. The school presents a convincing argument that the program does take into account the student's severe reading and writing deficits as they impact his ability to participate in the regular classroom content areas. They present the middle school experience as less text-driven, with much of the material presented orally, through visual methods and using hands-on learning. These methods of presentation build on the student's strengths and offer good opportunities for him to succeed with his age peers in his high interest subjects. This, coupled with the class modifications and assistive technology listed in the IEP, present a picture of a program that takes into account the students strengths and weaknesses. Finally, the school has made it clear that additional special education support staff in the regular classroom remains an option.

Much of the evidence of the hearing focused on the student's scores in standardized reading and writing achievement tests. Standard scores on assessments performed by the school in 1997, 1999, and 2002, and by the parent in 2001 have remained statistically consistent with very little variation<sup>9</sup>. The parent argues that because these scores did not increase between the 1997 and 2001 evaluations, and that his reading ability has not shown significant gain, the student has not made measurable progress, and therefore the IEP failed to confer benefit. It is true that testing does not show that the student has made substantial gains in his reading and writing over

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<sup>9</sup> The only standardized test scores that varied widely were the results from the Gray Oral Reading Test administered by the student's tutor at Aucocisco. Results of the test suggested a significant jump in reading ability over the relatively short period of time he has attended there. It is difficult to weigh the accuracy of this data. No description of the testing situation or the tester's impressions and conclusions were included, only the standard scores. The person who administered the test did not testify. The student's fifth grade reading tutor and his fourth grade reading instructor both questioned the student's ability to exhibit such growth over such a short period of time. It is difficult to weigh the accuracy of this data.

the past few years. This in and of itself is not conclusive evidence that the student has failed to benefit from past IEPs or that he cannot succeed in a public school setting given the currently proposed IEP.

The discrepancy between the student's ability and achievement in reading and writing is greater than two standard deviations. This profile has not changed over the years. School's psychologist, Dr. Kaufman, makes a convincing argument that these achievement scores indicate a student, who even with his significant impairment, is continuing to make slow measured progress in his areas of weakness. As the expectations increase in the normative sample of the test population, the student's consistent standard scores in reading and writing represents [sic] a picture of a student who is "holding his own". He opines that, given the severity of his neurologically based learning disability, the student has maintained the measured progress one might look for in a student with his profile.

Parent's expert, Dr. Slap-Shelton, does not disagree with this analysis, but uses it to draw different conclusions and make specific educational placement recommendations for the student. She testified that the student could, with the right instruction, show a rate of learning commensurate with his peers<sup>10</sup>, and that this data supports the parent's position that the student has failed to benefit from his education. She argues that the student must have intense individual and small group instruction, in small classes, in order for him to make greater gains in his deficit areas. This might indeed be the optimum atmosphere in which to remediate the student's reading and writing disability, but it is not what the law requires. The *Rowley* court made clear that "educational benefit" was not synonymous with "maximum" benefit.

We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children".

(*Id.* 666)

There was, and continues to be, no disagreement that the student has severe language based learning disabilities, and that his reading and writing deficits are significant. He has received services in the public school since kindergarten. He has expressed growing frustration with his disability as work requirements have increased. As he has advanced from grade to grade, services in his IEP have increased. There is no disagreement that the Aucocisco School provides an intense,

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<sup>10</sup> In her diagnostic report Dr. Slap-Shelton stated "...it is unlikely that [the student] will make rapid progress in reading in the coming school years". When questioned about this discrepancy between her report and her testimony, she stated that she had changed her mind. She offered no further illumination except to maintain that the student had never had an intensive enough program. She seemed unclear, however, of exactly what the student had received for programming.

structured learning environment for students with learning disabilities. School personnel do not argue that Aucocisco fails to provide the student with beneficial reading and writing instruction.

They do, however, contend that Aucocisco falls short in providing the student with the ability to progress in the general curriculum. Teachers report that while he struggles with his reading and writing, he has mastered content area material with modification and accommodation. His aptitude in these areas is borne out by testing and teacher and parent reports. By his own positive comments to the school social worker in February 2002, he maintains a high interest and feeling of accomplishment in science, chemistry, social studies, history and math. Even Dr. Slap-Shelton's own observation of the student made mention of the noticeable difference in the student's demeanor in reading, where his frustrations are greatest, as compared to math where he feels success. The student must have equal opportunities for successful experiences. There is no question that Aucocisco can provide the intensive remediation he requires in reading and writing, but they cannot offer the rich and varied experience the student needs in the content areas. Aucocisco cannot compete with the offering of the district's IEP in this regard.

That the student might make greater gains in reading and writing at the Aucocisco School is not the measure of whether the school has failed. Rather, has the IEP offered by the school provided a program that is reasonably calculated to provide the student educational benefit in the least restrictive educational environment? The school's IEP meets that test. The student is made up of more than his learning deficits; therefore his program should reflect his strengths as well as his deficits. The program designed by the school provides the student with greater opportunity to be challenged in his areas of strength and to develop social skills appropriate to his age peers. Parents have the right to make educational choices for their children as they see fit. The parent's decision to place the student at the Aucocisco School is clearly based on a strongly held belief that it will result in the student's reading at a level commensurate with his peers through the instruction provided there. That is a private choice. Special education law does not, however, compel the public school to support that choice.

**Is the parent entitled to reimbursement for her unilateral decision to place the student at Aucocisco?**

*If the parents of a child with a disability...enroll the child in a private [school] without the consent of or a referral by the public agency, a...hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the...hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.*



*The cost of reimbursement described in paragraph c of this section may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least the (10) business days...prior to the removal of the child from the public school, the parents did not give written notice to the public agency of [that intent].*

*(e)Exception. Notwithstanding the notice requirement in paragraph (d) (1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if the parent is illiterate and cannot write in English.*

34 CFR 300.403

The parent began the application process for the Aucocisco School on May 1, 2001. At the next two PET meetings on May 9 and June 13 the parent, her brother and the parent's advocate participated in lengthy discussions concerning the student's proposed IEP for the upcoming school year. While the parent expressed concern about the program and particularly about the move to the middle school, she did not reject the program and did not inform the team that she was considering enrolling the student in a private school. In fact, the June IEP ended with a determination that the PET would meet at the beginning of the school year to made adjustments to the program.

The parent became financially obligated to the Aucocisco placement on August 15, 2001 when the Enrollment Contract was signed and the initial tuition payment was made. The parent did not inform the school that the student had been placed privately until September 11, 2001, more than 10 business days **after** the student had been removed from the public school. This letter did not inform the school that she would be requesting reimbursement for her unilateral action. It was not until November 12, 2001 that the parent informed the school that she would be seeking reimbursement for her decision to unilaterally place the student at the Aucocisco School.

The parent argues that she meets the exception in the regulation because she also suffers from dyslexia and is therefore illiterate. The exception states clearly that "reimbursement may not be denied for failure to provide the notice if the parent is illiterate **and** cannot write in English". I do not dispute the parent's claim that she suffers from a significant learning disability similar to her son's, and struggles to read and write. But the evidence does not demonstrate that she is illiterate and cannot

write in English. The parent is a high school graduate. There are at least three documents in the record written by the parent in her own handwriting: the September 11, 2001 letter<sup>11</sup>, the application for enrollment at Aucocisco, and a letter to the school written in 1995. Both the application to Aucocisco and the letter to the school in 1995, while containing some grammatical errors, contain well-formed words and language that is clear. Her intent is easily understood. The principal and the student's fourth grade teacher both testified that they were aware that the parent had difficulty reading, but each of them had no indication that she was unable to read. There is no way to conclude that she meets the exception in paragraph (e).

The parent also argues that the school failed to provide adequate notice of her obligation to provide prior notice before removing the student from public school. There is no evidence upon which to draw that conclusion. The parent did not deny that she has received the procedural safeguards notifying her of her rights. Reading and interpreting the notice requirement when placing a student privately may have been difficult for the parent. However, she has been supported by both her brother and/or an able advocate for well over a year and a half.

Finally, the parent relies on the Court's analysis in *Burlington*<sup>12</sup> to support her claim for reimbursement. *Burlington v. DOE, Commonwealth of Mass.*, 471 US S.Ct. (1985) [Parents may only recover the cost of a private placement if the school failed to provide FAPE and the private placement is appropriate.] She argues that the school did not make FAPE available to the student in a timely manner prior to her decision to enroll him at Aucocisco, and that the Aucocisco placement is appropriate. The discussion and conclusions under Issue #1 make it clear I do not make such a finding. However, it is worthy of note that in *Burlington* and its descendants parents who have enrolled their children in private schools and petitioned the school to reimburse them for that action have simultaneously exercised their due process rights. That is not the case here. It is unclear when the parent when [sic] these issues would have been reviewed at hearing if the school had not moved forward with its request.

**Is the parent entitled to further compensation for the school's failure to provide a free appropriate public education for the 1999-2000 and 2000-2001 school years?**

The parent's post-hearing argument asserts that the school failed to offer an IEP for the student in fourth grade that was reasonably calculated to provide him with educational benefit. It is unclear, however, how this program failed. The PET met at

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<sup>11</sup> The parent claims that she only copied the words in this letter from a template given her by her advocate. While she may not have composed the letter, she clearly wrote it.

<sup>12</sup> It is worthy of note that in *Burlington* and other well-discussed court cases around claims for reimbursement parents have enrolled the child in the private placement while simultaneously exercising their due process rights. That is not the case here. Not only did the parent not put the school on notice prior to her unilateral decision to remove the student from school, but at no point did the parent exercise her due process rights to question the school's offering. It is not clear at what point she would have moved forward to press her reimbursement claim had not the school filed the due process hearing.

the end of the student's third grade school year to review his progress and make program decisions for the 1999-2000 school year when he would begin fourth grade. They determined that the student's triennial, which was due in May 2000, should be moved up to the fall of 1999 and that the PET would meet at that time to review and revise the student's IEP as necessary. In addition, the school performed additional reading assessments at the parent's request. The PET met in October 1999 and revised the IEP. Resource services were increased from 12 to 14 hours per week for reading, writing, math and support of content subjects.

The parent points to elements of the Wilson reading instruction in fourth grade as part of their claim that the student's program was inappropriate that year. Evidence does not support that conclusion. The student received 2 hours per day of Wilson reading instruction with a masters-level reading consultant. That she was in the process of becoming certified and used the student in her practicum does not render either her instruction or the program inappropriate. The Wilson reading was done outside the services delineated in the IEP; however, it was directly related to his reading goal and was done with the parent's blessing. This resulted in an actual increase in services to the student in his weakest area of achievement. He moved through the program from level 1.3 to level 4.2. There was no evidence to suggest that he failed to benefit from this instruction.

By all accounts the student benefited from his fourth grade program, and particularly benefited from the Wilson reading instruction. Standardized reading assessments recommended such a multi-sensory phonemic awareness approach, and no one disputes that he made gains and increased fundamental reading skills as a result of this instruction. His reading instructor recommended that he continue the program in fifth grade. However, when the student entered fifth grade the reading instructor had changed jobs and become a school-wide reading consultant and was no longer available to deliver the Wilson program to the student. There appears to be some disagreement over whether there was another staff available to provide the instruction at the school, but what is clear is that the school did not provide Wilson reading to the student during fifth grade. In fact, the school assisted the student's father in identifying and organizing a private tutor to provide the Wilson program to the student outside school hours.

The private tutor provided 3-4 hours of individual Wilson reading instruction to the student during the 2000-2001 school year and the summer of 2000. The school argued that this had no adverse affect on the student's program, but rather allowed the student's absent father, who had little opportunity to offer assistance to his son, to participate in his education. A somewhat curious argument, especially in light of the fact that this program was so intertwined with his reading disability and the Wilson instruction had proven to be successful. The school provided the program in fourth grade. The student showed measurable gains, to the extent that the teacher recommended it continue in the following year. No other similar reading program was offered in its stead. There was no discernable reason for the school to remove

it from his fifth grade program. I can only conclude that the student failed to receive a key component of his 2000-2001 program at public expense.

**Did the school violate procedures around the parent's request for an independent educational evaluation conducted in February and March 2001?**

*If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either initiate a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense...*

*If a parent requests an independent educational evaluation, the S.A.U. may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.*

[MSER §9.19]

At the conclusion of the PET in January 17, 2001 the parent handed the principal a letter requesting an independent educational evaluation. The school argues that this letter could not be discussed at the January meeting because the meeting was breaking up and members had already left. They proceeded to schedule another PET meeting, which did not convene until April 13, 2001. The school takes the position that the parent's request needed to be reviewed by the PET because the parent was requesting new information and PET action was necessary to accept or deny that request for new information. It is unclear why the school took this position.

There was nothing ambiguous about the parent's request. The letter clearly states: "I do not believe the school's evaluation of my son is appropriate... Please tell me in writing where I may obtain an independent evaluation... I understand that the school must pay for the independent evaluation unless it can prove in a due process hearing that it's assessment is appropriate." The school was on notice that this was a request for an independent educational evaluation. The school's responsibility in such matters is clearly laid out in Section 9.19. They had an obligation to either pay for the evaluation or deny the parent's request and initiate a due process hearing. They did neither.

While the school eventually did deny the parent's request to pay for the independent evaluation performed by Dr. Slap-Shelton, they did not initiate a hearing to defend their evaluation. By that time the school notified the parent that her request had been denied, three months later, the evaluation had been completed and paid for by private insurance. The fact that the evaluation was paid for with private insurance

does not mitigate the school's responsibility for its failure to comply with regulations. The school's failure to follow procedure in this matter makes them responsible for the cost of the evaluation and for reimbursing the parent's private insurer for that cost.

#### **V. Order**

- 1. The school, upon receiving bona fide evidence of payments to the tutor, Ann Nordstrom, shall reimburse the full cost of those payments for the 2000-2001 school year. This order does not include payments for any tutoring services during the summer of 2000.**
- 2. The school, upon receiving bona fide evidence of cost and payment from the student's private insurer, shall reimburse the insurance company for the full cost of the evaluation performed by Dr. Laura Slap-Shelton. The school shall also reimburse the parent for any actual costs she incurred to make the student available for that evaluation.**
- 3. The school shall convene the PET within 20 days of the receipt of this decision to develop a transition plan for the student's return to King Middle School for the remainder of this school year and/or for the 2002-2003 school year. The school shall also review the goals and objectives in the IEP to ensure that extended school year services are available to the student to the extent necessary to ensure that a free appropriate public education is available to the student during the summer of 2002.**

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Carol B. Lenna  
Hearing Officer