

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

April 4, 2004

Case # 04.028H, Parents v. MSAD #61

REPRESENTING THE FAMILY : Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: James Schwellenbach, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations.

This due process hearing was requested by the parents on January 26, 2004. The case involves the student, whose date of birth is xx/xx/xxxx. He is currently attending the Poland Springs Academy, having been unilaterally placed there by his family on January 5, 2004.

A prehearing conference call was held on March 2, 2004. Present on the prehearing conference call were the mother and father, Richard O'Meara, Esq., counsel for the family, James Schwellenbach, Esq., counsel for the school department and Lynne Williams, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner.

The hearing began on March 11, and continued on March 12, 2004. The family submitted 416 pages of documents, and the school district submitted 154 pages. Nine witnesses testified. Written closing arguments were submitted on March 22, 2004, and the record was closed at that time.

Following is the decision in this matter.

I. Preliminary Statement

This case involves a xx year-old male student who is eligible for special education services under the category of Other Health Impaired. He currently attends the Poland Springs Academy, having been placed there unilaterally by his parents in January 2004.

The family requested this hearing. It is their contention that M.S.A.D. #61 failed to provide Student with F.A.P.E. during his xx grade and xx grade school years; and that M.S.A.D. #61 failed to provide Student with F.A.P.E. during the period from September 2003 through December 2003. They argue that Student is entitled to reimbursement of tuition related to his unilateral placement at Poland Springs Academy; that Student is entitled to a compensatory education remedy for M.S.A.D. #61's failure to provide

F.A.P.E. during the xx and xx grade school years; and, that the P.E.T. erred in determining that Student's behavior on November 24, 2003 was not a manifestation of his disability. They seek a reversal of the "no manifestation" determination. The family also seeks a finding that the school district erred in changing Student's eligibility category from Learning Disabled to Other Health Impaired, and seek an order restoring the Learning Disabled code. Lastly, they seek a finding that the school district violated Student's rights by evaluating him without proper parental consent.

The school denies that it failed to provide Student with F.A.P.E. during the periods in question. They argue that Student is therefore not entitled to any remedy. They further argue that, even if Student were entitled to tuition reimbursement, Poland Springs Academy is not an appropriate placement. They argue that the P.E.T. did not err in determining that Student's behavior on November 24⁵ [sic], 2003 was not a manifestation of his disability nor did the team err in changing Student's eligibility. Lastly, they deny any violation of I.D.E.A due to procedural issues around the conduct [sic] of assessments.

II. Issues to be Decided by Hearing

- **Did M.S.A.D. #61 fail to provide Student with a free appropriate public education during his xx grade (2001-2002) and/or xx grade (2002-2003) school years?**
- **If a failure to provide a free appropriate public education is found for either, or both, of the above periods, to what remedy is Student entitled?**
- **Did M.S.A.D. #61 fail to provide Student with a free appropriate public education during the period from September 2003 through December 2003?**
- **If a failure to provide a free appropriate public education is found for either, or both, of the above periods, to what remedy is Student entitled?**
- **Did M.S.A.D. #61 err in determining that Student's behavior on November 24, 2003, resulting in his suspension, was not a manifestation of his disability?**
- **Did M.S.A.D. #61 violate Student's right to be evaluated only upon proper consent of his parents?**
- **Did M.S.A.D. #61 violate Student's rights by removing his eligibility categorization as a student with a Learning Disability?**

III. Findings of Fact

1. Student's date of birth is xx/xx/xxxx, and he is currently xx years old. (Exhibits: Due Process Request)

2. Student currently attends xx grade at the Poland Springs Academy, having been unilaterally placed there by his parents on January 5, 2004. (Testimony: Mother)
3. Student was initially identified with a learning disability and in need of special education services in a P.E.T. meeting held on May 2, 1997, at the end of his xx grade year. The I.E.P. developed at that meeting placed Student in the Resource Room for 1-2 hours a week, to address written language and reading deficits. (Testimony: Mother; Exhibits: P346-362, P364)
4. Student's annual review was completed in the spring [sic] 1998 and a P.E.T. was held on April 17, 1998. Student was coded with a specific learning disability in written language. The I.E.P. developed at this time stated that Student would receive resource services in spelling for 1-2 hours per week. Student's I.E.P. included a written language goal that stated, "Given classroom assignments, [Student] will produce a finished product utilizing capitalization, periods, question marks, and commas as specified below by 17 April 1999," and went on to specify, as objectives, improvement in capitalization and use of punctuation. Student's writing process goal stated that [Student] would produce a finished product utilizing "an introductory sentence, a topic sentence, 3 or 4 supporting sentences within each paragraph, a 3 paragraph body, a conclusion." There were also two spelling goals. During the I.E.P. discussion, Mother suggested possible retention for Student, but school personnel argued against it, noting that Student's social adjustment was good, which mitigated against retention. (Testimony: Mother; Exhibits: P359-361)
5. At a P.E.T. meeting held on June 1, 1999, at the end of Student's xx grade year, his services for the xx grade year were increased to 3-4 hours per week, with his goals and objectives remaining essentially the same, since it appears he had not mastered them. At this meeting it was reported by Student's Language Arts teacher that he was reading comfortably at the xx grade level, with the xx grade level a challenge and the xx grade level a definite challenge. (Exhibits: P358)
6. Student's parents placed him in the U.S.M. Summer Reading Program during the summer of 1999. Student's tutor in the program stated that Student "struggles with the physical act of writing," and noted "he will be entering the xx grade in the fall as a transitional reader and initial writer, [and] will find the material challenging." She further reported that student was easy-going and had a positive attitude. (Testimony: Mother; Exhibits: P344)
7. At a P.E.T. meeting held on November 30, 1999, the team added math services to Student's I.E.P., for a service total of 4-5 hours per week. (Exhibits: P355)
8. During Student's xx grade year, Student's family hired a tutor to work with him at home, in order to increase his spelling and written language skills. (Testimony: Mother)

9. The school department conducted Student's triennial reevaluation in the spring of 2000, the end of his xx grade year. Tests administered included the Wechsler Individual Scales for Children – Third Edition (WISC-III), and the Woodcock-Johnson Revised (WJ-R). Student's scores on the WISC-III were 98 Verbal IQ, 106 Performance IQ, and 101 Full Scale IQ. On the WJ-R, student scored 84 in Broad Reading, and 80 in Broad Written Language. He scored within the average range on all WJ-R subtests, except for Letter-Word Identification, on which he received a standard score of 86. (Exhibits: S146-154, P340)
10. At a P.E.T. meeting held on May 24, 2000, it was determined that Student's services would increase from 4-5 hours per week to 8-10 hours per week of "resource support" delivered by a resource/consulting teacher. The total time would include 45 minutes per day when he would work with his case manager on his assignments from his core classes. His other services would be delivered by an educational technician within the regular education classroom. The goals and objectives, one in the mechanics of writing and one in spelling, continued to include the same outcomes. (Exhibits: P334-449)
11. At the beginning of the 2000-2001 school year, Student entered xx grade at Lake Region Middle School and began meeting for 45 minutes per day with Ms. Farnum during focus study period, which was the first period of the day. He also received educational technician support within the classroom. (Testimony: Mother)
12. The P.E.T. met on May 17, 2001, to develop an I.E.P. for Student's xx grade year. The I.E.P. listed 15 hours per week support services by special education staff in the regular classroom. Ms. Farnum believed that it was the intent of the P.E.T. to continue the morning focus study period for Student's xx grade year as part of this service time, although this was not specifically stated in the I.E.P. Student never balked at going to Ms. Farnum's room to work with her during focus study period. Student's goals included one writing skills goal and one spelling goal. The written language goal was stated exactly as it was in the previous three I.E.P.'s. (Testimony: P. Farnum; Exhibits: S138-145)
13. On June 21, 2001, Student received his final grades for his xx grade year, receiving 83 in Language Arts, 82 in Social Studies, 80 in Math, and 70 in Science. (Exhibits: P330)
14. During his xx grade year, Student received 5 discipline reports. Penalties ranged from verbal warnings to in-school suspensions. (Exhibits: S23)
15. When Student began school in September 2001, his xx grade year, he was assigned two Language Arts classes, one in lieu of Spanish. Both Language Arts classes were independent classes. According to Vivian Howard, Student's P.E.T. coordinator, Student was resistant to accessing the services that he needed, such

- as meeting with the social worker and attending focus study with Judy Grace.
(Testimony: Mother, V. Howard)
16. By the middle of Student's xx grade year, he had begun developing behavioral problems, such as talking back and refusing to do his schoolwork. He also became withdrawn and refused to participate in family activities. On January 30, 2002, Student received an in-school suspension for disrespectful behavior and disturbing the class. On February 28, 2002 he received another in-school suspension for having another student forge his (Student's) mother's name on a permission slip and refusing to disclose the identify of the other student.
(Testimony: Mother; Exhibits: P325-328)
 17. A P.E.T. meeting was held on March 18, 2002. During the meeting, Mother expressed her concern with Student's lack of progress and the fact that he was failing both of his Language Arts classes. The team's response was essentially that Student failed to access the services he needs. The team did increase Student's services by an additional 4.5 hours of pullout language arts, in addition to the 13.5 hours of support in regular education that he was receiving. A behavior plan created at this meeting stated, "[Student] will accept help in the resource room and the regular classroom from any adult, with one cue only; [Student] will attend Focus Study daily with all needed materials, with one cue only; and, [Student] will use a weekly progress report to have progress noted by his classroom teachers and return the signed portion to school the next school day." Mother refused to sign on to this Behavior Plan, considering it to be punitive. She was also informed that adding the additional service time to Student's schedule would require a totally new schedule and Mother objected to this. (Testimony: Mother; Exhibits: S134-137)
 18. At some point during this period, there was a discussion between the family and the school about providing Student with social work services. Lake Region Middle School housed a Spurwink counseling center, but eligibility depended on family income, and Student did not qualify. (Testimony: Mother)
 19. As of April 2002, Student had not met any of his goals. (Exhibits: S141)
 20. On April 3, 2002, Student received a two-day in-school suspension, due to belligerent behavior. (Exhibits: P317-318)
 21. The family submitted a "Statement of Concerns" to the school, on or about April 24, 2002. In this document, they discussed the changes they had seen in Student, and requested that he be able to begin seeing the middle school counselor. Among other things, the family asked for a clarification of the direct instruction in Language Arts and various modifications that they believed to be necessary. In addition, they requested that the team conduct a functional behavior assessment and develop a new behavior plan, utilizing the services of a behaviorist, if necessary. (Testimony: Mother; Exhibits: S131-133)

22. The P.E.T reconvened on May 2, 2002, in order to address the family's concerns. The family asked the school department to agree to fund a neuropsychological evaluation. The team denied that request, but agreed to do a full psychoeducational evaluation, including psychological, intellectual and academic testing, an occupational therapy assessment and two classroom observations. In the meantime, Student's goals and objectives would remain the same¹ and Student would begin to receive social work services for 30 minutes per week. The service plan page of this I.E.P. was not completed and the team agreed to reconvene on June 3, 2002. (Exhibits: P121-127)
23. On May 9, 2002, Judy Grace conducted an educational evaluation of Student, utilizing the WJ-R. Student received a standardized score of 94 on Broad Reading, 98 on Broad Math and 84 on Broad Written Language. In the supplemental cluster, he scored 88 on Basic Reading Skills, 110 on Reading Comprehension, 90 on Basic Math Skills, 108 on Math Reasoning and 86 on Basic Writing. On the subtests, scores ranged from 108 in Passage Comprehension and Applied Problems down to 88 in Letter-Word Identification. (Exhibits: S119-120)
24. The team reconvened on June 3, 2002 and determined that they would again reconvene the first week in September, since some of the evaluations had not been completed. Student's goals and objectives remained unchanged. It was determined that Student would receive Extended Year Services, but the services were never utilized since, according to Mother, no information regarding transportation was ever provided. The school personnel did not deny this contention in their testimony. (Testimony: Mother; Exhibits: S112-114)
25. As of June 2002, Student had not met any of his goals. (Exhibits: P208)
26. On June 17, 2002, Student received his grades for his xx grade year. All of his grades were down from the xx grade year, with a final average of 74.5. (Exhibits: S115)
27. During the 2001-2002 school year, Student's xx grade year, Student received four disciplinary reports, comprising three in school in-school suspensions and one office suspension. (Exhibits: S21-22)
28. At the beginning of the 2002-2003 school year, Vivian Howard, P.E.T. coordinator during Student's xx grade year, brought his records up to the high school and reminded the staff that they needed to hold a P.E.T. meeting to finalize Student's I.E.P. (Testimony: V. Howard)

¹ Student's written language goals and objectives remained essentially unchanged between April 17, 1998 and May 2, 2002.

29. In September 2002, Student entered xx grade at Lake Region High School. Student was involved in behavioral incidents on September 30 and October 2, 2002, for insubordination and not doing his work. He received an in-school suspension for both incidents. (Exhibits: P269)
30. In September 2002, Nancy Maclean, the school social worker, began inviting Student to come and meet with her. He seemed reluctant to do so, but they finally had their first meeting in late October 2002. Social work sessions became more regular during the second half of the school year. (Testimony: N. Maclean)
31. Although the team had determined in June to hold a P.E.T. meeting during the first week of school in September, no meeting was held until a month into school, on October 2, 2002. No one from the middle school attended this meeting, so there was no one to speak about Student's progress, services and needs during his xx and xx grade years. The planned psychological evaluation had not been done. It was determined that Student would receive 200 minutes a week of inclusive support in math and 15 minutes per week of social work services. Student's goals and objectives were revised and now included two goals, a work completion goal and a social work goal. It was also agreed that the family would look into having a neuropsychological evaluation done. The team agreed to reconvene on November 6, 2002. (Exhibits: S102-103)
32. On October 3, 2002, Mark Ryder, Director of Special Services, sent a letter to the family and stated that since the psychological evaluation had not been agreed upon by the team at the October 2, 2003 meeting, there had never been a determination to do an evaluation. He further stated that a discussion of funding a neuropsychological examination was therefore premature. (Exhibits: P254)
33. On October 7, 2002, the family responded to Mr. Ryder's letter by reiterating the fact that on May 2, 2002, the P.E.T. had determined to conduct a full psychoeducational evaluation, and that the educational evaluation had been completed but not the psychological evaluation. The family stated in this letter that they intended to seek a full independent educational evaluation at public expense, including a neuropsychological evaluation, a psychological evaluation, and possibly assessments in speech and language, occupational therapy, assistive technology and other areas, as appropriate. (Testimony: Mother; Exhibits: P252-253)
34. Student was involved in two more behavioral incidents on October 15 and October 17, 2002, one for failure to show up to make up work and one for an unexcused classroom absence. (Testimony: Mother; Exhibits: P251)
35. On November 4, 2002, Student had been permitted to go to his case manager's office. However, he wanted to speak to the social worker, and went to her office instead. She was not in her office, and when he returned to the special education room he got into a verbal altercation with other students, and one student

- physically came after Student. This resulted in a 3 day in-school suspension for Student and a punishment for the other student as well. (Exhibits: P248-249)
36. On November 6, 2002, the I.E.P. was mailed to the family. The only service listed was 30 minutes per week of “Consultation” in the regular education classroom, not the 200 minutes per week support in Math and 15 minutes per week of social work services. The I.E.P. also included a behavior plan that had never been discussed at the P.E.T. meeting. The plan stated, in part, “[Student] will be given 2-3 minutes after the verbal cue to get himself organized and on task. If work does not begin, the teacher will ask if clarification is needed. If [Student] remains unproductive the teacher will send [him] to room 207 with his work assignment. Work will be completed and turned in before the next class period.” The “reinforcement” was that “[Student] will get his assignment in on a timely basis and avoid the school discipline policy.” (Testimony: Mother; Exhibits: S104-111)
37. A P.E.T. was held on November 12, 2002. The recent behavioral incident was discussed and the family’s advocate suggested that it was time to begin developing a formal positive behavioral intervention plan. The team determined that Student would have 30 minutes per week of social work services. (Exhibits: S100-101, P234-235)
38. On December 19, 2002, David Yarlott, M.S., School Psychologist, administered a Woodcock Johnson III Test of Cognitive Ability (WJ III GIA) to student. Student’s Full Scale IQ score on this test was 88. All subtests were within the average range, except for Short-Term Memory, on which he scored 76. His cognitive fluency score was 105, and his executive processing score was 111. (Exhibits: S87-96)
39. On February 7, 2003, Mr. Yarlott administered Woodcock Johnson III Tests of Achievement (WJ III A) and Student’s scores on that test were Total Achievement, 78, Broad Reading, 82; Broad Math, 87; and Broad Written Language, 84. On the spelling subtest Student scored 74. Although his writing fluency was average at 96, his fluency with reading tasks was limited at 81. His writing ability was 81 and passage ability was 82. (Exhibits: S87-96)
40. A P.E.T. meeting was held on February 13, 2002, and Mr. Yarlott’s findings were discussed. Mr. Yarlott noted that his data are “marked by an absence of clear indicators of the presence of a learning disability.” However, he did note that there was strong evidence of a processing disorder in short-term memory. The family informed the team that the neuropsychological examination was almost complete. The outcome of this meeting was an updating of Student’s classroom modifications. (Exhibits: S85-86, P186-193)
41. Dr. Julia Domino’s neuropsychological evaluation was completed at the end of February 2003. In her testing, Dr. Domino administered the WISC-III, Children’s

Memory Scale, Halstead-Reitan Neuropsychological Test Battery, Wechsler Individual Achievement Test-II (WIAT-II), Rey-Osterrieth's Complex Figures Test, Multilingual Aphasia Exam, Minnesota Multiphasic Personality Inventory-Adolescent Form (MMPI-A) and the questionnaires from the Anser System, as well as the Structured Interview for Diagnostic Assessment of Children, a parent interview and a clinical interview of Student. She also reviewed the referral information. On the WISC-III, Student received a Verbal IQ score of 87, a Performance IQ score of 96 and a Full Scale IQ score of 90. Student's scores on the Children's Memory Scale were within the average range, except for a score of 88 in Verbal Immediate Index. His WIAT-II scores were significantly below average on Word Reading (68), Spelling (75) and Written Expression (68). She concluded that Student had a language-based learning disability. In her report, Dr. Domino stated "his performance on subtests assessing basic reading and writing skills fell significantly below his level of ability indicting [sic] specific learning disability in those areas." She summed up by saying "[t]he results of neuropsychological testing were consistent with a history of learning disabilities and included deficits in sequential auditory processing, word finding, retrieval of isolated information, and a relative weakness in sensory-motor integration in the left hemisphere." Dr. Domino also noted that, from the results of her projective testing, Student met the criteria for a Dysthymic Disorder and "significant problems were seen for anxiety, low self-esteem and lack of self-confidence." He also met the criteria for ADD/Inattentive Type. Her recommendations included a "structured, repetitious, multi-sensory reading decoding program, similar to the SPIRE, Orton Gillingham or Wilson program. She also recommended an individualized daily program to remediate Student's written language deficits, as well as various modifications, such as ability to tape record lectures, reduced homework assignments and pre-teaching of subject area vocabulary. (Exhibits: S75-84)

42. Dr. Domino's report was completed in mid-march [sic] and a series of P.E.T. meetings were held on April 30, May 23 and June 12, 2003, to consider her findings and recommendations, as well as those of Mr. Yarlott. At one meeting, Mr. Yarlott stated "[y]ou wouldn't say [] there is no LD, it's just that the numbers aren't there..." Mr. Yarlott argued that without a significant discrepancy between ability and achievement, it would not be appropriate to continue Student's coding as Learning Disabled. As a result of these discussions, Student's eligibility category was coded as Other Health Impaired (OHI), and his service plan was amended to include a pull-out remedial reading program for the 2003-2004 school year, to include 160 minutes per week of direct instruction by a special educator in the special education classroom. The I.E.P. included 30 minutes per week of social work services. He would also be on the Sophomore Team, an alternative program where the team members see the same teachers every day and get a higher level of support from those teachers, and he would receive educational technician support in Biology, Math, Social Studies and Health. It was noted in the I.E.P that "[Student] is three grade levels behind his peers." His goals and objectives included two social work goals as well as a reading and writing goal,

- which stated, “[Student] will increase his reading and writing skills to 2 grade levels above his current ability by 6-04.” It was agreed that Student would not have an individualized Behavior Plan but would follow the behavioral standards for the Sophomore Team. If there were behavioral infractions, Sophomore Team members went right to in-school suspensions, rather than starting with detentions. (Exhibits: S41-53)
43. During the summer of 2003, Student attended summer school in order to finish the credits that he still needed for that year, and he also took the Common Assessment in English and Social Studies. The summer program was regular summer school, not ESY services. (Testimony: Mother)
44. Student started xx grade in early September 2003. When he began school, his family had not yet received his I.E.P., which was not sent to them until September 15, 2003. (Testimony: Mother)
45. Soon after school began, Student informed Mother that he was not receiving direct services. In a September 8, 2003 e-mail to Mark Ryder, Mother stated “[o]n Friday, 05SEP03, [Student] attended an eighty minute Tutorial Study class with no direct instruction provided. To take note for week ending 05SEP03, [Student] attended two Tutorial Study classes for total time of 160 minutes with no direct instruction provided by a Special Education Teacher. [Student] has not been introduced to his new Case Manager for this year. During both Tutorial Study classes of week noted, there has [sic] been no Special Education Teachers present in the classroom.” She received no response to this e-mail. After making inquiries of other staff, Mother was told that Marge Bachelder was Student’s case manager. After contacting Ms. Bachelder, Mother was told that there was no teacher available for [Student’s] reading instruction and there would not be a teacher any time soon. Ms. Bachelder stated that the teachers were told that most direct instruction would now take place within the regular education classrooms, due to the “No Child Left Behind Act.” A Sophomore Team meeting was held on September 23, 2004. At this meeting, Ms. Bachelder stated, “You have to be aware there is no reading class. [Student] isn’t receiving individualized reading.... There is no one to teach it at this level and he is not the only one that has it in his IEP.” Brian Clark, however, was under the impression that there would be a reading class available for Student. (Testimony: Mother, M. Bachelder, B. Clark; Exhibits: P121, P128, P133)
46. On September 23, 2003, Student received an in-school suspension for misbehavior. (Testimony: Mother)
47. A P.E.T. meeting was held on October 16, 2003. The family’s advocate also noted that Student’s I.E.P. included a reading program, which was not being delivered. He also suggested that a positive behavioral intervention plan be created. No changes were made to student’s I.E.P. or service plan at this meeting. (Testimony: Mother; Exhibits: P84-107)

48. On October 27, 2003, Student received a three-day out-of-school suspension. Earlier that day, he refused to do a packet of schoolwork and was sent to an in-school suspension. During that time, he used abusive language towards Jeffrey Porter, a teacher. Student then received the out-of-school suspension. (Testimony: Mother; Exhibits: P70, P73, P78, P80)
49. On October 29, 2003, Mother e-mailed Mark Ryder and requested an immediate P.E.T. to address the issues of a functional behavioral assessment and a behavior plan. She requested that he respond immediately with times and dates for a meeting. (Testimony: Mother; Exhibits: P79)
50. A P.E.T. meeting was held on November 12, 2003. Teacher reports were given to the team. In pre-algebra, Student's first quarter average was 91, in English it was 82, in U.S. History it was 60, and in Home Chefs it was 80. Mr. Schrader, P.E.T. coordinator, reported that "recent eligibility minutes were not specific as to how [Student's] disability was manifested and it was necessary to have another eligibility PET to clearly determine the parameters of [Student's] disability." It was also decided that an "appropriate intervention for [Student] would be a behavioral intervention plan designed by the social worker and other appropriate staff members." The team determined that classroom observations would be completed. The family gave signed permission for the classroom observations, but crossed out all other categories of testing listed on the form, including "Psychological Evaluation," which includes use of "parent/child interviews, projective tests, Child Behavior Checklists, Attention Deficit Disorder Evaluation Scales, etc." The family also disagreed with the decision to reconsider [Student's] eligibility and to have the social worker be responsible for designing a behavioral intervention plan. (Testimony: Mother; Exhibits: P55-66, S26-35)
51. On November 18, 2003, the social worker, Ms. Curlew, prepared a "Responsibility Contract," which was signed by Student and Mr. Porter. This document stated that Student would: "(1) Get list of work from Sophomore Team to be completed in tutorial study; and (2) monitor his own workload and seek Mr. Porter out for extra help as needed, and to get a break (i.e. leave class). The document stated that Mr. Porter would use non-verbal cues for distraction (finger on desk up to 3 times). On third cue, Mr. Porter would speak to Student in hall. On return to class, if Student continues to distract (talk, sleep, write notes), Student will be sent to in-school suspension for the remainder of the class. An outburst will result in an automatic out-of-school suspension." This plan was never discussed by the P.E.T., nor was a copy given to the family. (Exhibits: S25)
52. On November 24, 2003, Student was in history class participating in a mock trial. The teacher, Mr. Phillips, asked Student to remain after class so he could speak with him. Student decided not to remain and when he attempted to leave, Mr. Phillips tried to stop him. Mr. Brian Clark, head of the Sophomore Team, tried to intervene and Student used profanity towards him. Student left the building,

another teacher went to bring him back and he used disrespectful language towards this teacher. Student was given a five-day out-of-school suspension at that time, and the principal, Mr. Stickney, stated that he intended to ask the superintendent for an additional five-day suspension. (Testimony: Mother, B. Clark; Exhibits: S12-17, P38)

53. On December 4, 2003, Mother wrote a letter to Mr. Ryder, in which she noted that December 5th would be Student's eleventh day of suspension for the year and asked for information about what arrangements would be made to continue Student's special educational services during his continuing suspension and possible expulsion. Student began receiving tutorial services following his ten-day suspension. (Testimony: Mother; Exhibits: P22, P36)
54. A manifestation determination meeting was held on December 11, 2003. At this meeting, the family's advocate raised the issue of the school's failure to develop and provide a behavior plan. Mr. Schrader, the P.E.T. coordinator, stated that they did have a behavior plan and showed the family a copy of the "Responsibility Contract." When the advocate asked whether this plan had ever been discussed by the P.E.T., Mr. Schrader stated that it did not have to, since it was only between Student and Mr. Porter. Mr. Schrader stated that the school board would be considering expulsion, but since Student's suspension was ending he could return to the high school temporarily. He would not, however, be permitted to continue on the Sophomore Team. When the family's advocate inquired as to what student's schedule would be, he was told that a P.E.T. would need to determine that. When it was suggested that the current meeting was, in fact, a P.E.T. meeting, it was stated that it was only a P.E.T. meeting for the purpose of conducting a manifestation determination and they could not do anything else. At one point, Mr. Schrader said "[t]here was nothing in the I.E.P. regarding, anything regarding cursing....we don't have any testing to reveal any of that part. So with regards to the, actually implementing the I.E.P., we were implementing the I.E.P. at the time." Later in the meeting, during a discussion of what Student's disability was, Mr. Stickney, the principal, commented "So which part of that disability allows him to swear at teachers and be disrespectful?" When the team got to the question asking whether student's disability impaired his ability to understand the impact and consequences of the behavior, Dr.[sic] Yarlott answered "no", and the team moved on. When the family's advocate raised the issue of the school's failure to fully implement the academic portion of Student's I.E.P., Mr. Yarlott stated that the team was not allowed to consider any part of the I.E.P. that was related to Student's academic needs since the only disability they could discuss was Other Health Impaired. The team determined that Student's behavior on November 24, 2003, was not a manifestation of his disability. (Exhibits: P5-30, P31)
55. At the end of the manifestation determination meeting, the family informed the team that they were rejecting the high school placement as inappropriate and without appropriate services in place, they would unilaterally place Student in

another educational environment, and they would be seeking reimbursement from the district. (Testimony: Mother; Exhibits: P29)

56. On January 5, 2004, Student began attending Poland Springs Academy (P.S.A.), where he was placed by his family and where he continues to attend school. P.S.A. is a small school with 70 students. One-third of the students have been diagnosed with ADHD. The student to teacher ratio is between 12:1 and 8:1, depending on the room. Each student has an individualized curriculum. P.S.A. is not licensed by the state of Maine as a special purpose school. They are licensed by the National Association for Private Schools. In the past, M.S.A.D. #61 has tuitioned students into P.S.A. Reports from teachers suggest that Student is making academic progress in this placement and is not exhibiting the behavioral issues that were seen at Lake Region High School. (Testimony: Mother; Exhibits: P1-4)
57. In a letter dated January 5, 2004, David Yarlott informed the family that, because Student was not attending Lake Region High School at the time, he was unable to do the classroom observations that they had consented to. Therefore, he decided to submit Connors' Rating Scales, Rev. and the Behavior Rating Scales for Children (BASC) to teachers and the parents for completion. In his letter, he stated "[sic]" results from structured observation (as provided in behavior rating scales) from at least two settings (school and home) are required. [sic] Copies for the parents to complete were enclosed with the letter. The parents neither contacted Mr. Yarlott about the checklists, nor did they complete them. (Exhibit: S6)
58. In a letter dated January 13, 2004, the family was informed by the superintendent, Klaus-Peter Voss, that Student's expulsion hearing would be postponed pending the outcome of the due process hearing. (Exhibits: S5)
59. In a report dated January 14, 2004, David Yarlott noted that four teachers² completed the Connors' Rating Scales and the BASC³ and "[r]esults from the eight reports were marked by an absence of criteria associated with AD/HD." (Exhibits: S2-4)
60. The family filed a request for a due process hearing on January 26, 2004. (Due Process Request)
61. In early February 2004, the family contacted Richard Doiron, Ph.D., and requested that he review Dr. Domino's findings, as well as complete a record review and administer appropriate interview and rating scales. The goal of his involvement was to clarify the issues about Student's academic needs, and discuss the discrepancies between the Yarlott and Domino findings and the possible reasons for the drop in Student's cognitive scores. Dr. Doiron reviewed Student's

² Mr. Yarlott did not include the names of [sic]any information about those teachers in his report.

³ Mr. Yarlott also noted that the parents had not submitted completed forms.

previous assessments and evaluations and administered the Millon Adolescent Personality Inventory (M.A.P.I.) to Student, the Anser System forms to Student, his parents and the Poland Springs Academy staff, and the Brief checklists that address the issue of executive functioning. According to Dr. Doiron's findings and analysis, Student has major problems with personal regulation and control and with organizing himself and managing his activities. In a one-on-one environment, he does well, but in an ongoing structured situation there are difficulties. He shows very significant problems in general executive functioning and an inability to organize his personal space. The diagnostic criteria used in the M.A.P.I. suggest consideration of a diagnosis of conduct disorder. However, Dr. Doiron believes that Student's defensiveness and negative behaviors are defense mechanisms rather than his true self. Dr. Doiron noted that Student always responded to appropriate help. Furthermore, it was Dr. Doiron's opinion that Student did have a specific learning disability in Reading and Language Arts. He faulted Mr. Yarlott for failing to take into account intrasubtest scatter when considering a learning disability diagnosis. In addition, Dr. Doiron suggested that the decrease in Student's cognitive scores could be due to stress or motivational factors. Because of his inattentiveness, Student also has had a problem with 80-minute classes. (Testimony: R. Doiron; Exhibits: P365-416)

62. When questioned about his review of the notes from the manifestation determination meeting held in December 2003, Dr. Doiron saw a problem with the fact that the school had never instituted any positive behavioral interventions, but only used negative reinforcement. He also noted that Student was not receiving all of the services listed in his current I.E.P., most noticeably the reading program. (Testimony: R. Doiron)

63. In her testimony at hearing, Mother listed the expenses that the family has incurred to date for the Poland Spring Academy placement, as well as the ongoing expenses. The family has paid \$500.00 as a deposit, a \$35.00 application fee, \$416.00 per month tuition, and \$40.00 per hour for three hours per week of multisensory instruction, and transportation costs for 2 daily round trips at 108 miles per day. Mother also testified that she would prefer for Student for [sic] remain at Poland Springs Academy for one more year (through the 2004-2005 school year) and then transition to a school like P.A.T.H.S. (Portland Arts and Technical High School) for part of the school day. (Testimony: Mother)

IV. Discussion and Conclusions

The family in this case seeks reimbursement for Student's unilateral placement at Poland Springs Academy. An award of reimbursement and prospective tuition payments could be made under the *Burlington* and *Carter* line of cases, based on M.S.A.D. #61's failure to provide Student a free appropriate public education and the subsequent unilateral placement of Student in an appropriate private placement. (*Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 361 (1993)).

(a) Did M.S.A.D. #61 fail to provide Student with a free appropriate public education during his xx grade (2001-2002) and/or xx grade (2002-2003) school years?

(b) If a failure to provide a free appropriate public education is found for either, or both, of the above periods, to what remedy is Student entitled?

The I.D.E.A. requires that school districts provide those students identified with disabilities a free appropriate public education (F.A.P.E.), through services and supports that are specified in an Individualized Education Program (I.E.P.). 20 U.S.C. §1412(a)(1)(A), §1413(a)(1), §1414(d)(1)(A).

A review of the facts in this case, show that there were significant substantive violations of the I.D.E.A. that resulted in a failure to provide Student with F.A.P.E. in both his xx and xx grade years.

Student's I.E.P. for the 2001-2002 school year began with no direct academic assistance, despite the fact that **all** of his I.E.P.'s, for the years since his identification as a student in need of special educational services, increased the amount of direct instructional services over the prior I.E.P. In addition, Student's written language goal had not changed for at least two years; nor had he ever mastered the goal. Yet, he went into xx grade with an I.E.P. that essentially provided less intense services than those he had received during the years when he had repeatedly failed to master his written language goal. When Student began running into academic problems, the team stated that it would have to change Student's entire schedule just to give him some direct instructional assistance. Not surprisingly, Student did not meet any of his goals during this school year.⁴

Student also began developing behavioral problems during this school year. Rather than conduct a functional behavioral assessment, as Mother requested, and create a positive behavioral intervention plan, the team created a punitive plan that provided no positive incentives for work completion or any behavioral improvements. The school is required not only to address a student's academic needs, but also behavioral, social and any other relevant needs. This M.S.A.D. #61 failed to do, and this failure alone constituted a denial of F.A.P.E. See 34 C.F.R. Part 300, Appendix A, Q. 38, 64 Fed. Reg. 12479 (March 12, 1999) ("A failure to, if appropriate, consider and address these behaviors in developing and implementing the child's I.E.P. would constitute a denial of F.A.P.E. to the child.") See also *Town of Burlington v. Dep't of Educ., Comm. of Massachusetts*, 736 F.2d 733, 788 (1st Cir. 1984).

Student began his xx grade year at Lake Region High School without an I.E.P. The team was supposed to meet during the first week of school to finalize his I.E.P., but did not meet until October 2, 2002. However, the I.D.E.A. specifically requires that "at the beginning of the school year, each local educational agency must have in effect an I.E.P.

⁴ It is difficult to tell for sure, since there are very few graded I.E.P.'s in the set of documents, but it appears that Student may not ever have met any of his goals since being identified at the end of his xx grade year.

for each student with a disability.” 20 U.S.C. §1414(d)(2)(A); 34 C.F.R. §300.342(a). See e.g. *Gadsby v. Grasmick*, 109 F.3d 940, 951 (4th Cir. 1997).

And, when the team did finally meet, no one from the middle school attended the meeting, so there was no input about Student’s needs, progress or behavior issues during middle school. The team was not even aware that the Middle School team had determined that a psychoeducational assessment would be done. The I.E.P. that came out of that meeting again offered no direct instruction, even though Student had not done well the prior year in the absence of direct instruction.

Almost immediately into the 2002-2003 school year, Student began exhibiting behavioral difficulties. Again, rather than conduct a functional behavioral assessment (as was once more suggested by Mother) and develop a positive behavioral intervention plan, the school developed a behavior plan that was punitive, with no incentives for positive behavior. And, this plan was simply included with the I.E.P. that was mailed out on November 6, 2002, having never been discussed at a P.E.T. meeting.

The evidence is clear that Student’s I.E.P.’s for both the 2001-2002 and 2002-2003 school years were inappropriate. He failed to make even moderate progress towards his goals and his grades fell in the xx grade and fell again in the xx grade. Any educational benefit that he made was, at best, de minimis. He received no meaningful educational benefit during those years and he is therefore entitled to compensatory education services as a remedy. See *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187-188 (1st Cir. 1994) (adopting compensatory education remedy).

The district argues that the First Circuit has made it clear that reimbursement for private school placements is not available as a form of compensatory education. In a recent case, the court stated that compensatory education remedies “involve prospective injunctive relief, which would not encompass tuition reimbursement.” *Ms. M. v. Portland School Committee*, 2004 U.S.App. LEXIS 4446 (1st Cir. 2004). However, a review of the facts of *Ms. M* suggest a very fact-specific situation where the parent failed to meet the procedural notice requirements for receiving tuition reimbursement, and attempted to “refashion her claim for tuition reimbursement as a claim for compensatory education.” This is certainly not the case in this matter, since the family gave proper notice to the school that they would be unilaterally placing Student in another school, and would be seeking reimbursement for that action.

As recently as last year, the First Circuit confirmed that compensatory education is an available remedy when one or more of student’s past I.E.P.’s is found to have been inappropriate:

We know that a child eligible for special education services under the I.D.E.A. may be entitled to further services, in compensation for past deprivations, even after his or her eligibility has expired. See, e.g., *Adams*, 159 F.3d at 682 n.1; *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 188-89 & n.8 (1st Cir. 1993). Such a child’s claim for compensatory education begins to accrue when his or her I.E.P. is so

inappropriate that the child is receiving no real educational benefit. *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 396 (3d. Cir. 1996); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186, 1195 (1st Cir. 1994)

M.S.A.D. No. 35 v. Mr. and Mrs. R., 312 F.3d 9, 17-18 (1st Cir. 2003)

Student is therefore entitled to a compensatory education remedy due to the failure of M.S.A.D. #61 to provide him with F.A.P.E. during the 2001-2002 and 2002-2003 school years. In this case, that would consist of payment for the cost of Student's individualized multisensory reading program, which should continue to be delivered at Poland Springs Academy.

(c) Did M.S.A.D. #61 fail to provide Student with a free appropriate public education during the period from September 2003 through December 2003?

(d) If a failure to provide a free appropriate public education is found for either, or both, of the above periods, to what remedy is Student entitled?

Student began his xx grade year at the beginning of September 2003. However, the I.E.P. that had been developed in June 2003, was not sent to the family until September 15, 2003. Soon after school began, Mother became aware that Student was not receiving the direct services (a reading program) that were specified in his I.E.P. When she was finally able to identify that Ms. Bachelder had become Student's case manager, Mother was told by her that there was no teacher available for Student's reading instruction, and that there would not be a teacher any time soon. Mother then requested a meeting with school staff. A Sophomore Team meeting was held on September 30, 2004. At this meeting, Ms. Bachelder again stated, "You have to be aware there is no reading class. [Student] isn't receiving individualized reading. . . . There is no one to teach it at this level and he is not the only one that has it in his IEP." The school continued to argue in subsequent meetings that the presence of a special education teacher in a regular education classroom, whether or not she was working directly with any given student, constituted direct instruction for that student.

Following a series of behavior incidents, finally resulting in a three-day out-of-school suspension, Mother again requested a meeting to discuss a functional behavioral assessment and the development of a behavioral intervention plan. At the November 12, 2003 meeting, she repeated her request. However, the team merely ordered the social worker to develop a plan. She then created a "Responsibility Contract," signed by one teacher and Student, never reviewed by the P.E.T. and never forwarded to the family.

Once more M.S.A.D. #61 failed to implement Student's I.E.P., which was arguably not even an appropriate I.E.P., given its failure to address Student's behavioral needs. This failure resulted in a denial of F.A.P.E. and one appropriate remedy for this failure is a compensatory education remedy. These services should be designed to restore the student to where he would be had he received F.A.P.E. *See generally Pihl*, 9 F.3d at 187-188 (1st Cir. 1994).

The family is also entitled to recover reimbursement of tuition and related costs for the unilateral placement at Poland Spring Academy (P.S.A.) in January 2004. The school district argues that P.S.A. is not an appropriate placement, by producing a litany of facts, such as not being licensed by the Maine Department of Education as a special purpose school, employing non-credentialed teachers and utilizing curriculum that is not aligned with the Maine Learning Results. However, no statutory, regulatory or case law was cited to suggest that any of these factors would make a placement at P.S.A. inappropriate. The fact is that Student is making academic progress and is showing none of the behavioral issues that had been occurring at Lake Region High School.⁵

Student is therefore entitled to receive reimbursement of tuition and related costs, including transportation, relating to the unilateral placement at P.S.A. in January 2004 and continuing through the 2003-2004 school year.

(e) Did M.S.A.D. #61 err in determining that Student's behavior on November 24, 2003, resulting in his suspension, was not a manifestation of his disability?

Federal and Maine State Special Education law and regulations provide that “the relevant disciplinary procedures applicable to children without disabilities may be applied” to a student with a disability only after the school has conducted a manifestation determination. A manifestation determination review is essentially a meeting of a Student’s team, at which time they must consider all relevant information including “evaluation and diagnostic results,” and “the child’s I.E.P. and placement.” The team then needs to determine that

in relationship to the behavior subject to disciplinary action, the child’s I.E.P. and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child’s I.E.P. and placement; the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action.

34 C.F.R. §300.523(a).

In this case, since the school was recommending to the school board that Student be expelled, it was necessary to hold a manifestation determination review. The district convened this meeting on December 11, 2003; however, the process failed on a number of levels, not the least of which was the process itself. The team failed to give more than minimal consideration to the factors that they were required by law to address. They failed to address Student’s escalating behavioral incidents in the context of his emotional state as discussed in Dr. Domino’s report. They refused to consider the impact on Student’s behavior of any disabilities except for ADHD, arguing that they were not

⁵ It is also a fact that M.S.A.D. #61 has tuitioned student’s [sic] into P.S.A. in the past.

permitted to discuss any diagnoses but the currently operative one. They never considered that Student's mother had requested that he receive social work services on numerous occasions. They simply rushed through the meeting, and came to a conclusion without any discussion or debate about the manifestation determination review factors.

The team also failed to conduct a Functional Behavior Assessment (FBA) at any time prior to the manifestation determination review, despite the fact that Mother had been requesting one for two years. The I.D.E.A. mandates that an FBA be conducted either before, or not later than 10 business days after, the district first removes the student for more than 10 school days within the same school year. 34 C.F.R. §300.520(b)(1)(i); M.S.E.R. §2.10. The district did not, however, conduct an FBA in a timely manner or, in fact, at all.

In addition to the procedural inadequacies cited above, the school district failed to meet its substantive burden. The I.D.E.A. is clear that the school district bears the burden of demonstrating that a student's behavior was not a manifestation of his disability. The regulations make this clear:

In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of §300.523(d).

34 C.F.R. §300.525(b)(1); 20 U.S.C. §1415(k)(6)(B)(i); *see also Richland Sch. Dist. V. Thomas P.*, 32 IDELR 233 (W.D. Wis. 2000) (Burden on school district to establish that student's involvement in vandalism incident was not manifestation of his ADD and dysthymia).

The school district, therefore, bears the burden of demonstrating that during the period in question, fall 2003, "in relationship to the behavior subject to disciplinary action, [Student's] I.E.P. and placement were appropriate" and the I.E.P. was being implemented; that Student's disability did not impair his ability to understand the impact and consequences of his behavior; and, that Student's disability did not impair his ability to control his behavior. 20 U.S.C. §1415(k)(4)(c)(ii); 34 C.F.R. §300.523(c)(2). The school district failed to produce evidence sufficient to meet this burden.

The school district argues that the question to be considered is whether Student's I.E.P. was appropriate in relationship to his specific conduct on the day in question. They further argue that there is no evidence that failure to fully implement the academic portion of the I.E.P. had any relationship to the behavior, or that it would have had any practical effect on Student's conduct.

This argument is unpersuasive for a number of reasons. First, the district was not only failing to fully implement the academic portion of Student's I.E.P., it had not even addressed his behavioral needs, having failed to conduct an FBA or develop a positive behavioral intervention plan. Second, it was the burden of the district to produce

evidence about whether there was in fact a relationship between the behavior in question and any failure to implement the I.E.P., and this they failed to do.

In that it has already been decided that Student's I.E.P. for the 2003-2004 school year was inappropriate, the school district has failed to produce sufficient evidence supporting the first of the three factors to be considered. Not only is the 2003-2004 I.E.P. found to be inappropriate, but Student began the school year without any I.E.P. in place. When the I.E.P. was finalized in October 2003, even that portion that purported to address Student's academic needs, the reading program, was never implemented. Requests for a positive behavioral intervention plan were ignored. The district was fully aware of Student's behavioral issues. Yet, rather than develop a positive behavioral intervention plan that had a chance of succeeding, the social worker developed a "Responsibility Contract." This contract would itself be violative of the law if it was intended to substitute for a behavior plan.

The team, when making the manifestation determination, failed to consider all relevant evidence, failed to conduct an F.B.A. as required, and failed to carry its burden of demonstrating that, in relationship to the behavior in question, Student's I.E.P. was appropriate and being fully implemented. It was therefore an error to determine that Student's behavior on November 24, 2003, resulting in his suspension, was not a manifestation of his disability.

Did M.S.A.D. #61 violate Student's right to be evaluated only upon proper consent of his parents?

At the November 12, 2003 P.E.T. meeting, the team determined to conduct classroom observations of Student, in order to complete Student's triennial evaluation. The family consented to these observations, and signed a consent form at that time. When completing the consent form, they noticeably crossed out all other categories of testing, including the category of Psychological Evaluations. It was clear, therefore, that the family did not consent to the administration of any instrument falling in this category, which includes "parent/child interviews, projective tests, Child Behavior Checklists, Attention Deficit Disorder Evaluation Scales, etc."

However, when Mr. Yarlott sought to complete the classroom observations, Student was out of school following his suspension for the November 24, 2003 incident. Mr. Yarlott's appropriate action under those circumstances would have been to contact the family and ask them to consent to his administration of other instruments, to conduct his classroom observations at Poland Springs Academy, or to reconvene the P.E.T. and seek their guidance.

However, Mr. Yarlott did none of these things. Rather, he took it upon himself to send out behavior checklists for completion by Student's teachers and parents, stating that "results from structured observation (as provided in behavior rating scales) from at least two settings (school and home) are required."

It may have been frustrating for Mr. Yarlott to have been charged with completing the observations of Student and not be able to do so. However, it was inappropriate for him to go ahead with alternative assessments without parental consent. The family was not informed that he was planning to use behavior checklists to assess Student and the law is clear that parents must be “fully informed of all information relevant to the activity for which consent is sought.” Likewise, the consent form must describe the “activity and list the record[] (if any) that will be released.” 34 C.F.R. §300.500(b)(1).

The district argues that under Maine regulations, Mr. Yarlott had the right to choose an alternative assessment, in this case the behavior rating scales. Maine Special Education Regulation §9.12 provides that “[a]n evaluator may, based on clinical judgment, administer additional assessments or evaluations in addition to those specified in the notice.” However, the language of the regulation is most appropriately interpreted as permitting an evaluator to substitute instruments within categories, such as one cognitive test for another, rather than permitting an evaluator to expand into a whole new category of instruments, for which use the parents had not given permission. In addition, Mr. Yarlott does not even identify those teachers from whom responses were received, even though he makes diagnostic conclusions based on those teachers’ responses.

The family did not give Mr. Yarlott consent to utilize either the BASC or the Conners’ Scales to complete an assessment of Student and his use of the those instruments was a violation of the I.D.E.A. and the Maine Special Education Regulations.

Did M.S.A.D. #61 violate Student’s rights by removing his eligibility categorization as a student with a Learning Disability?

Student was identified as learning disabled in May 1997, with a specific learning disability in written language and, at that time, began receiving special education services. Additional testing was conducted in April 2000, by Alice Gruba, Licensed Psychological Examiner. Following a consideration of Ms. Gruba’s findings, Student’s team continued to find him eligible for special education services under the category of Learning Disabled. Student continued receiving services for his learning disability up until the spring of 2003.

On December 19, 2002, and February 13, 2003, David Yarlott, School Psychologist, administered cognitive and achievement tests to Student. Mr. Yarlott noted that his data “are marked by an absence of clear indicators of the presence of a learning disability,” noting, however, that there was strong evidence of a processing disorder in short-term memory.

In January 10, 2003 and February 15, 2003, Dr. Julia Domino conducted a neuropsychological evaluation of Student. In her report, Dr. Domino stated that Student’s “performance on subtests assessing basic reading and writing skills fell significantly below his level of ability” and opined that Student has a specific learning disability in those areas. She noted that her results were “consistent with a history of learning disabilities and included deficits in sequential auditory processing, word finding,

retrieval of isolated information, and a relative weakness in sensory-motor integration in the left hemisphere.” Dr. Domino also made a finding of ADD-Inattentive type.

At a P.E.T. meeting on April 30, 2003, the team reviewed and discussed the two reports. During that meeting, Mr. Yarlott stated “[y]ou wouldn’t say [] there is no LD, it’s just that the numbers aren’t there.” However, despite the fact that Dr. Domino had made clear findings that Student had processing deficits and a learning disability, and Dr.[sic] Yarlott suggested that he had found strong evidence of a processing disorder, the team recoded Student as Other Health Impaired.

Maine Special Education Regulations clearly articulate the standard for identifying a student as learning disabled: “A student with a specific learning disability exhibits a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations....” and a “severe discrepancy between the student’s achievement and intellectual ability” in one or more academic areas listed in the regulations. M.S.E.R. §3.11.

Mr. Yarlott, however, still appears to hold to the concept that it is necessary to find a specific numerical relationship between achievement and ability, a concept that is no longer applicable, either in the state regulations or in federal law. Likewise, Mr. Yarlott never coherently addressed the issue of the significant drop in Student’s cognitive scores, nor the wide scatter among subtest scores, a failing that Dr. Doiron pointed out in his testimony.

Since 1997, it has been clear that Student has significant difficulties with written language and spelling, and for six of those years he was identified as a student with a specific learning disability in the area of written language, and received services while coded as such. Student’s educational needs continue to center around these same written language weaknesses, and there was no rational reason whatsoever to recode Student’s eligibility category to Other Health Impaired. The P.E.T. therefore erred when it removed Student’s learning disability eligibility and recoded him as Other Health Impaired.

V. Order

1. Upon receipt of appropriate documentation of costs and payments, M.S.A.D. #61 shall reimburse the family for tuition and other costs, including transportation, related to Student’s unilateral placement beginning in January 2004. M.S.A.D. #61 shall continue paying these costs through June 2004.
2. Upon receipt of appropriate documentation of costs and payments, M.S.A.D. #61 shall reimburse the family for the costs of Student’s multisensory direct reading instruction, as a form of compensatory education. Such payments will continue through June 2004.
3. Within 45 days after receipt of this decision, the district shall convene a P.E.T. meeting, at which time an I.E.P. shall be developed, to incorporate the

multisensory reading program as part of Student's service plan, and to change Student's disability coding to Specific Learning Disability. The team shall also develop an appropriate I.E.P. for the 2004-2004 [sic] school year, said I.E.P. to be completed and distributed to the family by May 25, 2004.

4. The P.E.T.'s determination that Student's behavior on November 24, 2003 was not a manifestation of his disability shall be amended to state that the behavior was a manifestation of his disability. All relevant paperwork shall be amended accordingly.
5. The school district shall prepare a memorandum clarifying the federal and state law and regulations regarding parental consent for testing, and will distribute it to all appropriate personnel. The district shall also prepare a memorandum clarifying the federal and state laws and regulations regarding the standards for identifying a student as learning disabled, in particular the need to consider numerous sources of information, rather than relying on a statistical discrepancy between ability and achievement. A copy of both memoranda and the list of those who received them shall be submitted with the proof of compliance materials.
6. When the district has fully complied with this order, compliance data and information shall be submitted to the hearing officer as well as to the Due Process Consultant.

Dated: _____

Lynne A. Williams, J.D., Ph.D.
Hearing Officer

