State of Maine
Special Education Due Process Hearing Decision
December 10, 2004

Parent v. SAD #37, Case No. 04.141H

REPRESENTING THE PARENT:	Chad Hansen, Esq. Disability Rights Center
REPRESENTING THE SCHOOL:	Eric Herlan, Esq. Drummond Woodsum & MacMahon
HEARING OFFICER:	Carol B. Lenna

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 mother, resident of Maine School Administrative District #37, brings this case on behalf of her son, whose date of birth is xx/xx/xxxx. The student is eligible for special education services as a student with an emotional disability. The parent filed a request for due process on October 15, 2004. She seeks resolution regarding the appropriate placement for the student.

In preparation for the hearing, the parties met in a prehearing conference via telephone on Monday, November 1, 2004. At the prehearing, the parties disagreed about the student's "stay put" placement during the pendency of the due process proceeding. The parties provided written arguments on this issue to the hearing officer on November 3. In a follow-up telephone conference with the parties on November 4, the hearing officer issued an oral decision that the tutoring program was to be the stay put program based on the conclusion that the parties had "agreed otherwise" that "the student requires two hours of tutoring a day in a separate setting to meet his needs."

Documents and witness lists were exchanged by mail. The hearing convened on November 9 and November 10. The parties jointly introduced 90 documents (242 pages) which are labeled "exhibits" in the body of the decision. The parent introduced four additional documents (9 pages) which are labeled "parent exhibits". Eleven witnesses gave testimony.

At the conclusion of the hearing, the parties were given until November 19 to submit final written arguments. In addition, the hearing officer instructed the district to

provide a report of tutoring sessions from September 18, 2004 through November 29, 2004. The record remained open until November 29, 2004 for the receipt of that report.

On November 18, the parent's attorney contacted the hearing officer and the district's attorney, Mr. Chad Hansen [sic], to request the admission of additional evidence produced by Mr. Charles Rambo, a counselor involved with the student in the spring of 2004 when he attended school in Broadview, Montana. Mr. Rambo conducted a Taylor-Johnson Temperament Analysis with the student by telephone, on or about November 17, 2004. Mr. Hansen requested that the results of this assessment be considered by the hearing officer, arguing that it presented objective, straightforward information about the student. The school requested a copy of the evaluation report, and after reviewing the report, exercised its right under 34 CFR §300.509(a)(3) to have this evidence excluded from the hearing. (Any party to a hearing conducted pursuant to §300.507…has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing.) The district objected to the information, stating that the data was not clear, and raised questions about test validity and test administration. The parent asked that the hearing officer consider this evidence in spite of the district's objection.

The hearing officer concluded that there was no compelling reason to override the district's objection and accept this evidence into the record. The student recently completed a fairly extensive psychological and educational evaluation. While the parent remarked that she considered the evaluation to contain some invalid representations of her son, she presented no evidence to suggest that the evaluation failed to meet the standards set forth in 34 CFR §300.532. Furthermore, the circumstances denied the district the ability to question Mr. Rambo on the record regarding the purpose of the instrument, the testing conditions and the interpretation of the results of the assessment. The request to have this assessment considered by the hearing officer was denied.

On November 24, the parent's attorney requested the admission of yet another document into the hearing record. Again, setting aside the district's right to exclude this document outright, the hearing officer determined the information to be irrelevant to the hearing issues.

Closing arguments were received on November 24, 2004. No additional evidence was entered into the report except the requested tutoring calendar.

Following is the decision in this matter.

I. Preliminary Statement

The student enrolled in the district on September 16, 2004, as a transfer student with an existing IEP. That IEP placed him in a special education program described as a

public school, self-contained classroom for students with emotional disabilities, with one-on-one instruction. There is no comparable classroom in the district. The district convened a PET on September 17, 2004. The minutes of the meeting state that the team agreed that the student will receive tutoring two hours a day in a separate setting. The tutoring began on October 15, 2004.

The parent argues that the district has failed to offer and provide the student with a free appropriate public education in the least restrictive educational alternative since his enrollment in the district. They seek compensation for this alleged failure. In addition, they argue that the tutoring should not be considered the stay-put placement during the pendency of the due process proceeding because it is not the last agreed upon appropriate placement to meet his special education needs. The parent contends that she did not agree with the PET minutes which stated there was agreement, and has asked that the minutes be amended to reflect this disagreement.

The district does not defend tutoring as the appropriate long-term placement for the student, but argues that the placement sought by the parent was not available in the district. Ten hours of tutoring per week was determined by the PET as a short term solution until further placements could be explored. They argue that tutoring was the last agreed upon placement between the district and the parent, and thus is the stay-put placement for the duration of this proceeding.

The district now offers placement at KidsPeace, a local day treatment facility for students with emotional disabilities.

II. Issues

1. What is the student's stay put placement during the pendency of the "administrative or judicial proceeding"?
2. Has the student's program since October 15, 2004, tutoring in a separate setting, provided the student a free appropriate public education? If not, what, if any, remedy is he entitled to receive?
3. Does the district's offer at the October 29, 2004 PET--to implement the student's IEP in the KidsPeace day treatment program--provide him with a free appropriate pubic [sic] education? If not, what is the appropriate program in which he will receive FAPE?

III. Findings of Fact

1. The student is xx years, xx months old (DOB xx/xx/xxxx). He is eligible for special education services as a student with an emotional disability. He is

diagnosed with Attention Deficit Hyperactivity Disorder, for which he takes Ritalin and Clonidine. He and his mother currently reside in SAD 37, having moved there in September 2004. (Dispute Resolution Request Form; Testimony Parent)

2. The student has attended as many as 14 different schools in a number of states since he entered school in 1997. The student has always received special education and supportive services within the public school, in a range of restrictive settings. (Exhibit 47, 82, 93, 125, 127, 128, 140, 149, 192, 217, 227, 230; Testimony Parent)

3. When the parent enrolled the student in the district on September 16, 2004, she presented the student's educational records to the principal. There are gaps in the student's cumulative record based on that file. (Testimony Sawyer, Hodgkins, Parent)

4. While the student was in xx grade, his mother referred him for a special education evaluation, which was conducted in September 1998. The resulting evaluation document notes that the student achieved a standard score of 104 in General Conceptual Ability as measured by the Differential Ability Scales (DAS), and that he exhibited clinically significant T-scores in Hyperactivity, Aggression, Conduct Problems, Anxiety, Depression [sic] Withdrawal and Adaptability on the Behavior Assessment System for Children Rating Scale (BASC) [1]. There is no documentation of an IEP team discussion of this evaluation, but by February 1999 the first IEP in the record shows that he was considered a student with an emotional disability[2] and a specific learning disability. All IEP documents included in the record after that date identify him as a student with an emotional disability only. (Exhibit 67, 85, 96, 130,142, 158, 172, 192, 218, 227, 230-232)

5. A report, from a North Carolina Mental Health Center dated September 2000, states that the student "received mental health services [in Ohio as well as Wisconsin] for a variety of symptoms including hyperactivity, defiance, physical aggression, poor impulse control and suspected depression… [H]e was suspended frequently in other state schools he attended… He is often isolated from others, becomes easily agitated by others, feels that others do not like him and try to harm him… Diagnoses that mom reported include: Oppositional Defiant Disorder; Conduct Disorder, ADHD, Dyslexic, Depressive Disorder and Learning Disabled." A follow-up report by the staff psychiatrist in October 2000 notes that the student "has been having

[1] The report is obviously incomplete, with page one ending mid-sentence and not picking up again on the next page.

[2] The actual term used in this report is "emotionally handicapped." The term used to describe the student varies from document to document, depending on the state, but in all cases identifies a student with an "emotional disturbance" as described in IDEA [34 CFR 300.7(4)], or the Maine equivalent of a student with an "emotional disability." [Chapter 101, §3.5] For the purposes of this decision the term "emotional disability" is used throughout.

disruptive behavior and increased activity both at school and at home… He also reports that he has been seeing 'shadows' and hearing a 'voice' telling him to do certain things." The psychiatrist reports diagnoses of Attention Deficit Hyperactivity Disorder and Psychotic Disorder, NOS. A report of a follow-up visit, dictated by the same psychiatrist in November 2000, states that the student confessed to his mother that he "made up a story" about having hallucinations. (Exhibit 185, 187, 189-190)

6. A school-based evaluation was conducted in North Carolina by Valery Davis, MA, CAS[3] in December 2000 when the student was in xx grade. Using projective techniques, sentence completion techniques, clinical interview and observations, the evaluator concluded that the student "demonstrated a significant number of emotional indicators, which suggest significant emotional distress." She recommended outside counseling services to address family-based issues. School documents from that period indicate the student was placed in a self-contained class for students with emotional disabilities. (Exhibit 192, 197-200, 201)

7. A partial IEP, dated October 2001, during the student's xx grade year, notes that the student is being placed in a separate special education setting. (Exhibit 173)

8. A psycho-educational evaluation was conducted in January 2002 by Richard Perry, Ph.D. while the student resided in Wyoming.[4] Results of the Wechsler Intelligence Scale for Children – 3rd Edition (WISC-III) show the student obtained scores in the average range with a Full Scale IQ. score of 101. Scores obtained on the Woodcock Johnson – III (WJ III) were generally in the average range with the exception of Written Expression, which was 17 points below his expected achievement. Further evaluation in this area was suggested. The evaluator concluded that the student "appears to have appropriate diagnoses of Attention-Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder… It does appear that [the student's] emotional difficulty interferes with his ability to function in the classroom setting and interferes with his ability to perform academic tasks." (Exhibit 165-169)

9. An IEP from a North Carolina school district, dated February 2002, placed the student in a separate special education classroom and notes that the student "has difficulty with grade level material and controlling behavior." (Exhibit 163)

10. An IEP from a Michigan school district, dated May 2002, placed the student in a self-contained classroom for students with emotional disabilities with a behavior plan "through the social skills training program." (Exhibit 141-146)

[3] Certificate of Advanced Study.
[4] This evaluation also is missing information as it skips from page 1 to page 3. Based on the assessment techniques listed by the evaluator, Page 2 seems to address the "current mental status examination".

11. An IEP from a different Michigan school district, dated November 2002, placed the student in a self-contained classroom for students with an emotional disability (6.5 hours per day), with a behavior plan and one hour per month of social work services. (Exhibit 129-135)

12. An attendance sheet shows that the student attended a school in Kentucky from February 6, 2003 until February 26, 2003. No other documents from this placement appear in the record. (Exhibit 127)

13. Notes from a special education transfer student review meeting in Hinsdale, Montana, dated March 19, 2003, stated that the student would be placed in the resource room for most subjects, with reading in the regular classroom. No other documents from this placement appear in the record. (Exhibit 126)

14. In September 2003 the student began school in the West Des Moines, Iowa, Community Schools. He was placed full-time in a self-contained, social skills program for students with emotional disabilities, which was in the district but not in his neighborhood school. A functional behavioral assessment conducted in conjunction with this placement concluded that the behaviors of greatest concern were "story telling, telling untruths, and difficulty accepting consequences in a [sic] appropriate way." These were considered to be attention-seeking behaviors. His behavioral support plan addressed "appropriate peer and adult interaction" and "accepting consequences and redirection appropriately" using a social skills class daily for at least 30 minutes. Progress data from this period indicates limited progress toward meeting stated goals. His teacher testified that the student fit into her class, but that he did not do well when in the general school environment. She felt he needed additional support and supported his referral to a local practitioner for therapy. After approximately two months in the program, the student left the district on November 6, 2003. (Exhibit 97, 107, 110-124; Testimony Fritz)

15. The school record picks up again on April 1, 2004 after the student transferred into the Broadview School District, Broadview, Montana. While in this district, the student's IEP placed him in a combination resource and regular classroom. The behavior goal in the IEP states that, "In the short time that [the student] has been here he has been involved in several conflicts with students. He is a disruptive member of any classroom with his constant complaints and demands." In addition to his academic support, the program included counseling services for 30 minutes per week. His counselor throughout this period, Mr. Charles Rambo, stated that the student came to his office when he needed to leave the classroom, often one to three times per day several times a week, in addition to their scheduled weekly session. He described the student as depressed, hyper-vigilant, and taken to "flights of fancy" during those sessions. He provided instruction in the use of journaling techniques and behavior management strategies as part of the program.

The student remained in this placement for 29 school days, leaving the district before the end of the school year. There is no progress data from this period, although Mr. Rambo testified that he felt the student did show a better ability to handle social situations. (Exhibits 84-92; Testimony Rambo, Parent)

16. The parent signed a "notice of intent to conduct an evaluation" while the student was in the Broadview School District. There is no evidence that this evaluation was conducted. The student's counselor stated he did not conduct an evaluation of the student during the student's tenure at Broadview, His diagnostic impression of the student was that he suffered from dsythymia, adjustment disorder and attachment disorder. (Exhibit 83; Testimony Rambo)

17. The student began the current school year on August 9, 2004 in the xx grade at Smyrna Elementary School in Carteret County Schools, North Carolina. The IEP team met on August 11, 2004. On that date, the team developed an IEP that placed the student in a combination regular and resource room setting. Also on that date, the parent signed a "consent for evaluation" form. Soon after school began, a "shadow" was assigned to be with the student through out the school day. After multiple disciplinary actions, which were increasing in frequency and intensity, the IEP team met to consider a program change. (Exhibit 67, 78, 79; Testimony Dietzler)

18. On August 25, 2004, the team amended the IEP and placed the student in a self-contained classroom for students with an emotional disability, with one-on-one instruction and restricted access to non-disabled peers. This decision was driven by behavioral events that were becoming more frequent and more intense. The team intended this program to be an interim placement until the evaluation was completed. The principal stated that there was concern among school staff that the district was not meeting the student's needs, and that he required a different type of program. (Exhibit 67, 76; Testimony Dietzler, Armistead)

19. The Carteret County school psychologist, Ms. Carolyn Armistead, MA, CAS, conducted a psychological and academic evaluation on August 18 and 25, 2004. The evaluation consisted of an extensive records review, a social/developmental history with the mother as reporter, administration of behavior rating scales with the student's teachers and his mother as reporters, and administration of individual standardized psychological and educational tests. In addition, she made behavioral observations based on her interview with the student during one of his "outburst incidents" at school.

    Tests administered were: Woodcock-Johnson Tests of Cognitive Abilities - III, Woodcock-Johnson Tests of Achievement – III, Bender Visual Motor Gestalt Test, Achenbach Youth Self Report, Adolescent Symptom Inventory – 4 (ASI-4), Attention Deficit Disorder Evaluation Scale, Emotional and

Behavioral Evaluation Scale – 2 (EBPS-2), and Projective Testing using House-Tree-Person, Kinetic Family and Thematic Apperception Test.

Results from cognitive testing led the evaluator to determine that the student posses a General Intellectual Ability range of 103 to 112. His overall cognitive abilities are in the average to above average range, with Fluid Reasoning being a relative strength and Short-Term Memory a relative weakness. Results of achievement testing show that he has average to superior reading skills, low average to average math skills, and very low to low average written expression skills.

Information from behavioral/emotional testing led the evaluator to report that the student "has an extremely poor self-concept and significant feelings of inadequacy about himself. He tends to be overly sensitive to his environment and events that occur. [He] has developed a suspicious, hostile and defensive attitude and expects life to be against him. . . In addition, there was overwhelming evidence in the [projective] drawings that [he] uses fantasy to escape the stress of everyday life." Symptoms of dsythymia, traits of possible obsessive tendencies (inability to get distressing thoughts off his mind) and excessive vocal noises were noted by teacher reports on the ASI-4. The EBPS-2 scale indicated that teachers saw significant problems in the areas of interpersonal relations, and inappropriate behavior, and significant amounts of unhappiness/depression. She concluded that the student's poor impulse control and hyperactivity likely "meant he did not develop the early skills of sharing and turn taking" and that "socially acceptable socialization skills and how to read body language…did not develop even after medication was used to help control his activity and impulsive nature. . . [T]hus, through the years he continued to have discipline difficulties without the guidance needed to develop more appropriate skills. . . As a result, [the student] has developed a suspicious, hostile, and defensive attitude that has become routine, occurring automatically without any forethought."

The report recommends that, "Behaviorally and emotionally, [the student] will perform better in an environment in which he feels safe and nurturing [sic], one that is consistent and structured and one that is supervised well. He appears ill equipped at this time to deal with the social demands of the middle school program. . . [He] could benefit from specific instruction in social skills; a daily basis would be most beneficial. . .To also aid [the student] in understanding his impact on others and his world, role reversals could be used in a therapeutic sessions (sic) where an adult takes his role and he takes the teacher's role or administrator's role. Role reversals may be useable in social skills teaching sessions, as well, provided an emotionally safe situation with the other peers is present." (Exhibit 78, 47-63; Testimony Armistead)

20. The student left the district before the evaluation report was shared with the parents and the IEP team. Ms. Armistead stated that, had the team met to discuss the evaluation, she would have recommended that the student be placed in a highly structured, well-supervised program that would provide academic instruction to address achievement deficits and daily social skills training to assist him to deal with his emotions appropriately with an ability to practice these actions in safe role-play. She stated that the staffing should include a teacher who has experience working with students with similar problems as this student, as well as counseling support. She described a physical set-up that included a separate space for the student to decompress when necessary. Finally, she stated that therapy, focused on the family and the student's strengths within the family, should be part of the program. She would not have recommended that the student return to a mainstream setting in the short term, but rather that this become the long-term goal. (Testimony Armistead)

21. The student transferred into SAD 37 on September 16, 2004 with the IEP from North Carolina. This IEP described a placement that did not exist in SAD 37. Susan Hodgkins, director of special education for SAD 37; John Sawyer, Principal of the Cherryfield Elementary School; and Stephen Young, special education teacher in the Cherryfield school each spoke with personnel from North Carolina to inquire about the student and his program there. A copy of the recent evaluation was faxed to the school that day, as well. (Exhibit 45, 46, 67-72; Testimony Armistead, Dietzler, Hodgkins, Young, Sawyer)

22. SAD 37 convened the PET on September 17, 2004 to discuss program options for the student. Ms. Hodgkins reviewed the recent evaluation with the parent[5] and the team. After a discussion of the evaluation and the student's previous placement in North Carolina, it was decided that the student would receive tutoring two hours per day in a location separate from the elementary school. The minutes of the meeting were written during the meeting and were handed to the parent at the conclusion of the meeting. The minutes state that, "The Team agreed that the student requires two hours of tutoring a day in a separate setting to meet his needs." No disagreement of this decision was voiced at the meeting or in the subsequent three weeks. (Exhibit 39; Testimony Hodgkins, Sawyer)

23. On October 12, 2004, Ms. Hodgkins and the parent agreed that a follow-up PET would convene on October 19. Representatives of the KidsPeace program were invited to come and explain their programs. (Exhibit 29, Testimony Hodgkin)

24. Unable to locate staff, the district did not start the student's tutoring program until October 14, 2004. There were six days between October 14 and December 1 when no tutoring was offered, although tutoring was offered on

[5] This was the first time the parent had seen the evaluation report.

three days when school was not in session. (Exhibit 234-235; Testimony Parent, Hodgkins, Tenney)

25. The parent requested a due processing hearing on October 15, 2004. (Dispute Resolution Request Form)

26. At parent request, through her attorney, the district cancelled the October 19 PET meeting and rescheduled it to convene on October 29, 2004. The invitation for KidsPeace staff to attend the meeting was rescinded, also at the parent's request. (Testimony Hodgkins)

27. A letter from the parent's attorney, dated October 20, 2004, alerted the district that the parent was in disagreement with the determination stated in the September 17, 2004 PET minutes, and that she wished to have the minutes amended to reflect that she did not agree to limit the student's education to tutoring outside of school. (Exhibit 8)

28. The PET convened on October 29, 2004. A new IEP was drafted. Special education services included full-time special education placement in a separate day school, counseling one hour per week, social work services up to two hours per week, and consultation (undefined) four hours a month. The three annual goals described instructional objectives to assist the student to 1). develop coping skills and behavior strategies; 2). improve reading skills; and 3). improve math skills. The district proposed that this IEP be implemented in the KidsPeace day treatment program. There was no disagreement over the goals and objectives stated in the IEP, but the parent rejected the placement offer. (Exhibit A1-A4, A-5; Testimony Hodgkins, Parent)

29. The KidsPeace day treatment program is located in Ellsworth, Maine, approximately 35-45 minutes from the student's neighborhood school. It offers educational, psychosocial and psychiatric services for 55 adolescent students, aged xx-xx, who live in Washington and Hancock County [sic]. There are currently two xx -xx grade groups, each consisting of approximately 12 students, grouped according to academic level. Classrooms are highly structured, [sic] staffed with a special education teacher and an educational technician. In addition, the program includes a full-time psychologist, psychiatrist and social worker. Social skills training and appropriate response to emotional situations is [sic] a focus of the program throughout the day. Depending on the student's individual plan, individual and family therapy is available. The population of students currently in the program varies, but includes students who carry a diagnosis of conduct disorder, dysthymia/depression, attentional disorders, adjustment disorders, oppositional defiant disorders, and mood disorders. Acceptance into the program is determined by a probability that the student will benefit from a structured therapeutic setting in order to achieve academic success, not a

specific diagnosis. SAD 37 currently has two students placed at KidsPeace. (Testimony Novatnak, Hodgkins)

IV. Conclusions

What is the student's stay put placement during the pendency of the due process proceeding?

"During the pendency of any administrative or judicial proceeding. . .unless the State or local [educational] agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement of such child [sic]." 34 CFR §300.514 This provision, known as the "stay put" provision, describes the status of a student's placement under the Individuals with Disabilities Education Act (IDEA) during a due process action and any appeal to that action.

Since the parties in this dispute were unable to reach consensus about the stay put placement for the student, the parties agreed that the hearing officer would issue a ruling on this question. The attorneys submitted written arguments to the hearing officer, and then were convened by telephone conference. After consideration, the hearing officer notified the parties that the stay put placement for the student during the pendency of the hearing was the then-current tutoring program, concluding that the "local educational agency and the parents otherwise agree[d]" to this placement.

The presumption in law is that, when the parties enter due process, a student will remain in the placement described in his or her most recent IEP, "the then-current placement." However, when this student arrived in SAD 37, his most recent IEP described a program that did not, and does not, exist in the district. Consequently, the PET convened on September 17, 2004 (within two days of his enrollment), to consider program options. Records available to the PET at that time indicated that the student's previous district considered his needs to be significant. The PET deliberated, and made a determination that tutoring services would best meet the needs of the student until the PET could gather additional information and reconvene to determine the placement that best met the needs of the student.

The parent was a full participant in the PET meeting on September 17. She participated in the discussion and the determination that the "Team agreed that the student requires two hours of tutoring a day in a separate setting to meet his needs." The parent received the minutes, which clearly stated this determination, before she left the meeting that day. She did not give notice that she disagreed with this determination until five days after her request for hearing—more than 30 days after the meeting. It is clear that the parent now disagrees with the tutoring services as an appropriate program for the student. While the parent's concerns about the extended tutoring may be valid, the hearing officer concludes that the parent and the school "otherwise agree[d]" to tutoring as the student's initial program in SAD 37.

Has the tutoring provided to the student failed to provide him with a free appropriate public education (FAPE)?

"Students who received special education and supportive services in another school . . . shall, on transfer, . . . be provided with special education and supportive services consistent with the Individualized Educational Program (IEP) developed at the previous school . . .and shall be referred to the receiving unit's Pupil Evaluation Team. Upon referral, the Pupil Evaluation Team shall convene as soon as possible to . . . determine the student's . . . need for special education and supportive services, and develop a revised Individualized Education Program, if necessary, for the student" *Maine Special Education Regulations (MSER)* §10.9

"Tutorial services shall be provided to any student with a disability who is unable to participate in an administrative unit's regular or special education classes as determined by the Pupil Evaluation Team consistent with the requirements [of the least restrictive educational alternative principles]. *MSER* §5.8. See also §11.

The student who enrolled in the district on September 15, 2004 presented a somewhat complicated educational history. His school records described a student with an identified emotional disability who had been in a variety of special education settings in at least 14 different schools in six years. His most recent IEP, developed in August 2004, showed that within a two-week period, he displayed disruptive and escalating behaviors in the mainstream setting. This caused his move from a resource room placement into a highly restrictive special education program, a program which has no counterpart in the SAD 37 district. The most recent evaluation revealed a student who had difficulty with interpersonal relationships, poor conflict resolution skills, and significant social skills deficits. Feeling there was no alternative immediately apparent, the SAD 37 PET, with the parent as a full participant, decided that tutoring was an appropriate short-term solution.

The parent now argues that the student should have been allowed access to the public school at the time of enrollment. However, based on previous history, to have simply placed the student in a regular classroom or resource room with a full-time aide or "shadow" to minimize inappropriate social interactions was a set-up for another failed experience in school. The lack of anything approaching an appropriate program for the student in the school would have been detrimental to the student and contrary to the district's obligation to provide him with FAPE. While access to public school is a fundamental principle of the IDEA, schools are given latitude "when the nature or severity" of the disability warrant [sic] other arrangements. The information provided from school staff in North Carolina and Iowa, coupled with the recent evaluation, support the school's action to offer a tutoring program for the short-term. Evidence does not support the parent's

contention, that the mere fact that tutoring was the program offered, in and of itself, constitutes a denial of FAPE.

However, the team failed to develop a new IEP for the student. The minutes of the team meeting on September 17 note simply that the team agreed "that [the student] requires two hours of tutoring a day in a separate setting to meet his needs." There is no evidence that leads me to conclude that the IEP from North Carolina was to guide that tutoring, nor did SAD 37 draft a new IEP. To compound this failure, the student received no services from September 18 to October 14, 2004, when the tutoring services actually began. The fact that the district was unable to find staff to provide this service did not relieve them of their obligation to serve the student. The failure to develop a new IEP from September 17, 2004 to October 29, 2004, and the failure to actually provide any service until October 15, 2004 does amount to a denial of FAPE[6].

What remedy is the student entitled to receive?

When it has been determined that the district has failed to provide a free appropriate public education to a student, the hearing officer may "grant such relief as [she] determines is appropriate." 20 USC §1415(i)(2)(iii). If there has been educational harm, compensatory educational services are an available and appropriate remedy to the extent that such services were not delivered. *Pihl v. Massachusetts Dep't of Educ*. 20 IDELR (1st Cir. 1993) See also *MSAD No. 35 v. Mr. and Mrs. R*., 312 F.3d 9, 17-18 (1st Cir. 2003)

As discussed above, the district's failure to develop an IEP for the student from September 17 through October 29, and the failure to provide any services from September 17 through October 14, amounts to a denial of its obligation to provide the student with a free appropriate public education. The student came to the district with needs severe enough that he was unable to participate in the "administrative unit's regular or special education classes." Yet, he received no services for the first three weeks. During this time his access to the general curriculum was limited to his mother's attempts to assist him to complete school work in a new district, in a new school. The hearing officer concludes this resulted in "educational harm" to the student, and that compensatory educational services must be available as a remedy.

The school, however, makes a convincing argument that simply ordering more tutoring is not an appropriate remedy in this situation. Tutoring will not meet the social/emotional and educational needs described in his educational history. An appropriate remedy should be "designed to ensure that the student is appropriately educated within the meaning of IDEA." *Parents of Student W v. Puyallup School*

[6] The district's argument that the district should not be held accountable for "the first 10 days without services that the school is permitted before there is a significant change in placement" is not persuasive. The service, while ordered by the PET, was simply not provided. I do not agree that there is a 10-day "time-out" in this circumstance.

Dist. No. 3, 31 F.3rd 1489 (9th Cir. 1994) An hour-for-hour reimbursement of tutoring time equal to the time lost will do nothing to address the student's needs.

The student requires a full-time, full-day program that will meet not only his academic needs, but his identified social/emotional/behavioral needs. As discussed below, the KidsPeace program provides that opportunity. As a compensatory education remedy, the hearing officer orders the KidsPeace program to be extended through the end of July 2005 to compensate the student for the district's failure to provide FAPE from September 17 until the new IEP was developed on October 29.

Does the district's offer at the October 29, 2004 PET meeting--to implement his IEP in the KidsPeace day treatment program--provide the student with a free appropriate pubic education in the least restrictive educational alternative?

The Individuals with Disabilities Education Act (IDEA) requires that the school 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)* Schools shall ensure that "to the maximum extent appropriate. . .removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids an [sic] services cannot be achieved satisfactorily." *34 CFR §300.550(b)* This is commonly referred to as the right to be educated in the "least restrictive educational alternative" or LRE. In addition, schools shall ensure that "a continuum of alternative placements is available to meet the needs of children with disabilities" including "instruction conducted. . . in other settings" *§300.551, §300.25(a)(i)*

In 1982, when the United States Supreme Court was first compelled to interpret what the Congress intended by "free appropriate public education", the Court reasoned that a school had met its obligation to provide a "free appropriate public education" if the school had complied with the procedural and substantive requirements of the law. *Board of Education v. Rowley*, 553 IDELR 656, 670 (1982)

There is no claim that the district has failed to comply with the procedures set forth in IDEA. There is no substantive disagreement regarding the services or the goals described in the IEP. The disagreement centers around the question whether[sic] the proposed placement in the student's IEP complies with the LRE principle.

The two professionals who provided the most recent and most comprehensive view of the student were Mr. Rambo, the counselor from Montana, and Ms. Armistead, the psychologist from North Carolina. While they disagreed about the appropriate placement for the student, they agreed in substance with the type of program that would meet his needs: a highly structured, self-contained special education setting that could address his behavioral and academic needs; a small teacher-to-student

ratio with a teacher who has experience with this type of student; a focus on improving his social skills using closely monitored social skills training; and a professional counselor/therapist who could work with the student and his family. Mr. Rambo stated explicitly that the student's placement should be in the public school.

The parent argues that the student has always been placed in public schools, and most often his neighborhood school, and that to do differently in SAD 37 violates his right to be educated in the least restrictive placement. While it is true that the student has heretofore been in public school placements, there is insufficient information to determine that those placements were successful in meeting the student's needs. The Iowa placement (roughly September and October, 2003) generated the most comprehensive program data, but there is no way to draw any conclusion about the student's benefit in that program because the student attended for such a short time. Mr. Rambo, the student's counselor in Broadview, Montana, offers his opinion that the student made progress in his social development while at his school, but there too, the student attended for only 29 school days. The student was in a public school placement in North Carolina, but staff in that program felt strongly that he was not well placed in their program. There is no way to conclude that, just because he has always been educated in public schools, that [sic] he has benefited from those public school placements.

SAD 37 is a small district in rural Washington County [sic] Maine. It currently operates three self-contained special education classrooms in the district: one for children who are profoundly cognitively delayed, one for children who [sic] mentally retarded and one for children who have autism. The parties all agree that none of these programs is appropriate to the needs of the student. Yet, the capacity of the district to create a new program to meet the agreed upon needs of this student is limited. Aside from the self-contained population currently served in the district, all other special education needs in the district are met through the resource room model or with modifications within the regular classroom, or in a separate setting. The district has a shared guidance counselor that serves the elementary schools in the district, and a behaviorist on contract to the district two days/month. Space for another classroom is not currently available; specialized positions are difficult to fill in the district.[7] If the student is to receive meaningful benefit it will not be in a cobbled-together program in the Cherryfield Elementary School.

The law and the courts have made clear that placement in a location other than the school the student would normally attend may be required when "the nature or severity of the disability" is such that education in the student's neighborhood school cannot be satisfactorily achieved. *MSER §11.2 (C).* However, the courts remain consistent in their interpretation that proximity to home is not a guarantee, nor a mandate of the law. *Barnett by Barnett v. Fairfax County Sch. Bd.,* 927 F2d 146 (4th Cir. 1991) (Federal regulations impose no obligation on school district to duplicate highly specialized education program at student's base school.) *Kevin G. v. Cranston School Committee*, 130 F.3d 481 (1st Cir. 1997) (District's placement of

[7] The district has a special education position at the high school that has been vacant since April 2004.

student in non-neighborhood school to allow access to nursing services available there was appropriate.) *Schuldt v. Mankato Ind. Sch. Dist. No. 77*, 18 IDELR 16 (8th Cir. 1991) (Federal regulation is not a mandate that disabled student be placed in neighborhood school.)

In addition to the recognition that schools may serve students with highly specialized needs outside their neighborhood schools, the law also allows for schools to meet the "needs of children with disabilities. . . in other settings" including "private separate day school placements…" (*MSER* §11.3) Recent cognitive and psychological evaluations of the student conducted by Ms. Armistead describe a student that has significant and long-standing emotional and behavioral needs. While she does not speak to the issue of private placement in her evaluation, she states in her report that the student "appears ill equipped at this time to deal with the social demands of the middle school program." During her testimony she stated that she felt a therapeutic day treatment program such as KidsPeace would be an appropriate placement for the student, and had such a placement been available in her area, it might likely have been considered by the IEP team.

Mr. Rambo was the parent's most outspoken witness against the KidsPeace placement. Mr. Rambo felt the student's problems were a result of complicated family dynamics and his frequent moves which resulted in his always being the "new kid on the street". He testified that the student suffered from one or more mood disorders, not a personality disorder as suggested by Ms. Armistead[8]. He expressed a strong opinion that any program should include "normal" peers; that it would be detrimental for the student to be placed with "students like that" in a therapeutic day treatment program. Yet, Mr. Rambo had no direct knowledge of the KidsPeace program, nor the student population served in the program.

In contrast, Ms. Nabotnak, the program director from KidsPeace, made it clear that the student population and the program comes [sic] to that recommended by Mr. Rambo. She testified that acceptance into the program was not based on a diagnoses [sic]the Diagnostic and Statistical Manual of Mental Disorders, but on the individual student's need and the probability that he or she could benefit from the program. Students come into the program with all sorts of diagnoses and labels. Classrooms are highly structured with small student/teacher ratio, staffed with a special education teacher and an educational technician. The program includes a full-time psychologist, psychiatrist and social worker. Social skills training and appropriate response in reacting to emotional conflict is [sic] a focus of the program throughout the day. That the KidsPeace program is not in the public school does not render it inappropriate.

[8] During his testimony, Mr. Rambo challenged Ms. Armistead's use of, and conclusions drawn from, the EBPS-2. He stated that she used the rating scale to make clinical diagnoses, which she was not qualified to do. Ms. Armistead dispelled that notion in her testimony. She made it clear that her comments and conclusions using this rating scale were made using the Empirical Interpretation tables of the instrument, which compared the results noted by raters with a clinical population who [sic] is diagnosed with these symptoms. Her report clearly states that she is noting "symptoms of behaviors…in comparison to a clinical population."

Being in a program with access to non-disabled peers in a carefully monitored and positive way as suggested by Mr. Rambo is certainly the ideal. But, that program does not exist in SAD 37, nor does the law demand that they create it for this student:

> The IDEA does not promise perfect solutions to the vexing problems posed by the existence of…disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education:[sic] it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland School Comm., 998 F.2d 1083 (1st Cir. 1993) (Internal citations omitted).

Evidence shows that the student's behaviors deteriorated more rapidly and with more intensity in his most recent public school placement. Whatever the reasons which might have caused his unsuccessful experience in North Carolina, there is no reason to suspect that more of the same will be in this student's benefit. The school has acted appropriately in recommending placement in the KidsPeace day program. The hearing officer concludes that the proposed IEP, developed at the October 29 PET meeting, which places the student in the KidsPeace day treatment program, is reasonably calculated to provide the student with educational benefit and is the least restrictive educational alternative.

V. Order

- The district shall notify the parent that the IEP and placement at KidsPeace is available to the student immediately after the receipt of this decision, but in no case later than December 20, 2004, and shall provide the scheduled times when the district will transport the student to that program.
- The placement at KidsPeace shall continue through July 31, 2005, unless, before that date it is the judgment of the PET that the student's needs can be appropriately met in another placement. In such case, the district shall provide compensatory education services in the new placement through July 31, 2005.

Carol B. Lenna
Hearing Officer