

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

July 24, 2005

Case No. 04.165H, Parents v. School Administrative District #22

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

REPRESENTNG [sic] THE SCHOOL: Amy Tchao, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

This special education due process hearing has been conducted, and this decision has been written, pursuant to state and federal special education law, 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

The student's parent's [sic] initiated this case by filing a Dispute Request Resolution Form on behalf of their son (DOB: xx/xx/xxxx), with the Maine Department of Education on December 7, 2004. The student lives with his parents within SAD #22 and is currently eligible for special education services under the category of specific learning disability. The family was seeking a special education due process hearing because of their belief that the student had not received a free and [sic] appropriate public education (FAPE) during xx, xx or xx grades in SAD #22 schools and, further, that he would not have received a FAPE had he attended xx grade pursuant to the IEP proposed by the school. Consequently, the family unilaterally placed the student in a summer program operated by the Landmark School in Massachusetts during the summer of 2004 and also unilaterally placed him in the Landmark School for school year 2004-2005. The family paid all costs associated with the student's attendance at both the Landmark School programs and seeks to have those costs paid, in the context of either a compensatory education remedy or as reimbursement for a unilateral placement. Further, the family seeks an order continuing the student's attendance at the Landmark School at public expense beyond the school year 2004-2005.

The school flatly disagrees with the assertions made by the family. The school contends that the student received a FAPE during his xx, xx and xx grade years, arguing that the student's IEPs in those years were both designed and implemented in a manner reasonably calculated to enable him to receive meaningful benefit as required by the IDEA and state special education laws. Further, the school asserts that the student would have received a FAPE under the IEP proposed by the school for his xx grade year, 2004-2005. On those grounds, the school argues that the parent's claims for tuition reimbursement and/or compensatory education services at public expense should be denied.

A pre-hearing conference was held on December 14, 2004. Eight days of testimonial hearing were held between December 14 and February 1, 2005. The family presented 8 witnesses and introduced documentary evidence identified as P-1 to P-347 and P1[sic] to P79[sic]. The school presented 6 witnesses and introduced documentary evidence identified as School Exhibits 1 through 524 and 1-1 through 1-352 (Test Protocols A – F). The parties submitted written closing arguments totaling 160 pages, the last of which was received by the hearing officer on March 2, 2005. The record was closed on that date.

ISSUES

The issues to be resolved in this matter are:

1. Were the IEPs and placements provided to the student by the school during xx grade (2001-2002), xx grade (2002-2003) and/or xx grade (2003-2004):
 - A. Reasonably calculated to provide the student with a free and [sic] appropriate public education; and
 - B. Implemented so as to provide the student with a free and [sic] appropriate public education;
2. Was the proposed 2004-2005 IEP and placement offered to the student by the school reasonably calculated to provide him with a free and [sic] appropriate public education in light of his disabilities;
3. Are the student's parents entitled to reimbursement of the costs they have incurred in connection with their unilateral placement of the student at the Landmark School for the summer of 2004 and/or the 2004-2005 school year, either as an appropriate

placement or as a form of compensatory education for past violations of the IDEA; and

4. Is the student entitled to continue his placement at the Landmark School with public funding beyond the 2004-2005 school year as a form of compensatory education?

FACTUAL FINDINGS

- 1, The student (DOB: xx/xx/xxxx) lives with his parents within SAD #22. He attended SAD #22 schools from xx grade, school year 2000-2001, through the xx grade, school year 2003-2004. Prior to entering SAD #22, the student attended schools in Caribou, Maine where, though he spent two years in the xx grade, he was never identified as eligible for special education services. In 1996, the student was given the Woodcock Johnson – Revised Test of Cognitive Ability and scored in the low average range. In 1998, the student was again given the WJ-R Test of Cognitive Ability and was found to have broad cognitive ability in the average range. During his xx grade year in Caribou, school year 1999-2000, the student was given a psycho-educational evaluation that reached the general conclusion that he was “approximately one year behind his current xx grade placement” and noted delays in reading, written language and math skills. In that January 2000 evaluation, the student took the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), a test series designed to evaluate a child’s general cognitive abilities; on that test the student received a verbal IQ of 83 (low average), a performance IQ of 79 (borderline) and a full scale IQ of 79 (borderline). Midway through his xx grade year in SAD #22, in January of 2001, the student was found eligible for special education services under the category of speech and language impairment. He remained identified as speech and language impaired until midway through his xx grade year when a PET determined that he had a specific (language-based) learning disability and recognized him as eligible for special education under that

category (Dispute Resolution Request Form; Testimony of Father; Record, SE 501-504, 505-513, 516-523)

2. The student enjoyed a relatively positive start to his xx grade at the Weatherbee School in SAD [sic]#22. In January of 2001, a PET convened by the school determined the student was eligible for special education services under the category of speech and language impairment. The PET developed an IEP that included written language services, additional instruction in mathematics and also speech and language services. This IEP did not provide for any special education remedial reading instruction. The PET did a speech/language evaluation, scheduled an “attentional screening evaluation” but did not perform any evaluations of the student’s reading ability or general intelligence in the process of developing this IEP. The student received some of his special education services as “pull-out “ services; that is, he would leave the regular education classroom to receive certain of the special education services contained in the IEP. The student was troubled by this and felt that it “stigmatized’ him and made him appear to be different than other students [sic](Testimony of Father; Record, P-216 to P-220)
2. The student’s parents were concerned about the difficulty their son appeared to be having with reading in the xx grade and began to seek help, outside of school, to remedy this problem. In the summer between the student’s xx and xx grade [sic], the student began to work on his reading skills at the Masonic Learning Center (MLC) in Bangor. He attended two 50- minute 1:1 sessions per week, for a total of 9 sessions. The reading program used at the MLC was the Orton-Gillingham method. In June of 2001, the MLC tested the student, who had just completed the xx grade, and found him to be reading at a mid-xx grade level. The student enjoyed the sessions, worked hard in them and made progress with the Orton-Gillingham program. The sessions at MLC continued into the school year with the number of sessions increased to 3 times per week. (Testimony of Father and Patricia Martz; Record, P-197 and SE 447-451)

3. The student began the xx grade under the IEP developed in January 2001. No remedial reading services were included in the IEP, and none were provided to the student. In October 2001, his parents stated their opinion, in a letter presented to the 10/12/01 PET, that the student had a learning disability involving his ability to process information and requested that the school fund an independent evaluation to be used to design a program for him. Further, the parents asked the school to provide an Orton [sic] Gillingham structured reading program as part of the IEP. The school's then special education director, Mrs. Leathem, refused that request, stating that the school could not do 1:1 tutoring, and instead offered to provide the student with a reading program called the Specialized Program Individualizing Reading Excellence (SPIRE), a reading program that teaches reading skills via a structured phonetic reading approach. There was no discussion at this PET about the comparative merits of the Orton-Gillingham program and SPIRE, or about the appropriateness of either for this particular student.

The student was given a SPIRE evaluation in mid-October; among the recommendations contained in the evaluation report were that the student begin “to build skill in reading concepts at a very basic level” and that he should start at the “Reader One, Block 1 level in the SPIRE program”. The report also stated that his “reading and spelling program should be integrated in order that (the student) is writing and spelling the same concepts that he is learning to read.” The student was given a Comprehensive Test of Phonological Processing (CTOPP) about the same time. One of the conclusions in the 10/17/01 CTOPP report is that the student's “independent reading level falls in the mid to high second grade range....” The CTOPP report also identifies the student as having a [sic] both a phonological awareness deficit and a rapid naming processing disorder, thus making him a “child with a ‘double-deficit’...who will find the acquisition of basic reading skills extremely challenging”.

The student received some SPIRE tutoring during the xx grade, though the amount of services provided is not specified in the IEP and the records of the SPIRE service were not available for the hearing. While the IEP identifies the “Special Education Teacher” as the position responsible for the student’s reading program, the SPIRE program tutor was Mrs. Wilcox, an Educational Technician III. Mrs. Charles also worked with the student in reading. Results from the Woodcock Reading Mastery test administered by the Masonic Learning Center in July, 2002 indicate that the student’s basic reading skill score was a grade equivalent of 3.2. Results from the Gates-MacGinitie Reading Test, Level 3, Form T, administered at the Weatherbee School on April 26, 2002, indicate that the student’s reading level, based on both Vocabulary and Comprehension sections of the test, amounted to a grade equivalent of 2.6. During his xx grade year, the student continued to receive tutoring in the Orton- Gillingham reading program offered by the Masonic Learning Center three times each week. (Testimony of Father, Thurston; Record, P-124, P-192 to P-194, SE 400-408, 426-435)

4. The student entered the xx grade in the fall of 2002 at the Reeds Brook Middle School under the IEP developed in May 2002, during his xx grade [sic] at the Weatherbee School. At this PET, the possibility was raised that SPIRE services may [sic] not be available at the Reeds Brook Middle School because the middle school did not have a trained SPIRE teacher on staff. The special education teacher at Reeds Brook, Donna Accetullo, was trained in the Wilson Reading Program but not in SPIRE. This IEP provided that the student receive two 40-minute periods/day of language arts and reading instruction but does not state what reading program will be used nor how it will be taught. The reason given for the changes to the student’s IEP was “to match the Reeds Brook schedule.” The student did not receive SPIRE services on a consistent basis at the start of his xx grade. His special education teacher, Ms. Accetullo, left

SAD #22 in September, within a month after the start of school; further, there is no indication that she had any training in the SPIRE method.

Lisa Garneau, who became both the student's case manager and reading tutor in mid-October, is an Educational Technician teaching under a Targeted Needs Certificate, a mechanism designed to provide short-term authorization to teach for people not otherwise eligible for certification. She received her Targeted Needs Certificate in November of 2002. In September of 2002, she received 3 or 4 hours of training in SPIRE reading program methods. She has also attended a 2-day seminar designed to train tutors in the Wilson Reading Program. She provided the student with a multi-sensory reading program that incorporated elements of both the SPIRE and Wilson methods. The student was the first student Ms. Garneau ever tutored in the SPIRE reading program and was in the first group of students for whom she served as case manager. After she began tutoring the student in the fall of 2002, Ms. Garneau received direct supervision once a week for the first month, then no supervision. She had no contact with, or information from, the Masonic Learning Center where the student was receiving tutoring in the Orton-Gillingham reading program twice a week during his xx grade year. The student was reading trade books on a 2nd or 3rd grade level that Ms. Garneau described as "low level, high interest" books.

A PET met on November 12, 2002 to review the student's current programming needs. One of the primary issues discussed was where the student should receive his special education services in Language Arts and Reading. Typically, middle school special education students are mainstreamed for these services, while elementary school students receive them in the resource room. The PET decided that the student should not be placed in the regular classroom for Language Arts and Reading instruction, but should instead receive 60 minutes/day of 1:1 SPIRE instruction and 20 minutes/day of written language instruction outside of the regular classroom. At a PET meeting held December 16, 2002, the

special education teacher proposed reducing the SPIRE instruction from 60 minutes/day to two 40 minutes [sic] sessions/week in a small group setting. The parents objected and the PET did not adopt this suggestion.

The student became less interested in school and presented more behavioral problems toward the end of xx grade. He appeared less motivated to his teachers, notwithstanding a series of modifications implemented by the school - including the use of books on tape in the reading program, the modification of class content and the reduction of expectations and standards - for the student. The student experienced a significant amount of tension between his desire to be in the regular education classroom with the other students and the difficulties he had in dealing with the material as it was presented there. He had difficulty keeping up in that setting, but did not respond well to being pulled out to receive special education services in the resource room. Ms. Garneau reported that the student often “shut down” while with her in the resource room and simply put his head on his desk. He became increasingly resistant to going into the resource room that he had begun to refer to as the “retard room”.

While his reading recognition skill was improving somewhat, he continued to struggle with the comprehension component of the reading process. SPIRE services to the student ended at the school’s recommendation made at an April 2003 PET; he continued to work on reading comprehension with Ms. Garneau, utilizing the Great Leaps program, another remedial reading program,[sic] His math, science and social science classes were heavily modified, both in content and in the level of expectation placed upon him. His peer relationships became more problematic in middle school. In an attempt to avoid “teasing” issues that had become difficult for the student, the school moved him to a different homeroom. (Testimony of Father, Thurston, Garneau; Record, SE 297-299, 323-331, 347-351, 357-359, 365-373; Record P-336 to P-339)

5. The December 2002 PET determined that more information about the student was necessary, both about his cognitive abilities and about the possibility that he had a language-based learning disability, and determined that that [sic] a comprehensive evaluation, including a WISC, should be done. After some skirmishing between the parents and the school about who should do the evaluation and when it should be done, Lorna Kaufman, who holds a PhD in Developmental Psychology, was selected by the parents. Dr. Kaufman also has a master's degree in Learning Disabilities, and has done post-doctoral work at Boston Children's Hospital. She teaches a college level course in the evaluation of reading disabilities and has been trained in and worked with a variety of multi-sensory structured reading programs, including project read, LIPS, the Orton [sic]Gillingham among others. She has extensive experience as [sic] clinician and has supervised approximately 10 employees engaged primarily in performing educational evaluations. Dr. Kaufman is a [sic] certified in Massachusetts as a regular and special education teacher, and taught for about 15 years. Currently Dr. Kaufman primarily does evaluations of children, focusing on children with language-based learning disabilities; she has done hundreds of such evaluations in her career.

In this matter, Dr. Kaufman interviewed the student on 1/26/03 and 4/28/03 and, on those dates administered an extensive series of tests including the WISC-III, the Gray Oral Reading Test - 4 (GORT-4) and the Woodcock Johnson Psycho-educational Battery Third Edition (WJ- III). She also interviewed the student's parents and prepared a questionnaire to be filled out by the parents and school staff. She reviewed the responses of both parents and school staff. (Testimony of Father, Kaufman and Thurston; Record, SE 304-322, 342-346)

6. The scores that the student earned on many of the tests administered by Dr. Kaufman in the winter and spring of 2003 are found in the Record, SE 316-319. On the WISC III, a test of cognitive ability, the student received a Verbal IQ score of 93 (32nd percentile), a Performance IQ score of 89

(23rd percentile) and a Full Scale IQ score of 90 (25th percentile). These WISC-III scores are significantly higher than the student earned when he took the same test in January of 2000. On the GORT-4, the student received a grade equivalent of 3.0 in Rate, Accuracy and Fluency, and a grade equivalent of 3.7 in comprehension. All the percentile scores for the GORT-4 were below the 10th percentile. On the WJ-III, the student received a grade equivalent of 3.8 in basic reading skill, of 3.7 in broad reading skills, and of 3.3 in reading comprehension.

Academically, Dr. Kaufman found that the student exhibited weaknesses in reading, written language and math. He could decode single words at approximately a 4th grade level, but his extended text reading was at a beginning 3rd grade level. Dr. Kaufman found that the student has [sic] problems with both phonological processing and with orthographic processing; this finding confirms the “double-deficit” situation first identified in October 2001 when he was in the xx grade at the Weatherbee Elementary School in SAD #22. Further, the student displayed particular weakness in his spelling and math skills, where he tested at a 2nd grade level.

After reviewing all the information she had acquired about the student – interviews, test result, questionnaire responses from the student’s special education teacher, educational technician, and math/science teacher - Dr. Kaufman reached the conclusion that the student was “a good looking, personable preadolescent boy of average intelligence with average verbal and non-verbal reasoning and problem solving abilities” who was functioning “well within the average range of intelligence”. Dr. Kaufman believed that the student’s scores on the WISC-III very likely underestimated the student’s actual cognitive abilities because of difficulties, arising out of the student’s language [sic] based learning disability, that the student had with processing the language of the test itself. She further concluded that the student’s “cognitive and academic profile are consistent with a complex language [sic] based learning

disability and a reading disability.” (Testimony of Kaufmann; Record, SE 304-319)

7. Dr. Kaufmann made 20 separate programming recommendations that are found in the Record at SE 312-315. Generally, she recommended that the student’s educational program “in all language [sic] related subjects (including speech and language therapy, reading, English [sic] science, social studies, and special education) be carefully coordinated. Concepts, vocabulary, and methods of instruction should be coordinated and consistent for all subjects.” SE 312. Focusing on the student’s reading problems, Dr. Kaufman stated that the student has “a severe reading disability due to problems of phonological processing, orthographic processing, and a language disorder. Unless (the student) is provided with intensive remediation in ONE (emphasis in original) single reading program, or unless his 3 different reading programs are carefully coordinated, he is not likely to achieve basic adult literacy skills.”

Dr. Kaufman recommended the Orton [sic] Gillingham program as the most effective program because it is the most clinical program that “usually provides the most intensive remediation”. A certified and experienced Orton [sic] Gillingham teacher should deliver this program in a 1:1 session that meets 5 times/week for 45-60 minutes each session. She further recommended that his curriculum materials be modified so the student can [sic] access the content of the course material, given his weakness in reading, written language and math. She recommended a summer program for instruction in these areas and also recommended that the student receive counseling to help him address “adjustment problems related to his learning disability and lack of success in school.”

(Testimony of Kaufman, Record, SE 304-319)

8. The PET that developed the student’s xx grade IEP year met first on August 20 and then again on September 15, 2003. Dr. Kaufman’s report was available to this PET. The IEP dated September 15 continues [sic] to identify the student as eligible for special education services under the

exceptionality of “Speech and Language Impairment.” The student’s parents, who were increasingly worried about the difficulty their son was having with reading, brought to the PET meeting a statement of their concerns and a 6 page type-written document that included detailed descriptions of the changes they would like to make to the student’s IEP for the coming year. The parents requested that the school coordinate the reading program it was providing to the student with the Orton [sic] Gillingham instruction he was receiving at the Masonic Learning Center twice weekly after school. The requests the parents made for changes to the students [sic] IEP largely reflected the recommendations made by Dr. Kaufman in her evaluation of the student. The parents requested a program that was highly coordinated regarding services provided at school, home and the Masonic Learning center, daily 60 minute Orton [sic] Gillingham sessions provided 1:1 by a trained and experienced tutor, specific goals to be attained in reading, writing and math, counseling services for the student to assist him to cope with his learning disability and lack of self-esteem at school, and a series of modification [sic] at school.

The September 15, 2003 IEP provides for the student to receive 40 minutes daily of math instruction, 40 minutes daily for study skills (on non-band days), 40 minutes daily for skills lab (on non-gym days), 80 minutes every other day for science support and 80 minutes of direct instruction every other day with special ed support staff support for Reading/LA.

The special education teacher, Audrey O’Clair, is identified as the person with overall responsibility [sic] provide all of these services; however Judy Gamble, an Educational Technician, was designated as the student’s reading instructor. While, Ms. Gamble was receiving some Orton [sic] Gillingham training at the same time she was tutoring the student, she was neither certified nor eligible for certification as an Orton [sic] Gillingham instructor. Cedena McAvoy, a high school special

education teacher who had also been trained and certified as an Orton [sic] Gillingham instructor, was assigned to observe and supervise Ms. Gamble's work with the student. She attended only one tutorial session with Ms. Gamble and the student in the student's xx grade year. Speech and language services are [sic] to be provided by a speech/language clinician. 30 [sic] minutes per month of school social work services were to be provided by the school social worker. The student's reading goal was that "He will increase his broad reading to a 4.7 grade equivalent by June, 2004 as measured by selected subtests of the Woodcock-Johnson Reading Mastery Test." The student continued his Orton [sic] Gillingham instruction at the Masonic Learning Center in Bangor throughout his xx grade year, meeting with Kerry Curtis twice a week.

This PET discussed and adopted a series of significant modifications for the student including a reduced work load, slower pace of instruction, guided notes and outlines, extra time on tests, tests sent home, and preferential seating. Ms. Thurston voiced her concern that the program the parents were seeking would be too hard and demanding for the student. She also stated that an IEP is no guarantee of success and that the goals for the student may [sic] have to be revised. Ms. Well, the assistant special education director, stated that the student was in "a latency stage and huge amounts of learning may not happen"; she cautioned the parents not to have "unrealistic expectations" for the student. (Testimony of Father; Record, P34-40, SE 268-294)

9. A triennial review PET meeting was held on January 26, 2004, about midway through the student's xx grade year. This PET determined that there was a severe discrepancy between the student's achievement and ability, finding that the student's "Intellectual testing [is] in the average range, but below average in reading, math and written language" based on testing done in January/April 2003 and January 2004. Based on these findings, the school determined, for the first time, that the student had a language-based learning disability that affected his performance in

reading, math and written language. This was the first time the student had been so identified, three and one-half years after he entered the SAD #22 school system. The PET did not make any significant changes or additions to the student's IEP as a result of his identification as having a language [sic] based learning disability. The student continued to receive the same reading instruction from Ms. Gamble that he had been receiving prior to the PET's recognition of his learning disability.

The PET next met on February 9, 2004 and decided to schedule the student for a reassessment with Dr. Kaufman, who administered a series of tests on April 30, 2004. Those tests included the Gray Oral Reading Test-4 (GORT-4) and the Woodcock [sic] Johnson Psycho-Educational Battery, Third Edition (WJ-III). As compared to the 2003 test on the GORT-4, the student's 2004 scores in decoding accuracy placed him at a 2.0 grade equivalent, a drop from the 2nd to below the 1st percentile; his reading comprehension scores placed him at a 2.7 grade equivalent, a drop from the 9th to the 2nd percentile; his reading fluency score remained the same, at a 3.4 grade level. As compared to the 2003 test on the WJ-III reading tests, the student's 2004 scores in letter word identification placed him at a 3.5 grade equivalent, a drop from the 25th to the 7th percentile; his word attack scores placed him at a 4.0 grade level, an improvement from the 16th to the 23rd percentile; his reading comprehension scores placed him at a 6.0 equivalent, an improvement from the 7th to the 36th percentile; and his reading vocabulary scores placed him at a 4.7 grade equivalent, a drop from the 26th to the 20th percentile.

On the 2004 administration of the WJ-III written language section, the student's scores remained within the second grade equivalent level, except for story construction, in which he scored at a 3.4 grade level. Dr. Kaufman concluded that the student had significant delays in reading and written language skills and expressed concern that "he does not possess basic literacy skills." Dr. Kaufman re-asserted her earlier recommendations, and commented that if the student fails [sic] to respond

to the “interventions provided by the school system.... [He should be placed] in a specialized educational setting that provides a fully integrated language [sic] based program where the curriculum is coordinated and consistent for all academic subjects and where he can receive specialized tutoring for reading and written language” (Testimony of Father and Kaufman; Record SE 253-267, 242-249)

10. On June 7, 2004, toward the end of the student’s xx grade year, a PET met to discuss to review Dr. Kaufman [sic] recent evaluation and to determine what, if any, summer services would be appropriate for the student. At this meeting, the student’s parents raised the possibility of the student attending a five-week summer residential program operated by the Landmark School in Massachusetts in order to improve his reading, mathematics and written language skills prior to entering the xx grade. The school did not agree that the student needed a residential program such as Landmark. The school recommended a summer program consisting of reading instructional services provided by Ms. Gamble one hour per day, four days a week for eight weeks, and mathematics instruction consisting of two one-hour sessions a week for four weeks. The parents disagreed with the school on this issue and expressed their dissenting opinion at the PET. On June 16, 2004, the parents wrote a letter to the school’s special education director stating, in part, that “...it is our position that [the student’s] school programming did not afford him an appropriate education during his xx, xx and xx grade years. For this reason, we believe that [the student] is entitled to receive compensatory service...[we] have applied for [the student] to attend the Landmark School’s summer program...should he be admitted, we intend to send him there this summer as a compensatory placement.” The letter concluded: “Please let this serve as written notice to you that we will be making such a unilateral placement and intend to seek reimbursement of the costs associated with this programming once it has been completed.” The school received this letter on June 18, 2004. The student was accepted

into the Landmark School's summer program and attended the full summer session, where he worked hard and did well. (Testimony of Father, Kron; Record, SE at 204-210)

11. On August 11, 2004, a PET met to develop an IEP for the student's xx grade year, school year 2004-2005. The student's parents brought a 4 page letter to the PET, stating, in part, "Our biggest concern [is his] inability to read...he is xx years old and is reading at a third-grade level...[he] wants to attend college. Unless something dramatic changes in his academic programming, [he] will be unable to reach his life goals." This letter also listed several steps that the PET could take to improve the student's IEP. These steps included getting an appropriately trained/certified instructor who has [sic] experience with an appropriate research-based reading program, adding more reading instruction to the student's day, and increasing co-ordination within the overall program. In the IEP, the student's reading instruction increased to 80 minutes per day and school social work services were provided. At the PET meeting, the reading program was described as "a multi-sensory phonological approach, which allows for incorporation of a variety of skill development programs in addition to the Orton [sic] Gillingham." Beyond that general description, the IEP did not specify either the reading program or the identity or training of the instructor.

The only special education teacher in SAD 22 who was trained and certified in the Orton [sic] Gillingham method, Cedena McAvoy, was expected to be out of school on maternity leave; she left for the rest of the school year in mid-December. The school had recently appointed a new case manager for the student; she was a special education teacher who had just joined the school's staff. It turned out that she, too, was out of school on maternity leave in the fall of 2004. Toward the end of the PET meeting, the parents requested a recess for a discussion with their attorney. They returned and informed the PET that the proposed IEP was insufficient and that they were going to enroll the student in the Landmark

School for his xx grade year. On the following day, August 12, 2004, the parents sent a letter to the school’s special education director, Ms. Thurston, confirming their intention to place the student in the Landmark School “both as a form of compensatory education... [for inappropriate educational programming during the student’s xx, xx and xx grade years]... and to ensure that he receives an appropriate education during the coming school year...” The parents expressly rejected the proposed 2004-2005 IEP as inappropriate and informed the school they intended to seek reimbursement for costs related to the student’s enrollment at Landmark for school year 2004-2005. (Testimony of Father; Record, SE 129-145, 192

12. The student received reading instruction in tutorial sessions at the Masonic Learning Center (MLC) in Bangor. He began in the summer of 2001, between xx and xx grade, when he went for nine 50-minute sessions. In xx grade, he went to MLC three times per week, in the afternoons after school. In xx and xx grades, he went twice each week. His parents provided both transportation and financing for the tutoring at MLC. The MLC used the Orton [sic] Gillingham method of instruction, a multi-sensory, phonetic, sequential approach to reading, language and spelling. The MLC administered Woodcock Reading Mastery Tests (WRMT) to the student on three different occasions. The tests given measured word identification, word attack and passage comprehension. The results on these three tests are combined in different ways to produce both basic skills and total reading scores. The following is a summary of the scores earned by the student on three [sic] different administrations of the WRMT, on June 21, 2001, [sic] April 15, 2003 and May 5, 2004:

June 21, 2001

	%tile	score	grade equivalent
Word Identification	12	80	2.6
Word Attack	10	84	2.5
Passage Comp	6	77	2.4
Basic Skills	10	81	2.5

Total Reading 8 79 2.5

July 23, 2002

	%tile	score	grade equivalent
Word Identification	13	83	3.3
Word Attack	17	86	3.3
Passage Comp		(not reported)	
Basic Skills	14	84	3.2
Total Reading		(not reported)	

April, 15, 2003

	%tile	score	grade equivalent
Word Identification	12	83	4.1
Word Attack	25	90	4.4
Passage Comp	10	81	3.8
Basic Skills	15	85	4.2
Total Reading	10	81	3.9

May 5, 2004

	%tile	score	grade equivalent
Word Identification	7	77	3.6
Word Attack	17	85	4.0
Passage Comp	9	80	4.1
Basic Skills	9	80	3.8
Total Reading	6	77	3.8

124) (Testimony of Father and Martz; Record, SE 260, 448, P-71, P-105, P-

13. Carrie Thurston is the current Director of Special Services at SAD #22. She is certified in Maine as a K-12 special education teacher and carries both Director of Special Education and Principal certificates. She graduated from the University of Maine at Farmington in 1990 with a degree in special education, has served as a special education teacher in various Maine school systems, and has been working within SAD #22 since 1999. She was an Assistant Director of Special Services (to Carla Leathem) and became Director of Special Services in 2002, the student's

xx grade year. She became aware of the student in the fall of 2000 in the process of doing a file review after his enrollment into the xx grade. Ms. Thurston attended a PET for the student in November, 2000; her next direct involvement with him was in December, 2002, in the fall of his xx grade year. In the course of her responsibilities as Director of Special Services, including preparation for this hearing, she has spoken to every person involved with the student's school program in SAD #22 since his enrollment, and has read/review [sic] everything in his file. At no time during the course of the student's enrollment in SAD #22 schools did Ms. Thurston speak with, or attempt to contact, anyone from the Masonic Learning Center, who was involved with the reading instruction the student began receiving in the summer of 2001 through his xx grade year. She testified that services the student may have been receiving outside of school were, "...not my concern..." (Testimony of Thurston)

14. At the time of the November 2000 PET, Ms. Thurston believed that the student was of low borderline intelligence, as indicated by a full scale IQ score of 79 on a test administered by a prior school district. Ms. Thurston noticed that the subtest scores on this evaluation were "scattered" in strange fashion with a wide range of scores. At that PET, Ms. Thurston concluded that the student did not have a language-based learning disability because there was not a sufficient discrepancy between his intelligence and his actual reading performance. Speech and language testing was scheduled. The student was found not eligible for special education services. At a PET held in January of 2001, Ms. Thurston concluded that the student was reading "at a better level than would be predicted, given his full scale IQ of 79...or at least was reading at a level commensurate with his intelligence." This PET found the student eligible for special education services under the category of speech and language impairment. (Testimony of Thurston; Record, SE 433-437, 496-496)
15. In the summer of 2004, the student attended a five-week program operated by Landmark School on its Massachusetts campus. The student

attended Landmark School for his xx grade year, school year 2004-2005. In both of those situations, the student received an educational program that was highly structured and coordinated. Landmark used a curriculum designed to educate students with language-based learning disabilities similar to the ones involved in this case. For example, classes are small, subject matter classes use written texts and materials that are geared to the student's reading abilities, tutoring is readily available, note-taking skills are taught, and regular study time is scheduled and supervised by trained staff. In both situations, the student worked hard, did well and made good progress, especially in the areas of reading and writing. The progress made by the student from August to November of 2004 is [sic] remarkable. His development with the use of written language is [sic] demonstrated by comparing a handwritten statement he made in August, 2004 (P-44) to a typewritten statement he made in November, 2004 (P-07-08) [sic] in August of 2004, (Testimony of Father, Kron, Donnelley; Record, P-07-08, P-44)

16. A PET met on June 7, 2004, in part to discuss and develop a summer program for the student. This PET concluded that the student should receive instruction over the summer in reading for one hour per day, four days per week for eight weeks and instruction in mathematics one hour per day, two days per week for four weeks. (Record, SE 210)
17. A PET met on August 11, 2004 to conduct an annual and program review, and to discuss a draft IEP that the school had developed for the student's xx grade year, school year 2004-2005. After this meeting, an IEP was prepared. It provided, in relevant part, that the student receive 80 minutes of reading instruction per day, 40 minutes of language arts instruction per day, 40 minutes of speech services every other day, 40 minutes of structured study hall on non-PE days, and Ed Tech support in both science and social studies. The PET also called for the student to receive 45 minutes of school social work services per month, with outside counseling one hour per week for nine

weeks; in addition, there was a provision for monthly meetings with a special education reading consultant. (Record, SE 144, SE 130-162)

18. In 2004, tuition and fees for the summer program amounted to \$7, 645.00. Tuition and residential costs for the 2004-2005 school year amounted to \$45,000.00. Through the close of the hearing in February of 2005, other expenses associated with the student's attendance at the Landmark programs, including travel and school-related equipment, amounted to about \$5,125.00. (Testimony of Father, Hickey; Record, P-59)

DISCUSSION

Every student who has been determined to be eligible for special education services, such as the student in this case, is entitled under state and federal special education law to receive a "free and appropriate public education...designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400 (d)(1)(A). (Emphasis supplied) It has long been established that the standard on this issue is whether the individualized education program (IEP) is reasonably calculated to enable the student to receive meaningful educational benefit under the program. *Rowley v. Board of Education*, 458 U.S. 176, 207(1982) It is clear that a school is not obligated under federal or Maine law to offer an IEP that provides the "highest attainable level (of benefit) or even the level needed to maximize the child's benefit" in order to comply with the IDEA, *Id.* It is also clear that "parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993) However, the educational benefit provided by the IEP to the student must be meaningful and real, and not trivial or *de minimus*, in nature.

Further, the level of benefit that is required to pass muster under the law varies from child to child and is dependent upon the individual child's abilities. *Rowley*, at 202. In order to carry out the primary purpose of the IDEA - to help

students "who would otherwise become burdens on the state [become] productive members of society", *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171, 181-182 (3rd, Cir. 1988) – the IDEA requires that an IEP must enable a student to receive "a great deal more than a negligible benefit" and further provides that the appropriateness of the benefit "be gauged in relation to the child's potential" for academic growth and achievement. *Id at 182, 185*. The IEP must be individualized and tailored to the unique needs of each eligible child; both the nature of the child's educational needs and capacity to learn must first be accurately accessed [sic] and then carefully considered when developing or evaluating the IEP. *Nein v. Greater Clark County School Corporation*, 95 F. Supp. 2nd 961, 976-978 (S.D. Ind. 2000)

I.

The first set of issues to be resolved at this hearing involve [sic] the questions of whether individualized education programs and placements provided to the student by the school in his xx, xx and xx grade years were both (1) reasonably calculated and (2) implemented so as to enable the student to receive meaningful educational benefit, and thus to receive the free and [sic] appropriate public education to which state and federal special education law entitles him. For the reasons which are discussed below, the hearing officer finds that the individualized educational programs designed and implemented by the school for the student's xx, xx and xx grade years, were neither reasonably calculated nor implemented so as to enable the student to receive meaningful educational benefit. Consequently, for the years at issue in this matter, the student in this case did not receive a free and [sic] appropriate public education.

The hearing officer's conclusion that the individualized education programs at issue here do not provide the student with a free and [sic] appropriate public education rests upon the determinations discussed below.

A.

One of the reasons the hearing officer finds that the IEP's [sic]at issue in this matter do not provide the student with FAPE is that the school incorrectly concluded that the student was of borderline intelligence and therefore had a

severely limited potential for academic growth. The school reached this erroneous conclusion, and developed IEP's [sic] based on this mistaken view of the student's intellectual ability, notwithstanding the results of December 1998¹ and April 2003 tests of broad cognitive ability on which the student scored as [sic] "well within the average range of intelligence...with average verbal and non-verbal reasoning problem solving abilities."² [sic] The school's view of the student as having a borderline intelligence is a crucial misperception of the student's intellectual ability on the part of the school that contributed to the development of IEP's [sic] that were inappropriate for the student.

When the student enrolled in the xx grade at the Weatherbee Elementary School in SAD 22, he brought with him, among other documents, the results of the three tests of his cognitive ability he had been given by his prior school system. The first test, given in November of 1996 when the student was in his first year of xx grade, was the Woodcock-Johnson Test of Cognitive Ability. His "broad cognitive ability" was found to be in the low average range. The second test, given in December of 1998 when the student was in the middle of xx grade, was also the Woodcock-Johnson Test of Cognitive Ability. On this test, his "broad cognitive ability" was found to be in the average range. The third test, given by a third examiner in January of 2000 when the student was in the middle of xx grade, was the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). This examiner found that the student's verbal IQ to be 83, in the low average range, his performance IQ to be 79, in the borderline range, and his full scale IQ to be 79, also in the borderline range. Thus, three tests of the student's cognitive abilities produced three different conclusions: the student's cognitive ability was rated as "low average" in 12/96, as "average" in 12/98 and as "borderline" in 1/00. The hearing officer finds that the inconsistent results on

¹ The test administered in 1998, when the student [sic] in the middle of xx grade.[sic] was part of the Woodcock-Johnson Psycho-Educational Battery – Revised, specifically the WJ-R Test of Cognitive Ability. The test administered in 2003, when the student was toward the end of xx grade, was the Wechsler Intelligence Scale for Children-Third Edition (WISC-III)

² Testimony of Dr. Kaufman, who administered the most recent WISC III, a test of cognitive abilities, [sic] in the winter and spring of 2003 in the student's xx grade year.

these three tests – which were conducted by another school system and administered by three different examiners - should have alerted the school to the need to determine what the level of the student’s cognitive ability was, prior to developing an IEP - or as it turned out, four years of IEP’s [sic] – based on the incorrect premise that the student was of borderline intelligence.³

There were other indications that suggested that the “borderline” 2000 full-scale IQ score of 79 was inaccurate. Ms. Thurston testified that the “scatter” of the scores earned by the student on the 2000 WISC-III reflected something of an internal inconsistency on the test; some of the student’s achievement scores, in fact, exceeded his cognitive ability as measured by the 2000 WISC-III. Further, Ms. Thurston testified that in January of 2001 “the student was reading at a better level than would be predicted, given his full scale IQ of 79...or at least [reading]” at a level commensurate with his intelligence. These facts could have, and should have, caused the school to question the accuracy of the IQ score of 79. However, that did not happen; instead, the school used this information to support its conclusion that the student did not have a learning disability. The school did not order a new test but, instead, accepted the 2000 borderline score of 79 as accurate. Both the set of attitudes the school adopted toward the student, as well as all of the IEP’s [sic] that were developed for the student during his enrollment at SAD 22, were influenced by the school’s belief that he was a student of borderline intelligence. For reasons discussed below, the hearing officer finds that belief to be mistaken.

A PET met in December of 2002, when the student was in the xx grade. In response to the parent’s continuing requests for a neuropsychological evaluation of the student, the PET agreed to schedule an evaluation that would clarify a series of questions, including the following: “ What are [the student’s] cognitive abilities and are the previous WISC scores a true reflection of his ability? (If an updated WISC reflects a Full Score of 79 or less, the team is also

³ The school eventually recognized its mistake regarding the student’s intelligence when, in January of 2004, a PET concluded that [sic] had a learning disability because his intellectual ability was “tested in the average range but [he tested] below average in reading, math and written language.” Record, SE 262.

requesting an Adaptive Behavior Inventory)...[and]... Is [the student] appropriately identified as a student with a speech language disorder or, as his parents feel, a learning disability..." SE, 350. After some skirmishing between the school and parents about who should do the evaluation, Dr. Lorna Kaufman was selected by the parents. Dr. Kaufman is qualified and experienced in the administration of psycho-educational evaluations. From January 26 to April 28, 2003, she gave the student a series of tests that included the WISC-III a widely used test designed to measure the student's general cognitive abilities.⁴ On that test, the student earned the following scores: a verbal IQ of 93, in the 32nd percentile; a performance IQ of 89, in the 23rd percentile; and a full-scale IQ of 90, in the 25th percentile. These results indicate that the student's cognitive ability is significantly higher in all areas of measurement than was indicated by the results obtained in the 2000 testing. Dr. Kaufmann concluded that the student had "demonstrated overall average intelligence" and that he is "functioning within the average range of intelligence."⁵ Further, Dr. Kaufmann concluded that the test she administered to the student was likely to have underestimated his general cognitive ability because of the difficulty he had, arising from his learning disability, in processing the language of the test itself.

The hearing officer determines that there is no reason to question these results of the WISC-III administered by Dr. Kaufman in the winter and spring of 2003, late in the student's xx grade year. The evidence in this matter simply does not support the school's determination that the student's intellectual abilities were in the "borderline" range. Based upon the evidence presented at this hearing, the hearing officer concludes that the student is at least of average cognitive ability,

⁴ Her full report is found in the Record, SE 304-315.

⁵ The results obtained by Dr. Kaufman are generally consistent with the results earned by the student in 1998, another indication that the 2000 test is an aberration, and not an accurate measure of the student's cognitive ability. While it is of course possible that, on a bad day, this student could perform at a level below his abilities, it is simply not possible for him – or anyone else - to perform at a level above his abilities. As will be discussed later, Dr. Kaufman also found that the student's "cognitive and academic profile are [sic] consistent with a complex language-based learning disability and a reading disability."

as measured by an appropriate testing mechanisms [sic] properly administered by a competent professional.⁶

This school's conclusion that the student was of borderline intelligence, and the fact that the IEPs at issue were based on that erroneous assumption, is a fatal mistake on the part of the school. Given the school's profound miscalculation of the student's intellectual abilities and its subsequent reliance upon that miscalculation when developing the individualized educational programs at issue here, the hearing officer finds that those IEPs do not comply with the statutory mandate that eligible students receive a "free and appropriate public education that emphasizes special education and related services designed to meet their unique needs..." 20 USC 1400 (d)(1)(A) (Emphasis added) To pass muster, the individualized education program an eligible student receives must be tailored to fit his unique needs and abilities. *Rowley*, 458 U. S. at 201. To meet that standard, an IEP must be based upon an accurate assessment of the student's capacity to learn as well as his specific educational needs. *Nein*, 95 F. Supp 2d at 976-978. In this case, the IEPs at issue fall short of that standard because they are based upon a grossly inaccurate assessment of this student's cognitive abilities. Even assuming, *arguendo*, that the IEPs for the student's xx, xx and xx grade years might be considered appropriate for a student of borderline intelligence, those IEPs are not tailored to meet the unique needs and abilities of this student,

⁶ In general, the decisions of a PET are measured against information available to the PET at the time the decision at issue was made. In this case, however, the hearing officer finds that the school knew, or should have known, that the existing test results regarding the student's general cognitive ability were inconsistent and therefore inconclusive. Further, there were aspects of the student's academic performance that challenged the school's determination that he was of "borderline" intelligence: as Ms. Thurston testified, "...the student was reading at a better level than would be expected, given his full scale IQ of 79...". The hearing officer finds that at least by the PET meeting of January of 2002, the school knew, or should have known, that the borderline full-scale IQ score of 79 earned on the 2002 WISC-III was suspect. By that point at the very latest, the school knew, or should have known, that more testing was needed to clarify the crucial question of what the intelligence level of the student is [sic]. Without an answer to this question, how can a PET develop an appropriate IEP? The hearing officer finds that, under the circumstances present in this matter, a school cannot fail to obtain information on an issue so central to the development of an appropriate IEP, and avoid the consequences of that failure by saying, in effect, that we didn't know any better.

whose intelligence is well within the average range. For this reason, the hearing officer finds that the IEPs at issue were not reasonably calculated to provide the student with a free and [sic] appropriate public education.

B.

The second reason the hearing officer finds that the IEP [sic] at issue in this matter do not provide the student with FAPE is conclusion [sic] the school's puzzling failure to identify the student's exceptionality correctly, or at least completely. The student had never been identified as eligible for special education services when he first enrolled in school within SAD 22 in the fall of 2000, entering the xx grade in the Weatherbee Elementary School. In January of 2001, midway through the xx grade, the student was identified as eligible for such services by a PET that determined that he had a speech and language impairment. In October of 2001, early in the student's xx grade [sic], the school received test results from an evaluation ordered by the PET that revealed the student to have a challenging reading disability, arising from a "double deficit" phonological processing disorder.

Despite this information, the school continued to identify the student as eligible under the category of speech and language impairment until January 2004, in the middle of xx grade , when a PET determined that he had a specific (language-based) learning disability. Thus, the IEPs for most of the student's xx grade [sic], and all of his xx and xx grade [sic] were developed for a student who was classified as speech and language impaired when, if [sic] fact, the central and pervasive condition influencing the student's ability to learn was a severe "double-deficit" language based learning disability involving – and severely impairing - his ability to learn to read. The school's view of the student as having only a speech and language impairment is a crucial misperception of the nature of his educational needs. This misperception on the part of the school contributed significantly to the development of IEPs that were inappropriate for the student, because they were not planned with regard to the student's real educational needs.

The student's xx grade year began in September of 2001; the student was receiving special education services pursuant to an IEP that was developed in

January of 2001 and which identified him as being speech and language impaired. Earlier, the student's parents had become concerned about his poor reading skills and had arranged for him to receive tutoring at the Masonic Learning Center where he began working with a tutor trained and certified in the Orton [sic] Gillingham reading program during the summer between xx and xx grades. At a PET that met on October 12, 2001, the parents expressed their concerns about the student's reading difficulties; they expressly stated their belief that the student had a learning disability that made it difficult for him to learn and asked that he be tested in this regard. They also asked that the student receive a structured reading program at school similar to the Orton [sic] Gillingham program he was receiving at the Masonic Learning Center in the summer and after school during the school year.

The parents also requested that the student be evaluated and identified [sic] a particular evaluator they preferred to do the evaluation. After discussion of the parent's request for testing, the PET concluded that, "Testing for SPIRE⁷ and the Comprehensive Test of Phonological Processing (CTOPP) could be done next week." The testing was done as scheduled by evaluators selected by the school. The reports were written on October 17 and 18, and were received by the school shortly thereafter. The SPIRE assessment placed the student at Reader One, Block 1, the first step of the SPIRE program. The CTOPP evaluation measures an individual's abilities in phonological processing, which involves the "use of phonological information, especially the sound structure of one's oral language, in processing written language (reading and writing) and oral language (speaking and listening)... Three kinds of phonological processing appear to be especially relevant for mastery of written language: phonological awareness, phonological memory and rapid naming. A deficit in one or more of these kinds of phonological processing abilities is viewed as a common cause of reading disabilities." SE 430. The CTOPP administered to the student in October of 2001 found that his "performance on the phonological awareness and rapid naming

⁷ "SPIRE" in an acronym for Specialized Program Individualizing Reading Excellence, a method for teaching reading skills using a "structured, phonetic reading approach".

sections [is] significantly impaired...[the student] presents as a child with both a phonological awareness deficit and a rapid naming processing disorder. A child with a “double deficit ” of this kind will find the acquisition of basic reading skills extremely challenging.” SE 431-432. Thus, in the middle of the first semester of the student’s xx grade year, the school had an evaluation expressly identifying the student as having a double deficit in phonological processing to such a degree that would make it “extremely challenging” for him to acquire even basic reading skills.

There is no indication, however, that the school responded to new information about the student in any way. The PET that met in January of 2002, the first PET to meet after the school received the CTOPP report, did not even discuss the CTOPP report; rather, the PET continued to identify the student as speech and language impaired, and did not make any significant changes to the student’s IEP in response to the CTOPP evaluation.⁸ The hearing officer finds that the CTOPP report contains information on which the school could – and should - have concluded one of two things: either (1) that the CTOPP report itself established that [sic] student had a language-based specific learning disability that severely impaired his ability to acquire basic reading skills or (2) that the CTOPP report raised questions as to whether the student had a language-based learning disability sufficient to require further testing on the issue. The school, however, did not reach either of these conclusions. In fact, the school appears to have taken no action at all in response to the CTOPP report.

Other information received by the school supports the conclusion that the school knew, or should have known, that the student had a significant language [sic] based learning disability and/or reading disability. As discussed above, Dr. Lorna Kaufman administered a series of evaluative tests to the student in the winter and spring of 2003, when the student was toward [sic] the end of xx grade.⁹ In her report, she expressly identifies the student as having “ a severe reading disability due to problems of phonological processing, orthographic

⁸ The results of the CTOPP evaluation are reported in the record, SE 406.

⁹ Her full report is found in the Record, SE 304-322.

processing, and a language disorder.” She also concluded that the student’s “cognitive and academic profile are consistent with a complex language [sic] based learning disability and a reading disability.” The school received Dr. Kaufman’s report sometime in the summer of 2003, between the student’s xx and xx grade years. A PET met on August 20, 2003 to discuss Dr. Kaufman’s report and to review the student’s IEP. Ms. Thurston wanted the school’s speech and language clinician to review Dr. Kaufman’s evaluations and report to determine if any further testing of the student was required “for the speech language classification”.

Notwithstanding the conclusions in Dr. Kaufman’s 2003 evaluation, which are consistent with the conclusions in the CTOPP evaluation of 2001, this PET did not identify the student as having a specific learning disability. Ms. Thurston wanted the school’s speech and language clinician to review Kr.[sic] Kaufman’s report to determine if any further testing of the student was required “for the speech language classification.” The IEP dated September 15, 2003, produced by this PET, continued to identify the student’s exceptionality as a speech and language impairment¹⁰. It was not until January, 26, 2004, in the middle of the student’s xx grade year, that the school recognized that he had a learning disability, finding that the student’s “intellectual testing [was] in the average range, but [he was performing] below average in reading, math and written language”.¹¹ The January 2004 PET concluded that the discrepancy between the student’s achievement and his ability was sufficiently severe to establish that the student had a language [sic] based learning disability involving short term memory and phonological processing impairments that interfered with his ability to learn to read, write, and calculate.¹²

¹⁰ This IEP does increase the amount of reading instruction the student is to receive; it provides that the student receive tutoring in a multi-sensory phonological reading program for eighty minutes every other school day. Neither the reading program not [sic] the tutor is specifically identified in the IEP.

¹¹ The PET based this conclusion on the results of test [sic] given between January of 2003 and January of 2004.

¹² It should be noted that these conclusions are strikingly similar to the conclusions reached in the CTOPP evaluation done on the student in October of 2001.

Based upon the evidence presented at this hearing, the hearing officer determines that, upon receipt of the CTOPP report in October, 2001, the school knew – or should have known – that the student had a phonological awareness deficit and a rapid naming processing disorder, making him a “child with a ‘double deficit’ ... {who}... will find the acquisition of basic reading skills extremely challenging.” The hearing officer finds that the PET that met in January of 2002 should either have identified the student as having a language [sic] based learning disability impairing his ability to learn to read or determined that further testing was needed to answer the question of whether the student had a learning disability. The school did not pursue either of these options; in essence, the school simply ignored the CTOPP report and, for the next three years, continued (1) to identify the student as having only a speech and language impairment and (2) to develop and deliver IEPs based on that incorrect premise.

As a student determined eligible for special education services under the IDEA, this student is entitled to receive a free and [sic] appropriate public education that provides “special education and related services designed to meet [his] unique needs...” 20 USC 1400 (d)(1)(A) (Emphasis added) The individualized education program an eligible student receives must be tailored to fit both his unique needs and abilities. *Rowley*, 458, U.S. at 201. To meet that standard, an IEP must be based upon an accurate assessment of the student’s specific educational needs and abilities. *Nein*, 95 F. Supp at 976-978. In this case, the IEPs at issue fall short of that standard because they are based on an incorrect identification of the student’s primary educational disability. The school’s failure to recognize that the student had a specific language [sic] based learning disability arising from his “double deficit” phonological processing disorder until January of 2004 leads the hearing officer to conclude that the IEPs at issue here were not tailored to meet the unique educational needs of this student. This is a second reason that the hearing officer determines that the IEPs at issue in this matter were not reasonably calculated to provide the student with a free and [sic] appropriate public education.

C.

While the hearing officer can – and does - conclude at this point that the IEP's [sic] the school developed and delivered to the student from his xx grade year through the end of his xx grade year did not provide the student with a free and [sic] appropriate public education because the those [sic] IEPs were premised upon the two critical misperceptions discussed above, there are two other subjects that should be considered. The first is the manner in which the school implemented the IEPs at issue. The second is the limited amount of educational benefit the student received from these IEPs.

While the student presents a complex set of educational needs, it is clear that his core problem involves the difficulties he has in learning to read. This reading disability has led to his relatively low reading skill level, and his limited reading ability has had negative consequences throughout his entire curriculum. The reading instruction the school has [sic] provided to the student in the xx, xx and xx grades is notable in several aspects: the series of different methods of remedial reading programs the school chose to deliver to the student during the three years at issue here, the sheer number of different reading instructors the student had over that time, the relative inexperience and lack of training of those instructors, and the inconsistent, at best, co-ordination among the student's various classes, the various remedial reading programs provided at school, between the two schools within SAD 22 that the student attended and between the reading instruction the student got at school and at the Masonic Learning Center.

In his xx grade, the school first provided the student with a structured reading program called SPIRE, some time in the fall of 2001 after the SPIRE evaluation was completed in mid-October. Mrs. Charles was his reading specialist. By January of 2002, his SPIRE instructor was Mrs. Wilcox, an Educational Technician III who also worked with the student in mathematics and written language. The school did not provide any reading instruction over the summer of 2002, between xx and xx grade. Prior to his move from elementary to middle school in the xx grade, the student's parents requested that he continue to

receive SPIRE services there. They were told that the middle school did not offer SPIRE services. His intended xx grade special education teacher, Mrs. Accetullo, was going to tutor him in reading; she was trained in the Wilson Reading Program, another phonologically based reading program, but was not trained as a SPIRE instructor. Mrs. Accetullo left SAD 22 less than a month after xx grade started. It is not clear what kind or how much reading instruction the student received, if any, in the beginning of xx grade.

The school next appointed Ms. Garneau to be both the student's case manager and his reading tutor. Ms. Garneau is an Educational Technician [sic] then working in SAD 22 under a "Targeted Needs" teaching certificate, a device used to provide short-term authorization to teach for people not otherwise eligible for a teaching certificate; she received her Targeted Needs certificate in November of 2002. She had had three or four hours of training in SPIRE reading program methods in September of 2002, and had attended a two-day seminar designed to train tutors in the Wilson Reading Program. The student was the first student Ms. Garneau had ever tutored in reading using SPIRE methods. The reading program she provided to the student was a mix of both SPIRE and Wilson methods. Ms. Garneau provided this amalgam of reading instruction to the student [sic] programs [sic] until April of 2003 when it was discontinued by a PET and replaced with something called the Great Leaps reading program, also delivered by Ms. Garneau.

In xx grade, the student's reading instruction was provided within an every other day 80-minute block of direct instruction that included special education support staff for Reading and Language Arts. Ms. Garneau was replaced by Ms. Gamble, an Educational Technician, as the student's reading tutor. The Orton [sic] Gillingham program replaced the Great Leaps program, a change the parents had requested. However, while Ms. Gamble was receiving some Orton [sic] Gillingham training while she was tutoring the student, she was not fully trained in the Orton [sic] Gillingham method; if [sic] fact, she was not certified and never became certified under Orton [sic] Gillingham standards. SAD 22 did have a certified Orton [sic] Gillingham tutor on its high school staff. She

was assigned to observe and supervise Ms. Gamble's work with the student but, due to lack of time, this supervisor was able to attend only a single tutorial session with Ms. Gamble and the student. Ms. Gamble provided reading instruction to the student throughout his xx grade year, largely on her own.

In addition to the constantly changing menu of remedial reading programs and the shifting lineup of reading tutors, there was also very little effective coordination among the various parts of the student's curriculum, both programmatically and institutionally. The changes in reading programs have been discussed above. One of those changes occurred when the student moved from the Weatherbee Elementary School, where he had been receiving SPIRE services, to the Reeds Brook Middle School, which did not offer SPIRE services. Reeds Brook offered only the Wilson Reading Program because Mrs. Accetullo, the student's xx grade special education teacher, was a trained and certified Wilson Reading Program tutor. Thus, this change in reading program was not made in response to any change in the educational needs of the student. Rather, it was made for reasons of institutional convenience, simply because Reeds Brook happened to have a trained and certified Wilson Reading Program tutor already on its staff.

Another example of the lack of coordination that existed in relation to the student's education is the fact that the school never consulted with the Masonic Learning Center (MLC), where the student received tutoring in the Orton [sic] Gillingham reading method from the summer of 2001, between his xx and xx grades [sic], through the end of his xx grade [sic] in June of 2004. The student's parents took him to these fifty-minute sessions in the afternoon, after school, three times per week in the xx grade and twice per week in the xx and xx grades.¹³ The MLC tutors who worked with the student were fully trained and certified in Orton [sic] Gillingham reading program methods; they reported that the student was doing relatively well and was making progress within the Orton [sic] Gillingham system. Beginning in the student's xx grade, his parents had asked

¹³ The student went to the MLC in the summertime as well, again transported and financed by his parents.

the school to provide Orton [sic] Gillingham reading services to the student in school. While the hearing officer specifically does not find that the school is obligated to provide the particular reading program requested by the student's parents, it is surprising to the hearing officer that the school made no attempt to discuss the student's experience in the Orton [sic] Gillingham program with the MLC. Indeed, when at the hearing the school's special education director was asked why she had not talked with the MLC about the Orton [sic] Gillingham tutoring the student was receiving, she replied that services the student received outside of school were, "none of my concern." While the hearing officer does not find that the school was legally obligated to include, either formally or informally, the MLC in the process of developing an IEP for this student, it is apparent that the MLC would have been a good source of information for anyone interested in designing an effective reading program for this student. The school's failure even to consult with the MLC is another example of the lack of real coordination that existed with regard to the student's reading program.

In summary, in a little less than three years in SAD 22 schools – most of his xx grade, all of his xx and xx grades – the student had to cope with at least five different reading programs taught to him by at least five different tutors. Of those tutors, only Mrs. Accetullo was a [sic] certified as a special education teacher; and only Mrs. Accetullo was both experienced and fully certified to deliver the reading program she was using to tutor the student.¹⁴ The other reading tutors the school provided for the student were either Educational Technicians or temporarily certified teachers with little or no training in, and little or no experience with, the multi-sensory reading program each was using with the student. The hearing officer finds, with regard to the reading instruction provided for the student in the IEPs at issue here, that these IEPs were implemented in an [sic] such an uncoordinated, inconsistent, fragmented, and constantly changing manner as to render them ineffective. This student, who has a language [sic] based learning disability involving a phonological processing disorder that made

¹⁴ It should be noted that Mrs. Accetullo left her job less than a month after she became the student's xx grade teacher.

it extremely challenging for him to acquire basic [sic] reading skills, was forced to deal with too many different programs delivered by too many different tutors without enough training and experience. This set of conditions leads the hearing officer to conclude that the IEPs at issue were not implemented so as to provide the student with a free and [sic] appropriate public education.¹⁵

II.

Having found that the IDEA was violated as described above, the hearing officer must determine what remedy the family is entitled to receive. The typical remedy available under the IDEA to a student who has been denied appropriate services in the past is an award of compensatory education services in an amount sufficient to make up for the past educational deficiencies. This long-standing principle has been affirmed recently by the First Circuit as part of its review of a case arising in Maine:

¹⁵ While it may be somewhat redundant given the conclusions reached above, the hearing officer further determines that, as a direct consequence of the violations of the IDEA described in Section I of this decision, the educational programs the student received in his xx, xx and xx grade [sic] were not reasonably calculated to enable the student to receive meaningful educational benefit commensurate with his cognitive ability to learn. The student's central educational need involved his reading disability. The best measure of his reading progress over the years that was presented at the hearing is the series of Woodcock Reading Mastery Tests given by the MLC. These four tests were administered from the end of the student's xx grade (6/21/01) [sic] to the end of his xx grade year ([sic](5/5/04) and each test reports scores obtained by the student in several different areas for each administration. A comparison of the first test with the last reveals that, while the student made some progress over that time period, that progress was minimal. The Basic Skills and Total Reading scores, as reported in grade equivalents, both went from 2.5 to 3.8 in the three-year period. The Word Identification score went from a grade equivalent of 2.6 to one of 3.6. The Word Attack score went from a grade equivalent of 2.5 to one of 4.0. The Passage Comprehension score went from a grade equivalent of 2.4 to one of 4.1. Overall, the student's average gain amounted to a grade equivalent gain of only 1.36 GE units over a three-year period. The hearing officer finds that this level of gain falls within a "trivial" and/or "negligible" range of benefit, given this particular student's considerable intellectual potential. *Nein*, at 185; *Carter v. Florence County School District*, 950 F. 2d 156 (4th Cir. 1991). Finally, it is impossible to attribute even this minimal progress to the reading instruction the student received from the school. It is at least as likely that the Orton [sic] Gillingham tutoring the student received from the Masonic Learning Center from the summer of 2001 through June of 2004 is responsible for his improvement in reading.

We know that a child eligible for special education services under the IDEA 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. 2d at 682n.1; Pihl v. Mass Dep't of Educ., 9 F3d 184, 188-189 & n. 8 (1st Cir. 1993*

Maine School Administrative District No. 35 v. Mr. R., 321 F. 3d 9, 17-18 (1st Cir. 2003) The *MSAD 35* court goes on to state that an eligible child's claim for compensatory education begins to accrue at the point his or her IEP is so inappropriate that the child receives no real educational benefit. *Id.*, at 18. Under this principle as articulated by Judge Selya in the *MSAD No.35* opinion, the student here is entitled to compensatory education for "past deprivation" that occurred from the beginning of xx grade through the end of his xx grade year, and the family so argues. The school argues that the remedy the family seeks here is, in essence, tuition reimbursement, which is not available as a remedy in a compensatory education case, relying primarily upon *Ms. M. v. Portland School Committee*, 360 F. 3d 267 (1st Cir. 2004)¹⁶ for the principle that compensatory education remedies are limited to prospective injunctive relief, such as future services, and do not include tuition reimbursement.¹⁷ For the reasons that follow, the hearing officer finds the family is entitled the remedy described below.

The hearing officer finds this to be a case that is properly decided under the rubric of compensatory education, and not as a unilateral placement-tuition reimbursement case.¹⁸ The case required eight days of hearing to present, and most of that time – and the bulk of the testimony and documents –was focused

¹⁶ The hearing officer views the *Ms. M* case as primarily involving questions about whether certain exceptions to the notice provisions of 20 USC 1412(a)(10)(C)(iii) were triggered, given the facts of that case. There are no such notice issues in the instant case. Further, the *Ms. M* court specifically declined to determine "when claims of compensatory education are generally cognizable." 360 F. 2d at 274.

¹⁷ The school also refers to other cases, such as *Pihl v. Massachusetts Dep't of Education*, 9 F. 3d 184 (1st Cir. 1993) and *MSAD #35 v. Mrs. R.*, 321 F. 3d 9 (1st Cir. 2003)

¹⁸ Though it should be noted that the parents, after rejecting the school's IEPs for the summer of 2004 and school year 2004-2005 as inappropriate, gave the school prior notice of their intention to enroll the student at Landmark School, where the student has made, and by all reports presented at the hearing continues to make, impressive progress.

upon events involving the program the student received in xx, xx and xx grades. The parents contended vigorously that those IEPs were inappropriate; the school just as vigorously defended the IEPs as appropriate. After close consideration of the extensive record this case has generated, the hearing officer has reached the conclusion that the student did not receive a free and [sic] appropriate education in his xx, xx and xx grades [sic] because, *inter alia*, the school severely underestimated his intellectual ability, misunderstood the true nature of his educational needs and, consequently, provided the student with IEPs that were inappropriate because [sic] were premised upon those twin misperceptions of the student. It is not surprising that the student received only minimal educational benefit during those three years. Finally, in January of 2004 when the student was in the middle of his xx grade year,¹⁹ the school recognized that its prior conceptions about the student were incorrect in those two crucial ways. At that point, the school recognized that the student (1) was of average, and not borderline, cognitive ability and also (2) had a language [sic] based learning disability arising out of a “double deficit” phonological processing disorder that made it extremely difficult for him to acquire even basic reading skills, notwithstanding his innate intelligence.²⁰ Notwithstanding this belated recognition of the student’s academic abilities and educational needs by the school, the damage had already been done.

Based upon the considerations summarized above, the hearing officer concludes that, by the end of his xx grade year, the student had been deprived of the education to which he is [sic] entitled under federal and state special education law for the past three years. For this “past deprivation”, the family is entitled to a remedy that will in some way serve to compensate the student for the damage done during the three years of that deprivation. The student’s entitlement to

¹⁹ At that point, the student was in his fourth year in SAD #22.

²⁰ Even after the school came to understand the real abilities, and disabilities, of the student, the PET did not make any significant changes to his 2003-2004 IEP. Further, the school offered both a program for the summer of 2004, and an IEP for the student’s xx grade year, 2004-2005 that did not even attempt to compensate the student for the school’s failure to provide a FAPE to him during the preceding three years.

compensatory education began to accrue in the student's xx grade [sic], when the "past deprivation" began, *MSAD No. 35*, at 18, and it continued to accrue through his xx grade year. Given the conclusions reached by the hearing officer in this case, the reality of that deprivation is a fact that exists at the end of the student's xx grade year; further, the nature, duration and educational consequences of that deprivation are not altered by any offer of services the school may choose make for the student's xx xx year.

The school disagrees, however, and argues that the case should be decided under tuition reimbursement principles, which would shift the focus of analysis to the content of the IEPs offered for the summer of 2004 and school year 2004-2005. The hearing officer rejects this argument. If applied to this case, this theory would mean that [sic] school's failure, over three consecutive school years, to provide the student with the education to which he is entitled under state and federal special education law would evade scrutiny entirely.²¹ Such a result is unacceptable. The hearing officer has found that, for three school years, the school failed to comply with the most basic requirement imposed on schools by the IDEA: to provide an eligible student with a free and [sic] appropriate public education. Such a prolonged violation of the most central requirement of the IDEA should neither be shielded from scrutiny nor insulated against remedy. The student and his family, who suffer the educational consequences of such a violation of the IDEA most directly²², are entitled under the IDEA to a remedy for those "past deprivations" caused by the school's failure to provide FAPE during those years.

Consequently, the hearing officer determines that, under the circumstances presented in this case, the family is entitled to compensatory education services for the "past deprivations" described above in an amount equal to the costs

²¹ Additionally, of course, the school would avoid any accountability for its failure, over three years, to comply with the central mandate of the IDEA.

²² Ultimately, of course, it is the entire community which suffers when any eligible student does not receive the "free and appropriated public education...designed to meet [the students'] unique needs and prepare them for employment and independent living..." to which he or she is entitled under the IDEA.

associated with the student's attendance at (1) the 2004 summer program at the Landmark School and (2) the 2004-2005 school year at the Landmark School. Based on the evidence produced on this issue, the hearing officer finds the costs associated with the student's attendance at the Landmark School from the summer program of 2004 through the end of the 2004-2005 school year to be \$60,000.00.²³

ORDER

For the reasons set forth above, the school is ordered to provide \$60,000.00 (sixty thousand dollars) to the guardians of the student to be held in trust for the benefit of the student. These funds are intended to fund compensatory educational services for the student. These funds may be used either to pay for the educational services already obtained by the family for the student at the Landmark School from the summer of 2004 to the end of school year 2004-2005 or to obtain future educational services substantially similar to those already provided by Landmark School through the end of school year 2004-2005.

Peter H. Stewart
Hearing Officer

Date

WITNESS LIST

FOR THE FAMILY:

Kerry Curtis, Speech/Language Pathologist

²³ The family produced evidence and testimony documenting \$57,770.00 in such costs in tuition and fees through the end of the 2004-2005 school year. That sum included travel costs and other school related expenses through the end of the hearing in February of 2005. The hearing officer takes notice that the family will incur additional expenses associated with the student's attendance at Landmark from February of 2005 through the end of the 2004-2005 school year in June. In recognition of this additional cost, the hearing officer adds \$2,300.00, bringing the total to \$60,000.00.

Carole Donnelley, Landmark School
John Adam Hickey, Landmark School
Lorna Kaufman, PhD., Developmental Psychology
Stephen Kron, Landmark School
Student's Mother
Student's Father
Patricia Martz, Director, Masonic Learning Center (Orton-Gillingham specialist)

FOR THE SCHOOL:

Lisa Garneau, SAD #22
Elizabeth Jadallah, School Psychological Services Provider, SAD #22
Cedena McAvoy, Special Education Teacher, SAD #22
Julia Mahon, Speech/Language Pathologist
Laura Matthews, Science Teacher, SAD #22
Carrie Thurston, Special Education Director, SAD #22

DOCUMENTARY RECORD

FOR THE FAMILY:

P-1 through P-347
P1[sic] through P79 [sic]

FOR THE SCHOOL:

SE 1 through 524
SE 1-1 through 1-352

(NOTE TO READER: Numbering of “**Factual Findings**” after the first “2” has been done incorrectly.)