

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 9, 2005

05.069H--Parents v. York School Department

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on September 7, 8, 9, 30 and October 5 & 14, 2005 at the Department of Health and Human Services in Biddeford, Maine. In addition to counsel and the hearing officer listed above, those present for the entire proceeding were the parents, Parents, Jean Beetz, Director of Special Education for the York School Department ("District"), and Susan Macri, Assistant Director of Special Education. Testifying at the hearing were:

The mother	
The father	
Jean Beetz	Director of Special Education
Sally Brown	Occupational Therapist
Amy Carestia	Special Education Teacher
Joann Frankhouser, Psy.D.	Neuropsychological Examiner
Charlotte LeGolvan	Reading Teacher
Lisa McManus	Educational Director, Learning Skills Academy
Tim Rogers, Ph.D.	Psychologist
Gioia Schultz	Speech Language Therapist
Kimberlee Wing	Occupational Therapy Evaluator

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

The parents requested this due process hearing on June 17, 2005. The case involves their child (henceforth “the student”), whose date of birth is xx/xx/xxxx.

On August 4, 2005, the parties and their counsel attended a prehearing conference. Present were: the mother and father; Richard O’Meara, Esq., counsel for the family; Eric Herlan, Esq., counsel for the District; Jean Beetz, Director of Special Education; Susan Macri, Assistant Director of Special Education; and Shari Broder, Esq., Hearing Officer. Documents and witness lists were exchanged in a timely manner. The parents submitted 197 exhibits constituting approximately 619 pages, and the District submitted approximately 130 exhibits constituting 560 pages.

The hearing took place, as noted above, over the course of six days. Both parties requested and were granted leave to file written closing arguments, which were submitted on October 21, 2005, and the record closed at that time. The parents submitted a 56-page memorandum, and the school submitted a 46-page memorandum.

II. ISSUES:

- a. Did the IEP and placements provided to the student by the District during XX grade provide Student with a free, appropriate public education (FAPE)? If not, what remedies are appropriate?
- b. Did the IEP and placements provided to the student by the District during XX grade provide Student with FAPE? If not, what remedies are appropriate?
- c. Did the IEP and placements provided to the student by the District during XX grade provide Student with FAPE? If not, what remedies are appropriate?
- d. Is the family entitled to reimbursement of the costs incurred in connection with its unilateral placement of the student in private school, including transportation and related services?
- e. Is the District required to reimburse the parents for an independent occupational therapy evaluation? If so, what amount is appropriate?

III. FINDINGS OF FACT

1. The student is XX years old. Student lives with the parents and sister in York, Maine, where the student attended public school, beginning in XX grade. Student withdrew from York Middle School on or about March 5, 2005, during XX grade.

2. The student is identified as eligible for special education under the categories of speech and language impairment and other health impairment (OHI). The student has Attention Deficit Disorder (ADD), which is treated by medication. As a result of these disabilities, Student faces a number of educational and social challenges at school, including related processing disorders that cause Student to “see the world in pieces” and misinterpret things. Student has substantial weaknesses in Student’s verbal skills, executive functioning, motor skills, processing speed, working memory, visual scanning, sustained attention, and sensory integration and processing.

3. In the summer of 2002, the parents asked Joann Frankhouser, a licensed psychologist, to perform a neuropsychological evaluation on the student to gain information about Student’s learning style. [S-355-367] Dr. Frankhouser’s evaluation noted that the student had difficulty with executive functioning, particularly processing information. [S-359] Dr. Frankhouser administered the Stanford Binet cognitive test, and the student received a cognitive score of 73. Although this was a borderline score, she did not conclude that the student was of borderline intelligence, but felt student’s profile was typical of a child with a learning disability.

[Testimony of Dr. Frankhouser] This score was also consistent with testing done in September 2001, which resulted in a full scale IQ of 70. [S-A1] Although the student’s IEP for the coming school year, XX grade, had already been drafted by the time Dr. Frankhouser evaluated the student [S-372-388], Dr. Frankhouser felt that it included many of the things she suggested.

4. Towards the end of XX grade, the PET met to discuss the student's summer and transition from elementary school to York Middle School (YMS), where Student would attend XX grade. [S-389] The PET discussed changes to the student's IEP for the next school year. Student's IEP included direct special education instruction for three 45-minute periods each day, 30 minutes of speech and language services twice a week, and educational technician support 135 minutes daily in mainstream classes and special subjects. [S-397-398] The parents had the opportunity to meet Amy Carestia, the student's case manager, before the school year started. Ms. Carestia provided direct instruction in language arts, math and structured study hall.¹ The IEP contained 12 goals and 57 objectives in all of the areas identified by the PET. For OT, the IEP provided direct instruction for 30 minutes three times each week until June 30, 2002, then consultation services once a week for 30-45 minutes beginning on September 1, 2002, which was the start of XX grade. The PET minutes noted a discussion about the student's need to become more independent in applying strategies and getting her sensory needs met.² [P-466] For this reason, the PET felt it would be better for the student to have modifications and sensory strategies, rather than direct occupational therapy (OT) services in middle school. [P-466] Although the parents had a practice of closely reviewing the student's IEP and PET minutes, and asking questions when they did not understand something, they did not notice the change in OT services.

[Testimony of mother, father, J. Beetz]

5. Ms. Carestia was the student's case manager for both XX and XX grade [sic]. She did an excellent job communicating with the parents about the student, and did so on a daily basis.

[Testimony of mother, A. Carestia] She provided a supportive and nurturing educational

¹ In 2002, Ms. Carestia was not married, and her name was Amy Peterson. Upon marrying, she became Amy Carestia. For simplicity, she will be referred to as Amy Carestia throughout this decision.

² Ms. Brown wrote a report which recommended changing the student's services from direct to consult, and she gave a copy of this to the parents.

environment for the student. The student confided in her daily, and complained if things were bothering Student. [Testimony of A. Carestia] In Ms. Carestia's classroom, the student was bubbly, animated and social with student's peers and Ms. Carestia. Loud social atmospheres overstimulated the student, so Student was quieter and less social with the larger student population. The student preferred to stay in Ms. Carestia's classroom during lunch and recess most days, rather than eating in the cafeteria. Student ate with three to five other students, some of whom were Student's friends, and some of whom were not disabled. Ms. Carestia encouraged the student to go outside during recess and socialize with other students. [Testimony of A. Carestia]

6. During fifth grade, the student went to the nurse frequently. [S-A17] Sometimes, Student was anxious about school, and other times, Student wanted a snack. The frequency of the student's visits to the nurse decreased in XX and XX grade [sic], but Student continued to visit the nurse more often than most students. [S-A18]

7. The student needed a sensory diet, so occupational therapist Sally Brown met with Ms. Carestia weekly to discuss the student's OT needs. Ms. Brown met with the student's mainstream teachers as well. She trained Ms. Carestia in how to offer a sensory diet, and provided her with equipment. [Testimony of S. Brown, A. Carestia] Ms. Carestia developed a thorough understanding of this, and was able to give the student what was appropriate at the right time. Ms. Brown and Ms. Carestia felt the student needed to learn to access these tools independently, and this was a consideration in the decision to change from direct OT services to the consult model.

8. Ms. Carestia had the student do sensory diet exercises during every math class and every structured study hall as well as during lunch recess. [Testimony of A. Carestia] Consequently,

the student received essentially the same services as Student had previously, but they were no longer being provided by a licensed occupational therapist. [Testimony of S. Brown] All of the students in Student's classroom participated because they all had some need for this. When in regular education classes, the student would bring one OT item with Student that was small and unassuming. [Testimony of A. Carestia]

9. In structured study hall, Ms. Carestia reviewed the student's social studies and science work with the student and the other students in Student's classroom. Sometimes, the student finished work Student had started in Student's mainstream classes, and other times, Student worked on homework. [Testimony of A. Carestia]

10. The student had an educational technician to support Student in regular education classes, and Ms. Carestia spoke daily with this person. [Testimony of A. Carestia] The educational technician helped the student stay focused, and helped Student with organization.

11. Based upon Student's report card, the student did well in all of student's subjects during XX grade, earning As and Bs in all of Student's classes, including mainstream science and social studies. [S-4]

12. On September 29, 2003, the mother sent an E-mail to Ms. Carestia regarding her concerns about the student's social studies accommodations, and asked Ms. Carestia to look into it. [P-402] In the E-mail, the mother strongly expressed her confidence in Ms. Carestia, saying, "I believe you are right on top of as much of this as you can be with your own load, and have given (the student) more than any other teacher has ever, ever been able to, or wanted to give (the student). You are the biggest gift we have ever received." [P-402]

13. At PET meetings held on October 29 and November 12, 2003, the PET developed the student's IEP for XX grade. [S-205, 226] That IEP continued to provide the student with direct

instruction at 180 minutes per day for reading and language arts, math, and supported study. It added 30 minutes a month of special education consultation with the regular teachers to reflect services that the student had already been receiving. The student received 30 minutes each week of direct speech and language services. OT direct services were offered once a month for 45 minutes, with a weekly consultation for 30 minutes. The student continued to receive support from an educational technician in Student's mainstream classes. [S-213-215.] Student's program contained goals and objectives in math, science, social studies, reading, study and organizational skills, social pragmatics, sensory integration, and other areas of need. [S-150-162]

14. In XX and XX grade [sic], the student continued to have Ms. Carestia for math and structured study support for pre-and post-teaching of Student's mainstream classes and for assisting with homework completion, but went to Charlotte LeGolvan for language arts. Ms. LeGolvan was trained in Wilson and other reading programs. The program was intended to provide intensive, systematic instruction in reading, decoding, writing, and other language skills for students struggling in those areas prior to entering high school. [Testimony of C. LeGolvan] Ms. LeGolvan tested the student in September and November of 2003 to determine Student's needs. Testing revealed that the student had difficulty with fluency, and Student's word recognition was below average, but student had good decoding skills. [S-202-204] In light of Student's cognitive score of 79, Student did better than expected in some areas. [S-202-204] Ms. LeGolvan had ten students, and was assisted by an educational technician and Sherilyn Hatch, a speech and language therapist³. This class met for 90 minutes each day, five days a week in XX grade. In XX grade, the class met for 90 minutes every other day. The class spent 30-45 minutes doing Wilson work, then switched to other components, including reading

³ Ms. Hatch provided speech and language assistance three times every six days to the class, so the student received additional speech and language therapy through Student's reading program.

comprehension activities, story forms, and writing activities. Initially, Ms. LeGolvan started all of the students on step 1 so they would “all to be on the same page.” [Testimony of C.

LeGolvan] Because the student had prior instruction in Wilson and Spire, it soon became apparent that Student was ahead of the rest of the group. At the PET meeting on November 12, 2003, the PET decided that the student would not be in Student’s language arts class during the Wilson instruction, but would work with Ms. Carestia. Student would then see Ms. LeGolvan after school⁴ three times a week to work one-on-one at Student’s appropriate level. [S-208]

15. The student frequently chose to spend most of student's lunch/recess period in Ms. Carestia’s classroom with a few other students. [Testimony of A. Carestia] During this time, Student had lunch and engaged in social activities, yoga and other sensory diet activities. The student also participated in weekly lunch groups headed by guidance [sic] counselor, and ate in the guidance office on those days. The lunch group included both regular and special education students, and gave the student the opportunity to work on social situations. [Testimony of A. Carestia]

16. On March 16, 2004, the PET met to discuss the student’s progress in Student’s reading program. [S-192] Mrs. LeGolvan remarked that although the student was progressing in most areas, Student was not seeing much progress in reading comprehension. [S-192] The mother expressed her concern about this and about whether the student’s program was working for Student. [S-193]

17. Dr. Frankhouser reevaluated the student in April 2004, towards the end of Student’s XX grade year. S-173. She testified that she found the student was more poised and confident, and less anxious than Student was when tested two years earlier. Dr. Frankhouser also observed less impulsivity during testing, and noticed that the student caught Student’s own errors with greater

⁴ Due to transportation issues, these individual sessions were later held during lunch.

frequency. [Testimony of Dr. Frankhouser]. The student needed a little less support in terms of reassurance as well. Student still struggled with formulating what Student wanted to say.

[Testimony of Dr. Frankhouser] Dr. Frankhouser administered the WISC-IV, which resulted in a full-scale IQ score of 76, which was the 5th percentile. [S-182] The student made good progress in reading because Student had been taught with a very focused approach. Student's achievement test scores showed impressive gains over three years in word reading (from 16th percentile to 37th) and pseudoword decoding (from 13th percentile to 39th). [S-A1] In reading comprehension, Student's weakness, Student was in the 3rd percentile, up from the 1st percentile previously. Dr. Frankhouser felt that the student was capable of thinking and reasoning at a low average or average level in some areas. She recommended summer programming because the student's progress had been slow and there was a risk of regression. [S-181] She also recommended continuing to work on social and pragmatic skills. [S-181]

18. Ms. LeGolvan tested the student in May of 2004, which confirmed that the student made impressive gains in word attack. [S-171A, testimony of C. LeGolvan] On the Gray Oral Reading Test, the student made gains in every area except comprehension, and these gains were both in grade equivalent and percentile rank. [S-171A] This testing showed that the student had made good progress in decoding and phonemic awareness. Additionally, achievement test scores from October 2001 through April 2005 showed substantial gains in word reading, decoding and reading comprehension. [S-A1-S-A2] The student received As and Bs on her report card throughout XX grade, with an occasional C. [S-3]

19. The PET agreed that the student required an extended school year program following XX grade, consisting of one hour of tutoring in reading per week and 30 minutes four days a week of tutoring in math to maintain skills. [S-521] Although the District offered Student a program, the

parents chose [sic] send Student to Learning Skills Academy's (LSA) summer program.

[Testimony of mother] The District reimbursed them \$362.50 towards that program, which reflected the District's tutoring cost. [Testimony of J. Beetz] The student also participated in a social pragmatics course there. LSA is located in Rye, New Hampshire, and is approved by that state for grades four through ten, but not by any private accreditation associations. [Testimony of L. McManus] The student population ranges from grades six through eleven, and enrollment is between 23-26 students. Each class has between three and five students. [Testimony of L. McManus]

20. The parents were very pleased with the student's success in the LSA summer program, and thought Student responded particularly well to LSA's integrated approach to instruction, which linked various subjects to a common theme. Student's mother observed student being more independent and less clingy on a field trip. [Testimony of mother] The student also began to read independently for the first time. The parents later learned, however, that a boy at LSA pressured the student into touching him inappropriately. [Testimony of mother]

21. In July 2004, Sally Brown conducted the student's occupational therapy triennial evaluation. [S-131-137] She did a complete evaluation, including functions and thresholds, and used this information in drafting her recommendations.⁵ [Testimony of S. Brown] Ms. Brown noted that the student continued to have weak motor skills and sensory processing, with relative strengths in visual perceptual skills. The student continued to be "impacted both at home and to a much lesser extent at school, by sensory processing weaknesses." [S-136] Ms. Brown mentioned that the student continued to receive a regular sensory diet and many modifications to address a wide array of needs, including Student's weak fine and gross motor skills. [S-136] She saw "nice

⁵ Ms. Brown did not specifically include functions and thresholds in her report.

functional gains and increased independence in managing herself in the school environment.” [S-135-136] She also noted that, although she did not recommend direct services, the District provided them to the student at Student’s parents’ request. [S-136] The parents did not express any disagreement with this report. [Testimony of J. Beetz]

22. On September 20, October 18, November 8, November 17, and November 24, 2004, the PET met to develop the student’s XX grade IEP. [S-124, 108, 98, 89, 80] The IEP provided the student with 270 minutes per day of direct instruction on three out of every six school days, 30 minutes a week of special education consultation with Student’s regular education teachers, 40 minutes per week of speech and language instruction with one hour per month of consultation, and 30 minutes per week of direct occupational therapy with 30 minutes a week of consultation. The student would continue to receive educational technician support in Student’s regular education science and social studies classes, as well as in specials. The program again provided extensive classroom accommodations. [S-63-69] The IEP included extensive goals and objectives in reading comprehension, decoding, writing, fine and gross motor skills, sensory integration, pragmatic language, and math. [S-72-79, S-A90]

23. Special education instruction continued to be divided between Ms. Carestia for math and supported study, and Ms. LeGolvan and speech therapist Ms. Hatch for reading and language arts. Ms. Hatch’s speech language assistance in that classroom was again with the group as a whole and took place once a week on one week and twice a week on the alternating weeks, for 45 minutes each session. [Testimony of C. LeGolvan] The reading program changed slightly to have “stations” within the classroom through which students moved, permitting the student to do reading decoding work with the class as a whole. Although the student had some accommodations, Student’s teachers neither reduced Student’s workload nor changed Student’s

curriculum. [S-81]

24. Sometime during the fall of 2004, Ms. Carestia wrote a statement describing the student's program and Student's progress in it. [S-85] She wrote that the student previously stayed inside for recess, but with Ms. Carestia's encouragement, was going outside 50% of the time. [S-85] Student's independence had increased, and Student was interacting more with Student's peers. [S-85] Ms. Carestia also observed that social problems the student had previously encountered, like accepting dares from peers, had now ceased. [Testimony of A. Carestia]

25. At the October 18, 2005 PET meeting, the PET discussed, among other things, Sally Brown's OT evaluation. [S-108] The student showed growth in the quality of student's performance, but continued to have some difficulties. [S-108] Although there were no objections or disagreements about the testing itself, the parents felt the student needed direct services, which Ms. Brown did not recommend. [S-109]

26. As the parties were leaving the November 17, 2004 PET meeting, the family's advocate, Lou McIntosh, told Ms. Beetz that the parents needed an independent OT evaluation, and were going to use Kimberlee Wing. Ms. Beetz replied, "You need to do what you need to do. Make sure you get complete evaluations normed for her age."⁶ [Testimony of J. Beetz] Mr. McIntosh made no mention of wanting the District to pay for the evaluation. Also at that meeting, there was discussion about the student's ability to calculate change from money, which Student could do at school, but not at home. [S-90] The parties agreed to include generalization of this and other skills in the student's goals and objectives. [S-90]

27. At the November 24, 2004 PET meeting, Mr. McIntosh raised a concern about the student's relationship with Ms. Carestia. Mr. McIntosh complained that the student was in a cocoon, and

⁶ Ms. Beetz made this statement because prior evaluations conducted by Ms. Wing were not normed for the student's age.

that Student was overly dependent upon Ms. Carestia, who [sic] he alleged insulated the student. [S-83] Ms. Carestia was very involved with the students with whom she worked, and thought she was doing her best to serve them. [Testimony of A. Carestia] She was shocked by this criticism and by Mr. McIntosh's hostile attitude towards her. She was so hurt and taken aback by this that she left the meeting. Ms. Carestia firmly believed that the student had made "huge growth" at YMS, and felt she was happy and successful. [Testimony of A. Carestia] Although the student had some problems socially earlier, Ms. Carestia observed that Student developed more confidence over time. As a result of the parents' concern about the student's attachment to Ms. Carestia, which they felt had become unhealthy, Ms. Carestia was removed as the student's case manager, and Susan Macri replaced her. [Testimony of mother, J. Beetz]

28. At the November 24 PET meeting, Ms. Beetz asked whether the parents were requesting an independent educational evaluation (IEE) for OT. [P-286] On November 30, 2004, the mother sent an E-mail to Ms. Beetz confirming that she was requesting an independent OT evaluation to be conducted by Ms. Wing, and that it would be conducted with complete tests, not just subtests. [P-271] It was not until Ms. Beetz received a contract from Ms. Wing that she realized the parents were expecting the District to pay for the evaluation. [Testimony of J. Beetz] The contract contained an hourly rate, but no total fee. [P-269] The mother reported that the evaluation would run between \$2200-2300. Ms. Beetz responded that this seemed like an unusually high rate, and she wanted to investigate what a customary rate for such an evaluation was. [Testimony of J. Beetz]

29. The IEP drafted during the fall 2004 meetings continued the student's schedule alternating 270 minutes of special education every other day with mainstream science, social studies and special subjects. [S-65] The student had speech therapy for 40 minutes per week, with one

consultation per month. [S-65] The student received 30 minutes per week of OT, and 30 minutes per week of OT consultation. [S-66] Student continued to have one-to-one support from an educational technician when student was in the regular education classroom. [S-66] 30. In early winter 2004, Ms. Wing conducted her OT evaluation. [S-37] Ms. Wing reviewed Sally Brown's July 2005 testing, and thought it was very well done, but the sensory profile report appeared incomplete⁷. [S-134, testimony of K. Wing] Although Ms. Wing reached different conclusions from Ms. Brown, her testing and findings were similar. Additionally, despite Ms. Beetz's request to have the evaluations normed for the student's age, the Sensory Integration and Praxis Tests were normed for an eight-year old. [S-37]

31. Ms. Beetz learned that the District normally paid \$350 for an OT evaluation. [Testimony of J. Beetz] When Ms. Wing's bill arrived, it was for \$2700, plus an additional \$540 to present her report to the PET. Ms. Beetz thought this was an enormous amount of money. [Testimony of J. Beetz] She wrote a letter to the parents on February 11, 2005, offering to pay \$750 of the cost, explaining that this was considerably more than the customary rate. [S-30] The parents rejected this. [Testimony of J. Beetz] In another attempt to resolve this issue, Ms. Beetz offered \$1200 to the parents towards the cost of Ms. Wing's evaluation. [S-29] The parents did not respond to this offer. [Testimony of J. Beetz]

32. Ms. Carestia observed considerable growth in the student from XX through XX grade, both socially and academically. [Testimony of A. Carestia] The student's math computation skills continued to be weak, but Student was strong in rote learning. Student did well with abstract math concepts when given ample time. Additionally, the student appeared happy and smiling while at school. [Testimony of A. Carestia]

⁷ As noted above, the evaluation was not incomplete, but certain aspects of it were not specifically set forth in the report. See footnote 5.

33. During XX grade, the student fell about two hours behind on OT services, as Student received these services on Thursday and Friday, and there were three weeks during which there was no school on those days, due to snowstorms and school vacation. [Testimony of S. Brown] The student received seven hours of OT consult time beyond what was required in Student's IEP. [Testimony of S. Brown]

34. On February 14, 2005, the PET met to discuss the results of Ms. Wing's evaluation. [S-24-27] During the discussion, the parents announced that they thought LSA was an appropriate placement for the student, and would be placing Student there, beginning the week of March 8. [S-27] On February 17, 2005, the parents sent a letter to Ms. Beetz confirming that they did not believe that YMS had been able to provide an appropriate education for the student, and consequently, they intended to place the student at LSA. [S-20] They also notified the District that they would be seeking reimbursement for all costs associated with that placement⁸. [S-20]

35. Dr. Frankhouser observed the student at YMS on March 3, 2005, two days before Student withdrew from school. [P-181] She only observed the student in mainstream classes, not in special education. [Testimony of Dr. Frankhouser] Dr. Frankhouser noted that the educational technician worked with the student on managing the mechanics of being on task, and the student stayed on task. The educational technician rotated around so that she was not hovering over the student, and provided the student with repetition when needed. [Testimony of Dr. Frankhouser] Dr. Frankhouser also observed the student on the playground, as one of Student's social goals was to speak with other students. [P-182] The student did not engage much with other students, although a student in science class offered to help Student on the computer. Student was most positive when interacting with adults. [P-182] Dr. Frankhouser felt that the student had made

⁸ There is no dispute that the parents complied with the notice requirement in the Maine Special Education Regulations.

progress educationally over the past three years, had made more progress on word reading and pseudoword decoding than Student's peers, and had done better than expected. [Testimony of Dr. Frankhouser] On the other hand, Student had made less progress than Dr. Frankhouser expected in numerical operations, and Dr. Frankhouser was not sure the student's potential was being tapped fully. She was particularly concerned about the "social piece." [Testimony of Dr. Frankhouser]

36. Dr. Frankhouser again observed the student, this time on May 15, 2005 at LSA. She thought the student appeared happy and at ease in class. [P-182] She observed the student interacting with peers, and the student initiated this contact, but Student continued to rely heavily on adults. Dr. Frankhouser felt that LSA did a better job presenting information so that it was easier for the student to learn, and that Student was making more progress socially there than at YMS.

[Testimony of Dr. Frankhouser]

37. At LSA, the student's reading teacher reported that the student continued to look for "many many excuses" to leave the classroom, particularly somatic complaints. [P-139] This improved over time.

38. For XX grade, the student's draft IEP at LSA contained goals for decoding, encoding, reading comprehension, writing, math, organizational and study skills⁹. [P-44-56] For math, the goals and objectives were considerably less challenging than the goals Student had at YMS.¹⁰

[P-50-51, testimony of the mother]

39. Tim Rogers, Ph.D., a licensed clinical psychologist with extensive experience working with children with learning and developmental disabilities, reviewed the student's records, evaluations

⁹ Although the student receives speech and language and occupational therapy services, these were not in the draft of the IEP.

¹⁰ The parents had been concerned that the student's math goals at YMS were unreasonable, but Ms. Carestia felt the student was capable of meeting them.

and tests at the request of the District. He had never met the student personally. Dr. Rogers explained that most children, whether disabled or not, progress in school at a level that maintains their position on the bell curve throughout school, which means they continue to progress at the expected level, based upon their cognitive profile. [Testimony of Dr. Rogers] He elaborated that children with higher IQs progress faster than those with lower IQs. Based upon the student's cognitive profile and achievement test scores, Dr. Rogers concluded that the student progressed in District schools at the level Student would be expected to progress to keep Student's position on the bell curve in most areas, but made greater than predicted progress in some areas, including word reading and pseudoword decoding. [Testimony of Dr. Rogers]

IV. DISCUSSION AND CONCLUSIONS

Position of the Parents: The student has not received a free appropriate education during the last XX years Student was educated at the York Middle School. The staff at York Middle School had generally low expectations for the student, due to Student's cognitive test results. For this reason, they have characterized any perceived growth by the student as "huge progress." A balanced view of the objective indicators of Student's progress during student's middle school years, however, belies any conclusion that Student has received FAPE. The student's experience from XX through mid-XX grade was one of growing frustration with regard to mainstream academics in social studies and science, continued poor performance in math and reading comprehension, social isolation, and a growing and unhealthy dependence upon adults, particularly Amy Carestia. On the other hand, the student has done very well at LSA, which is structured to teach the student in a way that matches Student's learning style. LSA is meeting the student's academic needs and need for social skills in a way that the District did not. The

weight of the evidence supports a conclusion that the student's placement at LSA is appropriate, and that the family is entitled to full reimbursement for this placement.

Upon receiving the parents' request for an independent OT evaluation, the District had a choice between paying for the evaluation and requesting a due process hearing. The failure to initiate a due process hearing amounts to a waiver of the District's right to defend its evaluation and deny the parents' request for public funding. The parents are entitled to reimbursement for the cost of Kim Wing's OT evaluation.

Position of the District: The District believes that it has provided the student with a free, appropriate public education in the least restrictive environment over the three years in question, and therefore has no duty to reimburse the family for the cost of LSA. Standardized testing, rank cards and reports from evaluators and school staff demonstrate that the student has made meaningful educational progress, making gains at a rate expected for a student with her cognitive abilities, and impressive gains in some areas.

York should not be required to reimburse the family for their independent OT evaluation. The family never identified any areas of disagreement with the District's OT evaluation. Families are not entitled to an IEE at public expense solely because they disagree with the recommendations of the evaluator. It was not unreasonable for Ms. Beetz to look into the reasonableness of the cost before responding to the parents' request, or for attempting to amicably resolve the situation before requesting a hearing. When the parents requested a hearing on other issues, the District listed this as an issue in dispute to be resolved through due process.

A.

The central issue in this hearing is whether the District provided the student with FAPE during XX, XX and XX grades. Thus, the hearing officer must examine whether the student's

educational program contained and implemented through Student's IEP was reasonably calculated to enable the student to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). Every student who is eligible for special education services is entitled under state and federal 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). The First Circuit elaborated that the student’s educational program must guarantee “a reasonable probability of educational benefits with sufficient supportive services at public expense.” *See G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). It is well established that a school is not obligated 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.* Furthermore, "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). The educational benefit must be meaningful and real, and not trivial or de minimus, in nature.¹¹

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. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171,182, 185 (3rd, Cir. 1988). The law further requires special education programming to be delivered in the least restrictive environment. 20

¹¹ As the First Circuit stated in *Lenn v. Portland School Comm.*, “The law does not “promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; 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. 998 F.2d 1083, 1086 (1st Cir. 1993). In *Roland M. v. Concord School Comm* the First Circuit described the goal is to provide the student with “demonstrable” benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990).

U.S.C. § 1412(a)(5); Me. Reg. 11.1 to 11.3. What is least restrictive depends upon an individual's needs. The goal is to educate the student, whenever possible, with nondisabled students, and as close as possible to the child's home. 34 C.F.R. Sec. 300.552(b)(3); Me. Reg. 11.2(B). An out-of-district placement is only appropriate when the District is unable to provide the student with FAPE.

The evidence supports a conclusion that the student's educational programming at YMS allowed Student to make reasonable educational progress and steady gains consistent with Student's cognitive profile. [Facts 11, 14, 18, 32, 36, 39] Student's IEPs contained the elements necessary to address the student's disabilities. In fact, the services offered by the District were not markedly different than those offered at LSA. Sometimes, the student's progress was quite impressive, while Student struggled in other areas, but undoubtedly achieved "demonstrable" benefit. [Facts 11, 14, 17, 18, 21, 24, 32] It was apparent that the District was genuinely interested in providing the student with an appropriate education, and devoted a considerable amount of time and resources to achieve this. Large amounts of time were spent in PET meetings attempting to provide appropriate programming and address the parents' concerns. [E.g., Fact 22] The District strove to be flexible, at times agreeing to programming it felt was not required, such as direct OT services.¹² [Fact 13, 21] Charlotte LeGolvan provided one-to-one instruction to the student when Student's needs were not being met in the Wilson reading class. [Fact 14] Amy Carestia, who was a very credible witness, was very supportive of the student,

¹² At the hearing, the parents raised a question about whether the District properly eliminated direct OT services in XX grade, and whether the student received the services to which Student was entitled in XX grade. These issues were not raised separately at the prehearing conference, and are looked at in the context of whether the student received FAPE. If the parents did not notice the change in services, it was not because the District was trying to obfuscate the issue. Sally Brown, in her report, recommended changing to consultation services, and this was both discussed briefly at the PET meeting, and was included in the IEP given to the parents. The parents were conscientious about reading PET minutes and IEPs, and that [sic] they normally asked questions when they did not understand something. There was no evidence that York acted inappropriately with respect to the change in OT services. Additionally, although the student did not receive some of the hours of therapy, this does not change the conclusion that Student received sufficient educational benefit to constitute FAPE.

and worked hard to provide Student with an environment in which Student could be successful. [Fact 5, 12] Although the student's education program was not perfect, Student was successful in it and received meaningful benefits, as was apparent from Student's grades, test scores and most anecdotal reports. On Student's standardized test scores, Student achieved as well or better than might be expected of a student with Student's cognitive profile, and Student's scores in some areas increased significantly, advancing Student's position on the bell curve. [E.g., Fact 11] Student's grades were mostly As and Bs, including in Student's mainstream classes, which comprised almost half of Student's schedule.

The parents thought that the student could do better, and that Student's social needs were not being addressed adequately. They focused on Student's weaknesses, while the District touted Student's successes. It is not unusual, and is in fact admirable, for parents to want their children to be as successful as possible. For both disabled and nondisabled students, attending private school sometimes improves educational outcomes. It would not be surprising if, given the very small classes and specialized approach to educating learning disabled children at LSA, the student makes more progress than Student did in York. This is not, however, what the IDEA requires.

There was evidence that the student was somewhat isolated socially in the District, and that Student had few friends. According to Student's parents, Student was socially more comfortable at LSA. Middle school is a difficult time socially for many students, including those who are not disabled. It is not surprising that the student would feel more successful socially in a smaller environment comprised only of other students who are disabled. On the other hand, the student is cut off from the world of nondisabled peers who will comprise the lion's share of the population both at college and in the workplace. Isolating students in this way is contrary to one

of the basic tenets of the IDEA, which is to educate disabled students with their nondisabled peers whenever possible. The student has shown that Student can be educated successfully in mainstream classes. Thus, removing Student to the much more restrictive environment at LSA is unwarranted and inappropriate under the IDEA.

The parents contended that the hearing officer should not attribute the progress the student made solely to Student's IEP services because Student's parents made a considerable investment in therapeutic horseback riding, yoga, summer school at LSA and social pragmatics instruction. It was also apparent that the parents dedicated a good deal of their time and energy to Student's well-being and success. Although it is impossible to calculate the contribution of those efforts towards the student's progress, it is apparent from the evidence that the student's educational program at York was a major factor in Student's educational progress.

Because the District's programming for XX, XX and XX grades was reasonably calculated to allow the student to benefit educationally, and the student made appropriate educational progress, Student's parents are not entitled to reimbursement for Student's unilateral placement in an out-of-district private school.

B.

Maine Special Education Regulation 9.19 sets forth the rules regarding independent educational evaluations (IEE). Parents have a right to obtain, at public expense, an IEE of their child when they disagree with an evaluation obtained by the District. If a parent requests an IEE at public expense, the District must either initiate a hearing to show that its evaluation is appropriate, or provide the parents with an IEE. "Public expense" means that the District either pays the full cost of the evaluation or ensures that it is done at no cost to the parents. If the parents ask for an IEE, the District may ask why the parents object to the District's evaluation,

but “the explanation by the parent may not be required” and the District may not unreasonably delay either providing the IEE or initiating a due process hearing to defend its evaluation.

Maine Special Education Regulation 12.5 gives the District the right to initiate a due process hearing to challenge a parent’s right to an IEE if it believes its own evaluation is appropriate or that the amounts charged for the IEE are excessive.

Here, although the parents did not initially make it clear that they were requesting an independent evaluation at public expense, there was no dispute that by mid-December, Ms. Beetz knew this was what the parents wanted. [Fact 28] Ms. Beetz did not request a due process hearing initially because she was checking into prevailing rates and trying to resolve the matter amicably. [Fact 21] While this was a laudable goal, once the District knew the parents were unwilling to accept any offer, the District’s only recourse to contest this was to request a hearing *without unreasonable delay*. The District did not do this. The District’s listing this as an issue in its prehearing memorandum, over six months after the parents’ request for an IEE, and over four months after Ms. Beetz knew her efforts to resolve this issue amicably had failed, was not a substitute for its obligation to request a hearing under the Maine regulations quoted above. The fact that the parents did not state any specific objections to the District’s evaluation does not change the District’s responsibilities, as the regulation specifically states that “an explanation by the parent may not be required.” Thus, the District’s failure to contest the parents’ request within a reasonable time, in accordance with the regulations, means that it must provide the parents with an IEE at no cost to the parents. *See Portland v. M.*, # 02.088H at 20-21 (Me. Dep’t of Educ. 2002).

V. **ORDER**

After consideration of the evidence presented during this due process hearing, the Hearing Officer orders as follows:

1. The District provided the student with a free, appropriate public education during XX, XX and XX grades. It is therefore not responsible for the cost of the student's unilateral placement at LSA. [Issues a-d]
2. The District is responsible for providing the parents with an independent occupational therapy evaluation at no cost to them. Thus, the District must either pay Kim Wing directly for the cost of her evaluation done in the winter of 2004, within 30 days of the date of this decision (or 30 days after the District's receipt of Ms. Wing's invoice, if she has not already provided one), or if the parents have already paid Ms. Wing, reimburse the parents for this cost within 30 days of receiving evidence of the cost and payment made by the parents. [Issue e]

SHARI B. BRODER. ESQ.
Hearing Officer