

Special Education Due Process Hearing Decision
Parent v. Saco School Department

May 13, 1997

CASE NO. 97.028

COUNSEL FOR PARENT: Richard O'Meara, Esq.

COUNSEL FOR SCHOOL: Amy Tchao, Esq.

HEARING OFFICER: Carol B. Lenna

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, § 7207, et. seq., 20 USC, § 1415 et. seq., AND IMPLEMENTING REGULATIONS.

On February 12, 1997, the Department of Education received a request for a Due Process Hearing from Mr. Richard O'Meara, Esq., attorney for Parent, on behalf of her daughter, Student, (DOB X/XX/XX). Parent and her daughter reside at Address, Saco, Maine.

The hearing was initially scheduled for March 12, 1997. At the request of attorneys for both school and parent the hearing and pre-hearing conference were rescheduled. The Pre-hearing Conference convened on March 12, 1996. The Hearing convened on March 25, 26 and April 8. Seven witnesses gave testimony at the hearing; 219 documents were entered into the record. The parties opted to waive oral closing statements in favor of written summations. The record remained open until April 28 for that purpose. (Closing summations were originally required to be in the Hearing Officer's hands by April 17. A request for extension was made by school's attorney due to family illness. There was no objection from parent's attorney. The extension was granted.) Following is the decision in this matter.

I. Preliminary Statement

S is a 10 year old student who is eligible for special education services under the category of "other health impaired." She is diagnosed as having learning disabilities in the areas of reading and written language, Attention Deficit Hyperactivity Disorder and Tourette Syndrome. She has had a history of learning difficulties, and has been receiving special education services since 1993.

In the beginning of the 1996-97 school year, S was receiving 15-17 hours per week of special education instruction in reading, math, written language and comprehension and language development. She received science and social studies instruction with modifications and supportive assistance in a regular 4th grade class. She participated in gym, art and music with her non-disabled 4th grade peers. In January 1997 S's mother made a unilateral decision to move S to a private special purpose school for learning disabled students. S continues in that placement.

It is the position of the parent that S's needs cannot be met in a public school setting. She argues that S's academic skills in reading and written language remain at the mid-first grade level after several years of specialized instruction in the school. She further argues that S's extreme distractibility and impulsivity and her vulnerability to emotional deterioration when she is unable to meet either achievement or behavioral expectations has led to lowered self-esteem and increased anxiety.

It is the position of the school that the IEP developed in May 1996 is reasonable calculated to provide S with a free appropriate public education in the least restrictive environment. They argue that S was making considerable progress in the program being provided to her prior to her mother's decision to remove her from the public school. They contend that the placement chosen by S's mother is overly restrictive and does not provide S with access to her non-disabled peers.

II. Issues for Hearing

No procedural flaws were identified. At issue in the hearing:

1. Is the 1996-97 IEP developed by Saco School Department reasonably calculated to provide S with educational benefit in the least restrictive environment?
2. If not, does S require a private placement in order to meet her special education needs.
3. What, if any, reimbursement is the parent entitled for costs related to placement at the Southern Maine Learning Center Day School.

III. Findings of Fact

1. S entered kindergarten in 1991. Social and pre-academic growth was limited. The following school year, 1992-93, S repeated kindergarten in the morning and attended first grade in the afternoon. Teachers continued to express concerns about her language development and immaturity. A referral for special education was made in October 1992. A PET convened on October 29. A recommendation for a speech and language evaluation was made. (Document 153, 157; Testimony Parent)

2. A speech and language evaluation occurred on November 18, 1992. The evaluator noted that S's phonological development fell within the low average range and that she was below average in all first grade academic areas. The PET met on December 10 to consider the results and recommendations of the evaluation and make special education determinations. S was identified eligible for special education services under the category of "speech and language" and the recommendations of the evaluator were incorporated into an IEP providing her with speech and language services one hour per week. (D. 141, 144, 147, 151)

3. In February 1993, S's mother requested that the PET meet to discuss S's "slow progress in letter recognition", lack of "improvement...in...giving letter sounds", "no progress in counting" and lack of recognition of "presented vocabulary". The school supported this referral and convened a PET on February 8. The PET discussed S's learning and possible attention deficits. The team determined that a comprehensive educational and psychological evaluation be conducted. (D. 139, 133; Testimony Parent)

4. In March 1993 a psychological evaluation concluded that S's overall intellectual functioning fell "at the top end of the low average to average ranges"; that she displayed strength in verbal reasoning, long term memory...and understanding of cause-effect relationships." Weaknesses were noted in tasks assessing "attention and concentration as well as abstract spatial reasoning....S sometimes requires more time to unhook from one idea or response to go on to the the [sic] correct one." The evaluator notes that S's parents may wish to seek medical consultation for S's attentional difficulties. An educational evaluation conducted at the same time by the special education teacher concluded that "[s]equential skills...which require prolonged attention, are weak, while underlying conceptual knowledge is appropriate for her age." Both evaluations recommended special education services in the areas of reading and math. (D 129, 124)

5. The PET convened on April 13 to consider these evaluations and make program determinations. S's special education category was changed to "other health impaired" and increased special education services were recommended. The IEP

continued speech and language for 1 hour a week and placed S in the resource room for 6 hours a week for reading and math. (D. 106, 111)

6. In October 1993 the PET met to review S's progress and adaptability to her new school year. The minutes note that S had begun medication for her attention problems. Teachers stated that her attention and focus varies, but that generally her behavior is appropriate to the task and setting. The resource room teacher reviewed S's progress using the Orton-Gillingham method of teaching reading. No program changes were recommended or made. (D. 100)

7. The PET met on May 6, 1994 for the annual review. Minutes state that an increase in medication dosage has resulted in increasing positive behavior and participation in school activities. The special education teacher noted that the Orton-Gillingham program seemed successful for S and that her math skills had improved. The PET determined that S's special education program for the coming year would provide 6-7 hours a week in the resource room for reading instruction. Speech and language would continue for 1 hour per week. The balance of S's academic work would occur in a regular 2nd grade classroom. In-class support (not-defined) would be provided. Additionally, extended year services were recommended for the summer of 1994. An IEP to reflect these changes was written. (D. 89, 85, 83, 81)

8. In April 1995, the spring of S's second grade year, the PET again convened for the annual review. The minutes note that "[s]he is showing slow continual growth." However, they also note that growth is erratic and her performance is inconsistent. There was discussion of S's current medication regimen and its effectiveness. Teachers note that S has once again fallen behind in math. The team recommended increased special education services and continuation of extended year services. The IEP placed S in the resource room for approximately 11 hours per week for reading, written language, speech and language and math. Her present level of educational performance as written on the IEP states that "reading is presently at end of gr[ade] I expectations; writing is presently at end of gr[ade] I expectations" and "math is presently at beginning of gr[ade] II level." Reading and written language goals in that IEP stated that S will show growth to the "mid grade II level by 4/96". (D. 70, 72)

9. S's mother took S to The Center for Learning and Attention Disorders for psychological testing in September 1995 to obtain additional information about S's attention problems. The psychological evaluation supported earlier testing that concluded that S scores in the average to well below average range in intellectual testing and that attention was a significant factor affecting test results. A number of recommendations to modify her school program and provide instructional support were made. Additionally, the evaluator recommended that medication and dosage levels be reviewed by S's physician. (D. 62, Testimony Parent)

10. In late November 1995 S's mother notified the school that S had been diagnosed with Tourette Syndrome along with her ADHD. Her medication was changed by the diagnosing neurologist, taking her off Ritalin and prescribing Wellbutrin. The parent requested a PET in mid-December to discuss these changes and the recent evaluation. The PET was scheduled for early January, rescheduled due to a storm, and convened on January 27, 1996. An advocate accompanied the parent to the meeting.

The minutes of this meeting summarize team members' discussion of S's behaviors in school and her continued difficulty in reading. "[R]ecommendations were made by the team to provide more focus on developing a sight word vocabulary to try to boost S's reading ability, while continuing to practice basic phonetic skills. " As a result of this meeting, S's IEP was modified to reflect the team discussions: 1) Amend the IEP to include objectives to increase sight work reading, delete objectives which deal with turn-taking in conversations and talking at appropriate times, include 1 to 1 instruction for 10-15 minutes per day for sight word development, amend classroom rules so as to not penalize S for her Tourette related behaviors, allow S's complete homework in the resource room; 2) Request that S's triennial assessment be expedited¹; and 3) Conduct an independent sensory integration evaluation ² with S. (D. 61, 60, 59, 48; Testimony Parent, Powers)

11. S's triennial evaluation occurred in May 1996. The Woodcock-Johnson Psycho-Educational Battery-Revised was completed and a classroom observation done. S's standard score on Broad Cognitive Ability was 59. The evaluator stated that "caution needs to be used in interpreting this score as it is lower than previous evaluations; however, individual component scores are consistent with those obtained on the September 95 evaluation. He concluded that S's Broad Cognitive Ability...profile displays extreme weakness in auditory processing..., flexible thinking..., and memory....Assessment results are consistent with previous evaluations when the specifics measured are compared with one another." S will find the cognitive demands of age and grade level tasks involving Comprehension-Knowledge difficult, and age and grade level tasks involving Long-term Retrieval and Auditory Processing will be very difficult for her." Achievement testing showed scaled scores of 68 in reading, 73 in math 67 in broad language and 81 in broad knowledge. Grade equivalent scores were: Broad Reading 1.5, Broad Math 2.2 Broad Written Language 1.6, and Broad Knowledge 1.9 (D. 27, 202; Testimony Yahr, Powers)

¹ The evaluation was not completed until May 1996. There is no mention in the record why testing was not expedited. It was not raised as a concern by either party.

² The sensory integration evaluation was not completed until August 1996 (D.7) No evidence was presented by either party to address this fact.

12. The PET met on May 20, 1996 to review the results of this evaluation and make program recommendations for the upcoming school year. An advocate again accompanied S's mother to the meeting. There was extensive discussion of the recent testing, program results for the current school year, and S's behavior, and their implications for S's program for the coming year. The team concluded that the IEP should continue services in the resource room for reading, math, and written language. It was determined that the instructional approach for reading begun in January appeared to be successful and would be continued. Services were increased from approximately 13 to 15-17 hours a week. The increase reflected additional time for math, reading and written language instruction. Extended year services would continue for the summer of 1996. Annual goals state that S will "increase reading skills to a grade 2 level, increase vocabulary and language skills, increase math skills and increase written language skills. (D. 17, 13; Testimony Yahr, Powers)

13. An occupational therapy evaluation was conducted by the University of New England Community Occupational Therapy Clinic in April, May and June 1996. The report was sent to the school in the summer of 1996. During the fall S's case manager attempted to schedule a PET with S's mother to discuss the results of the evaluation. S's mother stated she was exploring other options for schooling for S and did not wish any program changes at this time. (D. 7' Testimony Parent, Powers)

14. In December 1995 S was evaluated by an outside evaluator in preparation for enrollment in a private day program for learning disabled students. The evaluator used the same instrument, The Woodcock-Johnson Psycho-Educational Battery-Revised, as that used by the school in May 1996. Scores on the cognitive portion of the test reflected some distinct differences from the testing done by the school with S scoring 84 in broad cognitive ability. Achievement test scores were generally consistent with the school's results in reading with S achieving a scale score of 63. Other scores were 87 in math, and 77 in broad written language. These scores gave S grade equivalents of 1.5 in reading, 3.7 in math and 2.4 in broad written language. (D. 175; Testimony Brunelle)

15. On January 6, 1997 S was removed by her mother from the Saco Schools and enrolled at the Southern Maine Learning Center Day School, a private day program for students with learning disabilities. There are 23 students in the school ages 10-18. S is the youngest child there and is one of only 5 girls. All students have been diagnosed with some learning difficulty. S's program plan is based on the testing done in December. Her program consists of language arts and math in the morning in a self contained classroom with a teacher and one other student. In the afternoon she has Pragmatics, a course that allows her to practice social and pragmatic language skills. She then participates in a science class with 5 other children, ages 10-13, and 2 teachers. Art, music and physical education also occurs in the afternoon

on a rotating schedule. (D. 168; Testimony Brunelle)

16. After requesting this due process hearing, S's mother again had S tested by an outside evaluator, Greg Carbone, Ph.d. Dr. Carbone's associate administered the Wechsler Intelligence Scale for Children – Third Edition (WISC-III), the Woodcock Johnson Test of Achievement and the Gray Oral Reading Test-3. The conclusions of this evaluator were reached after reviewing records in S's school file, reviewing test data, conducting an interview with S's mother and observing S at the private school for 30 minutes.

Dr. Carbone's report notes that test results from the Woodcock Johnson showed variability in subtest standard scores, from a low of 45 to a high of 98 with standard scores in reading of 72, math 87, broad written language 52 and broad knowledge 88. Grade equivalents put S at grade 2.0 in reading, 3.9 in math and 1.4 in broad written language. The WISC-III test scores show S attained a Verbal IQ of 81, a Performance IQ of 89 and a Full Scale IQ of 83, all falling in the Low Average range of intellectual functioning. The evaluator notes that the test results of the WISC "are generally consistent with those obtained in a [sic]1993 evaluation with the same instrument" conducted by the school. He does note an 9 point decrease in the Verbal score from the 1993 test results. (D. 159; Testimony Carbone)

17. From January 1996 to December 1996 S's teachers have done comparisons using the "New Instant Word List" and the "Dolch Informal Word Recognition Test" to determine S's ability to recognize and read words in isolation. By December S had progressed from 87% accuracy on the pre-primer Dolch list to reading from the second grade Dolch list with 80% accuracy. (D. 181-201; Testimony Powers)

IV. Conclusions

Is S's 1996-97 IEP and placement in the Saco school system reasonably calculated to provide her educational benefit in the least restrictive environment?

Special education law requires that schools must assure that all students with disabilities have a "free appropriate public education". 20 USC § 1412(1). This education, to the maximum extent appropriate, must be provided in the least restrictive environment with children who are not disabled. 20 USC § 1412 (5) (B). An individualized education plan (IEP), which must be written annually for each disabled student, defines the program of instruction and related services that have been specially designed to meet the unique needs of the student. 20 USC § 1401 (a) (20). A school's IEP is defined as appropriate if the school has complied with the

procedural guarantees set forth in law, and provides an individually designed instructional program which is reasonably calculated to provide educational benefit to the student. Board of Education v. Rowley, 102 S. Ct. 3034, 3051 (1982) The school is not required to maximize the potential for the student, but there must be meaningful benefit. Id.

S's 1996-97 IEP places her in a resource room for 15-17 hours a week. There she receives individual and group instruction in reading, math, and written language.³ The balance of her day is spent with non-handicapped peers in a regular fourth grade classroom where she receives instruction in science and social studies with the assistance of an in-classroom aide. Additionally, S participates in physical education, computer, library, music and art with her classmates.

S has been tested three times within the last nine months, once by Mr. Yahr for the school and twice by Ms. Brunelle and Dr. Carbone for the parent. Each evaluator used the Woodcock-Johnson Achievement Test Battery, two of the evaluators used the cognitive portion of the Woodcock-Johnson, one used the WISC-III to determine cognitive test scores. In 1993 S was evaluated by the school using the WISC-III. Each evaluator wrote an interpretative report of their findings stating test results and drawing, at times, distinctly different conclusions. A comparison of the Woodcock Johnson Achievement subtest scores among the three evaluators exhibits the lack of a clear pattern of test data with the exception of a consistent pattern of increase in math scores. A decrease in the reported scale score in broad reading is observed between Yahr (68) and Brunelle (63), and an increase when tested by Carbone (72). Broad written language scores show an increase from Yahr (67) to Brunelle (77), with a dramatic decrease reported by Carbone (52). Skills (E Dev) show an increase from Yahr (64) to Brunelle (72) and no change reported by Carbone (72). Social Studies and Science were not tested by Brunelle, but show an increase from Yahr to Carbone: social studies Yahr (82) and Carbone (89) and science Yahr (84) and Carbone (98)

Dr. Carbone, The parent's expert witness, concludes that "[r]esults of the current administration of the Woodcock-Johnson Test of Achievement generally compare favorable to those obtained in her May 1996 testing... Since those results underestimated her cognitive capacity, detailed comparison of achievement test scores obtained in the administrations cannot be relied upon to demonstrate progress. " He further concludes from his testing and his comparison with the 1993 testing that a drop in the Verbal portion of the WISC-III from 90 in 1993 to 81 in 1996 is "specifically attributable to lack of progress in the acquisition of information usually accumulated in the course of academic instruction ." (D. 164).

³ S's IEP provides extended school year services. Since that is not, however, at issue in this hearing, it is not dealt with in the discussion of the appropriateness of her IEP.

The school's evaluator disagrees. He concludes that these scores show a solid increase in math skills and a slow incremental increase in reading. He also concludes from his comparison of the test results that many scores are not statistically different and fall within the range of error for the individual test's normative data and do not exhibit a lack of progress. He stated that many of the areas S scored poorly on are directly related to her attentional abilities at the time. In regards to Dr. Carbone's comparison of the WISC-III from 1993 to 1997, he states that current research now refutes the use of the Vocabulary score, a subtest used to compute the Verbal score of the WISC-III, as a determination of long term memory on the Wechsler. He categorically disagreed with the parent's witness.⁴

Neither of these witnesses makes a convincing argument that their interpretation of the test data is the "correct" one. What is clear, and consistently noted by evaluators, is that S shows great variability in test results- from one subtest to another, and sometimes, on the same subtest from one test session to another. What all evaluators, generally, do agree to is that, cognitively S functions in the average to low average range. Even the school, whose test scores reported S's cognitive functioning at a much lower level, states that [c]autation needs to be used in interpreting this scores as it is lower than previous evaluations...and [a]nalysis of the various factors that make up this overall score indicate significant scatter among cognitive factors..."

What is also clear is that evaluators agree that overall achievement testing, as reported by "grade equivalents" show that S currently achieves at the mid to late first grade in reading and written language and that math is a relative strength with achievement in the mid second to possibly late third grade level. Testimony by S's instructional staff at the Saco schools and Ms. Brunelle concurs with this assessment.

A review of school documents shows that, since beginning special education services, S's progress in reading and writing mastery has been painfully slow, and when comparing present stated levels of function with past school documents, S has shown virtually no progress since April 1995 in reading and writing. In the spring of 1995 the IEP noted that S's current level of functioning was at the "end of gr[ade] I expectations" in reading and written language. The reading goal in that IEP set an annual goal of skill growth "to mid gr[ade] II level by April 1996. Similarly, her written language goal states that "S will improve her read[ing]/written lang[uage] skills to a mid gr[ade] II level by 4/96" Presently, in the spring of 1997 it is the conclusion of teachers and evaluators that she has achieved only to the mid-first grade level in reading and written language. It can only be concluded that S did not met these goals by April 1996, and according to the testimony and evidence she has not met them as of April

⁴ Ms. Brunelle did not weigh in on this debate. She simply testified to the results of her testing and their implications for S's current program. She drew no conclusions as to progress when compared to the school's testing. She did, however, state that her test results shoed S's scoring significantly higher in cognitive areas with a broad cognitive scores of 88 as compared with the school's 59.

1997. Even her relative growth in sight word recognition as measured by the Dolch Word Lists has not resulted in the generalization necessary for reading beyond this level. While an IEP is not a contract to which a school is held hostage it must be a plan which has expectations of conferring meaningful educational benefit. It does not appear that there has been sufficient growth in reading and written language to describe the IEP as having provided "meaningful" benefit.

I

I do not conclude, however, that S's placement in the public school is inappropriate. There is no disagreement that her math scores indicate growth. Teacher testimony regarding the growth in appropriate social and classroom behaviors was particularly convincing. I must conclude that there were gains made while in mainstream classes which resulted in real benefit for S.

Is S's current program and placement at the Day School of the Southern Maine Learning Center appropriate to meet her needs?

"An exceptional student shall be educated with students in regular programs to the maximum extent possible... Removal of an exceptional student from the regular educational environment shall occur only if the nature or severity of the exceptionality is such that the student's education cannot be satisfactorily accomplished in regular classes...or self contained classes within the regular school programs. " Title 20-A MRSA, § 7201 (2) (B)

S's mother argued at the hearing that the school's offering had not resulted in meaningful educational gains for S. She pointed to the low scores in recent testing as proof that S had shown little progress over the past five and a half years in the Saco schools. She described S's extreme behaviors at home which she interpreted as directly related to school stress and anxiety. She chose to enroll S in a private day school for children with learning problems similar to S's which provides instruction in a one-to-one or one-to-two teacher/student ration in a small, cloistered environment. She argued that this placement is appropriate because, in her opinion, S has already shown gains in academic achievement, is happy at this school, and is now free of school-related stress and anxiety.

According to testimony from Ms. Brunelle, the Director of Instruction, at the Southern Maine Learning Center, it is the philosophy of SMLC to provide a protected, nurturing environment in a highly restricted space with little distraction and small teacher/student ratio to enhance the learning process for children with learning difficulties. While some educators embrace such a philosophy for children with learning disabilities, and some parents may prefer this approach, it is not what Congress intended in fashioning IDEA. The law "does not require mainstreaming in every case but its requirement that

mainstreaming to be provided to the *maximum* extent appropriate indicates a very strong congressional preference... In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept." Roncker v. Walter, 700 F. 2d 1058, 1063, (6th Cir), *cert. denied*. 104 S. Ct. (1983)

It is clear that S's mother prefers the environment and philosophy of the Southern Maine Learning Center. She views S as having a safe learning environment which minimizes stress and anxiety for S. She reports that S's difficult behaviors at home have diminished and that she appears happier and more confident.⁵ but there currently is no objective way to conclude that S has made dramatic progress at SMLC in contrast to the public school program. Ms. Brunelle testified that S was doing well at the school and is happy there, but she confirmed that, after three months at SMLC, S currently has a functional reading level at the mid-first grade level.

Classroom observations done in conjunction with evaluations give a consistent picture of S as a student who benefits from her time in the regular education setting. S's teachers from Saco convincingly describe a student who participated in class activities in an appropriate, focused manner, and who apparently enjoyed her time in the mainstream. These teachers testified that they did not consider S as particularly anxious about school nor did they observe behaviors which were overly disruptive to S in her learning environment, nor to the students around her. They did not minimize the significant modification and support S needs to participate meaningfully in grade level work, but they described a student who was gaining significant benefit from her participation with non-disabled students. The point must be made that it is, and has consistently been, the intent of IDEA that students have the right, to the extent appropriate, to participate with non-handicapped peers in instructional and non-instructional settings. While the parent may prefer the philosophy and protected setting of the day school, there is no support that this is an appropriate placement for S. She has the right, and, from evidence presented, the ability to participate in the mainstream. To isolate her and deprive her from that environment violates the spirit and the intent of the law.

The day school program puts S in a place where she is the youngest student and the only girl in her "junior division". This is highly restrictive and the need for such a

⁵ S's mother testified that S exhibited extreme school-related stress behaviors in the fall of 1996. The school testified that they did not observe increased anxiety or disruptive behaviors at school. The parent's expert witness concluded in his report that S suffered from anxiety disorder, but he stated at the hearing that his conclusion was reached on information relayed to him by S's mother. He did not interview school personnel and did not do any objective testing in making this determination.

placement is not supported by the evidence. Anecdotal evidence by her past teachers and written descriptions of her behavior in mainstream situations support S's need to have access to non-disabled peers in a non-handicapped environment. "Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities...To determine a particular child's place on this continuum, the desirability of mainstreaming must be weighed in concert with [IDEA's] mandate for educational improvement." Roland M. v. Concord School Committee, 910 F. 2d 983 (1st Cir. 1990) While I do not find the school's current IEP to be appropriate, the evidence indicates that a program of sufficient focus and instruction can be fashioned in the Saco Schools. The instructional techniques and methods ⁶ used at SMLC are not so unique as to be nontransferable to the public school. Saco can provide S with a free appropriate public education in the *least restrictive environment*. SMLC cannot.

What, if any, reimbursement is S's parent entitled to receive for her unilateral placement of S at the Southern Maine Learning Center.

It is the determination of this hearing that S's placement at the Southern Maine Learning Center does not constitute a free appropriate public education in the least restrictive environment. Secondly, no procedural violations were claimed by the parent and none were found. The school did not fail S in its efforts to identify her in a timely manner and develop program plans to meet her needs. From the beginning of her second year in the Saco schools, the school was responsive to the parents concerns to gather more information about S's learning problems and provide special education services. Until the filing of this hearing the record reveals no request for services from the school that were denied. No IEP was rejected by the parent.

At no time during the past five and a half years did the parent request a PET meeting to insist on changes in S's program, nor did she request the school place S in a more restrictive placement prior to her action to remove S from the public school. She failed on several occasions to respond to the school's attempts to convene a PET to discuss the occupational therapy evaluation conducted in the summer, so that the school might enhance S's program. The parent states that the school must have known of her dissatisfaction with S's program because the school was aware of her

⁶ Parents made much of the point that Saco had changed its reading approach with S. They assert that Saco made program decisions based on an improperly determined cognitive ability score of 59. In fact, the reading approach with S changed in January 1996 in response to teacher concerns about her apparent lack of progress. Such a change of methodology is appropriate when instructional staff have concerns that the present methodology does not seem to be working.

explorations into alternative placements. While this may seem logical to the parent, it does little to support her claim for reimbursement. It was incumbent upon her to claim S's right to due process if she disagreed with proposed programming.

The law affords parents the opportunity to question the school's actions at every step along the way if they feel the program is inappropriate. [A] "parent ...may...request...a hearing regarding the ...educational program of the student..." at any time. Title 20-A MRSA, § 7207-B(2) (A) S's mother began to seek advocacy and outside consulting expertise as early as the summer of 1996 according to her testimony. Yet, she did not use this expertise to question the school program and request changes. While I find that the school's program did not provide S with benefit in some areas, neither do I find that they failed to act in good faith on S's behalf.

The determination of need and the development of educational plans of a handicapped child is an inexact science at best. Perhaps the school should have been more concerned about the results of cognitive subtests during the May 1996 evaluations and the implications they had about S's progress in reading and writing, but the parent had an equal obligation to express her dissatisfaction with the program in such a way as to request that changes be made. It is not enough for the parent to say she should have known she was unhappy because she was openly making plans to enroll S in a private school. The parent has been involved in program planning for S from the beginning. She had ample opportunity to request changes in programming or to put the school on notice that she was dissatisfied. From all accounts this never happened. She withdrew S from the public school in December 1996, and placed her at the Southern Maine Learning Center. She then filed a hearing in February 1997 to recapture expenses resulting in this decision. "Parents who unilaterally change their children's placement...do so at their own financial risk." Burlington School Committee v. Department of Education of Massachusetts, 105 S. Ct. 1996 (1985) S's mother assumes the financial risk of her decision to unilaterally place S at the Southern Maine Learning Center. While the IEP offered by the school was found to be inappropriate, in part, the placement at the SMLC was not required for S to receive a free appropriate public education, and violated her right to placement in the least restrictive environment. Coupled with the lack of action on the parent's part to actively disagree with the school's program prior to her unilateral decision to place S at SMLC, I do not find that she is entitled to recapture any expenses associated with that decision.

IV. Order

The school shall convene a PET within 20 days of the receipt of this decision to write a new IEP for S. The PET shall use all evaluative data accumulated on S since May 1996 in the consideration of this plan and the goals and objectives included in it. Program data from the Southern Maine Learning Center shall be requested, and if provided shall be reviewed and considered prior to making program decisions. Hours in special education shall be increased to the extent determined necessary in order for S to make meaningful progress to the extent of her cognitive capability.

The school shall retest S in December 1997 using the Woodcock-Johnson Achievement Battery, or a similar test instrument, to determine progress in reading, math and written language. Program adjustments shall be made as necessary.

Carol B. Lenna
Hearing Officer