STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

February 9, 1998

CASE **# 97.223**

Parent vs. MSAD # 28 on behalf of the student

Counsel for the Parents: Richard L. O'Meara, Esq.

Counsel for the School: Eric R. Herlan, Esq.

Hearing Officer: Jeannie M. Hamrin, Ed.D.

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, CHAPTER 303, SECTION 7207-B; TITLE 20 USC, SECTION 1415; TITLE 29, SECTION 794, AND IMPLEMENTING REGULATIONS.

A Special Education Due Process Hearing was held on January 12, 13, 15, and 21, 1998 to resolve a conflict between mother and the MSAD # 28 on behalf of her child [d.o.b.]. The record was left open until January 30, 1998 for the submission of closing statements. In preparation for this hearing a pre-hearing conference was held on January 7, 1998. Five-hundred and sixty-four pages of documentation were entered into the record and eleven witnesses presented testimony.

The school's attorney requested an extension due to lack of prior notice. School maintained they did not have five working days prior to the hearing to get their records in order. The parent's attorney objected and the record showed that the school knew on December 18, 1997 that the mother had filed for a hearing. The school had at least eight working days. A severe state-wide winter storm did delay the start of the hearing by 3 ½ hours. The parent waived her right to examine all documents five days prior to the hearing. Documents from the school received two days prior to the hearing, at the hearing, and a late piece of evidence on January 30, 1998 were all considered.

This hearing was requested by the mother to resolve the dispute regarding: [1] whether the 1997-98 IEP for the student provides him with a *free appropriate public education?* And [2] if not, does the student require a short term residential placement to receive educational benefit?

Following is the decision in this matter.

I. PRELIMINARY STATEMENT

The student is an xx year old boy with autism, including severe communication disorder, non-compliant behavior, obsessive/compulsive behavior disorder, seizure disorder, hyperactivity, pervasive developmental disorder, and mental retardation. He also is lacking the arm of his seventh chromosome. He has been identified as a child with autism. The label has not been contested, although school's attorney "expanded" the medical aspects of the student's disability to include Interstitial deletion on the long arm of Chromosome number seven. The student presently attends a self-contained program at the Rockport Elementary School, in Rockport, Maine.

There is dispute over the goals and objectives listed in the 1997-98 IEP, the lack of a behavioral plan, the lack of generalization and carry-over of goals, lack of self-help goals and lack of community integration. There is also conflict over amount of progress achieved, the need for a short term residential placement to stabilize behavior and/or medications, methodology [ABA vs. child-directed activities], and whether the proposed placement is for educational purposes or for medical reasons.

The student is currently placed in a self-contained classroom with a full-time one-on-one ed tech assigned to him. He also has access to his own private room which is used for some academic work and when he is "out of control." His IEP calls for 60-90 minutes/week of speech and language therapy and 45 minutes/week occupational therapy by a COTA. The IEP focuses on reducing non-compliant behaviors, improving readiness and self-help skills to the five year old level, increasing his ability to attend, improving his interpersonal relationships, improving expressive and language skills, improving sensory-motor functioning in the classroom/school environment and exploring the possibility of community involvement. There is virtually no time with non-disabled peers because of behaviors and the community swim program was discontinued for at least one month because of non-compliance. There is no specific program methodology employed in the classroom. There is no behavior plan. There is no home component with school maintaining that home is not their responsibility.

The school argues that the student is well placed in his current Spectrum program. They present their staff as having extensive experience and expertise working with students with similar needs and claim the program has received rave reviews from the Autism Society. The school has recently contracted for one hour/week plus 20 minutes telephone time with Bancroft for consultation services to the program. The mother is

asking for a more rigorous program that addresses non-compliance and lack of generalization of skills to the home and other settings. In spite of her requests, the school maintains that the student has made good progress and the program is reasonably calculated to provide him with educational benefit in the least restrictive alternative.

ISSUES

[1] Does the 1997-98 IEP for the student provide him with a *free appropriate public education?*
[2] If not, does the student require a short term residential placement to receive educational benefit?

III. STIPULATION

There were no stipulations.

IV. FINDINGS OF FACT

1. The student is an xx year old boy residing with his mother and attending Spectrum, a self-contained class at Rockport Elementary School for children with Pervasive Developmental Disorders [PDD]. His handicapping condition is autism. [S-45] The student has a history of PDD/Autism, Interstitial Deletion on the long arm of Chromosome number seven, Attention Deficit Hyperactive Disorder, Obsessive Compulsive Behavioral Disorder, Oppositional Defiant Disorder, Mental Retardation and Seizure Disorder which have impacted on his ability to communicate effectively, to relate to people in a socially acceptable way, to acquire basic self-help skills and to achieve skills necessary to functioning in the home, school, and community [P-33] He currently takes the following medications which are monitored by Dr. Sally Guimaraes, Psychiatrist and Dr. Emery Howard, Pediatrician: Clonidine, Depakote , Prozac, Trazodone, Mellerill, and Ducolax. He is medically stable at present. [Testimony of Dr. Guimaraes, Dr. Howard, Mother; Exhibits P-06, P-07]

2. The student's mal-adaptive behaviors include: non-compliance such as flopping on the floor, aggression, tearing and chewing fabric, toileting problems, trashing his environment, climbing on furniture, general restlessness, stripping, obsessive rituals, avoidance behaviors, and a lack of awareness of personal safety. [P-04; P-31]

3. His 1996-97 IEP called for no time in regular education with the exception of attending recess and lunch whenever possible. He received 30-45 min./week of OT and 120-150 min./week from a speech clinician and support personnel on the district school bus. There was no transportation goal. Goals included reducing target behaviors, improving readiness skills, self-help skills, ability to attend and work, interpersonal relationships, receptive and expressive language skills, to provide vestibular and sensory stimulation, to increase participation in fine motor activities and increase eye contact. [S-6-8] There

were 20 short term objectives which were to be measured biannually [S-9-15] and one page of nine modifications. [S-17] Ratings on the IEP showed that the student was making progress on eight objectives, had achieved eight objectives and one objective was either not addressed or progressing, as both were marked. [S-19-24]

4. At the January 7, 1997 PET, the student's mother, felt that "we need to be working on compliance issues." The other PET members agreed. [P-35] A behavior plan was initiated in late April of 1997. Dr. Egan from the May Institute designed the plan. She was contacted twice since April of 1997 by the school for help with the student's behavior management. Dr. Egan strongly supports the urgent need for a very intensive program, specifically a residential treatment program that would provide increased structure and consistency, expertise in applied behavior analysis methods and procedures to teach the student functional skills and appropriate social behaviors. [P-05]

5. On February 10, 1997, the PET discussed developing a behavioral plan for compliance starting in one area and then to be carried over into other settings. It was agreed not to start his plan until his behavior had been stabilized after a placement at JBI for a medication review. His mother reported that his behavior was showing more aggression and that his academic work had deteriorated as he was unable to focus. His present program was to remain in place until after the medication review. [P-34]

6. The goals of the 1997-98 IEP was very similar to the 1996-97 IEP with the addition of "To explore the possibility of community involvement in the Student's educational program." Speech and language services were decreased to 60-90 min./weekly and transportation support, although given by the district, was not listed as a service. There was no discussion or explanation for the reduction in speech and language services. [Testimony of Mother; Exhibit P-29]

7. Dr. Patricia Egan of the May Center at the request of the former Director of Special Education, Davene Fahy, conducted a behavioral observation on April 17, 1997 to help the district develop a behavioral plan. Dr. Egan observed the student for 45 minutes at home and for 2 ½ hours at school. Prior to the observation she received from the student's team the following documents: a general daily schedule, a descriptive report of the student's problem behaviors compiled by his mother, a list of questions and concerns related to the student's behavior compiled by school staff. She obtained further information through brief interviews with the student's mother and his morning educational technician, Nancy Nelson. [P-31]

Most activities observed were child-directed. He was made to finish activities before being allowed to do something that he wanted. Activities lasted about five minutes with the student becoming restless after two or three minutes. The student clearly was interested in attention. He was able to be "coaxed" through some activities when he was resistant; but for some others he just refused to comply. Dr. Egan found that many of these non-compliant episodes were reinforced by allowing the student to escape a teacher-directed situation. Both the mother and the student's school staff

acknowledged that they often "gave in" to the student's oppositional behavior in order to prevent a struggle with him. They understand that by allowing the student to defy their instructions works to strengthen his oppositional behavior. They feel they have no other recourse, given the student's physical strength and determination. There were 11 recommendations, including collecting data on aggression, tantrums and falling to the floor to determine whether the time-out procedures are effective. [P-31] The student spends a portion of his day mopping and vacuuming with the janitor although this is not in his IEP. This is a preferred activity of the student.

8. On 10/31/97, Leanna Cloutier reported to the PET that the **current behavior plan** is **not working**. Staff asked for outside consultation. The mother expressed concern that the student was not generalizing his learning to the home and *feels it is the school's responsibility to see that generalization occurs.* Members of the PET felt that although it is a real issue, *the school is not responsible.* The Occupational Therapist recommended considering residential placement for evaluation/stabilization. Determinations of the PET were: to contract with an outside agency for consultation about the student's behaviors, seek legal clarification about mom's request for services to continue in the home after the regular school day, SCSN and Autism consultant for the DMHMRSAS will seek clarification regarding funding responsibilities for after school programming, and Ms. Foreman will contact with the Regional Interdepartmental Coordinating Committee. [Testimony of Cindy Foreman, Mother; Exhibit P-27]

9. A follow-up from the previous PET was held on 11/17/97. Ms. Sparrow, Autism Consultant for SCSN reported that Pauline Miller had a way for funding services for an extended day service with school. The school becomes a provider with Medicaid. Ms. Foreman reinforced that she believe *the IEP speaks to the student's needs and the school is not responsible for providing services beyond regular school day.*

The mother reported that the student was in a crisis mode and his behaviors were really escalating. The group felt the behaviors may not be intentional. His teacher, Ms. Cloutier, reported that there appears to be no pattern or predictability to his behaviors. There was a discussion about placement at The Lindens, described in the PET minutes as "hospital unit access" designed for students like the student using a behavioral analysis approach. [P-01 shows that The Lindens is not a hospital.] A phone conference with The Lindens would be arranged re: all preliminary and current information and concerns. The representative from Bancroft said a bed may not be available until December or later.

Mary Leavitt, consultant from Bancroft suggested backing off somewhat from potentially confrontative situations and using the student's private room more often. She clarified during the hearing that there were less distractions and less for him to obsess over in his own room. If he were obsessing, one should try to redirect him. She was not in support of letting him engage in mal-adaptive behavior for an extended period of time which had happened on several occasions. Karen Sparrow from SCSN suggested that staff keep a log of concerns to share with The Lindens in the upcoming phone

conversation. [Exhibit P-26] There was much conflicted testimony about this PET. The mother understood this meeting to constitute an agreement to proceed with the placement. Cindy Foreman states that she understood The Lindens to be a hospital and the student would be placed there for issues of medication and stabilization. Ms. Foreman never envisioned the school to be the lead agency but supported Bancroft and mother to look at The Lindens as she thought it was a hospital. She stated that she would never assign the Bancroft consultant and mother to look at a residential placement for educational reasons, that it was the school's responsibility and she would look in-state first, work with Christine Bartlett at DOE for educational placements. She felt there was consensus about concern for medication impact on behaviors. [Testimony of Cindy Foreman] The typed minutes from the 11/17/97 PET meeting were not sent to the mother until 1/6/98 or more than 21 school days after the PET. [S-197] The mother did pick up a copy of the handwritten minutes from the school prior to the pre-hearing.

10. The data collection and graphs of the student's school behavior were presented to the 12/15/97 PET. Behavior frequency data re: stripping, urinating, hitting, running away, taking shoes off, falling to the floor, biting and pulling hair were gathered from 9/19/97 through 1/6/98. [Testimony of Leanna Cloutier, Cindy Foreman, Nancy Nelson; Exhibits S-55-113; S-210 & 211]. The estimation of occurrence for these specific eight behaviors was 13-14 times per day for a duration of from 15 seconds to 25 or more minutes in the school setting. There were some longer episodes noted with some behaviors being very well ingrained and difficult to address. [Testimony of Nancy Nelson; Exhibit P-18] There was no consistent plan in place to address these behaviors. The mother requested data collection of non-compliant behaviors such as when the student was off-task, not able to be directed, wandering, or engaged in self-directed activity. Ms. Foreman noted there is no data on non-compliance.

PET discussion continued around toileting issues, discontinuation of the student's community swimming program due to severe compliance/behavior/safety issues, difficulties with bus transportation, Extended Year Services including vacation periods, and the issue surrounding the discrepancies from the 11/17/97 PET regarding The Lindens placement. [Testimony of Mother, Cindy Foreman; Exhibit P-18]

11. School personnel all agree that their program is appropriate and that the student is making progress. They further allege that the student "senses" when his mother is in the building and acts worse at that time. They also insist that medication check was the reason they agreed with a placement at The Lindens at the 11/17/97 PET. [Testimony of Cloutier, Foreman, Nelson] Ms. Degan, Speech Pathologist, does not agree that the student needs a 24 hour/day program to learn or improve. She also thought the 11/17 PET discussed the Lindens for medication evaluation--to have the student in a physically safe environment while medications were withdrawn and then slowly reintroduced until he was stabilized. [Testimony of Phyllis Degan]

12. Karen Sparrow is a consultant for children with Autism [SCSN], Department of Mental Health, Mental Retardation, and Substance Abuse Services [DMHMRSAS]. She

has attended a week-long institute about Autism and has about 100 hours of CED credits, attended the National Autism Conference a couple of times, and reads Autism journals. She has a degree in elementary education. She has worked in her position for 12 ½ years helping coordinate services and funding and doing behavior and school evaluations. She was first involved with the student in April of 1996 when he was admitted to St. Mary's Hospital. She is the student's case manager. She has observed him at home, at school and at St. Mary's. She has never seen him out of control. The Department has offered an array of services from respite care to hospitalization at Charter Brookside in March 1997. Services have been refused by the mother for safety reasons. The student and his mother did accept the bed at Charter Brookside and were taken by ambulance late at night in a snow storm. The mother refused to stay because there was no one-to-one aide to be with the student. Ms. Sparrow stated that the one-on-one person would have been available the next morning. The student is eligible for a community home based waiver which is funded by SCSN for 33% and by Medicaid for 66%. This waiver was made available around February 1997. He is eligible to receive placement in a specialized group home but there is no home available. He is a top priority for a slot in a group home. SCSN provides the seed money for the waiver program, but that money can not be used for residential placement. The waiver money is used for in-home supports.

At present the student receives about 40 hours of nursing services/week as well as the services of a recently added Bancroft consultant who is charting behaviors to develop a behavior plan. She testified that with Medicaid changes [Sect. 65] the student would be able to receive services from both nursing and Bancroft in home. Ms. Sparrow did attend the 11/17 PET and she recalls consensus for a short term placement at The Lindens. She suggested that the team come up with a list of questions that they wanted The Lindens' expertise and guidance about. She thought The Lindens was going to evaluate both medication and behavior and then the student would be transferred back to a group home and public school placement. The source of funding was to be Medicaid. She did not think that The Lindens was a hospital or that the placement was primarily for medication stabilization. She understood that The Lindens was to develop a behavior plan and a transition plan. Bancroft offers a consistent environment to develop plans. A group home setting **might be available** for the student within 6 months to one year. Ms. Sparrow testified that there have been two group home beds available and the mother has turned them down. [Mother disagreed.] Ms. Sparrow testified with her supervisor present which was agreed upon by both attorneys. [It was noted by this Hearing Officer that the supervisor, through head shaking and raised eyebrows, coached the witness.] [Testimony of Ms. Sparrow]

13. Rosemary Porter-Fetterman, Psychological Examiner for SAD # 28, has had experience with children with autism/ PDD and has worked for Bancroft. She has visited Bancroft in New Jersey. She has been "significantly involved" with the development of the Spectrum Program which is SAD # 28's newly initiated [9/97] program for children with PDD. The philosophy behind the program is strong communication, sensory, and behavior management components and a developmentally appropriate curriculum. The

program has seven students, one of whom is the student. One student is totally mainstreamed and one is only present for 1-1 ½ hours/day. Ms. Porter-Fetterman serves as the case manager for the other two PDD children, but not the student. She has seen the student for approximately 20/min. per week while observing the dynamics of the Spectrum classroom in general. She is not a data collector and has not designed an ABA program. She has not worked on a written plan with the student. It was a "let's give this a try and see if it works." Nothing has ever been put in writing. She was not part of the Bancroft Behavior Program Meeting that took place on 12/22/97.

She states that it is healthy to let students self-direct--to take their interests and work them into our goals. For example, when the student is mopping or vacuuming with the janitor he is getting positive attention and able to say "hello" to those who pass by that he is working on this communication goal . She believes that his mal-adaptive behaviors have dropped off since November when the paid consultant said not to press compliance issues with the student. Testimony about the downward trend in the Vineland Adaptive Behavior Scale Scores [VABS] should not be seen as a lack of progress. [Testimony of Rosemary Porter-Fetterman]

15. The one objective measure that has been used over the last six years has been the Vineland Adaptive Behavior Scale [VABS]. Both parent and school have rated the student in the Communication Domain, Daily Living Skills, Socialization and Motor Domain. [P-22] A comparison of Standard Scores [SS] shows a drop of between 30 and 50 points in each area over the six year period. School's psychological examiner states that the drop in SS indicates that the student is falling further behind the normed group but it does not mean that he has not progressed. There is no "normed" group like the student and the VABS is not meant to be used longitudinally for an individual. [Testimony of Ms. Porter-Fetterman]

Scores from the VABS in May of 1994 indicate that the student was at the following age levels:
Communication Domain = 2 years, 3 months
Daily Living Skills Domain = 3 years, 2 months
Socialization Domain = 2 years, 7 months
Motor Domain = 2 years, 1 month [P-22]

Scores from the VABS in December of 1997 indicate the following age levels:
Communication Domain = 2 years, 5 months [solid]
Daily Living Skills Domain = 3 years, 5 months
Socialization Domain = 2 years, 9 months
Motor Domain = 3 years, 1 month [P-20]

"Some" progress [2 months - 1 year] has been made on the only objective measures placed into the record. This is the only objective measure offered by the school as the student is unable to complete standardized testing.

It should be noted that the VABS, administered in July of 1992, showed the following results:

Communication Domain = 1 year, 9 months
Daily Living Skills Domain = 3 years, 11 months
Socialization Domain = 2 years, 1 month
Motor Domain = 2 years, 6 months

The growth from 1992 to 1994 is considerably greater than the growth from 1994 to 1997 despite there was 1 year and 9 months more time between the 1994 and 1997 assessments.

15. School personnel have attended workshops about autism, have some experience with such children, but **no staff member has any formal educational training in children with autism or PDD**. Phyllis Degan has a masters degree in Communication Disorders. She has worked as a teacher's aide and teacher for children with autism while in college. She has attended a two-day conference on Autism in 1997 as well as other one day conferences. Nancy Nelson, the student's ed tech for the past two years has experience working with adults with developmental disabilities and has provided child care for a child with autism. She has a degree in music education. Leanna Cloutier has a masters degree in Psychology and literacy. She is a certified special education teacher and has attended workshops on Autism. She has had children with autism in her classes for the past ten years. Rosemary Porter-Fetterman has the most experience with children similar to the student but she has the least amount of contact. [Testimony of Cloutier, Degan, Fetterman, Foreman, Nelson].

16. the student was referred by his pediatrician, Dr. Howard, to Mid Coast Children's Services at eight months of age. An arena assessment provided no diagnosis. He began receiving a variety of early intervention services. At age three, he began to have seizures and became hyperactive. Whereas the student had been a docile little boy up until age three, he now became anxious and agitated. A variety of medications were tried to control the seizures and hyperactivity. At age nine he was admitted to St. Mary's Hospital for "out of control" behavior. Obsessive-Compulsive Behavior Disorder was added to his diagnosis. His behaviors continued and there were difficulties in regulating all the drugs to a therapeutic dose. In March of 1997, his psychiatrist and his mother were looking for a hospital setting to monitor his medications. Charter Brookside in New Hampshire had a bed available and mother and the student were transported there by ambulance where they arrived after midnight. He did not stay as mother felt the placement was not safe, the environment inappropriate and they were not prepared for him. Mother states that the student has a long list of mal-adaptive behaviors: self-injurous behaviors such as picking at open sores, tearing his clothing and eating them, smearing feces, stripping and urinating, hitting, biting, pulling hair, avoidance behaviors, impulsive behaviors, mood swings, some sexual behavior and eating disturbances. [P-02, P-39]

His self-help skills are at the 1.8 year level. She has double keyed entry locks, locks on windows and a fence at home, all of which are necessary to keep him safe. His room looks like a padded cell. There is no bureau, lamp, or bed, just a vinyl covered mattress. He has lost all ability to be integrated into the community. He will not stay seated in a car so she must hire someone to accompany them to the doctor's appointments. Dr. Guimaraes, his psychiatrist, monitors his medications at school so he doesn't have to be transported. He used to be able to go for walks with his mother, go to the playground, and take field trips, but all of those skills are lost. At the end of his 1995-96 school year, the student got the diagnosis of organic brain syndrome with autistic features.

His first two years in school were somewhat successful. He was hyperactive, had some interest in the environment, learned some routines, and was mainstreamed with the kindergarten class for some activities. Toileting was an issue as there was no program. Augmented communication has been an issue also with a parental preference for picture symbols. He began to become resistant to instruction during the third year. He wanted to engage in his own activities.

He moved to SAD #28 for his fourth year with his IEP from SAD #5 transferring with him. He had his own self-contained classroom with Nancy Nelson as his morning aide and Becky Stoddard as his afternoon aide. Self-care skills were added to the IEP with a requirement of self-care for regular class participation. The student did not want to be in the self-contained classroom so he was allowed to socialize with a third grade class without meeting the requirement for self-care. Mark Hammond made an augmented communication schedule board. This was later modified as being "too difficult" for the student by Ms. Degan. Dr. Pat Egan from the May Center observed the student and attended the April 1997 PET and suggested a behavior plan. There was some initial success with the plan. The June 1997 IEP [P-29] recommended extended-school-year services. In September 1997 the PET addressed compliance issues. There was a medication change and there was to be no behavior plan until the medications were stable. For the 1997-98 school year, the student's IEP was relatively unchanged. He now is placed in the Spectrum [self-contained program for children with Autism] with his own one-on-one aide and his own classroom for some academic activities and for times when behavior is difficult.

The student did receive summer services. The behavior plan totally broke down over the summer. The mother asked the school to address the mal-adaptive behaviors, the student's strong will to self-direct and not comply. The October 31, 1997 PET [P-27] reviewed the current IEP/status of program. Ms. Cloutier shared that the current behavior plan was not working. Discussion centered around why the student was exhibiting these behaviors. Dr. Guimaraes encouraged the group not to expend much time and energy attempting to find out why--but instead attempt to modify behaviors. The mother requested that school staff be sent into the home to continue the program with ADL and communication. Members felt that the school is not responsible for programming after school hours. There was no consideration for a medication change. [P-27]

SAD #28 has not done any assessment of the student's level of needs with the exception of the Vineland Adaptive Behavior Scale in December 1997. Mother has presented two documents dated December 1997 [P-19 and P-20] which contain goals for toileting, dressing, other self-help skills, safety skills, social skills, and community inclusion. She states that his present level of performance includes "non-compliance, oppositional/aggressive/destructive behaviors, resistance to instruction, daily living skills extremely below age level, high level of mal-adaptive behaviors, severe communication impairment, weak peer and social interactive skills, independent toileting skills are not completed and severe developmental and behavioral deficits impair his ability to access learning in all areas." [P-19, P-02, P-39]

There has been a CNA in the home for 40 hours/week for custodial care and not educational care. School denies any responsibility for after-school hours care and generalization of skills to other settings. Bancroft became involved with the student on 12/18/97 when Michael Tyler started to collect baseline data in the home. This in-home Bancroft help is funded by SCSN. When Mr. Tyler is finished collecting data, they will be analyzed and a home program will start.

The mother has continued to ask for an appropriate educational program that is immediately accessible. A day school placement within Maine is not practical because of the travel issue and there are no appropriate group homes available at this time. The Bancroft Agency suggested The Lindens, a 24 hour/day controlled environment for behavioral and neuropsychological interventions. The Lindens' literature states that the program is designed to help people with brain-related disabilities overcome severe behavioral crises. [P-01, p. 1] The literature further describes it as a state-of-the-art neurobehavioral stabilization program featuring a homelike setting. The program has two primary goals: 1.] eliminating or reducing severe behavior problems; and 2.] training the student in functional, daily-living skills that increase their independence. [P-01, p.2] "Most people reduce their behavior problems by 80 percent or more within eight weeks at the Lindens." [P-01, p. 8] The Lindens program was presented and approved to be appropriate as a placement at the 11/17/97 PET.

The Mother states that The Lindens was presented as a short term intensive behavior program with the goal of making the student more stable so he could return and be successful in a less restrictive environment. The mother states that there was consensus about placement and she left the PET feeling that the student would be admitted to The Lindens as soon as a bed was available. In the meantime, the student's behavior has continued to deteriorate.

A 12/5/97 telephone conversation between Cindy Foreman and the mother was taped without the knowledge of Ms. Foreman. A discussion about the purpose of the placement: medical for psychiatric reasons or for behavior analysis and stabilization with excerpts follows.

Ms. F: School's responsibility is to pay for educational component, that's fair.
Mother:But nobody is able to educate him because he's not stable.
Ms. F: Which is a medical thing.
Mother:Well no...it's educational...if you can't educate him it becomes an educational issue.
Ms. F: All I'm saying mom.. Is who is paying for room & board and treatment?...Medicaid?...
Mother:I don't know at this point.
Ms. F: Okay, that's what we've got to get to the bottom of because I heard there was some problems with Medicaid.

[skipped a few statements]

Mother:The piece requires a behavior analysis type of approach because it's the behaviors that are interfering with everything.
Ms .F: That in essence may be the educational component I am talking about, but who is going to pay for room & board and the actual treatment costs of him being there? ... Medicaid? ... Are we quite sure that Medicaid will pay for that?

[skipped a few statements]

Ms. F: That may be part of the educational costs mom.. And I'm not disagreeing with you...I've got to find out what those costs are, but I want to know who's paying for the room & board and actual treatment component...because typically in a psychiatric care facility it's a medical placement.
Mother:This isn't a hospital, this isn't a medical placement.
Ms. F: Yes.
Mother:This is a comprehensive behavior analysis approach.
Ms. F: I'm uncomfortable right now about putting the PET in that responsibility because I believe we should be paying for the educational costs...now...what I've done to try to clarify this--2 things...I called Christine Bartlett at the State. Whenever a kid goes out of state we have to get her approval. She also understands Medicaid... ....
Mother:I don't think we should be prohibiting a PET on that basis...because a recommendation has got to be made so that...
Ms. F: Yes, but, ***we made the recommendation thinking that Medicaid was funding everything except for the educational component...the PET hadn't made that recommendation that he be in The Lindens and that the PET fund it...***

[continued discussion about funding]

Mother:the student has...above and beyond the Katie Beckett...the student has been issued what they call a waiver slot...
Ms. F: I need to have more information that would make the PET as informed as they can be...

[more conversation around funding, fighting between agencies, who to contact]

Ms. F: And you know mom.. I'm sensitive to the fact that there is a bed available and ***we've got to get him down there.***

[conversation about the student's horrendous behaviors...throwing furniture, etc.]

School objected to the taping of a conversation without Ms. Foreman's permission and parent stated that she needed to do it because of the lack of trust that had built up. Ms. Foreman did not refute the content of the conversation as transcribed. [Testimony of

Mother, Ms. Foreman; Exhibit. P-24]

17. Mary Leavitt, the Clinical Coordinator for Bancroft, Inc., has 13 years experience as a Behavior Analyst. She has worked in different types of settings providing help in charting behaviors and developing programs to extinguish the behaviors. She has spend one week at Bancroft, Inc. headquarters in New Jersey. She has access to their expertise if she runs into a problem in her current job of coordinating and overseeing psychiatric, behavioral and medical treatment plans for clients in Bancroft's group homes along the coast of Maine. She oversees Michael Tyler, the student's home observer. Mr. Tyler's observations and data collection will take from one to two months. Then a specific behavior plan will be written based on functional analysis. All providers including family members are all environments which must be involved in the plan. The behaviors in all settings will be handled in the same way.

Mr. Tyler is almost finished gathering the data from the home. The in-school data collection has been informally started and there is consistency in behavior between the two settings. A meeting in mid-February will take place to design the behavioral plan. The staff in both settings are open, cooperative, and committed. The long term expectation is that the student could function throughout the day without seriously endangering himself and others and his mal-adaptive behaviors will diminish. The student, as a whole person, has many aspects to him: psychiatric, medical, developmental, etc. All these "parts" must be dealt with for him to have a "quality of life." Dr. Guimaraes must be a part of the treatment team. The student will respond to those parts that are able to be impacted by behavioral therapy and receive some benefit but it is too early to tell how meaningful the approach will be.

Ms. Leavitt is new to public school programs. She works with three children, all in SAD # 28. Her present contract is for one hour/week for the classroom and 20 minutes of telephone time. She has not seen any trends in school activity yet because of limited contact time. She did recommend that the school limit the extra stimuli for the student because it sounded like he had overriding psychiatric issues which were driving the behaviors. By spending less time in the larger room, the amount of non-compliance should decrease. The ABA program will work at the surface level. She questions the underlying physiological issues. The rewards/consequences will be related to the function so it is extremely important to understand the function of the behavior.

Ms. Leavitt supports a short term placement at The Lindens to stabilize his behavior and to get to the "behavioral truth" faster. The biggest problem with the treatment model at home is there are maybe 1000 variables that can't be controlled.. At The Lindens all aspects of behavior can be analyzed simultaneously because they can eliminate 90% of the variables. They can get to the behavioral truth quicker, more accurately and consistently. The Lindens will simulate an entire day by setting up a demand and then gather data about the student's response to it. Then they will add another variable: for example, attention plus the demand and no attention plus the demand. Data will be collected and analyzed. The demand will then be moved into other

settings. To be successful, the student will need consistency settings and at that point he will be transitioned back to the community. Both Ms. Leavitt and Michael Tyler would go to New Jersey to be trained for the student's transition back to the community. The value of The Lindens is that they can do the functional analysis and training adaptive behavior more efficiently. They can provide a reward every five seconds for adaptive behavior which she cannot do.

She testified that the 45 minute obsessive/compulsive behavior in the bathroom should not have been allowed to go on for so long. He should have been redirected, offered alternatives, etc. and the school should have recorded what worked and what didn't work. [Testimony of Ms. Leavitt]

18. Mr. Herlan, school's attorney, sent a fax on January 30, 1998 from the State of New Jersey where The Lindens is located. The New Jersey Department of Education states that The Lindens Program, a branch of Bancroft, Inc. is not approved by the Department of Education. [S-215] Ms. Jaeger, spokesperson for Bancroft, Inc. stated that it was an approved educational facility. [Testimony of Ms. Jaeger]

19. A letter dated June 8, 1995 from the Camden County Office of the New Jersey Department of Education grants approval for three classrooms located in the Linden's Complex. Each class is approved for a maximum of five students and four staff. The three classrooms are in separate buildings. [P-42]

20. The Lindens is a program designed to help people with brain-related disabilities overcome severe behavioral crises. It is one of a handful of neurobehavioral stabilization programs. The Lindens provides the least restrictive alternative to institutionalization for children experiencing a severe behavioral episode. Bancroft, The Lindens' parent company, is licensed and accredited by the New Jersey Department of Health and the New Jersey Department of Education. The Lindens' educators and counselors who provided one-on-one staffing are supervised by a Ph.D. level behavioral psychologist. House managers have master's degrees in applied behavioral analysis. [Testimony of Jan Jaeger; P-01, P-42]

V. DISCUSSION

This case relates to the issue of whether the student has received a *free appropriate public education [FAPE]* and if not, does he require a short-term residential placement at The Lindens to stabilize his behavior and develop a behavior plan?

As a preliminary matter, the school clearly has the burden of proving that it has complied with the **IDEA** in providing *FAPE*. The mother, as the party challenging the school's decision, also bears some burden of proof as to how the student has been denied *FAPE* and why he needs a short-term residential placement at The Lindens in order to receive educational benefit.

Although 564 pages were entered into evidence, specific behavior plans and measurements of baseline data mentioned in IEPs were missing. Also there was no triennial evaluation from 1997. An extended school year summer program was offered during 1997 for three hours/day for three days/week for 6-8 weeks. [Testimony of Mother; P-30, P-3.] There was no record of what goals/objectives were worked on and what progress was made. There was testimony that he regressed during the less structured summer program and the behavior plan no longer functioned. The school recognized the severity of the student's needs by providing an ESY program but there was no follow-up to the reported regression.

The presentation of relevant facts by the school was somewhat vague. The school focused their case on anecdotal reports of isolated successes, the misunderstanding surrounding the actual PET recommendation of 11/17/97, attacks on the mother's ability to carry through with demands of adaptive behavior in the home, the difficulty the student might have in separating from his mother if he were to attend The Lindens and the difficulty in transitioning back into the community, and attacks on The Lindens and the cost of the program.

In deciding this case, basic standards established in the case law were reviewed by the hearing officer. Parties were instructed to become familiar with case law at the pre-hearing conference.

In denying a short-term residential placement for the student, the district argues that such placements must be made for educational purposes only, that their IEP and program are appropriate, and that the student is receiving benefit. They also report a decline in mal-adaptive behaviors. The district denies that generalized appropriate behavior at home, in social settings away from the school and in the greater community is the responsibility of the school. The school argues that if the student is making progress in school towards his goals then he is receiving educational benefit.

The parent argues that the school has failed to develop an IEP designed to meet the student's individual needs and specifically a need for a short-term residential placement to stabilize his behavior and design a behavioral plan. She argues that the student has not received educational benefit based on his unique needs because the IEP failed to include goals calling for generalized behavior, failed to consider an extended day program, failed to have a transportation goal, failed to provide a toileting program, failed to have a behavioral plan, failed to have baseline data, failed to have any meaningful evaluative data to measure growth. She argues that the student has not received any educational benefit and has actually regressed. The parent contends that it is not possible for the school, even with the addition of the one hour/20 minutes/week school funded Bancroft consultant and 40 hour/week SCSN funded in-home Bancroft help, to provide the kind of structured environment and training the student needs to stabilize and improve his behavior. She feels that it is especially important that the student's behavior be brought under control as soon as possible because of his increasing size and strength. Simply controlling the student's behavior at school will not

provide him with any meaningful educational benefit and therefore will not provide him with a *FAPE*. She also denies that the student's behavior is appropriate or has improved in school.

> The basic requirement of the *FAPE* statute is defined as follows:
>
> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.
>
> The term "special education" is defined as "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." **20 U.S.C. § 1401(16)**.

There is a legal presumption that the educational program proposed by the school is appropriate for the child. The burden of proof rests with the parent to prove the proposed IEP is not calculated to enable the child to receive educational benefits. [*Tatro v. Texas,* 703 F.2d 823 (5th Cir. 1983), *aff'd,* 468 U.S. 883 (1984). This presumption is based on the Act's deference to the expertise of local educational authorities in developing educational programs.

The Supreme Court has held that IDEA does not require that a district give a handicapped child the best education possible, but rather that it confer an educational benefit upon him. *Board of Education of the Hendrick Hudson District v. Rowley,* 458 U.S. 176 (19820. The Court further states that the determination of the adequacy of educational benefits will vary from case to case depending on the nature and severity of the handicapping condition. *Rowley,* 458 U.S. at 202.

The Court determined that Amy Rowley, a deaf student, who passed all subjects and advanced from grade to grade was receiving educational benefit. Advancing from grade to grade is not an appropriate standard to apply to the student. The concept of what constitutes educational instruction is viewed broadly when in concerns severely handicapped children such as the student. If a child lacks very basic social and self-help skills such as toilet training, feeding, and communication, these areas are considered part of the child's education. *Battle v. Commonwealth of Pennsylvania,* 629 F.2nd 269 (3rd Cir. 1980), *cert. denied,* 452 U.S. 968 (1981).

The appropriateness of a residential placement must determine if the placement has been made for medical, social, or emotional needs that are segregatable from the learning process. *Kruelle v. New Castle Country School District,* 642 F.2d 687 (3d Cir.

1981). The school maintains that the student's problems are medical in nature and the placement is for medication stabilization. This implies that if the doctors would only get his medication right, his behavior would be controlled. The testimony of two physicians strongly refutes this allegation. They maintain that his medication is stable and it is the behavior that needs stabilization. The school's attorney in his closing brief states that although his label is autism, what he really has is an "interstitial deletion on the long arm of chromosome number seven," along with a number of other conditions. [Testimony of Dr. Howard; P-33] While this is a fact, this Hearing Officer is not sure of the relevance.

Does this mean that children with Down Syndrome [a chromosome lack] are medical cases and not educational?

Applying the *Rowley* standard to a case involving a severely retarded child, the First Circuit held that "the Act does not authorize *residential care merely to enhance an otherwise sufficient* day program." *Abrahamson v. Hershman,* 701 F.2d 223, 227 (1983) In this present case, it is clear that the day program is not sufficient and that *behavior control* is the *primary educational need*, which must be attained before any meaningful academic instruction can be accomplished. The school tried to argue that much of what would be provided to the student in The Lindens would not be educational [academic] in nature as only 5-10 hours/week would be spent in the classroom. This hearing officer would disagree as until the student is able to control his behavior in any environment and his mal-adaptive behaviors continue, all education is undermined. The student's exhibited out of control behavior precludes any learning or independence. A safe, consistent, predictable environment must be provided before academic learning which is rather high up on Maslow's hierarchy of needs.

The record clearly shows that the student's inability to control his behavior is a predominant characteristic of his handicapping condition, and it must be addressed before academic goals can be achieved. If the student cannot be taught behavior controls that are generalized to environments outside the classroom, he will never maintain any independence and will have to be institutionalized for life. One of the characteristics of persons with autism is that they cannot generalize. The failure of the school to assure any gains that would be generalized to other environments including the home, raises questions about the appropriateness and efficacy of the student's program. If gains are school specific [stimulus bound to the school environment] then the school has failed in its' overall mission to help students become functional adults. It is this Hearing Officer's opinion that the student's need for behavior control in the home and greater community is *not segregable from his educational need for behavior normalization*, and thus was considered in determining whether he is benefiting from his educational program.

Does the student's IEP recognize the importance of behavior needs outside the classroom by requiring the PET to address the following items: extended educational programming, daily schedules reflecting minimal unstructured time, in-home training or viable alternatives, prioritized behavioral objectives, and parent training? Has the

student developed "a reasonable degree of self-sufficiency" or achieved more than "trivial" educational benefit? The *Rowley* Court intended that the educational benefit bear a practical relationship to a student's life after school. What is the impact of the student's present education on his quality of life, as well as his potential for progress and improvement?

It appears that in the past the student has made gains both at home and at school when his behavior was more controlled. The question is: what is an appropriate program where he can make gains in the future?

The parent through pictures and words presented a child totally "out of control." She described her son as engaging in major non-compliant and mal-adaptive behavior such as picking open sores, removing his clothing, tearing the clothing into small pieces and eating them, flopping on the ground, screaming, kicking, biting, pulling hair, having tantrums. Her doors all have double keyed entry locks, windows have locks, his bedroom is empty except for a vinyl covered hospital mattress. He has lost all ability to integrate into the community. She needs to hire someone to go with them to a doctor's appointment. The school recognized this need by allowing an ed tech to accompany the student and the Mother to an emergency appointment. The testimony of several witnesses from the school confirmed some of his mal-adaptive behaviors but they maintain that his behavior has improved. However, the written home-school journal does not support their testimony, nor do their behavioral graphs. [S-210] The charts only target eight specific behaviors for frequency only with no data about duration or severity. A greater flaw is using weekly time periods which are unequal [i.e., comparing a two day week with a five day week]. There was no baseline and there was no behavior plan. There is no data about time on-task, compliance or other learning behaviors. There simply is no basis for stating that his behaviors have improved. School personnel state that his behavior improved after they removed him from the Spectrum classroom and backed off on trying to get him to comply. There is no evidence to support this beyond observation. They also noted that the student has a "sense" of when his mother is in the school and he acts worse at that time. This is also unsubstantiated by the home-school notebook. If one were to compare the student's behavior now to his behavior in October, November or December, one sees no progress. The graphs are random--one behavior is down and another is up on one week and then they switch.

The district court in Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) made the following interpretation of the substantive requirements imposed by **IDEA**.

> **The purpose of the Act was to open the door of public education to handicapped children by means of specialized educational services rather than to guarantee any particular substantive level of education once the child was enrolled. The Act does not require a state to maximize the potential of each child commensurate with the opportunity provided to non-handicapped children.**

> **In an action such as this a court must first determine whether the responsible agencies have complied with the statutory procedures and then must determine whether the individualized program developed through such procedure is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the responsible authorities have complied with the obligations imposed by the Act, and <u>the court can require no more</u>. [my emphasis]**
>
> **Courts must avoid imposing their view of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.**

Clearly, the requirements of the Act have not been met in this case. Careful, impartial consideration was not given to the student's individual educational needs. School's attorney in the opening statement of its' closing argument speaks about "the most extensive examples of interagency cooperation and comprehensive programming" that this Hearing Officer is likely to encounter. In my opinion, the interagency cooperation in this case was neither demonstrated nor was it sufficient. SCSN is reportedly developing a group home without the knowledge of the school. The school is refusing to provide extended day services and has financed minimal in-school services for the Bancroft program. The school has not taken its' lead role in seeking an appropriate program for the student utilizing the interagency agreement. The school has not acted as an advocate for the student's educational needs. A full, free appropriate public education has not been offered to him.

The mother, because of the student's severe behaviors, with support from her experts, assert that a short-term placement at The Lindens is the <u>only</u> proper placement for the student at this time. The school has not offered any other alternative except a willingness to contract with Bancroft for more services if it were to be ordered. [It is not even guaranteed that Bancroft has any more time for SAD # 28.]

The student's IEP is substantively deficient. He entered SAD # 28 in 1996 with an IEP from SAD # 5. [S-165] At this time he was receiving about 1/3 of his daily schedule in regular education. He had a behavior management plan with baseline data from 12/95. There was a community goal. His present IEP has no time in the mainstream and the only community goal is the swim program at the Y. That program had to be discontinued because of the student's behavior. Parts of the 1996 IEP have been slowly whittled away while other parts have remained substantially the same. The school has never conducted any comprehensive evaluation of the student's current skill levels even though his triennial evaluation was due in May of 1997. There has never been a PET discussion about methodology.

The annual goals do not describe what the student can be reasonably expected to accomplish *within a twelve month period.* The single objective measure that has been

used over the last six years has been the Vineland Adaptive Behavior Scale [VABS]. [P-22] A comparison of Standard Scores [SS] shows a drop of between 30 and 50 points in each area over the six year period. Whereas it is true that SSs only allow us to readily compare the obtained test scores to those of other children, an essential basis for any interpretation of progress is maintaining the relative SS from year to year. Scores from the VABS in May of 1994 indicate that the student has made "some minimal" [2 months growth on three domains-one year's growth on the motor domain] progress on the only objective measures placed into the record. However, this growth is so minimal as to be trivial. Of course, the school could argue that the standardization group is not appropriate for children with autism. However, this is the *only* objective measurement offered by the school as the student is unable to complete standardized testing. There was no triennial evaluation. Since the student's measured growth has been at a glacial speed — some few months over the last 3 ½ years — it is not realistic to think that he will make 2 - 3 years growth on readiness skills and self help skills in a period of one year, as measured by the Brigance. Those goals have remained the same for the past three IEPs.

The short term instructional objectives are not measurable as there is no baseline data. There was no "collected data" to support growth in objectives from goal number five. Although the home-school notebook describes incidences of the student's flopping, screaming and refusing to get on the bus, there is no goal addressing transportation behavior. School personnel wrote about these tantrums but neither offered help or discussed this difficult behavior to PET for inclusion in his IEP. There is a lack of evaluation data to support any particular methodology/approach.

This hearing officer has determined through analysis of the IEP, the frequency of behaviors graphs, the home-school notebook, the Spectrum placement with his own individual room, the lack of a behavioral plan, the lack of specialized training of school personnel, the minimal amount of recently contracted consultation time, the minimal amount of speech and language services for a child with severe communication abilities [school estimates 65 words] and the minimal amount of OT that the student has not been denied *FAPE*. The school has failed to offer any alternatives beyond a regular school day in the Spectrum program.

The school did state that they were willing to contract for more time with Ms. Leavitt who may or may not have much more time to give. Her current responsibility is to coordinate and oversee the psychiatric, behavioral and medical treatment plans for a variety of clients with MR, SED, PDD, ADHD and physical disabilities in group homes along the coast of Maine. Ms. Leavitt does have expertise in ABA. Even she recognizes that The Lindens can provide a more appropriate program at this time.

Since the contracting with Ms. Leavitt in November, the school is now going towards an applied behavioral analysis [ABA] approach for the student. There is no evidence that methodology was ever discussed by the PET. There was no evaluation of the student's individual needs [e.g., breadth of disabilities and effects, types of

intervention strategies, length of school day, length of school year, etc.] before making program and placement decisions which were based on current program availability rather that his individual needs. The IEP failed to set forth *reasonable* goals and objectives, failed to consider any services beyond the school day, failed to have the school act as the lead agency in providing coordinated services and failed to provide promised ESY services [Christmas vacation].

The mother came before the PET in November of 1997 to request a placement at The Lindens. A large part of the hearing was taken up with contested testimony of who said what. The school clearly maintains that the placement was for medical reasons and they supported the placement for these reasons and because they thought Medicaid was paying for it. The parent states that the student has been hospitalized before [JBI, St. Mary's, and Charter Brookside] and she never came to the PET for placement at those times, that this was an educational placement. Evidence strongly suggests that the student's program had not been working for quite some time either at home or at school and school was well aware of the "crisis." [P-02, P-03, P-24, P-26, P-27, S-55, S-60, S-114, S-209] Although there appears to have been consensus for placement at The Lindens for a short term behavioral analysis and stabilization, both parties disagree as to whether it was a placement for medical reasons or educational reasons. When it became clear to the school that the placement was for educational purposes and Medicaid would not fund the placement and SCSN would not allow Katie Beckett waiver funds to be used, the school then no longer considered The Lindens to be a possible option. This is not interagency cooperation. The parent did tape a conversation with Ms. Foreman without her permission. The school objected to this transcript being entered into the record because of the way it was obtained but they did not object to the content. It is admissible as evidence which supports the "confusion" surrounding the proposed placement. All cooperation ended shortly after the taped conversation and 12/15/97 PET with the parent filing for a hearing.

The School must recognize that *IDEA* is a dual advocacy law, placing responsibilities on both parents and school districts to advocate for what they believe is necessary to appropriately meet the needs of their child. Schools must provide programs/services which appropriately address the needs of a student with disabilities and **if more than one is appropriate**, then the district may choose the option and not the parents. If, however, the district's program is not appropriate, and the parent's program is appropriate, then the parent's program prevails.

School personnel, even if they strongly disagreed with The Lindens placement which they didn't at the 11/17, PET have since "rushed to attack the parent and the placement," forgetting about maintaining a cooperative relationship with the parent and *at a minimum* fulfilling its fundamental evaluation/IEP obligations to the student.

In a closing brief, the school's attorney stated that the school is gathering data to implement an ABA program which is true. The school did not offer any testimony as to how they would implement the program which will have great systemic implications that

will require several discussions and information sharing among school providers. Among these issues are: the expertise/training to develop/supervise/deliver the program. ABA is not an exact science. Sometimes, even when all of the best known resources are used in the most appropriate ways, the outcomes fall short of what would be desired. At present, Ms. Leavitt is the only qualified person to supervise the implementation of the program and she has a contract for a mere 27 minutes/week for the student. It is also difficult to access competent individuals who have the needed training and experience to do the program/personnel monitoring/supervision. The ABA program demands total collaboration between home and school with the most important ingredient being trust. It should be understood that it will be very difficult to establish trust after this extremely adversarial hearing. Home-school ABA has a degree of intrusion as all personnel dealing with the student must be open to careful review by others through regular assessment. Whereas parent has opened her home, the school has not been so open. It was reported that the school would not allow video taping by a third party after accusing mother of being a cause of the student's poor behavior in school. There was much criticism aimed at the mother for dropping in at school unannounced. Another factor to evaluate before implementing a home-school ABA program is the student's age. Although there is not an abundance of research data about ABA programs, research suggests that the older the student is when s/he receives ABA training, the less likely there will be a positive outcome. For this reason time is critical. A program must be in place as quickly as possible by gathering data about the student's functional behavior in an efficient and tightly controlled environment.

The school suggested that The Lindens is not certified for special education which is untrue. They further alleged that the program is not really educational in nature. This is also inaccurate. Even if The Lindens were a state unapproved placement, the school's program is insufficient to ensure the student's progress and The Lindens can provide the program the student needs. Both *Carter v. Florence County School District Four* and *Burlington School Committee v. Massachusetts Department of Education* have required reimbursement for unapproved private school placement when the public school has failed to offer an appropriate education.

For three years there has been no measurable gains. With the absence of any other alternatives, this Hearing Officer is left to choose between continuing a program with no measurable gains and a lack of evaluation data or The Lindens. For this reason, the student shall be placed at The Lindens for evaluation and behavior stabilization for a period of twenty weeks. There is nothing to prevent the school from using the Interagency Agreement and Children's Cabinet to pursue joint funding for the placement. In the spirit of cooperation, SCSN, DHS and other insurance should support the placement to the extent possible

VI. DECISION

[1] SAD # 28's 1997-1998 IEP is not reasonably calculated to provide the student with educational benefit .

[2] The Lindens is an appropriate short term [20 week] educational placement for the student.

VII. ORDER

[1] SAD # 28 will develop an appropriate IEP for the student including placement in a structured twenty-four hour program such as The Lindens where the student will receive a consistent, round-the-clock ABA program, implemented by personnel experienced in working with children with autism. A comprehensive evaluation of all his needs should take place to be used as baseline data for future planning.

[2] After 20 weeks, the PET shall determine whether the student's behavior has improved sufficiently to allow him to return to his home and school setting without significant behavioral regression. If he is able to return home, the PET shall arrange for an appropriate transition program, including training local staff to work with the parents and school.

[3] In any future deliberations, the PET will consider the student's behavior in all settings in evaluating the appropriateness of his program and it will provide extended day services, in-home training and any other supportive services listed in Chapter 101, particularly 6.1.A. The IEP will have measurable goals and objectives based on the evaluation data from The Lindens, a behavioral management plan, transportation goal, a coordinated home-school program, and any transition services needed for change from Rockport Elementary to the next school.

So ordered,

S/Jeannie M. Hamrin, Ed.D.
Hearing Officer

cc: Eric R. Herlan, Attorney for SAD # 28
Richard L. O'Meara, Attorney for the parent
Dr. Michael Opuda, Due Process Consultant