

**Special Education Due Process  
Hearing Decision  
Parent v. Brunswick School Department**

**March 20, 1998**

CASE NO. 97.227

COUNSEL FOR THE PARENT: Parent, Esq.<sup>1</sup>

COUNSEL FOR THE SCHOOL: Donald A. Kopp, Esq.  
Drummond Woodsum & MacMahon

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 December 22, 1997, the Department of Education received a request for a due process hearing from the mother on behalf of her son. The mother and student reside at Maine. The student is currently in first grade at the Longfellow Elementary School in Brunswick.

The Pre-hearing Conference in this matter was convened on January 20, 1998. At the request of both parties the 45 day time limit was waived. The Hearing convened on January 30th, February 2nd, February 4th, and February 23rd at the Sagadahoc County Court House in Bath, Maine. The written record consists of 285<sup>2</sup> numbered documents. Nine witnesses gave testimony at the hearing. The parties waived oral closing statements and requested an opportunity to submit written summations. The record remained open until March 4, 1998, for that purpose<sup>3</sup>.

Following is the decision in this matter.

**I. Preliminary Statement**

The student is a xx year old boy currently entered in first grade after two years of kindergarten. During his first year in kindergarten the student was identified as eligible for special education services under the category of speech and language impairment. He began receiving services in December 1995. Resource services for reading and writing were added during the 1996-97 school year.

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<sup>1</sup> The hearing was brought by mother. Father was not a party to the proceeding. He acted only in the role of counsel.

<sup>2</sup> On the last day of the hearing, the continued dispute by the parties over student's writing ability prompted the hearing officer to order the parties to each submit four writing samples completed by him. The eight writing samples are entered into the record as documents 278-285.

<sup>3</sup> No instructions were given to the parties regarding reply briefs and no extension of time was allowed for such replies. The parent chose to submit such a brief, to which the school responded.

The PET met in May and June 1997 to review recent language testing and make determinations about the student's special education program for the 1997-98 year. Current testing and progress data indicated that the student no longer met the eligibility criteria for speech and language services. Unable to come to consensus on eligibility, or the continued need for services, the speech and language designation remained, and the team decided to meet in the new school year to assess the student's progress.

In October the PET again met to determine the student's special education needs. School staff felt he had made progress and was performing at grade level. The parents disagreed. They felt he continued to require special education services, although they agreed that he no longer qualified for eligibility under speech and language impairment. The PET ordered further testing. Evaluations were conducted in October, November and December. The PET met on December 17, 1997 to consider the results of these evaluations. Consensus could not be reached regarding the student's special education eligibility nor his continued need for special education services. As a result the parents requested a due process hearing.

It is the contention of the parents that testing supports the student's identification as a student eligible for special education services under the category of learning disability. They argue that recent evaluations show a significant discrepancy between the student's IQ and his achievement especially in tests related to reading and writing. They contend that he continues to have great difficulty in these areas despite all of the assistance he has received and his ardent desire to read and write.

It is the school's position that the student is no longer eligible for special education services. They argue that, while test results show relative areas of weakness, his education is not adversely affected. School personnel attest that the student is performing at grade level, and therefore he does not require special education instruction in order to benefit from his regular education program.

## **II. Issue for Hearing**

Is the student eligible to receive special education services under the category of learning disability?

No procedural violations were claimed or identified.

## **III. Findings of Fact**

1. The student entered school in September 1995. In October 1995 he was referred to the PET because of concerns with his poor articulation and expressive language abilities. Speech and language testing was recommended. (Ex. 62-63; Testimony Parent)

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2. The PET met in December 1995 to consider the results of testing. Results showed the student scored in the moderately high range on the Peabody Picture Vocabulary Test, and scored above average on all subtests of the Clinical Evaluation of Language Fundamentals-Revised, but that he made many sound substitutions “that contributed to a level of unintelligibility” when given the Goldman-Fristoe Test of Articulation. Independent psychological testing obtained at parent expense made a diagnosis of attention deficit-hyperactivity disorder (ADHD). (Ex. 269-275)

The student was identified as being eligible to receive special education services under the category of “speech and language impaired”. He began to receive speech and language services two times a week for 30 minutes each session. The school agreed to conduct an independent neuropsychological assessment at parent request. (Ex. 60-61)

3. The neuropsychological assessment was completed in January 1996. In March and April the PET met to discuss the results of this and other testing as well as the student’s progress. The evaluator who completed the neuropsychological assessment discussed her findings. She stated that the student scored in the average range on the Stanford-Binet Intelligence Scale (4th Edition) achieving a composite score of 106 “with significant inter-subtest variability ranging from the superior to the low average level”. Verbal scores were a clear strength. “Results of neuropsychological testing were not entirely consistent with IQ test findings...In contrast to his strong verbal and visual reasoning abilities (Stanford-Binet), on neuropsychological measures, his conceptual problem-solving abilities were variable.” (Ex. 50-59, 124-131; Testimony Strzok)

Occupational therapy assessment found the student to have “well developed visual perceptual skills, [and] tactile discrimination. His developmental hand skills are coming along”. He exhibited “developmentally younger gross motor skills”. The evaluator did not find the student in need of direct OT services but teacher consultation was recommended. (Ex.123-123)

Both his classroom teacher and his special education teacher stated that the student’s social awareness appeared to be lagging and that his drawing and writing skills appeared developmentally young. The PET determined that speech and language services would continue, that a multi-sensory approach would be employed, and that the teacher would consult with the occupational therapist. The PET ruled out eligibility for services under the category of learning disability at the April meeting because there was not a significant discrepancy between ability and achievement as measured by recent testing. (Ex. 50-59)

4. On June 10, 1996, the PET met to discuss progress since the previous meeting and make IEP modifications for the 1996-97 school year. Teachers noted the student’s increased compliance with behavior expectations and positive social growth. Achievement testing conducted by the special education teacher led her to conclude that the student “made gains in all areas assessed”. She found phonological awareness skills were almost age appropriate. Classroom observations showed the student to have delays in articulation and language syntax skills; below average drawing, writing and encoding skills; lagging social development; and weak fine motor skills which adversely affected his achievement in the regular classroom. The

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PET determined that the student would attend both a morning and an afternoon kindergarten session in the coming year, with resource services five days a week between the two sessions to improve phonological awareness, decoding and encoding skills, and visual motor integration skills. Speech and language services for articulation therapy continued an hour per week. A second occupational therapy evaluation was ordered, but no services were recommended. (Ex. 46-49; 120-121)

5. The student began the 1996-97 school year attending all day. The PET met in October to discuss progress. The student's behavior chart was modified and behavior objectives were added to the IEP, but teachers observed that overall he was making "nice gains in compliance and classroom participation". (Ex. 44-45; Testimony Stahl, Parent)

6. On January 24, 1997 the PET met for the student's annual review. There was extensive discussion around the student's behavior. Behavior compliance in the classroom was inconsistent; compliance was problematic during physical education. The student's resource room teacher reported that he "always demonstrates a positive attitude" and "is a willing enthusiastic reader and writer during his time with her"; "[h]is phonological skills are developing daily and appear to be appropriate for both his grade and age". It was decided that a new IEP could not be written without further testing to determine academic levels, language skills and processing deficits. (Ex. 41-43; Testimony Stahl)

7. On May 5, 1997 the PET met to review the results of testing and discuss program needs. His AM kindergarten teacher stated that "she has seen a great deal of growth for the student this year" noting that he is more appropriate in social situations, although he still needs reminders to attend. She noted that he can sit and write independently, but stated that "[t]here are still times when compliance is an issue". The afternoon kindergarten teacher agreed with this description of the student and noted that he was "paying attention to most directions in class". (Ex. 39)

The speech clinician reviewed the results of her speech and language testing. She concluded that with "[the student]'s average to extremely high ability with expressive language, receptive language and vocabulary, as well as his high level word finding skills... [the student] does not qualify for specific language services". (Ex, 108, 40)

The resource room teacher reviewed the results of her achievement testing. Test scores ranged from the average to the very superior range, with reading and writing in the average range. In her diagnostic impression she wrote that "[b]ased on the results of this academic assessment, [the student] is ability appropriate in the areas of Reading, Writing, and Mathematics when his achievement is compared to his tested ability (Stanford Binet 1/96)" She noted that "[c]lassroom achievement and observations indicate steady academic progress...However, continuing concerns about [his] ability to make transitions, and attend to directions and consistently comply with classroom expectations appear to remain as adverse effects." (Ex. 74-77, 109, 116-117)

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The members of the team discussed the student's continued need for special education services, but were unable to come to consensus on his category of eligibility. (Ex. 40; Testimony Parent, Stahl)

8. In early June 1997 the PET reconvened to continue discussing evaluation results and classroom observations and to determine a category of eligibility for special education. The student's teachers reported that his "academic skills compared to his peers are on top and that there are no significant academic adverse affects". His special education teacher stated that she felt that the student had made great progress during the year and that he should have supported services rather than being removed from the classroom next year.

Again, there was significant discussion around issues of the student's attention and ADHD diagnosis<sup>4</sup>. Identification under the category of Other Health Impaired was discussed. The student's teachers felt his attention problems did not adversely affect his education. Classroom observations discussed at the meeting state that "[o]verall [the student] was generally successful and engaged primarily in positive behaviors..." (Ex. 34, 69-72)

A "Learning Disability Evaluation Report" was completed. School team members concluded that no learning disability existed and questioned the student's continued eligibility for special education; the parents did not agree with this conclusion. (Ex. 37-38)

The team concluded that the student would begin the new school year in first grade, continue the "speech and language impaired" identification for the sake of continuity. They wrote a new IEP to continue speech and language services 20-30 minutes weekly, resource services 30-45 minutes weekly, and para-professional support for the student in physical education once a week. The team agreed to meet in the fall to assess his program and his transition into first grade. (Ex. 1-6, 36; Testimony Parent, Stahl)

9. The PET met on October 8, 1997, to discuss the student's progress in the first six weeks of the new school year. An informal observation by the school psychologist and a formal observation by the school's behavior specialist was discussed. The student's teachers reported on his educational status from their perspective. The school concluded that the student was no longer in need of special education services and recommended that he be put on "monitor status" for the balance of the school year to monitor continued progress. The parents rejected this conclusion and requested further testing to specifically rule in or rule out a learning disability. The PET determined that further testing would be done. (Ex. 26-28, Testimony Parent, Stahl, Ellis)

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10. An independent psychological/neuropsychological assessment was completed in mid-October 1997. The evaluation included formal and informal testing instruments, a review of

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<sup>4</sup> There is significant evidence in the record that the student has been diagnosed with Attention Deficit Hyperactivity Disorder. However, the PET did not determine that the student requires special education services for his ADHD. The question of eligibility under the category of Other Health Impaired was raised at the pre-hearing conference as a possible issue, but was removed as an issue for hearing by the parent before the hearing began.

previous evaluations and school information since 1995, parent interview and phone consultations with the student's teacher and the school psychologist.

On the Wechsler Intelligence Scale for Children, 3rd Edition (WISC-III) the student achieved a Verbal score of 132 and a Performance score of 119, resulting in a Full Scale IQ of 128 (97th percentile or "superior" range). Sub-test

scores on the WISC-III ranged from a low of 10 in "symbol search" and "picture completion" to a high of 19 in "vocabulary", a range from average to superior.

Other cognitive measures designed to assess the student's visual motor integration and learning style showed the student's clear preference for visual learning. The report stated, "He had the most difficulty when he was asked to learn sound symbols [where] his score...fell to the low average range". The evaluator concluded that "visual-motor integration difficulties (writing, copying), uneven processing speed, and his difficulty with a sound-symbol task" were of significant concern. She interpreted test results to conclude that demands for abstract visual analysis (reading letters, words, sentences) and copying were problematic for the student although at times he compensated.

When comparing her testing results with recent educational achievement testing she observed that the student's "paper and pencil skills (writing, copying) are relatively weak, and his reading skills inconsistent". She testified these weaknesses translate into poor writing skills, uneven progress in reading, and an inconsistent processing speed. She testified that it was her opinion that the student meets the eligibility criteria for learning disability; if he were reading at a level commensurate with his age and ability he would be reading at approximately a fourth grade level, not struggling to read at a first grade level. (Ex. 93-101, Testimony Strzok)

11. An independent educational assessment was completed in November 1997. The student's standard scores<sup>5</sup> on the Wechsler Individual Achievement Test (WIAT) ranged from a high in Listening Comprehension of 135 to a low in Reading Comprehension of 79. He achieved a score in Basic Reading of 95 and in Spelling of 98<sup>6</sup>.

Other norm-referenced testing supported these findings. The evaluator concluded "The student's ability to express himself orally is far stronger than his ability to express himself in a written mode...which will likely become more problematic...as he moves to higher grades..." (Ex. 90) "[His] skill in reading is at a first grade level but lower than his other academic skills." (Ex. 92) She testified that his reading scores were significantly lower than would be expected

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given a student with his ability. The student was not observed to use any decoding skills in the testing situation. (Ex. 88-92; Testimony Porter-Fetterman)

12. On November 4, 1997, an independent classroom observation was conducted by a special education teacher from a neighboring district. This observation consisted of observing the

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<sup>5</sup> Standard scores and percentile rankings are given by the tester in both age and grade comparisons. Only age scores are discussed here.

<sup>6</sup> The evaluation report at page 90 shows the spelling score to be 101. This score was corrected in testimony.

student in the resource room and in his reading group in the regular first grade classroom. The observer concluded that the student's behaviors were not atypical of a first grade student in either setting, but that he did appear to have stronger skills than most of the students in his reading group in the regular classroom. It was her observation that he demonstrated complex phonetic, reading and spelling skills. She stated in testimony that she observed no behaviors or learning problems which appeared to adversely affect his ability to benefit from the regular education program. (Ex. 64-65; Testimony: Ewing)

13. On December 3, 1997, the school psychologist conducted an assessment of the student which included teacher completion of the Achenbach Teacher Report Form, and the Connor's Teacher Rating Scale, and parents completion of the Achenbach Child Behavioral Checklist, and the parent version of the Connor's Rating Scale. The psychologist also observed the student in the classroom in both a reading and writing activity. (Ex. 79-87; Ellis)

The classroom observation consisted of watching the student participate in a group reading activity and doing independent seat work. As part of this observation the psychologist compared the student's behavior to another student chosen at random in the classroom. He concluded in his observation that the student's performance and behavior were consistent with the behavior of the other children in the group reading activity, and while he was often off task in the writing activity, his performance and behavior "was not significantly different than his peer in terms of independent work activity". (Ex. 83)

The student's classroom teacher, gym teacher and resource room teacher all completed the behavior checklists and behavior rating scales. Analysis of the teachers' responses resulted in no clinically significant scores (above 70) on either reporting form. These results indicate that "...in a variety of [school] settings [the student]'s behavior is not significantly different than his age-mates". (Ex.80)

The student's parents individually completed the two parent versions of the checklists. Analysis of their responses resulted in clinically significant scores (above 70) in several areas. The student's mother reported him as having clinically significant concerns in the areas of anxiety/depression, aggressive behavior, and cognitive problems. Both his mother and father identified attention and hyperactivity as significant difficulties. (Ex 81)

14. On December 17, 1997 an observation was completed by the psychologist who conducted the October 1997 neuropsychological assessment. The observation was conducted during art class, and closing activities. The psychologist noted in her report that "[w]hile [the student]'s behavior during this observation was essentially appropriate, given the written record, clinical observations, and detailed collateral reports, this examiner continues to believe that [the student] continues to warrant the designation of attention deficit disorder (predominantly inattentive type)". (Ex. 276, 277)

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15. The PET met on December 17 to review assessments and observations conducted since the October meeting, and to make a determination regarding the student's need for special education services. After a thorough discussion of the results of the written information and reports by his teachers of current classroom progress, the team was unable to reach consensus in completion of the "Learning Disability Evaluation Report". The parents and two of the

evaluators, Strzok and Porter-Fetterman<sup>7</sup> stated that the student had a tested learning disability. School personnel maintained that the student's reading achievement score was in conflict with classroom observations and the daily performance observed by his teachers. (Ex. 20-25; Testimony Stahl, Ellis, Porter-Fetterman)

16. The student's parents had him tested by a reading specialist in January 1998. She administered the Gallestel Ellis Tests of Coding Skills, a criterion referenced test of reading skills. The evaluator concluded that the student "is having a difficult time developing fluency and is not at an automatic level in decoding letter sounds in simple three and four letter words". She supported a diagnosis of language based learning disability. (Ex. 265; Testimony Dee)

17. The student's resource room reading teacher has known him for the past two and a half years, first observing him in the kindergarten classroom in 1995. She began providing resource room support for reading and language in April 1996. In June of 1996 and April of 1997 she did achievement testing with the student. The 1996 test report concluded that the student "has made gains in all areas assessed..." "[His] Phonological Awareness skills are almost age appropriate". (Ex. 120, 121) The 1997 testing included administering the Woodcock-Johnson Achievement Battery. She found no discrepancy between ability and achievement when those scores were compared to the student's then current Stanford-Binet ability score of 106. (Ex. 109)

She testified that the conclusions of Ms. Dee's assessment of the student's skills are contrary to what she sees on a daily basis. She sees the student as a student with excellent language skills who is reading well in a first grade class. He seems to be functioning well in a combination phonetics and whole language approach to reading. She stated that the student has made steady progress in his reading. She sees him as reading across all school environments at a skill level appropriate to his peers. She does not think he continues to require special education services. (Ex. 20, 22, Testimony Stahl)

18. The student's first grade teacher testified that the student is placed in the top reading group in her class and performs at a level comparable to others in the group. She stated that he sometimes has limited attention span, but she views his behavior and performance, generally, to be appropriate to the setting. She testified that the student has mastered the list of site words she expects of first graders at the end of the year; she has no concerns with his reading comprehension; she has no concerns with his current decoding skills; she feels he has grade appropriate writing skills. She, also, does not agree with the conclusions of Ms. Dee's

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assessment regarding the student's decoding skills. In her opinion the student does not need special education instruction in order to succeed in the classroom. (Testimony Milne)

19. The student was one of the students chosen to be screened by the school's Reading Recovery<sup>8</sup> program in September 1997. The reading specialist testified that the student

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<sup>7</sup> Ms. Porter-Fetterman stated that she signed the report because of student's tested discrepancy; she had no knowledge of student's classroom achievement and could not comment of whether this discrepancy adversely affected his education.

<sup>8</sup> Reading Recovery was described as a reading program governed by strict guidelines which serves children who require reading remediation but are not eligible for special education.



scored “average” to “substantially above average” on all aspects of the screening test. He was found ineligible to participate in the Reading Recovery program because of his high scores on the screening instrument. (Ex. 147, Testimony Knight)

20. The student’s mother testified that the student does not read at the level characterized by his teachers. She does not observe him to be an equal participant in his reading group; she feels he struggles to decode and encode words in spite of his desire to read. A classroom observation done by her describes the student as inattentive, disorganized and performing poorly on tasks. She testified that her observations of the student reading with her at home and in his first grade class, coupled with recent testing, supports the parents’ belief that the student has a significant language based learning disability. She is convinced that his reading and language needs require individual instruction using a multi-modal teaching approach such as the Orton-Gillingham program. (Ex. 29, 204, 208, 209; Testimony Parent)

#### **IV. Conclusions**

##### **1. Is the student eligible for special education services as a student with a learning disability?**

The Pupil Evaluation Team (PET) must rely upon definitions set forth in State regulations to determine if a student is eligible for special education services under the category of learning disabilities :

###### Section 3.1: Student with a Disability; General Definition

A student with a disability is an individual who:

...C. Has a disability which adversely affects the student’s educational performance and requires the provision of special education services in order that the student may benefit from an elementary or secondary educational program.

A student with a disability shall have one or more of the disabilities listed in sections 3.2 through 3.14 of this part.

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###### Section 3.10: Learning Disability

A student with a learning disability exhibits a disorder in one or more of the basic psychological processes (such as auditory, visual, kinesthetic or other psychological process) involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations and the disorder adversely affects the student’s educational performance...

To be eligible for special education services the student shall demonstrate a severe discrepancy of approximately 1.5 standard deviations between the student's achievement and ability as determined by individualized assessment of intelligence and academic achievement in one or more of the following areas:

Oral expression;  
Listening comprehension;  
Written expression;  
Basic reading skill; Reading comprehension;  
Mathematical calculation; or  
mathematical reasoning.

The discrepancy cannot be primarily the result of visual, hearing or motor handicaps; mental retardation; emotional disturbance; or environmental, cultural or economic disadvantage.

The severe discrepancy standard of approximately 1.5 standard deviations shall be used only as a guideline to assist the Pupil Evaluation Team in identifying a learning disability. It shall be considered in conjunction with other relevant criteria including, but not limited to, classroom observations and evaluation.

Maine Special Education Regulations, Chapter 101, Section 3 (1995)

Soon after the student began school it was determined that his speech and language impairment adversely affected his educational performance. He was determined eligible for special education services. Over the next year he received speech and language services, and in 1996 services for reading. By the end of his second year in school all parties agreed that he no longer qualified for special instruction under the disability category of speech and language impaired, but could not come to consensus on whether he continued to qualify under another category. New testing was ordered to address this question.

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The psychologist who tested the student testified that the student exhibits a disorder in the visual process. She concluded that visual analysis of symbols interferes with his ability to make sound/symbol associations, and visual motor integration has a direct negative impact on his ability to comprehend written language. These deficits, as well as his attention and concentration deficits interfere with his ability to read, write and spell.

The school concedes that he scored lower on visual motor tasks but argue that that these "lower" scores are within the "average" range and therefore do not support that he has a learning disability. The regulation does not state that if students score in the average range it automatically rules out a learning disability. Rather, the regulation directs the PET to consider test results in a relative relationship between ability and achievement.

Test scores show that the student demonstrates a severe discrepancy of more than 1.5 standard deviations (or 22 points) between his achievement and his ability. His tested intellectual ability score of 128 shows a discrepancy of 27 points on the spelling sub-test of the WIAT, 33 points on the basic reading sub-test, and 49 points on the reading comprehension sub-test. There is a tested discrepancy between ability and achievement using valid and reliable assessment which were performed by a qualified professional. She concludes that a child of the student's ability could be expected to achieve at the third to fourth grade level, which clearly he is not doing.

The school presented no contradictory psychological testing to refute these assessment conclusions. The school, rather, used its day-to-day observations of the student and the criterion referenced tests which are part of the curriculum to argue that the student is performing at grade level and therefore any disability exhibited does not "adversely affect [his] educational performance".

I am persuaded that student is presently performing at grade level. However, it cannot be ignored that he has repeated a year of school and has received, and is currently receiving, special education support. When one factors in his age, the gap between his ability and performance and an expected educational performance well in excess of average first grade work, he does indeed fit the definition of a diagnosed learning disability.

The school points to the student's developmental lags during his first year in school and compare that to the exhibited growth and maturation over the last two and a half years. His teachers testify that he is achieving at a level considered appropriate for first grade students. They argue that any discrepancy between his achievement and ability can be corrected through modifications of his regular education program and therefore he does not qualify for continued services. The evidence supports the school's contention that the student has made significant gains during his school tenure. However, the fact remains that he has made these gains while receiving special education support, and repeating a grade of school. This must be factored into the "eligibility" equation. It has yet to be proven that he can continue these gains with no intervention. Therefore, I find the student fits the definition of a student with a learning disability, and should continue to be considered eligible for special education services until this question is answered. If we are to err, it is best to err on the side of the child.

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## **2. What program is appropriate to meet the student's special education needs?**

The parent's attorney states that the hearing officer has before her the issue of eligibility only and therefore it would be premature for her to make any determination around programming stating in his reply brief, "[T]hat is a question for another day". I disagree. To do so would be a waste of valuable time and resources when so much information about the student is already available to the hearing officer.

The record of this hearing provides an extensive review of the student's academic and educational life over the past three years. The record contains all evaluations of the student which have been conducted since he began school, as well as testimony by almost all of the professionals completing those evaluations. Evaluators did not confine their testimony to information relating only to the identification issue. The student's regular and special education teachers testified at length about his academic year and his progress in the school setting. The

psychologist and the reading specialist employed by the parent spoke at length about his educational needs and their opinions about recommended methodology. It is simply not reasonable to assume that a new hearing would generate sufficient additional information about the student's educational needs to support restricting this decision to the identification issue solely. Limiting the decision to such an extent would serve no practical or public policy purpose.

Maine Special Education Regulations at Section 1 states:

Maine Law...entitles all school-age students with disabilities to [a]...free appropriate public education.

The Supreme Court in the Rowley decision has set the standard for schools to define a "free appropriate public education". *Board of Education v. Rowley*, 3 IDELR 553:656 (102 S. Ct. 1982) "Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some education benefit upon the handicapped child". (Id. 667)

The Court was clear that the [Individuals with Disabilities Education] Act (formerly the Education for All Handicapped Children Act) does not require the school "to maximize the potential of each handicapped child...", but rather that it "...requires ...States to educate handicapped children with non handicapped children whenever possible. When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child...The grading and advancement system thus constitutes an important factor in determining educational benefit...[I]f the child is being educated in the regular classrooms of the public education system, [the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (Id. 669)

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The parent, personally and through expert witnesses, recommended that the student be taught reading and writing using a multi-modal approach such as the Orton-Gillingham program. Ms. Dee was particularly adamant that results of her testing suggested that the student's fluency in decoding was so limited that without a structured, repetitious program he was in danger of falling further behind as he grows older. However, neither of the parent's experts had the advantage of observing the student reading in a classroom situation.<sup>9</sup>

The student's teachers specifically argue against such an approach. His resource room teacher contends that the student is a very bright, high functioning student who would become quickly bored with a single sound approach to decoding; in her opinion he needs a higher linguistic

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<sup>9</sup> Ms. Dee had limited time with I. She conducted one reading evaluation. She did not observe him in class nor in his special education class. Dr. Strzok observed I in art class, but did not observe him in any classroom instruction.

approach to reading. She stated that, based on her observations and the standardized curriculum tests administered by her, the student has met the goals and objectives in his IEP and is continuing to make progress in decoding and encoding skills. She believes that the student will make better progress if his education is within the context of his regular classroom.

His first grade teacher makes it clear that his current reading program, which mixes phonetics and whole language, provides the student with the skills to support his continued progress in reading. She stated that his reading achievement is at a level commensurate with other students in the top reading group in her first grade class. Independent observations<sup>10</sup> show that his performance in his regular classroom suggests behavior and work skills appropriate to the setting, and describe a student who has is happy and enthusiastic about his school work.

The parent's argument that this achievement is in part due to his continuing special education support has some merit. The school has met the Rowley test to support that the student is receiving an "appropriate" program. However, it cannot be known at this time if he will continue to do so. For that reason, the school shall remove his supports slowly. The special education and regular education staff know the student well in the school setting. They both argue convincingly that to continue support services in an isolated exclusionary fashion is not in his best interest.

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A review of the student's educational history makes it clear that he has exhibited identifiable progress and is currently achieving passing marks which will allow him to move from grade to grade. To insure a smooth transition from individual supported assistance toward independence the school shall institute a gradual progression from "pull-out" services in the resource room to a supported classroom services.

If we are to put any faith in public education it is necessary to put reliance on the assessment of students by classroom teachers. Both Ms. Milne and Ms. Stahl provided credible testimony that the student demonstrates mastery of grade level expected work. This achievement may be inconsistent as demonstrated by his writing samples and attention and focus on the lesson at hand, but clearly he is an active participating member of his class who is accessing the general curriculum. The school has made a convincing argument that the student is achieving well within the average range of his first grade class. This is all the Act requires of them.

**V. Order**

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<sup>10</sup> Parent's attorney argued that the observations relied on by the school should be ignored because they were not conducted by a PET "member" as defined in MSER Section 8.6, and therefore the hearing officer should only rely on the mother's observation to determine I's classroom behavior. Section 8.6 reflects the *minimum* number and categories of participants. It does not limit nor diminish the other participants who come at the invitation of the parents or school. There are no valid or invalid members or votes. The process is one of consensus on behalf of a child, not a case of "real" members versus "on-lookers". To view the system in this light undermines the foundation of consensus upon which the process exists.

1. The PET shall meet to revise the student's IEP goals and objectives as necessary based on recent testing and progress toward meeting previous goals. This program shall be delivered in the regular classroom within the regular classroom curriculum for the balance of the school year.
2. The PET shall reconvene after the first grading period of the 1998-99 school year. If the student continues to achieve commensurate with the average ability of his second grade peers and maintain passing grades, the PET shall put him on "monitoring status" as described in Chapter 101, Section 5.3 for the balance of the 1998-99 school year. Updated achievement testing shall be done at that point to determine if the student continues to require special education services.