

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

June 25, 1998

CASE # 98.051

Parent on behalf of child v. MSAD #35

Counsel for parent: Richard L. O'Meara, Esq.

Counsel for 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; AND TITLE 29, SECTION 794, AND IMPLEMENTING REGULATIONS.**

A Special Education Due Process Hearing was held on June 3, 4, & 5 1998 to resolve a conflict between the Parent on behalf of their Child [d.o.b. and MSAD #35. In preparation for this hearing a pre-hearing conference was held on May 26, 1998. Thirteen-hundred and seventy-five pages of documentation were entered into the record and twelve witnesses presented testimony. The record was held open until June 16, 1998 for the submission of written final arguments.

This hearing was requested by Parent to resolve the dispute regarding: *whether the parents are entitled to reimbursement for the tuition and transportation costs that they have incurred for their child to attend the Center Of Optimum Learning during the 1997-98 academic year and obtain necessary related services under either a traditional reimbursement theory, or as compensatory educational services due to past failures on the part of MSAD #35 to provide their child with a **free appropriate public education**? If so, what is the appropriate amount of reimbursement to be awarded?*

## I. PRELIMINARY STATEMENT

The Student is a xx year old boy eligible for special education services under the exceptionality of Behavioral Impairment. The Student also has a learning disability and displays significant difficulty with written language, motor skills, and executive function skills. He has been diagnosed as having Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Oppositional Defiant Disorder, and mild depression.

## II. ISSUES

[1] *Is the family entitled to reimbursement for the tuition and transportation costs that they have incurred for the Student to attend the Center Of Optimum Learning during the 1997-98 academic year and obtain necessary related services under either a traditional reimbursement theory, or as compensatory educational services due to past failures on the part of MSAD #35 to provide the Student with a **free appropriate public education**?*

[2] *If so, what is the appropriate amount of reimbursement to be awarded?*

## III. STIPULATIONS

1. At the pre-hearing conference, both parties stipulated that they had no issues of bias concerning the Hearing Officer's impartiality to decide this case.
2. There are no procedural issues apart from the face of the IEP and how it was written.

## IV. SUMMARY OF TESTIMONY

3. The Student is a xx year old male who suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Oppositional Defiant Disorder, and mild depression. He resides with his mother within the jurisdictional boundaries of M.S.A.D. # 35.
4. M.S.A.D. # 35 is the local educational agency [LEA] responsible under the IDEA 97 for providing the Student with a **free appropriate public education**.
5. The Student was identified as a child with a Behavior

- Impairment in kindergarten due to his impulsive and argumentative behavior. He attended the Wells Elementary School for kindergarten and first grades, transferring to M.S.A.D. # 35 for his second grade year. He entered the Eliot Elementary School with an IEP from Wells. There were constant phone calls from his teacher, Ms. Parsons about his behaviors. Academically he did alright although he had difficulty focusing and he was unable to write as well as his peers. [Testimony of Parent]
6. A PET was held on October 30, 1992 for the purpose of transferring the Student into Eliot's special education program. [S-262]
  7. The observed or measurable constraints on performance were: easily discouraged, behavior interferes with learning [anger, tests boundaries to see if adult will back down and desires to be in control]. He is given 7.5 hours weekly in the composite room to address reading and written language. His IEP for the year is unmarked. [S-264-269]
  8. His basic scores on the California Achievement Tests given in October 1992 as part of his Chapter I Remedial Reading Program were: Vocabulary at the 2<sup>nd</sup> %ile, Comprehension at the 24%ile and Total Reading at the 14%ile. [S-271]
  9. A PET on February 8, 1993 determines that an evaluation as to whether the Student has an Attention Deficit would be in order and recommended a referral to Dr. Pinto-Lord to consider the diagnosis of ADD and to consider medication. The hope is that if the Student has ADD and that medication is appropriate, that medication will slow him down and allow him to be less impulsive and control his behaviors. Poor self-esteem is noted. [S-257-258]
  10. The Student was seen by Dr. Pinto-Lord on March 23, 1993 for a neurological evaluation. The main concern prompting the evaluation were the school difficulties. His behavior is described as wanting to be in control through aggressive abusive behaviors such as spitting, hitting, and kicking. Even in one-on-one situations he has difficulty staying focused. Since February, his behavior has deteriorated seriously. He was diagnosed as meeting the manifestations of Attention Deficit Hyperactive Disorder [ADHD], also an oppositional disorder, and some visual perceptual motor difficulties. Dr. Pinto-Lord recommended an Occupational Therapy evaluation, EEG with sleep tracing, continuation of the behavior modification program, no medication at this time and a follow-up visit in three months to re-evaluate matters. [S-253-254]

11. The Student was doing well by the end of second grade. [Testimony of Parent] At the end of the year PET held on May 18, 1993, The Student was reported to be at the 2.2 level in math on a formal test. Informally, his reading and writing were at the same level. He had not made the expected progress in the behavior area. The team discussed the medical aspects--that the Student's difficulties are not emotionally based. Dr. Pinto-Lord "feels there is more involved that ADHD; that in fact there may be some right side of brain implications." Mrs. Wilson also noted that she wanted to pursue, in case medications do not have an impact, as alternative educational placement..." Determinations were for the Parent to follow through with the medical aspects, medication trial. "If medication does not make a different [sic], the team will continue in looking toward the KIDS Program in Portsmouth." OT evaluation will be completed and results sent to Dr. Pinto-Lord. [S-241-242]
12. The IEP developed for the 1993-94 year was essentially the same as the 1992-93 IEP even though the Student's behaviors had worsened and his parent was seeking services from a neurologist. [S-227-S-33; S-243-247; S-264-268]
13. The Student is seen for his EEG which reveal no abnormalities and is started on a trial dose of Ritalin 5 mg. BID in late May 1993. On 6/10/93, the Parent contacted the physician's office stating that "school had observed some improvement in the quality of the Student's work, his ability to stay focused, but not for very long." His medication was readjusted to 10 mg. BID. [S-235] The PET held on June 17, 1993 confirms his success with being more in control. [S-226]
14. Third grade started well. Ms. Johnson, a certified teacher with 24 years of experience, was the teacher of a classroom with 20 or 21 students and no ed tech. The Student was sometimes apprehensive and unsettled but not really disruptive. At an initial observation, Ms. Lewis, Special Education teacher, found him to be 80% off task. Six weeks later, at the October observation, Ms. Lewis found him to be off task only 10% of the time demonstrating that it took six weeks for him to settle down and be in control of himself. [S-214-22-5] The Student was fully mainstreamed and had a successful year. Writing was very difficult for him and self esteem was low. He was socially accepted. In March 1994, the Student became more frustrated, especially in the afternoons. There was a consultation with Dr.

Pinto-Lord concerning "safety issues." The Student was sent to the office six times to complete work, not for discipline reasons. [Testimony of Ms. Johnson]

- 15. The Student started the Ritalin two weeks prior to the start of school, met with his counselor and teachers, helped set up the classroom. The first PET held on October 20, 1993, was to ensure that the Student's placement is appropriate and that he is making progress, everything is going well. [S-214] A new IEP was developed, services with Dr. Powers, Psychologist, one hour/weekly, were stopped, and resource room dropped off to consultation for two hours/week. [S-215-217]
- 16. On 3/18/94, The Student was seen by Dr. Pinto-Lord as he has become more fidgety, constantly interrupting, been in trouble on the bus, oppositional and disruptive. Mother had also noticed some nervous tics, throat noises, sniffing, mouthing with the tongue sticking out. He played with toys in a very impulsive manner. It was thought to be a reaction to the drug so his Ritalin was withdrawn. [S-209-210]
- 17. Tics continued but were much improved after the Ritalin was withdrawn but his behavior and school work deteriorated significantly. On May 5, 1994, a trial of another stimulant medication, Cylert, is ordered. [S-206]
- 18. The Parent reports to Dr. Pinto-Lord that the Student was much better in terms of behavior, attention and impulsivity on May 23, 1994. [S-204]
- 19. A PET met on June 17, 1994 to go over the results of the Triennial evaluation and to develop an IEP for the upcoming year. The Student was found to be a "real challenge" to test. His IQ was in the low average range, perceptual-motor skills were about 1 ½ years delayed and his behaviors were still an issue. [S-182-184] On the Woodcock Johnson Tests of Achievement - Revised, The Student received the following grade scores:

Test	Grade Score	Standard Score	Percentile Rank
Broad Reading	4.2	101	52
Broad Math	3.7	96	39
Broad Written Language	2.8	87	19

[S-180-181]

The Student will receive direct instruction in written

language and word processing for 150 minutes/week. [S-182-184; S-186-187] A list of modifications for organization, written language, socialization and motor activity are made. [S-188-189]

- 19. The Student begins the 4<sup>th</sup> grade well. He had a male teacher and related well to Mr. Barron. [Testimony Mr. Barron and the Parent] There were 16 children in the class. Handwriting and work completion were still issues according to the Parent. Mr. Barron stated that the Student had some behaviors but they had developed a system of visual cues, such as "rubbing face" and the Student would stop the behavior and return to the task. Mr. Barron became a role model for him and even lifted weights with him after school. He fit into the classroom well, did well on the MEAs, made social and academic progress. He improved on this goals on the IEP regarding written language. [S-191]
- 20. Mr. Barron never saw an oppositional Student. He saw a child who was fun to be with and who had difficulty accepting praise . He was given the "Most Improved Student" award at the end of the year. Mr. Barron described the Student as leaving his classroom "running." [Testimony of Mr. Barron]
- 21. On the California Achievement Test given in the fall, 1994, the Student received the following scores:

<b>Subtest</b>	<b>Percentile Rank</b>
Computation	24
Concepts/Applications	52
Total Math	41
Vocabulary	30
Comprehension	41
Total Reading	30

[S-128; S-160]

- 22. An addendum to the IEP was made on January 20, 1995 for the necessary adaptations to the MEA. [S-176]
- 23. The annual review took place on May 26, 1995. It was noted

that the Student can be "up and down." His test scores reflected an "up" as he was able to complete the tests and had increased his standard scores from the previous year.

**Woodcock Johnson- Revised Tests of Achievement**

Subtest	Standard Score	Percentile
Broad Reading	106	65
Broad Written Language	92	30

[S-198]

His IEP called for 50 minutes/week of psychological services to deal with his esteem, prosocial behaviors and gain understanding about ADHD. [S-198-203] An extended year program was recommended for the Student to maintain his present level of performance and for peer interaction of a prosocial nature. [S-196-197]

- 24. The Student attended the Learning Skills Academy for three weeks during the summer of 1995. He came away from the experience really positive about learning. He worked on the computer, all learning was thematic, and he learned more in three weeks than he did during the whole school year. [Testimony of the Parent]
- 25. Ms. Phipps was his teacher for the fifth grade. The Student had difficulty settling down and working academically. He did not produce a lot of written work, was generally about one year below grade level. In December his program changed and he had an ed tech to help him stay on task. With the addition of the Ed Tech, he produced more work, became more attentive and got more out of class. He felt a part of the class and school and even returned for the reunion in October of his sixth grade year. [Testimony of Ms. Phipps]
- 26. The Parent. requested an Independent Evaluation to look at written language. Mr. Height offered an evaluation by Candace Bray, Ph.D. on November 21, 1995. Recommendations for his educational programming and classroom modifications were made.
- 27. Dr. Bray testified that the Student did not know how to manipulate language, receiving a SS=80, severely below average in the verbal analogies and SS=86, low average, in verbal antonyms and synonyms. [J-127] The area of written language is a specific area of concern, also executive function. [J-128] She testified that the

Student needed to be shown how to organize, follow a plan, web, outline. She recommended social skill needed to be directly taught, keyboarding, learning strategies and study skills. Keyboarding should be daily, either in the classroom or resource room for 10 minutes per day.

[Testimony of Candace Bray; J-124-131]

25. A Psychoeducational Evaluation was completed by Dr. James Powers on November 21 & 28, 1995. Dr. Powers raised the question of whether Tourette's Disorder might be present. He found that the average overall ability score of the WISC-III to be very misleading. Visual motor processing was impaired, which together with other data, strongly suggests lateral neurological involvement. Short term memory was impaired, sequential processing was very poor, problem-solving skills were poor and attention was impaired. [S-151] The Conners Continuous Performance Test [CPT] indicated inattention, problems with attention/arousal which indicated that the ADHD is not being controlled by his present medication. [S-152-153] The Wide Range Assessment of Memory and Learning [WRAML] test confirmed the presence of memory problems noted on the WISC-III. [S-154-155] The Student's responses to the Rorschach were often negative and oppositional, blaming others, showing little empathy for others, misinterpreting others motivations or behaviors. He presented a picture of an alienated and unhappy youngster. [S-155] In the Tasks of Emotional Development [TED], The Student presented as impulsive and aggressive, consistent with ADHD. His responses also indicated that he felt inadequate at school which made him feel sad and helpless. [S-146-157]
28. On a standardized occupational therapy evaluation given on October 25, 1995, The Student's performance in areas related to visual-motor integration was below age level. [S-1661-163]
29. A PET was held on December 19, 1995 with all the outside consultants present to present their findings. [S-141] His levels of educational performance according to the WIAT were:

Total Reading = 4.3

Spelling = 3.9

Written Expression = 1.2

They found that he had low self esteem, difficulties with distractibility, short term memory, sequencing, perceptual-motor activities, organization and social judgment. His output of work is very low. His IEP was written for 90



- minutes/week of resource help for written language. [S-134-140] Determinations included the hire of an Ed Tech to work with the Student, The Parents would pursue the neurological and medication questions that were raised, the Student would continue with counseling both within and outside school, a behavioral management program would be developed and a new IEP would be developed to address the results of the testing. C. Bray would continue to be a consultant for the school regarding the Student. [J-109-110]
30. On January 24, 1996, The Student was seen by Dr. Stephen D. Rioux, Neurologist, who diagnosed him as having Tourette syndrome, as well as features suggestive of obsessive/compulsive disorder, oppositional defiant disorder and ADD. He was placed on a trial of nortriptyline 25 mg. Po b.i.d. [J-98-99]
  31. The purpose of the May 16, 1996 was to develop a transitional program for the Student. The Student's medication appears to have lessened his confrontational issues, allowed him to be more focused and gave him a better attitude. His fifth grade teacher had seen improvements over the year in an increase in work completion and social improvements. The Student can "melt down" as the day progresses and he is having transition problems. His special education teacher indicated that the Student had met most of his IEP's short term goals. The Student's Ed Tech felt that the transition between classes would be a problem at the Junior High School. Determinations were for the Student's current IEP to continue until December of 1996. He will spend two hours/week at the Junior High during the summer, continue to have an Ed Tech with him throughout the day, a behavior modification will be put in place, one structured study hall per day, resource room support for written language, and special transportation. [S-88-89; J-132]
  32. The Parent said that the Ed Tech, J. Pelke, was the "most positive experience in elementary school." Fifth grade was generally a good year. She expressed concern over all the changes with seven different teachers. She stated that she was looking "to move him out of district. NBD and LD were opposing symptoms. ADHD kept him from focusing and Tourette's Syndrome makes him "get stuck." This meeting had all the teachers, both past and present, there and focused on all his problems. [Testimony of the Parent]
  33. The 1996-97 IEP included placement in mainstreamed classes

- with 90 minutes weekly of resource services for written language, an Ed Tech in the classroom and modifications. He would be scheduled for one Allied Arts. [J-79]
34. School started and there were three "rotating" Ed Techs who would check on the Student every day. There was no one who checked with the Student on the first day of school, nor did he go to the resource room or have any place to put his materials. It was several days into the school year before this changed. On Friday of that first week of school, Ms. Douglas, Special Education teacher clarified that the Ed Tech was there but not just for the Student. The year started on a negative note. [Testimony of the Parent; J-135-141]
  35. Bob Hight, former Special Education director, in a telephone conversation with the Parent on September 11, 1996, mentioned a school in Scarborough that could meet the Student's needs if things didn't get better. [Testimony of the Parent; J-142]
  36. By September 19, 1996, Mrs. Schoff, Language Arts teacher, was concerned about the Student's general performance and homework. There was no "general plan" regarding the Ed Tech, the assignment book, and homework in the study period. [Testimony of the Parent; J-144]
  37. The parent wrote to Mr. Kennedy, Superintendent, on September 3, 1996 with a formal complaint about the failure to provide services specified in the IEP developed on May 14, 1996. [J-144]
  38. Mr. Kennedy responded that the District would provide those services and a PET was scheduled. [J-145]
  39. The PET met on September 27, 1996. It was reported that the Student was sometimes "disruptive in class but always cooperative." He was failing Social Studies because of missing homework. He was not doing his homework in the other subjects. All teachers agreed that he did not like the Ed Tech being with him in the class. Determinations were made concerning homework and consultation with Dr. Bray. [J-149]
  40. Paula Coutu became the Student's homework tutor in November after an October 30, 1996 PET. The Parent asked all teachers to make sure the Student has his homework, any work to be made up, and if no homework, then extra credit worksheets for her to work with. [J-150]
  41. The Student was beginning to deteriorate. He is becoming increasingly confrontational, angry, and rages and storms at home. [Testimony of the Parent]

42. The assignment notebook from September 4-December 18, 1996 contains "notations" by several persons. Generally there is no "plan" or clear communication indicating follow through by adults. The Parent writes on several occasions that "The Student said he did it in school." or "Not brought home." "15 min. With Paula--he doesn't know these words." "What does log entry # 1 mean?" There were seldom written answers to the comments. [J-156-183]
43. At the Annual Review PET held on November 26, 1996, teachers report that his performance had declined over the past two weeks, he is more defiant than before and he is doing much less work with several missing assignments. Determinations are that he will no longer have a supervised study hall but will add an Allied Arts class, continue with support in written language, continue with modifications and behavioral goals were to be established emphasizing "punctuality, organization and assignment completion." [J-64-65]
44. The IEP initiated on 12/09/96 lists the **present level of educational performance** as: *The Student displays significant difficulty with written language. His difficulty stems mostly from writing mechanics, spelling and poor motor skills. These contributing factors make copying assignments from the blackboard, from the textbook and from worksheets very difficult. In addition the Student has a poor attitude toward school and he is unmotivated.* The **extent of participation in regular education** is: *The Student will participate in all areas of his academic program except when he is receiving written language support, for his academic subjects, during the teams 20 minute study hall.* **Document why placement is in the least restrictive education setting:** *Because of the Student's success, the least restrictive environment is the regular classroom. Resource service is necessary in order to ensure continued success in the regular education setting.* [J-66-67] Two goals and short term objectives address classroom behavior and achieving a C or better on quarterly report cards. [J-68-69] His BROAD WRITTEN LANGUAGE standard scores and percentile scores on the Woodcock Johnson Revised have declined from 1994.
45. **Comparison Score for the Woodcock Johnson Revised:**

<b>Broad Written</b>	1994	1995	1996
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Language									
	G.E .	SS	%il e	G.E .	SS	%il e	G.E .	SS	%il e
	2.8	87	19		92	3.6	3.6	79	8

[J-72-72]

46. His modifications were to include a reduction of assignments, being given only one worksheet at a time, longer time, oral repots and use of a word processor. [J-74]
47. The Student graphed out his total homework assignments for an average number of assignments per day = 3.1 for the time period from 11/18/96-12/18/96 demonstrating no reduction. [J-287-288]
48. Ms. Schoff, sixth grade language arts, said the Student was a good reader, had problems with written language, getting his homework done and maintaining interest. He received grades for the four quarters of F, D, F, and F. His grades were improved with the Homework Tutor worked with him which would have been second quarter. She felt that NG began to "shut down" toward the end of the year. [Testimony of Ms. Schoff; S-2; J-231]
49. Mr. DuVarney, sixth grade social studies, stated that homework was a problem all year long. He said the Student was always cooperative and not a problem in class. He appeared happy in school, got along with other children but seemed ambivalent toward school. His grades for the four quarters were F, C-, F, and C. He was going to get an F for the fourth quarter but was given the chance to take an oral exam and he did very well so he passed for the quarter. [Testimony of Mr. DuVarney]
50. The May 14, 1997 social studies progress report indicates that NG had received 8 zeroes for homework not done, a final average of 43.2 on tests. [J-233]
51. His mathematics progress report for the fourth quarter indicates an average of 48 with the comment that "The Student seems to have just given up..." [J-232]
52. The Student's average for English was a 50 for term 4. [J-234]
53. The Earth Science quarter status report for the fourth quarter indicated that 27 assignments were given and 16 were currently missing. [J-235]
54. Ms. Douglas, special education teacher, has been four years at the junior high school. She attended the PET meeting

- held in May of the Student's fifth grade year and all the other PET meetings through the end of July of his sixth grade year. She was part of a team of five academic teachers, allied Arts teachers and 120 children. The teachers shared common planning time and had lunch at the same time. A major change in his IEP took place after the October 30<sup>th</sup> PET with the withdrawal of the Ed Tech and the addition of the Homework Tutor. His resource time was reduced in November by PET decision from 45 minutes to 20 minutes/day because the time was not productive. The Student had began to "shut down." He would not work for me so we put him back into Allied Arts. The home tutoring seemed to work well. [Testimony of Ms. Douglas]
55. On 3/4/97, The Parent reported to the PET that the Student was experiencing frustration and depression because of school. Homework makes him angry and he was confrontational with the tutor. His teachers reported that he is failing because he doesn't do the work. "If he were doing the work, he would be receiving a passing grade...He does not want to accept the responsibility for doing it." Another teacher felt "more demands should be placed on ..."  
Mrs. Tobey [English] stated that "her assignments are already so modified that further changes would mean no work." It was a determination of the PET that the Student would no longer report to the resource room for the team's 20 minute study hall because the Student loses too much time in transitions. [S-55-56]
56. His IEP initiated on 03/05/97 takes away his remaining time in the resource room and replaces it with one time/week consultation by the special education teacher. He continues to be placed in the **least restrictive education setting** because of his "success." [J-58] His goals and short term objectives remained the same. [J-59-60]
57. A lengthy PET meeting was held on 5/28/97 to discuss the Student's placement for next year. The parent addresses the Student's educational needs based upon Dr. Bray's recommendations, Dr. Sparrell's recommendations and other professional sources. Her list includes: organizational strategies, time management, planning, active reading, work strategies, note taking, memory, written language, keyboard training, work processing and editing, study skills, thematic approach, problem solving skills, work modifications, consistent environment... [J-237] There is much dialogue around neurobiological disorders, lack of success during the past year and a request for an out-of-

- district placement. The team felt that the Student's needs could be met in house. Mr. Hight agreed that an IEP could be developed to meet those needs. The Parent asks why hasn't an IEP been developed where the Student would have succeeded? Why did he bring home failing grades all year? Why is he so upset about school? The team denies the "raging" behaviors and believes he would be successful if he would only do homework. [J-237-249]
58. Aaron Stuart, Director of *Youth Bound* [5/29/97], states that the Student needs "...to have someone who can understand where he is coming from...potential for his success is there he just needs direction and support." [J-250-251]
59. The Student had received inappropriate discipline at times during the year. Mr. DuVarney asked him to write "I will not throw erasers." 500 times because he needed to be treated like the other children. [Testimony of the Parent and Mr. DuVarney] Mr. Asbell gave the Student an in-school two day suspension. [J-252]
60. In June 1997, Stephen Rioux, MD writes that the Student has Tourettes syndrome with some oppositional defiant disorder [ODD] and obsessive/compulsive disorder [OCD] features. He still takes nortriptyline which is not resulting in complete resolution. His symptoms interfere with his school performance. The OCD slows processing speed and makes it very difficult for him to express himself in writing. ODD increases difficulty with compliance and affect effort. Negative mood and depressed affect are also symptoms. [S-253]
61. A PET was scheduled for June 17, 1997 to revise the IEP. The Parent refused to waive her right to 7 days prior notice. [S-308-314]
62. The Parent through her attorney files for a Due Process Hearing on May 28, 1997. [Set-126]
63. School's attorney, by letter dated June 16, 1997, state that the District is willing to make a settlement offer. The District is willing to offer the following services in the public school for the 1997-98 school year:
- direct services to improve the Student's written language skills to be implemented by special education staff with the assistance of a consultant with learning disabilities expertise
  - a behavioral management plan to be developed by a behavioral consultant with experience in dealing with children with the Student's disabilities

- staff training by the behavioral consultant in implementation of the behavioral management plan in each of the Student's classes and in how to recognize and address the Student's disabilities
  - direct instruction in organizational skills, study skills, and homework completion
  - individual counseling for the Student.
- [Set-124-125]
64. The Draft IEP developed on 6/17/97 has no **present level of educational performance** but reiterates the same statement about his difficulty with written language, poor attitude... Services are for 80 minutes/day in the resource room, consultation by a contracted behavioral consultant and a LD consultant, tutorial services for one hour/day for 3 times/week, psychological counseling once per week. Modifications: reduce written assignments, modified grading criteria, complete homework in school, weekly communication with home... It was stated that: "*Multi-sensory approaches and small group instruction that could not be appropriately provided in the regular education setting are necessary to address the Student's writing and organizational difficulties.*" [Set-117-119] This Draft was written at a planning meeting. When the Student could not be present, staff used the scheduled time to discuss possible services and develop a Draft IEP for later consideration by the PET. [S-33]
65. The Parent's attorney responded with an outline of what needed to be agreed to for the 1997-98 year in modifying and adding to the draft IEP. [Set-112-115]
66. A letter confirming the settlement agreement, thus obviating the need for a due process hearing was sent to Carol Lenna, Hearing Officer, on June 26, 1997 by the Parent's attorney. [Set-111]
67. In a *hand delivered* letter on June 30<sup>th</sup>, Attorney O'Meara sent two originals of a proposed settlement agreement...incorporating the various terms set forth in his counter-offer. [Set-110]
68. Mr. O'Meara sent a follow up letter to a telephone conversation on July 16, 1997. He noted that he still had not received any changes from school's attorney re: settlement agreement. [Set-107-108]
69. School's attorney responds with an amended agreement on July 17, 1997. [Set-102-106]
70. Mr. O'Meara states that the District apparently has decided to renege on the substance of several items of importance .

He view this as a bad faith action on the part of the District "to back away from a deal it already had made..."

The Parent nevertheless agreed to attend the August PET to develop a comprehensive IEP and placement. She will not, however, be bound by her promise to release the school from claims for compensatory education... [Set-99-100]

71. On August 13, 1997, Ms. Tchao, attorney for MSAD #35 denies ever reaching a formal agreement and thus any responsibility for parent's attorney and expert fees. [Set-95-96]
72. Mr. Hight in a handwritten letter dated Sept. 3, 1997, writes: "I thought we had an agreement and I'm surprised that Wes [Superintendent?] is demanding changes. I never thought the agreement was outrageous in any form... I lost favor with Wes in the summer of '96 when I agreed to settle two cases that were in due process then... I want to mediate he wants to fight regardless of the cost." [P-473-474]
73. A 7/9/97 PET meeting was held to develop an IEP for the student. Discussion centered around the Student's learning disability identification and the items in the settlement agreements. The Parent is referring to it as a "legal agreement" which specifies when training is to take place, use of a consistent Ed Tech, weekly reports, etc. Carole Smith, the new special education director, suggests that the team reconvene in August. The Parent wants her "legal agreement" which states that the summer tutor to be hired will be by mutual agreement to be honored. Mr. Asbell is claiming the right to hire a tutor and does not think a "legal agreement" can supercede state law. [P-462-466]
74. The school offers a tutor for three days per week/two hours per session for three weeks to work on keyboarding and writing skills. Ms. Durgin was hired and the Parent declined the services. [S-78; S-79]
75. Ms. Patricia Wilson, M.Ed. conducted an observation as part of an on-going effort to gather information to develop an appropriate plan for the Student. This observation took place on 6/17/97. She indicated that this one snapshot revealed that the Student was successful in what was asked of him task-wise and in working with other students. In a brief talk with the teachers, she was told that the area *not working involves the Student completing and returning homework assignments.* [S-82-92]
76. The District agrees to pay for the Awareness Camp in Ellsworth to be held from August 17-August 30. [Testimony



- of the Parent & Ms. Smith; S-93; S-94]
77. The Parent files for a complaint investigation on August 11, 1997. [P-470]
  78. Kate Neale, Complaint Investigator found that the district did fail to provide the parent with prior written notice that a consultant would be making an observation of the Student. The school was not found in violation of the other allegations. [S-29-36]
  79. The IEP for the 1997-98 year was developed at a meeting held on August 6, 1997. Consensus was reached after 3 hours. The Student's handicapping code was changed to *multihandicapped*. A comprehensive IEP with modifications and a behavior plan was developed. [S-60-69] Present levels of educational performance are still the same as from other IEPs, Carole Smith testified that the actual levels were based upon the extensive testing of Dr. Bray and Dr. Powers and were well documented in the minutes of the PET meeting. The behavior plan was developed by Mr. Amidon after the August 6<sup>th</sup> PET meeting. There was no teacher present from the sixth grade team that could have provided knowledge about the Student as a learner. There was no discussion regarding placement. The Parent refused to sign the consent for placement form. [Testimony of Ms. Smith; S-53-59; S-60-73]
  80. A course offering of "Working with Behavior Impaired Children in the Classroom" was scheduled to be offered for 1 CEU from 9/97-1/98. Dr. Linda Monahan, Ray Amidon and Carole Smith would be the instructors. [Testimony of Ms. Smith; S-71-73]
  81. Materials mentioned in Dr. Bray's report were purchased. [S-74]
  82. On August 8, 1997, the Parent informs Mr. Kennedy, Superintendent, in writing that she has enrolled the Student at the Center Of Optimum Learning [COOL], Brentwood, NH for the '97-'98 year. [S-50-51]
  83. The Center Of Optimum is a small alternative school for children between the ages of 9 and 14 who are experiencing difficulties with traditional school instruction. It is a year round day program, operating 193 days/year. The calendar runs from August 10, 1997-June 26, 1998. The school is designed to revitalize and remotivate learning through consistent individualized instruction. Each student will have a state-of-the-art computer system in an ungraded language-based setting. The curriculum is interdisciplinary and thematic. Tutoring is offered after

- school. One day per week is spent in field studies. Individual growth is assessed through portfolio documentation of each child's work as well as informal and formal diagnostic evaluation. Support is offered for the development of skills such as planning, organization, problem solving and time management. There is one child attending COOL who does not have a code. [Testimony of Ms. Cook; P-475-477; P-488-489]
84. The school accepts students of both genders eligible for the appropriate grades served, with average or above average intellect. They *may*, but not necessarily have, a learning disability, language processing difficulties or ADD/ADHD. **They can not have a primary coding of seriously emotionally disturbed.** If diagnostic information is available then no other assessment is necessary. [P-489]
85. There are four progress report narratives sent home during the year and four report card conferences scheduled for each child. [P-491]
86. The Parent applied to the COOL Day School on May 20, 1997. [P-479-485]
87. The total tuition for one year was \$17,500. [P-486]
88. Jo-Anne Dee, Special Education Consultant, has made four observations of the Student in his classes. Two were made during the sixth grade year at Marshwood Jr. High School and two were made during his seventh grade year at COOL. She recommends that the Student continue in the COOL school with the focus being on increasing attention and academic performance. [Testimony of Ms. Dee; P-32; PP-33; P-45; J-315]
89. The Student's Individual Plan at COOL contains 71 pages of individualized **Outcome Based Goals and Short Term Objectives**. His present level of performance is written as grade levels and where difficulties are encountered for the Reading Comprehension: Written Expressive Language and Grammar. Goals are outcome based and short term objectives are taught through an instructional process which have four levels from lowest to highest:
- Teacher Modeling of Skill**  
**Guided Practice of a Skill [rehearsal [sic] level]**  
**Monitored Practice of a Skill [transition level]**  
**Applied Learning [automatic application]**
- Short term Objectives are measured by: informal assessment through classroom tests and quizzes, Student Presentation Portfolio, Narrative Reports during marking term, Parent/Teacher/District conferences. Students start at the

**Teacher Modeling level.** [P-526-597] The IEP is very detailed to help focused on the Student's needs.

[Testimony of Ms. Cook]

90. The Student's school program was designed to address the Student's depression, to improve his self-esteem and social interactions, to address his negativism and inability to deal with his emotions, to increase his attention, to gain better control over his behaviors, to take responsibility for learning, to become more independent, to learn to control his impulses where possible. [Testimony of Ms. Cook] The Student has show success in his program through grades and a major improvement in self-esteem and ability to get along with peers. [Testimony of Ms. Cook, the Parent, P-599-600] The Student's written words regarding the difference between the COOL and MJHS: "...I am learning how to talk to people and behave right. And I have my computer." [P-600]
91. While at COOL, The Student was enrolled in a grade level academic curriculum and received passing grades in all subjects. His grades for the first term were 7 B's and 2 C's, for the second term were 2 A's, 6 B's and 1 C, and for the third term were 9 B's and 1 A. He has not missed a day of school. [P-598]
92. Carol Cook, Teacher/Director of COOL, has a master's degree in reading from UNH and a master's degree in learning disabilities from Notre Dame. She spent 16 years in Epping, NH as a LD Resource Room teacher, Reading specialist, curriculum developer and Director of Special Education. She formed "Business Venture Tutelage" where she integrated educational records for families, make prescriptions, implement programs and advocate for children. She did this for five years where as an advocate, she testified at due process hearings about 20 times. She then began a new alternative school--"Learning Skills Academy"--where the focus was on the training of faculty and curriculum development. She has received the Samuel Kirk award for LD Teacher of the Year in 1988. Ms. Cook was subpoenaed to attend this hearing. [Testimony of Ms. Cook]
93. The COOL school was a return to what Ms. Cook enjoys most--working with a small group of children in an intensive two year program in an environment that helps them relax with learning. The program is year-round as it keeps the continuity and consistency for the children. Ms. Cook is

the teacher, with help from experts in speech and language who do the after school tutoring daily, experts in art and fitness weekly. Outside musicians also visit the school.

[Testimony of Ms. Cook]

94. The school is approved and certified for attendance, curriculum design and health and fire safety. It does not have special education approval, by choice. When five children are district-placed, Ms. Cook will then seek certification. There is one district-placed child this year and there will be three next year. [Testimony of Ms. Cook]
95. Dr. Bray, school's expert witness, has a master's degree in learning disabilities and a Ph.D. in Language. She holds a certificate as a Special Education Consultant. [Testimony of Ms. Bray]
96. She evaluated the Student in 1995 [J-124] and found that he did not know how to manipulate language. His reading was average to low average and his written language was the major area of concern. [J-127]
97. Dr. Bray again tested the Student in March of 1997 as part of her regular consulting day with MSAD # 35. She testified that the Student made gains in every area except written language as measured on objective tests from 1995-97. He had gained faster than his age equivalent peers, except in written language where he lost ground. She found the Student to have processing speed significantly below average, SS=71, difficulty with pencil/paper/timed tests, difficulty organizing thoughts, forming letters. In 1995 she had recommended direct instruction in "executive function" [J-128]--organizing, following a plan, webbing and outlining. He needs to be shown how to organize materials and ideas, how to develop social skills, learning strategies and study skills, and keyboarding. She recommended a team approach. The Student was not observed by Dr. Bray while in sixth grade. She did talk with Mr. Hight about the Student and did not agree that he was receiving a reasonable level of service. The Student needed daily help. By March of 1997, the Student was extremely discouraged, failing and felt that it didn't matter what he did. [Testimony of Dr. Bray]
98. Dr. Bray testified that the IEP developed in August 1997 met the standard "...reasonable success" if the staff were trained and followed through with the plan. If the Student and the Parent and all the players do not buy into the plan, it will not work. Trust is a major hurdle. The

action plan is what sparks the Student and teachers need weekly opportunities to discuss their personal instructional needs on how to teach the Student.

[Testimony of Dr. Bray; J-40]

99. The Student is a complicated "high risk" kid. Teachers have to be trained to know how to deal with him. They did not know how to deal with him. The Student is capable of building trust with caring people. A new environment equals a new beginning with a different set of people in a different setting. When negativism and trust were issues in fifth grade, The Student changed his attitude and engaged in learning with the assistance of a great Ed Tech. It could happen again. [Testimony of Dr. Bray]
100. Dr. James Sparrell, Ph.D. in Clinical Psychology, has an extensive background working with children and adolescents. Dr. Sparrell is licensed to practice in Maine. He first saw the Student on 2/10/97 and has seen him for a total of 26 visits over the last 16 months. The Student's diagnosis is Tourette's Syndrome, Oppositional Defiant Disorder, ADHD and some depression. Dr. Sparrell said the depression was almost at the level of a dysthymic disorder. There was self-loathing, negative self-statements, hopelessness and helplessness. Dr. Sparrell was concerned with the violent fantasies that the Student was having by the end of the sixth grade year. He wrote a letter to the team in May 1997 [J-36] stating that the team might need to consider a special school placement. There is a strong environmental component with the Student that affects his mood. The school was giving lots of negative feedback that the Student was not trying and that he could do the work if he tried which led to a "disconnection" between the Student and school. His violent fantasies dropped off and he shifted to more age-appropriate video games by November/December of 1997. He has developed friends and engages in social relationships. He has stopped saying "Im [sic] stupid." He is a different child, one who responded to the positive educational changes. [Testimony of Dr. Sparrell]

## V. DISCUSSION

### Tuition Reimbursement

The primary issue for this hearing is the matter of whether the

Parent is entitled to reimbursement from MSAD #35 for the educational services costs including transportation that were incurred by her at an out-of-state unapproved school. The Parent seeks reimbursement of tuition costs [\$17,500] and transportation costs [\$3,107.30] incurred during the 1997-98 school year.

In *School Committee of the Town of Burlington, MA v. Depart. Of Education of the Commonwealth of MA*, **105 S.Ct 1996 (1985)**, the Supreme Court found that reimbursement of special education expenses under the IDEA was an appropriate remedy if it was found that the public school's placement was not providing the child with a "*free appropriate education*" and that the parent's alternative placement was "*proper*" under the act. In *Florence County School District Four v. Carter*, **20 IDELR 532 (U.S. 1993)**, the United States Supreme Court held that the IDEA's requirement that special education placement must meet state standards *cannot be applied to unilateral parental placements*. The Court reasoned that it would be inconsistent with the goals of the IDEA to forbid parents from placing their child at a private school that otherwise offers an appropriate education simply because the private school has not been authorized by the same public school system that failed to provide the student with a *free appropriate public education*.

Accordingly, for the Parent to prevail on this issue, she must establish by a preponderance of the evidence that the Student was not being provided with a *free appropriate public education* by the MSAD # 35 and that the Center of Optimal Learning School was a proper placement under the act during the 1997-98 school year.

In determining whether the Student was receiving a *free appropriate public education* at the time he was unilaterally placed by his mother, this Hearing Officer is guided by the following two-fold inquiry set forth in *Board of Education of Hendrick Hudson Cent. School Dist. V. Rowley*, **458 U.S. 176, 102 S.Ct. 3034 (1982)**:

First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Regarding the first inquiry, this Hearing Officer finds that MSAD # 35 has basically complied with the procedures set forth in the

Act during the Student's second through sixth grade school years.

The second part of the *Rowley* inquiry is whether the Student's IEP was reasonably calculated to enable the Student to receive educational benefit when he was enrolled in the COOL school and when the school was officially notified that he was enrolled. The Parent applied to the COOL program on May 20, 1998 and she officially notified the superintendent that the Student would not be returning to school on August 8, 1998. The Student had two IEPs during this time period. The first was dated 05/28/97 and was to terminate on 12/09/97 and the second was developed on 08/06/98 to be in effect 09/02/98 to 06/30/98. At the PET meeting on August 6, 1997, it was determined that the Student's handicapping code should be changed to *multi-handicapped*. This is the first recognition of his documented learning disabilities.

Consensus was reached to change the code, to include two periods of resource room support daily. The PET reached consensus on goals for improving written language, improving study skills, improving organizational skills, improving homework completion rate, and improving pro-social skills. The related services of LD Consultant, Tutorial services [if needed], Counseling with Dr. Sparrell, classroom modifications and staff development were also a part of the total IEP. Placement options were not discussed as this IEP was presumed to be carried out at Marshwood Junior High School.

The IEP from 05/23/97 was inappropriate. It added "back in" 40 minutes/day of resource room support as a supervised study hall, despite the Student's failing grades. Although there have been five PETs during the year to address the Student's failing grades and non-compliant behavior, this is all the school is prepared to offer him at this time. There is no doubt that the Student had the intellectual ability to perform grade level work and to maintain passing grades in school. However, the reason he was performing poorly in school and receiving incomplete and failing grades was due to his writing disabilities, inability to put forth the required effort into work completion, and depressed mood. The type of avoidant and confrontational behavior that the Student displayed all year long with greater frequency in all classes denied him with meaningful benefit. Such misbehavior as he demonstrated, regardless of its origin, can only have the effect of impairing the traditional authoritative role of the teacher that is so important for maintaining an appropriate environment where the Student can be educated. The Student's behaviors did not improve with any intervention except for a

brief "honeymoon period." Teachers tried discipline, even a short-term in-house suspension which were punitive and non-productive. His behaviors were not effectively dealt with and managed during the school day. Work was sent home where the Parent reports, the Student would "rage" and "refuse to do it." The school then blamed the Parent for not making the Student do his homework. For the Student to receive any meaningful educational benefit, he needed to learn how to organize and plan, control his impulsive behavior, and be successful. [Testimony of Dr. Bray] To meet this goal, the Student needed a highly structured program capable of providing the consistent behavioral, emotional, social and educational support that the Student needed.

For the foregoing reasons, this Hearing Officer finds that the Student's IEP as amended on May 26, 1997, and all the IEPs for that year, to be inappropriate. It failed to provide the necessary structure and support that the Student required to adequately address his educational, emotional, behavioral and social needs. The IEP developed on August 6, 1997 which was to be initiated on September 3, 1997 was appropriate to address the Student's educational, emotional, behavioral and social needs. The Student started at COOL school on August 10, 1997

Because the Student was not receiving a *free appropriate public education* at that time he was unilaterally placed and for the entire year preceding, is his mother entitled to reimbursement of his tuition and related expenses at the COOL school?

Consideration of reimbursement for his tuition and related expenses hinges on whether the unilateral placement school was proper under the Act. This Hearing Officer finds the Center of Optimal Learning (COOL) school to be a proper placement.

COOL school is a small, nurturing environment offering an ungraded setting, an individual plan for each student monitored by portfolio assessment and diagnostic evaluation, language-based instruction, interdisciplinary and thematic curricula across all subjects, development of basic and cultural literacy, computer technology, applied learning, study skill, development of critical and creative thinking skills, community-based learning through field studies, and character development for meeting social responsibilities. The Student required the structure and nurturing of such a setting because his behaviors had escalated during the sixth grade year to such a point that he needed a much



more structured, consistent and total program to address all his needs.

School's attorney raises the issue of *least restrictive environment* as a major reason why COOL school is not an appropriate placement. This Hearing Officer looked to the *Burlington* and *Florence* decisions for guidance. They stated that a private school's failure to comply with the mainstreaming requirement can not be used as a reason to bar reimbursement. This Hearing Officer also looked to *Roland M. v. Concord School Comm* (1<sup>st</sup> Cir., 1990) and *Milford Sch. Dist. v. William F.* (D.N.H., 1997) for guidance.

The question becomes when should the school have known that the Student had learning problems related to his language/writing disability that escalated his oppositional behavior problems? Certainly the Candace Bray Independent Evaluation to look at written language from November 1995 and the Psychoeducational Evaluation by James Powers, also November 1995, made specific recommendations that addressed the student's social, educational, emotional and behavioral needs. The school did not act upon the documented learning disability until the August 6<sup>th</sup> IEP. COOL does not accept students who are *seriously emotionally disturbed*. They *may*, but not necessarily have, a learning disability, language processing difficulties or ADD/ADHD--all labels that apply to the Student.

The remaining primary issue is whether the Student's IEPs from 1992-1996 were appropriate. From the evidence present, this Hearing Officer finds that NG's IEPs, as periodically modified through the second through fifth grades, were appropriate and reasonably calculated to provide the Student with educational benefit. During this period, the PET properly responded to the Student's increasing behaviors by modifying his IEP and providing him with an ed tech to provide more structure and support for him. The acts of the PET were clearly reasonable based **upon the facts and information that they possessed at that time**. In response to the Student's behavior, he was provided with an aide to assist in behavioral control and programming. In response to the student's writing deficit, he was given individualized instruction in written language. Although, he has fallen behind in writing due to processing speed, motor problems, his standard scores did not indicate a major disability. In fact he went from a SS=87 in Broad Written Language (1994) to a SS=92 in 1995. This indicates that the support was appropriate at this time. It was first in 1996 that his Broad Written Language score

plummeted. His Tourette's was not diagnosed until the fifth grade, nor was the obsessive compulsive disorder. IEPs are snapshots, not retrospectives. In judging "appropriateness," one looks for what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.

Thus we have two appropriate programs for 1997-98. The issue in this case is not whether the MSAD # 35 IEP is better or worse than the COOL program; but rather, the issues is whether the district's program adequately balances the Student's needs for educational benefit in the least restrictive environment. Under the Act, mainstreaming is preferred. Schools must educate handicapped and non-handicapped children together "to the maximum extent appropriate." The COOL program is certainly not the same as the "neighborhood" school nor does it offer richness of non-disabled peers from the Student's own community. It does provide, however, opportunities to be with non-disabled persons through the weekly field trips, weekly visit to the Exeter Art program, weekly luncheon at a restaurant, access to one non-disabled classmate and access to non-disabled children on the playground.

What is the proper balance between *free appropriate public education* and *least restrictive environment*? The desirability of mainstreaming must be weighted in concert with the Act's mandate for educational improvement. Appraising an appropriate educational plan, therefore, requires a balancing of the marginal benefits to be gained or lost on both sides of the academic gain/least restrictive fulcrum. Neither side is automatically entitled to extra ballast.

**[Roland M. v. Concord School Comm. (1<sup>st</sup> Cir., 1990)]**

The parent assumed a financial risk by unilaterally changing the Student's placement. The Parent would be entitled to reimbursement only if the school's proposed program was determined inappropriate. That is not the case as we have two appropriate programs.

The Parent informed the district that she was enrolling her son at COOL on August 8<sup>th</sup>, two days after the last PET meeting to determine the Student's program for the year. Consensus was reached on all goals and objectives at this PET. There was no discussion regarding placement. The Parent refused to sign the consent for placement form. IDEA-97 gives parents even greater powers as a member of the PET with regards to programming and

placement.

At this point, the school had the option to demonstrate that their IEP was appropriate by going to hearing. They did not, nor did they follow-up to see if the private school were providing a *free appropriate public education*. Given the Parent's prior history of filing for a due process hearing and only withdrawing her request when she thought there was a settlement, the school should have known that she would file again. Does the school bear some responsibility in protecting a parent "at financial risk" from making a unilateral placement?

In fact there had not been any conversation between COOL and MSAD # 35 staff at any time prior to the hearing. We have a child whose program was woefully inadequate during the sixth grade year, even though excellent evaluative data existed from the fifth grade to have made a program. There were five PETs during the sixth grade which did not offer more services to this failing child, but offered less services. The PET to determine programming and placement for the sixth grade was held in May and the Parent refused to go along with the program and filed for a hearing. There were settlement talks, documents and an agreement was reached in exchange for the Parent to withdraw her request for hearing. The agreement fell through and there was a change in special education directors. The new director, who did not know the Student, did manage to pull together an appropriate IEP which was finalized at August 6<sup>th</sup> PET, with further addition of the behavior plan in late August.

In this case, one must also look at the issue of compensatory services for the district's failure to check the downhill slide in the sixth grade public school placement and the renegeing on the settlement agreement offered in June 1997. How can one make up for the "lost" services in sixth grade and the default by the school on the settlement agreement?

The comparison of the two IEP from the equity viewpoint pits the public school placement with an appropriate IEP with community peers versus a private school placement with an appropriate IEP with limited exposure to non-handicapped peers. Certainly the COOL program is language-based, multisensory and offered by a nationally recognized teacher. There clearly was no discussion of placement which occurred "after and pursuant to the development and approval of an individualized education program," and insured "that the placement decision [was] made by a group of

persons, including persons knowledgeable about the child, meaning of the evaluation data, and the placement options." In fact, no sixth grade teacher was present, and neither Dr. Bray, Dr. Sparrell, nor Dr. Powers were present. Dr. Bray, testified that the school's IEP was appropriate to provide benefit but also testified that the Student was a complicated "high risk" kid who would benefit from a new environment because it equals a new beginning with a different set of people in a different setting. Also weighing on the scale is the default by the school to the settlement offer.

This Hearing Officer believes the school could have provided a *free appropriate public education* during the seventh grade year but for the failure of the sixth grade year and the default on the settlement agreement, the Student is entitled to compensatory education for one year only. Since the Student has thrived in the COOL program as evidenced by work samples, testimony of Ms. Cook, the Parent, Dr. Sparrell, and the Student's own written documentation, the Parent's should be reimbursed for the tuition costs incurred for the academic year 1997-98.

### **Transportation**

Regarding transportation, this Hearing Officer finds that the Parent is not entitled to reimbursement for the transportation expenses incurred for transporting the Student to and from school from August 10, 1997 to June 26, 1998. There was no testimony about whether the Parent carpooled, whether the driver remained in New Hampshire or returned to Maine during the day, or any other details about the transportation arrangements.

## **VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations are hereby Findings of Fact.
2. The Student is a child with a multihandicapped code suffering from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Obsessive Compulsive Disorder and some Depression who qualifies for special education services. **[34 CFR Reg. 300.7 (b) (8)]**.
3. MSAD # 35 has the responsibility of providing the Student with a *free appropriate public education*. **[20 U.S.C. § 1400 et seq.]**

4. The Student's IEPs, as developed at the May 1996 PET meeting and all the IEPs developed during the 6<sup>th</sup> grade year, including the May 28, 1997 IEP were inappropriate for failing to provide the highly structured environment the Student needed to adequately address his academic, emotional, social and behavioral needs. [*Board of Education Of Hendrick Hudson Cent. School Dist. v. Rowley*, **458 U.S. 176; 102 S.Ct 3034 (1982)**].
5. No IEP from the second grade year through the sixth grade year was graded as to whether objectives were met or not met. There was a total of five PET meetings during the sixth grade year with special education services ever decreasing even though the Student was failing and not meeting the goals.
6. The Student's IEP developed on August 8, 1997 was appropriate to meet his complex needs. [Rowley]
7. The Student requires a highly structured non-confrontational program of consistent education, social, behavioral and emotional support as was provided at Center of Optimal Learning. [*School Com. Of Burlington v. Dept. Of Education of Mass.*, **471 U.S. 359 (1985); 34 CFR Reg. 300.302**]
8. COOL is not approved for special education placement by the state of Maine or New Hampshire. [Testimony of Ms. Cook; S-1]
9. The COOL school is an appropriate placement. [*Florence County School District Four v. Carter*, **20 IDELR 532 (U.S. 1993)**]
10. The "Settlement Agreement" was not honored after the Parent had withdrawn her request for hearing. [Testimony Ms. G; Set-95-126]
11. The parent is entitled to tuition reimbursement from MSAD # 35 for the educational costs associated with the Student's placement at Center Of Optimum Learning from August 10, 1997 through June 26, 1998. Payment of the tuition reimbursement satisfies all claims for compensatory education.

## VII. ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer ORDERS that MSAD # 35 reimburse the Student's mother for \$17,500, being the tuition for the Center Of Optimum Learning placement for the school year 1997-98. This satisfies all claims for compensatory education due to the failure of the MSAD # 35 to provide the Student with *a free appropriate public education* during 1996-97 and to honor the settlement agreement made in exchange for the withdrawal of a hearing request in June of 1997.

All other relief not expressly granted, including the request for transportation costs, is DENIED.

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So ordered,

Jeannie M. Hamrin, Ed.D.  
Hearing Officer

**#98.051, "Parent v. MSAD #35"**

Keith L. Barron, 4<sup>th</sup> grade teacher

Candace Bray, Ph.D., Learning Disabilities  
Consultant

Carol A. Cook, Director/teacher at Center of Optimal  
Learning

JoAnne Dee, Special Education Consultant

Cindy Douglas, Special Education Teacher

Douglas E. DuVarney, 6<sup>th</sup> grade Social Studies  
Teacher

Parent

Terry L. Johnson, 3<sup>rd</sup> Grade Teacher

Carol A. Phipps, 5<sup>th</sup> Grade Teacher

Tami Schoff, 6<sup>th</sup> Grade Language Arts Teacher

Carole Smith, Special Services Director

James Sparrell, Ph.D., Psychologist