

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 16, 1999

Case #99-162. PARENTS v. Falmouth School Department

REPRESENTING THE SCHOOL: Amy Tchao, Esq.
REPRESENTING THE PARENTS: Richard L. O'Meara, Esq.
HEARING OFFICER: Lynne A. Williams, Ph.D., J.D.

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 USC §§1415 et. seq., and accompanying regulations.

This hearing was requested by the PARENTS on July 13, 1999. The case involves their child . The student resides with the student's parents and a sister in Falmouth, Maine. the student is eligible for special education services under the category of multi-handicapped. The student is currently a student at the Aucocisco School in South Portland, Maine, having been unilaterally placed there by the student's parents.

The parties met in a pre-hearing conference on August 24, 1999, to exchange documents and list of witnesses, and to clarify the issues for hearing. A series of hearing dates commenced on September 8, 1999 and continued on September 14, 16 and 20 and October 4 and 6, 1999, at the Cumberland County Probate Court and the law offices of Drummond Woodson & MacMahon, Portland, Maine. One additional witness and two rebuttal witnesses testified by conference call. The parents entered 385 pages of documents into the record; the school district entered 411 pages into the record. Twelve witnesses testified.

I. Preliminary Statement

This case involves a x year-old student who is eligible for special education services under the category of multi-handicapped. The student is currently attending school at the Aucocisco School, a private, special purpose day school for learning disabled students in South Portland, Maine. The student's placement at Aucocisco was the result of a unilateral decision by the student's parents.

The parents requested this hearing. It is their contention that the Falmouth School District failed to identify student in a timely manner. They further contend that student made inadequate academic progress under the IEP developed for the student's third grade year in public school and that the school failed to address student's behavioral and social/emotional needs while the student was in public school. They further argued that

IEP's developed for student's fourth and fifth grade years were inappropriate. Consequently, the parents contend, they had little choice but to place student at the Aucocisco School, beginning in the student's fourth grade year. They are requesting reimbursement for that placement.

The District contends that it did identify student in a timely manner and did develop and put in place an individualized educational program which was reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment, for student's third grade year. The District further contends that student made reasonable progress during third grade, and would have made similar progress if the family had chosen to access the IEP's developed for student's fourth and fifth grade years.

II. Issues to be Decided by the Hearing

1. Did the Falmouth School Department timely identify student as a student with disabilities?
2. Did the School fulfill its obligation to provide a free appropriate public education to student in the 2nd (1996-1997) and/or 3rd (1997-1998) grade?
3. Was the IEP developed by School for the 1998-1999 school year (4th grade) reasonably calculated to provide student a free appropriate public education in the least restrictive environment?
4. Are the Parents entitled to reimbursement for the expenses they have incurred (tuition, transportation and related services) in connection with their unilateral placement of student at the Aucocisco School, for the 1998-1999 school year, either as compensatory educational services or due to the inappropriateness of the proposed 1998-1999 IEP and public school placement and the appropriateness of the Aucocisco placement?
5. Is the IEP developed by the School for the 1999-2000 (5th grade) school year reasonably calculated to provide student a free appropriate public education in the least restrictive environment?
6. Are the Parents entitled to reimbursement for the expenses they have incurred, and will incur (tuition, transportation and related services) in connection with their unilateral placement of student at the Aucocisco School, for the 1999-2000 school year, either as compensatory educational services or due to the inappropriateness of the proposed 1999-2000 IEP and public school placement and the appropriateness of the Aucocisco placement?

III. Findings of Fact

1. Student is currently x years old. (Testimony: Parents)
2. Student attended kindergarten through first grade in the Kennebunk School District. (Testimony: Mother)
3. During the summer following kindergarten, the summer of 1995, student witnessed the assault of the student's teenaged sister. (Testimony: Mother)

4. When the school in Kennebunk was informed about this incident, student began receiving social work services, from an L.C.S.W., one time weekly through the school. (Testimony: Mother; Exhibit: P49)
5. While in first grade at Kennebunk, student received assistance in reading through the Reading Recovery Program, and seemed to make some progress in reading. (Testimony: Mother)
6. During this same period, student developed increasing separation anxiety, particularly with having to separate from the student's mother. (Testimony: Mother)
7. At the end of first grade, student was "sad, confused and increasingly angry." In addition, the student's exhibited violent behavior at home, particularly towards the student's mother. (Testimony: Parents)
8. During the summer following first grade (1996), student and the student's family moved into the Falmouth School District. (Testimony: Mother)
9. Student entered second grade at Lunt School in Falmouth on the first day of the 1996-1997 school year. At the beginning of this school year student had some problems separating from the student's mother. Ms. Boffa, the guidance counselor, told student's mother that she should try to get student on the bus and she (Ms. Boffa) will meet student at school and take it from there. The problem did seem to resolve after three or four weeks. However, student did miss several days during second grade due to anxiety and home issues. (Testimony: Mother, Karen Boffa; Exhibit: 382)
10. Sometime during October 1996, Ms. Gredler, student's second grade teacher at Lunt School, spoke with Mother about problems student was having at school, particularly avoidance behavior. Ms Gredler told Mother that she wanted to refer student for "testing." Mother verbally agreed that she should do so. (Testimony: Mother)
11. At about this same time, student's sister attempted suicide (not her first attempt) and student witnessed her being taken away in an ambulance. (Testimony: Mother)
12. Student continued to show separation anxiety, particularly concerning Mother, and also exhibited increasing anxiety regarding school. At home the student exhibited frustration and serious explosions 3-4 times a month, worsening as time went on. (Testimony: Mother)
13. On or about October 17, 1996, student began receiving Title One Reading instruction at Lunt School. (Exhibit: P51-53)
14. On October 21, 1996, Ms. Gredler completed a Student Assistance Team ('SAT') referral form. This form was not seen by the Parents at that time. On this form, Ms. Gredler noted problems with staying on task, following directions, grasping new concepts, lack of motivation and seeming confused. She also stated "at the beginning of the school year [student] missed several days of school due to anxiety/home issues." She also noted, with reference to the Kennebunk School District record check, that student had "emotional issues" and that the parents will be "contacted before the meeting." It is unclear what meeting this comment referred to, although it seems to refer to the SAT meeting that was subsequently held on November 14, 1999. (Exhibit: P382)
15. On October 30, 1996, Joy Halligan, Resource Specialist, did a review of student's records from Kennebunk. The record check report noted that student had problems separating from the student's mother, likes to fade into the crowd and gets lost with instructions. Noted as areas of concern were "all areas in reading, written language

- and math" as well as "concentration, self-confidence, frustration level, withdrawn and sad/anxious." (Exhibit: P49-50)
16. During this period, Mother frequently asked Ms. Gredler whether she had "heard from the team" regarding the testing. Mother meant the Pupil Assistance Team (PET) and at no time was it clarified for her that student had only been referred to the SAT, not the PET. (Testimony: Mother)
 17. During this school year, the District's distribution method for their "Child Find" policies was to post the policy on the May page of the school calendar. There was also a statement regarding parents' right to refer their children for an evaluation in the Plummer-Motz/Lunt School handbook, which the District stated was given to all parents upon registration. Both Father and Mother testified that they never received a copy of the handbook for the 1996-1997 school year. (Testimony: Ms. Tomaszewski, Parents; Exhibit: 350)
 18. A special education Pre-Referral form was completed and signed by Ms. Gredler and Joy Halligan, on November 12, 1996. This form indicates that student "seems to be experiencing a lot of anxiety which is affecting (the student's) ability to focus on (the student's) learning....(The student) is displaying avoidance behaviors which are inhibiting (the student's) program. [Student] is reading below grade level and seems to have academic gaps." This form notes that the teacher was consulted and that the parents were contacted by telephone regarding concerns on November 12, 1996. Some modifications and strategies to be implemented for the period from December 11, 1996 to January 13, 1997 were listed and include paraphrasing, daily skills review, checking comprehension and a buddy system for following directions. Also referenced on this form was a November 14, 1996 SAT meeting. (Exhibit: 334)
 19. On November 14, 1996, Ms. Gredler completed a Pre-Referral Checklist, indicating that student had reading difficulties, problems with recall, focus, problem solving, and directions. She also notes difficulty interacting with peers and tattling and states "children from other classes are seen calling (the student) names." (Exhibit: 336)
 20. Also dated November 14, 1999, was a Student Action Plan, which again noted anxiety, problems with focus and attending and below grade level reading. This form indicated that Karen Boffa, the Guidance Counselor, would make a pre-referral to special education and the classroom teacher, Ms. Gredler, would complete the pre-referral form (as noted above). (Exhibit: 333)
 21. Throughout November and December 1996, student's avoidance and anxiety-related behavior continued increasing. During this time, Mother had frequent communication with Ms. Gredler regarding these issues and related academic problems. (Testimony: Mother)
 22. In mid-January, 1997, parents decided to contract for an independent educational evaluation, since the district still had not yet scheduled testing. They scheduled a testing date for February 1997 with Dr. Randall Grumpelt. (Testimony: Parents, Dr. Grumpelt)
 23. Mother then called the Special Education Director, Jeanne Malia, to inform her of the scheduled testing. Ms. Malia informed Mother that the District would not pay for the testing. (Testimony: Mother)

24. At the end of January, 1997, the parents received a "Consent to Evaluate Form", dated 1/24/97. The parents signed the form on 2/3/97 and returned it to the school district. (Testimony: Mother; Exhibit: 348)
25. During March, 1997, an Achenbach Checklist, Teacher Report Form, was completed by Ms. Gredler. The actual scores were neither communicated to the parents, nor was their interpretation discussed at the 4/16/97 PET. The Parent Report Form of the Achenbach was never administered to the parents. Immediately prior to the final day of this hearing, the results of this checklist were given to the parents. Father read into the record the following information: Ms. Gredler checked "True" or "Often True" in response to the following behaviors: can't concentrate or pay attention, confused, daydreams, fidgets, difficulty following directions, easily jealous, fears going to school at the beginning of the year and at his previous school, nervous, tense, too fearful and anxious. He further conveyed that student scored at the 93% in the categories of "anxiety/depression" and "thought problems." (Testimony: Father)
26. Regarding the Achenbach scores, Leslie Fitzgerald, the District's Behavior Specialist, wrote in a memo dated 3/97, "Based on this data only, [student] is behaving within the normal range. (The student's) behavior at this point does not appear to be adversely impacting (the student's) performance." This memo was shared with the PET at the 4/16/978 meeting. (Testimony: Leslie Fitzgerald; Exhibit: 317)
27. During late February and early March, 1997, Dr. Grumpelt completed a series of psychological and educational tests on student. On the WISC III, student's overall performance was in the low average range. Dr. Grumpelt stated that student's test taking attitudes probably resulting in some lowering of scores and suggested that his actual IQ scores were most likely higher. Results of the Kaufman Assessment Battery for Children and the Woodcock Reading Mastery Test indicate a learning disability in the area of basic reading skills and possibly a secondary learning disability in reading comprehension. (Testimony: Dr. Grumpelt; Exhibits 318-329)
28. Dr. Grumpelt also administered the Thematic Apperception Test ('TAT') and the House-Tree-Person Drawing Test and states in his report that "if anxiety is high for a period of time and (the student) is in a situation without much structure, (the student's) thinking can become confused and disoriented." He also found "a mixed picture" regarding the possibility of ADHD. (Testimony: Dr. Grumpelt; Exhibit: 326-327)
29. In summary, Dr. Grumpelt found significant personality problems, including over-dependence, high level of separation anxiety, and feelings of incompetence. "His personality problems are so intense that they appear to qualify [student] as having a Mild Level Behavioral Disorder. Certainly [student's] level of insecurities/fearfulness leads to problems in learning." He noted student's separation anxiety and serious dependence on adults and opined that the real fears must be dealt with right at the time they are occurring in order to help student get over it. Dr. Grumpelt felt that student's IEP should have identified someone who would, on a regular basis, help student resolve emotional issues. (Testimony: Dr. Grumpelt; Exhibit: 327)
30. In a section entitled "Recommendations for the School", Dr. Grumpelt includes the following: Multiply handicapped, needs low teacher/student ratio, high structure; teacher needs specialized certificated training regarding children with learning disabilities and emotional deficits; multi-modal approach; a friendship group. He

states, "The programming in the emotional/behavioral area is complicated because the staff will first need to help [student] feel more secure and self-confident and then they will need to help him extinguish some of his overly dependent behaviors." He also stated that, for reading, student needs a great deal more 1:1 and small group work." (Exhibit: 329)

31. The school accepted Dr. Grumpelt's evaluation and paid the costs. (Testimony: Mother, Elaine Tomaszewski)
32. The school conducted its own Occupational Therapy and Speech and Language evaluations. (Exhibits: 305, 310)
33. A PET meeting was held on 4/16/97 and identified student as eligible for special education services under the category of multi-handicapped. The team developed an IEP which included the following: Resource services (Wilson reading program) for 2.5 hours per week; Speech and language services, 1.5 per week; OT, 1 hour per week; Extended year services ('ESY'), 2 hours per week for 6 weeks; Classroom modifications, including a multi-sensory approach. The IEP included reading, language, listening comprehension and OT goals. (Exhibit; 289)
34. At the PET meeting, Dr. Grumpelt felt the IEP was "quite weak" and questioned the short amount of time allocated for administration of the Wilson program, lack of emotional support mechanisms, minimal modifications and no written language services. Father made similar objections. The minutes do not reflect these concerns. (Testimony: Dr. Grumpelt, Father)
35. Ms. Fitzgerald testified that, at the time of the 4/16/97 PET meeting, there was nothing in Dr. Grumpelt's report that the school needed to address, since student's anxiety was not occurring at school. (Testimony: Leslie Fitzgerald)
36. On May 5, 1997, Dr. Grumpelt wrote a letter to Ms. Malia, stating that it was his understanding from three other districts that they ordinarily schedule a minimum of 3/4 of an hour, and usually one hour, for Wilson reading sessions. He states, "I will be watching with interest whether she (Karen Dunn) is able to meet the Wilson program goals on the kind of tight time schedule she apparently uses." (Exhibit: 285)
37. However, parents did consent to the 4/16/97 IEP and felt that even though they did have the stated concerns, student could benefit somewhat from the program. (Testimony: Father)
38. Student received the student's full 12 hours of ESY services during the summer of 1997, where the student made good progress in the Wilson reading program. Testimony: Karen Dunn; Exhibit: 339-340)
39. Student did have some problems separating from the student's mother during these ESY sessions and Mother remained outside the tutoring room during the sessions. Ms. Dunn did note that, in her experience, this was very unusual. (Testimony: Karen Dunn, Mother)
40. Resource Services and Speech and Language service to student per the 4/16/97 IEP began on April 28, 1997. The OT began in September 1997. (Testimony: D. Sullivan, E. Tomaszewski)
41. Student began third grade at Plummer-Motz School in September, 1997. Both the family and student were optimistic at the start of this school year, and things did go well for a while. (Testimony: Mother)

42. During Fall 1997, student attended a friendship group, which was co-chaired by Karen Boffa and Leslie Fitzgerald. Student participated well during the sessions, enjoyed the group and asked about continuing in the next friendship group. (Testimony: Karen Boffa, Leslie Fitzgerald)
43. A PET meeting was held on October 28, 1997, to review student's progress. The PET made no changes in the IEP, although Father did express concern with the hours of service being given and with whether the modifications were being implemented. He noted that he had become aware that the Wilson program was being administered 2:1, as opposed to 1:1. During this meeting Father also stated that student may not be able to express the student's problems at school, but the student returns home filled with anger and rage. Ms. P. Sullivan, the Speech and Language Specialist stated that "the parents are the best judge of how [student] feels because (the student) may not express (the student's) feelings to teachers." (Testimony: Father; Exhibit: 278)
44. By mid-March, 1998, student's behaviors had deteriorated to the extent that the student was engaging in violent and manipulative behavior at home. The student seemed unable to deal with school and constantly destroyed the student's homework. In April 1997 the student began refusing to attend school. (Testimony: Mother)
45. Around this time, Mother asked Ms. Connolly, student's third grade teacher, to modify the student's homework because of the student's extreme frustration with the student's inability to even attempt to complete it. Ms. Connolly explained that with so many children in her class, she was unable to do so. (Testimony: Mother)
46. In March, the parents met with Dr. Gmeiner, the School Psychologist, at which time Dr. Gmeiner recommended that a neuropsychological examination be done. Dr. Gmeiner never met with student prior to this time. (Testimony: Mother; Exhibit: 196)
47. PET meetings were held on 3/30/98, 4/15/98, 5/6/98, 5/20/98, 6/1/98 and 6/19/98. In March, 1998, Parents had retained Barbara Melnick, the Director of the Aucocisco School in South Portland, as an educational consultant. Ms. Melnick attended the March 30 and April 15, 1998 meetings (as well as the 5/20/99 and 6/21/99 meetings). She felt that student needed a low stress environment with a behavioral management program designed to handle the student's phobia. She also felt that the 6/19/98 IEP was an improvement over the 1997 IEP, but still had problems with the size of the school, the number of students, the lack of phonemic awareness work and the fact that the student's school avoidance behavior was not addressed in the IEP. (Testimony: Ms. Melnick)
48. When student was given an assignment to speak in front of the student's class, sometime during April, the student developed night terrors. During this time student also stated to the student's father that Ms. Dunn, the Wilson tutor, was pushing the student too hard and if she continued to do so the student would stop talking. (Testimony: Father, Dr. Grumpelt)
49. During late Spring, 1998, the parents became unable to get student to regularly attend school. When it was time to leave for school, student would run into the woods, hide in the shed, or take other extreme measures to avoid school, including grabbing onto the tail pipe of the family car when the student had been dropped off at school. Mother asked Ms. Boffa if she would be able to pick up student at home and bring the student to school. Ms. Boffa said she could not do this, that it was the parents'

- responsibility to get student to school, and she would take it from there. (Testimony: Parents)
50. During April 1998, parents began to consider transferring student to what they felt might be a more appropriate program. Student did visit a number of special program schools. (Testimony: Father)
 51. On 4/15/98, the PET met, and recommended that a neuropsychological examination of student be conducted. (Exhibit: 212)
 52. At the 4/15/98 PET, Dr. Grumpelt raised concerns regarding student's emotional issues, the student's avoidance behavior and the student's personality problems, as well as the student's opinion that the level of school anxiety student was exhibiting was at the point where it could lead to decompensation, i.e. a major mental illness. Dr. Grumpelt observed that student had serious difficulties with the pull-out model, and stated that while many children would have some problems with feeling different, with this student it was a very serious issue, due to the student's extreme sensitivity to others. He also felt that student should have shown more than one year's progress in reading. (Testimony: Dr. Grumpelt)
 53. At the 5/6/98 PET meeting, Patricia Sullivan, the speech and language provider, stated that student was at 2.3 grade level in reading, indicating approximately one year's progress. Dr. Grumpelt felt that student made some, but not adequate, progress in reading, but lost ground regarding avoidance behaviors. (Testimony: Dr. Grumpelt; Exhibit: P110)
 54. During the 5/6/98 and 5/20/98 PET meetings, Ms. Tomaszewski solicited input regarding student's present level of performance, needs and goals related to those various areas. A draft memo including this information was prepared by Ms. Tomaszewski and distributed to PET members. The memo includes extensive information about student's needs and goals; however, a need submitted by Ms. Melnick – "ID/reduce anxiety associated with school" - has no notations beside it regarding goals or services, as do the other identified needs. (Exhibit: 202)
 55. At the 5/20/98, Father specifically asked for anxiety and self-esteem goals. (Exhibit: P150-152)
 56. During this same PET meeting, Ms. Tomaszewski wanted to draft an IEP. However, the team chose to wait until the results of the neuropsychological exam were received and reviewed. (Testimony: Ms. Tomaszewski, Father, Ms. D. Sullivan; Exhibit: P156)
 57. Prior to the series of PET meetings during March, April, May and June, 1998, Ms. P. Sullivan and Ms. Gredler had been made aware of student's violence at home and Dr. Gmeiner had been informed that student had witnessed the student's sister's assault. Ms. Boffa, who had had numerous conversations with parents, was also privy to this information, and most likely to more detailed information. However, none of these professionals appear to have communicated the seriousness of student's situation to the PET. (Testimony: Parents, Ms. Boffa)
 58. During the 6/1/98 IEP meeting, academic goals and objectives were drafted. In addition, individual psychotherapy, outside of school, was added. (Testimony: Father; Exhibits: 157, 162)
 59. Dr. Julia Domino conducted a neuropsychological examination on student during May and June, 1998. In her report, Dr. Domino noted that student's "emotional

functioning had worsened over the past year and a number of influences, such as academic difficulty, the experience of past trauma, and difficulty separating from family, may be contributing to (the student's) current level of emotional functioning." Dr. Domino said small group instruction with individualized instruction from teachers who are trained to deal with learning and attentional problems was essential, but that student's "learning is significantly affected by both attentional and emotional factors to the extent that (the student) often may not be available to learn." She said that one couldn't necessarily attribute student's depression and anxiety just to school, but if the situation continues, the problems will be compounded. In addition, Dr. Domino suggested that student receive a psychiatric evaluation in order to determine the possibility that medication may be efficacious. (Exhibit: 117-131)

60. During the last three weeks of the school year, it became increasingly difficult, and eventually impossible to get student to go to, and to stay at, school. For about two weeks, Father brought student to school and stayed with the student for an hour or so. However, on most days student was unable to remain at school without the student's father present. During the last week of school, student did not attend at all. School personnel were aware of this situation. (Testimony: Father)
61. On 6/12/98, Father sent a letter to the school, noting student's anxiety regarding class presentations, pointing out that student is not at school that day because classroom modifications are not working and asking what could be done about that. (Exhibit: 132)
62. The 6/19/98 PET meeting resulted in a final IEP, which included 10 hours a week of resource services (Wilson program and other resource services), the services of an Ed Tech III, 1 hour per week of counseling (outside of school), 15 minutes per day of guidance counselor time, OT for 1.5 hours per week, 2 hours per month of behavior specialist consultation services and 1/2 hour per week of staffing. The IEP included a number of emotional and behavioral goals suggested by Dr. Grumpelt (Exhibits: 85-86, 115)
63. At the PET meeting, Dr. Grumpelt expressed concerns with the Ed Tech services, for the same reasons as with pull-out, i.e. student's extreme sensitivity to others and distress at appearing and feeling different. (Testimony: Dr. Grumpelt)
64. Father informed the PET that parents were considering Aucocisco School because they didn't think the services being offered were appropriate to meet student's needs. Father queried "Is this the final and best offer?" to which Ms. Tomaszewski replied "Yes." At the end of the 6/19/98 PET meeting, Father stated that he appreciated all the work the PET had done, but that he thought, given student's emotional issues, that the program was inappropriate for meeting the student's needs. Ms. Tomaszewski stated that if Father disagrees with the IEP, the old IEP stays in force and there could be no added services, including the psychotherapy. However, the psychotherapy with Mr. Chatalbash did in fact begin over the summer. (Exhibit: P279)
65. During the period of the 1998 PET meetings, student began making suicide threats, and showed extreme distress when he arrived home from school. As Mother stated at the 4/15/98 PET meeting, "When (the student) walks through the door, (the student's) been crying, (the student's) in tears and (the student) doesn't want to come to school." At this same PET meeting, Patricia Sullivan stated "It's a different child that we see. (The student) keeps a lot inside" and Dr. Domino stated "This isn't the

kind of child, that if (the student) started getting A's, all (the student's) other problems would go away." At the 6/19/98 PET meeting, Father stated, "Another issue that we haven't ever talked about before is (the student's) phobia about coming back –" after which a discussion ensued about strategies to abate student's separation anxiety and school phobia. A brief discussion about systematic desensitization took place, but no determinations were made about utilizing any sort of re-entry, transition or desensitization program to get student back into school. (Testimony: Mother; Exhibits: P103, P274-278)

66. On 7/14/98, student met for the first time with David Chatalbash, consulting social worker for the Aucocisco School. During the summer, Mr. Chatalbash met with student five times and identified issues of anxiety, lack of desire to go to school and separation problems. The Falmouth School District paid for Mr. Chatalbash's services for the summer of 1998 and continues to do so. (Testimony: David Chatalbash, Ms. Tomaszewski)
67. On 8/11/98, Father forwarded a letter to Ms. Tomaszewski informing her that student would be attending the Aucocisco School for the 1998-1999 school year. (Exhibit: P22)
68. Student began at Aucocisco School at the beginning of the term in September, 1998. However, when school began, the student was unable to attend, because of the student's school-related fears and anxiety. Ms. Melnick and Mr. Chatalbash developed a plan of systematic desensitization whereby student was picked up each morning by Ms. Melnick, and each day was driven closer to the school. After two weeks, student was able to enter the building, although the student still had very high anxiety levels. Over the next four to six weeks the student began exhibiting less anxiety and was able to more fully participate in the school program. (Testimony: Mr. Chatalbash, Ms. Melnick, Parents)
69. During student's first year at the Aucocisco School, and continuing into this current school year, student sees Mr. Chatalbash for individual counseling (1/2 hour per day), group counseling (45 minutes per week) and two mornings a week for one half hour each morning. In addition, student is able to access Mr. Chatalbash at any time that he is present at Aucocisco School.¹ At the beginning of the 1998-1999 school year, student tended to drop in about twice a day. By the end of the school year, the student was hardly dropping in at all. (Testimony: Mr. Chatalbash, Ms. Melnick)
70. Although student still exhibits problems with work avoidance and sensitivity to others, the student has learned strategies to deal with the student's emotional issues, but has not yet internalized these strategies. Rather, the student's progress is a result of the external structure and support the student has been experiencing. Mr. Chatalbash further testified that student is not ready to return to public school, that the student's transition back will be a long and complex process, but that beginning in December, 1999, or thereabouts, it might be wise to begin developing a transition plan. (Testimony: David Chatalbash; Exhibit: 67)
71. Student's program at Aucocisco, combined with the psychological support the student is given, has resulted in a 95% attendance rate and a 6% tardiness rate, as of May 12, 1999. (Exhibit: 65)

¹ Mr. Chatalbash is typically at Aucocisco two full days per week.

72. According to a Progress Report submitted by Barbara Melnick, student exhibited the following academic gains as measured by the Wechsler Individual Achievement Test: Basic Reading (from standard score of 80 to 85), Reading Comprehension (from 78 to 90), Reading Composite (76 to 84), Math Reasoning (83 to 95), Numerical Operations (79 to 94) and Math Composite (78 to 91). (Exhibit: 64)
73. The Parents state that although student still becomes anxious about attending school, both separation anxiety and avoidance behaviors are greatly reduced and self-injurious behaviors are no longer occurring. (Testimony: Parents)
74. Although the District continued to pay Dr. Chatalbash's fees, Falmouth personnel neither visited Aucociso School nor requested updates about student's progress there. (Testimony: Mr. Chatalbash, Ms. Melnick, Parents)
75. A PET meeting was held on 5/20/99, at which time a draft IEP was developed. On 6/21/99, the PET developed a final IEP which, with the exception of a mutually agreed upon decrease in OT services, was essentially the same as the 6/19/98 IEP. The PET did not develop a plan to assist student in making a transition back to the Falmouth School District. (Exhibits: 35- 49)
76. Father expressed concern at the 6/21/99 PET that no transition plan was included in the IEP and also that the potential fifth grade teacher was not present at the PET meeting, nor involved in the development of the IEP. (Testimony: Father)
77. Subsequent to this PET meeting, and prior to commencement of the hearing, Lucretia Buckley was identified to the parents as the teacher student would have for his fifth grade year. Ms. Buckley did testify at the hearing about what she felt the benefits of her class would be to student, but Ms. Buckley had never met student, nor participated in the development of any of the student's IEP's. (Testimony: L. Buckley, Father)
78. On June 25, 1999, Ms. Tomaszewski forwarded a letter to the parents, in which she stated that if student were to come back to Plummer-Motz for the student's fifth grade year, the PET would be happy to discuss a transition plan. On July 17, 1999, Ms. Tomaszewski forwarded a letter to the parents, in response to parent's July 7, 1999 letter regarding a transition plan, noting that a plan would be a PET decision and might include some of the following: meeting between Aucocisco and Falmouth staffs, input from Dr. Chatalbash, transfer of information, consideration of gradual integration into Falmouth Schools based on advice of counselor/therapists, friendship group. (Exhibits: 8, 10)
79. On July 13, 1999, the parents filed for Due Process. (Testimony: Parents)
80. Dr. George Sheckart, the current consulting school psychologist for the Falmouth School District, was requested by the District to review and determine the appropriateness of the proposed 1999 IEP. At no time did Dr. Sheckart meet or evaluate student. The report, dated 7/28/99, concluded that the IEP was appropriate. (Exhibit: 4)
81. On 7/31/99, Dr. Grumpelt completed an updated psychological evaluation of student. He noted that the personality problems continue, but have diminished and confidence has increased. The student's separation anxiety has also decreased, although the student is still more dependent than the average child that age. Dr. Grumpelt's recommendations include one to one help, especially in student's crucial academic areas, rapid access to a highly supportive person when needed, and continuing

development of skills that will help student be more socially acceptable. (Testimony: Dr. Grumpelt; Exhibits: P1-3)

IV. Conclusions

(a) Introduction

In this case, student began exhibiting school avoidance and separation anxiety even prior to enrolling in the Falmouth School District. The exact causality of student's emotional and social issues is unknown, but is likely of very complex etiology. When student was x, the student did witness an assault on a family member, and then witnessed a subsequent suicide attempt by that family member. However, the exact etiology is irrelevant when the resultant emotional behavioral issues impact student's ability to progress academically. The manifestation of this student's emotional issues, either full-blown school phobia or, at the very least, serious school avoidance and separation anxiety, is clearly a direct impediment to academic progress. As in other areas of the law, the school must take the student as they find the student. Given this student's serious and emotional needs, the question we must answer here is whether the school appropriately addressed these issues and provided a program which was reasonably calculated to result in appropriate academic progress.

The parents seek reimbursement for student's unilateral placement at the Aucocisco School for the 1998-1999 and 1999-2000 school years, either under a theory of compensatory education based on the District's failure to identify student as eligible for special education services in a timely manner and to then provide an appropriate program (*Phil v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993)) or under the *Burlington* and *Carter* theories of reimbursement, based on the District's failure to offer an appropriate public education and the subsequent unilateral placement of student in an appropriate private placement. (*Burlington School Comm. V. Dep't of Educ.*, 471 U.S. 359 (1985), *Florence County School Dist. Four v. Carter*, 114 S.Ct. 361 (1993)).

(b) Did the Falmouth School Department timely identify Student as a student with disabilities?

Student began attending school in Falmouth in September, 1996. Sometime during October, 1996, student's second grade teacher informed Mother that she wanted to refer student for "testing", due to some problems at school, particularly avoidance behavior. On October, 21, 1996, student was referred to the Student Assistance Team ('SAT') and the referral form noted "at beginning of school, [student] missed several days of school due to anxiety/home issues." She also noted, with reference to the Kennebunk School District, student's former district, that student had emotional issues. On October 30, 1996, Joy Halligan, Resource Services Provider for the District, conducted a record review of student's Kennebunk records, and noted in her report that student had

problems with reading, writing and math, had been “sad and anxious” and had problems with separation.

Additional SAT forms completed on November 12, 1996 and an SAT meeting held on November 14, 1996, all made clear note of student’s emotional issues, not as separate, home-based problems but rather as issues that are negatively affecting student’s performance at school. Yet, rather than refer student to the PET in November, 1996, the District pursued its dubious policy of automatically referring students to the SAT, holding a meeting, developing an SAT plan, and implementing fifteen school days of modifications, prior to making a referral to the PET.² This attenuated process resulted in there not being a “Consent to Evaluate Form” being prepared until at least January 24, 1997, forwarded to and received by the parents some time subsequent to that date, and signed and returned by parents on February 3, 1997. The District’s fourteen week delay in finally initiating a PET referral, as well as their failure to explain to the parents the difference between an SAT and a PET referral, resulted in the parents’ decision to contract for an Independent Education Evaluation (‘IEE’), for which the District eventually paid.

As frustrating as this may have been for the parents, the record indicates that it was the second grade teacher, not either of the parents, who made the initial referral for “testing.” Under Federal and state law, the District did have the right to have in place a policy which directed a staff referral to an SAT as a first step. MSER §7.8(A). Nonetheless, the District did commit a procedural violation of the law in not meeting the Maine *45 day rule*, in that it allowed 47 school days to elapse from the date consent was given (2/3/97) to the date of the PET (4/16/97), counting teacher in-service days as school days. MSER §8.20 (1995) (45 school day rule); §2.5 (the state regulations at that time defined teacher in-service days as school days).

This two-day lapse would typically be considered a *de minimis* procedural violation. More troubling than this technical violation is the fact that the District had so much information about student, that by this time the student should have been flagged as a child with emotional problems who required school-related intervention. Early on, student had caught the eye of Karen Boffa, the guidance counselor, as a child with separation issues and school fears. During October, 1996 and March, 1997, Mother had frequent communication with the teacher and Ms. Boffa regarding child’s problems at home, as well as at school. And, in March, 1997, at least some school personnel had *more* information about student’s school related issues than even the parents. In March, Ms. Gredler, student’s second grade teacher, completed the Achenbach Teacher checklist, and clearly articulated student’s emotional problems to be as bad as, if not worse, than when she completed the initial SAT referral checklist in October, 1996. She noted his fears, nervousness, tension, anxiety and poor schoolwork. Yet, the seriousness of Ms. Gredler’s observations was never shared with either the parents or the PET.

As the record shows, every form completed by school personnel between October, 1996 and March, 1997 indicated that the student exhibited serious emotional, separation and

² The record indicates that the Falmouth School District no longer follows this policy.

school avoidance issues. Yet the District allowed the SAT process to take its course, prior to initiating a PET referral. While it is true that the District committed only one de minimis procedural violation, when the significant delay in finally identifying student as eligible for special education is viewed in the context of all of the information available which pointed to student's serious emotional problems, I find that the District did fail to evaluate and identify student as eligible for special education services in a timely manner.

(b) Did the School fulfill its obligation to provide a free appropriate public education to Student in the 2nd (1996-1997) and/or 3rd (1997-1998) grade?

The Individuals with Disabilities Education Act ('IDEA') requires that school districts provide students identified with disabilities a free, appropriate, public education ('FAPE'), through a program described in an individualized educational program ('IEP'). 20 USC §1412 (a)(1)(A), § 1413(a)(1), § 1414(d)(1)(A). The United States Supreme Court has articulated the questions that must be answered when determining whether an IEP meets the FAPE standard.

First, has the state [i.e. school district] 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 benefit?

Bd. of Educ. V. Rowley, 458 U.S. 176, 206-7 (1982)

An IEP can be found to be inappropriate if procedural requirements are not met, whether "procedural inadequacies compromised the pupil's right to an appropriate education...or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Committee*, 910 F.2d 983, 994 (1st Cir. 1990).

One such procedural requirement is to address the student's behavior, if that behavior is impeding learning, using positive behavioral interventions, strategies and/or supports. 20 USC § 1414(d)(3)(B). *See also* 34 CFR § 300.346(a)(2)(i).

Falmouth failed to meet this requirement. From the point at which school personnel became aware that student was experiencing separation anxiety, nervousness, and other emotional problems which were impeding the student's school attendance, as well as the student's performance at school, the District had an obligation to address those issues by developing behavioral interventions and related supports, designed to address the problems. No Behavioral Intervention Plan ('BIP') was ever developed. The parents' appeals for assistance in getting student to school, during the spring of 1997, fell on deaf ears. The April, 1997, IEP contained no BIP or supplementary supports and services designed to meet student's emotional needs; nor did subsequent IEP's.

Behavioral intervention should have been a critical element of student's program, yet it was absent throughout the student's time in the Falmouth schools. The school's only response to these issues was to increase pullout services, one of the most negative aspects

of student's program. The District argues that it was initially unaware of student's serious emotional issues, and even when it became aware of the student's problems, these issues were not being manifested at school.

As the record shows, almost from student's arrival at Lunt School the guidance counselor and student's teacher were aware of the student's emotional issues. Although, it is true that student tended to "present well" and did exhibit far more serious behavior at home than at school, the school had been informed by the parents that student was exhibiting serious school-related behaviors at home, and *the school should have done something*. To quote from a Maryland District Court case, in which a student exhibited violent, school avoidance at home, "in a sadly ironic [student] himself may have contributed to the problem by venting his frustrations at home while hiding them in the classroom in a guise of happiness and good behavior. In the final analysis, however, the ...ultimate fact is that [student] was denied the FAPE to which he was entitled." *Gerstmeyer v. Howard County Public Schools*, 850 F.Supp. 361 (MD 1994).

Witnesses at the hearing engaged in extensive discussion regarding the academic services provided to student during the student's third grade year, particularly the administration of the Wilson program. However, looked at from a purely academic standpoint, given the student's test scores and academic needs, I find that the *academic* portion of the 1997-1998 was reasonably calculated to provide academic benefit. However, at the initial PET meeting, student was classified as multi-handicapped. Maine regulations define a multi-handicap as "concomitant impairments resulting in severe social, communication, educational and/or developmental deficits which adversely affects the students' educational performance." MSER §3.12 (1995) Given that category of eligibility, it should have been self-evident to the PET that student would require services to address more than just the student's learning disability. Nonetheless, the PET disregarded significant portions of Dr. Grumpelt's evaluation and recommendations and provided no services directed towards social/emotional/behavioral issues.

I find that the Falmouth School District failed to provide FAPE to student during the second grade (1996-1997) and third grade (1997-1998) school years.

(c) Was the IEP developed by School for the 1998-1999 school year (4th grade) reasonably calculated to provide Student a free appropriate public education in the least restrictive environment?

As discussed above, there were procedural errors that made student's 1998-1999 IEP inappropriate and a denial of FAPE. However, the lack of any behavioral interventions, supplemental supports and services or transition plan, designed to assist student to confront and overcome the student's school fears and separation anxiety, is a second factor which makes this IEP inappropriate and a denial of FAPE.

At the point that the 1998-1999 IEP was developed, the school clearly knew that student was almost unable to attend school. During the last three weeks of school, in order to try his best to get student to school, father brought him to school early and remained with

him during the beginning of the school day. Even with this support, student could rarely remain at school when the student's father departed. During the last week of school student was unable to attend at all.

The PET did add outside counseling to student's PET, resulting in David Chatalbash beginning to work with student during the summer of 1998. However, they failed to develop a behavior plan or include other interventions in the IEP with the goal of assisting student to address the student's school fears, return to school in the fall, and *remain* at school without emotional distress.

The district now states that if student returned to Plummer-Motz School in September, 1998, a transition plan would have been developed prior to the start of school. However, no mention of this was made in student's June, 1998 IEP, the document which is supposed to contain the student's entire program, including related services and supplementary supports. The IEP must at least include the amount of each service, and the staff positions responsible for providing the services. MSER § 9.3. Furthermore, the amount of services to be provided must be described to the extent that "the level of the agency's commitment of resources will be clear to parents and other IEP team members." *DOE Q & A Document*, Question 35, 64 Fed. Reg. 12479 (March 12, 1999) Services designed to support student's school related fears and anxieties were neither described, nor even mentioned, in the IEP. Again, if student could not come to school or, if there, could not remain without the presence of the student's father, how could an IEP not addressing that situation be said to be reasonably calculated to provide educational benefit?

As noted above, I found that the 1997-1998 was appropriate *academically*, and in fact student did make about a year of academic progress in reading under that IEP. However, it is inappropriate to isolate the question of academic benefit from the total constellation of student's needs. Congress envisioned that IEP's developed under the IDEA would address all of a student's needs – physical, emotional, social, behavioral, or academic – as appropriate. *Town of Burlington v. Dep't of Educ., Comm. Of Massachusetts*, 736 F2d 733, 788 (1st Cir. 1984) This is reflected in the Maine state regulations as well. MSER § 2.7 (1995)

At the June 19, 1998, PET meeting, Father specifically asked the Special Education Director whether the proposed IEP was the "final offer", to which the reply was yes. It is appropriate for the parents to rely on this response, and to assume that once again student's IEP was lacking. Whatever the District now contends would have happened before September, 1998, the fact is that the parent should not have to rely on "might have been" when deciding on the appropriateness of an IEP for their child.

I find that the Falmouth School District failed to provide an IEP that was reasonably calculated to provide academic benefit for the 1998-1999 school year.

(d) Is the IEP developed by the School for the 1999-2000 (5th grade) school year reasonably calculated to provide Student a free appropriate public education in the least restrictive environment?

The 1999-2000 IEP offered to the family was identical to the previous year's, with the exception of a mutually agreed upon decrease in OT services. The PET still failed to develop a plan whereby student could be successfully transitioned back to Plummer-Motz and continue to receive the immediate and individualized supports that the student needs throughout the day, nor did it in any way incorporate the placement recommendations of Dr. Grumpelt, Ms. Melnick or Dr. Domino.

The District argues that the plan for fifth grade would include more individualized attention for student, because of the makeup of the class, that the transition to Plummer-Motz would be easier than the transition to Middle School, and that the longer student stays in a specialized school, the harder any transition will be. In addition, they argue that fifth grade students get to visit, and become acclimated to, the Middle School, as well as rotate their afternoon classes, much like Middle School students.

However, student currently rotates most of the student's classes, and there is no reason why the student and the student's family cannot participate in the visits and orientation at the Middle School. The reality of the situation is that David Chatalbash, student's counselor since Summer, 1998, does not think student is ready to return to public school. Mr. Chatalbash states that although student has learned some strategies to cope with the student's emotional issues, the student has not internalized those strategies. Nor are there any professionals who currently work with student, or who have recently evaluated the student who think that the student is ready to return.

According to Mr. Chatalbash, student's eventual return will be a long and complex process and creating a plan will take further lead-time. There is currently no plan in place to even begin to transition student back to public school. In the absence of this plan, and related supports and services, the 1999-2000 IEP will continue to be an inappropriate.

(e) Are the Parents entitled to reimbursement for the expenses they have incurred (tuition, transportation and related services) in connection with their unilateral placement of Student at the Aucocisco School, for the 1998-1999 and 1999-2000 school years, either as compensatory educational services or due to the inappropriateness of the proposed 1998-1999 and 1999-2000 IEP's and public school placement and the appropriateness of the Aucocisco placement?

Once it has been shown that the District failed to offer the student appropriate IEP's for the 1998-1999 and 1999-2000 school years, the question become whether the parent's unilateral placement at the Aucocisco School is appropriate. [34 CFR S300.403(c)] The District argues that the Aucocisco School is an inappropriate placement because it is currently configured as a single sex school without such amenities as a playground,

swingset or an indoor gym.³ They further argue that the Aucocisco School, a specialized school for children with learning disabilities, and an environment with only disabled peers, is not the least restrictive environment within which student can make reasonable academic progress.

The least restrictive environment must be determined following an assessment of the child's whole constellation of needs. Granted, student could theoretically make adequate academic progress at Plummer-Motz School. However, the District's argument fails to acknowledge the fact that the student had become emotionally and psychologically unable to attend Plummer-Motz School. No academic progress could possibly be made if student is either physically or psychologically unable to attend school. This case exemplifies a situation, albeit rare, where the mainstream placement is more, not less, restrictive. Inability to attend school is the ultimate restriction.

Because of the failure of the District to offer an appropriate IEP for 1998-1999 and 1999-2000, the parents had few placement options, all of them being special purpose schools for children with learning disabilities. Contrary to what the District argues, the IDEA does not mandate mainstream placement, as the Third Circuit recently clarified in *Warren G. v. Cumberland County Sch. District*, 31 IDELR 27 (3rd Cir. 1999). That court noted that if a parent rejects an inappropriate IEP and unilaterally places the student in a private specialized school, that "appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement...[T]he test for the parents' private placement is that it is appropriate, and not that it is perfect." *Id.*

Aucocisco School is clearly an appropriate setting for student and can, and does, meet the student's academic as well as emotional needs. In September, 1998, Aucocisco personnel were ready and able to immediately work with student and the student's counselor so as to enable the student to gradually overcome the student's separation anxiety and school fears to the extent that the student could begin attending school on a regular basis. They continue to provide the student with immediate emotional support during the school day. As testimony shows, student is far from being cured of the student's anxiety and fears regarding school. However, Aucocisco personnel are able to successfully ease student back into school following vacations periods or other times of regression. Consequently, they are meeting student's academic needs as well as those serious social/emotional needs that the District never adequately addressed during the 1998 or 1999 IEP process.

This is not to state unequivocally that an appropriate education cannot be provided to student by the Falmouth School District. With an IEP that addresses all of the student's needs, a carefully developed transition plan and a behavioral intervention plan designed to provide in school supports for student's emotional needs, Falmouth could likely meet

³ It should be noted that the testimony of Karen Boffa specifically stated that student got along very well with members of the opposite sex and that she specifically developed an all same sex friendship group so that student could increase the student's skills in this area. It should also be noted that the playground, particularly the swingsets, at the Plummer-Motz School has been the site of many of student's negative social situations

student's emotional and behavioral, as well as academic, needs. However, testimony indicates that a hasty transition could cause student to lose what progress the student has made in conquering the student's separation anxiety and school related fears. The more prudent plan would be to begin now to develop a transition plan, culminating in the return of student to the Falmouth Middle School in September, 2000. A plan to transition student back into Plummer-Motz School, and then a few months later have the student transition again to Middle School, seems doomed to failure, since it places a probably insurmountable hurdle in front of student. It is Plummer-Motz, not the Middle School, which is related to student's anxiety and fears. Why court failure for student, when a gradual and incremental plan, to a new site, is much more likely to be successful.

Mr. Chatalbash appears to know and understand student quite well, and would be the most appropriate person to develop a plan, with input from PET members and the parents. It is not the purview of the hearing officer to say what such a plan should include, but an incremental transition plan could include any number of possible contacts with the Middle School during next spring. Some examples would be transitioning student into sessions with the Middle School occupational therapist and/or speech and language provider, visits to the Middle School, even eventually changing Mr. Chatalbash's sessions to the Middle School site. In addition, student should be included, when ready, in all Middle School student and family visits.

In summary, it is my finding that the Aucocisco School was an appropriate placement for student during the 1998-1999 school year, and continues to be an appropriate placement for the duration of the 1999-2000 school year.

V. Equitable Defenses

The District argues that the family failed to cooperate in this case and therefore should be precluded from receiving tuition reimbursement for student's placement at the Aucocisco School. Falmouth contends that the family failed to meet a duty of good faith when dealing with the school, said duty being an obligation to notify the local school unit of concerns and difficulties as they arise, and to provide the school with an opportunity to remedy those difficulties at that time. They cite as an example of this bad faith the contention that Falmouth sought to conduct a psychiatric evaluation of student in June, 1998 and that the family refused to allow it to occur. Furthermore, argues Falmouth, it was with guidance of counsel that the parents pursued a legalistic game plan including failure to raise any concerns about student's referral to special education or the adequacy of programming in second and third grades.

The fact is that Falmouth, at all times, had extensive information about student's academic and social emotional issues that could have enabled the PET to develop appropriate IEP's. Ms. Tomaszewski even tried to develop an IEP for the 1998-1999 school year prior to the completion and review of a neuropsychological examination that had been ordered by the PET. And, it was that very report, prepared by the neuropsychological examiner Dr. Julia Domino, that first suggested a psychiatric evaluation as a possibility. It is somewhat incredulous to now suggest that the parents

somehow prevented the District from evaluating the student. In fact, it was the parents' who initially contracted for an IEE because of the school's delay in scheduling testing for student back in 1996-1997.

The parents frequently expressed their concerns about student's program. From the point at which Mother repeatedly asked when testing was going to occur, to the objections of Father regarding the Wilson program and lack of services to address emotional issues, the parents let Falmouth know of their concerns. Likewise, the school knew about student's increasing absences towards the end of the 1997 school year, and at least some of the PET members knew about the serious emotional issues underlying these absences. It is not the parents' fault that neither Ms. Boffa nor Dr. Gmeiner chose to communicate the seriousness of student's emotional problems to the PET. Ms. Boffa argued that the requirements of confidentiality prevented her from sharing this information with other professionals at the school. However, she never asked the parents for permission to disclose any information to the PET. Even at the hearing, when the parents gave oral, and then written, consent to disclosure, Ms. Boffa was less than forthcoming about what she knew about student and the student's social/emotional issues. Perhaps some PET members did not know about the seriousness of student's situation, but at least two members did, and it was those professionals, not the parents, who withheld information.

The evidence shows that it was not the parents who failed to give the school the opportunity to address student's behavioral and emotional issues, but rather it was the school which failed to take action to develop an appropriate IEP, even though it had a wealth of evidence showing student's needs. In a recently decided case in which a Pennsylvania school district made a similar argument, the Third Circuit stated "...it is undisputed that the District failed to come forward with appropriate IEP's and there is no finding that the parents conduct obstructed its ability to do so." *Id.* This court further states that "[v]igorous advocacy is an anticipated by-product of a policy encouraging parental involvement (citing *Rowley*, 458 U.S. at 209) and a denial of reimbursement based on such "vigorous advocacy" would undermine this policy." Falmouth's argument that the parents somehow withheld information that the school could use to develop an appropriate program for student, while at the same time hewing to a legal game plan devised by their attorney, is unpersuasive and unsupported by the evidence.

The District also advances a laches argument to support a denial of the parents' claim, citing cases where compensatory education claims were denied because the family failed to assert their claims until long after the programming at issue has been completed. Laches is an equitable defense which may be asserted when a party, by omission or neglect, fails to assert a right in a timely fashion and that lapse or time causes prejudice to the adverse party. (*Conopco, Inc. v. Campbell South Co.*, 95 F.3d 187 (2d Cir. 1996)) It is the burden of the defending party to show harm or prejudice. *See Board of Educ. of the Pawling Cent. Sch. Dist.*, 29 IDELR 644 (SEA N.Y., 1998) (no evidence to support petitioner's contention that it was prejudiced or disadvantaged by the time of respondents' request for a hearing)

The District is correct in noting that the Court in *Bernardsville Board of Educ. v. J.H.*, 42 F.3d 149, 157-158 (3rd Cir. 1994) did dismiss compensatory education claims asserted by the family as untimely. However, the *Bernardsville* court stated that “plac[ing] in issue the appropriateness of an IEP...is accomplished through the initiation of review proceedings *within a reasonable time* of the unilateral placement for which reimbursement is being sought.” [emphasis added] *Bernardsville*, 42 F.3d at 156-58 & n.14. The time period in *Bernardsville* was over two years. The family in this case filed for due process on 7/13/99, less than one year after their letter dated 8/11/98, in which they informed the District that they were placing student at Aucocisco School for the 1998-1999 school year. The District had numerous opportunities prior to July 13, 1999 to develop an appropriate IEP for student and were in no way prevented from doing so by the timing of the parents’ due process request. In addition, the District could have filed for due process at any time to obtain a ruling on the appropriateness of student’s various IEP’s. I find that the parents’ due process request was within a reasonable time and that the District was not prejudiced or harmed by the time of this request. The District’s equitable arguments are unpersuasive and unsupported by the evidence.

VI. Reimbursement

Upon a finding that the IEP’s offered to student for the 1998-1999 and the 1999-2000 school years were inappropriate, and a denial of FAPE to student, as well as a finding that the private unilateral placement made by parents was and continues to be an appropriate placement for student, the parents are entitled to reimbursement for expenses related to the unilateral placement, subject to equitable considerations. As discussed above, the parents’ conduct in making the placement was reasonable, as was the parents’ conduct prior to making the placement. The final consideration must be to determine what expenses are related to the placement. Obviously, tuition and transportation expenses are directly related expenses. So too are expenses for occupational and speech and language therapy, services which would have been provided to student under an appropriate Falmouth IEP. Testimony indicated that transporting student back to Falmouth for those services was unreasonable, if not impossible, given the student’s inability to attend Plummer-Motz. It was therefore necessary to contract for those services to be provided at the Aucocisco School. Consulting services of Dr. Grumpelt and Ms. Melnick, utilized to assist the parents in trying to get appropriate IEP’s for the 1998-1999 and 1999-2000 school years, are also reimbursable.

However, I find that the psychotherapy currently being provided to student in addition to Dr. Chatalbash’s services falls outside the realm of educational services. No doubt it is helpful, if not necessary. However, the testimony of the parents indicates that it is more within the realm of family therapy, addressing broader family issues rather than educational issues. As such, this expense should be paid for either by the family themselves or their own health plan.

VII. Decision

The Falmouth School District committed procedural violations of IDEA and MSER when it failed to address the behavioral needs of student in the 1997-1998, 1998-1999 and 1999-2000 IEP's.

Furthermore, the District failed to develop IEP's reasonably calculated to provide educational benefit, for the 1997-1998, 1998-1999 and 1999-2000 school years, thereby denying student a free and appropriate public education.

The parents' unilateral placement of student at Aucocisco School was, and continues to be, appropriate. Therefore, the parents are entitled to reimbursement for reasonable expenses related to this placement. Such reimbursement will extend through the balance of the 1999-2000 school year only.

VIII. Order

1. The school shall hold a PET meeting as soon as possible, but no later than December 20, 1999 (or the last day before holiday break). The school shall contract with an outside facilitator to chair the PET meeting. Prior to this meeting, Mr. Chatalbash should develop a draft plan and timeline to address the incremental reintegration of student into the public school system for September, 2000, as discussed above. Mr. Chatalbash shall present his ideas to the PET and solicit their input. At this meeting, or a subsequent meeting if necessary, an IEP will be developed, incorporating a detailed transition plan. The PET process shall include student, to the extent possible, considering the student's age, disabilities and the preferences of the student's parents. The new IEP shall be completed by 2/15/00.
2. Upon receipt of appropriate documentation from the parents, the District shall reimburse them for the following expenses for student's attendance at the Aucocisco School during the 1998-1999 school year: tuition, mileage and tolls, occupational therapy, speech and language services, and consulting fees for Dr. Grumpelt and Ms. Melnick.
- 3.. The District shall reimburse the parents for these same categories of expenses to the extent monies have been expended for the 1999-2000 school year. The District shall pay the balance of tuition for the 1999-2000 school year, as well as reimbursing the family for mileage and tolls. Expenses for occupational therapy and speech and language therapy shall be paid by the district up to the date upon which student is able to begin working with either, or both, the Middle School's occupational therapist and speech and language provider.
4. Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator.

Lynne A. Williams, Ph.D., J.D.
Hearing Officer

Date