

**STATE OF MAINE**

**SPECIAL EDUCATION DUE PROCESS HEARING**

September 13, 2002

Case # 02.216, *M.S.A.D. 57 v. Parent*

REPRESENTING THE FAMILY : Richard L. O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

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

The hearing was requested by M.S.A.D. 57, on July 3, 2002. The case involves Student, whose date of birth is xx/xx/xxxx. He resides with his parents and sibling in Maine. Student is diagnosed as having significant speech and language deficits, dyspraxia and ADHD. He attended the Learning Skills Academy in Rye, New Hampshire, for six years, having been placed there by M.S.A.D. 57. Subsequent to completing eighth grade at the Learning Skills Academy, Student's parents unilaterally registered him at Riverview School, a residential special purpose school for children with severe language deficits, which he was to begin attending in September 2002.

The District is asking this hearing officer to uphold the appropriateness of Student's I.E.P., developed at a May 10, 2002 P.E.T. meeting. That I.E.P. contains 25 goals, with a program of special education services and supports, to be delivered in a placement at Massabesic High School.

While not disagreeing with the substance of the academic program outlined in student's May 10, 2002 I.E.P., the family contends that the program outlined in student's I.E.P. cannot be successfully delivered at Massabesic High School. Furthermore, they argue that the I.E.P. inadequately addresses the issue of student's need to acquire pragmatic language skills. The family also alleges procedural violations of the I.D.E.A. in the development of the I.E.P. They are requesting reimbursement for deposits and tuition payments already made to Riverview School, a private placement, and for continuing tuition payments to Riverview School.

## Statement of Facts

1. Student's date of birth is xx/xx/xxxx and he is currently xx years old. (Exhibit: Due Process Request)
2. In 1992, Student began receiving services from Child Development Services, due to speech and language delays and motor planning issues. (Exhibit: S261)
3. In 1994, George Storm, M.D., diagnosed student with ADHD and placed him on medication. Since that time, student has taken various medications for this condition. (Testimony: Mother; Exhibit: S261)
4. Student attended kindergarten through 2nd grade in the Waterboro elementary schools in M.S.A.D. 57. (Testimony: Mother, D. Smith)
5. Following a psycholinguistic evaluation by Dr. Richard Kemper, dated April 1996, Student was placed by M.S.A.D 57 in the Learning Skills Academy (L.S.A.), a private school for student's[sic] with language-based learning disabilities, located in Rye, New Hampshire. Student has been attending year-round since late spring 1996. L.S.A. has 35 students with a staff of 20, and goes from 4th grade through 10th grade. (Testimony: Mother, D. Smith, A. MacMahon; Exhibits: S487-570, S580-582, S613)
6. Student's language disability affects all of his academic areas as well as the full range of his social interactions. (Testimony: Dr. Kemper, A. MacMahon, Mother; Exhibits: S21-22, S71-74)
7. Student's program at L.S.A. included extensive academic tutorial and small group work, as well as participation in Adventure Lore, a program, run by a psychologist, Dr. Jason Holder. Adventure Lore has a very significant counseling piece and all staff have counseling backgrounds. The goal of the program is to assist students in getting beyond their fears by facilitating their supported participation in physical outdoor activities, such as kayaking and rock climbing. The L.S.A. Adventure Lore program is given once a week, on Fridays. (Testimony: A. MacMahon)
8. In an October 28, 1998 P.E.T. meeting, the team discussed transitioning student back to public school and the minutes state that "Everyone involved will have to give serious consideration to whether or not [Student] is making enough progress to make a solid transition to the middle school program next year." (Exhibit: S289)
9. The minutes of Student's June 24, 1999 P.E.T. meeting states "He doesn't fit into the regular program at L.S.A. There was some discussion about future placement. The team agreed to begin discussing his placement for 2000-2001 at his 1999 fall conference." However, there is no indication that this was done. Likewise, the Parent Conference form, dated January 26, 2002, makes no mention of placement, nor does the Parent Conference form dated November 1, 2000. Student's placement for the 2000-2001 remained L.S.A. (Exhibits: S223-224, S200-201, S153, S164)
10. During the period of Student's attendance at L.S.A., Denise Smith, formerly M.S.A.D. 57 Director of Special Education<sup>1</sup>, was remembered as repeatedly stating the [sic] there were no peers for student in M.S.A.D. 57. (Testimony: Mother)
11. Student's graded 2001-2002 I.E.P. showed some movement in spelling, but regression in math, with some marginal progress towards his very limited goals.

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<sup>1</sup> Ms. Smith is no longer the Director of Special Education at M.S.A.D. 57, but held that position for the entire time that Student was placed at L.S.A.

(Exhibits: S121-139)

12. During the fall and winter of 2001 - 2002, Laurel Richards, a special education teacher at Massabesic High School, visited L.S.A. numerous times. Her purpose in visiting was twofold: first, to complete observations and some academic evaluations of Student; and, second, to observe and learn about the L.S.A. program being delivered to Student. (Testimony: L. Richards)
13. On January 14, 2002, Dr. Robert Kemper, a psycholinguistic evaluator who had previously evaluated Student in 1996, conducted a psycholinguistic evaluation of student. In his report, Dr. Kemper noted that Student scored below average to poor in all areas of testing, and manifests dyslexia “in its most severe range.” Dr. Kemper further states that “contributing to and exacerbating [Student’s] dyslexia, is a specific language impairment, which has interfered with his ability to process and express both oral and written information.” He further notes that this combination of disabilities “manifests itself in difficulties with sociocommunicative functioning.” He placed Student in the top 5% to 10% of the disabled population that he has evaluated, i.e. with one of the most significant language-based disabilities. Dr. Kemper further stated that Student’s educational setting should emphasize social communication as part of the overall program, and be housed in a quiet atmosphere. (Testimony: Dr. Kemper; Exhibits: S76-85)
14. According to Kemper, Student has made progress over the last six years at L.S.A., especially in the area of reading, but that it is important at this time to continue to “increase basic literary and language skills, while at the same time learning to use language more effectively in social and vocational contexts.” He recommended a multi-sensory, structured language program “within the context of a substantially separate school that is devoted to addressing the needs of children who have significant language impairments.” Kemper further states that the educational setting should have a maximum 8:1 student:teacher ratio, with all teachers trained in the multi-sensory approach. (Testimony: Dr. Kemper; Exhibits: S76, 85, 87)
15. On January 31, 2002, Dr. Laura Slap-Shelton conducted a neuropsychological evaluation of student. The tests administered included the Wechsler Intelligence Scale for Children-III (WISC III), the Comprehensive Test of Nonverbal Intelligence (CTONI), the Woodcock Johnson-III Tests of Achievement, a series of neuropsychological tests, and a series of Personality and Behavior Tests. Dr. Slap-Shelton also conducted interviews with the parents. (Exhibits: S95-110)
16. Dr. Slap-Shelton’s WISC-III testing produced a Verbal IQ score of 61, a Performance IQ score of 58 and a Full Scale IQ score of 61. Student’s Verbal Comprehension score was 64, Perceptual Organization was 70, Freedom from Distractibility was 50, and Processing Speed was 54. Student’s subtest scores indicated significant scatter, ranging from 1 on Information, Arithmetic, Coding, Digit Span and Picture Arrangement to 9 on Object Assembly and 6 on Picture Completion and Similarities. (Exhibits: S96)
17. Student’s scores on the CTONI, the nonverbal cognitive test, were significantly higher, with a Nonverbal Intelligence Quotient of 77, a Pictorial Nonverbal Intelligence Quotient of 79 and a Geometric Nonverbal Intelligence Quotient of 79. Again, there was significant scatter among subtests, ranging from 3 in Geometric Analogies to 9 in Pictorial Categories and Geometric Categories. (Exhibits: S98)

18. Dr. Slap-Shelton noted that Student's Nonverbal Intelligence Scores, significantly higher than his WISC scores, but closer to his WISC Perceptual Organization score of 70, are a more accurate representation of student's cognitive level. Denise Smith and Dr. Kemper agreed with this conclusion. (Testimony: D. Smith, Dr. Kemper; Exhibits: S98-102)
19. Dr. Slap-Shelton also administered a Woodcock-Johnson III Test of Achievement (WJR-III), and Student's scores were very low, with percentile ranks ranging from less than the 1st percentile to the 5th percentile. Both reading and math skills are very weak and are all at the first or second grade level. (Exhibits: S102-103, S111-112)
20. Behavior ratings by parents and teachers showed behavioral symptoms of inattentiveness and hyperactivity with a weakness in sociocommunicative skills. Student was thought to be at risk for social isolation despite social skills ratings of average to above average. However, Slap-Shelton and others have opined that Student is emotionally intact and agreed that he exhibits no behavior problems either at school or while at home. He is very excited about learning and exhibits neither depression nor anxiety. (Testimony: Parents, A. MacMahon, R. Kemper; Exhibits: S105-106)
21. Dr. Slap-Shelton's neurological testing produced findings that "were significant for the presence of diffuse, by history, chronic, mild to severe brain dysfunction, affecting several neurocognitive areas. These include fine motor speed, visual motor integration, integration of cortical processing across cortical hemispheres, working memory, visual and verbal memory, auditory attention, auditory processing, and executive functions. However, [Student] was able to do some higher level thinking in terms of categorical and sequential analysis." (Exhibit: S106)
22. Dr. Slap-Shelton's academic recommendations include placement in an alternative academic setting, with a multi-sensory, language-based, highly structured, academic program that also provides 1:1 learning opportunities, intensive reading tutorials with the systems [Student] has been working with, and an intensive social communications component. She further recommended a daily social skills group that will emphasize and teach appropriate verbal communication strategies, social pragmatics, and interpersonal interaction skills. In addition, it was recommended that Student have social opportunities built into his academic program, opportunities to view and discuss social interactions, to role play and to view himself on video. (Exhibits: S108-109)
23. A Kaufman Test of Education Achievement (K.T.E.A.) completed by Laurel Richards, a special education teacher at M.S.A.D. 57, on April 10, 2002, noted that Student was "extremely low in all categories," with percentile ranks ranging from less than the 1st percentile to the 3rd percentile. A previous K.T.E.A., administered in spring 2001, showed similarly low scores, again with a the same range of percentile ranks. (Exhibits: S123, S189)
24. Despite his rather good social skills, Student's difficulties with pragmatic language severely limit his social interaction with peers and to date have prevented the formation of friendships and social relationships with peers. He does, however, interact well with those adults who are patient and understanding of the nature of his language-based disability. (Testimony: Mother, A. MacMahon, Dr. Kemper)

25. In early May 2002, the family, along with Ari MacMahon, visited Riverview School in Sandwich, Massachusetts. On this visit they observed class sessions and met with school administrators and teachers. They also viewed the dormitories. Following this visit, Student remained on campus for a three day visit. During May, the family's advocate, Debralee Hovey, also visited Riverview School. (Testimony: Mother, Father, A. MacMahon, D. Hovey)
26. Riverview School is a residential, special purpose school in Sandwich, Massachusetts, that is licensed by that state. The school admits students with cognitive scores between 70 and 100, who have severe language-based disorders. All teachers at Riverview are masters level teachers, and all coaches, house parents and after-school activities teachers attend a seven day training on language-based disabilities, followed up by ongoing in-service trainings. While at Riverview, Student would be in a group of about 25 9th graders, with 4 teachers. The group would be further divided according to specific needs and abilities and student would receive his academic instruction in a small group with students at about the same ability level. (Testimony: Mother, D. Hovey)
27. Dr. Kemper strongly supports Riverview School as the best placement for student. In his testimony and in his report, Dr. Kemper is clear that he believes that Student's pragmatic language skills are so delayed that it is only a residential placement, specializing in teaching students with language-based disorders, that can provide the holistic atmosphere and environment that student will need to develop adequate pragmatic language. A "sociocommunicative environment" is what Dr. Kemper terms this setting. (Testimony: Dr. Kemper)
28. A P.E.T. meeting was held on May 10, 2002. At this meeting, reports from Dr. Slap-Shelton, Dr. Kemper (both of whom had to leave prior to the end of this five hour meeting), Ari MacMahon and staff from M.S.A.D. 57 were discussed. Dr. Slap-Shelton's and Dr. Kemper's recommendations were as described above. Ms. MacMahon recommended that student be placed in a quiet setting, with ongoing structure, constant cueing and with minimal audio or visual distractions. Proposals for goals and objectives developed by Ms. Hovey were also fully discussed and considered. At this meeting, the team developed a comprehensive I.E.P with 25 goals and objectives in the areas of reading, spelling, comprehension, vocabulary, higher order thinking, writing mechanics, editing, calculation, applications, social studies, science, study skills, organizational skills, articulation, expressive and receptive language, pragmatic language, social/emotional functioning, experiential learning, life skills, written language, computer skills and fine and gross motor skills. (Testimony: D. Smith, Dr. Kemper, A. MacMahon, Mother, D. Hovey, L. Richards; Exhibits: S24-48, P64-84)
29. The Language-Based Learning (L.B.L.) program proposed by M.S.A.D. #57, according to testimony and to a brochure prepared by the district, will be housed in a self-contained portable classroom on the grounds of Massabesic High School. This program is designed for students with severe language-based disabilities, and includes small group and individualized tutoring in reading and math, and instruction in science and social studies, during alternating semesters. Student is also scheduled to receive technology instruction, which will become life skills in the second semester. According to Student's IEP, he will receive 5.15 hours per day of direct instruction by

a special education teacher<sup>2</sup> covering these core areas, and that instruction will be either individual tutoring or instruction with the other students in the program. According to his IEP, Student will also receive 90 minutes a week of speech/language therapy, 60 minutes per week of occupational therapy, 90 minutes per week of social work services and 4 hours per week of an experiential learning program. According to testimony, there will also be a once a week group, facilitated by the speech therapist, the social worker and the educational technician, that will focus on pragmatic speech. Following morning academics, the other seven students will leave the portable classroom in order to attend either mainstream classes or life skills classes. Therefore, except for a few non-program students who may attend the technology group, and during the time of the pragmatic language group, student will be essentially alone every lunch period and afternoon. The special education teacher will be Laurel Richards, who has extensive experience in the Orton-Gillingham methodology and who has also taught within language-based learning programs. It is unclear how much math, science and social studies teaching experience she has. Study hall, technology and the experiential learning program will be provided by Brya Parks, an Educational Technician III with a college degree in recreation. (Testimony: D. Smith, L. Richards; Exhibits: S647)

30. The L.B.L. program also includes an experiential learning component, that will be delivered twice a week, after school hours. This program will be designed by Laurel Richards and the social worker at the Y.M.C.A., but will be delivered by the educational technician and an, as yet unidentified, employee of the Y.M.C.A. The program appears sketchy at present, but will apparently consist of skills training, periodic day trips and a service learning component. Since this program is after school hours, it is not mandatory, and it is unclear how many other students, if any, will be part of the program. (Testimony: L. Richards)
31. The district's goal in developing the L.B.L. program was to mirror the L.S.A. program being delivered to student as closely as possible. (Testimony: D. Smith, L. Richards)
32. When the concept of the L.B.L. program placement was presented to the parents, they requested specific information about it, including curriculum, outlines, lesson plans, schedules and other information. However, no information was available at that time, nor was it available at any time prior to the hearing. In addition, the family was informed that the program would be presented during the 2002 summer session to a small group of students. However, when Mother attempted to visit and observe she was informed that the L.B.L. program was not being delivered during the summer session. (Testimony: Mother)
33. In June 2002, Student completed eighth grade at L.S.A. Although L.S.A. continues

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<sup>2</sup> Although, according to testimony, student may receive less hours per day of direct instruction by a special education teacher, with some of the services being delivered by an Educational Technician III. (Testimony: L. Richards, D. Smith; Exhibit: S647)

past eighth grade, it was determined by staff at L.S.A. that the curriculum and workload of the L.S.A. High School (grades 9 and 10) program would not be appropriate for him. They also felt that he needed “exposure to more appropriate social opportunities as well as life skills training.” (Testimony: Mother, D. Smith, A. MacMahon; Exhibit: P-85)

34. There is no disagreement that student made slow, but measurable, progress while at L.S.A. Dr. Kemper has stated that student’s progress is astounding given the severity of his disabilities. (Testimony: A. MacMahon, Dr. Kemper, Mother; Exhibits: S113-119, S144-145, S148-152, S154-158, S160-163, S195-199, S203-209)
35. Student was accepted at Riverview School, and in late May 2002 the family forwarded a deposit of \$5500.00 to Riverview School to hold Student’s place. An additional payment was forwarded to Riverview in July 2002 and a third payment in August 2002. To date, the family has paid Riverview \$44,100. (Testimony: Mother, Father; Exhibit: P0008)
36. The family believes that Student’s I.E.P. cannot be fully implemented at Massabesic High School. They are also concerned that Student’s need to develop pragmatic language skills is not adequately addressed in that I.E.P. Likewise, Student’s current teacher, Ari MacMahon, and Student’s psycholinguistic evaluator, Dr. Robert Kemper, express concerns that the Massabesic High School program is inappropriate for student, although Dr. Kemper admitted that the academic portion of the program “has merit.” (Testimony: Mother, Dr. Kemper, A. MacMahon)

#### **Issues to Be Decided at Hearing**

- Did M.S.A.D. 57 commit procedural violations of the I.D.E.A. in the development of student’s 2002-2003 IEP?
- Is the 2002-2003 IEP, developed at a P.E.T. meeting on May 10, 2002, reasonably calculated to provide student with educational benefit in the least restrictive educational environment?
- If the program outlined in the 2002-2003 I.E.P. is appropriate, can it be fully and effectively delivered at Massabesic High School?
- If not, is the Riverview School an appropriate placement?
- If the Riverview School is an appropriate placement, is tuition reimbursement the appropriate remedy?

#### **Procedural Matters**

Both parties expressed, on the record, disagreement with the conceptualization of the

issues, as indicated by the wording, but this hearing officer concluded that the above wording most fully expressed the concerns as expressed by the parties.

Prior to the start of the hearing, but after opening the record, both parties objected to the submission of various documents into evidence. The parties' arguments for and against exclusion were heard and decisions were made regarding each document.

## **Discussion**

The I.D.E.A., in 20 U.S.C. §1412(a)(1), and the Supreme Court, in *Hendrik Hudson Central School District v. Rowley*, 459 U.S. 176, 185-186 (1982), established a two prong standard for determining whether a local school unit is offering an appropriate program for a student. The first is procedural and the second is substantive. First, has the school complied with the procedures set forth in the act? Second, is the individualized education program reasonably calculated to enable the student to receive educational benefit? The family alleges both procedural and substantive violations of the I.D.E.A.

### **Did M.S.A.D. 57 commit procedural violations of the I.D.E.A. in the development of Student's 2002-2003 IEP?**

The family alleges that M.S.A.D. 57 pre-determined a placement for Student, prior to the development of the May 10, 2002 I.E.P., while placement decisions should be made only after decisions about the student's needs and the services necessary to meet those needs. 64 Fed. Reg. 12406, 12473 (March 12, 1999) (App. A, Question 9).

Although there is evidence of P.E.T. members' disagreement over placement, there is no evidence that the school district pre-determined Student's placement. Disagreement between parents and school personnel, and a belief by district personnel that their proposed placement and program is appropriate, does not warrant a conclusion that the placement was pre-determined. As noted in a recent Maine hearing officer decision, it is not unusual, much less wrong, for parties to come to P.E.T. meetings with strongly held opinions. ("Disagreement with the parent's preference by the school does not equate with pre-determination of placement.") *Portland Public Schools*, 102 LRP 18986 (ME SEA May 23, 2002).

In this case, there was open and lengthy discussion at the May 10, 2002 P.E.T. meeting, about Student's significant needs and how best to meet those needs. The parents and three of the parent's professional experts attended all or part of that meeting, and each expert submitted written evaluation reports, with extensive recommendations, which district personnel had reviewed prior to the meeting. The team worked off a set of draft goals and objectives, prepared by Ms. Hovey, and she had extensive input into the reformulation of these goals and objectives, as did Ms. MacMahon, Student's L.S.A. tutor.

There is no disagreement about the academic portion of the I.E.P., including the goals and objectives, and Dr. Kemper agrees that the academic portion has merit. The fact that



the school district believes it can deliver a program, at Massabesic High School, that is reasonably calculated to result in educational progress for student is not an indication *per se* that Student's Massabesic High School placement was pre-determined. Since there is no additional evidence that the placement was pre-determined I hold that there was no procedural violation of the I.D.E.A. by M.S.A.D. 57.

**Is the 2002-2003 IEP, developed at a P.E.T. meeting on May 10, 2002, reasonably calculated to provide student with educational benefit in the least restrictive educational environment?**

**If the program outlined in the 2002-2003 I.E.P. is appropriate, can it be fully and effectively delivered at Massabesic High School?**

These issues relate to the substantive prong of *Rowley*, whether Student's I.E.P delivers special education and related services that are reasonably calculated to provide Student with educational benefit in the least restrictive environment. *Rowley* at 200, 203, 207; *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). The law and precedent emphasize "appropriate", which doesn't mean "best" or "optimal." Rather, the student must reap some measurable educational benefit, make some measurable educational progress.

In order to evaluate Student's program and placement under this standard, we must look not only to whether the program and placement is appropriate, but why it may not be and what might be done to change it. It is true that for at least two years, if not more, the L.S.A. staff had been of the opinion that its program was no longer suitable for Student. And some mention was made during at least one P.E.T. meeting of transitioning Student back to public school. However, there is no indication that anything concrete was ever done to even evaluate whether such a transition might be appropriate. Student just continued attending L.S.A. until such time as the director of that school made it clear that their program was no longer appropriate for Student. It appears that at that time M.S.A.D. 57 made the decision to design a program that could educate Student within the public school setting.

However, if Student is now able to be educated within the public school setting, as M.S.A.D. 57 contends, why was that not a possibility two years ago, or one year ago? Clearly, the district never tried very hard to transition student back. They never attempted to design an appropriate program that could be delivered within the public setting. Denise Smith commented several times throughout the years that there were no appropriate peers for student within the district. How is Student different now, where have the proposed peers been all these years, and why didn't M.S.A.D. 57 develop a Language-Based Learning program years ago for these seven or eight students who would benefit from it, according to the district?

These are rhetorical questions that do not need an answer in the context of this decision. Rather, the question that must be answered is whether the program and placement

proposed in Student's current I.E.P. is reasonably calculated to afford him educational progress of the type that addresses his special and unique needs. I conclude that it is not.

The reservations about this program center around three areas: staffing, the peer group and the experiential learning program. According to the district, Student's morning classes in reading, writing, math and social studies/science would be taught by Laurel Richards, a special education teacher with some experience in language-based learning and with significant experience in Orton-Gillingham and similar methodologies. Ms. Richards would likewise deliver Student's reading and math tutorials, one in the morning and one in the afternoon. Study Hall and Technology would, however, be offered by Brya Parks, an Educational Technician III. Ms. Parks has a college degree in recreation. As of the last day of hearing, August 16, 2002, she had not yet received any training for this position. Ms. Richards stated that she would train Ms. Parks "next week." There was no discussion offered about the length of training, type of training, or ongoing, in-service training that Ms. Parks would receive.

One of the most troubling aspects of the Educational Technician's role in Student's program is the fact that she, rather than Ms. Richards, would participate in the pragmatic language skills group and would be responsible for insuring that the skills being taught in the group are practiced and reinforced throughout Student's day. Pragmatic language skills training is, by far, the most important aspect of Students L.B.L. program. The professionals that have major roles in the teaching of pragmatic language skills to student should certainly have more training, and more experience utilizing that training, than Ms. Parks. In addition, it is Ms. Parks who would be Student's full-day teacher if Ms. Richards is absent, since there are no appropriately qualified special education teachers who would be prepared to fill in for Ms. Richards.

The district, however, argues that Student's program would still be appropriate even if he fails to meet his social skills goals, comprising 14% of his total goals. But social skills training, or rather pragmatic language skills training, is more than just 14% of Student's overall goals and objectives. We are not, in actuality, talking about social skills in the sense of making friends or developing a social life. Rather, we are talking about the acquisition of pragmatic language, and the improvement of Student's pragmatic language skills to the level that he would be able to eventually be an independent and productive member of society, living independently and supporting himself financially. Even if he were to meet his math and reading goals, his OT goals, and his other academic goals, how far along would that place student towards independence if he was bereft of the ability to communicate with others?

The proposed L.B.L. program peer group is also an issue. The composition of the peer group is a concern, although less of a concern than that expressed by the family. All of the students in the program apparently have some level of serious language deficits and supposedly have academic needs similar to those of Student. The age of the peers is a concern, however, since there is only one other 9th grader, two 10th graders, with the other four students in either the 11th or 12th grade.

The main concern, though, centers around the fact that these other students will only be with Student for the morning. They will leave for lunch in the cafeteria and will then attend either mainstream classes or the life skills class. A different student or students will most likely join Student for study hall and possibly for technology class, but this is also problematic, given Student's need for a consistent peer group with which to generalize his language skills. And, most troubling, is the fact that student will most likely eat lunch alone for many, if not most, days. The district states that they will "make sure" that student has other students with him during these times. However, student should not have to depend on the persuasiveness of school personnel and the kindness of the other students to ensure that he has a full-time peer group, present all day, every day.

Lastly, the after-school experiential learning program is really just a pale imitation of the L.S.A. Adventure Lore program. Adventure Lore is directed by a licensed psychologist, is a long-running program with demonstrated results and is not a recreation program, but rather an Outward Bound-type program, designed to support the students while they strive to push themselves beyond perceived limits. The program proposed by the district appears to have nothing of this substance. However, since there is no written material about the experiential learning program, its curriculum, schedule or staff, it is difficult to tell exactly what the program will consist of, or what it purports to help student achieve. An additional problem with this program is that its after school schedule makes it voluntary. The school district was unable to guarantee that there would be any other students involved with the program, so Student might well be the only participant in this experiential learning program. The district points out that Riverview does not even offer a program of this type. However, Riverview offers students a host of after school activities, sports and other types of groups, and it is very likely that all activities will have multiple students participating.

In summary, an overall analysis of the L.B.L. program as currently proposed by the district indicates that it is deficient in its staffing and program elements, and fails to provide student with ongoing opportunities for interaction with an appropriate peer group.

### **If not, is the Riverview School an appropriate placement?**

Although, as discussed below, there are problems with the Riverview School placement, there is no doubt that it meets the academic and language needs of student. This placement offers fully trained staff with extensive experience in the delivery of language-based methodologies. Student will have an [sic]homogenous peer group, with which he can practice and generalize his developing pragmatic language skills. He will have music, art and other "specials" as well as physical education classes. And the after school program will offer student the opportunity to engage in sports, arts or other activities of interest to him, along with his fellow students.

The school district argues that under First Circuit precedent, as well as under the IDEA and federal regulations, students must be educated in the least restrictive placement,

preferably where they would attend school were it not for their disability. 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. §300.550(b)(2); *Roland M.*, 910 F.2d at 992-993. They further argue that this should undermine the appropriateness of the Riverview School placement. Least restrictive alternatives, however, do not need to be addressed in this case since there is no range of educational alternatives being presented. Although there is concern about the restrictiveness of the Riverview placement, at the present time that is the only placement that has been identified that is able to provide a free appropriate public education to student.

**If the Riverview School is an appropriate placement, is tuition reimbursement the appropriate remedy?**

The task now becomes fashioning an appropriate remedy for the family. They seek reimbursement of the amounts paid to the Riverview School thus far, under the *Burlington/Carter* precedents. *Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993). The amount paid to Riverview now totals \$42,100.00, plus transportation and other ancillary costs. Riverview School's annual tuition is \$54,200.00.

Tuition reimbursement is an equitable remedy, (20 U.S.C. 1415 (e)(2); *Burlington*, 471 U.S. at 374, 105 S.Ct. 1996) and, as such, is not an "all-or-nothing" award. As the United States Supreme Court stated in *Carter*, even if a parent is entitled to reimbursement for private school placement, due to an inappropriate public placement, "total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable." *Carter* at 514. Although *Carter* referred to courts having the authority to make such determinations, OSEP has clarified that this authority extends to the equitable remedial responsibilities of hearing and review officers. *See, e.g.*, 64 Fed. Reg. 12,602 (Mar. 12, 1999).

There are serious concerns about Riverview's annual tuition cost, which appears to be far in excess of the tuition charged by similar residential special purpose schools in Massachusetts. Perhaps this is not the case; unfortunately, there is no way of knowing. Nor is there any way of understanding just what it is that Riverview does to warrant the higher tuition, since the school refused to send a representative to the due process hearing, or to present testimony by telephone. It is true that Ms. Hovey conveyed some programming questions to officials at Riverview, and then testified as to their responses. Although evidentiary procedure in due process hearings is more relaxed than in court proceedings, and Maine's administrative code does not contain a prohibition against hearsay evidence, the code does state "evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." Title 5, MRSA, Part 18, Chapter 375, Subchapter 4, §9057. There are limits to the reliability and believability of testimony that is based on hearsay and double hearsay and unfortunately that is the nature of much of the testimony about Riverview School. Therefore, in the absence of any contrary, reliable testimony, it is concluded that the Riverview School tuition is unreasonable.

In a 1999 decision, the Fourth Circuit Court of Appeals affirmed a U.S. District Court decision holding that a district did not have to pay for a student's unilateral residential placement in a private school, since the parents failed to show that the cost of the placement was reasonable. *DeLullo v. Jefferson County Board of Education*, 194 F.3d 1304. Likewise, a recent Pennsylvania state review decision used the same "reasonable-cost" analysis to award reimbursement of private educational costs but not the cost of the residential component at a private school. The review officer stated "at the final step of the *Burlington-Carter* analysis, the [School] entails costly unnecessary trappings, such as a 'residential' component, that are notably inequitable." In refusing to award tuition costs for the private residential placement, he stated "On balance, as an equitable matter...we conclude that reimbursement of the instructional component of the 2000-01 [School] program amply suffices in this case....This careful equitable allocation, rather than a simplistic 'all-or-nothing' approach, is supported by decisions both before and after the *Carter* confirmation of the reasonable-cost consideration." *West Shore School District*, 34 IDELR (PA SEA March 7, 2001).

The family is therefore awarded reimbursement of the costs of the instructional component of the Riverview program, but not the costs of the residential component. Since it is likely that the final payment, due on November 15, 2002, will be paid prior to the district's development of a redesigned program for student, the tuition award will cover the entire instructional cost for the 2002-2003 school year.

Given the unresolved questions about the reasonableness of Riverview's tuition, and despite the inadequacies of the district's L.B.L. program, there is evidence that student could receive an appropriate education within the public setting, although with significant changes in some aspects of the program. These changes would include the following: the addition of a second fully qualified and trained teacher to the program, to provide the elements of the program that would currently be provided by the Educational Technician; a reformulation of the group of students who would receive services within the L.B.L. program, so that there would be students present in the non-academic portions of the program, such as lunch time; inclusion of more age appropriate peers within the L.B.L. program; a consideration of the possibilities for including student in some outdoor activity program that would give him the opportunities and support that he received in Adventure Lore;<sup>3</sup> and, most importantly, the development of a curriculum, schedule, and set of lesson plans that could be presented to any family, not just the one in this case, whose child is being considered for inclusion in the L.B.L. program.

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<sup>3</sup> The district may want to consider contacting L.S.A. to discuss the possibility of student attending the Friday Adventure Lore program at L.S.A. if he were to return to M.S.A.D. 57. His participation in this program would address some of the deficits in the L.B.L. program as designed, such as the lack of physical education and a weak experiential learning program. And, although no longer attending L.S.A., student would probably be familiar with most of the other students in the Friday program.

## Order

1. The family shall request that Riverview School apportion that part of its 2002-2003 tuition that is attributable to educational, as opposed to residential, costs. Upon receipt of this revised figure, M.S.A.D. 57 shall reimburse the family for that amount.
2. M.S.A.D. 57 shall reimburse the family for reasonable transportation costs, to include six round trips to Riverview.
3. M.S.A.D. shall call a P.E.T. meeting by October 15, 2002, in order to begin discussing the reformulation of the L.B.L. program. Dr. Kemper, Ms. MacMahon and possibly Dr. Slap-Shelton shall be invited to this meeting. The P.E.T. shall address and eliminate the deficits in the L.B.L. program by March 1, 2003. At that time, or earlier if the task has been completed, a P.E.T. meeting shall be held, at which time the newly formulated L.B.L. program shall be presented to the family.
4. During the process of revising the elements of the L.B.L. program, one or more M.S.A.D. 57 personnel shall visit Riverview School and observe student in that setting. Such observation information shall be reported to the P.E.T. and utilized in the redesign of the L.B.L. program
5. Proof of compliance with this order shall be submitted to the hearing officer as well as to the Due Process Coordinator.

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

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Date

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S200-201 Parent/Teacher conference report, dated January 26, 2000

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S324 Letter from Ms. Smith to Parents, dated August 28, 1998

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S333 Memo to all parents from Learning Skills Academy, dated August 10, 1998

S334 Grade report for 1997-1998

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S341 Letter from Learning Skills Academy to Denise Smith, dated ` March 31, 1998

S342 Letter from Learning Skills Academy to all parents and District, dated March 12, 1998

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S572 Letter from Parent to Leigh Phillips, dated July 22, 1996

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S583 Agenda for meeting of June 10, 1996

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S585 Letter from Ms. Smith to Parents, dated June 3, 1996

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S602 Letter from Parent to Ms. Phillips, dated May 27, 1996

S603 Letter from Ms. Smith to Parents, dated May 24, 1996

S604-605 Letter from Parent to Ms. Smith, dated April 26, 1996

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#### **District's Witness List**

Denise Smith, Former Director of Special Services, M.S.A.D. 57

Jim Foley, Ph.D., School Psychologist

Laurel Richards, Special Education Teacher

Shelley Morse, School Social Worker

Donna Smith, Speech and Language Therapist

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P6	(Excluded)
P7-10	Letter from Jeanne Pacheco, Director of Admissions and Placement at Riverview School, to Parents, with attached Enrollment Agreement, dated July 10, 2002
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- P64-84 EDCEL: Draft materials for 2002-2003 I.E.P.
- P85 Letter from Jane Berg of Learning Skills Academy to Parents, dated April 22, 2002
- P86-98 (Excluded)
- P99-100 General Information materials for Riverview School, dated September 2001
- P101-113 Psycholinguistic Evaluation Report by Robert L. Kemper, Ph.D., dated May 13, 1997

**Family's Witness List**

Mother

Father

Dr. Robert Kemper, Psycholinguistic Evaluator

Ari Nathans MacMahon, Teacher, Learning Skills Academy

Debralee Hovey, Educational Consultant