

State of Maine
Special Education Due Process Hearing Decision

Parent v. MSAD #22, Case No. 02.289

REPRESENTING THE SCHOOL: Amy Tchao, Esq.
Drummond Woodsum & MacMahon

REPRESENTING THE PARENT: Parent appeared *pro se*

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, §207-B et seq., and 20 USC §1415 et seq., and accompanying regulations.

The parents, residents of Maine School Administrative District #22, bring this case on behalf of their son, whose date of birth is xx/xx/xxxx. The student is eligible for special education services under the category of Other Health Impaired. He currently is not attending school, having been removed by his parents under a doctor's order in early October 2002. The parents seek resolution to determine the appropriateness of the student's IEP and placement, and to obtain reimbursement for educational services provided by them. They also seek an Independent Educational Evaluation at public expense¹.

The parties met on Monday, October 28, 2002 for a prehearing conference in preparation for the hearing. The hearing convened on November 4, November 13, and November 18. The parents introduced 27 documents into the hearing record²; the school introduced 383 documents into the record. The school appended the student's daily log notes for the period December 12, 2001 through October 9, 2002. Ten witnesses gave testimony.

Following is the decision in this matter.

¹ The school objected to the inclusion of the IEE as an issue for this hearing. The parents had not requested an IEE previous to the prehearing conference in this case. They had not notified the school that they disagreed with an evaluation obtained by the school, nor had the school denied the parents an opportunity to obtain an independent evaluation. The parents were clear that they were asking to have an IEE for the student. The hearing officer, therefore, allowed the issue to become part of this hearing to reduce unnecessary duplication of process.

² On the second day of the hearing the parent requested that work performed by the student with his current tutor be introduced into evidence. The school objected to its admission. The tutor had already testified on the first day of hearing and was not being called back. Since there was no way to cross-examine the witness to determine the circumstances under which the work was performed, it was not admitted by the Hearing Officer.

I. Preliminary Statement

The student is a xx-year-old middle-school student who is eligible for special education services under the category of Other Health Impaired due to diagnoses of Attention Deficit Hyperactivity Disorder, Dysthymia, and Anxiety Disorder NOS. Until the middle of 6th grade he was educated in regular classes with resource support. After several significant behavioral events during the spring of 6th grade, his program changed to a shortened-day program with one-on-one instruction in an isolated setting.

In June 2002 the PET met to plan for the student's placement for 7th grade. There was a lack of consensus so the student began the 2002-2003 school year with the same program as he had ended [sic] 6th grade, one-on-one instruction in an unshared space with no mainstream activities. The parties agree that this is an inappropriate long-term solution to meet the student's needs, but were again unable to reach consensus at the PET in September. The school proposes an IEP that places the student in a self-contained program designed to address the needs of students with behavioral challenges at the Wagner Middle School, one of two middle schools in the district.

The parents disagree with this proposal in favor of a hybrid program consisting of individual instruction with the student's current private tutor, and attendance in selected classes and extracurricular activities at his neighborhood school, Reeds Brook Middle School. Additionally, the parents request the hearing officer to order an Independent Educational Evaluation at public expense. Finally, the parents request reimbursement for the costs they have incurred in providing private individual educational instruction for the student for the period October 4, 2002 to the conclusion of this hearing.

II. Issues

1. Is the student's current IEP, 2002-2003, reasonably calculated to provide him educational benefit in the least restrictive educational environment?
2. Is the placement defined in that IEP – the self-contained program for students with behavioral challenges at Wagner Middle School – required in order for the student to receive a free appropriate, public education?
3. Are the parents entitled to an Independent Educational Evaluation at public expense?
4. Are the parents entitled to reimbursement for the services of the private tutor, provided at their expense since October 4, 2002?

III. Findings of Fact

1. The student was found eligible for special education services in May 1996 as a student with a learning disability. A cognitive evaluation conducted by Christine Fink, Ph.D., a licensed clinical psychologist on contract with the district, found the student scored in the Superior range in tests of verbal abilities (122), and in the Average range in performance tests (91). Visual-motor integration skills were suggestive of delays. A Physical Therapy Evaluation conducted at the same time found fine motor proficiency was below age expectation. Overall skill in the visual motor area was significantly low. He received services from the physical therapist, and received resource room assistance in the areas of fine motor skills and written language. (Exhibit 366, 356, 372, 377, 377, 382; Testimony Parent)
2. A follow-up physical therapy assessment, done in November 1998, showed a 10-month delay in visual motor control as well as difficulty with certain areas of upper limb coordination. The evaluator recommended direct physical therapy services for 30-60 minutes a week. (Exhibit 352)
3. Further cognitive and achievement testing was conducted by the school in January and February 1999 as part of the student's triennial review. Results obtained on tests of cognitive functioning again showed a significant discrepancy between the student's verbal and performance abilities, with a verbal scaled score of 126 and a performance scaled score of 90. Scores on the Woodcock-Johnson achievement battery were consistent with previous results, again with scores ranging from the low average range to the superior range. Reading skills were noted to have improved significantly since the 1997 evaluation. Using the information from this evaluation, the PET again found the student eligible for special education services as a student with a learning disability. (Exhibit 342, 340)
4. In March 1999 Bruce Chemelski, Ph.D., the school's consulting psychologist, conducted an Attention Deficit Hyperactivity Disorder screening. Using the Achenbach Child Behavior Checklist, with the student's mother and two of his teachers as informants, Dr. Chemelski concluded that "[f]indings across raters and settings are indicative of fairly broad based attention related concern." His analysis of teacher data found the student to exhibit "Moderate (96th percentile) to Clinically Significant (98th percentile)" ratings. He further concluded, "in combination with previously documented learning challenges, the above noted attentional difficulties are seen as significantly interfering with [the student's] completion of tasks and/or academic levels. Ratings provided by [the student's] mother, though somewhat less intense...also were reflective of fairly broad based attention related concerns." He went on to

- note that “school-based ratings also demonstrated elevations with respect to oppositionality, argumentativeness, defiance and problems with anger control. [The student] was described as an individual who, once upset, has difficulty getting back under emotional control.” Dr. Chemelski recommended additional formal assessment. (Exhibit 338; Testimony Chemelski)
5. In July and September 1999, at the direction of the PET, Dr. Chemelski conducted a formal assessment “to explore, in a more comprehensive manner, [the attentional as well as behavioral/emotional] aspects of [the student’s] development.” After administering a number of standardized evaluation instruments Dr. Chemelski determined that the student was “experiencing significant levels of challenge with respect to attentional and emotional areas of functioning. From an attentional perspective, the vast majority of current data support attentional deficits of a broad based nature.” He concluded that the results of the assessment “are significant with respect to clinically relevant impressions of [the student’s] attentional and affective/behavioral status... [He] presents as a youngster with an Attention Deficit Hyperactivity Disorder, Combined Type... Emotionally, [he] generally appears to have a positive view of himself, his family and various important aspects of his life. However, he experiences, at a rate that is of clinical concern, frustration and related anger control difficulties that have had a negative impact on certain aspects of his self-esteem and, in particular, his social interactions.” Dr. Chemelski recommended that these findings be shared with the student’s teaching staff and his physician for further planning and intervention on the student’s behalf. He also recommended counseling support to assist the student with his own frustration levels. (Exhibit 329; Testimony Chemelski)
 6. In March 2000 the school obtained a neuropsychological evaluation of the student, again conducted by Christine Fink, Ph.D. Based on the results of this evaluation Dr. Fink concluded that the student’s “subtle pattern of difficulties with attention regulation, impulse and motor control organization/planning and speeds of information processing suggest...neurocognitive difficulties [that] likely help to account for [the student’s] features of ADHD.” She noted in her report that the student exhibited “mild difficulty with auditory attention regulation and speeds of information processing”, “motor functions were generally within normal limits”, “visual-motor precision was quite meticulous, but moderately compromised by fine motor slowing. When compared to the 1999 evaluation, [the student] has made significant gains in his visual-motor integration. However, he continues to exhibit at least mildly impaired performance when a time element is introduced.”

Test results supported previous findings that the student’s “receptive vocabulary [is] superior”, and “fluid reasoning and abstract concept formation were above average.” Tests of memory and learning functions showed

“immediate and delayed recall of more complex visual information were moderately impaired...[losing] many of the finer details”. “[V]erbal and less complex visual memory were average or better.”

Current academic functioning was assessed using the Wechsler Individual Achievement Test (WIAT). His reading and spelling skills were in the high average to superior range, math concept formation was average, math calculations were in the average range, “although he showed more difficulty with computation errors. Written language expression was in the low average range hampered by his difficulties with organization, fine motor skills, and processing speeds.”

Results of teacher and parent behavior rating scales indicated the student was “exhibiting at least mild features of depression”. The evaluator also noted that “attentional and behavioral difficulties at school are likely exacerbated by the performance demands, discrepancies in his abilities and high expectations he sets for himself. In the structured office setting, his ability to regulate his impulse control and activity level was at an average level.” “While he kept his behavior under check in the novel office setting, there was a general sense that he would have been less controlled in a more familiar setting.” The evaluator’s conclusions and recommendations were shared with the PET in June 2000. (Exhibit 299)

7. The student attended regular classes through fourth grade, with some individual instruction in the resource room. Grades were mostly A’s and B’s in all subjects, except writing/language where he continued to have problems with written expression. (Exhibit 295, 301; Testimony Parent)
8. The PET met in June 2000, at the conclusion of the student’s fourth grade year, to review Dr. Fink’s neuropsychological report and revise the IEP. The team recommended an occupational therapy assessment to focus on sensory needs. The team agreed to meet at the beginning of the 2000-2001 school year to finalize the fifth grade program. (Exhibit 291)
9. The PET convened in late September 2000. The student’s teachers reported that he had made a good transition to fifth grade. He was doing well in his regular classes. In-classroom behaviors and interactions with peers was [sic] generally appropriate. Minor modifications were made to the IEP, including monitoring of his classroom behavior by the resource room teacher. (Exhibit 285)
10. An occupational therapy evaluation was completed in October 2000. The evaluation consisted of subtests of the Bruninks-Oseretsky Test of Motor Proficiency, the Evaluation Tool of Children’s Handwriting, The Sensory Profile Caregiver Questionnaire completed by the student’s mother, and clinical observations. Test results showed that the student was

- “demonstrating above average visual-motor abilities” and that “[h]is manuscript handwriting is considered to be in the average range for a child his age. He appears to be having difficulty with oral sensory processing and sensory processing as it relates to endurance and tone, as well as probable difficulty with visual processing, touch processing, modulation of movement, emotional/social responses and behavioral outcomes of sensory processing.” Educational recommendations made by the evaluator included scheduled “sensory breaks” and the “Brushing/Joint Compression Program” to decrease possible sensory defensiveness. (Exhibit 279)
11. The PET met in December 2000 to discuss behavior events that were impacting the student in the school setting. The team discussed the student’s designation as a student with a learning disability and the seeming lack of appropriateness of this designation to describe his special education needs. There was consideration of further evaluation. The school suggested that the family consult with Jonathan Heeren, Ph.D., a local psychologist, as a possible evaluator/program consultant. The parents agreed to think about additional evaluation and notify the team at a later date. The team did agree, however, to add Other Health Impaired to Learning Disability as the student’s special education categories, and changed the IEP accordingly. (Exhibit 272, 273, 276)
 12. The PET reconvened in February 2001 for the student’s annual review. The IEP was revised³. Direct special education instruction for writing occurred in the resource room. The balance of the student’s day was in the regular classroom. Supportive services to the program consisted of psychological services, counseling services and physical therapy. A behavior intervention plan was included. The occupational therapy evaluation was not discussed, nor were OT goals included in the IEP. (Exhibit 252 269, 271)
 13. On March 20, 2001 the student was suspended for three days for pushing a student and a teacher, and swearing. The PET met on April 4, 2001 to conduct a manifestation determination, to discuss their overall concerns of the student’s behavior, and to consider the OT evaluation. The PET determined that further information was needed in regards to the student’s behavior. The school expressed concern that they felt a need for further information regarding the behaviors the student could control, and those he could not. A functional behavior assessment and additional psychological evaluation were ordered by the PET. Consideration of incorporating a brushing program in the IEP was set aside until the parents had more time to discuss it. The parents shared their recent insights into the student’s behavior and the principles advocated by Ross Greene, Ph.D., in his book The Explosive Child, (Exhibit 238, 241, 244, 250, 251; Testimony Thurston, Parent)

³ The IEP is dated “3/13/01” in one place and “2/13/01” in another. It is not clear which date is correct, but it is clear that a PET meeting occurred on February 13. There is no indication that another meeting was held on March 13.

14. The PET met in June 2001 to discuss the student's transition to sixth grade and middle school. Overall, school staff and parents agreed that the student's year had been productive. The IEP was modified to include a brushing program to begin in the fall. Special education support would continue to be offered for writing skills. A computer would be available for all writing assignments; keyboarding skills would be taught early in the school year. Study hall would be with the resource room teacher. Decisions regarding additional evaluations were to be held until the fall. The parents provided copies of The Explosive Child to school staff and presented a summary of the Ross Greene principles, and suggested that these principles be considered in relation to the student's program at school. (Exhibit 218, 219, 221; Testimony Thurston, Parent)

15. The student began sixth grade at Reed's Brook Middle School in the fall of 2001. Things went well at first, but negative behaviors began to escalate in November. On November 29 and December 3 there were incidents in which the student hit other students. The PET convened on December 6 to discuss these events. The team developed a new behavior plan. As part of the discussion in the development of this plan, the student's teachers were encouraged to read Dr. Greene's work to further understand the nature of the student's explosive tendencies. The IEP was modified on December 6 to incorporate the use of the Basket Approach as described in Dr. Greene's book to teach the student skills of flexibility and frustration tolerance. Classroom modifications were rewritten and included in the IEP. The team also determined that an education technician would be hired to monitor and assist the student throughout the school day, and to assist in implementing a sensory diet for the student under the direction of the PT. (Exhibit 190, 194, 98, 203, 210, 212; Testimony Parent; Thurston)

16. The PET met on February 26, 2002 to review the student's program. "Meltdowns" had increased over the period January 7 through February 14 resulting in less and less time in academic classes. The student had begun meeting with Dr. Heeren for individual therapy in January. Dr. Heeren attended the PET and assisted in the development of a short-term plan. Regular meetings began to occur among the student's teaching staff, parents and Dr. Heeren to monitor and adjust the plan as needed. School administrators agreed to follow through on setting up training opportunities for staff in the Ross Greene approach. (Exhibit 179; Testimony Heeren; Thurston)

17. The student's behaviors continued to be problematic. On March 22, 2002, the PET convened another manifestation review as a result of an incident on March 14, in which another student was hurt. The incident triggered a request for an emotional safety screening, which was conducted by Dr. Chemelski. In the interim the student's program had been changed to individual tutoring

three hours a day. Dr. Chemelski found that the student had elevations in affective distress “primarily taking the form of depression (Mild to Moderate range) but also anxiety”. He also saw low frustration and anger management as significantly impacting the student’s ability to meet age appropriate expectations. After discussion of the incident, and a review of the evaluation, the team was unable to come to consensus about whether the behavior was a result of the student’s disability, and whether the school had failed to implement the student’s IEP. The team agreed that reintegration of the student into the middle school was the goal, but were unable to agree on a plan to implement the goal. They were able to agree that the staffing team would meet again in a week to reassess the student’s ability to be reintegrated into school for some activities. (Exhibit 142, 166, 169; Testimony Chemelski)

18. On April 2, 2002 the district’s physical therapist conducted another evaluation. In addition to administering the Bruininks Oseretsky Test of Motor Proficiency, the evaluator conducted clinical observations and tests of sensory processing on several dates in March and April, completed a sensory profile questionnaire and completed a Sensory History Consultation with both parents. The evaluator concluded that the student has demonstrated that his mood and tolerance for stressful situations is improved with controlled sensory interventions, but stated that it “is very difficult and usually incorrect to attribute behaviors solely to sensory motor dysfunction”. Results of the Bruininks Oseretsky Test indicated that the student has excellent motor skills in a testing situation, but often demonstrates difficulty with performing skilled tasks when left to depend on his own modulation skills. She recommended direct sensory intervention at least one half-hour per week, and discussed at length the importance of appropriate training for those implementing the plan. She began implementing the program on April 22, 2001. (Exhibit 151, 160)
19. On April 12, 2002 Dr. Fink conducted an updated assessment of the student’s intellectual, attentional and behavioral functioning. In addition to administering a number of standardized instruments designed to evaluate cognitive, neuropsychological and behavioral functioning, she conducted a lengthy records review and interview with the student and his parents. Test results indicated that the student’s verbal abilities continues [sic] to be a strength. General fund of knowledge and working vocabulary remain very strong. Verbal reasoning and social problem solving are slightly less proficient than in years past, “thought to be due in part to...depression.” Attentional functions continue to be quite erratic. Evident across home and school settings were difficulties with executive functions involved in maintaining purposeful, goal-directed problem-solving behavior. Results of behavior rating scales were “consistent in expressing concerns about the student’s pronounced features of depression and related features of anger... The adults familiar with the student also see the features of stress, anxiety and worry that are further affecting him... [The student’s] difficulties interacting

- with peers are becoming more apparent... In addition to traditional social skills deficits, he is described as having difficulties with the nonverbal aspects of communication and the pragmatic aspects of language.” Dr. Fink made a number of educational and programmatic recommendations. (Exhibit 132)
20. The PET met on May 10, 2002 to review progress toward reintegration of the student into the middle school. Staff reported that he was attending an activity time each morning, and had attended lunch with teacher-selected non-disabled peers twice. Both activities appeared to have gone well, but staff continued to express concern about the student’s inappropriate topics for conversation: guns and violence. He continued to be agitated and resistant about his academic work. The subject of placement at the Wagner Middle School program was discussed. No decision was reached regarding the Wagner program, but the parents agreed to visit the program. (Exhibit 128; Testimony Thurston)
 21. The student’s negative behaviors did not stabilize during the period from March to May. He began medication trials for depression and anxiety in March 2002 under the management of his child psychiatrist, David Hawkins, MD. The student developed adverse side effects to the medications and the negative behaviors increased. His resistance to the sensory intervention program provided by the physical therapist continued, and on May 17 physical therapy services were discontinued for the year because the student refused to participate. After a meltdown on May 20, the parent removed the student for the balance of the school year. Drug therapy was determined unsuccessful. Medications were tapered and discontinued as of that date and no new trials have begun. (Exhibits 116, 117, 126; 151, P.27)
 22. The student’s staffing team met June 14, 2002 to continue discussion of placement options for the 2002-2003 school year. The possibility of the student’s attending the Wagner program was continued. Because the student had made clear that he saw the transfer to Wagner as punitive, the parents rejected this option. The team then spent the balance of the meeting discussing what should happen over the summer to prepare the student to return to Reed’s Brook Middle School. Three meetings were scheduled in July for the parents, Dr. Heeren and the educational technician to continue their discussions. The team agreed that Dr. Chemelski would conduct a psychological re-screening in August. No meetings were held during the summer. Dr. Heeren’s individual therapy with the student terminated in July by parent request. (Exhibit 117; Testimony Heeren, Chemelski; Thurston)
 23. Dr. Chemelski conducted a screening of the student’s emotional status on August 15, 2002, as a follow-up to his safety screening in the spring. He concluded that after a relatively successful summer the student was “showing a higher level of emotional and behavioral stability”. His “level of affective

distress is modified from previous (spring) findings.” (Exhibit 111; Testimony Chemelski)

24. The PET met on August 22 to review Dr. Chemelski’s report and to make final plans for the coming school year. A number of options were discussed to make the student’s reintegration back to school successful. It was determined that the student would start with a 3 hour day, beginning with an early morning activity in his homeroom. Individual instruction from his educational technician would take place in an unshared space for academics, with sensory breaks as needed to assist him to maintain his ability to handle frustration. The school psychologist would provide monthly consultation to staff. Physical therapy would resume as the student was able. (Exhibit 102)
25. The student began the school year as planned. Dr. Chemelski met with the student’s program staff and observed the student at school on September 16. He commented that the educational technician was providing the pacing and communication style that was helpful in increasing a sense of trust with the student. He reported that he felt that the program was generally structured to provide the student an opportunity for success, but overall did not think the program was adequately helping the student to develop adaptive or coping skills. He recommended the continuation of regular staff meetings to review the student’s program and progress, and to modify the program as appropriate. (Exhibit 91; Testimony Chemelski)
26. At the request of the school, Dr. Fink provided the team with a diagnostic clarification of the student based on a review of evaluations to date. In a report dated September 13, 2002, after completing an historical review of the student’s symptom profile, Dr. Fink concluded, “his features of perfectionism, sensitivity, anxiety and worry could be interpreted as being consistent with an Anxiety Disorder Not Otherwise Specified.” She also opined “his features of depression, irritability, low self-esteem and negativity could conservatively be interpreted as being consistent with a Dysthymic Disorder.” There was also a question, based on parent report, of a seasonal aspect to his “affective dysregulation”. (Exhibit 090)
27. In early September 2002, Jennifer Cammack, the district’s occupational therapist, conducted a records review and four clinical observations at home and school in order to address the student’s behavior as a sensory integration issue, and to make recommendations to the PET regarding the student’s needs for occupational therapy for sensory needs. She administered no standardized assessments. The student was observed in his classroom during academic activities with the educational technician, during a sensory break at school, at home interacting with his horse, and in the school lunchroom. The evaluator’s observations note a marked difference between the home and school setting in the student’s “mood, affect and ability to tolerate a frustrating conversation or situation”. The evaluator determined

- that the student's behaviors are not "primarily due to sensory defensiveness or integrative dysfunction. Although there may be underlying sensory issues that impact his functioning they are not uncommon or unlike the typical child his age with Attention Deficit Hyperactivity Disorder." She did not recommend ongoing occupational therapy services at this time, because she felt that he had not shown a benefit from the sensory diet program in the past. (Exhibit 075; Testimony Cammack)
28. On September 18, 2002 the PET met to review the reports from Dr. Fink, Dr. Chemelski and Ms. Cammack, and to review the student's progress to date in preparation for modifying the IEP. The meeting was lengthy, with the school and parents having markedly differing opinions about the next step. Both parents and school agreed that a full-time, full-day program at Reeds Brook School was not currently feasible or appropriate. Although the student's "time on task" for academic activities was increasing, school staff described the student's limited progress with academics and the isolation of his individualized instructional setting. The level and frequency of disruptive behaviors since the beginning of school were not diminishing. The need for additional evaluations was discussed but no conclusion was reached. Placement at the Wagner Middle School program was discussed again. The parents were opposed to this change based on the student's resistance to attending the program. The school felt it would be a better alternative in meeting the student's needs, offering him a full school day in a program designed to address the challenges of students with emotional and behavioral needs, and greater access to mainstream opportunities. At the conclusion of the meeting the change in placement was determined, without consensus, to take place on October 2, 2002. The parents were also informed at this meeting that the student's current educational technician was taking another job in the district as soon as a new person was hired and acclimated to work with the student. The new educational technician began on September 28, with a 5 day shared transition period. (Exhibit 30, 31, 32, 39-42, 49, 51, 53, A-58; Testimony Thurston, Parent)
29. The parents filed for [sic] due process hearing on September 27, 2002, received by the Department of Education on October 1, 2002. (Exhibit 46, 47)
30. On September 28 the parents stated in writing that they disagreed with the district's occupational therapy evaluation, and requested an independent OT evaluation at public expense. The school granted this request. On October 14, 2002 the parents obtained an OT evaluation conducted at the FIND clinic in Dover-Foxcroft by Mary Merchant. A number of standardized instruments were administered. Based on her findings, in addition to a number of educational recommendations, the evaluator suggests in her report that the student receive monthly consultative occupational therapy services to address sensory processing difficulties, but stated that she would need more

information before making any final recommendations to the PET. The evaluator did not conduct a records review, speak to school staff about the student's program nor observe the student in his school setting. (Exhibit 43, 13; Testimony Merchant)

31. In mid to late September the district's speech and language clinician conducted an evaluation at the request of the parents. Assessment consisted of Teacher Checklist of Social Language, Clinical Observation and informal language sampling. No formal language tests were administered due to the student's refusal to be tested. The parents did not return the Parent form of the Checklist. The evaluator was unable to make anything other than tentative suggestions about incorporating training in the use of social language skills to improve the student's ability to interact with peers and adults to enhance his education. Likewise, she was unable to offer a strong opinion on the benefit of scripted or structured interactions by adults working with the student. (Exhibit 34)
32. The parents unilaterally removed the student from school October 9⁴. The student began private tutorial sessions with Anne Marie Quin, Ed.D, on October 4. Since that time he has continued to work with her individually two hours per week in her office, at parent expense. Dr. Quin has not consulted with school staff in her choice of curriculum or academics. The work is student driven, with some guidance from her, and to date has included only language arts. The student has exhibited no negative, challenging behaviors with her. She has no training in, nor does she use, the Ross Greene principles in her work with the student. (Exhibit 31, 32; Testimony Parent, Quin)
33. The PET met on October 24, 2002 to review the student's program and discuss the need for further evaluations, specifically an independent functional behavioral assessment. The school also offered to organize a supported meeting with the parents and staff of the Wagner program, to include Dr. Chemelski, and/or Dr. Heeren. The parents declined both. (Exhibit 3, 11; Testimony Thurston)
34. The new IEP was written at the September 2002 PET. The program consists of full-time, full-day direct special education instruction. Psychological service consultation is increased to two hours per month, physical therapy consultation to school staff monthly, and home as needed. An educational technician is assigned 100% of the school day. Modifications include extra time for assignment completion and option for reduced work quantity, computer for written language, seating to reduce auditory and visual stimuli, organization of assignments and movement breaks. A behavior plan is

⁴ The parent testified that the student was removed under doctor's orders and is undergoing a variety of medical evaluations. He alluded to a letter recommending such action, but no document exists in the record. Up to this point the parents have refused tutorial assistance from the district.

attached which includes a menu of choices to be selected by student for breaks. Goals include work completion, time on task, following teacher direction without outburst, 75% success in the seventh grade curriculum, with a separate goal for written language. Placement is in the behavior program at the Wagner Middle School. The IEP has not been implemented as the school and family are in dispute regarding the placement recommendations and the exclusion of occupational therapy services. (Exhibit 5, 6, 57, 59; Testimony Parent, Thurston)

35. The program being proposed by the district is a behavior program located in one of the two middle schools in the district, but not the student's neighborhood school. The program uses a cognitive behavior approach. It is staffed by a head teacher with 24 years experience, a masters degree in special education, and a focus on teaching students whose behavior interferes with learning; a tutor facilitator with two years experience in the mental health field; and two educational technicians, one with a masters degree and several years experience, one with a degree in rehabilitation and a specialty in behavior intervention. An additional educational technician would transition into the program with the student, if he attends. Dr. Chemelski consults with program staff on a monthly basis, observes the students in the program and meets with students directly to assist and facilitate their success both in the program and transitioning into the mainstream. The program currently has 11 students with varying behavior needs, and many with histories of public school failure. The goal of the program is to make it possible for the students to participate in full day mainstreaming. Both the head teacher and Dr. Chemelski are familiar with the principles of Ross Greene, and employ as appropriate, his methods in the program. One of the educational technicians attended a Ross Greene training with the head teacher. (Testimony Seaver, Chemelski, Thurston)

IV. Conclusions

Is the student's 2002-2003 IEP reasonably calculated to provide him educational benefit in the least restrictive educational alternative? As part of that question, is the placement identified in the IEP, Wagner Middle School, required in order for the student to receive a free appropriate public education in the least restrictive environment?

The Individuals with Disabilities Education Act (IDEA) requires that the school provide students identified as disabled with a "free appropriate public education" which is described in the student's "individualized education program" (IEP). *20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)*

In 1982, when the United States Supreme Court was first compelled to interpret what the Congress intended by “free appropriate public education”, the court reasoned that a school has met its obligation to provide a “free appropriate public education” if the school has complied with the procedural and substantive requirements of the law.

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefit.

Board of Education v. Rowley, 553 IDELR 656, 670 (1982)

There is no question - and indeed no evidence was offered to argue otherwise - that the school has met its procedural obligations on behalf of this student. The parents and school have worked in concert since the student was first referred for special education in 1996 to identify the student’s needs, and design programs to meet those needs. PET meetings, in which the parents were equal and participating members, have been held several times each year. Exhaustive assessment data has been collected in attempts to clarify this student’s complex cognitive and behavioral needs. A team of skilled professionals, again with the parents’ active participation, has deliberated on many occasions regarding the services and goals that should go into the IEP. Each IEP has met the elements of form set forth in regulations. (See *Maine Special Education Regulations*, § 10.2) And, until the IEP in question, there was no challenge that these programs failed to provide the student with benefit. Though the parties are now in dispute over the content and placement described in the proposed IEP, even here there can be no question that it was “developed through the Act’s procedures”.

The second test, according to *Rowley*, is whether the student’s IEP is reasonably calculated to enable the child to receive educational benefit. In making such a determination prospectively as in this case, it is necessary to view the IEP within the context of the history of the student’s school career measured against a standard of what reasonably will be required to provide the student benefit based on that history.

Cognitive and neuropsychological evaluations over the years have provided a somewhat consistent picture of this student. He reads at an advanced level and has a general fund of knowledge in the superior range. He possesses excellent verbal skills, but has difficulty with written output, especially when tasks are timed. He has a diagnosis of Attention Deficit Hyperactivity Disorder, with underlying sensory issues, Anxiety Disorder and Dysthymia. He displays low frustration tolerance that can lead to explosive behavior. He has difficulty with social interactions and peer relationships. He has been able to achieve at or above grade level in all subjects except math, and until recently was able to be educated in regular classrooms with modifications and supports.

As he has gotten older, and school and social expectations have increased, he is having more difficulty with the curriculum and workload and his social skills have not kept pace with his peers. Mounting anxiety and recurring depression have colored his lack of success in school. Although the goal is to reintegrate him into the mainstream, his increasingly angry outbursts and off-task behaviors have served to further isolate him from his peers. By the time he was removed from school by his parents in October 2002, he was attending school only three hours per day in an isolated setting with individual instruction. The parties do not argue. This program is not appropriate to meet the student's needs and should not be reinstated.

The IEP that has been developed as an alternative, and is currently under dispute, proposes full-day, full-time special education services. The program focus is to assist the student to develop strategies to self-regulate and modulate his behavior responses, and includes instruction specially designed to meet his needs. In addition, the IEP lists the modifications necessary to accommodate the student's need for shortened assignments, need for assistive technology and need for movement breaks. The goals in the IEP are tied to the academic instruction required of the student by state education standards, Maine Learning Results, and reflect the student's participation in the general seventh grade curriculum.

The IEP lists psychological services as a supportive service necessary to the student's program. Psychological consultation services with program staff, to include the student and his parents, is to occur two hours a month, with the purpose of monitoring emotional and behavioral functioning, and adapting the plan as necessary. Assessments and discussions at numerous meetings between school and parent make it clear that such support will be critical to the success of any program for the student. There appeared to be no dispute on this matter.

On the other hand, there is dispute over the need for occupational therapy services as a supportive service. The OT evaluation obtained by the parents suggested, "A sensory diet may be very helpful in assisting the student to better organize his sensory system..." The parents argued that based on this recommendation OT services should be included in the IEP as a supportive service. The parent's position lacks persuasion, due to the limitations of the evaluation. The evaluation was conducted in the therapist's office, a considerable distance from the student's school. The only observation outside the office setting was at the family's summer camp where, the evaluator testified, she spent most of the time talking with the student's mother. The evaluator did not review the student's educational file, did not observe him in an educational situation and did not interview any of the educational team. Even she admitted during her testimony that she would need more information before making any final recommendations to the PET.

In contrast, the school's occupational therapy evaluation presented a more balanced picture of the student's sensory processing status in a school setting. The Occupational Therapist's report was based on four separate clinical observations of the student in four different locations, both at school and at home, and an extensive

analysis of past evaluations as they addressed the student's sensory processing difficulties. Her conclusion, that the student does not require additional supportive services from an occupational therapist, was based on sound reasoning. The PET discussed her report and accepted her recommendation to exclude occupational therapy services at this time.

What the PET does not appear to have done, however, is determine to what extent physical therapy services - which are included as a supportive service - will address the student's sensory needs. The student's previous IEP provided direct sensory intervention services under the direction of the physical therapist. The services began in the early spring of 2002, and continued until the student was removed in late May for the balance of that school year. While evidence points out that the sensory interventions were inconsistently beneficial, there is documentation to suggest that the student's struggles with unsuccessful drug therapy might have been a contributing factor. There is nothing in the record to indicate that the physical therapist has done any evaluative follow-up to rule in, or rule out, the benefit of continuing such services. Likewise, there is nothing to indicate that the PET has discussed or determined that the service should be discontinued. Until the team revisits this issue from the perspective of physical therapy services, the sensory integration interventions need to be included in the student's IEP.

The placement that the IEP proposes is a self-contained/resource class placement at the Wagner Middle School, one of two public middle schools in the district. The program is designed specifically for students with behavioral difficulties. The parents object to the placement, arguing that because it takes the student out of his neighborhood school it is not the least restrictive educational alternative.

A student with a disability shall be placed in the school the student would normally attend unless the Individualized Education Program *requires* a different placement. In such a case, the placement shall be as close as possible to the student's residence.

MSER, §11.2(B) (emphasis added). Placement in a location other than the school the student would normally attend may be required when "the nature or severity of the disability" is such that education in the student's neighborhood school cannot be satisfactorily achieved. *Id.* (C). The parents assert that removing the student to the Wagner placement is not required, and that the law dictates that the student remain at Reeds Brook. There is no question that maintaining the student in his neighborhood school is preferred by the law. However, the courts remain consistent in their interpretation that proximity to home is not a guarantee, nor a mandate of the law. *Barnett by Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991)(federal regulations impose no obligation on school district to duplicate highly specialized education program at student's base school). *Kevin G. v. Cranston School Committee*, 130 F.3d 481 (1st Cir. 1997) (district's placement of student in non-neighborhood school to allow access to nursing services available there was

appropriate). *Schuldt v. Mankato Ind. Sch. Dist. No. 77*, 937 F.2d 1357 (8th Cir. 1991) (federal regulation is not a mandate that disabled student be place [sic] in neighborhood school).

The parent's argue that the school hasn't done enough to make attendance at Reeds Brook possible for the student. I disagree. The district has done all that the law requires in its attempts to maintain the student in his neighborhood school. They have simply exhausted the possibilities that exist at Reeds Brook. Even parent's witness, Dr. Heeren, commented that in his work with school staff, he found them to be very professional and doing the best they could with this very complex student. They worked very hard with a willingness to implement strategies recommended at the staff meetings to the degree they were able. He found no fault with their work. The school has made a reasonable decision that the student requires a more intense program. They offer that program at Wagner Middle School.

Dr. Chemelski and Ms. Thurston make compelling arguments that the Wagner program can provide the support that will assist the student to concentrate his energies on developing coping strategies to help him regulate his behavioral responses to frustration and anxiety. While Dr. Heeren did not endorse the Wagner placement, he too agrees that the student lacks the self-regulation and control necessary to be successful in a general education environment, and that these are important issues to address. The goal of the Wagner program is to teach students how to integrate into the general education environment while providing them the full support necessary in their areas of need. In this case it is clear that the student's placement in a school other than the school he would normally attend *is* required in order for the student to benefit, and that the program at the Wagner school is the least restrictive educational alternative on the continuum.

The parents maintain that if the school had been successful in eliminating the student's inflexibility, anxiety and frustration, which manifests itself in explosive behavior, then the education process could go forward just about anywhere, including the regular classroom at Reeds Brook. Likely, no one would disagree with that argument. But, it misses the point of the obligation imposed on the district by special education law.

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of...disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education: it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland School Comm., 998 F.2d 1083 (1st Cir. 1993) (Internal citations omitted).

Currently the student is out of school working with a private tutor, Dr. Quin, two hours a week, primarily on language arts. The parents wish the hearing officer to order a program that continues to incorporate Dr. Quin's two hours a week with a planned and gradual reintegration of the student into certain carefully selected academic classes, such as science labs and math, and non-competitive extracurricular activities at the Reeds Brook School, with a goal toward full integration. A review of evidence does not support this option as appropriate or practicable.

Continued isolation of the student from the general education environment is not supported by any of the professional opinions as desirable for either social or educational reasons. The parent's proposal would not only limit the student's language arts instruction to two hours a week, but it would have the effect of restricting the student's access to the general curriculum, a requirement of his education. Dr. Quin was clear that she did not follow a standard public school curriculum, and had no interest in doing so. Simply put, the student would not get the required instruction to meet his written language deficit or his general education requirements.

While Dr. Heeren and Dr. Chemelski disagreed about the wisdom of placement at the Wagner program, Dr. Heeren admitted that he knew little of the Wagner program. He did agree that whatever program was put in place needed to be highly individualized and highly structured with environmental flexibility and a collaborative piece to respond to the student where he is. Both Dr. Heeren and Dr. Chemelski expressed concern that the student lacks the self-monitoring and self-regulation necessary to control his outbursts when he becomes frustrated and anxious, and they agreed these are identified needs that should be addressed. The Wagner program meets the criteria set out by Dr. Heeren, in that it can provide the flexibility and consistency he feels is important to the student's success, and has the capacity to address the student's identified need for behavioral intervention. The parent's proposal offers no interventions toward that end, but rather chooses a plan that only imposes structure to prevent frustration and anxiety and thus prevent "meltdowns". The law requires more of the school. A program must identify and address all the student's needs.

The parents maintain that with the program they propose, and steadfast adherence to the methods articulated by Ross Greene, the student can receive a meaningful education. There is no evidence to support this contention. While the school may not have strictly followed the Ross Greene principles in the past, it is clear that they incorporated the approach as a foundation for the student's program during sixth grade, and to the extent practical in a middle school setting, they followed these principles. Evidence supports the school's contention that certain aspects of the Ross Greene approach do not transfer to a school setting. The general middle school environment cannot always be engineered to the extent desired by the

parents. Even as he supports the Ross Greene principles, Dr. Heeren stated in his testimony that a school has considerations that are not covered by the methodology, noting that it is [sic] recognized critique of the program. There is every reason to assume that the same level of frustration and anxiety around schoolwork and peer relationships will exist for the student. Without interventions to address those behaviors, it is difficult to conclude that this attempt at gradual reintegration would prove any more successful than previous attempts.

Finally, the parents take the firm stand that the Wagner program is inappropriate because the student himself has rejected it. Dr. Heeren, too, voiced concern that without the student's agreement the program was unlikely to be successful. Yet, when asked directly how to overcome this rejection, he did offer several suggestions. He felt if the adults presented a unified front and included the student in the discussion of Wagner proposal as being in his best interest, that transition to the program would stand a better chance. The student's rejection of the program remains a possibility, but evidence does not support that the adults have made the concerted effort described by Dr. Heeren. The student's father has never visited the program; the student's mother took a cursory tour. The parents have not met with program staff. They have rejected the program as a program for conduct disordered students that uses only a "behavior modification" approach to behavior intervention. The statements of program staff do not support that opinion. Ms. Seaver and Dr. Chemelski describe a program that has every reason to be considered appropriate to the student in his current stage of behavioral development.

There is no assertion that attendance in this program will eliminate the behaviors that interfere with the student's learning. Only, that when compared to the program that existed before, and based on the opinions of professionals who work with him, there is greater likelihood that the student will benefit from the Wagner program in ways he clearly was not benefiting [sic] before. The IEP proposed by the school addresses the areas of deficit as defined by evaluations, and contains personalized instruction with sufficient supportive services to permit the child to benefit from the instruction. The placement in the Wagner program is required in order to provide this instruction. There is sufficient evidence to conclude that the IEP is reasonably calculated to provide the student with educational benefit.

Are the parents entitled to an Independent Educational Evaluation at public expense?

Although not raised as a matter with the school prior to this hearing, the parents now state their wish to obtain an independent educational evaluation at public expense. They requested, and were granted by the hearing officer, the opportunity to raise the issue at hearing.

The parents of a student with a disability have the right to obtain, at public expense, an independent educational evaluation of their

child when they disagree with an evaluation obtained by the administrative unit... [T]he public agency must...either initiate a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense.

Maine Special Education Regulations, §9.2

The parents did not identify any evaluation, either to the district or during the hearing, with which they disagreed and were refused an opportunity for an outside opinion.⁵ To the contrary, the record is replete with the PET's recent requests of the parents for additional evaluations from independent evaluators. The parents have refused to grant consent for these additional evaluations, expressing concern that the student has been over-evaluated.

The parents explain that what they are seeking is an independent review of the "behaviors and actions of those working with [the student], to get an accurate picture, from an outside source, as to what works and what doesn't... An educational evaluator could observe [the student] interacting with Dr. Quin, interacting with the tutor, interacting with the teachers, and offer observations as to how to best teach [the student] in the least restrictive alternative setting." (Summation of Parents, p13)

The term evaluation, as defined in the regulations, is a process, which uses "certain procedures whereby information is gathered...to determine the nature and extent of the special education and supportive services needed by the student". *Id.* at §2.8. The Regulations go into significant detail to describe how this process shall unfold.

In conducting an evaluation the school administrative unit shall use a variety of assessment tools and strategies to gather relevant functional and developmental information, not use any single procedure, [and] use technically sound instruments that may assess...cognitive and behavioral factors, in addition to physical or developmental factors. Each school...shall ensure that only those assessment tools and strategies are used that provide relevant information that directly assists the pupil evaluation team in determining the educational needs of the student.

Id. at §9.5. There is no provision for an independent review of the "behaviors and actions" of the student's teachers and support staff, beyond those issues brought forward at a due process hearing. The parents are not entitled to an Independent Educational Evaluation at public expense.

⁵ Earlier the parents did voice disagreement with the district's occupational therapy evaluation and requested an independent evaluation. The school granted the request.

However, the parents' desire for an independent process to "get an accurate picture, from an outside source, as to what works and what doesn't" could be achieved through the school's offer of a Functional Behavior Assessment.

The term "functional behavior assessment" means a school based process used by the Pupil Evaluation Team, which includes the parent and, as appropriate, the student, to determine why a student engages in challenging behaviors and how the behavior relates to the student's environment. The term includes direct assessments, indirect assessments and data analysis designed to assist the PET to identify and define the problem behavior in concrete terms; identify the contextual factors (including affective and cognitive factors) that contribute to the behavior; and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain that behavior.

Id. at §2.10. A list of four professionals, who are independent of the district and who have the expertise and background to perform a Functional Behavior Assessment, has been provided to the parents. The parents have been given the opportunity to choose any of the four. Evidence supports the judgment that such an assessment would provide additional, valuable information for the team to begin to gather information to identify antecedents to the students "meltdowns".

Are the parents entitled to reimbursement for the services of the private tutor, provided at their expense since October 4, 2002?

When the parents removed the student from school in October, they enlisted the services of a private tutor, Anne Marie Quin. The parent asks that these services be reimbursed, and that Dr. Quin's services be maintained as part of the student's program. The question of Dr. Quin's future involvement at public expense has been discussed at length in an earlier section. The standard for review to determine a reimbursement claim is whether the parent's actions were necessary because the school had failed to provide a free appropriate public education to the student. As a reimbursement claim, Dr. Quin's services fail to meet the test.

The parents assert that Dr. Quin has been able to elicit high quality work from the student when the school has not, and without behavior interference. Whether or not Dr. Quin has obtained results the school has not is beside the point as a hearing matter. Parents who request reimbursement for services they have unilaterally provided may be awarded reimbursement for those costs, only if the IEP proposed by the school is found to be inappropriate.

Parents who unilaterally change their children's placement during the pendency of proceedings do so at their own

financial risk. If the courts ultimately determine that a child's proposed IEP was appropriate, the parents are barred from obtaining reimbursement from an unauthorized private school placement.

Burlington School Comm. V. Dept of Educ. Of Massachusetts, 105 S. Ct. 1996 (1985). (See also *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990). As discussed earlier in the decision, the school offers an appropriate education to the student. However, it is worth noting that based on the record, the fact that he is able to work with Dr. Quin without behavioral incidents, and has produced quality work is not altogether surprising.

Evidence shows that Dr. Quin works with the student in her office in downtown Bangor. Professionals who have evaluated and worked with the student outside of school comment that the stress and anxiety about school issues play a role in his negative behaviors, but that he has demonstrated his ability to perform well on tasks outside the school setting that otherwise trigger outbursts. In March 2000 Dr. Fink commented in her evaluation, "attentional and behavioral difficulties at school are likely exacerbated by the performance demands, discrepancies in his abilities and high expectations he sets for himself. In the structured office setting, his ability to regulate his impulse control and activity level was at an average level." She noted elsewhere in her report, "While he kept his behavior under check in the novel office setting there was a general sense that he would have been less controlled in a more familiar setting." As late as October 2002 during the occupational therapy evaluation in Dover-Foxcroft the student "easily transitioned" even though he had made it clear "this was not his desired activity for the day." This is not to question that Dr. Quin's instructional techniques are not sound, but it would appear that the student's ability to attend to task and do so without behavioral outbursts has as much to do with the novel setting as the quality of instruction.

Secondly, Dr. Quin does not have occasion to cause resistance in the student. He is allowed to be self-directed, working with her on subjects of high interest to him. Again Dr. Fink noted in March 2000, "when he is engaging in tasks of particular interest, he tends to 'hyperfocus', working diligently for extended periods of time." Dr. Quin's work with the student does not necessitate that the student perform tasks that meet the IEP obligation to be "involved in and progress in the general curriculum". *Maine Special Education Regulations*, §10.2. The school does not have that luxury. The school has an obligation, by law, to follow the seventh grade curriculum to the extent possible and appropriate for the student – even when it elicits resistance from him.

V. Order

The IEP proposed by the school is found to be reasonably calculated to provide the student with educational benefit, and the self-contained behavioral program at the Wagner Middle School is found to be the least restrictive educational alternative.

The PET shall meet within 15 days of the receipt of this decision to set in motion a transition plan to integrate the student into the Wagner program. This process shall include the parents, Dr. Chemelski, the student's individual therapist if that should be someone other than Dr. Chemelski, the staff of the Wagner program and, when appropriate, the student. During the PET, the team shall define the services of the physical therapist and include the goals of that service in the IEP.

The school shall provide to the Department of Education, Due Process Office copies of summary discussions from the meeting(s) convened to develop the student's transition plan to the Wagner program. Such discussions shall include a timeline for the transition to take place. These documents shall be mailed to the DOE within 45 days of the receipt of this decision.

The school shall proceed to obtain a Functional Behavioral Assessment, to be conducted by an independent licensed psychologist with experience in conducting such assessments. The parents shall be given the opportunity to choose a person from a list provided by the school. The assessment shall be completed within 45 school days of the date the parent notifies the school of their choice of evaluators. A copy of the completed report shall be forwarded to the DOE within 15 days of its completion.

Carol B. Lenna
Hearing Officer