

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

January 5, 2007

Case No. 07.020H, Parent and Parent v. Gorham School Department

FOR THE FAMILY: Richard L. O’Meara, Esq.

FOR THE SCHOOL: Amy K. Tchao, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

This hearing has been conducted, and this decision issued, pursuant to state and federal special education law, 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

The father and mother initiated this matter on August 29, 2006 by filing a Hearing Request Form with the Maine Department of Education on behalf of their son (DOB: xx/xx/xxxx) who lives with them within the Town of Gorham. He began attending the Gorham public schools in xx grade and continued there until late November of his xx grade year. At that time, his parents removed him from the Village School in Gorham and unilaterally placed him in the Aucocisco School in Cape Elizabeth, Maine, a private day school specializing in the education of students with language-based learning disabilities. The parents removed the student from the Gorham system because they did not believe he was receiving a free and appropriate education (“FAPE”) under the individualized education program (“IEP”) as developed and implemented by the Village School. Toward the end of his xx grade year, a pupil evaluation team (“PET”) determined that the student, who is diagnosed as having Attention Deficit Hyperactivity Disorder-Inattentive Type (“ADHD”), was eligible for special education and related services under the category of Other Health Impairment.

In this hearing, the family seeks to recoup the tuition and expenses associated with the student’s placement at the private school, asserting that they are entitled to such recoupment either under a unilateral placement-reimbursement theory or as a compensatory education remedy. The family first argues that the IEP the school developed for the student’s xx grade year was inappropriate under the IDEA (“Act”). The family then asserts that the educational program the student has received – and is still receiving – at Aucocisco is “proper under the Act.” Further, the family believes that the school still has not offered the student a program that would provide him with FAPE, as required by the Act. Consequently, they believe they are entitled to be reimbursed for all costs associated with that unilateral placement under the *Burlington/Florence County* line

of cases.¹ The family alternatively argues that, during the student's xx grade and beginning of xx grade, the school failed to provide him with the free and appropriate public education he is guaranteed by the IDEA. As remedy for that past failure, the family asserts that the student is entitled to a compensatory education remedy that should include recoupment of costs incurred by the family to provide the student with an appropriate education.

The school disagrees with the assertions made by the family. The school contends vigorously that the student received FAPE under the IEPs provided to him in the Gorham schools during xx grade and the beginning of xx grade and further asserts that he would have continued to receive FAPE in the Village School had he not been unilaterally removed by his parents. The school argues that while the student might be doing well in his private placement, the IDEA does not require public schools to provide its special education students a program that enables a student to reach his/her maximum potential. The IDEA imposes a more limited obligation on public schools: to offer special education students a program that is reasonably calculated to provide demonstrable educational benefits. The school asserts that it has met that standard and has provided the student with FAPE during his time in the Gorham schools. The school argues that the family, while understandably seeking to provide their very talented child with the best possible education, is not entitled to any reimbursement on either of the theories it advances.

The pre-hearing conference was held on October 5, 2006.² The parties exchanged documents and witness lists. Six days of hearing were required to complete the testimony. The family presented 8 witnesses and introduced 232 pages of documents. The school presented 7 witnesses and introduced 386 pages of documents. The parties elected to submit written closing statements, the last of which was received on December 5, 2006, and the record was closed at that time.³

ISSUES

The issues to be resolved in this hearing are:

1. Reimbursement claim from November 2005:
 - A. Whether the Student's xx grade IEP and placement were reasonably calculated to provide him with a FAPE in the least restrictive environment;

¹ See, *Burlington School Comm. V. Department of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

² This conference was scheduled for an earlier date but was postponed due to a family emergency.

³ The decision is being issued today due to an illness of the hearing officer during the writing period.

- B. If not, whether the Family’s unilateral placement of the student at the Aucocisco School was appropriate to meet his needs; and,
 - C. Whether the Family failed to meet their prior notice obligations to the School under the reimbursement provisions of IDEA such that reimbursement should be reduced or denied.
2. Recoupment of school year 2006-2007 costs:
- A. Whether the School met its FAPE obligation to the student during school years 2004-2005(xx grade) and 2005-2006 (xx grade), the two school years relevant to a compensatory education against the School; and,
 - B. Whether there were any violations sufficient to constitute a denial of FAPE since the beginning of the Student’s xx grade year entitling the family to recoup 2006-2007 tuition costs.

FINDINGS OF FACT

1. The student (DOB: xx/xx/xxxx) lives with his parents in Gorham. He attended public school in Gorham from xx until November of his xx grade year, when he was unilaterally placed by his parents in the Aucocisco School, an out-of-district private day school that specializes in educating students with language-based learning disabilities. In June of 2003, toward the end of the student’s xx grade year, a Gorham PET determined that he was eligible for special education services under the category of Other Health Impairment. He has also been diagnosed as having Attention Deficit Hyperactivity Disorder – Inattentive Type. He has a full scale IQ of 137, as measured by the WISC-III. (Hearing Request Form, testimony of parents)
2. In the spring of his xx grade year, the school referred the student to Elizabeth Howe, M.S., a Certified School Psychological Service Provider and Licensed Psychological Examiner, for an initial evaluation because his “progress in work completion, compliance, focusing, and literacy is less than expected given supports in place.” Those supports included receiving instruction in a small group or 1-1 situation, preferential seating, verbal redirection, reward systems, and reminders to return to task. This initial evaluation reported the student to have a full scale IQ of 137 as measured by the WISC-III, in the “very superior range of overall intellectual ability”. He had high ratings on the Conner’s Rating Scales in the following categories: Oppositional, Cognitive Problems/Inattention, Anxious/Shy, Social Problems, Hyperactivity, Perfectionism, ADHD Index= ‘at risk’, and Restless-Impulsive. Regarding the DSM-IV series, his scores showed an above average correspondence to both ADHD – Inattentive Type and ADHD –

Hyperactive-Impulsive Type. The report concludes that the student's "inattentive, impulsive, and hyperactive behaviors are impacting upon [his] educational performance...these issues together appear to be related to [the student's] difficulty to focus on and complete work. Difficulties in self-regulation, self-control, self-monitoring, and sensory processing appear to be impacting upon [his] behavior, and specifically contributing to difficulties in complying with expectations, interacting with peers appropriately and motivational issues." Further, the report states that, according to his parents, the student has frequently said things such as, "I want to kill myself", "I want to die" and "I wish I were dead". Ms. Howe's evaluation report is quite lengthy, running eleven single-spaced pages, but two specific recommendations are noteworthy:

(1) "[The student] would benefit from a learning environment which is structured, consistent, and predictable. Continue to provide opportunities for small group and individual attention, especially in reading and writing. Provide assistance with multi-stepped directions and projects. Directions should be clear and concise. Reduce timed tasks; provide extended timelines..."; and,

(2)"[The student's] social-emotional functioning [should] be monitored for signs of stress or depressive symptoms. It may be helpful to consult with the School's social worker in regard to concerns about social skills and some of the concerns noted by [his] parents."

(Testimony of parents, SE 203-209, 223-233)

3. On June 10, 2003, at the end of the student's xx grade year, a PET met to develop an IEP for his xx grade year, 2003-2004. That IEP called for 5 hours of consultation/month and 1 hour/day of direct instruction, both provided by his special education teacher. In early November of xx grade, the PET added a one time, one hour Occupational Therapy consultation. At another meeting on January 26, 2004, the PET increased direct instruction by 15 minutes/week to 315 minutes/week. (SE 197-198, 166)
4. On June 14, 2004, at the end of the student's xx grade year, a PET met to develop an IEP for his xx grade year, 2004-2005. At that meeting, the school reported that the student was generally successful in the xx grade and has [sic] made real progress in reading, writing and with his ability to focus. His parents still had serious concerns about his reading fluency and ability to focus, as well as his impulsivity. The PET created a "monitor" IEP under which the student received 2 hours/month of monitoring by the special education teacher in the regular education setting and 1 hour of occupational therapy consultation. For all other classes, the student was mainstreamed. This "monitor" IEP did not provide any direct instruction in any content area. This IEP was implemented at the beginning of xx grade, but the student soon experienced difficulties, both in school and at home. His reading fluency had declined from 77 words correct per minute ("wcpm") at the end of xx grade to 54 wcpm on gradexx level text by the time the PET met on October 18, 2004. At this PET meeting, his teacher reported that the

student was having “difficulties in attending and focusing [that] are causing him to lose ground in reading and writing as school progresses”, and also stated that he seemed to be more successful when he got instruction in small group or 1-1 situations. She described the student as “distracting” to other students, said that there are too many students (22) in the class for her to “get back to him” and that he was “too knowledgeable. I have to shut him down.” The student’s mother described the student’s emotional behavior and self-critical behavior that occurred regularly when doing homework, particularly spelling homework. About three times each week the student would strongly resist doing his homework: he [sic] have tantrums when asked to do his homework, would refuse to do it, would cry and say that he couldn’t do it, would fall to the floor crying and yelling or simply refuse to talk at all. About once a week, he would run out of the house and into the nearby woods. On one occasion, he was so upset by the task of trying to do his spelling homework that he ran out of his house into the woods after dark and would not come back. His father had to go find him and carry him back into the house kicking and screaming. The student also resisted going to school in the morning, often stating that he “hated school”. In October of 2004, the student’s mother described this homework-related behavior at a meeting of the PET. At this same meeting, his classroom teacher told the PET that the student was “more successful when working in small groups or 1:1”. In response to the difficulties the student experienced during this time, early in xx grade, the PET replaced the “monitor” IEP with an IEP that called for the student to receive 120 minutes per week⁴ of direct instruction in word recognition, fluency and spelling provided by a special education teacher. The PET stated that the reason these services were added to his IEP is that “he is reading at a xx grade level, [and therefore] direct services for word description, fluency and spelling are needed.” The PET also eliminated spelling homework, as “not worth it”. In December, his classroom teacher e-mailed his mother, mentioning both schoolwork the student had not completed and one incident in which he hit another student in the head with a pencil. In January of 2005, his classroom teacher commented about the student: “[the student] is very bright, but it is hard to challenge him because he has such a hard time staying focused, initiating and completing tasks...[sic] (Testimony of mother, J. Esty and L Tibbitts; SE, pps.121, 125, 127-138, 148, 155; PE 123, 179, 228)

5. In the fall of the student’s xx grade year, because of their concerns about the student’s social and emotional status, and his academic difficulties at school, the parents arranged for a neuropsychological evaluation of the student. Marcia Hunter, who holds a Ph.D. in Clinical Psychology and has more than 25 years of experience as a neuropsychological examiner, did this evaluation. She interviewed and tested the student on three occasions in December 2004 and January 2005. She met with the PET in February 2005 to discuss her report. Dr. Hunter’s evaluation found the student to have a full scale IQ of 137 as measured on the WISC-IV, again in the Very Superior range of cognitive ability. Her

⁴ For a five-day school week, 120 minutes per week averages to 24 minutes per day.

testing confirmed the student's attentional disorder, ADHD. Dr. Hunter concluded that the student's ability to bring his intelligence to bear upon his academic program "...has been compromised by...several factors: advanced intellectual potential concurrent with subtle learning issues; emotional immaturity; mild to moderate weaknesses [regarding] executive mental functions...The impact of his neurocognitive vulnerabilities can be seen in areas of learning, emotional regulation, highly variable attention, cognitive rigidity...Perhaps most significantly, there is evidence that [the student's [sic] sense of himself is being negatively influenced, and he is experiencing psychological stress and episodic depressed mood." Her recommendations identified four areas of concern: 1) executive function weakness, 2) attentional difficulties, working memory and processing speed deficits, 3) high cognitive ability combined with language-based learning problems, and 4) his psychological health, including self-esteem and variable mood issues. At the hearing, Dr. Hunter persuasively explained that her recommendations were not intended to describe a program that would allow the student to receive maximum or optimal benefit from his education. Rather, her efforts were aimed at describing a series of responses that were appropriate for a student with the unique combination of strengths and vulnerabilities in academic, social and emotional domains that this student presents. This February 2005 PET, while it did consider possible changes in the student's program, did not change the student's IEP in response to the new information presented during the meeting. (SE 95-119)

6. In June of 2005, a PET convened to develop an IEP for the student's xx grade year, 2005-2006. This PET established new goals and objectives for the student, and added one hour per week of direct services, bringing the total to three hours per week. The PET also noted that the student's name "has been put on the list for Gifted and Talented services when these are available at the school. Meanwhile, Mrs. Esty will work on locating another mentor...who can work with [the student] on some enrichment projects next year. [sic](SE 69-84)
7. The student entered xx grade at the Gorham Village School in September of 2005 and things did not go well for him. He did not want to go back to school at all; he said he had no friends there, got bullied on the playground and didn't want to ride on the school bus. On his first day in school, he discovered that his classroom teacher worked only part-time and had a substitute for the rest of the time. This substitute was not allowed to see the student's IEP and did not know anything about the student's particular needs. The student came home each day of the first week highly frustrated and angry: his mother described him as "angry way beyond normal, irrational...I hadn't seen him act like this in months..." After the third day of school, the family took a bike ride past the Village School. As they were cycling by, the student jumped off his bike, threw himself on the road, crying, and saying, "I can't do it, I can't go there, she's mean, she doesn't like me, doesn't know me...I can't do it...I won't go to school...you can put me in jail if you want but I won't go to school". The next morning, his mother drove him to school and met with his classroom teacher and the assistant principal. She told

them both about the difficulties the student was having at school, described the student's behavior at home, discussed his suicidal ideation and stated her belief that all this was related to events and experiences at school. Not only were the parents generally concerned about the student's "rough start" in school generally, they were very concerned about his emotional well-being as he had begun once again to talk about killing himself and wanting to be invisible. Because of these concerns, the parents contacted Dr. Hunter and asked her to do an update evaluation. The parents also asked the school convene a PET to review the student's emotional and academic status. (Testimony of mother, father, Dr. Hunter, J. Esty; SE 48)

8. The PET met on October 10, 2005 and the parents raised the social and academic issues discussed. In response, this PET increased the student's direct services by one hour, from three to four hours per week, to "support his needs in written expression." The PET also determined that "to help address [the student's] enrichment needs...", the assistant principal would "arrange" for a high school mentor and "investigate" setting up typing classes for him. These services were not included in the IEP. After this PET, and despite the added hour of special education service, the student's emotional situation at school did not improve. He continued to struggle with his homework, at times crying or having a "meltdown" out of frustration. The parents continued their discussion with the staff of the Aucocisco School about the advisability and possibility of enrolling the student there. Dr. Hunter tested the student on two occasions, observed him in his classroom environment, and had an "evaluation session" with him in her office. She concluded, in part, that the student: (1) continued to present as a child who is highly stressed, with signs of covert depression, highly variable self esteem and social alienation; (2) has variable motivation, inadequate coping skills, problematic peer relationships; (3) "continues to struggle within academic, emotional and social domains"; and, (4) [sic] continues to display moderate to severe weaknesses within executive mental function domains." She also stated that the student "...has qualities of a bored and angry child who is at risk for depression, social withdrawal, and a highly distorted sense of self." Finally, Dr. Hunter concluded that the student "requires an educational setting that can also support his growth within social/emotional domains as he is at risk for serious psychological effects of his complicated mix of exceptionality and deficiency." The PET convened to review and discuss this report. At the end of the meeting, which was scheduled to last only one hour, the mother told the rest of the PET that she and the student's father "had lost faith" in the school's ability to educate their child, that they were rejecting the educational plan the school had developed, and that they were going to enroll the student in the Aucocisco School. She also told the PET that they intended to seek reimbursement of the tuition. The PET minutes state: "Parents have notified the PET that they have placed [the student] at Aucocisco and request tuition from the Gorham School Department." On November 17, the day after this PET meeting, the assistant principal wrote an e-mail to the mother stating, in part, "...As your request for outside placement came [sic] at the end of that PET we were not in a position to adequately respond to it.

I am unclear about your reference when you say you “rejected the plan we had...”. The student’s last day in the Village School was November 18th; his first day at Aucocisco was November 21. On November 28, 2005, the student’s mother wrote a letter to the assistant principal in which she reiterated the family’s rejection of the students [sic] IEP, their intention to enroll him in Aucocisco, and intention to seek reimbursement for the tuition costs at Aucocisco from the Gorham School Department. This letter was delivered to the school at the PET meeting held on December 2, 2005. (Testimony of mother; PE 101; SE 12, 24, 26-40, 48.)

9. The Aucocisco School is a private day school in Cape Elizabeth, Maine. It has about 40 students, including many with language-based learning disabilities, and about 18 teachers, some on a part-time basis. Since November of 2005, the student has received most of his instruction in the Lower School, in a class with three or four other children. He also receives some 1:1 instruction as well. When he first arrived, his teacher described him as staying under his desk “on his hands and knees, barking like a dog, and refusing either to read or write...so academics were not our primary concern.” Instead, Aucocisco initially addressed the student’s social and emotional needs, helping him learn “how to make friends and be a friend, how to chose between being right and being a friend” and worked on such social skills as how to be part of a group, and how to function productively within a group. Then Aucocisco had to identify his intellectual strengths and devise ways to honor and display them. The final piece was to find ways to work on his weaknesses with language, reading and spelling but the initial focus was on the social and emotional aspects of his needs. The student made good progress, especially with social skills, and also made real advances toward becoming a productive and cooperative member of a group. The student also made good progress in more traditional academic areas. At the end of the 2005-2006 school year, he put a portfolio, in a Powerpoint format, and presented it to a live audience including other Aucocisco students and his parents. After his initial problems with the transition into Aucocisco, the student became more and more comfortable there and seemed quite happy at and interested in school. His parents and others who observed him noticed dramatic positive changes in his behavior when out of school. A next-door neighbor who used to be uncomfortable when the student came over to play because he would lose his temper or become too violent with his children testified that the student is “much more controlled now...much calmer, and interactive with my kids when he just wasn’t before...more cooperative, and joins in their games”. The neighbor testified that, “on a scale of 1 (worst) to 10 (best), the student had progressed from being a 1 to being a 7 or 8”. The student’s parents also noticed profound changes in their son. Instead of coming home from school angry, sad and frustrated, he returned “happier than he has ever been...”. His parents have seen a series of positive changes in him, changes in his behavior, attitude, self-esteem (he no longer refers to himself as “stupid”), in his ability to relate and cooperate with family members and others, and in his sense of happiness and contentment about himself. The tantrums he used to display at home no longer occur, he no longer talks about disappearing or

killing himself, he doesn't run off into the woods to avoid homework and he no longer resists going to school. Last summer, he began to read for pleasure, something he had never done before. He is helpful around the house, most of the time. To his parents, he now seems like a normal xx-year-old boy. The student has continued to make progress across academic, social and emotional domains while at Aucocisco during the current during school year, 2006-2007. (B. Melnik, K. Condon, mother, father, Friend, Aunt; PE 28-87; SE 18)

10. The student was tested throughout his attendance in the Gorham School system. At the end of xx grade, the student was tested at a reading fluency rate of 77 words correct per minute ("wcpm"), a rate approximately at the 33rd percentile of his age peers. In early September of xx grade, he was tested at a reading fluency rate of 110 cwpm, about the 50th percentile. By early October of xx grade, his fluency rate had declined to 50 cwpm, just below the 20th percentile. When last tested in the Village School, in mid-November of xx grade, his fluency rate had rebounded somewhat to 61 cwpm, just below the 25th percentile. (PE 226; SE 146)
11. The student began attending the Aucocisco School on November 21, 2005 and completed his xx grade year there in June of 2006. The tuition costs for the 2005-2006 school year at Aucocisco amounted to \$16, 800.00. Prior to March 2006, when the school began to provide transportation, the student's parents drove him to and from school, for a total of 88 days at 48 miles each day. The parents enrolled the student in the Aucocisco School for school year 2006-2007, his xx grade year. Tuition costs at Aucocisco for the 2006-2007 school year are \$25,700.00. (Testimony of father.)

DISCUSSION AND CONCLUSIONS

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education...*designed to meet their unique needs* and prepare them for employment and independent living." 20 USA 1400(d)(1)(A). (emphasis added) It has long been established that the standard on this issue is whether the individualized education program (IEP) is reasonably calculated to enable the student to receive a meaningful educational benefit under the program. *Rowley v. Board of Education*, 458 U.S. 176, 207 (1982). The level of benefit received by the student must be more than trivial; it must be adequate in both quantity and quality so that it is considered both meaningful and "...demonstrable...", *Roland M. v. Concord School Comm.*, 910 F. 2. 983 (1st Cir. 1990). Further, as stated in a recent Maine SEA decision, the IEP must be both reasonably calculated and implemented to enable the student to receive meaningful benefit in all areas of educational performance that are affected by the disability identified by the PET: "...to have received (FAPE), the Student must have made demonstrable improvement in her specific area of need." *Adult Student v. Sanford*, Case No. 06.056H at 21 (Maine SEA 10/31/06). It is clear that a public school is not obligated under federal or Maine law to offer an IEP that provides the

“highest attainable level [of benefit] or even the level needed to maximize the child’s benefit” in order to comply with the IDEA. *Rowley*, 458 U.S. at 198. It is also clear that “parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan” to an eligible student, *Brougham v. Town of Falmouth*, 823 F. Supp. 9 (D. Me 1993).

The level of benefit that is required to pass muster under the law varies from child to child and is dependent upon the unique needs of the individual child. *Rowley*, at 202. In order to carry out the primary purpose of the Act - to help students “who would otherwise become burdens on the state [become] productive members of society...” *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171, 181-182 (3rd Cir. 1988) - an IEP must enable a student to receive “a great deal more than a negligible benefit” and further the appropriateness of the IEP must be “gauged in relation to the child’s potential” for academic growth and achievement. *Id* at 185. To be appropriate, an IEP must be individualized and tailored to the *unique* needs of each eligible child in order to be considered appropriate; both the nature of the child’s educational needs and capacity to learn must first be accurately accessed and then carefully considered when developing or evaluating the IEP. *Nein v. Greater Clark County School Corporation*, 95 F. Supp. 2d 961, 976-978 (S.D. Ind. 2000).

It is also important to note that, to be appropriate, an IEP must address “...all of a child’s needs, whether they be academic, physical, emotional or social.” *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), cited in *Mr. and Mrs. I v. MSAD 55*, 416 F. Supp. 147 (D. Me. 2006), a case which points out that the State of Maine has chosen to define “educational performance” more broadly than the federal scheme does, expanding the definition to include non-academic areas that fit under the rubric of the “...physical, emotional or social” needs referred to above, as well as more traditional academic areas.⁵ Finally, the family, as the party seeking relief, carries the burden of proof on the issues in this hearing. *See, Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005)

I. Was the IEP developed by the school for the 2005-2006 school year reasonably calculated to enable the student to receive meaningful educational benefit as required by the Act?

For the reasons that are discussed below, the hearing officer finds that the 2005-2006 IEP the school developed for the student was not reasonably calculated to enable the student to receive meaningful educational benefit.

The lengthy hearing and extensive record reveal the student to be a child with a very difficult and interesting set of characteristics and needs that any school would find challenging to manage successfully. He was diagnosed in xx grade as having Attention

⁵ *See also, Roland M.*, supra, at 992, “...purely academic progress...is not the only indicia of educational benefit implicated by either the Act or state law.”

Deficit Hyperactivity Disorder-Inattentive type⁶. This condition made it difficult for him to stay focused, stay on task and to complete his work. His birthday of xx/xx means that he entered school as the youngest child in his class.⁷ He has a language-based learning disability that interferes with his ability to learn to read and write. He also has a full scale IQ of 137, as measured by the WISC-III, indicating a very high cognitive potential. His high intelligence makes certain things, like math and science, very easy for him but also causes problems. He can become bored easily with the regular curriculum; his boredom exacerbates his attentional difficulties, making it even harder for him to stay “on task” and with the group. His cognitive skills also serve to separate him from others in his class who are not as skillful or quick; for example, some of his classmates made fun of him, called him “Einstein” and cut off his long hair on the school bus. He was socially and intellectually isolated in school and found it difficult to be a comfortable member of any group in school. He also found it difficult to make friends. He had only one friend at school and had few friends outside of school.

His intelligence was a mixed blessing in another way. He is smart enough to know that he is very bright, but he is also highly aware that he is not good with language, not very good at reading, writing or spelling. This language-based problem was frustrating to him and made him angry with himself, because he couldn’t read, write or spell well, and also angry with people who were asking him to do something at which he wasn’t very successful. While this anger and frustration were expressed more freely at home than at school, it is clear that the causes of his anger and frustration are found in his situation at school and events that occurred there.⁸

Elizabeth Howe, a Licensed Psychological Examiner chosen by the school to evaluate the student in his xx grade year, described the difficulties the student was having in school. She reported on his suicidal ideation (“I want to kill myself, I want to die, I wish I were dead.”), stated that his “inattentive, impulsive and hyperactive behaviors [were] impacting on his educational performance [sic] and recommended that “his social-emotional functioning be monitored for signs of stress and depression.” (SE, 232) She also stated that he would benefit from instruction that was structured, consistent and predictable, with opportunities for small group and 1-1 instruction, especially in areas of weakness, such as reading, writing and spelling, as well as direct support in learning social skills.

The Howe evaluation report is remarkably consistent with an evaluation done by Dr. Marcia Hunter in the winter of his xx grade year. Dr. Hunter described the student as a child who “presents with a complex mix of exceptional strength and relative weakness that requires intervention and support” on a series of levels including executive function

⁶ The student also received elevated scores on the ADHD-Impulsivity index in the Elizabeth Howe evaluation obtained by the school late in his xx grade year.

⁷ In Maine, a child must have his or her xx birthday by October 15 to be eligible to enter xx the preceding September. Thus, if this student had been born one day later than he was, he would not have been eligible to enter school until one year later than he did.

⁸ The reports of Dr. Hunter support this conclusion.

weakness, inattention issues, his intellectual exceptionality, and attention to his psychological health, including self esteem and mood issues. She observed that he is “young”[sic] emotionally” but “old” intellectually and that he “needs a contradictory mix of extra attention and autonomy.” (SE 98-119)

Dr. Hunter did a “brief re-assessment” of the student in the fall of 2005. Both in her report and testimony, Dr. Hunter described the student as being a “complex mix of exceptional attributes and serious vulnerabilities”, as having “two exceptionalities”, who requires a curriculum that responds to his developmental needs that are “outside the range of typical on both ends of the spectrum.” She reported that he continued to present as a child who was highly stressed, with “evidence of covert depression, highly variable self esteem and social alienation” and was particularly concerned about his continuing struggle in the academic, emotional and social domains. (SE 26-42)

The school had access to the reports of Ms. Howe and Dr. Hunter. The school knew that the student was struggling in school, both in working with the consequences of his ADHD and his difficulties in learning to read, write and spell. The Howe and Hunter reports make it clear that the student had serious social and very troublesome emotional issues as well. Further, it is also clear that the parents kept the school informed, on a regular and ongoing basis, of the behavioral, emotional and social problems the student was encountering both at home and at school. The school’s assistant principal testified that student’s mother had told her about the student expressing suicidal intentions, She knew the mother was increasingly concerned about the student’s emotional health and suicidal ideation” [sic] and knew that the family “believed that his statements were directly linked to events at school.” She also believed that the mother was being truthful about the student’s behavior and ideation at home. However, the assistant principal also testified that the school had no reason or obligation to do anything about the student’s emotional situation: “That is not mine to influence unless the student displays adverse impact at school.”

The hearing officer concludes that the 2005-2006 IEP that the school developed for the student was not reasonably calculated to enable the student to receive meaningful educational benefit. While there are a series of considerations that lead to this conclusion, the central flaw in the 2005-2006 IEP was that it did not sufficiently address the student’s social and emotional needs in any effective manner. The school was aware of those needs, both from the Howe evaluation that the school obtained when the student was in the xx grade and from the Hunter evaluations obtained by the parents in 2005. Both reports described the student’s social and emotional vulnerability. Both reports discussed the possibility of stress and depression in this student, and both associated those conditions with his experiences in school. The student’s mother also kept the assistant principal informed about the student’s behavior at home, the most dramatically dangerous being the student’s suicidal ideation, and she too linked that behavior to events and experiences at school. She met with both the student’s classroom teacher and the assistant principal on the fourth day of the xx grade; she told them both of the student’s dramatic difficulties in his first days of school, of his behavioral regression at home, of his suicidal ideation, and of her belief that his behaviors and ideation were related to

events at school. The school, however, did not respond to the mother's information about the emotional and social problems the student was encountering, erroneously believing that the fact that the student did not act out in a similar fashion while at school relieved the school of any responsibility to respond.⁹ In the face of this inaction, the situation grew worse until the parents removed the child from school.

Under the IDEA, it has long been a requirement that an IEP must address, "all of a child's needs, whether they be academic, physical, emotional or social." *Burlington*, supra. If the IEP does not address all those needs, it is not an appropriate IEP. This conclusion is supported by [sic] recent case decided by the United States District Court in Maine, *Mr. and Mrs. I*, supra, in which [sic] court reaffirmed that Maine has defined "educational performance" broadly to include many non-academic areas, including emotional, physical and social domains. It is clear to this hearing officer that the student's emotional and social difficulties both derived from his experiences at school, and significantly contributed to his inability to access his very superior cognitive potential. This inability to make meaningful academic gain is seen particularly clearly in the student's poor performances and, at best, insignificant gains in reading, writing and spelling, the areas of his greatest academic weakness.¹⁰ The IEP at issue in this case makes no real attempt to deal with the social and emotional needs of the student. Indeed, the school specifically disavowed any responsibility to do so. Consequently, the hearing officer concludes that the 2005-2006 IEP was not reasonably calculated to enable the student to receive meaningful educational benefit.

II. Was the educational program the student received in his private placement proper under the Act?

For the reasons discussed below, the hearing officer finds that the educational program the student received in his private placement was proper under the Act.

The appropriateness of a placement such as the one here – a unilateral parental placement of a student in an out-of-district private school in the context of a dispute over the provision of FAPE – is viewed somewhat differently, and more favorably to the parents, than the question of whether the placement is required in order to provide FAPE¹¹. The parents, who still bear the burden [sic] persuasion under *Schaeffer*, need to establish that

⁹ The school argued that the IEP could have been different if the parents had asked for different services for the student. First, what is at issue in this hearing is the IEP as written when the parents made their choice to remove the student from the school, and not any other possible IEP that might have been developed. Second, the responsibility to develop the content of an IEP does not lie with the parents exclusively. It is the responsibility of the PET and, while it is true that parents are PET members, it is typically the school that provides the professional expertise and educational experience required to design an appropriate IEP.

¹⁰ In fact, according to some measures, the student actually lost ground in certain areas during his years in the Gorham system. *See*, paragraph 10, page 9.

¹¹ *See*, *Mrs. B. v. Rome School Comm.*, 247 F.3d 29, 34, n.5 (1st Cir 2001).

their unilateral placement is designed to confer educational benefits upon their child but they do not have to prove that the placement is the least restrictive environment in which he could be appropriately educated.¹²

Aucocisco is a small private day school in Cape Elizabeth, Maine, that specializes in the education of children with various language-based reading disabilities. There are about 40 students in the school and about 18 teachers, some on part-time status. The student receives most of his instruction in the Lower School with the three or four other children near his age and he receives some individual attention as well. His classroom is in the “quiet” wing of the school. The student had some difficulties during his first weeks at Aucocisco, particularly with the social and emotional challenges presented by a new situation¹³, new people and new rules. Ms. Condon described his needs upon arrival as follows: first, he needed work on his social skills, how to fit into a group, even learn what a group is; secondly, we had to identify his strengths and devise ways to honor them; then the challenge was to know when and how to work on his weaknesses, such as spelling and reading.¹⁴ Ms. Condon chose not to put a primary focus on spelling, but to focus instead on the social and emotional aspects of the student’s needs, as well as build some confidence in him by honoring his strengths. The student made good progress in those areas, particularly with his social skills; he made real advances toward learning to “be a member of the group so the group could go forward...”¹⁵

At the end of the 2005-2006 school year, the student’s first year at Aucocisco, he produced a computer-generated portfolio that is found on pages 28 to 87 of the Parent’s Exhibits. He put his portfolio into a Powerpoint format and proudly made a presentation of it to his classmates and his parents, whom he had invited to attend. It is instructive to compare this 60-page portfolio with the final piece of work the student did on November 18, 2005 (SE 18), his final day in the Village School in Gorham, and note the progress the student made in his ability to articulate and convey thoughts, via the written word, from late November, 2005 to early June, 2006. The comparison is a vivid demonstration

¹² The hearing officer disagrees with the school’s argument on this point. To apply the LRE standard to a parental unilateral placement would virtually eliminate the parental option created by the Act. These parents do not have to prove that the student cannot be appropriately educated in the public school; they need only prove that he was not receiving an appropriate education under the IEP as implemented by the school at and before the time of his removal. The hearing officer has already ruled in favor of the parents on that issue.

¹³ His main teacher, Kathy Condon, has a B.S. and M.S./L.D. and more than 25 years of experience as a teacher. She reported that when the student first arrived “he was on his hands and knees, barking like a dog, and refusing either to read or write...so academics were not our primary concern...”. She also said that the student first had to learn “how to make a friend”, how to chose between “being right” and “being/making a friend” – to learn basic social skills so that he could function with, and relate to, others productively.

¹⁴ Early in his time at Aucocisco, the student described himself as follows: “I’m not a reader but I’m a genius at math; you (Ms. Condon) can scribe for me but I don’t write.”

¹⁵ Testimony of Ms. Condon.

of the remarkable progress the student made, and therefore the amount of educational benefit that he received, during his first six month [sic] at Aucosisco.

People who knew the student in an out-of-school context testified about the positive changes in his behavior, manner, and mood they have noticed since his enrollment at Aucocisco.¹⁶ The student's parents testified about the profound changes that have occurred since he changed schools, changes in the student's behavior, attitude, self-esteem, ability to relate and co-operate with family members and others, and perhaps most movingly, in his own sense of happiness and contentment about himself. The student's father reported that the student is "happier than he has ever been..." both at school and at home; that he is doing really good work at school, likes to go to school, did a long Powerpoint presentation and was proud of himself for it. Last June, near the end of the school year, the student said. "I don't want school to end"¹⁷, and, over the summer, he began to choose to read for pleasure. At home, the changes in the student are also dramatic. The parents report that he is mostly cooperative and happy at home, mostly does what he is asked to do around the house, and he relates normally. There are no more fits and tantrums about doing homework, no more running off in the dark, no more resistance to going to school in the morning, no more suicidal ideation. To his parents, he seems like a normal xx-year-old boy.

After reviewing the facts and law, the hearing officer determines that the program the student has received while in the Aucocisco School is appropriately calculated to address the academic, physical, social and emotional aspects of his educational needs and is therefore providing meaningful educational benefit to the student. This program is proper under the Act.

III. Did the family comply with the prior notice obligations imposed by the reimbursement provisions of the Act?

The school asserts that the family failed to comply with the notice provisions of the IDEA concerning reimbursement for a private unilateral placement. The Act provides that any reimbursement for such a placement that might otherwise be available to a family may be reduced or eliminated if the parents have not informed the school prior to the placement that they: (a) are in disagreement with the IEP offered by the school, (b) intend to enroll the student in a private school, and (c) intend to seek reimbursement from the school for that placement.¹⁸ The parents must give the required notice to the school either at the last PET meeting before the student leaves public school or in writing at least ten days before the student leaves public school. The school asserts that the parents failed to give sufficient notice regarding the content requirement set forth above at the last PET meeting prior to the student leaving public school for his private placement, and did not provide written notice until after the student had begun attending the private

¹⁶ See, Paragraph 9, page 8.

¹⁷ While at Gorham, the student used to cry and say, "I'm not going to school...you can put me in jail but I'm not going to school."

¹⁸ See, MSER 12.11(S) and 34 CFR 300.403(d)(1)(i).

school. Therefore, the school's [sic] argues that the family's reimbursement claim should be denied.

The parents assert that they gave adequate notice to the school at the November 16, 2005 PET meeting, the last one held before the student left the Village School.¹⁹ The school knew before the November 16 PET that the parents were dissatisfied with the IEP their son was receiving; that position was restated at the PET, where the family told the school they had lost faith in the school's ability to provide their son with an appropriate education and expressed their intention both to enroll the student in the Aucosisco School and to seek reimbursement for that placement.

After reviewing the evidence on this point, the hearing officer concludes that by the end of the November 16th PET meeting, school officials, including the assistant principal, knew or should have known that the parents (1) were rejecting the IEP that was being provided for the student because they believed it was inadequate and inappropriate, (2) intended to enroll the student at the Aucosisco School, and (3) were going to seek reimbursement for the costs associated with that placement. This conclusion is supported by both documentary evidence and testimony.

The minutes of the November 16th PET meeting, which were prepared by school staff, state in part that, "While [the student's parents] recognize that the Gorham School [sic] have worked to accommodate his needs, they feel that these efforts have fallen short...the inability to serve his cognitive profile has had significant impact on his emotional state..." The same minutes also state, "Parents have notified the PET that they have placed [the student] at Aucosisco and request tuition from the Gorham School Department..." (School Exhibit, p. 23-24) Further, on November 17, the day after the PET meeting, the assistant principal sent the student's mother an e-mail regarding the PET meeting that stated, in part, "As your request for outside placement came at the end of that PET we were not in a position to adequately respond to it. I am unclear about your reference when you say "rejected the plan we had" as [the student's] IEP was not reviewed..." (School Exhibit, p 19) (emphasis added) The school's post-hearing written argument provides provides [sic] further support for the conclusion that the parents gave adequate notice to the school, stating, "Ms. Esty [the assistant principal] felt that by the time the November 16th PET meeting was called, the parents had already made up their mind and their decision was communicated to the Team as a *fait accompli*..." (School's post hearing memorandum, p. 35, fn. 26) (emphasis added) These documents, all authored by people associated with the school, establish that the parents did give clear notice that (1) they "rejected the plan" the school was offering, (2) were making a private placement and (3) intended to seek reimbursement. This notice was given at the last PET prior to enrolling the student in the private placement.

Further, testimony given at the hearing unambiguously supports the conclusion that the statutory notice criteria for reimbursement has been met by these parents. First, the

¹⁹ Friday, November 18, 2005, was the last day the student attended the Gorham school; his first day at the Aucocisco School was Monday, November 21, 2005.

parents testified consistently on this issue; both said they told the PET that they had “lost faith in the school’s ability to provide their son with an appropriate education”, that they rejected and [sic] given up on the school’s plan, were going to place him at Aucosisco, and were going to ask the school to reimburse them for the cost of Aucocisco. The 11/16/05 PET meeting was chaired by the school’s assistant principal who testified that, at the end of the meeting the father told her that, “. . .the school may be trying to meet the student’s needs, but the efforts have fallen short. . .we have lost faith in your ability to meet his needs. . .”. Further, the school had known for months that the parents had been looking at other alternative placements for their son; in the spring of 2005, during xx grade, the student’s mother told both his teacher and the assistant principal that the family had visited and applied to two private schools in an attempt to find an appropriate learning situation for him.

The hearing officer finds that the notice provided by the parents to the school was timely given, was sufficient as to content and, therefore, was in compliance with the requirements of the IDEA.

IV. Did the school comply with it [sic] obligation to provide the student with a FAPE during school year 2006-2007 as required by the Act?

The student was enrolled in the Aucosisco School by his parents for the current school year, 2006-2007. The family argues that it is entitled to recoup all costs associated with that placement and asks the hearing officer to order “continuing reimbursement until such time as [the school] offers [the student] a free and appropriate public education.” The basis for this “continuing reimbursement” is the undisputed fact that Gorham did not prepare an IEP for the student for the current school year. The family asserts that this failure violates a long-time requirement of the IDEA that schools develop and offer eligible students an appropriate IEP at the beginning of every school year. They further assert that recent changes in the IDEA do not remove, and therefore continue to impose, that obligation. Since no IEP was developed for the student for school year 2006-2007, the school has failed to provide him with a free and appropriate education. Therefore, the family is entitled to continuing reimbursement until the school develops an IEP that provides the student with FAPE.

The school agrees that it did not develop an IEP for the student but argues that the IDEA, as currently amended, does not impose any obligation upon it to do so. The school asserts that amendments to the IDEA, effective on July 1, 2005²⁰, operate to relieve Gorham from any obligation to prepare an IEP for a former student unilaterally place [sic] in a private school by his parents, even in the context of a dispute over the provision of FAPE. Instead, that obligation is shifted to the LEA where the private school is located. Therefore, the school argues, the IDEA was not violated by, and the family is not entitled to any remedy for, the school’s failure to develop a 2006-2007 IEP.

²⁰ See 20 U.S.C 1412 (hist. and stat. notes) (Supp. 2006)

In the view of the hearing officer, this issue is resolved by *Ms. K v. MSAD 40*, No. 06-42-P-H, slip op. (D. Me. October 26, 2006) in which the facts are functionally identical to those in this case. The student in *Ms. K* was unilaterally placed by his family in an out of district private school in the context of a dispute about whether he was receiving FAPE in the public school. The family requested reimbursement of the costs of the private placement, the school declined, and a due process hearing was held. In that hearing, the school advanced the same argument on this issue that the school asserts in the case at bar. The hearing officer in the *Ms. K*. case ruled in favor of the school on that point and held that the 2005 amendments to the IDEA did, in fact, operate to relieve the school from the obligation to prepare an IEP for the student in the out of district private school. The due process decision was appealed to the US District court, District of Maine, where the Magistrate explicitly reversed the hearing officer's decision on that point, stating, in part, "I believe the hearing officer erred as a matter of law when he read the IDEA as relieving the District of all responsibility for developing an IEP and providing special education services in these circumstances." *Id at 27-28*. The *Ms. K*. decision removes any possible ambiguity from the ruling on that point by stating, in an emphatic footnote:

Indeed, the hearing officer, like the District, appears to have viewed the IDEA amendments as giving the District carte blanche to cut [the student] loose, without any duty even to assist in the transfer of his IEP to the other Maine district...*I cannot stress forcefully enough my opinion that the District's use of the IDEA as some kind of trap door through which to jettison a special education child who is parentally placed in a private school because of parental dissatisfaction with the IEP subverts, utterly, the most basic objective of the IDEA.*

Id at fn.5, p. 28 (emphasis added) In my view, the decision in *Ms. K*, resolves any doubt about this question. After *Ms. K.*, it is clear that the 2005 amendments to the IDEA do not relieve a "home" school of the responsibility to prepare a yearly IEP for a student such as the one in this case. Under the Maine special education scheme, the responsibility for providing special education services is described in the Maine Special Education Regulations (MSER) 4.1, which states, in part:

Each school administrative unit is responsibility [sic] for providing special education services to all resident students...within its geographical jurisdiction who are identified as students with disabilities...

A "resident student" is defined by the MSER 2.18 as "...a student of eligible school age whose parent or legal guardian resides in the school unit." Under these rules, Gorham retains the responsibility to prepare an IEP for the student.

Because the Gorham School Department was, and continues to be, obligated to prepare a 2006-2007 IEP for the student and has admittedly failed to do so, Gorham has failed to provide the student with a free and appropriate public education, thereby violating the IDEA. As remedy for this violation, the Gorham School Department is responsible for the costs associated with the student's current placement at Aucocisco

from the beginning of the 2006-2007 school year until such time as the school develops and offers the student an IEP that, if implemented as written, would provide him with a free and appropriate public education.

ORDER

After consideration of all the evidence and argument presented during this due process hearing, the hearing officer orders as follows:

The school shall reimburse the family for all costs associated with the placement of the student at the Aucocisco School from the time of his enrollment there in late November 2005 until the end of the 2005-2006 school year. Based upon the evidence presented at this hearing, the tuition and transportation costs incurred by the parents in that time period amount to \$18,428.00. Further, the school is responsible for all costs associated with the placement of the student at the Aucocisco School from the beginning of the 2006-2007 school year until such time as the school develops and offers the student an IEP that provides him with a free and appropriate education as required by the IDEA.

Peter H. Stewart, Esq.
Hearing Officer

Date

WITNESSES

FOR THE FAMILY:

Neighbor
Marcia Hunter, Ph. D
Mother
Father
Barbara Melnik, Co-Founder and Director of the Aucocisco School
Kathy Condon, Student's teacher at the Aucocisco School
Family friend
Student's aunt

FOR THE SCHOOL:

Jane Esty, Assistant Principal, Village School, Gorham School Department
Ronnie Hanson, Director of Special Education
Andrea Hyland, Special Education Teacher
Diane Knott, Math Specialist
Aggie Lane, xx grade teacher
Laurie Tibbitts, xx grade teacher
Tim Rogers, Ph. D.

DOCUMENTS

PARENTS EXHIBIT'S: PE 1 through PE 232

SCHOOL EXHIBIT'S: SE 1 through SE 386