

**SPECIAL EDUCATION DUE PROCESS  
HEARING DECISION  
Parent v. Union # 96  
Case No. 97.058**

May 24, 1997

COUNSEL FOR PARENT: Parent Represented Themselves

COUNSEL FOR SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Carol B. Lenna

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO 20 USC § 1415, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), AND TITLE 20-A, MRSA, § 7207 B, AND ACCOMPANYING REGULATIONS.

This due process hearing was requested by the Parents on April 2, 1997 on behalf of their son (DOB: xxx). The parents and their son reside in Gouldsboro, Maine, and are residents of the Schoodic Community School District.

In preparation for this hearing a pre-hearing conference was held on April 29, 1997. The hearing convened on Friday, May 9, 1997. Eight witnesses gave testimony. There were 137 documents entered into the record jointly by the school and the parent numbered J1-J137. In addition, the parents entered 37 documents numbered P1-P37.

Following is the decision in this matter.

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**I. Preliminary Statement**

Student is a xx year, x month old by who currently is in fifth grade at the Mountain View Middle School in Sullivan, Maine. He was identified as eligible for special education services in February 1996, while in fourth grade, under the category "speech and language". During the balance of that school year and the beginning of the next, J received one hour per week of speech and language services, 9 hours per week of resource services and 3 plus hours a week of migrant teacher support.

In November 1996 J's parents had him evaluated by an independent evaluator, Behavioral Development Pediatrics (BDP), a program associated with Eastern Maine Medical Center. This evaluation identified student a child with a learning disability. The PET met on February 10, 1997, and a new IEP was written. In addition to "speech and language" the IEP identifies student as eligible for special education under the category of "learning disability". Services provided under this IEP are 5 hours per week in the resource room for math, oral reading, reading comprehension, and study and organizational skills. In addition student receives 2 hours per week of speech and language services to work on written language. The balance of his week is spent in the regular fifth grade classroom

It is the position of student's parents that his current program is inappropriate to meet his needs. They argue that he requires additional special education instruction and increased modifications in his regular education classes, as well as an extended school year. They also argue that he requires a speech and language services provided by a speech and language pathologist, not a speech and language clinician as listed in the IEP.

It is the position of the school that student has recently received a new identification and a new program. They assert that the current special education staff and methodology is appropriate to address his learning difficulties. They argue that the current IEP incorporates the recommendations of the BDP evaluation and is reasonably calculated to provide student with educational benefit.

## **II. Issues for Hearing**

1. Is student's current IEP reasonably calculated to provide him with educational benefit in the least restrictive environment.
2. Does student require an extended school year.
3. Should student be tested annually by the BDP at public expense to determine progress.

In addition to the issues raised at the hearing, the parents allege that the following procedural violations occurred.

1. Failure to accurately report PET determinations which were agreed upon at meetings.
2. Failure to conduct an appropriate evaluation to determine special education identification and needs.
3. Failure to identify student as eligible for special education services in a timely manner.

### **III. Finding of Fact**

1. In May 1994 student's second grade classroom teacher referred him to the PET because of her concerns with his academic progress. (Exhibit J-130)

2. A consent form to evaluate student was signed by the parent on May 23. The form indicates that "academic", "intellectual", and "learning developmental" testing will be done as well as classroom observation. (Exhibit J 126-127)

3. Student was evaluated by an outside evaluator in the early fall of his 3<sup>rd</sup> grade year, 1994-95. This evaluator administered the Wechsler Intelligence Scale for Children, Third Edition (WISC-III), and the Bender-Gestalt. The report of this evaluation, dated September 22, 1994 states that student received a full scale score of 80 on the WISC-III, putting him in the low average range. The evaluator concluded that student's scores suggest that his "abilities are relatively consistent within the verbal and visual domain." Results from the Bender-Gestalt "suggests that student is not at a level consistent with his age expectancy". The evaluator cautions that test results may not be a "definitive measure of [student]'s overall level of intellectual functioning as he may have been capable of higher scores..." He notes that student did not complete tasks within the allotted time although he completed them successfully. He concludes that student "will be at risk if placed in a traditional classroom setting without program modifications due, in part, to problems with auditory memory, attention and concentration, and vulnerability to distraction. " He recommends that student "should undergo comprehensive achievement testing to generate age-equivalent standard scores to assess the possibility of a significant discrepancy between cognitive ability (using his expected achievement standard score of 88) and academic achievement." The evaluator went on to make a number of specific educational recommendations. (Exhibit J-120-125)

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4. The Pet met on November 1, 1994. The minutes do not indicate if the outside

evaluation was discussed, nor if academic testing and classroom observations were presented. The PET determined that student "does not qualify as a special education student". The minutes state that student will "remain in regular class academics" and continue with Chapter I assistance. (Exhibit J. 111-113)

5. In the fall of student's 4<sup>th</sup> grade year, 1995-96, he was again referred for special education by his classroom teacher. On October 20 student's mother signed another consent to evaluate form. "Academic", "intellectual", "learning developmental" testing and classroom observations are again checked as the evaluation items ordered. About this time student began receiving assistance from the special education teacher in the resource room as a "diagnostic placement". (Exhibit J. 109-110, Testimony Shufelt)

6. On November 28, 1995 a second outside evaluation was completed, this time by a different evaluator. The WISC-III and the Bender-Gestalt were the only instruments administered. The evaluator determined student's full scale score on the WISC-III to be 87. Student's performance on the Bender "is indicative of significant growth since the previous evaluation." The evaluator concluded that student "demonstrates cognitive abilities in the average to low average range. " Generally average verbal reasoning and comprehension and perceptual organizational skills are noted." (Exhibit J. 103-106)

7. One of the school's special education teachers administered a Woodcock- Johnson Psycho educational Battery to student on December 7, 1995. Specific test scores are not given, but the evaluator concluded that student "scores range from grade 1 (memory, processing print and emerging reasoning abilities) to grade 3.5 (general knowledge and managing other visual information other than print)". He further concludes that there is "little evidence to suggest a learning disability". The report states, however, that student "should continue working in his current special ed[ucation] placements." (Exhibit P. 9-17, Testimony Shufelt)

8. The PET convened December 11, 1998. The minutes do not reflect any discussion of recent evaluations, however, the determination was made that student "does not qualify for special ed[ucation] services under the 'LD' label" Recommendations for a speech and language evaluation and an ADHD assessment were made. (Exhibit J. 107-108, Testimony Shufelt)

9. The school completed a speech and language evaluation on January 30, 1996. The evaluator found that the test results showed average to below average scores in both receptive and expressive language but concluded that "a significant delay in the area of expressive language" exists. She recommended that student should "receive language therapy to help him learn to organize and express his thoughts" (Exhibit P. 5-7, Testimony Havey)

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10. The PET convened again on February 1, 1996. Student was found to be eligible for

special education under the category of "speech and language". The minutes state that no IEP was developed at the meeting. (Exhibit J. 97-98)

11. An IEP, which is dated 2/1/96, was written at some point, which states that student will receive speech and language services 1 hour a week, instruction in the resource room 9 hours a week and "migrant program 3 hrs. 20 min. [sic]". Goals and objectives are written for reading, reading comprehension, written language and spelling, as well as expressive language. Student continued receiving services in the resource room and began receiving services from the speech clinician. (Exhibit J. 89-96, Testimony Shufelt, Havey)

12. Student entered 5<sup>th</sup> grade in the fall of 1996. His parents, at the recommendation of student's pediatrician, took student to the Behavioral Development Pediatrics, Learning Disabilities Clinic (BDP), for an outside evaluation because of their continued concern that student was not learning to read or write. There he was evaluated by a team of evaluators. A psychological evaluation, a speech and language evaluation and an educational evaluation were done.

The speech evaluation found student's "overall speech and language function level to be well below the Average range with similarities between receptive and expressive language abilities." Educational testing found student "currently experiencing internal orientation difficulties....and performances at the first grade level in all academic areas with the exception of general knowledge. He has a dysphonetic and dyseidetic reading and spelling pattern which is the most severe of the four types of patterns requiring intense, long-term remedial teaching."

The psychologist found student's "overall functioning level to be within the Average to the Borderline/Slow Learner range" on tests of intellectual functioning. However, he concluded that student's composite score of "83 may not accurately represent his true abilities in that it masks relative strengths and relative weaknesses." Given the variability [in factor scores] it would appear most appropriate to compare student's level of academic skills to the Verbal Comprehension Factor, which is typically most related to academic achievement. Therefore, significant discrepancies between ability and achievement would be strongly suggested in some areas as outlined in the attached educational assessment."

A Team Conference to discuss the findings of the evaluation team was convened on November 15. Student's special education teacher from the school attended the Team Conference. (Exhibit J. 32-88; Testimony Seigel-Jones)

13. The PET met on January 9, January 13, and February 10 to discuss the results of the BDP evaluations and make special education determinations for student. (Again, no classroom observation appears to have been presented for PET consideration. He was determined eligible for special education services under the category of "learning disability". An IEP was written which provides student with resource services 5 hours per week for math, oral reading, reading comprehension, and study skills and organizational skills development. In addition, 2 hours per week of speech and language services are provided to address written language needs. The balance of his time is in the regular classroom with specific curriculum modifications. (Exhibits J. 22-28, J. 1-15, Testimony Higgins, Hopper)

14. At the time of the hearing student was not receiving speech and language services. The school had contracted with a private agency to provide student's speech and language due to a disagreement between the school's speech clinician and the parents. The private agency speech pathologist resigned her position with the agency in mid-April. The school has been unable to fill this contracted position, and the parents continue to be unwilling to have student served by the school's speech clinician. (Testimony Higgins, Parent)

15. The school's speech clinician stated that she worked on written language with student, both in and out of the classroom in the spring of 4<sup>th</sup> grade and the fall of 5<sup>th</sup> grade.<sup>1</sup> She felt student showed progress in the writing process; that he participated positively and appropriately in the writing instruction she directed in the regular classroom. (Testimony Havey)

16. Student's current special education teacher, who has worked with him since the fall of 1996, testified that she began using the Wilson Reading Program with student in November and has continued this methodology at the recommendation of the BDP evaluator. She sees this as an appropriate reading approach for student. He has progressed from Level I to the beginning of Level III over the year. She has observed progress in both student's writing creativity and mechanics. She feels that although he continues to struggle student has made progress over the year and that he is benefiting from his education. She does feel that he requires extended year services. (Testimony Seigel-Jones)

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<sup>1</sup> There was a factual dispute between the parents and the school regarding the amount of time the school's speech clinician worked directly with student. The parents assert that student who did not testify at the hearing said he had not worked with the speech clinician but a couple of times. The speech clinician testified under oath that she had worked with student weekly as required in the IEP in individual or small group settings both in and out of the classroom. No other information occurs in the record regarding this matter.

17. Student's classroom teacher reports that student is a willing participant in class and definitely benefits from his time in regular education. Even though student is not at grade level in most of his skills, the teacher states that student is a very active and involved learner in the regular classroom. Although most of student's grades indicate a modified curriculum he feels that student has gained educational benefit from his non-special education subjects. (Testimony Hopper)

18. The parents testified that student has made little academic progress over the past four years. They have struggled to get the school to identify student as a student in need of special instruction since second grade. They feel had it not been for their outside evaluation student would not have been appropriately identified as learning disabled. In their opinion the educational recommendations from the first evaluation report are similar to those given in the BDP report which supports their position that the identification should have been made earlier. They question the school's ability to interpret test data and have lost faith in the school's ability to appropriately program for their son. They express concern that he will not have the skills to complete high school and compete as an adult. (Testimony Parents)

## **V. Conclusions**

### **Allegations of Procedural Violations**

#### **Did the school fail to accurately report PET determinations which were agreed upon at meetings?**

There was no clear evidence presented to make a finding on this allegation. Parents stated that they thought that the team agreed that student would receive 9 hours of special education services per week rather than the 5 which is listed in the IEP. They did agree, however, that they were angry at the conclusion of the meetings where the IEP was discussed and that they ceased being active participants in the discussion.

#### **Did the school fail to conduct an appropriate evaluation to determine special education identification and needs, and did the school fail to identify student as eligible for special education services in a timely manner?**

Based on the review of the minutes of the PET meeting held in November 1994, and the referral document which led up to that meeting, student's teachers were quite

concerned with his lack of progress. The school properly referred student to the PET and the PET properly began the process for evaluation to determine if student was eligible for special education services. A consent to evaluate was signed by the parent.

The school listed 4 separate procedures to be completed on the consent form. This process conforms with regulations which require that “[w]hen identifying the special education needs of students, the [PET] shall make its determinations based on a multidisciplinary evaluation”, which includes a classroom observation performed by someone other than the student’s regular teacher”. [MSER Section 8.12, 8.13] The school then contracted with an outside evaluator to perform some of the testing. The testing completed by this evaluator appears to have been thorough and completed according to regulations, but limited to the administration of a WISC-III and a Bender Gestalt.

If, as it appears, this was the only testing done at this time, the school was in violation of evaluation requirements, and their own policy. “No single evaluation, diagnostic procedure or source of data shall be used as the sole criterion to determine a student’s need for special education.” [Section 8.13] The evaluator himself states in his conclusions that student should “undergo comprehensive testing to generate age-equivalent standard scores to assess the possibility of a significant discrepancy between cognitive ability and academic achievement.” (Exhibit 123) There is no evidence that this additional testing was done, nor that a classroom observation was completed. By violating evaluation procedures the PET had insufficient information on which to base their decision to deny student eligibility for special education services.

The following year, student’s fourth grade teacher again referred student for special education consideration. From all accounts student continued to struggle to gain basic reading and writing skills. He was again tested by an outside evaluator, again using the WISC-III and the Bender Gestalt. There was little change in test results although cognitive scores were a little higher. Achievement testing was completed at this time using the Woodcock-Johnson, however, the results of this testing is so poorly reported it is impossible to determine how the evaluator concluded that student’s “achievement is commensurate with his ability”, especially in light of the fact that grade equivalent scores put student at first grade in most academic areas. Again, there is no indication from the record that a classroom observation was done.

The PET of December 1995 concludes that student “does not qualify for special education services under the ‘LD’ label”. There is no record in the minutes of any discussion leading up to this conclusion. However, if we assume-based on the evaluators statement in his report that “achievement is commensurate with his ability”- that the evaluator did not find student to meet the “1.5 standard deviation” cited in regulations, it must be emphasized that “[t]he severe discrepancy standard of



approximately 1.5 standard deviations shall be used only as a guideline to assist the [PET] in identifying a learning disability. It shall be considered in conjunction with other relevant criteria including, but not limited to, classroom observations and evaluations.” [Section 3.10. See also 8.18] The school’s testing showed that student, a fifth grade student was performing at the first grade level in reading and writing and the second grade level in math. The school was under an obligation at this point to do additional testing to determine the proper diagnosis for student.

Although it is clear that the school was making a concerted effort to find some category under which to find student eligible for services, the speech and language evaluation they ordered should have been used to assess language in light of other evaluative information, not as an identification for speech and language services only. At that point student’s learning needs presented a picture of a student with much greater needs than just expressive language.

This conclusion is supported by the actions following the PET of January 1996. The PET met on January 10 to review the results of the speech and language evaluation where they determined that student fit the criteria for a student in need of special education under the speech and language category. However, even though the evaluator concluded that student showed a significant delay in expressive language his IEP for the 1996-97 school year included goals and objectives in reading comprehension, written mechanics and spelling in addition to the goals to address student’s expressive language needs. Even more curious is the information that student has been in a “diagnostic” placement in the resource room since November 1995. It can only be concluded that the PET either did not provide themselves with the tools they needed to make a definitive diagnosis of student’s needs, or they lacked the expertise to do so at that time.

## **Issues at Hearing**

### **Is student’s current IEP and placement reasonably calculated to provide him with educational benefit in the least restrictive environment?**

“Maine law... entitles all school-age students with disabilities to a ...free appropriate public education.” “This education includes special education and supportive services which...[a]re “appropriate to the special needs of the student as defined in an Individualized Education Program” (IEP) Maine Special Education Regulations Section 1.” “The development of an [IEP] ... and the provision of a free appropriate public education shall be preceded by an identification and evaluation procedure which focuses on the student’s individual needs and determines if the student qualifies as a student with a disability.” [MSER, Section 8.1] A school’s IEP is

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defined as appropriate if the school has complied with the procedural guarantees set forth in law, and provides an individually designed instructional program which is reasonably calculated to provide educational benefit to the student. Board of Education v. Rowley, 102 S. Ct. 3034, 3051 (1982) The school is not required to maximize the potential for the student, but there must be meaningful benefit. Id.

From the evidence presented at this hearing the school and the parent have struggled with student's learning problems and the question of his eligibility for special education services since 1994. In 1994 when student was in third grade his classroom teacher referred him to the PET for consideration for special education services. The PET correctly had student's mother sign a "consent to evaluate" form and contracted with an outside psychologist to conduct an evaluation. But only a portion of the testing ordered by the PET was completed. There is no record that any educational achievement testing was completed nor that a classroom observation was done. There is no discussion of test results in the meeting minutes, nor discussion of why the PET found him ineligible for special education services. "When identifying the special education needs of students, the [PET] shall make its determinations based on a multidisciplinary evaluation", which includes a classroom observation performed by someone other than the student's regular teacher." [MSER, Section 8.12, 13]

Likewise in late 1995 and 1996 the school apparently failed use all test data available to the PET and failed to interpret their own test data correctly. This is not to say that the school acted in bad faith. Evidence supports their contention that they were concerned about student's failure to gain skills in reading and writing. They recognized that he had significant deficits, and they did provide intervention. However, the intervention was not specifically designed to meet his needs<sup>2</sup>, and failed to provide him with benefit if the scores of 1995 and 1996 are compared.

Since the completion of the BDP evaluation, the school has written a new IEP. The current IEP does comply with regulations. The school began the implementation of this IEP in mid-February. The goals and objectives for special education and the in-class modifications appear to incorporate some of the recommendations contained in the educational section of the BDP evaluation. In addition, the school has determined that the IEP will be reviewed for needed modification at the conclusion of the school year. I find the school is being responsive to student's needs and the concerns raised by the parents, but there is no conclusive way to determine at this point if the current IEP has, or has not, provided student with meaningful benefit. It simply has not been in place long enough. However, given student's current level of functioning it is hard to imagine that gains could be significant with only one hour of special education

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<sup>2</sup> The 1995-96 IEP is in violation of regulations. The goals and objectives in reading, writing and spelling are a series of pre-printed statements which were, as related by the special education teacher's testimony, used for all students in the group with student. They were not designed to meet student's individual needs.

and 30 minutes of written language per day. It is also not clear when receptive language issues will be addressed as defined by the recent BDP evaluation. Student's severe lag in reading achievement, coupled with past procedural failures leads me to conclude that the school must offer a more intense effort. The school needs to increase special education time to remediate areas showing the greatest need.

Though not raised as a specific issue prior to the hearing the parents raised concerns that student's speech and language needs could only be met by an individual certified as a speech and language pathologist. Student is currently not receiving speech and language services because the pathologist contracted by the school to work with student has left the area. The school has been unable to locate a replacement pathologist. The school's speech clinician is available to provide services to student but the parents have objected to her serving their son.

No evidence presented at the hearing leads me to conclude that student's speech and language needs require the services of a speech pathologist. And in fact the schools' speech clinician, while not yet completing the course requirements to reach certification as a speech pathologist, has greater experience than the speech pathologist previously hired by the school. Special education rights do not reach out to give parents the authority to choose what staff the school assigns to work with their children. The full extent of the dispute between the parent and the speech clinician is not clear, but there was again no evidence presented at the hearing which precludes the current school staff providing this service to student. To continue denying him this service further jeopardizes his ability to make gains.

### **Does student require an extended school year?**

"The purpose of extended school year services is to maintain skills which are at risk of being lost due to excessive regression and recoupment. Recommendations for extended school year services shall be determined by the PET based on one or more of the following factors:...[the]nature and severity of the student's impairment..."[Section 5.12] Based on a review of PET minutes it does not appear that the PET has denied student extended school year services. The PET has yet to discuss his need for such services as part of the current IEP. The Director of Special Education testified that this issue would be discussed and a decision made at the upcoming PET meeting. No evidence was presented to determine if this is a service which should have been provided in previous years. However, it is clear from the BDP evaluation and the testimony of student's special education teacher that both consider student's learning disability to be severe enough to warrant such service and have recommended that it be provided.

**Should student be tested annual by Behavioral Development Pediatrics at public expense in order to determine progress?**

“A reevaluation of each student who receives special education and supportive services shall be conducted every three years, or more frequently if conditions warrant or if the student’s parent or teacher requests an evaluation. The purpose of such reevaluation is to determine if the student continues to be a student with a disability....and to determine if the student continues to demonstrate the original disability as identified by the PET.” [Section 8.22] The parent’s have requested that student be tested by BDP after a year so that progress, or lack of progress, can be determined. Given the comprehensive nature of the evaluation completed by BDP and the fact that intellectual and developmental testing administered over the past three years has resulted in consistent data regarding student’s cognitive and developmental functioning, the evidence does not support the need for a complete reevaluation of student within twelve months. However, educational achievement testing, and classroom observations to determine progress and to modify student’s IEP, if needed, should be completed. Given the school’s past failure in this regard, and the parent’s present lack of faith in the school’s evaluation ability it is reasonable that BDP should perform this progress assessment. Costs associated with this assessment should be billed to Medicaid with any excess costs being borne by the school.

The evidence submitted demonstrates a prior failure on the part of the school to appropriately follow procedure and analyze data regarding student’s needs. His parents acted positively in pursuing the BDP evaluation. And, since the spring of 1996 it appears that the school is working to remedy past failures on student’s behalf. His current special education teacher and the school’s speech clinician appear to have the credentials and the experience necessary to comply with the recommendations of the evaluations and provide student with an educational program which will provide him with educational benefit. The parents have helped set the course. It is now time to allow the school to act on these recommendations and to work with them on student’s behalf. Their continued anger with the school and the school staff is no longer productive. PET meetings and other interactions with the school should be focused on what student needs in the future, not on what was denied him in the past.

**VII. Order**

**1. The PET shall convene prior to the end of June to develop a new IEP for student which includes extended school year services. This IEP shall use both the Ives and the BDP evaluation to develop educational goals and objectives. Special education instruction shall be increased to an amount which provides two additional hours per week for remediation in reading and writing. Regular classroom modifications shall continue as recommended. A case manager shall be appointed for student to be a link between the parents and the school.**

**2. In November 1997 the school shall contract with Behavioral and Developmental Pediatrics to conduct a follow-up educational assessment to assist the school to determine progress and modify the IEP, if necessary. This assessment is to be provided at public expense, using Medicaid reimbursement as appropriate. It is not to be considered an annual event.**

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Carol B. Lenna  
Hearing Officer