

**Katherine A. Neale, M.Ed., J.D.**

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August 15, 1997

To: Parent  
Bruce Young, Superintendent  
69 Augusta Road  
Whitefield, ME 04353  
549-3261

From: Katherine A. Neale, Hearing Officer

Subject: Hearing Decision #97.125, Parent v. Union #51

This is to provide you with my decision in the Special Education Due Process Hearing involving Parents and Union #51 on behalf of Student.

Either party may appeal this decision by filing a petition for review in Maine Superior Court or Federal District Court within thirty (30) days of receipt of this decision. The petition for review in Superior Court must be filed in the county in which the student resides or the county in which the Administrative Unit is located.

The Administrative Unit shall submit to the Commissioner of the Department of Education, with a copy to the Due Process Consultant, documentation that the Unit has either complied with this decision or that an appeal is pending. Such documentation shall be submitted no later than forty-five (45) days after the receipt of this decision.

The parent may request the Department of Education to review the Unit's compliance with this decision by filing a written complaint with the Commissioner of the Department of Education.

Any questions regarding this decision or the record of the hearing should be directed to: Due Process Consultant, Division of Special Education, Department of Education, State House Station #23, Augusta, ME 04333.

cc: Jim Breslin, DMHMR&SAS, Advocate  
Ralph Newbert, Director of Special Services  
A. Leigh Phillips, Due Process Consultant

**STATE OF MAINE**

**SPECIAL EDUCATION DUE PROCESS HEARING**

August 15, 1997

**Case # 97.125, Parent v. Union #51**

Advocate for the Parent: Jim Breslin, DMHMR&SAS

School represented by: Ralph Newbert, Ed.D., Director of Special Services

Hearing Officer: Katherine A. Neale, M.Ed., J.D.

**THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO  
TITLE 20-A, M.R.S.A., §7207 et. seq.; TITLE 20 USC, § 1415 et. seq.; AND  
IMPLEMENTING REGULATIONS.**

On June 20, 1997, the Department of Education received a request for a Due Process Hearing from the Parents on behalf of their son.

The pre-hearing was scheduled for July 8, 1997, but through mutual agreement of the parties was rescheduled to July 17, 1997 and held via a telephone conference call. Exhibits submitted by the Parent are numbered P-1 through P-33 and exhibits submitted by the School are numbered S-1 through S-27. The hearing was held on July 29, 1997 in Augusta, ME. The record was held open until August 5, 1997 to allow both parties to submit Closing Statements.

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**I. PRELIMINARY STATEMENT**

The Student (DOB x/xx/xx) has attended school in Union #51 since kindergarten and received Chapter 1 assistance throughout much of his early elementary education. His grades generally were C - D, and in the 7th grade, he received failing grades in all academic subjects. Currently the student is a xx year old student who is identified as Multihandicapped. The present level of educational performance on the IEP describes the student as having poor interpersonal relations and very slow processing speed. School Union #51 does not have a high school. Following the 8th grade, students select an area high school from a number of public and private schools with which Union #51 contracts. The student was parentally placed at Erskine Academy, a private secondary school in South China, ME.

## **II. ISSUES**

1. Whether the School properly developed the Individualized Education Program (IEP) vis-à-vis procedural requirements?
2. Whether the IEP was reasonably calculated to provide educational benefit?

## **III. FINDINGS OF FACT**

1. On December 7, 1995, while in 8th grade, the school referred the student to the Pupil Evaluation Team (PET) because his teachers were concerned that he lacked many basic academic skills, had difficulty focusing attention in class and his productivity was low. The PET met on January 8, 1996 and ordered an evaluation. The parents signed the consent to evaluate on January 29, 1996. On March 7, 1996, Dr. William Keegan issued the report of his psychological evaluation of the student and on May 6, 1996, Mary Bridgham completed an educational evaluation. (Exhibits S-24; S-22)

2. Dr. Keegan's psychological evaluation included a WISC-III, Sentence Completion Test, Achenback Teacher Rating Scales, Human Figure Drawing and parent/ student/teacher interviews. The evaluation report contained no discussion of the Human Figure Drawing and the Achenback was completed by only one teacher. The school was cited in a Complaint Investigation for failure to assess in all areas related to the suspected disability. The student received the following scores from the WISC-III: Verbal (90), Performance (89) and Full Scale (88). The evaluator found the student to have low average cognitive skills and to be in need of special education services due to a behavioral impairment. He recommended the following: a behavior management plan to monitor the student's work output; monitoring, encouragement and social support to

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increase academic productivity; and monitoring written work to assess “whether his slow production speed is an inherent learning weakness or a subtle avoidance or attention getting strategy.” (Exhibits P-20; S-24)

3. The educational evaluation consisted of the Kaufman-Test of Educational Achievement (K-TEA) and classroom observations. His standard scores reflect the following: Math applications (98); Reading decoding (110); Spelling (100); Reading comprehension (104); and Math computation (82). The evaluator concluded that the student was learning and retaining the material presented, was mostly on grade level or above in the areas tested and was not in need a special education services. (Exhibit S-22)

4. On May 10, 1996, the PET met to review the evaluations. Those in attendance were: two 8th grade regular education teachers; Dr. Newbert, Director of Special Services; Ms. Bridgham, special education teacher/educational evaluator; a special educator and guidance counselor from Erskine Academy; and the father, who arrived late in the meeting. The team determined that the student was not eligible for special education services. As the family had decided to apply for admission to Erskine Academy, the team recommended that the student be part of the academic assistance program at Erskine. (Exhibit S-20C)

5. The student’s 8th grade (1995-96) report card reflects the following quarterly marks: Literacy, i.e. Reading/Spelling/Writing (F, C, inc., F); Math (F, F, F, F); Social Studies (D-, no grade, F, F); Science (F, F, F, F). Additionally, the student was absent 35 days and tardy 17 days. (Exhibit S-20B)

6. In a letter dated June 5, 1996, the parent requested that the school pay for an Independent Educational Evaluation (IEE). On June 11, 1996, Dr. Newbert asked the parent to state the reasons for disagreeing with the school’s evaluation and the parent responded in a letter dated June 19, 1996. On July 10, 1996, the school granted the parent’s request for an IEE. Within this time period, the parent filed a request for a Complaint Investigation with the Commissioner of Education (June 24, 1996) and a report was issued on August 19, 1996. Within the body of this report, there is a reference to an agreement between the parties that the student would receive a neuropsychological evaluation, Occupational Therapy (OT) evaluation and a written language assessment. Only the neuropsychological evaluation is referenced in the Corrective Action Plan and there is no evidence that the “agreement” between the parties generated from the PET as required by law. There is no evidence in the record of an OT evaluation. (Exhibits P-25; P-23; P-22; P-20)

7. Despite failing every academic subject in the 8th grade, the student transferred to Erskine Academy, a private secondary school, as a 9th grader during the 1996-97 academic year. (Exhibit S-20B; Testimony: parent, Dr. Newbert)

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8. The parents had originally planned to have the student evaluated at Bayside Rehabilitation in Portland but there was an extended wait for an available opening. After calling around, the family secured an earlier evaluation date at Richard Doiron, Ph.D., (Neuropsychology Associates) only to have a cancellation by the evaluator and a reschedule at a much later date. A neuropsychological evaluation was conducted by Dr. Julia Domino (Neuropsychology Associates) and the report was issued on December 16, 1996. (Testimony: parent; Exhibit S-14)

9. A Speech and Language evaluation was conducted by Sharon Peabody, M.S., CCC-SLP and the report was issued on September 9, 1996. The evaluation procedures included the Test of Written Language - 2 (TOWL-2) and the Language Processing Assessment. The evaluator concluded that the student had weak written language skills and made a number of recommendations to be used in the classroom, including the following:

6. Written language instruction should be initiated to assist [the student] when developing topics, developing paragraphs, maintaining verb tense agreement, organizing his written language, combining ideas, increasing written language cohesion, and using correct punctuation and capitalization.

7. The use of semantic organizers, such as webbing, story maps, etc. may assist [the student] when organizing his written or verbal language.

Additionally, the evaluator recommended that a formal language evaluation should be conducted to evaluate his receptive and expressive verbal language knowledge and use. (Exhibit S-18)

10. On February 10, 1997, the PET met to review the evaluations. The PET determined the following: the student qualified for special education under the category of multihandicapped; his parents will visit composite settings and choose one; and the PET will meet again on February 24th to discuss placement (there is no evidence that the PET met on this date). The minutes reflect a discussion of whether the root problem for the student was depression or ADD. The parent testified that there was not a thorough discussion of Dr. Domino's evaluation findings nor a discussion of the student's needs. Rather, from the parent's perspective, the meeting consisted of an attack of Dr. Domino's credentials by Dr. Newbert. Furthermore, the parent stated that placement was discussed to the exclusion of programming needs. A review of an audio tape of the meeting reveals a discussion between Dr. Domino (her voice barely audible) and Dr. Newbert disagreeing over the source of the student's attentional problems. Dr. Domino stated that based on her evaluation, she thought ADD was the primary disability and Dr. Newbert stated that depression was the primary disability. When Dr. Domino asked why he thought depression was the primary source of the student's problem, Dr. Newbert stated, "I'm not going to debate that here." There was no review of the Speech/Language evaluation conducted by Sharon Peabody. When the parent asked about the OT evaluation, Dr. Newbert's response clearly indicated that it had not been conducted yet. A review of the

minutes and the audio recording of the meeting reveals no discussion of the student's programming needs. The clear focus of the discussion from the school is placement and specifically a composite room placement. Dr. Newbert repeatedly makes statements, such as, "He needs composite services" and "We will seek a composite room placement." Regarding the identifying category of multihandicapped, the tape reveals an inadequate discussion with the parent inquiring about "Other Health Impaired" and Dr. Newbert concluding that due to the student's "motor speed problem and processing speed problem," multihandicapped was the appropriate category. The parent asked about psychologist services due to the student's depression. Dr. Newbert replied, "Counseling as a related service, we can discuss that at the next meeting" which was scheduled for February 24th, but not held until March 20th. There is no record of counseling being discussed at any subsequent meeting. (Exhibits S-13; P-33 (audio tape of 2/10/97 PET meeting); P-4; Testimony: parent)

11. From February 24 to February 28, 1997 and again from March 3 to March 27, 1997, it appears that the student was denied access to an education. The parent testified that personnel at Erskine Academy took the student's books away and told him he could not participate in classes at Erskine. (Exhibit P-4; Testimony: parent)

12. On March 20, 1997, the PET met to discuss programming and concluded with the following two determinations: "1. Parents will explore options of alternative placements. 2. Consent for Placement was discussed but no placement made and consent not signed." A draft IEP was presented which contained the following goals and objectives:

A. [The student] will participate fully in the high school program and successfully attend classes.

1. Given transportation to school [the student] will have no unexcused absences from school by 3/98.
2. Given special education support and allowances for slow processing speed, [the student] will achieve grades of 75 or better on unit tests and quizzes, by 3/98.
3. Given therapeutic interventions, [the student] will have no more than 6 inappropriate behaviors per month that require staff intervention, by 3/98.

B. [The student] will improve his written production.

1. Given a picture prompt, [the student] will write about the prompt using at least 80 words and six sentences with proper capitalization and punctuation, as measured by teacher made or standardized writing sample, by 3/98.
2. Given a picture prompt, [the student] will correctly spell words in a spontaneous writing sample at an 80% correct level, by 3/98.

A review of the audio tape of this meeting reveals Dr. Newbert identifying the student's deficit areas as behavioral and slow processing speed. He then offers supportive services in the form of psychological counseling (if the student attends a public high school). While describing the special education placements available at Cony High School, the special education teacher (who had reviewed the student's file prior to this meeting) mentioned the resource room, two behavioral programs and then stated, "We also have a composite room for the multihandicapped, which he [the student] is obviously not appropriate for. That is for kids who are very low functioning; identified as mentally retarded, which [the student] is not." During this meeting, the parents continue to beg the question about services for ADD and the results of the Dr. Domino evaluation, but to no avail as Dr. Newbert was determined not to discuss that evaluation. (Exhibits S-10; S-11; P-32 (audio tape of 3/20/97 PET meeting); P-12C)

13. The record contains a handwritten note from James V. Nelson, Headmaster at Erskine Academy dated March 25, 1997 with a salutation "To whom it may concern" stating that "Erskine Academy will admit [the student] as a special needs student if it is determined by the P.E.T. process that E.A. has the proper program to meet his educational needs." On March 27, 1997, Dr. Newbert sent a letter to the parents offering to provide a tutor "until this issue is settled", i.e. Erskine not educating the student as noted above in #11. (Exhibits P-7; P-10)

14. On March 31, 1997, the PET met to "draft a temporary placement in Special Services until the due process hearing." The minutes go on to state that the "Resource Room will be utilized to the maximum amount since Erskine does not have a composite room or self-contained program." Following reports from teachers regarding his failure to complete or return assignments and lacking the necessary skills to succeed in General English, the PET made the following determinations: "\*Foundations of Writing and Literature; Integrated Science; Transitional Math I; Health; Study Skills; P.E.; Arts and Culture. \*I.E.P. developed with Resource support up to 80 min. daily. \*Consent for placement signed." Two draft I.E.P.s were presented at this meeting. The "Amended Draft 3/31/97" IEP was accepted by the parents. It contained essentially the same goals and objectives as noted above, but with two classroom modifications added, i.e. tests can be taken in the resource room and additional time allowed on tests. Dr. Newbert also presented (and favored) another I.E.P. with the same goals and objectives, but with two hours daily of "Composite with Amended Day" services. This draft I.E.P. contains no classroom modifications and includes an early dismissal. (Exhibits S-6; S-8; P-6; Testimony: Ralph Newbert)

15. On June 10, 1997, the PET met to review the student's program. The school hired an outside facilitator to facilitate this meeting per an earlier agreement. His teachers reported that the student was failing due to not turning in assignments despite time extensions. His math teacher states in the minutes that he "has trouble getting his book, pencil, and

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notebook out on time in class" and that she has not received homework assignments from

him for a long time. Again there was no consensus on the issue of placement. Neither the minutes nor the Facilitator's Report reflect a discussion of the student's specific academic needs based on the previously conducted evaluations. The formal PET meeting was adjourned. The facilitator met with the parents and their advocate and discussed issues related to the student achieving enough credits to successfully complete the 1996-97 academic year and the parents need to visit the area public high schools before school ended for the year. Presumably this individual was hired to help develop the I.E.P. and that clearly did not happen. The facilitator's report inaccurately states, "When the decision is made on the family's preference for placement, then a team will be assembled to write the IEP."

(Exhibits S-2; S-3)

16. Erskine Academy has a trimester system. the student's final grades for 9th grade are the following: Introduction to Writing/Literature - 50; Integrated Science - 67; Transitional Math - 67; Arts & Culture III - 85; Health - 59; Physical Education - 72.

(Exhibit P-1)

17. On June 17, 1997, the parents filed a request for due process hearing against Union #51 for failure to develop an appropriate program for the student. (Exhibit P-2)

#### IV. CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA) requires that the local school unit provide students identified as disabled with a "free appropriate public education." [20 U.S.C.A. §1412 (2) (B)] IDEA provides little guidance as to what constitutes an appropriate program. The United States Supreme Court in Board of Education v. Rowley, 102 S. Ct. 3034 (1982) concluded that the law imposes a two-fold obligation on the school in developing an appropriate program: the program developed must meet the procedural requirements of the law and regulations; and the program developed must be reasonably calculated to provide the student with educational benefit. [Rowley, 102 S. Ct. at 3051] The Court concluded that IDEA does not require schools to maximize a student's potential in developing the IEP. [Rowley, 102 S. Ct. at 3049]

In addressing the first prong of the Rowley test, the Court ruled that the procedural requirements of IDEA are as important as the substantive requirements of the law. The 1st Circuit Court of Appeals (Maine is in this Circuit) noted that a school's program may be found in violation of the law on procedural grounds when the "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formation process, or caused a deprivation of educational benefits." [Roland M. v. Concord School Dep't., 910 #97.125 p.8

F.2d 983, 984 (1st Cir. 1990)] However, it should be noted that where the school's procedural violation has been technical and non-prejudicial, it may not, per se, defeat an



individualized educational program. [Doe by Doe v. Defendant I, 16 EHLR 930 (6th Cir. 1990)] Relief is also not available where the due process violation does not cause harm. [Myles S. v. Montgomery County Board of Education, 20 IDELR 237 (M.D.Ala. 1993)]

In addressing the second prong or the issue of “educational benefit,” the Supreme Court stated that for a student with a primarily mainstream program, the standard is likely met if the program “is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” [Rowley, 102 S. Ct. at 3049, 3051 n. 28] It is clear from the law that the standard is more than minimal benefit or slight academic gains. The First Circuit Court of Appeals has also made it clear that educational benefit would require “demonstrable improvement.” [Roland M., 910 F.2d at 991]

In the present case, the parent alleges that due to the school’s procedural violations and an I.E.P. not calculated to provide educational benefit, JO has been denied an appropriate education. In analyzing the first prong of Rowley, the school was cited in a Complaint Investigation Report (#96.122) dated August 19, 1996 for failure to assess in all areas related to the suspected disability [MSER § 8.12], and failure to complete the evaluation process and convene a PET within 45 school days [MSER § 8.20]. After granting the parent’s request for an Independent Educational Evaluation (IEE) on July 10, 1996, the PET did not reconvene until February 10, 1997 to review the evaluation - **7 months later!** While it is true that there was an extreme delay in getting the appointment at Neuropsychology Associates, there was still a delay of 28 to 30 school days after the school had the evaluation report in hand and when the PET reconvened. IEEs are difficult for the school to control in terms of compelling the time limitations under the regulations, however, when the school has agreed to pay for the evaluation, they need to exercise some influence over the evaluator to comply with the law.

It is the responsibility of the PET to review all the existing evaluations in developing the program for a student.[MSER § 8.3] It appears from the record that the Speech/Language evaluation of September, 1996 was never reviewed by the PET. This evaluation contains some excellent concrete academic recommendations that were never discussed and thus are not in the I.E.P. where they belong. Further, the evaluator recommends a “formal language evaluation to evaluate the student’s receptive and expressive language knowledge and use.” Despite the disagreement between Dr. Newbert and Dr. Domino over the source of the student’s disability, i.e. ADD vs. depression, the record does not contain evidence of the PET using this 15 page evaluation with 3 pages of recommendations to develop a program for the student.

The PET must develop the goals and objectives in the I.E.P. so as to provide the student with an appropriate education. [MSER § 8.3.D] Dr. Newbert presented a number of “draft” I.E.P.s to the PET with the same two goals (as noted above in #12). PET **#97.125 p.9**

meetings were stalled around discussions of placement with the school trying to get the parents to select a public high school instead of Erskine Academy. There is no evidence

that the PET ever sat down, reviewed all the existing evaluations, coupled with their collective knowledge of the student, and developed the goals and objectives of his I.E.P.

It is also arguable that the school failed to implement the I.E.P. as per the “therapeutic interventions” under the first goal. [MSER § 9.8] While the PET discussed the student’s need for counseling, it appeared contingent upon his going to a public school. The parents finally signed the consent for services on March 31, 1997. There is no evidence in the record that the student received any “therapeutic interventions” for his “inappropriate behaviors.”

Further, the PET is mandated to determine the least restrictive environment in which to implement the I.E.P. [MSER § 8.3.F] The record is full of Dr. Newbert’s references (like a mantra) to a “composite room” setting for the student’s program. It wasn’t until the March 20, 1997 PET meeting at Cony High School that the special education teacher pointed out the inappropriateness of the composite room for the student, and threw into question the appropriateness of the “multihandicapped” identifying category for him.

These procedural violations are not merely technical, rather, they have compromised the student’s right to an appropriate education and deprived him of educational benefit. While the school is extremely frustrated with the parent’s decision to send the student to Erskine Academy which does not have a continuum of services for students with disabilities, the record is full of the parent begging the questions, e.g. what about the ADD and LD in writing in Dr. Domino’s report; why the category of multihandicapped and not other health impaired; what about psychological counseling; shouldn’t we develop the program first and then decide placement; etc. When the school fails to address the parent’s concerns, as in the present case, it effectively hampers the parent’s opportunity to participate in the formation process.

In analyzing the second prong of Rowley, we look to whether there was educational benefit. The student failed four of the five academic subjects taken during the 9th grade year and failed all academic subjects in 8th grade. Although the student was not identified until February, 1997 and the parent did not sign the consent for services until the end of March, there was no improvement in grades during the third trimester (March 17 to June 18).

The I.E.P. offered by the school and accepted by the PET is wholly inadequate, not developed following a thorough review of all the evaluations, and not reasonably calculated to provide an appropriate education. The over-riding work completion problem is not addressed in the I.E.P. despite Dr. Keegan’s recommendations in his report. The

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written processing deficits addressed in Ms. Peabody’s report are not reflected in the I.E.P. And so on.

## V. DECISION

The school failed to properly develop the I.E.P. vis-à-vis procedural requirements and failed to develop an I.E.P. reasonably calculated to provide educational benefit, thus denying the student an appropriate education. The parents have prevailed.

## VI. ORDER

1. The school shall hold a PET meeting as soon as possible, but no later than September 19th to develop an appropriate I.E.P. for the student with specific, measurable goals and objectives. If it is absolutely impossible to hold the meeting by the 19th, the school will first inform the Hearing Officer of the difficulty and then notify regarding the new date. If the family has chosen a public high school, then obviously include faculty from that school, however, if the student is still enrolled at Erskine (**which is strongly not recommended**), then include Erskine faculty and **develop an appropriate program**.

2. The school shall contract with an outside educational consultant to assist in the development of the goals and objectives in the I.E.P. Some suggested professionals are:

Larry Starr, Camden (236-2893)  
Candice Bray, Camden (236-6038)  
Joanne Dee, Sanford (324-8697)  
Ellen Brunelle, Scarborough (Southern Maine Learning Center 883-5225)

3. The school shall provide the consultant and all other PET participants copies of all evaluations conducted to date, e.g. Keegan, Bridgham, Domino and Peabody in advance of the PET meeting (by at least two days) so that programming decisions can be informed and relevant to the evaluative data.

4. The PET shall address the following issues/topics and the discussion shall be reflected in the PET minutes:

- a. the area of exceptionality
- b. counseling services
- c. Sharon Peabody's recommendation for additional evaluations in the area of receptive and expressive language knowledge and use

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- d. Occupational therapy evaluation (agreed upon previously but never conducted)
- e. specific, measurable goals and objectives addressing JO's areas of disability

- f. the need for extended school year services (the parents previous inquiries about ESY services were not addressed by the PET, i.e. explain regression/recoupment and discuss if it is appropriate or not)
- g. the least restrictive environment (LRE) in which to implement the program
- h. a plan to increase work production and completion

The school shall provide the Hearing Officer with a copy of the minutes within 10 days of the meeting.

5. The school shall compensate the student for the time he was excluded from Erskine Academy, i.e. February 24 to February 28 (5 days) and March 3 to March 27, 1997 (20 days). The school shall provide the Hearing Officer with the total number of tutoring hours provided already and if there are still hours of tutoring due to the student, include a projected plan for providing any remaining hours. This documentation is due by September 12th.

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Katherine A. Neale, M.Ed., J.D.  
Hearing Officer

### **LIST OF WITNESSES**

James Nelson, Headmaster at Erskine Academy

Mother of student

Nancy LaGasse, Special Education Teacher at Erskine Academy

Dr. Ralph Newbert, Director of Special Services, Union #51

Father of student