UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROME SCHOOL COMMITTEE,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-CV-20-B
	)	
MRS. B.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON PLAINTIFF'S APPEAL OF HEARING OFFICER'S DECISION UNDER THE INDIVIDUAL WITH DISABILITIES AND EDUCATION ACT

Plaintiff, Rome School Committee, challenges the administrative hearing officer's decision that Plaintiff did not properly prepare an individualized educational program ("IEP") for DC, a twelve year old student, for the 1998-1999 school year. Plaintiff contends that the hearing officer exceeded her authority and violated provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491, and state special education law, 20-A M.R.S.A. §§ 7001-8101. For reasons delineated below, I recommend that the Court REVERSE the hearing officer's decision.

Factual Background[1]

At issue is the educational development of DC, a twelve-year old who resides in Rome, Maine with his mother, Mrs. B. From kindergarten through most of third grade, DC attended Belgrade Central Elementary School ("Belgrade Central"), a school within Maine School Administrative District No. 47 ("M.S.A.D. 47"). In May 1997, before DC completed third grade,

[1] The Court cites the administrative record by a capital R followed by the page number ® __). The Court notes citations to transcripts from the hearing by the name of the witness followed by the page number (Mrs. B at __).

Mrs. B withdrew DC from Belgrade Central and educated him in a home schooling program during 1997-1998, his fourth grade year. Mrs. B later enrolled DC in Valley View School, an out-of-state boys boarding school for DC's fifth grade year. DC is presently a sixth grade student at Valley View.

Before attending Belgrade Central Mrs. B recognized that DC had impulsive and aggressive behavior. For example, DC attended five different pre-schools due to hitting, biting and other behavioral problems. At home, Mrs. B had difficulty retaining the services of a nanny due to similar behavior by DC. *Mrs. B* at 837-839.

DC attended kindergarten for the 1992-93 school year. In kindergarten, DC exhibited behavior that concerned his guidance counselor, Wendy Flaschner. In a 1992-93 Guidance Report, Ms. Flaschner indicated her concern about DC's hyperactivity, poor listening behavior, impulsiveness with work, and disruptiveness. *R* 192. Ms. Flaschner recommended that DC use a home/school notebook to maintain daily contact between home and school, and that the school begin the pupil evaluation team ("PET") process if DC's academic process was minimal by the end of the first quarter of next year. *Id.*

As a result of DC's poor academic progress, he repeated kindergarten in 1993-94.[2] *Mrs. B* at 843-844. During the year, Ms. Flaschner recommended that DC be evaluated at the Mid-Maine Medical Center in Waterville, Maine. On December 15, 1993, Harold Longenecker, M.A. and Glen Davis, M.D. prepared an evaluation report that diagnosed DC with attention deficit hyperactivity disorder (ADHD) and some pre-conduct disorder symptoms and recommended that:

[2] Mrs. B volunteered in the classroom during DC's two years in kindergarten and into DC's first grade year.

(1) the family meet with their primary care physician and consider pharmacological strategies to manage ADHD and (2) the family share the information in the report with the school so that school officials "can be more aware of [DC's] overall behavioral and emotional presentation" and be participants in managing behavioral contingencies. *R* 159-165. After the evaluation, DC was placed on medication for ADHD and had weekly behavioral control meetings with Mr. Longenecker. Mrs. B kept the school appraised of DC's treatment.

On January 27, 1994, DC's two kindergarten teachers completed a Second Year Kindergarten Report on DC. In the report, the teachers noted that "we feel medication has really helped [DC]. Improvement was so noticeable that first week [after DC began treatment]. [DC] was like a different child. We have noticed less improvement in the last week." *R* 195-96. In fact, Mrs. B stated that in spite of the treatment employed by Longenecker, DC's impulsive and aggressive behavior returned after initial weeks of success.

After completing his second year of kindergarten, DC advanced to Ms. Wintle's first/second grade class for the 1994-1995 school year. Like she did in kindergarten, Mrs. B volunteered in the classroom until she witnessed Ms. Wintle blame DC for conduct provoked by another student. Mrs. B felt that Ms. Wintle treated DC unfairly. Ms. Wintle noticed that DC was impulsive and had behavioral inconsistencies that affected his work, but he was not rude to her nor did he fight with other children. *Mrs. Wintle* at 735-737. Mrs. B, however, recalls an incident where DC punched a student in the head because the student would not give DC his basketball. Ms. Wintle never sent DC home or to the principal's office for misbehavior during the year. DC generally received favorable comments from Ms. Wintle in his Multi-Age Progress Report. Although Ms. Wintle stated that inconsistencies in DC's behavior affected his work, she also

stated that DC "has a good attitude towards school and seems to enjoy our multi-age activities." *R* 166-67.

During the 1994-1995 school year the school asked DC to keep a home-school notebook. The notebook contained notes by DC's teachers concerning his behavior during class, and notes by Mrs. B responding to the teachers' comments or adding additional observations about DC's behavior at home. *R* 166-67. Also during the year, Mr. Longenecker referred DC to Dr. Salvato at the Behavioral Medicine Clinic. In her March 14, 1995, evaluation, Dr. Salvato's assessment found that DC exhibited "mild oppositional behavior with aggression and ADHD, as well as difficulty with social skills and making friends." *R* 454-459. She suggested that DC's medication be slightly increased to address his hyperactivity. *Id.*

In June 1995, a Guidance Services Report listed under "referral concerns" DC's difficulty with his peers at school and at home. *R* 132. In the Report it was recommended that certain strategies be employed to address those concerns including: participation in a social skills group and consultation with DC's teacher, and behavioral consultation for DC's mother with Stan Davis, a school guidance counselor. While Mrs. B began meeting with Mr. Davis in June 1995, the social skills group was discontinued after three or four meetings. *Mrs. B* at 855-857; *Mr. Davis* at 353-354.

Also in June 1995, Mrs. B arranged an appointment with a child psychiatrist, Dr. Thomas Jensen, to evaluate DC. In a letter to Mrs. B dated June 20, 1995, Dr. Jensen concluded that DC has ADD and an aggressive behavior disorder and may have a speech and language disability. *R* 448. Dr. Jensen also stated that DC's aggressive and violent behavior "leads to a diagnosis of Oppositional Defiant Disorder. Arguably, the more serious diagnosis of Conduct Disorder could

be fairly applied." *R* 446. As treatment, Dr. Jensen recommended pharmalogic treatment and a focus on behavior management strategies. *Id.*

After completing the evaluation, Dr. Jensen referred DC to Lynda Mazzola, a speech-language pathologist. Ms. Mazzola determined that DC had a language-based disability and that his reading skills tested a full grade below his present grade level. Mazzola recommended that the school start a PET to address DC's disability. *R* 143-147.

Mrs. B testified that during the summer DC continued to exhibit serious behavioral misconduct. DC made a prank call to 911, killed a duck sitting on the dock at the family's home, and while in Washington DC, he ran while pushing his cousin in a wheelchair causing the chair to hit a curb thereby injuring his cousin, who had to go to the hospital to receive stitches. *Mrs. B* at 860-861.

DC began second grade in the 1995-96 school year in Ms. Wintle's first/second grade class. As in first grade, the school initiated a home/school notebook for DC. The notebook reflects that DC had good days and bad days. *R* 407. Mrs. Wintle noticed that DC appeared to be angrier than last year. *Mrs. Wintle* at 745. During that same month, in September 1995, DC threatened his sister with a butcher knife. Mrs. B told Mr. Davis, the school guidance counselor, who referred Mrs. B to a Family and Child Crisis Unit. *Mrs. B* at 862-863.

In September 1995, the school formally convened a PET meeting and determined that DC had a speech-language impairment and prepared an IEP. *R* 136-137. The modifications listed in the IEP include: a star catcher system for positive reinforcement, a sterile work environment using only materials DC needs for the activity, a home/school notebook to provide daily contact

between the teacher and the parent, and a behavioral specialist and speech clinician to observe and consult with DC, his parents and teachers as needed. *Id.*

Later that autumn DC twice took a nine-inch buck knife to school. On one occasion Ms. Wintle found the knife and gave it to the principal, Mr. Kopp. School officials did not punish DC for either incident. *Mrs. B* at 869-870

Concerned about her son's progress, Mrs. B sent a letter to the school on November 16, 1995 requesting that the school move DC from the mixed first/second grade classroom to the standard second grade classroom. Mrs. B desired the transfer because she believed that the other class had what DC needed, a stern teacher and structured environment. Mrs. B enclosed a letter by Dr. Jensen stating that DC would benefit from a highly organized structured environment with predictable rules. *R* 445.

In a letter from Principal Kopp dated November 23, 1995, the school denied the request. Kopp based his decision on discussions with DC's teachers, the fact that the teacher of the second grade class has six daily home/school notebooks to complete whereas Ms. Wintle has only one, and that the second grade classroom has more visual materials on the walls which may distract an ADHD student like DC. *R* 122-125.

On January 9, 1996 Mrs. Fabian, DC's resource room teacher, observed DC during class. Mrs. Fabian observed and noted DC's inability to focus, difficulty putting ideas into words and putting those words on the paper. She recommended that important words be highlighted on a chart, that DC be questioned on those words, and that a specific time limit for the work to be completed be set. *R* 114.

School officials held a PET meeting on January 11, 1996 and determined that DC had a learning disability due to poor language skills. An IEP was prepared that in addition to the modifications listed in the previous IEP added 120-150 minutes a week with a special educator focusing on speech/language. *R* 111-113.

On January 26, 1996, DC attempted to commit suicide at home by placing a belt around his neck. Mrs. B called guidance counselor Davis who referred her to a family crisis line. In a report dated February 2, 1996, Davis made the following observation of DC's behavior based on weekly meetings with DC since October 1995:

> Initially I saw what seemed to me a significantly depressed mood with little affect or spontaneity and a gloomy, pessimistic tone in his interaction . . .As we have continued, [DC] has seemed more spontaneous and relaxed with me . . .The gradual change parallels reports I hear of improved mood and energy in class and at home.
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> . . .
>
> On January 26th I asked him about the incident, reported to me by his mother, in which [DC] put a belt around his neck. He told me that he had been worried that he would get in trouble at his father's if he couldn't find a sock his father had given him. . . [DC] told me during our meeting that he was no longer worried about being punished about the socks. He made a clear commitment to me not to kill himself.

R 397.

Before DC completed the second grade his new counselor, Mary Biter, recommended residential placement to Mrs. B because of DC's behavior. *Mrs. B* at 879. In his 1995-96 Multi-Age Progress Report Ms. Wintle noted that DC's behavior affected progress in some areas. Those areas classified under "needs improvement" include: participating in group activities, working independently, organizing and caring for work space, and managing time responsibly. *R* 129. Although Mrs. B asked Ms. Fabian to grade DC to determine if he was meeting the goals under

his IEP the school never sent her any document indicating his rate of progress. *Mrs. B* at 881-882. During the summer, Mrs. B hired a special education teacher to work with DC. *Mrs. B* at 880.

DC was a student in Mr. Lisa's third grade class for the 1996-1997 school year. The school held a PET meeting on September 18, 1996 and developed an IEP. The IEP set a goal to provide services for DC to increase his reading skills by a grade from 1.7 to 2.7 and word attack skills from k.9 to 1.9. The IEP offered no behavioral intervention plan but did include three additional modifications that include testing DC in a small group setting, providing DC preferential seating in the classroom, and using devices such as a calculator or computer to assist DC with his work. *R* 90-94. At the PET meeting school officials and the parents agreed to discontinue DC's speech/language services although the school continued to provide services to assist DC with reading and spelling. *Id.*

Approximately mid-way through third grade Mrs. B noticed that DC became much more violent. She felt she could no longer leave him at home and feared for the safety of her daughter. Mrs. B at 885-886. Around Thanksgiving Mr. Lisa, DC's third grade teacher noticed a decline in DC's behavior. *Mr. Lisa* at 621. Around this time Dr. Katz, DC's behavioral therapist, determined that DC's biological father sexually abused DC. *Mrs. B* at 879-880. In February 1997, Dr. Jensen recommended residential treatment to address DC's behavioral problems. *Mrs. B* at 888; *Dr. Jensen* at 690-691.

On April 15, 1997, school officials and DC's parents held another PET meeting. At the meeting the participants developed a behavioral plan that included an immediate time out for noncompliance behavior and also established behavioral goals. In addition the parties agreed to provide DC with an additional thirty to forty minute weekly meeting with Stan Davis. Mr. Lisa

suggested that DC attend the district's alternative program or have a one-on-one aide for DC in the classroom. Karen Buckman, Director of Special Services, rejected both suggestions and stated that she felt the alternative program would be too restrictive a setting for DC. Mrs. B agreed with Ms. Buckman that placing DC in an alternative program would be too restrictive a setting for him.. *R* 77-78.

On May 12, 1997, Mr. Lisa completed an Achenbach Behavior Checklist and Cheryl O'Heir, Ed.S. completed a Behavior Evaluation on DC. The evaluation listed the following areas to be within the clinically significant range: withdrawn, attention problems, delinquent behavior, and aggressive behavior. In the evaluation Mr. Lisa is quoted as stating that DC exhibited significant behavioral difficulties. O'Heir recommended that DC could benefit from "guidance on channeling his observed anger in appropriate directions." *R* 74-75.

Later during the spring, DC threw a wrench over the playground fence when a school official approached him about unbolting equipment in the school playground. Mrs. B became frustrated at what she perceived as the school's inability to control DC's behavior. As a result, she withdrew DC from Belgrade Central and home-schooled him the rest of the year. Defendant's Findings of Fact ¶ 47.

During the summer of 1997 DC attended Camp Kennebec day camp. At the camp DC engaged in aggressive behavior like hitting, biting, throwing rocks at propane and oil tanks, and jumping on counselors. *Mrs. B* at 898-899. For the remainder of the summer, Mrs. B sent DC to Bunker Hill Military Camp in Georgia which provided DC with a military-like environment. *Mrs. B* at 899.

Mrs. B decided to home-school DC for 1997-98, his fourth-grade year. On September 15, 1997, school officials held a PET meeting to discuss DC's status. At the meeting Mrs. B declined the school's invitation to supplement DC's home schooling with special education services at the school. Ms. Buckman at 135-136. The PET never developed an IEP but indicated that if Mrs. B changed her mind to contact the school. The school, in a document entitled "Parental Notice/Proposed Change of Program" indicated that DC achieved all his IEP goals and objectives and no longer needed special educational services. *R* 67-68.

During the school year DC became increasingly violent. DC attacked his step-father with an ax, went after his uncle with a fire poker, punched and bit his sister, and attacked people and pets with a hockey stick. Once Mrs. B called police to get DC under control. *Mrs. B* at 902-904. On March 24, 1998, a team of doctors at the Pediatric Behavioral Medicine Clinic in Waterville, Maine evaluated DC. The team diagnosed DC with Conduct Disorder, Childhood Onset Type, ADHD, a history of child abuse and learning disabilities in writing and possibly reading. The team recommended that: DC begin individual counseling with Jacqueline Clark again, DC receive behavioral management counseling with Harold Longenecker, and that DC return to school and receive services with a one-on-one aide or, if that is not successful, that consideration be given to placing DC in an alternative school placement. *R* 49-62.

Mrs. B realized that because of DC's behavior, she could no longer home-school him. She requested a PET meeting which was convened on April 13, 1998. *R* 29-31. Mrs. B asked the school to provide DC with residential treatment, in response the school orally agreed to provide

DC with: private transportation to school, a one-on-one education aide, and a behavioral plan.[3] Although Mrs. B expressed concerns regarding the plan she agreed to give it a try. When DC learned that he would attend Belgrade Central he went into a rage. He threatened to kill himself, attacked the family's dogs and his sister. Mrs. B had to call the police. Mrs. B contacted doctors that treated DC in the past about what she should do. The consensus opinion was that DC should not return to Belgrade Central. *R* 44-46; *Mr. Jensen* at 695-697; *Mrs. B* 906-908, 910-913. Mrs. B notified the school that DC would not be returning to Belgrade Central. *Ms. Buckman* at 142-143.

Mrs. B searched for a school that she felt would address DC's needs and discovered Valley View School in North Brookfield, Massachusetts. Mrs. B enrolled DC in April 1998 and DC began attending Valley View in mid-July. *Mrs. B* at 913-915. As discussed during the April 13, 1998, PET meeting, Mrs. B consented to the school conducting evaluations of DC in the spring of 1998. Dr. Scott Hoch, a psychologist, evaluated DC on May 28th and June 1st 1998. *R* 24-28. Also in June 1998, Lori Wyman, an occupational therapist, conducted an occupational therapy evaluation and Celeste Chaput, conducted a speech diagnostic report. *R* 328-331.

Dr. Hoch made the following recommendations: provide DC with a highly structured curriculum that will probably require employing a behavioral specialist and full time aide for DC; provide individual counseling for DC; provide the use of a computer because it help students with ADD stay more focused; provide DC with extracurricular activity to improve his self esteem;

[3] Although the school developed an IEP in April 1998 a written IEP was not sent to Mrs. B until September 10, 1998.

provide specialized training to ascertain DC's strengths and weaknesses; and provide regular weekly meetings with the school staff. *R* 24-28.[4]

School officials held another PET meeting on July 30, 1998. At the meeting Mrs. B and school officials disagreed over the particulars of the IEP. The parties did not reach a consensus on the plan. On August 27, 1998, the school held another IEP, and once again the parties failed to agree on an IEP. *R* 9-11. Nevertheless, the school issued an IEP and sent it to Mrs. B. The IEP called for the school to provide DC with 32.5 hours of special education services a week. An educational technician would provide seventy percent of the services and an hour a week would be spent with a psychologist. The educational technician would provide one-on-one support with DC to chart DC's behavioral progress and, if necessary, intervene when he behaves inappropriately. The IEP also provided a behavioral plan, through a point system, that would reward DC for positive behavior, and punish him for inappropriate behavior. *R* 11-23 The plan, however, did not delineate the system of rewards DC would receive for positive behavior, and Mrs. B expressed doubt whether the system would improve DC's behavior. *Mrs. B* at 924.

The plan also devoted ten hours of direct special education support with a special education teacher to address DC's academic progress. The plan also called for DC to receive private transportation to school and one-on-one instruction in reading and writing. *R* 11-23. The school never implemented the IEP because DC attended Valley View.

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[4] Dr. Hoch later reviewed the 1998-199 IEP and determined that it would provide an appropriate individual educational program for DC. *Dr. Hoch* at 210. Dr. Hoch further testified that DC had done well under less intensive programs than the 1998-1999 IEP. *Dr. Hoch* at 197-198, 202. However, Dr. Hoch later appeared to contradict himself when he indicated that DC would require the services of a behavioral specialist if he had returned to Belgrade Central for the 1998-1999 school year. The 1998-1999 IEP did not provide for the services of a behavioral specialist. *Dr. Hoch* at 249-250.

Valley View is a private school whose students are boys ranging in age from eleven to sixteen. Most of the students at the school had difficulty in traditional schools because of their anti-social behavior. Average class size at Valley View is six students. Since arriving at Valley View DC has received one-on-one attention in English for over an hour each day. In addition to the individualized instruction, DC, like other students, is subject to a very structured environment. Students eat, dress, shower and do their laundry in groups. Students are also graded on their behavior through a point system. *R* 226-246. Mrs. B has noticed an improvement in DC since enrolling DC in Valley View. *Mrs. B* 929-931.

Hearing Officer's Decision

On October 22, 1998 Plaintiff requested a due process hearing to obtain approval of the IEP from a hearing officer. *See* 34 C.F.R. § 300.507(a). The officer held the hearing on December 1, 3, 4, and 6, 1998 and issued a decision on December 26, 1998.

In her decision the hearing officer found that Plaintiff failed:

(1) to comply with the procedures set forth in the IDEA;

(2) to refer DC in a timely manner for special education services;

(3) to develop appropriate IEPs for DC during his time at Belgrade Central; and

(4) to develop an appropriate IEP for the 1998-99 school year that met both the procedural and substantive provisions of the IDEA.

The hearing officer did find that Plaintiff properly addressed DC's learning disabilities and found that Valley View was an inappropriate school to address DC's learning disabilities. Nevertheless, as a result of Plaintiff's failure to comply with the IDEA, the hearing officer ordered Plaintiff to

provide Defendant with seventy-five percent of the educational costs and one hundred percent of the transportation costs associated with sending DC to Valley View.

Standard of Review

The IDEA provides that when reviewing the determination by a hearing officer the court:

> (i) shall receive the records of the administrative proceedings;
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> (ii) shall hear additional evidence at the request of a party; and
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> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B). The First Circuit has interpreted this language as requiring scrutiny more vigorous than clear error review but falling well short of *de novo* review. *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). To add a measure of structure to the ambiguity inherent in the First Circuit's description, this Court has in the past followed a three-step approach when reviewing a hearing officer's determination:

> First, the Court carefully reviews the entire record of the due process hearing. Second, appropriate deference is given the Hearing Officer and [her]expertise, particularly with regard to factual determinations. Finally, the Court makes an independent decision whether the Hearing Officer's determination is supported by a preponderance of the evidence. The Court may also account for additional facts presented by the parties should it find such facts credible and supported by the evidence on the record.

Greenbush School Committee v. Mr. and Mrs. K, 949 F.Supp. 934, 938 (D.Me. 1996).

Overview of the IDEA

Congress enacted the IDEA to provide federal funds to educate handicapped children subject to the states instituting certain goals and procedures. *Lenn v. Portland School Committee*, No. CIV. 92-0011-P-H, 1992 WL 510892 at *2 (Dec. 14, 1992). To qualify for the funds the

states must offer all children a "free appropriate public education" in the least restrictive educational environment. 20 U.S.C. §§ 1412(2)(B), (5)(B).[5] The "free appropriate public education" should "emphasize special education and related services designed to meet their unique needs and prepare them for employment and independent living. . . ." 20 U.S.C. § 1400(d)(1).

The primary tool behind implementing a "free appropriate public education" under the IDEA is the student's individualized education plan ("IEP"). 20 U.S.C. §1414. The IEP is developed by a team of persons most familiar with the student's needs including the student's teachers and parents. *Greenbush*, 949 F. Supp. at 938. "The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Burlington II*, 736 F.2d at 788. In Maine, the team that develops the IEP is called the Pupil Evaluation Team ("PET"). *Id.*

When analyzing whether a local school unit violated the IDEA a Court must apply the following two-prong standard

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

Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 185-86 (1982).

The hearing officer determined that Plaintiff complied with the IDEA and provided DC with a "free appropriate education" with regard to his learning disabilities but provided totally inadequate services to address DC's behavioral needs. In addition, the hearing officer found that

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[5] The "least restrictive educational environment" language in the IDEA is often referred to as mainstreaming preference. *See Roland M.*, 910 F.2d at 992-93 ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria.")

Plaintiff did not comply with the procedures pursuant to the IDEA and applicable state law and that those violations impeded the development of an adequate IEP.

A. Substance of the 1998-1999 IEP

The IDEA does not require that a student receive an education that maximizes the student's potential. *Rowley*, 458 U.S. at 197-198. As the First Circuit explained:

> The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland School Committee, 998 F.2d 1083, 1086 (1st Cir. 1993).

To conform to the provisions of the IDEA the IEP must be reasonably calculated to provide the student with an educational benefit. *Greenbush*, 949 F. Supp. at 939. In analyzing whether the IEP violates the IDEA the hearing officer should scrutinize a child's IEP. *Id.* at 248.

In her decision the hearing officer determined that the 1998-1999 IEP violated the IDEA by inadequately addressing DC's behavioral disabilities and by not instituting a behavioral plan. She then concludes with her own assessment of what the child needs:

> What type of program does the student need? He needs a program that is language-based, multisensory and offers structure and clear limits, diverse ways to fulfill assignments, competence and achievement, meaningful participation in the school and community, positive social interactions with adults and peers, and frequent opportunities to release physical energy. These developmental needs are critical to any program that will be successful with the student.

R 562. Strikingly absent from the hearing officer's decision is any description of the 1998-1999 IEP and how the terms of *that* IEP were not reasonably calculated to provide the student with an educational benefit. As described above the 1998-99 IEP provided DC with a behavioral plan and

apparently the hearing officer determined that the provisions offered by Plaintiff were inadequate to address DC's needs. However, by failing to describe *how* the specific terms of the plan failed to comply with the IDEA the hearing officer left this Court with little guidance on how she reached her conclusion. The Court, therefore, is left with the assertions of the parties in this action regarding the sufficiency of the IEP.

As stated above the 1998-1999 IEP contained the following items to address DC's behavioral difficulties: an educational technician to provide one-on-one supervision to address DC's behavioral needs and intervene when he behaved inappropriately, one hour a week with a psychologist and a plan that would reward DC for positive behavior.[6] The plan also called for DC to receive private transportation to school.

Defendant contends that the hearing officer's conclusion should be upheld for several reasons. First, Defendant points out that the educational technician did not have any specialized training in working with students with behavioral problems. Second, Defendant maintains that the IEP statements regarding DC's present levels of performance, goals, and objectives are vague, and how the school would measure DC's future performance is poorly described. Third, and this seems to be the most important contention from Defendant's point of view, the IEP limits services to DC during the normal school day, instead of providing DC with a full-day structure to meet his needs.

With regard to Defendant's first two arguments, that the educational technician lacks specialized training in working with students with behavioral problems, and the vagueness of the

[6] The plan also addressed academic areas but the Court does not restate those provisions of the IEP because the hearing officer determined that the school complied with the IDEA as to DC's academic needs.

IEP, the Court is satisfied that neither one carries much weight. While the educational technician may lack specialized training, he or she would provide the one-on-one behavioral support that three doctors recommended in a March 24, 1998 report after evaluating DC.[7] The Court fails to see how the one-on-one support DC receives during the school day at Valley View from an instructor who has no specialized training in behavioral management is more adequate than what Plaintiff offered.[8] Nor is the Court convinced that the 1998-1999 IEP is insufficiently vague. The IEP contains both a behavioral education plan that mapped out a system to measure his behavior, through the one-on-one aide, and a set of goals for DC to meet. *R* 20-23 Further, the report provides that Mrs. B would receive a report of progress of the IEP goals with the report card so that she and the school could monitor DC's progress under the IEP.

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[7] Three specialists, a developmental pediatrician, a licensed clinical social worker, and a licensed psychologist, recommended the following:

> If services of a one-on-one has not been implemented, then the team recommends that [DC] return to school with the assistance of an identified one on one aide in place with specific targeted behaviors agreed upon between Ms. Blake and the aide. Once the services of an aide has been implemented, but is not successful in terms of keeping [DC] in class and improving his behavior and work completion, or if the one on one aide is not implemented to begin with, then an alternative school placement is recommended.

R 51. The school followed the specialists recommendation in the 1998-1999 IEP.

[8] Defendant points out that DC's one-on-one instructor at Valley View is in the process of obtaining a master's degree in special education, whereas one could be an educational aide at Belgrade Central without completing a college degree. Assuming that the Valley View one-on-one instructor is better equipped to address DC's needs, that does not automatically lead the Court to conclude that the IEP offered by Plaintiff is inappropriate or that the assistance of the aide would not afford DC some educational benefit as required under the IDEA. *See Lenn v. Portland School Committee*, 998 F. 2d 1083, 1086 (1st Cir. 1993).

Plaintiff and Defendant pointedly disagree over the amount of responsibility the school bears for DC's behavioral development outside the school. In fact, the primary difference between Belgrade Central and Valley View is that Valley View offers constant supervision after school hours. Defendant points out that the sufficiency of an IEP is not measured by academic progress alone. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990) ("Thus, purely academic progress – maximizing academic potential – is not the only indicia of educational benefit implicated . . ." by the IDEA.). On this the Court, and even Plaintiff agrees. What really is at issue is not the amount of responsibility Plaintiff bears for DC's behavioral development while at the school, but the amount of responsibility Plaintiff bears for DC's behavioral development outside the school.

This Court has addressed the issue before. In *Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378 (D. Me. 1995), a student diagnosed with Childhood Psychotic Disorder exhibited assaultive behavior similar to DC. The Court stated:

> The Court recognizes that Joshua's behavior, particularly outside the structure of his school programming, is often unpredictable and sometimes dangerous. This, by itself, is not enough to compel a residential placement under the IDEA, as long as the student is receiving an educational benefit from his placement. (citations omitted). The result would likely be different if the Court found that Joshua's "behavior eventually reached a point at which he was uncontrollable both in and outside of school, rendering him uneducable without extensive psychological treatment."

Ciresoli, 901 F. Supp. at 386-87 (quoting *Manchester Sch. Dist. v. Charles M. F.*, Civ. No. 92-609-M 1994 U.S. Dist. LEXIS 12919 (D. N.H. Aug 31, 1994)).

Here, little evidence has been presented that DC's behavior made him uncontrollable *in school* or that DC's behavior made him uneducable without extensive treatment. In fact, the record establishes that, while at times DC had behavioral problems in school, on the whole those

problems were treatable and did not interfere with his educational development. From kindergarten through second grade there is little evidence of DC engaging in even inappropriate behavior at the school, much less uncontrollable behavior. Even when DC allegedly acted most inappropriately at school, the month preceding DC's withdrawal, his behavior cannot be characterized as uncontrollable. According to the home-school notebook maintained during this period, eighteen out of thirty-one school days DC received no disciplinary reprimands. Of the thirteen other days, five involved minor comments and eight others more serious comments. *R* 378-396. Of the eight other days that garnered more serious comments those comments included arguing with another student on the playground, hitting a girl on the behind, being removed from class for fifteen minutes due to disruptive behavior, and using a wrench to loosen playground equipment. *Id.* While the Court does not discount the seriousness of DC's behavior, it is satisfied that his behavior was not so disruptive as to make him uneducable at Belgrade Central. *See Ciresoli*, 901 F. Supp. at 386-387. Accordingly, the Court concludes that the 1998-1999 IEP did not violate the IDEA by failing to address DC's behavioral problems outside of school. Further, based on the record before it the Court concludes that the 1998-1999 IEP complied with the provisions of the IDEA.

B. Procedural Process in Developing the 1998-1999 IEP

The hearing officer's decision regarding the adequacy of the 1998-1999 IEP focuses primarily on what she perceives as the procedural flaws prior to Plaintiff developing the plan. Procedural flaws by themselves do not render an IEP inadequate. *Roland M.*, 910 F.2d at 994. Before determining that an IEP is inadequate "there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously

hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Id.* Here, the hearing officer determined that Plaintiff committed two serious procedural errors. First, Plaintiff violated section 4.7 of the Maine Special Education Regulations by failing to prepare an IEP even though DC's parents informed the school they intended to home school him during 1997-1998 year. Second, Plaintiff violated the IDEA by determining to place DC at Belgrade Central prior to completing its development of the 1998-1999 IEP.

a. Violation of section 4.7 of the Maine Special Education Regulations

In April 1997 Mrs. B withdrew DC from Belgrade Central and began home instruction. At the beginning of the following school year, September 1997, the school held a PET to discuss developing an IEP for DC to compliment his home instruction. At the meeting Mrs. B indicated that she did not want DC to participate in special services at that time. The school indicated to Mrs. B that if should change her mind she should contact the school. *R* 67. In March 1998 Mrs. B contacted the school and asked that a PET be held. The school held a PET on April 13, 1998 and orally agreed to an IEP for DC with Mrs. B on the same day. The school never initiated the IEP because when DC learned that he may return to Belgrade Central he reacted violently and threatened to kill himself. After contacting specialists DC had been seeing, Mrs. B decided to send DC to a school other than Belgrade Central.

The hearing officer held that Plaintiff violated section 4.7 of the Maine Special Education Regulations. Section 4.7 provides that:

> A school administrative unit shall provide a genuine opportunity for equitable participation in the unit's special education services to each identified student with a disability participating in an approved home schooling program . . . .

> When a student with a disability is receiving home instruction, the school administrative unit shall at least annually:
>
> A. Inform the parent of the unit's responsibility to offer a free, appropriate education;
>
> B. Review the special education needs of the student with a disability;
>
> C. Develop a proposed [IEP] for the parent's consideration; and
>
> D. Advise the parents of the procedural safeguards contained at 10.11.
>
> Nothing in this section shall interfere with the rights of either the parent or the school administrative unit to initiate a due process hearing.

Section 4.7 clearly requires a school to develop an IEP when a parent educates his or her child through home instruction and wants the school to provide special services to their child. However, the section is completely silent on the issue presented here, what the school system should do when a parent is offered special services by the school and refuses them. The parents are the key in developing an IEP for their child and parental participation is a primary concern when developing procedures under the IDEA. *Defendant I*, 898 F.2d at 1191 ("Adequate parental involvement and participation in formulating an IEP . . . appear to be the Court's primary concern in requiring that procedures be strictly followed.") The reason for parental involvement is apparent. The parents can provide insight and substance that the child's teachers and other educators cannot possibly do when developing an IEP. The importance of the parent's role in the special education setting is paramount. A student's placement in special education services is only done with parental consent and the parent may withdraw the student from special services at any time. Me. Dep't of Educ. Reg. Ch. 101, §10.4(c). Mrs. B's refusal to accept special services from the school left the school little choice but to accept her decision. For the reasons stated

above, the Court disagrees with the hearing officer's determination that the school violated section 4.7.

The hearing officer found that by failing to develop an IEP in September 1997, over the parent's wishes, the school diminished DC's educational benefit. The officer pointed out that in January and February 1998, when Mrs. B testified that she felt she could no longer home-school DC, an alternative at the school was unavailable. However, as stated above *it was Mrs. B* who eliminated that alternative by refusing special services from the school in September 1997 and not requesting a PET during the intervening period.

Defendant contends that because the school failed to prepare an IEP in September 1997, they were unprepared when Mrs. B requested services and as a result the school failed to have a written IEP in place until September 1998. However, the facts reveal otherwise. Mrs. B requested a PET meeting in March 1998, evaluations were done on DC by the end of the month, and on April 13, 1998 the school held the PET meeting. At the PET the parties orally agreed to an IEP for DC. The only reason why the school did not implement the IEP was that *Mrs. B chose* to place DC in Valley View after DC reacted violently upon learning that he would return to Belgrade Central. Further, as Plaintiff points out, even if it had an IEP in place in September 1997, Mrs. B's request for additional testing for DC in March 1998, would have led to a new PET meeting to discuss whether to modify the existing IEP.[9]

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[9] The hearing officer relied on *Murphy v. Timberlane Regional School Dist.*, 22 F. 3d 1186, 1196 (1st Cir. 1994) to reach her conclusion that the school should have requested a due process when Mrs. B withdrew DC from Belgrade Central in May 1997 so that a hearing officer could determine the sufficiency of the IEP. However, in *Murphy* the school district argued that it was not bound by a New Hampshire *state regulation* that required the school district to *request a hearing* if a disagreement exists with the parents over the content of an IEP. Even if one could characterize Mrs. B's withdrawal of DC as a disagreement with the school district, neither the

The second procedural error that the hearing officer found was that Plaintiff pre-determined Defendant's placement in Belgrade Central at the April 1998 PET meeting. This finding is quite puzzling in light of the fact that everyone at the meeting, including Mrs. B, agreed to the IEP as delineated in the PET meeting minutes. R. 29-31. In fact, even though Mrs. B raised concerns and inquired about residential placement she agreed to give the proposed IEP an opportunity. It was only after DC reacted angrily to returning to Belgrade Central that Mrs. B reversed course and insisted on residential placement. Based on the record before me, I cannot conclude that Plaintiff pre-determined DC's placement at the April 13, 1998 PET meeting.

C. The IEPs developed for DC in second and third grade

The hearing officer determined that DC's second and third grade IEPs were inadequate to meet DC's behavioral needs. Specifically, the hearing officer found the IEPs inadequate because they failed to contain behavioral plans.

Under the federal regulations public agencies must implement services in accordance with the IEP, and assist the child in a good faith effort to achieve the goals of the IEP. 34 C.F.R. § 300.350(a) & (b); *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir. 2000). The regulation clearly limits challenges to the implementation of past IEPs, *not to the content of past IEPs*. This is to avoid the situation that occurred in this case, the hearing officer with the benefit of hindsight, revisited the question of the sufficiency of a plan to which the parties had all agreed and had completely implemented. *See Roland M.*, 910 F.2d at 992 ("For one thing, actions of the school systems cannot, as appellants would have it, be judged exclusively in hindsight."). Here, neither the hearing officer nor Defendant assert that the school failed to

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hearing officer nor Defendant point to a similar regulation that exists in Maine.

implement services in accordance with the IEPs or that Plaintiff exercised bad faith in implementing the IEPs.[10]

D. Lack of Special Education Services Prior to Second Grade

The Court cannot conclude that the school district must pay compensatory education for not providing special education. As Plaintiff points out, the hearing officer offers little factual information to support her conclusion that "the student [DC] should have been evaluated for possible education services long before second grade." *R* 559. The hearing officer only points out that DC's primary physician was "remiss in not referring the child to the Child Development Services System when she first became aware of his behavioral difficulties in the pre-school setting." *Id.* This fact is far from sufficient to impose liability on the school. In fact, the record reveals that DC was not a student who needed special services. Both his teachers testified at the

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[10] In *M.C. v. Central Regional School Dist.*, 81 F.3d 389, 396-97 (3rd Cir. 1996) the Court rejected the good faith standard applied above and adopted the following standard:

> When an IEP fails to confer some (i.e., more than *de minimis*) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by the IDEA. It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the IEPs failure.

Id. Even applying this more lenient standard, the Court cannot conclude that Plaintiff is liable when, as explained above, DC received an appropriate education for his learning disabilities and his behavior never manifested itself to an uncontrollable degree when he was attending school.

Other cases that have awarded compensatory education have done so when the school district clearly failed to provide an educational benefit to the student. *See Lester H. by Octivia P. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990) (awarding student two and half years of compensatory education because the district spent two and a half years to find an appropriate placement for the student); *Burr v. Ambach*, 863 F.2d 1071, 1073 (2nd Cir. 1988) (awarding compensation after state institution disqualified student because it could not accommodate his disability without considering alternate placement in another program); *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (awarding compensatory education after finding that district failed to provide any education services even though the district's evaluation recommended providing such services.)

hearing that they did not believe that DC needed special education services during that time even though they had made special education referral services in the past for other students. *Mrs. Wintle* at 741; *Mrs. Sprague* at 670. Even though Mrs. B volunteered in the classroom with DC through part of his first grade year, she never requested special educational services for him. *Mrs. Sprague* at 670; *Mrs. Wintle* at 746. In fact, the school initiated a PET meeting to develop an IEP soon after Mrs. B requested a referral for special education services for DC. This court cannot conclude that Plaintiff is liable for failing to refer DC for special education service prior to his second grade year. *See Roland M.*, 910 F.2d at 992 (court warning against judging a school system in hindsight.).

E. Reimbursement

Having determined that the 1998-1999 IEP is adequate the Court must next determine whether Defendant must reimburse Plaintiff for the tuition it paid for DC to attend Valley View during that school year. Plaintiff's ability to obtain reimbursement is limited. *Town of Burlington v. Department of Education for the Commonwealth of Mass.*, 736 F.2d 773, 800-01 (1st Cir. 1984) ("We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local educational agency is estopped from obtaining reimbursement for the time period, usually one year, covered by the state agency decision and order.") Accordingly, Rome is not entitled to reimbursement because Mrs. B complied with and implemented the hearing officer's determination that DC be permitted to attend Valley View.[11]

[11] Plaintiff points to a recent case that opens up the possibility that a parent may, in some instances, be ordered to reimburse the school district if the IEP and placement proposed by the district is later deemed appropriate. *Verhoven v. Brunswick School Committee*, No, 98-2348,

Conclusion

For the reasons stated above, I recommend that the hearing officer's decision be REVERSED.

Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of March, 2000.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-20

ROME SCHOOL COMMITTE v. B, MRS Filed: 01/25/99
Assigned to: JUDGE MORTON A. BRODY Jury demand: Defendant
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 20:1400 Civil Rights of Handicapped Child

ROME SCHOOL COMMITTEE
plaintiff

ERIC R. HERLAN, ESQ.
[COR LD NTC]
DRUMMOND, WOODSUM, PLIMPTON & MACMAHON

1999 WL 721698, slip. op. at *11 n.1 (Sept. 21, 1999). The Court is satisfied that based on the facts in this case, it would be inequitable to order Defendant to reimburse the town for complying and acting within the strictures of the hearing officer's decision.

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v.

B, MRS, On her own behalf and on behalf of her minor son, DC
defendant

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