STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

August 17, 2006

06.024AH – Parents v. MSAD #6

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: Amy Tchao, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on May 30, June 1, June 8, June 15, June 22, June 27, and July 14, 2006, at the offices of Drummond, Woodsum & MacMahon in Portland, Maine. In addition to counsel and the hearing officer listed above, the student's mother, and Jennifer Donlon, Co-Director of Special Education for MSAD #6, were present for the entire proceeding. Testifying at the hearing under oath were:

Student's Mother
Student's Father
Jennifer Donlon, Co-Director Special Education, MSAD #6
Mark Geren, M.S, BCBA, Behavior Analyst, Woodfords Family Services
David Lennox, Ph.D., Behavior Analyst, QBS, Inc.
Charles Lyons, Ph.D., Educational Consultant
Holly Marston, Support Aid, CASA
Laura Pershouse, M.D., Psychiatrist, Maine Medical Center Jennifer Stanford, Case Manager, Community Counseling Center Carla Turner, Special Education Teacher, Bonny Eagle High School Tracy Welch, Educational Technician, Bonny Eagle High School

I. PROCEDURAL BACKGROUND

Student's Parents filed a request for this due process hearing on March 28, 2006, on behalf of their son, XX-year-old Student. The parents' request to amend their complaint was granted on April 13, 2006, without objection by the district, and the timeline for the proceedings began anew. On April 28, 2006, the district challenged the sufficiency of the parents' complaint on the basis that it did not provide reasonable notice of the relief sought. On May 3, 2006, the sufficiency challenge was denied by written decision.

A prehearing conference was held on May 22, 2006. Present were: Student's Mother, Richard O'Meara, Esq., Jennifer Donlon, and Amy Tchao, Esq. Both parties submitted prehearing memoranda. Documents and witness lists were exchanged in a timely manner. I provided a post-prehearing memorandum summarizing the issues for hearing, which were modified at the start of the hearing at the joint request of the parties.

Due to a joint extension request, the hearing was held on the dates noted above. The family submitted 41 documents, comprising 95 pages (hereinafter P-1 to P-95), all of which were accepted into the record. The district submitted 89 documents, comprised of 244 pages (hereinafter S-1 to S-244), as well as an appendix of 3 sets of documents, comprised of 399 pages (hereinafter S1-1 to S1-399). Some of the district's documents, offered during the course of the hearing, were excluded.

During the hearing, the district sought to introduce a set of documents comprised of daily reports sent home by Student's teachers, structured ABC Data Sheets, and Partial Interval Data records dating from May 22 through June 12 (S1-331-399). The documents also included graphs created by behavioral consultant Mark Geren analyzing the

collected data. The parents objected to the introduction of these documents, arguing that they had not been previously disclosed to them and therefore their admission would violate the "five-day rule." In a written decision issued June 12, 2006, I excluded the documents not presented to the parents five days prior to the start of the hearing pursuant to Maine Special Education Regulation ("*MSER*") § 13.12(D), which states that the hearing officer "may exclude irrelevant or unduly repetitious evidence and shall exclude evidence not disclosed to the other party at least five business days prior to the due process proceeding." *MSER* § 13.12(D) (emphasis added). The district provided a written opposition to my ruling. It was determined that some of the documents had previously been provided to the parents and the parents waived their objection to several additional documents, resulting in the acceptance of pages S1-344 to S1-379 and S1-380 to S1-387 into the record and the exclusion of pages S1-331 to S1-343 and S1-388 to S1-399. The district's submission of a rescored IEP (S-237-242) was also excluded under *MSER* § 13.12(D). All of the district's other submissions were admitted.

On June 30, 2006, after testimony was thought to be completed but prior to the submission of final closing briefs, the district moved for the admission of additional evidence regarding a behavioral incident that occurred on June 29, 2006, at the student's summer camp program. The parents agreed that additional testimony was necessary. Since the record had not yet closed, I exercised my discretion under *MSER* § 13.12(K) to hold an additional day of hearing on July 14, 2006, limited to testimony on the student's summer camp experience. The parties again requested the opportunity to submit written closing briefs and the record was closed on August 2, 2006, giving this decision a due date of August 17, 2006, under *MSER* § 13.14(A).

II. ISSUES

a. Did MSAD #6 violate the IDEA or Maine special education law by failing to provide Student with a free appropriate public education in the least restrictive environment in his 2005-2006 Individualized Education Program ("IEP") (as amended)?

b. Did MSAD #6 violate the "stay-put" provisions of the IDEA or Maine special education law by not implementing Student's February 2005 IEP since the time that the family filed its complaint?

c. If MSAD #6 did commit a violation of the IDEA or Maine special education law, is Student entitled to a remedy of compensatory educational services?

d. Is the program, placement, and behavioral intervention plan currently being implemented for Student in the functional life skills program at Bonny Eagle High School appropriate to meet his needs for the 2006-2007 school year?

e. If not, what program and/or placement changes need to be made and/or what is the least restrictive environment in which an appropriate IEP and behavioral intervention plan can be implemented to allow Student to receive a free appropriate public education?

III. FINDINGS OF FACT

1. Student (born XX/XX/XX) is X years old, stands about X feet XX inches tall, and weighs approximately XXX pounds. He lives with his family in Standish, Maine, and attends Bonny Eagle High School in MSAD #6. He has been educated in MSAD #6 since kindergarten. Student is eligible for special education and supportive services under the category of multiple disabilities, *MSER* § 3.8, due to autism and speech impairments. (S-110; Testimony of Student's Mother; Carla Turner.)

2. Student's autism causes diminished motor, social, coping and verbal skills. He is particularly sensitive to touch, sounds, and excessive visual stimuli, all of which provoke emotional responses. He requires repetition of routine and has unpredictable moods. Student's limited coping skills make it difficult for him to deal with change,

disappointment, and excitement. Student exhibits anxiety by speaking loudly or yelling, engaging in repetitive talk, and speaking to himself out loud. He also throws objects, such as pencils or his glasses, when expressing frustration. (S-113; S-120; Testimony of Student's Mother; Laura Pershouse; Carla Turner.)

3. Student is a social and outgoing teenager who is charming and polite and who generally wins people over. He is usually a fun student in the classroom. (Testimony of Student's Mother; Laura Pershouse; Carla Turner.)

4. Student performs at a kindergarten to grade 3 academic level. His cognitive ability is within the moderate range of mental retardation. He has consistently required support to maintain attention and complete activities and is easily distracted. (S-106; S-113; S-117; S-212.)

5. In XX grade, Student had three incidents with Melody Price, an educational technician, in which he grabbed her and pulled her to the floor, slapped her, pushed her, punched her, and chased her. Ms. Price subsequently requested a change of classroom due to her fear of Student. (S-219-223; Testimony of Jennifer Donlon.)

6. In general, Student enjoyed middle school and was successful there. He continues to talk fondly of his middle school teachers. (Testimony of Student's Mother; Carla Turner.)

7. In September 2004, Student began his X grade year at Bonny Eagle High School in the Therapeutic Life Skills Program with special education teacher Carla Turner in Room 120. (Testimony of Student's Mother.)

8. The layout of the special education suite at Bonny Eagle High School includes Room 120, a small room enclosed within Room 120 (the quiet room), an administrative suite for

teachers, service providers, and administration (Room 121), and a small office with an entry off of the hallway outside Room 120 (Room 120A). (Testimony of Carla Turner.)

9. When Student began X grade, no one-on-one educational technician was assigned to Student although Mrs. Turner had several educational technicians in her classroom. He attended mainstream classes for health, physical education, and art. Student typically produced many more academic assignments than other students in the Therapeutic Life Skills program. Student would normally do forty to forty-five assignments per quarter in each math and English, the two academic subjects on which he focused. Student often selected the quiet room for academic work that required reading and writing, routinely spending up to fifty percent of his individual academic work time in the quiet room. (S-179-180; Testimony of Carla Turner.)

10. From the time that Student started X grade, Student's Mother and Mrs. Turner had a friendly relationship. They worked together to further Student's education and they saw each other socially on a few occasions. (Testimony of Student's Mother; Carla Turner.)

11. Student's IEP for the period of February 4, 2005, to February 3, 2006, called for him to be educated in the Therapeutic Life Skills classroom for all of his life skills and core classes and to receive occupational therapy consultation, speech therapy, and one-on-one support. The PET minutes noted concerns about Student's "behavioral outbursts due to anxiety" as well as his "access to mainstream peers and friends." (S-179-180; S-183-195.)

12. On April 8, 2005, Student tipped over a computer and keyboard in the quiet room after experiencing frustration with a spelling test that he was being asked to type instead

of handwrite. This incident marked a drastic escalation in Student's use of aggression when frustrated. (Testimony of Student's Mother; Carla Turner.)

13. At a Pupil Evaluation Team meeting ("PET") convened on April 12, 2005, the Team determined that a rewards and consequences behavior plan would be developed immediately and that the Team would try to determine why Student's outbursts had become more violent. Student's Mother agreed to seek a review of Student's medications. In addition, Student's Mother spent two days in Student's classroom observing him and working with Mrs. Turner to explain the family's use of consequences and rewards at home to facilitate the development of a behavior plan for school. Additionally, a behavioral consultant from Spring Harbor Hospital was hired to conduct a behavioral analysis of Student. The consultant conducted two days of observation but did not complete a report due to her relocation. Following this incident, Student's prescription for Zoloft was increased. (S-113; S-161-165; Testimony of Student's Mother; Carla Turner.)

14. Student did not have another major outburst until X grade, on November 7, 2005. Shortly after arriving at school, Student asked to go into the quiet room. Before entering the quiet room, however, he turned back into the main classroom, picked up a computer, and threw it on the floor while yelling "No!" Two of his classmates, one of whom was in a wheelchair, were in the immediate vicinity, and a third was working at the computer right next to the one that Student threw to the ground. Following the incident, Student asked to go to the health clinic, which he understood to mean that a parent would come to pick him up. (Testimony of Carla Turner.)

15. On November 16, 2005, Student again threw a computer on the floor, this time in the quiet room. After shouting a profanity during gym class, Student asked for the quiet room. After picking at the hair on his arm for a few moments, a common stereotypy [sic] behavior for Student, he yelled and threw his glasses. He then stated that he wasn't felling [sic] well. Mrs. Turner asked Student if she should enter the quiet room, to which Student answered "no" and then knocked over the computer and desk. He then put his finger in his mouth and tried to gag himself. Mrs. Turner and an educational technician walked Student to the clinic, where one of his parents picked him up. (S-172-173.)

16. Student is always very contrite after a behavioral outburst at school. He often cries and says that he is sorry. (Testimony of Carla Turner.)

17. No PET meetings were held to discuss Student's behavioral incidents in November. Modifications were made to the classroom, however, such as removal of a giant fish tank and attachment of storage cabinets, bookcases, computers, and computer tables to the wall. (Testimony of Student's Mother; Carla Turner.)

18. On Monday, January 9, 2006, Student had another behavioral outburst that culminated in his striking Mrs. Turner. Student had missed a Portland Pirates hockey game over the weekend and he knew Student's Mother was home from work visiting with family. Student told his father that morning that he did not want to go to school. On the bus ride to school, Student told his bus driver he was sick, language he often used to indicate a desire to go home. Upon arriving in Room 120 at approximately 7:00 a.m., the first student in the room, Student told Mrs. Turner he was sick and rattled off his mother's phone number. Mrs. Turner immediately phoned Student's Mother. She then told Student to hang up his coat and backpack and informed him that she was on the

phone with his mother. As Mrs. Turner was talking to Student's Mother on the phone, Student threw a pencil. Mrs. Turner directed Student to go to the quiet room. In the quiet room, Student tried to push the computer over but it had been bolted down. He picked a chair up over his head and smashed it down into a metal cabinet. Tom Anderson, a staff member who had come into the room to assist Mrs. Turner, stood at the door to the quiet room and held it shut, asking Mrs. Turner what they should do. Mrs. Turner stated that she thought Student would deescalate on his own in the quiet room. Student then tried to leave the quiet room by bolting towards the door at full speed but he was able to get only partially out the door. Mr. Anderson held the door partially shut but Mrs. Turner told him that they should not keep him squeezed in the door. As Mr. Anderson let the door swing open, Student came flying out and hit Mrs. Turner's arm with his own. Mrs. Turner was unsure whether the contact was accidental or intentional. Mr. Anderson and Randy Staples, the school safety officer Mrs. Turner had called for help, restrained Student in a flat basket hold for approximately one to two minutes as he lay on the physical therapy bench. Chris Leavitt, Student's one-on-one educational technician, had arrived and spoke soothingly to him. Student relaxed and said he wanted to go to the clinic. When he was asked if he was ready to go, Student replied yes. As Student sat up and started for the door, the bell rang, and Mrs. Turner instructed him to sit on the physical therapy bench to wait for the hall to clear. Student did not usually go out into the hallways when they were busy with students going between classes. When he stood up to leave a few moments later, Student leapt between the men standing around him and hit Mrs. Turner on the side of the face with a two-handed karate chop. Mrs. Turner described the impact as very significant, knocking her off her feet and into a

pegboard on the wall. Student then sat down at Mrs. Turner's instruction and put his face in his hands and his head on his knees. Student then walked quietly to the clinic with Mr. Anderson, Mr. Leavitt, Officer Staples, and Mrs. Turner. At some point during the incident, Student was yelling about the Portland Pirates. Student's Mother arrived shortly after the incident ended to take Student home. After his mother picked him up, Student was very upset and repeatedly said he was sorry. (S-131; S-146-150; Testimony of Student's Mother; Carla Turner.)

19. Student's PET met on January 10 and determined that it would consult with Mary Scammon, M.S., CSPSP, a psychological examiner who contracted with the school, to determine if an evaluation or outside placement was needed. Student received an in-school suspension for ten days. (S-128-133; Testimony of Jennifer Donlon; Carla Turner.)

20. Student's Mother was unhappy about the suspension. She felt that Mrs. Turner had missed cues that Student was extremely anxious and that by first telling him to hang up his coat and backpack and then by directing him to sit down until the hallway cleared she had aggravated the situation. She also questioned why Mrs. Turner was so close to Student as to allow him to hit her after seeing that he was extremely agitated. (P-58; P-61; Testimony of Student's Mother.)

21. As a result of the January 9 incident, Mrs. Turner drafted a Behavior Intervention Plan for Student that called for a daily schedule review at 7:15 a.m., sensory compressions in each of the four blocks during the school day, rewards for positive behavior, and a full-time one-on-one educational technician. (S-126; S-218.)

22. Student was tutored in the district's central office during his suspension from January 12 through January 27 by Level I Educational Technicians. Evaluations for Student's triennial IEP review were also completed during this time. (S-106; Testimony of Carla Turner.)

23. On January 24, Mrs. Turner, Student's Mother, and Student visited the Cummings School of Spurwink as a possible private school placement. Student's Mother concluded that the program was unduly restrictive and not appropriate for Student. (S1-128; Testimony of Student's Mother.)

24. Also on January 24, Student's PET met again. Triennial evaluations, including an occupational therapy evaluation, a speech evaluation, and a comprehensive psychological evaluation, were reviewed along with a safety assessment by Student's psychiatrist, Dr. Laura Pershouse. (S-106.)

25. The psychological evaluation by Ms. Scammon did not endorse any particular placement but did recommend a positive support plan with rewards and consequences that targeted appropriate social interactions, following directions, and work completion as well as instruction in managing disappointment and developing appropriate coping skills. Ms. Scammon noted that Student "is compliant with a predictable and structured schedule but can become upset with unforeseen and unwanted changes." Ms. Scammon's written report also stated that there was "some delay" in Student's communications being understood on January 9 and that by the time they were understood he was very agitated. Student's Mother believed that Ms. Scammon had recommended that Student go back to Room 120 right away. Mrs. Turner and Ms. Donlon, on the other hand, believed that Mrs. Scammon was in agreement that Student

should not be returned to Room 120 unless a more detailed behavior intervention plan was in place. (S-113-118; Testimony of Student's Mother; Carla Turner.)

26. Dr. Pershouse provided a brief safety assessment reporting that she had interviewed Student on January 11 and that he had expressed remorse for striking Mrs. Turner and denied any future aggressive intent. In her letter, Dr. Pershouse stated that she believed Student was safe to return to school and would benefit from doing so. Dr. Pershouse had an expectation that Student would not act unsafely if an adequate safety plan, which she thought was being reviewed, were in place. (S-119; Testimony of Laura Pershouse.)

27. David Lennox, Ph.D., a behavioral consultant who provided safety training for Bonny Eagle High School staff subsequent to the January 9 incident, testified that he believed Dr. Pershouse's safety assessment was not useful since remorse is not a measure of whether a person will act the same way again and since Dr. Pershouse did not take into account Student's potentially increased agitation level in the classroom. (Testimony of David Lennox.)

28. At the PET it was noted that school staff had hired a behavioral consultant from Woodfords Family Services, recommended by Jennifer Stanford, Student's case manager at Community Counseling Center. It was noted that a behavioral goal would be added to the IEP after consultation with the behavioral analyst. (S-106-107.)

29. The PET determined that Student could not continue at Bonny Eagle High School due to safety concerns and would be placed "in an outside placement as soon as one is selected to learn [impulse control], coping strategies, problem solving and communication of needs in a safe way." No outside placement was specified at that time. (S-101; S-108.)

30. The IEP that resulted from this PET, covering the period of January 25, 2006, to January 24, 2007, called for Student to receive occupational therapy, speech therapy, and direct special education instruction. New goals for educational performance were drafted in the areas of computer technology, functional life skills, reading and language comprehension, and speech. Although the IEP did not specify mainstream classes, it appears that Student was to continue in mainstream art and physical education. Mrs. Turner reported that Student had been well behaved but did not benefit much from the content in health and often left the classroom because he "shut down." In addition, the behavior plan that Mrs. Turner had created was incorporated. (S-85-94; S-98; S-102; S-105; S-108; Testimony of Student's Mother; Jennifer Donlon; Carla Turner.)

31. On January 26, Mrs. Turner visited Margaret Murphy School as a possible private placement for Student. Student's Mother did not attend the visit because she believed that Ms. Donlon had removed it from consideration due primarily to its distance. After her visit, Mrs. Turner phoned Student's Mother to let her know she did not think it an appropriate placement for Student. Mrs. Turner believed that from that day forward there was an agreement to keep Student at Bonny Eagle High School. (Testimony of Student's Mother; Carla Turner.)

32. Around the end of January, Mrs. Turner stated to Student's Mother that Student would not be allowed back in her room for the next eight or nine months "unless he had a bodyguard." Mrs. Turner later regretted this comment, which she intended to be sarcastic. (Testimony of Student's Mother; Carla Turner.)

33. Another PET meeting was held on February 1, at which Student's new placement in a red portable classroom outside Bonny Eagle High School was discussed. The behavioral consultant was to begin working on Student's plan immediately. (S-79-82.)

34. The family and the district have very different perceptions of Student's activities during the time that he was in the red portable. Mrs. Turner testified that Student had two educational technicians with him at all times and she went out to the red portable during every block to check on his progress. She stated that Student was offered the chance to participate in gym class, although he often chose to walk the track instead of attend class, performed his on-the-job training of delivering announcements, and was given the choice of several locations inside the school building for lunch. Mrs. Turner also testified that Student was offered the chance to participate in life skills activities in Room 120, such as using the washer, dryer, and dishwasher, when less able students were not in the room, but that he consistently refused, saying that the machines were too loud. Ms. Donlon testified that she had lunch with Student and several educational technicians weekly in Room 120 during this period. (Testimony of Jennifer Donlon; Carla Turner.)

35. Student's Mother believed that Student was not allowed to leave the red portable to go into the main school building and that there were no peers in the red portable with him all day. Student's Mother testified that Mrs. Turner called her at home during this period and suggested that she should be upset about Student's restrictive placement in the red portable. Student's Mother then phoned Mrs. Donlon to request that Mrs. Turner no longer call her. Student expressed anxious behaviors during his time in the red portable and often expressed a desire not to go to school in the morning. (Testimony of Student's Mother.)

36. Woodfords Family Services assigned Mark Geren, M.S., BCBA, to be Student's behavioral analyst. Mr. Geren has been a behavioral consultant for eighteen years, working extensively with teens and children with autism for the last seven years. Mr. Geren has created functional behavioral assessments and behavioral intervention plans through observation and data collection for schools, hospitals, treatment centers, and other organizations. (Testimony of Mark Geren.)

37. Soon after Mr. Geren began to work on Student's case in early February 2006 he realized that there were "multiple agendas at work." He believed that Student's Mother wanted Student back in Room 120 immediately, but special education staff at the school wished to reintroduce him more gradually. Mr. Geren sought a meeting with school administrators, special education staff, and Student's Mother to clarify Student's anticipated placement in the coming months. This meeting was held on February 14, but Student's Mother did not attend because no one from the school invited her. (S-64-65; Testimony of Student's Mother; Mark Geren.)

38. At the February 14 meeting, school officials and special education staff disagreed about whether Student should continue to be educated at Bonny Eagle High School at all. While school administrators were not comfortable with Student being placed anywhere at Bonny Eagle High School, special education staff wanted to consider returning Student to Room 120 and getting him out of the red portable. Although there remained no agreement amongst school staff on the proper course of action, Mr. Geren was instructed to move forward with a plan that would allow Student to remain at Bonny Eagle High School. (Testimony of Jennifer Donlon; Mark Geren.)

39. On February 16, Student's Mother wrote Mrs. Donlon that she felt that the red portable was not the least restrictive environment in which Student could be educated and requested that Student be returned to Room 120. Student's Mother stated that Mrs. Turner had escalated the January 9 incident to scare school staff into thinking Student was dangerous in order to keep him out of her classroom. Student's Mother requested that Mrs. Turner be placed on administrative leave pending an investigation into her handling of the January 9 incident and Student's subsequent education. Student's Mother concluded that she would "guarantee Student to be successful and to return to his normal self" if he were returned to Room 120 with a substitute teacher. (P-79-80.)

40. Student's Mother kept Student out of school from Friday, February 17, until Wednesday, March 8 (a week of which was February vacation). On February 21, the family filed a request for a complaint investigation and a mediation with the Due Process Office of the Maine Department of Education. During the time that Student was kept home from school, he was confused but his anxious behaviors were decreased. (P-94; Testimony of Student's Mother.)

41. On March 1, Mr. Geren provided a brief report, noting that he was not comfortable recommending a specific plan until the parties had agreed on whether Student would be introduced back into Room 120, either immediately or in a graduated fashion, or placed in an out-of-district placement. Mr. Geren felt that returning Student to the classroom right away would create too much risk and instead recommended a graduated approach to Student's re-entry into Room 120 over several weeks or months. He agreed that Student should not be kept in the red portable for an extended period of time. Once a placement was agreed upon, he recommended that the next steps should include a functional

assessment to ascertain the likely function of Student's behaviors, development of a written behavioral plan, implementation of an ongoing corelational analysis, staff training on the behavioral plan as well as safety measures, and frequent clinical oversight and adjustments to the plan. (S-64-67; Testimony of Mark Geren.)

42. Mr. Geren's report noted that the function of Student's outbursts were [sic] not yet clear but it would be reasonable to hypothesize that they were attempts to escape or avoid demands. Mr. Geren had reviewed the incident reports related to Student to see if staff were missing antecedent behavior, but he could not draw any conclusion. (S-66; Testimony of Mark Geren.)

43. Another PET was held on March 6 to review Mr. Geren's initial report and Student's programming. Student's Mother did not attend because she understood that the PET had been cancelled and a mediation would be held instead on the same date, as outlined in a letter from the district's attorney. Mrs. Turner testified that after waiting twenty minutes to begin the PET on March 6, she called Student's Mother at work to ask if she was planning to attend and Student's Mother stated that she would not be coming to the PET but would be at the mediation and then hung up on her. Student's Parents both testified that they were at home the morning of March 6, preparing for the mediation, and they did not receive a call from Mrs. Turner indicating that the PET was going forward. Jennifer Stanford, Student's case manager, and Student's Mother testified that they both discovered at the mediation held the afternoon of March 6 that a PET had been held in the morning without them. The PET minutes are blank in the section for documentation of efforts to contact absent parents. (S-59; Testimony of Student's Mother; Student's Father; Jennifer Donlon; Jennifer Stanford; Carla Turner.)

44. The minutes of the March 6 PET state that Mr. Geren suggested removing Student from art class due to the presence of dangerous items in the classroom. Mr. Geren, however, stated that he was noncommittal to the idea of removing Student from art class. Student was removed from art from that point on. (S-61; Testimony of Student's Mother; Mark Geren.)

45. A mediation was held in the afternoon of March 6. The parties agreed that Student would return to Bonny Eagle High School and that the district would "work on relocating quiet space" for Student "in a room directly outside of [the] classroom." The parties specifically agreed that the red portable would not be used for quiet time. The district asked Student's Mother to keep Student home on March 7 to allow them to prepare for Student's return. (P-67A; Testimony of Student's Mother.)[1]

46. When Student was returned to school on March 8, he was placed in a small windowless room right outside Room 120 that had previously been used as an office. The office furniture had been removed and replaced with a beanbag, pillow, and blanket. The door to Room 120 was locked so that Student could not go into the classroom. (S-55; Testimony of Student's Mother.)

47. Another PET meeting was held on March 10, at which Mr. Geren was again present to discuss his initial report and his proposal for data collection over the new few weeks. Student's Mother expressed concern about the restrictiveness of the Room 120A setting, since she had not envisioned Room 120A as being Student's primary placement under the March 6 mediation agreement. Nancy Parent, Student's occupational therapist, also

[1] With the understanding that the parents were not seeking enforcement of the mediation agreement from the hearing officer, the district did not object to its introduction at hearing.

expressed concern that Student was spending too much time in Room 120A. (S-52; S-56; Testimony of Student's Mother; Carla Turner.)

48. That day, Mr. Geren provided Antecedent Behavioral Consequences ("ABC") forms to be used to record Student's anxious behaviors, the first step towards his development of a behavioral intervention plan. The initial goal was to identify patterns in Student's behavior, specifically incidents precipitating anxious behavior, without instigating dangerous outbursts. Mr. Geren also provided "Partial Interval Data" forms to record Student's physical aggression, environmental disruption, anxious behavior, and ability to remain on task doing IEP-related activities in fifteen-minute intervals. (S-56; S1-93-94; Testimony of Mark Geren.)

49. On March 14, Student's Mother requested an alternative location to Room 120A for Student to use as part of a gradual reintroduction to the classroom. Student's Mother believed that the only reason Student had not been returned to Room 120 was resistance from Mrs. Turner. She also advocated for the reinstitution of the prior rewards and consequences plan that she and Mrs. Turner had created and for Student's return to mainstream settings and classes. She interpreted the assessments of Dr. Pershouse and Ms. Scammon, in conjunction with the determination that Student's aggressive behavior was a manifestation of his disability, to mean that he was not a safety concern to himself, his classmates, or school staff. (P-58; P-61; P-64; P-66-71.)

50. On March 16, Dr. Pershouse prescribed Student Respiradol to address his anxious behaviors. (Testimony of Laura Pershouse.)

51. On March 21, Student's Mother again removed Student from school. When removing Student from school, she asked Lynn Brown, the assistant principal, if she

would be happy if this arrangement were for her son, and she replied "no." (P-64; Testimony of Student's Mother.)

52. On March 27, Student's Mother emailed Ms. Donlon that she would return Student to school only if he could be returned to Room 120. Student's Mother also emailed other school officials, stating that she believed that Student did not assault a teacher, noting that Mrs. Turner did not need medical attention after the incident. She refused to return Student to "an isolated closet type room with constant one on one tutoring . . . with the door locked to his classroom," which she found to be inconsistent with the mediation agreement, Student's IEP, and his PET recommendations. Student's Mother stated that such an arrangement was "not fit for an animal much less my son." Student's Mother argued that portraying Student as unsafe to his peers was unfair to him. (P-53; P-57; P-58.)

53. On March 28, Student's Mother filed the family's initial request for a due process hearing.

54. In March and early April, David Lennox provided safety training to ten to twelve staff members to provide them with strategies and techniques for preventing, minimizing, and managing behavioral issues ranging from noncompliance to physical assaults in students with communication deficits. (Testimony of David Lennox.)

55. On April 3, another PET was held, at which Student's Mother and Mr. Geren were both present. The PET determined that data collection would continue once Student was returned to school, that Mr. Geren would provide the team with a plan based on the ABC data that had been collected even though it was not the full two weeks worth of data that he had sought, that the plan would include Student beginning his day in Room 120 with

opt out opportunities every five minutes, and that behavioral goals for Student would reflect an attempt to extinguish disruptive behavior. Mr. Geren stated that the lack of data due to Student's absence had delayed the process. Mr. Geren suggested that Student be allowed forty-five minute opportunities in Room 120 after two weeks of non-aggression in Room 120A. Student's Mother became upset by comments of Mrs. Turner and left the meeting. (S-41-46; P-47; Testimony of Mark Geren.)

56. On April 5, Mr. Geren submitted his eight-page "Initial Behavior Treatment Plan" after observing Student at school twice, speaking with Student's Mother to obtain Student's history, and interviewing Mrs. Turner. Mr. Geren developed the plan under the assumption that Student's outbursts were the result of an inability to request a break when needed or the denial of access to a preferred activity or item. The purposes of this plan were: 1. to define Student's preferred conditions or activities that would predict the absence of the most serious forms of Student's aggression and 2. to get Student back into school and his classroom as much as possible. Under the plan, Student would be offered continuous access to the widest possibly array of preferred items and activities. He would be observed constantly and cued every five minutes to make a choice from an array of possibilities including English, math, life skills, leisure activities, sitting on a beanbag, playing cards, drawing, listening to music, having a snack, folding towels, doing math, sitting, chatting, reading, listening to a story, and walking. Student was not to be prompted to pick any particular activity. The plan sought to reduce aggression and environmental disruption to zero and then slowly increase academic demands to eventually return Student to his full curriculum. In Mr. Geren's experience, this approach

was more likely to be successful than a plan that would create consequences for negative behavior. (S-31-37; Testimony of Mark Geren.)

57. Student's Mother was concerned that the behavior intervention plan failed to incorporate educational goals, it created an unreasonable goal of reducing Student's environmental disruptions to zero, and it provided Student with so many choices that it would aggravate him. She also expressed concern that the stated objective of the plan was "NOT to maximize work output at this time, but rather to begin to make [Student] more available for learning." Mr. Geren testified that the level of IEP work introduced at the start of such a behavioral plan was highly individualized and would be increased over time. (S-35; Testimony of Student's Mother; Mark Geren.)

58. On April 10, Student's Mother returned Student to school under protest and the implementation of the behavioral plan began, although at the request of Student's Mother Student was not allowed to use Room 120A or the quiet room to do academic work. The behavioral plan proceeded until the end of the year although the cuing was later extended to every fifteen, rather than every five, minutes. In late April, Mrs. Turner asked staff to begin recording the location that Student chose for each fifteen-minute block on the partial interval data sheets. (Testimony of Student's Mother; Mark Geren; Carla Turner.)

59. The behavioral intervention plan was incorporated into Student's IEP with the addition of a behavioral goal on April 10, drafted by Mrs. Turner without review by Student's PET, that Student would "communicate his needs for change without disruption in a socially appropriate way 100% of the time." (S-30; Testimony of Carla Turner.)

60. Sometime in April, Student's IEP was scored to reflect progress towards particular goals. Patricia Milligan, Student's speech therapist, graded Student's speech goals with

four grades of "1," indicating poor progress, three grades of "2," indicating average progress, and one grade of "3," indicating above average progress. Mrs. Turner scored Student with complete zeros, reflecting no progress, in all other objectives. Mrs. Turner testified that since Student was absent twenty-three days during the quarter, including a period of assessment, she had initially scored him as making no progress but that in retrospect she felt the grades were erroneous since he had made progress when present. A rescored IEP was offered at hearing but not accepted into the record since it had not been previously disclosed to the family. (S-89-94; S-237-242; S1-93; Testimony of Carla Turner.)

61. Mark Geren provided a revision of his initial behavior intervention plan on May 26 to reflect minor changes. The behavioral intervention plan was applied until the end of the school year on June 12. (S-225-232; Testimony of Mark Geren; Carla Turner.)

62. During the first quarter of his tenth grade year, Student produced forty-one math assignments and fifty-four English assignments. During the second quarter, Student completed fifty math assignments and fifty English assignments. During the third quarter (approximately January 23 to March 31) including the time Student spent in the central office, in the red portable classroom, and in Room 120A, Student completed thirty-six math assignments and forty-five English assignments despite his absence for twenty-three days. During the fourth quarter (approximately April 3 to June 12), Student produced seventeen math assignments and sixteen written English assignments and many oral English assignments, often selecting Room 121 as a place to do academic work although it is not as private as the quiet room or Room 120A. (S-233-236; Testimony of Carla Turner.)

63. ABC and Partial Interval Data forms were utilized from March 13 through the end of the school year. Mr. Geren's analysis of the data sheets led him to conclude that Student was in Room 120A for generally decreasing amounts of time after the behavioral plan was introduced. Mr. Geren's analysis also led him to conclude that Student's ability to remain on task doing IEP-related activities increased slightly during the course of the data collection. (Testimony of Mark Geren.)

64. Mr. Geren testified that he considered the plan to be extremely successful since Student had exhibited only one minor disruption, throwing his glasses, at school since its implementation. He testified that he believed Student had learned to use a quiet space to calm himself down, as evidenced by his observation of Student on the day of a field trip. Student chose to relax in Room 120A just before the start of the trip and when he got on the bus, he looked less agitated and chose the field trip even though he was offered other activities. Mr. Geren believes that Student has learned to exhibit an alternate behavior to supplant serious behavioral outbursts. (Testimony of Mark Geren.)

65. Dr. Lennox testified that he found Mr. Geren's data collection and behavioral intervention plans to be a well-planned course to minimize the risk to others while getting Student back into the classroom gradually. (Testimony of David Lennox.)

66. Mrs. Turner also feels that the behavioral intervention plan has been successful. She felt that after six or eight weeks, Student had significantly increased his ability to communicate the need to take a break. Mrs. Turner testified that Student now regularly requests Room 120A to take a break even without prompting and often goes into Room 120A for fifteen minutes prior to delivering announcements and reports that he is "getting ready to go to work." (Testimony of Carla Turner.)

67. Student's Mother believes that Student has spent most of his time in Room 120A sitting on the beanbag with a blanket over his head since the start of the data collection. She feels that the lack of a structured routine in his school day has been detrimental to Student and that he has performed very little academic work. Student's Mother also believes the behavioral plan has decreased Student's ability to cope with disappointment. She prefers an approach that provides consequences for negative behavior, pointing to the failure of the plan to address verbal outbursts that include profanity at school. (Testimony of Student's Mother.)

68. Student's Mother believes that Mrs. Turner and Student never had a positive relationship and that Student is fearful of Mrs. Turner. She feels that Mrs. Turner placed excessively high academic demands on Student and that she does not listen to his communications. Student's Mother also feels that she can no longer collaborate with Mrs. Turner. (Testimony of Student's Mother.)

69. Mrs. Turner, on the other hand, feels that she and Student continue to have a good working relationship. She testified that he routinely picks her flowers, initiates group hugs, and is enthusiastic to be in her classroom. Further, Mrs. Turner feels that she can continue to work productively with Student's Mother. (Testimony of Mark Geren; Carla Turner.)

70. Charles Lyons, Ph.D., a consultant with three decades of experience as a special education educator, professor, and administrator, observed Student at school, on May 1 and May 24, and reviewed Student's behavioral plan at the request of Student's family. Dr. Lyons opined that Student had not been provided a free appropriate public education since the January 9 incident. During his two observations of Student at school, which

lasted for a total of six and a half hours, Student spent most of his time in Room 120A sitting on a beanbag and self-selecting the activity of relaxing, although Dr. Lyons acknowledged that the data collection sheets revealed that Student had been performing some IEP-related work. (Testimony of Charles Lyons.)

71. Agreeing that the purpose of the data collection was to reintegrate Student slowly into the classroom, Dr. Lyons found the data collection to be flawed since it did not require Student to undertake IEP activities. He also found the plan inadequate because it did not provide any consequences for negative behavior or poor choices by Student. Dr. Lyons felt that Student did not pose any larger threat than any other autistic adolescent and that good educators could recognize the signs of distress before aggression occurred. His review of the incidents from XX grade in which Student acted aggressively towards Melody Price led him to the conclusion that it had something to do with Student's relationship with Ms. Price since no other serious incidents were reported during Student's middle school experience. (Testimony of Charles Lyons.)

72. Dr. Lyons believes that Student can obtain a free appropriate public education under his current IEP at Bonny Eagle High School only under a better-designed behavioral plan with Mrs. Turner removed as his classroom teacher. (Testimony of Charles Lyons.)

73. The family accepted the school's offer to provide Student with ten weeks of STRIVE summer camp, including tuition, transportation, and an adult aide, to compensate for the weeks that Student was out of school due to the family's frustration. The school has provided one-on-one support for Student at the STRIVE program through Tracy Welch, an educational technician at Bonny Eagle High School, and Holly Marston, who has been hired by the school on a limited basis as an aide for Student's STRIVE and Extended

School Year Services programs. (Testimony of Student's Mother; Jennifer Donlon; Holly Marston.)

74. On June 22, Mrs. Turner brought the Geren behavioral intervention plan to the STRIVE camp and asked Ms. Welch and Ms. Marston to implement it with some modifications. Ms. Welch roughly implemented the behavior plan that afternoon. Ms. Welch then spoke to Student's Mother about the plan, which they both felt was not necessary for use at camp given its leisure activities and low demand level. Student's Mother did not return the behavioral plan notebook to camp after it came home in Student's backpack the afternoon of June 22 and it was not used for the rest of that week or the next. When Ms. Donlon encouraged Student's Mother to allow the behavioral intervention plan to be employed at STRIVE, Student's Mother assured her that STRIVE was fun for Student and Student was allowed to opt out if he wanted, so no plan was needed. She felt that no quiet space or behavior modification plan was needed and was confident that no incidents would occur. (Testimony of Student's Mother; Jennifer Donlon; Holly Marston; Tracy Welch.)

75. On Monday, June 26, Student threw his glasses on the roof of the camp building in frustration. Neither Ms. Marston nor Ms. Welch was present but a camp counselor named Rebeckah Perry approached him. When Student asked to call his mother, Ms. Perry denied his request and stated that he could go home when camp ended in mid-afternoon. Student did not exhibit further frustration. (Testimony of Tracy Welch.)

76. The following week, on June 29, Student had a behavioral outburst in which he struck the same counselor. In the morning, Student went to the local grocery store on a field trip with the rest of the campers. He yelled loudly several times in the store. Ms.

Marston reminded Student that they had a trip planned to the mall the following day that Student would not be able to go on if he misbehaved. Around lunchtime, before Ms. Marston left for the day, Student asked her again if they were going to the mall the next day. Ms. Marston replied that they would if Student behaved. Student got up after lunch and went to draw at a separate table. When a craft project for the entire group was set up at a nearby table, Ms. Welch asked Student if he would like to join the group with her and although he responded yes, he continued to draw. After further prompting, Student went to the large table but was still holding onto this [sic] drawing papers. When Ms. Welch asked him if she could hold his papers for him during the craft project, he yelled "no, thank you," and threw his glasses across the room. Ms. Welch suggested that Student take a rest on the couch, which was removed from the table area but in the same room and which he had previously used as a quiet space. Ms. Welch approached Student, who was then lying on the couch, and told him he could join her at the drawing table when he was calm. She reminded him that he would not be able to go to the mall the following day if he did not behave. A few minutes later Student approached Ms. Welch at the drawing table and asked for his glasses, which he then threw again while yelling a profanity. Student then mumbled further profanity and returned to the couch. Rebeckah Perry asked Ms. Welch if she could approach Student given that she had been able to calm him during his outburst a few days earlier. Ms. Welch agreed and Ms. Perry approached Student to ask if she could sit down. Student agreed. They began to talk and Student asked Ms. Perry if he would be able to go to the mall, to which she replied that she did not think so but she was not sure. Student then began to hit Ms. Perry in the ear and head with his hand, yelling that he wanted to go to the mall. He then pivoted and

kicked her in her upper arm with his feet several times. Ms. Welch got Ms. Perry off the couch. Student then began to cry and removed his sock and shoe, biting his toe and yelling. He also stuck his fingers in his mouth and tried to gag himself. Once everyone was removed from the building, Ms. Welch phoned Student's Mother who came to pick Student up. Once Student was informed that his mother was coming to get him, he calmed down. (S-243; Testimony of Holly Marston; Tracy Welch.)

77. Student returned to camp the next day remorseful and he apologized to Ms. Perry. Ms. Perry saw a doctor who expressed some concern about the bruising around her ear. (Testimony of Tracy Welch.)

78. Student's Mother believes that Ms. Perry made an error in judgment by approaching Student when he was resting, which allowed events to spiral out of control. Although she agreed with the approach of using the withdrawal of the mall trip as a consequence for poor behavior, she felt that by invading Student's quiet space and then telling him he could not go, Ms. Perry had provoked Student. (Testimony of Student's Mother.)

79. Mr. Geren found the June 29 assault by Student to be functionally consistent with his prior aggressive behavior. He believed that with modifications of the activities offered his behavioral intervention plan could be used at STRIVE and it would probably have prevented the assault. He opined that the use of a verbal behavioral contract with Student was confusing for him due to his limited verbal skills. Mr. Geren believes that reshaping Student's behavior will be a long process. (Testimony of Mark Geren.)

80. If Student returns to the Therapeutic Life Skills Program in the fall, Mr. Geren is not likely to adopt a plan that presents demands quickly and forcefully because Student has shown a willingness to use aggression to terminate a demand. Instead, Mr. Geren would

adopt an approach that gradually increases academic demands on Student. By beginning with demands that are easy for Student to comply with, the plan would slowly shape compliance by providing Student a history of positive reinforcement for compliance. (Testimony of Mark Geren.)

IV. POSITIONS OF THE PARTIES

Family's Position: 2005-2006 IEP. The family contends that Student has not been provided a free appropriate public education ("FAPE") under his IEP, as amended with a behavioral intervention plan, since January 9. The family argues that the process for creating Student's IEP in January 2006 ran afoul of procedural requirements in several ways. First, the family argues that the behavioral intervention plan was developed largely outside the PET process including meetings with Mark Geren to which Student's Mother was not invited as well as the March 6 PET. Second, the parents allege that Mrs. Turner's drafting of a behavioral goal without the PET's review was a procedural flaw. Third, the family points to the lack of information in the IEP about behavioral intervention services and the failure of the IEP to specify the location, duration, and frequency of many special education services.

The family also contends that Student's program and placements after January 9 did not provide Student with FAPE because of substantive deficits. The family points to several deficiencies in Student's program while he was educated in the central office, in the red portable classroom, and in Room 120A, a period roughly encompassing the third quarter of the school year. First, the family contends that the district's use of Level I Educational Technicians to provide instruction on new material without the direct supervision of a certified classroom teacher while Student was placed in the central office violates Maine law. Second, the family contends that Student was unduly isolated from peers during this period in violation of the least restrictive environment ("LRE") principle. Third, the family contends that Student was deprived of IEP-required instruction in cooking and other functional life skills during this period.

With regard to the period following April 10, roughly encompassing the fourth quarter of the school year, when Student was returned to a placement that included Room 120 for at least part of the day pursuant to a behavioral intervention plan, the family contends that the failure of the school to impose IEP-based demands was not endorsed by Student's PET. The family argues that Student's educational growth came to a halt with the implementation of the initial behavioral intervention plan. The family contends that this loss of educational progress was not counterbalanced by any behavioral benefit.

Stay-Put. The family argues that the district violated Student's right to remain in his placement once the family filed its request for a complaint investigation and mediation on February 21 since he was not restored to the program designated in his February 2005 IEP.

2006-2007 School Year Program. The family contends that Student's IEP for the coming year is substantively inappropriate because it has been ineffective at making gains in Student's behavioral and coping skills. The family seeks a new functional behavioral assessment that focuses on the function of Student's behavior and his diminished ability to cope with change and frustration as well as a behavioral plan that incorporates more academic demands. With regard to Student's placement, the family would like to see Student remain in the Therapeutic Life Skills program at Bonny Eagle High School only if Mrs. Turner is replaced as the lead teacher and Ms. Marston is hired as Student's one-on-one educational technician. Otherwise, the family requests an order requiring the district to seek a placement for Student in a public school program outside of MSAD #6 due to the hostility between the family and the district.

Compensatory Education: The family argues that Student is entitled to a remedy of compensatory education in the form of an additional year of eligibility for special education and related services.

District's Position: 2005-2006 IEP. The district argues that the programming and behavioral intervention plan provided to Student since January 9 have provided him with FAPE. The district contends that it was required by law to take into account the impact of Student's disruptive behavior on others and address his disability-related disruptions in his programming for his safety as well as the safety of others.

With regard to the third quarter of the year, the district asserts that by immediately convening a PET meeting on January 10, investigating outside placements with the parent's approval, hiring a behavioral consultant recommended by Student's case manager, and resuming Student's programming to the extent possible while a behavioral intervention plan was being developed and safety training for staff was occurring, it took reasonable steps at all junctures. The district contends that the parents' actions, in keeping Student out of school for twenty-three days during the third quarter, hampered the district's ability to quickly develop an appropriate behavioral intervention plan. The district argues that Student received FAPE in the third quarter as evidenced by his production of written assignments and his participation in speech and occupational therapy.

With regard to the fourth quarter, the district argues that the application of the behavioral intervention plan, for which there is no substantive standard in the law, did not prevent Student from being provided FAPE. The district contends that Mr. Geren's behavioral plan, which incorporates an ongoing functional behavioral assessment, is the

"standard of practice" and has taught Student long-lasting communication tools. The district argues that Student did make academic progress, but also contends that teaching Student communication skills is more important than teaching him academic skills at this late stage in his academic career.

Stay-Put. The district contends that it did not violate the stay-put requirement because Student's placement was not the physical location of Room 120 but rather the Therapeutic Life Skills program, to which there were only "de minimis" changes. The district maintains that any alterations did not constitute a "substantial and material alteration" of Student's program such that the stay-put provision would be applicable.

2006-2007 School Year Program. The district contends that Student's IEP and behavioral intervention plan, instituted in the fourth quarter, will continue to be appropriate. The district cites testimony from Mark Geren and David Lennox that there will be a gradual increase in academic demands on Student as set by benchmarks developed by his PET. The district rejects the suggestion that Student should be returned to Room 120 with the same level of academic expectations as he had prior to January 9 since Mark Geren and David Lennox felt this plan was likely to lead to another dangerous outburst. The district contends that the incident at STRIVE shows the danger involved in failing to employ a behavioral plan.

The district argues that the family cannot dictate which school personnel will teach Student and that the hearing officer should not order an out-of-district placement since the parental-school hostility in this case is not sufficient to negate any educational benefit Student would otherwise obtain at Bonny Eagle High School.

Compensatory education. The district argues that Student is not entitled to an award of compensatory education. This district maintains that even if Student is awarded compensatory education, such an award should be limited to the ten weeks of STRIVE camp that the school has already offered and the family has accepted.

V. DISCUSSION AND CONCLUSIONS

A. Whether Student's IEP Program and Behavioral Intervention Plan Denied Him FAPE From January 10 Through April 10.

The parties agree that Student qualifies for special education as a student with multiple disabilities under *MSER* § 3.8. (S-110.) As such, special education law requires that MSAD #6 provide Student with a free appropriate public education. 20 U.S.C. § 1412(a)(1)(A); *MSER §§* 1.3 & 11.1. A free appropriate public education is one in which a student is provided with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 202 (1982). Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student's individual potential. Id. at 202. At a minimum, a student's program must be geared toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special need." Town of Burlington v. Dep't of Educ., 736 F.2d 773, 788 (1st Cir. 1984), aff'd, 471 U.S. 359 (1985); see also Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991-92 (1st Cir. 1990) (noting that academic progress is not the only indicia of educational benefit). A student's program is not required to maximize his or her potential, but must afford "some educational benefit." Lenn v. Portland School Comm., 998 F.2d 1083, 1086 (1st Cir. 1993). To determine

whether FAPE was provided, it must be determined whether the district, first, complied with the IDEA's procedural requirements, and, second, developed an IEP that was "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 206-07. The burden of proof rests with the family on challenges to Student's IEP. Schaffer v. Weast, 126 S. Ct. 528 (2005).

1. Procedural IDEA Violations

The first issue is whether the district committed procedural violations of the IDEA that served to deny Student FAPE during the second half of the 2005-2006 school year. When reviewing alleged procedural violations, a hearing officer may find that a child did not receive FAPE due to procedural violations only if the violations "(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); see also Roland M., 910 F.2d at 994.

a. Exclusion from Meetings

First, the family argues that they were excluded from critical meetings with Mr. Geren as well the March 6 PET meeting. Student's Mother was not invited to the February 14 meeting even though Mr. Geren had specifically requested that Student's parents be invited. Student's Mother also was not invited to any of the meetings between Mr. Geren and Mrs. Turner. With regard to the March 6 PET, Student's Mother and Jennifer Stanford, Student's case manager who had been to Student's PETs before, credibly testified that they were not aware until the mediation on the afternoon of March 6 that a PET had occurred that morning, as supported by a letter that Student's Mother

received from the district's attorney stating that the PET previously scheduled would be supplanted by the mediation. Although Mrs. Turner testified that she called Student's Mother at work that morning, Student's Parents both testified credibly that they were home that morning and did not receive a call indicating that the PET was going forward. Further, the PET minutes are blank in the section for documentation of efforts to contact parents, even though special education regulations require a district to record its efforts to arrange for parents to be present. 34 C.F.R. § 300.345(d); *MSER* § 8.4. At this PET, Mr. Geren's initial report was submitted and discussed. In addition, the decision was made to remove Student from mainstream art class even though he had not been disruptive in that class, although Mr. Geren disputed the minutes' attribution of this removal to his suggestion that this was an appropriate safety measure.

The exclusion of the family from the February 14 meeting, at which Student's placement pending the development of the behavioral plan was discussed, and the March 6 PET meeting, at which components of Student's placement and behavioral intervention plan were discussed, are indeed serious procedural violations of the IDEA. Parents of a child with a disability are members of the student's PET and must be given seven days notice of all PET meetings. *MSER* §§ 8.5 & 8.6(A). Further, the parents of a child with a disability "are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child." 34 C.F.R. § 300.345 & App. A (1999) (Q&A #5); *MSER* § 8.11 (parents are "equal participants" in Team).

Nevertheless, school administrators and special education staff disagreed about whether Student could be appropriately placed at Bonny Eagle High School during the February 14 meeting with Mr. Geren and no decision was reached. Instead, Mr. Geren

was asked to draft a behavioral intervention plan that would allow Student to remain at Bonny Eagle, the placement that the family sought at that time. Although Student's placement within Bonny Eagle was ultimately unsatisfactory to the family, the particular placement was not decided on February 14. Moreover, the family expressed their frustration about Student's placement and programming to school staff and at the multiple PETs held during this quarter. With regard to other meetings that Mr. Geren undertook with Mrs. Turner to facilitate the data collection and development of a plan, it was customary for him to meet with school staff during the course of his consultation. (Testimony of Mark Geren.) Further, Student's Mother knew of one of these meetings before it was held and did not protest that it was going to be held without her since she was not available.

Although Mr. Geren's initial report was presented at the March 6 PET, it was provided to Student's Mother at the mediation held later that day. (Testimony of Student's Mother.) Further, Student's Mother attended another PET four days later, on March 10, at which the initial plan, including data collection and behavioral reinforcements, was again reviewed, including a discussion of expectations for the plan and its development. (S-54.) The Prior Written Notice of a Program Change given to the family at the conclusion of the PET indicated that full reintegration of Student on an immediate basis had been rejected due to the fact that a behavioral plan was not yet in place. (S-52.)

In addition, a PET, at which Student's Mother and Mr. Geren were both present, was held on April 3, at which time Student's Mother's frustration with the length of time the data collection process was taking was reflected in a PET request that Mr. Geren

produce a behavioral intervention plan within two days even though two weeks of ABC data had not yet been collected. (S-41.) Also at the April 3 PET, the decision to remove Student from mainstream art was reviewed, with the art teacher expressing that he was not comfortable with Student returning until the PET could assure that his behavior would be safe. (S-45.)

As such, the procedural violations did not rise to the level of significantly impeding the family's ability to participate in the decisionmaking process. Cf. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004) (school significantly impeded parents' ability to participate when it made a decision to place a child in a particular program without considering his individual needs and prior to convening a PET with the parents); Mars Area Sch. Dist., 106 LRP 26461 (Penn. SEA 2006) (school significantly impeded parent's ability when it held a manifestation determination hearing on a date it knew the parent was unavailable, which resulted in an inappropriate placement).

b. Adoption of Student's Behavioral Goal

Second, the family argues that the behavioral goal drafted by Mrs. Turner, but not reviewed by Student's Team, was inappropriate because it called for Student to communicate his need for change in a socially appropriate way one hundred percent of the time. (S-30.) Although it would have been preferable for the PET to review the goal as drafted by Mrs. Turner, it was based upon extensive PET discussion of the need for Student to improve communication of frustration and anxiety. Further, the essence of Student's behavioral goals and objectives, and the methods intended to achieve these goals, were found in the detailed Geren behavioral plan appended to Student's IEP in

April when the goal was added. Although the plan recited an objective of reducing to zero Student's environmental disruptions and aggression, it also included the more moderate and concrete goals of keeping Student free of disruption in the classroom for two consecutive weeks, decreasing his anxious behavior by fifty percent, and allowing him to resume work within Room 120 for eighty-five percent of the time for one consecutive week by the end of the school year. (S-32-33.) As such, Mrs. Turner's drafting of Student's behavioral goal did not result in a denial of FAPE.

c. Lack of Specification of Level of Services

Third, the family alleges a procedural violation in the failure of Student's 2006-2007 IEP, drafted to begin on January 25, 2006, to include specific information about the level of behavioral intervention services as well as the duration, frequency, and placement of special education and supportive services. Even though the IEP recorded zeros for the amount of service each week, school staff credibly testified that this was due to lack of familiarity with a new computer program and did not reflect substantive determinations. (Testimony of Jennifer Donlon; Carla Turner.) In addition, the PET determinations noted the frequency and duration of the supportive services specified in the IEP. (S-108.) Further, the PET minutes and determinations clarified that a behavioral consultant had been secured and his behavioral intervention plan was ultimately incorporated within Student's IEP. If there had been any disagreement about the appropriate level of these services, these errors could be more significant. In context, however, they did not deny Student FAPE.

2. Substantive IDEA Violations

The family also alleges that the district's substantive failures under the IDEA denied Student FAPE from January 9 forward. In particular, the family argues that Student was not placed in the least restrictive environment, that essential components of his program were not provided, and that the school violated Maine education regulations by providing direct instruction through Level I Educational Technicians.[2] Because I hold in section A.2.c., below, that the district violated Student's stay-put rights beginning February 21 thus denying him FAPE from that point until April 10, I analyze these claims only with regard to the period prior to February 21 and after April 10.

a. Student's Placement in the Central Office

The parents allege that Student was not educated in the least restrictive environment while he was placed in the central office. The family also argues that the district violated Maine educational regulations by providing Level I Educational Technicians to tutor Student without direct supervision during the twelve days that he was in the central office.[3] Maine educational rules allow Level I Educational Technicians to "review and reinforce learning previously introduced by the classroom teacher or appropriate content specialist, or assist in drill or practice activities" while under the direct supervision of the classroom teacher. 05-071 Code of Maine Rules Ch. 115 Part I § 10.1(A).

[2] The family also alleges a flaw in the failure of the district's behavioral consultants, Mark Geren and David Lennox, to be certified in Maine. I find no procedural or substantive requirement, nor does the family point to any, that requires a consultant to be certified in order to provide services to a special education student.

[3] The parents allege that this violation continued during Student's placement in the red portable, but Mrs. Turner testified credibly that she visited the red portable every 84-minute block to check on Student's progress. The parents also assert that the entire curriculum in Room 120, in which Mrs. Turner acknowledges that she provides little direct instruction to the students, is a violation of Maine educational regulations. There was insufficient evidence presented at hearing to determine whether in fact the current program in Room 120 is a violation of Maine law such that it denies Student FAPE.

The family asserts that this violation was sufficient to deny Student FAPE since one criteria of providing FAPE is to "meet the standards of the State educational agency." 20 U.S.C. § 1401(9)(B). The district, although not addressing these challenges directly, asserts that it was not required to provide any services at all during Student's ten-day suspension.[4]

Student's placement in the central office was a temporary period of suspension, in which the district was not obligated to provide any services. 20 U.S.C. § 1415(k)(1)(B) & (D).[5] Even if the district were obligated to provide special education services during this period, with regard to LRE, Student's time in the central office was utilized to conduct three triennial evaluations, which are necessarily done in relative isolation. (S-106; S1-127-134.) Finally, because another person was always with the educational technician working with Student, including Mrs. Turner, Ms. Donlon, or the professional assessors, sufficient supervision was provided. (Testimony of Carla Turner.)

b. Student's Placement in the Red Portable

The parents also allege that Student was not educated in the LRE during his placement in the red portable from February 1 until they removed him from school on

[4] The record is not clear as to why Student remained in the central office for 12 days instead of 10, although it appears to be due to the school's lack of preparation for an alternative site for Student's programming since Student's Mother was asked to keep Student at home February 27 and 28 while the school readied the red portable building. If keeping Student in the central office for an additional two days were an extension of his suspension, then the school would have been required to make a manifestation determination under section 1415(k)(1)(D) and returned Student to his prior placement if his behavior was determined to be a manifestation of his disability under section 1415(k)(1)(F)(iii). See also Honig v. Doe, 484 U.S. 305, 328 (1988) (holding that when student was suspended for more than 10 days, his placement was changed and he was entitled to stay-put placement pending an administrative hearing).

[5] Although the IDEA is not explicit that services need not be provided during suspensions of up to ten days, a school is allowed to mete out the same punishment to a student with a disability as it could to a non-disabled student for up to ten days. 20 U.S.C. § 1415(k)(1)(B). In contrast, a school is required to provide educational services for suspensions of more than ten days. 20 U.S.C. § 1415(k)(1)(D).

February 17.[6] As part of its obligation to provide FAPE, a district must educate a disabled student with non-disabled students to the maximum extent appropriate to the needs of the child, including in non-academic settings. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.553 (mainstreaming requirement applies to lunch, gym, recess, transport, and recreational activities); *MSER* §§ 11.1 & 11.2 (mainstreaming requirement applies to non-academic and extra-curricular activities). The least restrictive environment requirement dictates that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.550(b)(2); *MSER* §§ 11.1 & 11.2.C. A child with a disability may be removed from the regular setting where, despite provision of supplementary aids and services, his behavior is so disruptive that it "significantly impair[s] the learning of others." 34 C.F.R. Part 300 App. A (1999) (Q&A #39).

Without directly confronting the family's LRE argument, the district relies on an IDEA provision requiring a PET Team, when fashioning the IEP of a student whose behavior impedes his own learning or that of others, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); see also *MSER* § 10.3(D). This provision places an affirmative obligation on school districts to devise strategies for managing a student's disruptive behavior. The LRE and positive behavioral intervention requirements, when combined, establish that "[i]f the child can appropriately function in the regular

[6] The parents also allege that essential components of Student's program were not provided during this period. I do not reach this argument since I hold that Student was denied FAPE because he was not educated in the least restrictive environment during this period.

classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA." 34 C.F.R. Part 300 App. A (1999) (Q&A #39). The school also relies on Alex R. v. Forrestville Valley Community Unit School District #221, 375 F.3d 603 (7th Cir. 2004), in which the Seventh Circuit Court of Appeals held that the IDEA did not set substantive standards for behavioral plans. Id. at 615. Alex R. is not instructive on the issue of what setting constitutes the LRE while a behavioral plan is being developed, however, since the court specifically noted that LRE was not at issue there. Id. at 618.

Applying the principles of LRE to Student, prior to January 9, Student's access to non-disabled peers consistently [sic] mainly of education and art classes, as well as interaction in passing in the hallways and while delivering announcements. The PET minutes of February 1, held the day Student began his temporary placement in the red portable, state that reintegration with activities outside Room 120 and adult interactions would resume as tolerated. (S-79.) While he was in the red portable Student was not allowed into Room 120 unless his peers were absent, although he went into the school building for speech therapy in Room 121 several times a week. (Testimony of Carla Turner.) Student's daily logs reveal that about halfway through his twelve days in the red portable he began to deliver announcements in the main school building, attend gym or take a walk, and have lunch in Room 120 when his peers were absent. (S1-114-122.)

Although during this time, Mr. Geren was working towards implementing a behavioral plan for Student that would allow him back into the special education classroom, Student was exceptionally isolated. Student was particularly anxious about

going to school during this period and often expressed that he did not wish to attend. (Testimony of Student's Mother.) As Mr. Geren noted in his initial report, he did not recommend keeping Student in the red portable for an extended period of time since no school staff believed that "this would be an acceptable course of action and because it is not an ideal long-term solution from a socially normative standpoint." (S-64.)

While Student was not a candidate for more instruction in mainstream classes, his interaction with peers, both mainstream and non-mainstream, was "very limited" during this period. (Testimony of Carla Turner.) Although this placement was temporary, and intended to give the school time to collect data upon which to draft a behavioral intervention plan in order to meet its obligation to develop positive behavioral strategies, by the time Student's placement in the red portable started, more than three weeks had passed since the January 9 incident. By the time his placement in the red portable ended due to his removal from school, five full weeks had passed since the incident. Despite the fact that in the middle of Student's placement in the red portable his interaction with mainstream peers was restored at least partially, it was not sufficient to constitute the least restrictive environment appropriate. As such, I hold that Student was denied FAPE from February 1 to February 21 because he was not educated in the least restrictive environment appropriate.

c. Stay-Put Placement

The family also argues that the district violated Student's right to have his last agreed-upon placement reinstated once they filed a request for a complaint investigation on February 21. The district counters that it did not violate the stay-put provision since even though Student experienced a change in location, there were only "de minimis

changes" to Student's programming during his placements in the red portable and Room 120A.

Special education law provides that a school is required to maintain the student's "then-current educational placement," unless the school and parents otherwise agree. 20 U.S.C. § 1415(j); see also 34 C.F.R. § 300.514; *MSER* § 12.12(A). The statute does not define "then-current educational placement," but many courts have defined it as the last placement that was agreed upon by the parents and the school. See, e.g., Sammons v. Polk County Sch. Bd., 44 IDELR 251 (M.D. Fla. 2005) (holding that stay-put placement is "last uncontested placement" that preceded controversy); Warton v. New Fairfield Bd. of Educ., 125 F. Supp.2d 22 (D. Conn. 2000) (same) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)).[7] Maine law extends this "stay-put" provision to the time period following a family's request for a complaint investigation. *MSER* § 12.12(A).[8] If a school is concerned that maintaining the current placement of the student "is substantially likely to result in injury to the child or to others," it may request an expedited hearing, and until a decision is issued, the student may remain in the interim alternative educational setting established by the school. 20 U.S.C. § 1415(k)(3) & (4).

[7] At hearing Ms. Donlon testified that she believed that the extent of the PET's agreement about Student's placement immediately after January 9 was that an outside placement would be considered. Nevertheless, the district does not pursue an argument that it did not violate the stay-put provision since the last agreement upon placement was to consider other placements. The district also agreed to a formulation of issues that identified the February 2005 IEP as the stay-put placement. Even if the January 2006 IEP were considered the last agreed-upon placement, the result would be the same since the programming in the two IEPs is very similar.

[8] The only exception to the stay-put requirement allows a school to remove a child from his or her placement for up to forty-five days under the following special circumstances: when the student possesses a weapon at school, possesses or uses drugs at school, or inflicts serious bodily injury on another person while at school. 20 U.S.C. § 1415(k)(1)(G) (allowing school to remove a student to an interim placement for up to 45 days in these three exceptional circumstances without regard to whether the behavior is a manifestation of the student's disability). At no time has the school indicated it was operating under this provision. (P-51.)

The stay-put provision prevents a school from unilaterally excluding a student from the classroom during the pendency of a due process proceeding. Honig v. Doe, 484 U.S. 305, 323-28 (1998); see also Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 373 (1985). The provision is intended "to maintain some stability and continuity in a child's school placement during the pendency of review proceedings." Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 (E.D. N.Y. 1985). It is "[p]erhaps the most important right provided by the [IDEA]," since it allows a student to continue his or her normal routine of education "while necessary changes can be made to his or her program to deal with the behavior of the child." Greene County Bd. of Educ., 36 IDELR 144 (Ala. SEA 2002).

As the Office of Special Education Programs has explained, a student's placement has three components: "the education program set out in the student's IEP, the option on the continuum in which the student's IEP is to be implemented [such as regular classes, special classes, or separate schooling as referenced in 300 C.F.R. § 300.551(b)(1)], and [the] school or facility selected to implement the student's IEP." Letter to Fisher, 21 IDELR 992 (OSEP 1994); see also White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003) ("'Educational placement,' as used in the IDEA, means educational program - not the particular institution where that program is implemented."). Thus, a change from one location to another is not a change in placement as long as the student's IEP is applied and there are no meaningful discrepancies between the two locations. Bayonne Bd. of Educ., 37 IDELR 118 (N.J. SEA 2002). A change in placement occurs, however, when there is a fundamental change or elimination of a basic element of a student's educational program. Lunceford v. District of Columbia Bd. of Educ., 745 F.2d

1577 (D.C. Cir. 1984). The touchstone for whether a change in placement has occurred is whether an alteration has affected a child's learning experience in some significant way. DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149 (3d Cir. 1984). Modifications to a student's schedule did not constitute a change in placement where the student received the same amount of special education services each week and his opportunities to be educated with mainstream peers and to take part in extracurricular activities remained the same. Cavanagh v. Grasmick, 75 F. Supp.2d 446, 469 (D. Md. 1999). But when a change in setting dilutes the quality of the student's education or departs from the student's LRE-complaint setting, it is a change in placement. A.W. v. Fairfax County Sch. Bd., 372 F.3d 674 (4th Cir. 2004).

Student's placement was not the physical location of Room 120, but instead was the educational program set out in his IEP to take place in all of the facilities used by the special education program at Bonny Eagle High School. Thus, although Student's mere removal from Room 120 to a different location was not in and of itself a change in placement, the changes in location were accompanied by significant changes in the educational program offered to Student and as such did constitute a change in placement. Student's February 4, 2005, IEP, the last agreed-upon program, called for direct instruction for [sic] the special education teacher for three daily blocks of eighty-four minutes as well as assistance from an educational technician for two daily blocks. (S-183.) In addition, Student was to receive speech therapy for one hour a week and an occupational therapy consultation for fifteen minutes a week. (S-183.) The IEP stated that although Student needed a small, quiet environment to undertake his life skills training and core classes in the special education class, he would participate in

mainstream classes twenty-five percent of the time. (S-183.) Although the mainstream classes were not specified, testimony indicated that they were health, physical education, and art. (Testimony of Student's Mother; Carla Turner.) Student's goals included developing basic computer skills; learning to tell time, count money, and measure; improving his independent living skills in the areas of cooking and appliance use; improving his comprehension and writing skills to demonstrate greater independence; and improving his language competence. (S-187-192.)

From February 21 forward, the district was required to provide Student with substantially the services detailed in this IEP. From February 21 until March 8, however, Student was removed from school by his parents due to their frustration with Student's continued isolation and failure to receive these educational services. Had Student been in school for that period, however, he would likely have remained in the red portable building since his removal to Room 120A was gained only through a mediated agreement on March 6. Once Student returned to school, on March 8, he was placed in Room 120A. During this period he completed written math and English assignments and continued to receive occupational and speech therapy. He did not, however, perform many of his life skills related to cooking and shopping during this time. Although Mrs. Turner testified that Student was offered the opportunity to cook in the classroom and chose only once to make popcorn during this period, she also acknowledged that the family was never informed that Student was allowed back into the classroom to cook, thus eliminating any possibility that they would replenish the cooking supplies that she had sent home on January 24. (Testimony of Carla Turner.)[9]

[9] Although Ms. Turner graded Student with zeros in all areas of his IEP for the third quarter, it is unlikely, given his record of written assignments during this period, that he did not make any progress on any of

Moreover, Student was not provided the same access to peers as was called for in his February 2005 IEP. From February 21 to April 10, Student continued to be excluded from mainstream art and all activities in Room 120 that involved other students. He also missed three field trips and a swimming program during the third quarter. (Testimony of Carla Turner.) Although the district argues that prior to January 9, Student had selected the quiet room for up to fifty percent of his day and that his placements in the red portable and Room 120A replicated that environment, there is a fundamental difference between the quiet room, from which a student could observe and have easy access to activities and peers in Room 120, and the red portable building, completely outside the school building and away from all classmates and activities in Room 120.

The role of the hearing officer is not to determine the adequacy or wisdom of any programming that was substituted for the stay-put placement since the law does not allow a school to unilaterally make a substitution. In the present case, although I am mindful of the district's safety concerns, it did not take any steps to relieve itself of the requirement that it implement Student's last agreed-upon placement during the pendency of the due process proceedings. See M.P. v. Governing Bd. of Grossmont Union High Sch. Dist., 858 F. Supp. 1044 (S.D. Cal. 1994) (holding that there is no "violence exception" to the stay-put provision that permits a school to unilaterally remove a student from the educational environment based on the school's belief that the student is violent). In reviewing the entirety of Student's educational experience during this period, it is clear that Student's program from February 21 to April 10 was significantly different than Student's last agreed-upon program. See Mackey v. Bd. of Educ. for Arlington Central

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these goals. Therefore, I credit Mrs. Turner's testimony that the zeros were not representative of Student's progress that quarter.

Sch. Dist., 373 F. Supp.2d 292 (S.D. N.Y. 2005) (holding that alternative placement does not satisfy stay-put if there is an "appreciable difference" from stay-put placement). As a result, the district violated Student's stay-put rights during this period.

However, since the application of Student's behavioral plan on April 10, many of the services and programming detailed in Student's IEP have been restored to him. Under the Geren behavioral plan, Student had a variety of IEP-related tasks incorporated on his choice board. Further, although the application of the behavioral plan decreased Student's academic output at least temporarily, it appears that he was offered most of the programming in his IEP, with the exceptions of cooking and mainstream art. He was included on field trips and the Special Olympics. (Testimony of Carla Turner.) He also delivered announcements on a daily basis. (S1-1A-61; S1-344-385; Testimony of Carla Turner.) He began to spend increasing periods of time in Room 120, necessarily increasing interaction with special education peers. (Testimony of Mark Geren.) As such, Student's programming after April 10 was not in violation of the stay-put requirement since it was substantially similar to the last agreed-upon placement.

Because the district failed to place Student in his stay-put placement after the filing of the Parent's complaint on February 21, I hold that Student was denied FAPE from February 21 until April 10.

B. Whether the Behavioral Intervention Plan Implemented April 10 Denies Student FAPE.

The family, while agreeing that a behavioral intervention plan is necessary, contests the appropriateness of the Geren behavioral intervention plan, arguing that it has caused Student to lose so much ground academically that it denied him FAPE during the fourth quarter. The family asserts that the behavioral plan has taught Student that he can

avoid academic expectations, that he can choose whatever activity he likes without consequence, and that he does not have to cook his own food for lunch. The parents contend that the behavioral intervention plan has been ineffective in helping Student gain behavioral and coping skills and that his lack of outbursts under the plan is due to its failure to impose any expectations on him. The family seeks another functional behavioral assessment that focuses on the function of Student's behavior and his diminished ability to cope with change and frustration as well as a behavioral plan that incorporates more academic demands.

The district, on the other hand, finds that the behavioral plan has been effective at teaching Student to check in with himself and seek a break when he needs one. School staff testified that toward the end of the school year, Student had begun selecting Room 120A as a quiet space to calm down before activities that caused him excitement, such as delivering announcements or going on a field trip. Further, the district points to the lack of behavioral outbursts during the implementation of the behavioral plan as indicative of its success. The district notes that Student made academic progress in the fourth quarter of the school year, as evidenced by his production of written assignments, although at a lower than average level, and also that he took part in mainstream activities. The district seeks to continue the implementation of the behavioral plan while systemically increasing academic demands.

Mr. Geren holds a master's degree in applied behavior and is a board certified behavioral analyst who has conducted behavioral interventions for nearly two decades, the last several years of which have been spent working with autistic children. He works

with school districts both in and out of state and followed his typical protocol in developing Student's behavioral intervention plan. (Testimony of Mark Geren.)

Mr. Geren feels that the plan has successfully taught Student to check in with himself and to express his need to take a break from a given activity. (Testimony of Mark Geren.)[10] Mr. Geren and Dr. Lennox both expect to see a decrease in academic progress during the initial application of a behavioral plan, followed by a resumption in academic progress once the student learns to engage in positive behaviors through repeated reinforcements for positive behavior. (Testimony of Mark Geren; David Lennox.)

The IDEA does not provide a substantive standard for the evaluation of a behavioral plan. See Alex R., 375 F.3d at 614. In Alex R., a student with a neurological disorder exhibited escalating disruptive and violent behavior that culminated in attacks on school staff and fellow students. Id. at 608. The school suspended the student but also held a series of PET team meetings, altered his placement and program in response to the escalating violence, and provided additional services. Id. at 609 & 616. The Seventh Circuit Court of Appeals held that it could not "create out of whole cloth substantive provisions for the behavioral intervention plan contemplated" by the IDEA. Id. at 615. The court concluded that it was appropriate to consider the history of the student's disability and his outbursts in evaluating the substantive adequacy of the student's IEP. Id. at 613 (citing 20 U.S.C. § 1414(d)(3)(B)(i)). The Court of Appeals agreed with the

[10] Student's Mother repeatedly advocated for Mr. Geren to observe Student in Room 120. (P-64; P-69; P-71.) Although the family complains that Mr. Geren did not do so and therefore his data is less reliable, Mr. Geren testified that he did in fact observe Student in Room 120 on two occasions during his six to eight visits to the school, although it is not clear from the record if Student's peers were present. (Testimony of Student's Mother; Mark Geren.) The family also notes that there were several errors in data collection that were discovered and corrected while the data was being collected. These errors were not significant enough, however, to render incompetent the bulk of the data collected.

district court that the school had "'acted reasonably in attempting to deal with an increasingly difficult situation affecting not only Alex but other students as well,'" even though the school's efforts had not been successful in curbing the student's violent behavior. Id. at 616.

In Pell City Board of Education, 38 IDELR 253 (Ala. SEA 2003), a hearing officer found a behavioral plan to be sufficient when the student did not regress in his behavior or his academics while the plan was in place. The plan included input from the student's psychiatrist and psychological counselors, utilized a self-contained special education classroom, reduced access to less structured activities, and provided positive feedback, use of a quiet space, and a one-on-one aid [sic]. See also In re Student with a Disability, 41 IDELR 115 (Wis. SEA 2003) (holding that a behavioral plan was appropriate when it contained strategies including behavioral interventions and supports to address student's disruptive behavior).

The issue then is whether Student has been or will be denied FAPE as a result of the behavioral plan, which thus far has placed no academic expectations on him in favor of a free choice plan. Since the application of the behavioral plan, Student has been able to remain free of major incidents at school and has voluntarily utilized quiet space in order to calm himself. With regard to his academic progress during the fourth quarter, although Dr. Lyons opined that Student regressed academically under the behavioral plan, his testimony pointed to no objective evidence to suggest that this was the case. In fact, Student continued to make academic progress during the fourth quarter of the school year. He produced seventeen math assignments, with an average grade of seventy-two,

and sixteen English assignments, with an average score of eighty, as well as several oral English assignments. (Testimony of Carla Turner.)

Student's progress on functional life skills during the fourth quarter is less identifiable.

As noted earlier, Student's cooking supplies had been sent home on January 24 and the family was never notified that he could resume cooking. Instead, the family was informed when Student's lunch money ran low. (S1-42 & S1-344.) Student's daily log sheets for this period reveal few instances where Student took part in cooking or used the appliances or the computer. (S1-1A-61; S1-344-385.)[11] Student did, however, undertake a functional math activity in time, money, or measuring nearly every day. (S1-1A-61; S1-344-385.) Moreover, Student received several grades of "2" (indicating average progress) on his fourth quarter progress report. (Testimony of Carla Turner.)[12] As such, Student received sufficient educational benefit during the fourth quarter to prevent him from being deprived FAPE. See, e.g., Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000) (holding that a student does not have to progress in every area of IEP instruction in order to attain an educational benefit). In fact, by reducing his disruptive behavior, which all parties agree needs to be addressed, Student has shown improvement in at least one area in which he is in special need, another way of evaluating whether an IEP provides a meaningful benefit. See Burlington, 736 F.2d at 788.

Moving forward, at the start of the next school year, after a period free of serious disruptions, the plan would incorporate academic demands in a systemic manner with an

[11] The family expresses concern that Student is no longer eligible to enter the PATHS off-site vocational cooking program in the fall because he did not undertake much cooking over the last half of the school year. Although Student's PET did not submit an application for him to take part in PATHS this fall, district witnesses testified persuasively that cooking in the classroom is not a prerequisite to the PATHS program and that if Student's PET believes that he is behaviorally prepared to undertake the program, the district will do its best to ensure that he is able to enroll. (Testimony of Jennifer Donlon; Carla Turner.)

[12] This is consistent with Student's quarterly scores for the prior four quarters, which were mostly scores of 2 with a few scores of 3 and 1. (S-187-192.)

ongoing functional behavioral assessment. (Testimony of Mark Geren.) Mr. Geren believes that an immediate application of the full academic demands placed on Student prior to January 9 would likely trigger another violent outburst, ultimately resulting in a more restrictive placement for him. (Testimony of Mark Geren.) Mr. Geren also eschews a plan that would provide more negative consequences, such as suggested by the family, as both inhumane and more likely to encourage problem behaviors. (Testimony of Mark Geren.) David Lennox agrees with Mr. Geren's gradual and systemic approach to increasing academic demands as a commonly used procedure. (Testimony of David Lennox.)

As such, Student's current IEP, developed in January 2006 for use until January 2007, including its April 2006 amendment with the adoption of the Geren behavioral plan, is reasonably calculated to provide Student with FAPE during the 2006-2007 school year.

The parties have both requested minor modifications to Student's IEP and behavioral plan. I agree with many of the modifications requested and hold that Student's PET should convene to consider these modifications. In particular, I agree with the opinions of several experts that Student needs to continue to have access to a quiet space free of all sensory stimuli for use as a time-out space. (S-52; Testimony of Laura Pershouse; Mark Geren.) I also agree with Mr. Geren that Student should continue to have access to a separate quiet working space in which to conduct [sic] individual assignments. (Testimony of Mark Geren.) In addition, I concur with the family and Dr. Lyons that Student has become overly dependent upon his speech therapist for social interaction outside of the one hour of speech therapy called for in his IEP. (Testimony of

Charles Lyons.) This does not mean that Student should never be allowed to eat lunch or spend non-therapy time with the speech therapist, only that such time should be reasonable in quantity and should not encourage Student's dependence. Moreover, all of Student's IEP activities, including cooking, should be included on his array of choices under the behavioral plan. Finally, Student's behavioral goal, drafted by Mrs. Turner, should be reviewed by the entire PET and modified as agreed.

I hold that Student's January 2006 IEP, with the review of these recommended minor modifications by the PET and as amended with a behavioral plan in April 2006, is reasonably calculated to provide Student with FAPE during the coming school year.

C. Whether Student Requires an Out-of-District Placement.

The family also contends that Student cannot be educated successfully at Bonny Eagle High School due to the animosity between the family and school staff, namely Mrs. Turner. As such, the family contends that Student's IEP must be implemented in an out-of-district placement in order for him to gain educational benefit. The family particularly requests that the hearing officer order the district to investigate the possibility of placement in an area public high school.

The district responds that case law clearly establishes that a family does not have the ability to dictate which school personnel will teach a disabled student and that selection of particular personnel is not subject to review in this proceeding. Moreover, Jennifer Donlon has investigated the three out-of-district high schools suggested by the family. (Testimony of Jennifer Donlon.) The only one with a possible opening, Deering High School, also contracts with Mark Geren as a behavioral consultant. (Testimony of Jennifer Donlon.) Mark Geren believes that the program at Deering has more physical

space constraints, tends to be noisier, and has less clear expectations. (Testimony of Mark Geren.)

The law is clear that a hearing officer does not have authority to order the school to remove particular personnel. Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp.2d 880 (D. Minn. 2003) (holding that "school districts have the sole discretion to assign staff"); Freeport Sch. Dist. #145, 34 LRP 189 (Ill. SEA 2000) (noting that "the selection or retention of an aide to assist a student with disabilities is an administrative function and not subject to review under the IDEA" unless the selection "deprives a student of a free appropriate public education"); C.S.D. 18, 102 LRP 4378 (Me. SEA 1998) ("There is no basis in education law or regulations which allows parents employment jurisdiction over staff who serve their special education children."). Nor does a hearing officer have jurisdiction to order another public school district to accept Student as a student, but may order MSAD #5 [sic] to explore other public school district placements. See, e.g., Greenbush Sch. Comm. v. Mr. & Mrs. K, 25 IDELR 200 (D. Me. 1996) (ordering defendant school district to locate alternative placement for student but not specifying a particular one).

Nevertheless, the ultimate issue continues to be whether Student's IEP can provide him with educational benefit. There are no limits on the factors "that can be considered in judging the likely impact of the IEP on the child so long as they bear on the question of expected educational benefits." Bd. of Educ. of Cmty. Consolidated Sch. Dist. No. 21, Cook County, Illinois v. Illinois State Bd. of Educ., 938 F.2d 712, 716 (7th Cir. 1991) [hereinafter Cook County]; see also Greenbush, 25 IDELR 200. As such, parental hostility to a program or school personnel can be considered if it is severe

enough to negate any educational benefit for the child. Cook County, 938 F.2d at 716; see also Greenbush, 25 IDELR 200.

In Cook County, the Seventh Circuit Court of Appeals held that, where the parents "vehemently and vocally" opposed the student's IEP such that its prospect of success was "doomed," the student could not obtain an educational benefit from the program. Cook County, 938 F.2d at 717. In Greenbush, the hearing officer determined that the student could no longer receive any educational benefit in his placement due to the longstanding hostility and distrust between the school system and the parents and his difficulty in the program due to his treatment by fellow students. The parents' negative feelings had "taken on a life of their own" and were "little influenced by factual information" and the student as well as his parents felt that he had been unfairly ostracized by school personnel. Greenbush, 25 IDELR 200; see also South Royalton Sch. Dist., 27 IDELR 920 (Vt. SEA 1998) (student's outside placement to continue due to her family's hostility to the school, including threatening and abusive behavior by the parents toward school staff and the student's own belief that she was humiliated, frightened, and unsafe while at school). In Cook County, the hearing officer found that the student's parents "had already 'poisoned' the option" proposed by the school in the student's mind. Cook County, 938 F.2d at 717.

In both the above cases, however, the student himself was impacted [sic] the hostility. In Greenbush, the student himself felt that the school had treated him unfairly. In Cook County, the student was aware of his parents' hostility towards the school's proposal. Here, there was no evidence that Student was aware of or impacted by the hostility between his parents and Mrs. Turner. Although Dr. Lyons opined that Student

struck Mrs. Turner as a result of his perception of the hostility between his mother and Mrs. Turner, he later acknowledged that there was no hostility between the two until this very incident. In fact, Student continues to be fun and interactive in his classroom and with Mrs. Turner. Although Student has an affinity for certain teachers, including those from his middle school experience, there was not sufficient evidence upon which to confirm that Student has a fear, dislike, or distrust of Mrs. Turner or any other personnel at Bonny Eagle High School.

Moreover, the parents do not indicate hostility towards school personnel other than Mrs. Turner and acknowledge that Student's placement at Bonny Eagle High School would be acceptable to them if Mrs. Turner were removed as the lead teacher. Although Mrs. Turner would continue to be the lead teacher in Student's classroom, multiple other staff members work effectively with Student. The parents have particularly requested that Holly Marston be hired by the district as Student's one-on-one educational technician. Although the hearing officer does not have the authority to direct the district's personnel decisions, as explained above, the hearing officer agrees with the family that, if Ms. Marston otherwise met the requirements of the position, she would be a good candidate, particularly in light of testimony of school personnel that they agreed that Ms. Marston and Student work exceptionally well together.

Furthermore, given the systemic nature of implementing a behavioral plan, it would seem that transferring Student to another school would only delay his progress, particularly since the most likely transfer would be to a district that contracts with Mr. Geren and the behavioral plan would therefore be similar in nature. Finally, as Student completes his final two years of high school, the focus will be on transition planning,

which will be more difficult if Student is not in school close to the area where he is likely to live and work following his graduation. As such, I hold that Student does not require an out-of-district placement in order to receive FAPE.

D. Whether Student is Entitled to a Compensatory Education Remedy.

The family contends that the district's violations of the least restrictive environment and the stay-put provisions entitle Student to an award of compensatory education. The district counters that any compensatory education that Student is awarded should be limited to the ten weeks of STRIVE camp that the district has already agreed to provide, including tuition, transportation, and an adult aide.

Compensatory education is a remedy, available in this Circuit, designed to compensate a student for educational opportunities missed as a result of substantive IDEA violations. MSAD v. Mr. & Mrs. R., 321 F.3d 9, 19 (1st Cir. 2003); see also Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993). It is available to remedy the failure of a school to grant a student his stay-put placement. Greene County Bd. of Educ., 36 IDELR 144; see also South Eastern Sch. Dist., 43 IDELR 105 (Penn. SEA 2005). An award of compensatory damages "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005); see also MSAD #22, 43 IDELR 268 (Me. SEA 2005) (stating that the typical compensatory education award is an award of "services in an amount sufficient to make up for the past educational deficiencies").

Compensatory education is an equitable remedy but it does not require a finding that the school acted in bad faith or egregiously. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996). Although an IEP need only provide some benefit, "compensatory awards must do more – they must compensate." Reid, 401 F.3d at 518. An award of compensatory education need not by [sic] an hour-for-hour replacement for

lost time or opportunity; instead, a compensatory education award should be designed to "ensure that the student is appropriately educated within the meaning of the IDEA." Parents of Student W. v. Puyallup Sch. Dist. #3, 31 F.3d 1489, 1497 (9th Cir. 1994); see also Reid, 401 F.3d at 518 (rejecting a "cookie-cutter approach" that "runs counter to both the 'broad discretion' afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce"). An award of compensatory education should be fact-specific, depending on the child's needs. Reid, 401 F.3d 516 at 518.

Although the district argues that the parents' removal of Student for two different periods of time during the third quarter hindered their ability to complete a behavioral plan, the parents did not in any way obstruct the district's ability to meet its obligations to educate Student in the LRE and to restore Student to his stay-put placement during the pendency of the due process proceedings. To compensate Student for the nine and a half weeks (including periods when he was removed from school) between February 1 and April 10 that he was denied FAPE, I hold that the district is required to provide him with ten weeks of STRIVE summer camp.[13] Student has already attended a portion of this program and the district and family have agreed that his final weeks in the program will be attended next summer. (Testimony of Jennifer Donlon.) This form of compensatory education will particularly provide Student with interaction with peers that he was denied during the period he was denied FAPE.

[13] The parents acknowledged in their closing brief that the STRIVE summer camp program could be considered a form of compensatory education, but argued that it was not sufficient to compensate Student for the district's IDEA violations.

FINDINGS

1. I hold that MSAD #6 violated the IDEA and Maine special education law by failing to educate Student in the least restrictive environment from February 1 until February 21, thus denying him FAPE during that period.

2. I hold that MSAD #6 violated the stay-put provisions of the IDEA and Maine special education law by not implementing Student's February 2005 IEP from the time that the family filed its request for a complaint investigation on February 21 until April 10, thus denying him FAPE during that period.

3. I hold that Student is entitled to ten weeks of STRIVE camp as a compensatory education remedy for these violations of the IDEA and Maine special education law.

4. I hold that Student's January 2006 IEP, as amended in April 2006 with a behavioral plan, is reasonably calculated to provide him with FAPE in the Therapeutic Life Skills program at Bonny Eagle High School for the 2006-2007 school year.

5. I hold that Student's PET should convene to consider the minor modifications for Student's January 2006 IEP recommended in this decision.

ORDER

Because the district violated Student's right to be educated in the least restrictive environment under 20 U.S.C. § 1412(a)(5)(A) and *MSER* § 11.1 and to have his current educational placement maintained under 20 U.S.C. § 1415(j) and *MSER* § 12.12(A), it is ordered to provide him with the balance of ten weeks at the STRIVE summer camp including tuition, transportation, and adult aides. The district is also ordered to reconvene Student's PET within a reasonable amount of time, not to exceed two weeks into the school year, to consider the recommended modifications to his January 2006 IEP.

Rebekah J. Smith, Esq.
Hearing Officer