

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

January 21, 2008

Case No. 08.017H, *Parents v. Maine School Administrative District #61*

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

FOR THE SCHOOL: James C. Schwellenbach, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

INTRODUCTION

This hearing has been conducted, and this decision written, pursuant to 20-MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and accompanying regulations.

The case involves a student, (DOB: xx/xx/xxxx) who lives with his parents in Naples, Maine, a town within School Administrative District #61. He is eligible for special education services under a diagnosis of autism and is currently receiving his educational services at the Margaret Murphy Children’s Center (MMCC) in Auburn, Maine. While The student is age-eligible to attend xx at the Songo Locks Elementary School in Naples, on August 28, 2007, just prior to the start of school, the family rejected the IEP prepared for The student’s xx year by SAD #61 and filed a request for this hearing. Pursuant to the stay-put provisions of the IDEA, The student continues to attend the program at MMCC.

The family asserts that the IEP offered to the student in August of 2007 fails, in several ways, to provide the student with a free and appropriate public education. The family argues that the IEP does not contain a transition plan that is necessary to help the student successfully make the move from the program at MMCC to the xx class at Songo Locks Elementary, does not require that the applied behavioral analysis (ABA) method of teaching be used in the program and does not require that the student be taught by teachers appropriately trained, qualified and experienced in the ABA method. Further, the family asserts that the setting in which the services would be provided – The Learning

Center in the Songo Locks Elementary School – is not the least restrictive environment (LRE) for the student, who they feel should receive most of his educational services with his non-handicapped peers in the regular education classroom, with a full time 1-on-1 aide. The school disagrees with each contention advanced by the family. The school asserts that the IEP is appropriate as written, arguing that a transition plan is not a required part of an IEP and that, in any event, the Songo Locks staff members are aware of the difficulty the student has with transitions generally and will pay particular attention to him. Further, the school argues that the IDEA does not empower a family to compel a school to adopt any particular educational methodology and asserts that the teachers who would be working with the student are appropriately trained and experienced to teach autism spectrum disorder children, are familiar with ABA methods and will use them with the student appropriately.

The hearing was held on October 30 and 31, and November 1, 2007 in the offices of both the Casco Memorial School and the Songo Locks School within SAD #61.

Testifying under oath at the hearing were:

Michelle Hathaway	Director, Margaret Murphy Children’s Center (MMCC)
Lori Melanson	Student’s Case Manager, MMCC
Wendi Leavitt	Speech and Language Pathologist, MMCC
Harold Longnecker, Ph.D.	Clinical Psychologist, MMCC
Student’s Mother	
Student’s Father	
Lisa Hanson	Director of Special Education, SAD #61
Gail Hamilton	Consultant/Special Education Teacher, SAD #61

At the hearing, the hearing officer admitted Family Exhibits pps. 1- 375 and School Exhibits pps. 1-155. Additionally, the hearing officer asked the school to provide copies of certain documents in the school’s possession. The parties agreed to their admissibility, and those documents were admitted into the record as Hearing Officer Exhibits pps. 1- 57. The record was closed on December 15, 2007 and this decision is being issued on January 21, 2008.

ISSUES

The issues to be resolved in this matter are:

- (1) Did the 2007-2008 IEP and placement offered to the family on August 22, 2007 for the student's xx year provide him with a free appropriate public education in the least restrictive environment, including an appropriate transition, given his unique disabilities; and,
- (2) If not, what modifications must MSAD #61 make to the IEP and placement offer to assure that the student receives a free and appropriate public education in the least restrictive environment, and an appropriate transition?

FACTUAL FINDINGS

1. The student, (D.O.B. xx/xx/xxxx) lives with his parents in Naples, Maine, a town within School Administrative District #61. He has been diagnosed with autism and is eligible for special education services. As a xx student, he attended the Margaret Murphy Children's Center (MMCC) in Auburn, Maine. He was age-eligible to attend xx in SAD #61 for school year 2007-2008 but just before school started his parents rejected the individual education program (IEP) developed for the student by the school and requested this due process hearing. Pursuant to the stay-put provisions of the IDEA, The student continues to attend the program at MMCC.
(Testimony of Mother, Hearing Request Form)
2. The student presented behavioral problem and developmental delays from early infancy, including chronic crying and screaming while at home, lack of response to noises and speech, inappropriate behavior – frequent hitting and biting - with his siblings and a clear reluctance to relate to his family through eye contact or speech. From the beginning, he needed a regular routine in his life and responded positively to well-established and

consistent expectations. Changes in his routine, including transitions to new situations, created serious difficulty for him and tended to provoke dramatic or violent reactions when they occurred. At xx, his parents took him to Child Development Services (CDS) for evaluation; he began receiving in-home speech therapy and developmental therapy. This therapy was largely unsuccessful. In September of 2004, when he was about xx years old, the student began attending a xx program with other children. This did not go well for the student; his mother called his experience in this program “a disaster”. Even with a 1-on-1 aide provided at the xx program, the student consistently displayed tantrum behavior, biting, hitting and screaming on a regular basis. He continued to have difficulty in transitioning from home to xx. In February of 2005, the student was evaluated at Maine Neurology and diagnosed as having an autism spectrum disorder. The evaluating physician recommended that the student be treated in a program that used a technique known as Applied Behavioral Analysis (ABA). (Testimony of parents, PE 327-328)

3. The Margaret Murphy Children’s Center (MMCC) specializes in the treatment and education of children with autism spectrum disorders who typically present developmental delays in acquiring appropriate communication and social skills and uses ABA techniques with the approximately 70 children who were receiving services from MMCC at the time of the hearing. The student began receiving services at MMCC in September of 2005, when he was just over xx years old. The student required a slow transition into the program at MMCC. He began with one hour of programming per day, his mother with him the whole time. The time he spent at MMCC each day gradually increased, and his mother’s presence gradually decreased, as he became more comfortable in the MMCC environment. In his first year there, the student made good progress in both social skills and behavioral skills, areas in which he had significant deficits. He became more aware, and somewhat interested in, his peers,

learned to pay attention to and make eye contact with people, including his parents, and greatly improved his verbal skills. He also made good progress in self-care skills: by Christmas, 2005, the student had become potty trained and able to wash his hands himself. When his father, a merchant marine often away at sea, returned home for Christmas, he encountered a “different boy” than the one he had know previously, a boy who had “grown from a son nearly without interaction at home to a pretty normal relator...” During the 2005-2006 year at MMCC, the student, accompanied by his 1-1 aide, was initially placed in a small classroom with a few other children with developmental delays; the focus in that placement was to transition him into the new situation while focusing on his behavioral and social issues. After making sufficient progress in that initial placement, MMCC introduced him to a “reverse mainstreaming” class where, for part of the day, 4 or 5 typically developing regular education children were brought for part of the day into the classroom where the student and one other developmentally delayed child were receiving services. The reverse mainstreaming class was successful with the student; these typically developing children provided good models for the student, particularly in the acquisition of behavioral, social and verbal skills, his areas of greatest need. He learned to play and interact pretty comfortably in that group. Throughout his time at MMCC, the student was accompanied by a 1-1 aide for all his classes and activities. His aides were qualified at the Educational Technician III level. In the spring of 2006, the student received a neuropsychological evaluation by Ellen Popenoe, PhD, who diagnosed him as having a high functioning form of autism with significant delays in acquiring speech and language skills. She concluded that the student would benefit from services similar to those appropriate for autistic children with high cognitive skills, similar to children with Asperger Syndrome. Further Dr. Popenoe concluded that with “his significant difficulty with flexibility and adjusting to transitions, [he] needs a high degree of predictability and routine in his day...any changes in routine are likely to be quite overwhelming and when they must occur, he

should receive preparation for them...he needs much preparation to prepare for transitions..." (Testimony of parents, Hathaway, Popenoe Report at SE 141-148)

4. The student, now xx years old, returned to MMCC for school year 2006-2007. One goal for the year was to mainstream the student successfully, to include him in the regular education program – again in the company of an Ed Tech III 1-1 aide – for as much of the school day as he could tolerate. The transition into the regular ed classroom began in early 2007 and was implemented slowly and carefully, beginning with short visits where the student would stand at the door of the classroom looking in so he could see that he knew most of the children, and the teacher, who were there. Gradually, over time and a pace with which he was comfortable, the student was introduced more fully into the classroom and began to participate more and more with his typically developing peers. The student's transition into the regular education classroom could not be rushed; if the transition were to proceed too quickly, before the student was ready for it, he would be likely to "crash and burn...[show] tantrums, oppositional behavior, aggression..." In short, absent an appropriately designed and implemented transition plan, his transition into the new situation would fail and he would then regress, making it even more difficult for him ever to succeed in that situation. By May of 2007, the student was able to be in the mainstream class for the morning session and by July of 2007 the student was spending the entire day in the regular education classroom, again with a 1-1 aide, except for one hour per day of pullout services. Even with this very gradual introduction into the mainstream class, he continued to have difficulty making the transition from home to school until recently. He responded well to his exposure to his typically developing peers and has made significant progress in his communication, social and behavioral skills while in the regular education xx at MMCC. He remains in the MMCC program due to the operation of the stay-put provisions of the IDEA and, at the time of the

hearing, continues to be successful there. (Testimony of parents and Hathaway; Popenoe Report at SE 141-148)

5. MMCC uses the Applied Behavioral Analysis (ABA) method to deliver services to the autistic children in its programs. The ABA method is a series of strategies and techniques designed to change, or at least influence, behavior in children, to eliminate or diminish troublesome behavior and to encourage appropriate behavior. It has a major focus on developing communication and social skills, areas in which autistic children such as the student typically struggle. It includes such elements as identification of those areas of a child which most need development, exploration of appropriate solutions, creation of situations in the school day in which the child has an opportunity to learn the skills he or she is working on and needs to master, with help and instruction available in real time, and observation and recording in 15 minute intervals of the child's behavior as noticed by the staff. The teaching interventions used include positive reinforcement, negative reinforcement and automatic reinforcement. ABA, as implemented by the MMCC staff, requires that the teaching team first observe and define the behaviors that need to be change [sic], develop a theory as to why the troublesome behaviors occur, then based on that theory develop appropriate interventions to change the targeted behaviors, and observe the result of the interventions as applied. Data is collected at 15-minute intervals to see whether the interventions are successful. This is a process that undergoes constant analysis and modification. When one targeted behavior goal is achieved, new ones are established, and the process continues. ABA is validated by peer-reviewed research, uses classical conditioning techniques, has been proven to increase pro-social behaviors in children with autism spectrum disorders, and does so in a way that can, and has been, demonstrated empirically. It is the single most effective treatment for ASD children, and is considered the "treatment of choice" for them. Furthermore, the ABA method as applied to the student during his time at MMCC was, and continues to be, dramatically successful and has produced

significant improvement regarding his targeted behaviors: his ability to relate to others, his ability to communicate with others at school and at home, and his ability to behave appropriately in the various situations that occur in his life. (Testimony of Hathaway, Longenecker, PE 293-295)

6. In November of 2006, The student's parents first contacted Lisa Hanson, the Director of Special Education for SAD #61, because they were concerned about his ability to negotiate the transition into xx in the fall of 2007, given the difficulties that he had experienced making similar transitions in the past. The parents specifically inquired about the placement and program options that would be available for the student within SAD #61. Ms. Hanson, who was aware that the student was receiving services at MMCC through the CDS system, responded that she didn't know at that time exactly where he would go and perhaps they would simply put him in a xx class and "see how it goes with him..." SAD #61 operated a program for autistic children at the Stevens Brook Elementary School. The program was called The Learning Center (TLC) and, in March of 2007, the parents asked Ms. Hanson if they could visit TLC, see the classroom and talk to the teachers about the program the student would enter in the fall. While Ms. Hanson denied the parent's request, the Superintendent of SAD #61 granted it. The parents visited Stevens Brook and saw the classroom but were not able to talk to the teachers or see the program in operation. In early April, the parents met with Ms. Hanson and Gail Hamilton, a consulting teacher employed by the school to oversee the autism program in SAD #61, in another attempt to find out what program the school would offer for the student in xx; again, they were unsuccessful, though Ms. Hamilton explained that the program used "ABA-like methods" and the school liked to use "a variety of methods" with autistic children." (Testimony of Mother, Hanson, Hamilton)

7. The first PET meeting held to develop the student's IEP for the 2007-2008 school year was held on May 9, 2007. Prior to this meeting, MMCC staff generated two documents that related to the student's transition from MMCC to xx in the fall: one was a Positive Behavioral Support Plan, a description of methods used successfully by MMCC with the student to encourage positive behavior as well as respond to episodes of inappropriate behavior; the second is called "Transition Planning Considerations" (TPC) which contains a detailed and specific description of considerations and actions to be taken to achieve a successful transition for the student. As stated in the TPC, the main point of both documents is to avoid a "transition and hope model in which very little forethought is given to the transition process" in favor of a "supported transition" intended to maximize the likelihood of the student, who has had lifelong problems in times of even minor transitions, making a successful transition from MMCC to xx in SAD #61. The parents also prepared a document for this PET meeting, "Parental Concerns for the student," which sets out 8 pages of concerns about the student, his transition to xx and the program he would receive there. While MMCC brought copies of these documents to this PET meeting, there was no discussion of either the student's transition from MMCC to SAD #61 or the program he would receive at xx there. No program was developed by this PET meeting. (Testimony of parents, Longenecker; SE 93-100, 101-105 and PE 293-295)
8. On May 10, 2007, the parents wrote a letter to Ms. Hanson setting forth their concerns about "our son, the student, and his potential transition to a program operated by SAD #61 in September...". The parents' main concerns were about the absence of any transition planning for the student's move from MMCC to xx at SAD #61 and about the content, design and implementation of his 2007-2008 program and placement. The parents' concerns were based on the difficulty the student had experienced in making the transition into the "regular education" classroom at MMCC and their

belief that, absent an appropriate transition plan, the student might be unsuccessful in making the transition to xx and would regress as a result. The parents thought the transition ought to begin over the summer with visits by the student to the school, the playground and his classroom so he could become familiar with and comfortable in the school he would be attending in the fall. The school proposed to hold the next PET sometime in August, because it was difficult for school staff to attend over the summer. The parents thought an August PET would be too late in the summer to be useful and requested an earlier date. The school did not respond to the parents' letter of May 10 until June 29, when Ms. Hanson wrote a letter of both apology for the delay and response to some of the substance of the parents' letter. (Testimony of mother; SE 87-88)

9. On May 21, the school tentatively scheduled a PET meeting for June 13 and so notified the family, inviting a response if that date were inconvenient. The student's mother called the school and informed Ms. Hanson's secretary that June 13 was impossible for both the family and MMCC staff because of irreconcilable conflicts for both. On June 7, Ms. Hanson called the student's mother and told her that the meeting would go on as scheduled, notwithstanding the fact that neither the student's mother or father, nor any of the student's then current providers at MMCC could attend the meeting on June 13. The meeting was held that day, without either parents or MMCC staff. It was not characterized as a PET meeting, but rather as a staffing session intended "to develop a draft IEP for your consideration at a later IEP team meeting." (Testimony of mother; SE 77-78, 85-86)
10. The next PET/IEP meeting was held on July 24 with school staff, the student's mother and MMCC staff attending. The draft IEP that had been prepared by school staff was reviewed. School staff told the mother that the PET/IEP team would not discuss either the transition plan that would be used to introduce the student into xx or the educational methodology the

school would use to deliver his program at xx. A full time 1-1 aide was proposed for the student. The school staff proposed to place the student at the start in The Learning Center (TLC) program at the Songo Locks Elementary School with a transition to the mainstream classroom as a future option. This program was scheduled to have three other children in addition to the student, two of whom were transitioning from MMCC. These are also autistic boys, one essentially non-verbal and the other non-conversational. The mother and MMCC staff told the team members at this meeting that the student was receiving his instructional service in a regular education classroom for five hours each day. The student's mother expressed her concern that the student would regress if he were placed in a self-contained special education classroom with two non-verbal children. No consensus was reached at this meeting and the team agreed to reconvene at a later date. (Testimony of Mother, Hathaway; PE 256-277, SE 32-62)

11. On July 31, the family's advocate detailed, in a letter to the school's advocate, the requests the family had in connection with the student's transition to, and his program once enrolled in, xx. In the letter, the family requested an IEP for 2007-2008 that replicated his program at MMCC, a program based on an ABA model implemented by appropriately trained and experienced staff, a full-time 1-1 aide, placement in the LRE with maximum contact with typically developing peers, with a transition plan designed to ease the student's introduction to a totally new educational environment. The student's father returned to Maine about August 1, on leave from his job at sea as a merchant marine because of his concern that the student still had no IEP and school began in less than a month. The family and school sought to schedule and hold a PET/IEP meeting on August 2. That attempt failed due to staff interviews held by Ms. Hanson on that day. On August 3, a school PET/IEP team member began a vacation and Ms. Hanson was unwilling to conduct a meeting in his absence. On August 1, the family's advocate wrote the school a letter setting forth their

ideas for the kind of program and placement the student needed in xx and described the elements of a transition plan to introduce him into his xx year in a new school, with new classmates and new teachers. (Testimony of parents; PE 65-68)

12. On August 16, the school wrote the parents a letter, signed by Ms. Hanson and June Conley, the principal of the Songo Locks Elementary School (SLES) [sic] In it, the school invited the parents to arrange a tour of the SLES and announced for the first time the special education staff that would be implementing the student's program in xxx. The staff consisted of: Marian Rabe, Special Education Teacher; Jeanna Gregor, Lisa Andrews, and Lenay Hartford, Day Treatment Support Technicians; and Gail Hamilton, Consulting Special Education Teacher. Rabe and Hamilton are certified in Maine as special education teachers. Gregor, Andrews and Hartford are certified as Educational Technicians. An inquiry by the parents as to the level of certification held by the Ed Techs listed revealed that all were Educational Technicians I, the lowest level of Ed Tech certification. This letter also stated that school staff would not discuss the student's transition to xx during the tour. The parents visited the Songo Locks TLC room on August 22, one week prior to the beginning of the school year. During this tour, the student's mother asked: (1) what curriculum is he going to receive, (2) what kind of program is he going to receive, (3) will he be mainstreamed, (4) who of the Ed Techs has been assigned to him, (5) would the Ed Tech assigned to the student in the TLC room leave the classroom with the student and go with him to the mainstream class., and (6) what does his daily schedule look like. School staff gave the same answer to all those questions: No decision has been made about that yet. Also, during this tour, the parents saw for the first time the IEP that reflected the PET/IEP meeting of July 24. (Testimony of Mother; SE 18-19)

13. The next, and final, PET/IEP meeting was held on August 22, 2007. The IEP discussed at this meeting was essentially the same document that was developed by the school staff at the June 13 staffing meeting. There is no discussion of the educational methodology in the proposed IEP and no description of a transition plan to assist the student in his move from MMCC to xx. At this meeting, the school held to its position that neither transition nor educational methodology is a part of an IEP. Neither topic was discussed in any detail at this meeting. As to placement, the IEP stated that the student needed “a less stimulating/distracting environment” and should be “slowly introduced to participation with his regular education peers.” At this meeting, the school provided no answers to any of the other questions asked by the mother during the tour of SLES earlier in the day. (Testimony of Mother; PE 368, SE 10)

14. School staff met with the family the next day, August 23. The school explained that the meeting was not a formal PET/IEP meeting but an “informal meeting”. Even in this informal setting, the school was not willing to discuss, as part of the IEP, either a transition plan for the student or the educational methodology to be used to deliver his program. When asked, at this meeting held less than [sic] a week before the start of classes, how the student’s school day would be scheduled, school staff responded, “We have an idea. It looks like we are building that” and “Sounds like we need to have a discussion with the teacher. This is helpful getting a sense of what that would look like.[sic]” The school reasserted its position that the IEP presented at the August 22 PET/IEP meeting was its final offer. (Testimony of mother; PE 368)

15. The parents filed a request for a due process hearing that was received by the Maine Department of Education on August 28, 2007. (Testimony of parents, Hearing Request Form)

16. On September 4, Ms. Hanson sent the parents a letter to summarize the August 23 meeting between the parties. In this letter, Ms. Hanson stated that SAD #61 agreed (1) to educate the student “to the maximum extent possible with his neuro-typical peers in the full day xx program at Songo Locks” with pull out time built in, (2) to “provide full-time one-on-one special education support for the student throughout his school day” using Ed Techs, one for morning, one for afternoon and, (3) that “the student’s current ed tech from Margaret Murphy Center, Ms. Jan Reid, will assist with his transition into the Songo Locks School...Ms. Reid would be working directly with the student in both xx and the TLC classroom while being shadowed by SAD #61 staff ...[who]...would gradually assume more responsibility for the direct instruction of the student...”. This letter also included as attachments (1) a summary description of “the training and credentials of the staff employed by SAD #61 who will work directly with the student...[including] experience in working with children with autism as well as training and experience in applied behavior analysis”, (2) a detailed schedule reflecting the events of the student’s day in both the regular education and TLC classrooms at Songo Locks and (3) several forms used to record at precise intervals the behaviors displayed by students, interventions used by staff in response to the behaviors and the results of the interventions. The parents responded to Ms. Hanson by a letter dated September 25 in which they expressed several points of disagreement. (Testimony of Hanson; SE 149-150, PE 371-375)

DISCUSSION AND CONCLUSIONS

The first issue that must be resolved is whether the Individualized Education Program that was presented to the family on August 22, 2007, would have provided the student with a free and appropriate public education, if implemented as written. If not, the second issue is what modifications must the school make to the IEP and placement to assure that the student receives a free and appropriate public education

in the least restrictive environment, with an appropriate transition. Every student who is eligible for special education services is entitled under state and federal special education law to receive a “free and appropriate public education...designed to meet their unique needs and prepare them for independent living.” 20 USC 1400(d)(1)(A). The Supreme Court has set a two-fold inquiry for assessing whether the local school unit has complied with this mandate:

First, has the [school] complied with the procedures set forth in the Act?
And, second, is the [IEP] developed through the Act’s procedures
reasonably calculated to enable the child to receive educational benefit?

Board of Education v. Rowley, 102 S. Ct. 3034, 3051 (1982). The First Circuit has held that a student’s educational program must guarantee a “reasonable probability of educational benefits with sufficient supportive services at public expense.” *G.D. v. Westmoreland School District*, 930 F. 2d 942,948 (1st Cir. 1991) Further, it is well established that a school is not obligated to offer an IEP that provides the “highest attainable level [of benefit] or even the level needed to maximize the child’s benefit” in order to comply with the IDEA. *Id.* Furthermore, it is clear that mere “parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child.” *Brougham v. Town of Yarmouth*, 823 F. Supp. P (D. ME 1993) The educational benefit must be meaningful and real, not trivial or de minimus, in nature. *Roland M.*, 910 F. 2d 983, 991 (1st Cir 1990) Finally, the family, as the party seeking relief, carries the burden to show that the proposed IEP is inappropriate. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005).

A.

After a review of the evidence and argument presented in this matter, the hearing officer concludes that the IEP proposed by the school and offered to the family on August 22, 2007, if implemented as written, would not have provided the student with a free and appropriate public education. The first reason for this conclusion is that [sic] IEP at issue¹ does not contain an appropriate transition plan, or any evidence [sic] transition

¹ The final PET/IEPT meeting occurred on August 22 and the IEP was never amended after the school made its “final offer” at that meeting. There was also an informal meeting on August 23 involving the parties, which Ms. Hanson purported to summarize

planning, designed to facilitate the student's move from his xx placement at the Margaret Murphy Children's Center into his xx class at the Songo Locks Elementary School.

While the school correctly states that Maine's current special education regulations² do not specifically require that all IEP contain a "transition plan", at this point it is clearly established law that an IEP must be reasonably calculated to enable a student to receive real and meaningful educational benefit and, further, must be designed to meet the unique needs of the student. The evidence produced at the hearing reveals this student's pervasive and chronic difficulty in coping with even minor changes in his life, such as going to a new restaurant or changing from one room to another in a familiar school. Here, the student was facing a move from a xx environment where he had been for two school years into xx, a new grade in a new school system, a new building with new teachers, new aides, new classmates and a new program. It is simply not reasonable to expect that a child such as the student, who has consistently experienced significant difficulty in coping with even minor changes in his daily routine, could just arrive at the school on the first day of xx and cope successfully with all the newness and strangeness inherent in that situation. If the student had gone to xx in the Songo Locks Elementary School without a carefully designed transition plan involving both MMCC and school staff as participants, it is far more likely that he would have a meltdown and resort to oppositional and aggressive behavior similar [sic] as he has displayed in the past. The probable outcome of this sort of trauma is regression into the oppositional, aggressive, anti-social or otherwise inappropriate behavior common to him prior to his success at MMCC within his ABA program. Indeed, the parents were worried about the possibility

in her letter to the family on September 4, about a week after the parents filed the Hearing Request Form that lead to this due process hearing. In this proceeding, the school has argued that the IEP of August 22 should be understood as if it somehow included the contents of the August 23 meeting and September 4 letter. The hearing officer cannot accept this argument. The IEP is the foundation document of a student's program; it describes the services and setting that a student is legally entitled to receive from the school. It is to the IEP as written that a hearing officer must look to determine whether the services and setting described are appropriate under state and federal education law. Further, any documents created by a school after the filing of a Hearing Request Form must be viewed with a particularly careful eye, especially when, as here, the parents disagreed with the school's purported summary of the 8/23 meeting. (PE 371-375)

² Maine Unified Special Education Regulations (MUSER)

of regression and expressed their concern at the PET/IEPT meetings. However, the school would not agree even to discuss the issue [sic] of the student's transition at any of the several PET/IEPT meetings, despite the parents repeated requests to do so. Given the nature of the student's personality and his demonstrated problems with managing transitions, an IEP that does not include some planning or strategy to help him navigate the passage from xx to xx is not "reasonably calculated to enable [him] to receive educational benefit."

This conclusion is consistent with a decision made by a Maine due process hearing officer, *Falmouth School Department*, (Maine SEA Case No. 03.100H, 11/7/03, Williams), a case dealing with the transition of a student from a private placement into a public school. The hearing officer concluded, in part, that to be appropriate the IEP needed to have

...a structured reintegration plan with a good chance of success... specifically tailored to the student's unique needs and carefully executed...

The hearing officer, who found that the IEP at issue did not have such a plan and was therefore inappropriate, went on to say that any attempt to introduce the student into the new school was a "recipe for failure".³ A case that deals specifically with the transition of an autistic child to public xx is *T. P. and S.P. v. Mamaroneck Union Free School District*, USDC, SDNY, (May 10, 2007), 47 IDELR 287. In that case, the autistic child had been receiving 30-35 hours per week of ABA services at home and the IEP offered by the school for the child'sxx year did not provide either a transition plan or any ABA services at home. The Court stated that it

...cannot conclude that the child was likely to make progress under a plan that would bluntly change his routine and in which no at home ABA therapy was provided, despite his being accustomed...[to receiving]...30-35 hours per week of ABA services, under which he made meaningful progress.

The *Mamaroneck* court held that "the IEP, which failed to include any transitional provisions for at home ABA services was not reasonably calculated to enable the child to

³ The *Falmouth* hearing officer rejected the school's argument that, while there was no plan already in place for the student, the school would have developed one for him upon his enrollment.

receive an educational benefit and deprived him of a FAPE.” These two cases support the conclusion reached here: the IEP offered by the school on August 22 was neither reasonably calculated to enable The student to receive an educational benefit nor designed to respond to his unique needs.

B.

This IEP is inappropriate for another reason: it fails to place the student in the least restrictive educational environment. Songo Locks Elementary School operates a regular education xx as well as the self-contained TLC program. While the IEP did not expressly state in which of the two classrooms the student would be placed upon his arrival in xx, the language of the IEP can be interpreted only one way: the student would be placed initially in the TLC program. The LRE statement in the IEP is as follows:

Due to the severity of the student’s autism with associated interfering behaviors, he requires a program in a less stimulating/distracting environment with a high degree of predictability. He will be slowly introduced to participation with his regular education peers with progression based on his gradual adaptation and need for sensory arousal increase/decrease & need for a more highly structured, quiet environment as seen in his current level of stereotypy and other interfering behaviors.

(Emphasis added) While this paragraph is hardly a model of clarity, it does say that the student will be “slowly introduced to participation with his regular education peers” at a rate determined by the progress he makes in his less stimulating/distracting environment. According to the evidence produced at the hearing, the Songo Locks Elementary School operates only two xx classrooms, the regular education classroom and the TLC room designed for the four autistic children the school expected to enroll in the fall of 2007.⁴ Therefore, if the student is to be “slowly introduced to participation” with regular education children, it has to mean that he is not in the regular education classroom to start with. Since the only other option at Songo Locks is the TLC program, the IEP has to mean that the school intends to place the student in the TLC classroom upon his enrollment.

⁴ In fact, only one of the four autistic children actually attended the TLC in September of 2007. The other three, including the student, are or were involved in the due process system.

The LRE requirement of the IDEA requires that children be educated as much as possible with their non-handicapped peers, with supplemental aids and services as appropriate. From July of 2007 through the time of the hearing, the student received his educational services in a regular education classroom at MMCC for a five-hour school day, in the company of a full-time Ed Tech III⁵, with one hour of pullout services daily. He had done well in the regular education classroom at MMCC and seemed to benefit from the contact he had with the regular education students. He made good progress on his social, verbal and behavioral skills as a result of being around the regular education children, who served as positive role models for him, and is also making progress in developing the significant cognitive skills he has been identified as having. His parents were concerned that the student's placement in a self-contained classroom with only other autistic children, who are not on the high-functioning end of the autism spectrum and who have severely limited verbal skills, would not be good for him, and would likely result in serious regression across the range of skills on which the student was working.

The evidence in this matter indicates that the student has been educated successfully in a regular education classroom at MMCC, with a full-time 1-to-1 aide, since July of 2007. There was absolutely no evidence introduced at the hearing to show that a similar arrangement would not be effective for the student in the regular education xx classroom at the Songo Locks Elementary School.⁶ The regular education classroom, with an appropriately qualified full-time aide, is clearly a less restrictive placement than the self-contained TLC program. Consequently, this IEP – which places him in the TLC - does not provide the student with a free and appropriate education in the least restrictive education environment.⁷

⁵ There were two Ed Tech III aides assigned to the student at MMCC, one for the morning classes and another for the afternoon classes. A third aide spent some time with him, and could serve as a familiar substitute in the absence of one of the “regular” aides.

⁶ It should be noted that, in Ms. Hanson's letter written on September 4, she agreed to place the student in the regular education xx “to the maximum extent possible” and to provide him a full-time 1-1 aide based on the MMCC model, with pull-out to the TLC for recess, lunch, music and rest periods.

⁷ The family also asserted that the IEP was inappropriate because it did not explicitly state that the school would employ the Applied Behavior Analysis methods to design,

ORDER

After consideration of the evidence and argument presented by the parties in this matter, the hearing officer finds that the Individual Education Plan offered to the parents on August 22, 2007 is not reasonably calculated to provide the student with a free and appropriate public education in the least restrictive environment and orders that this matter be remanded to the IEP Team, which must include staff from both MMCC and the Songo Locks Elementary School, the student's parents and other appropriate service providers as necessary. This IEP Team shall:

1. Develop a gradual and supportive transition plan to facilitate the student's move from his current placement at MMCC into the regular education xx class at Songo Locks Elementary School. The transition plan shall be based upon the document entitled "Transition Planning Considerations" found on SE 101-103 and paragraph 3 of Ms. Hanson's letter of 9/4/07 to the student's parents found

deliver and monitor The student's program in xx, despite his long and successful history with ABA methods at MMCC. In fact, ABA is the only method that has ever been successful with the student. While it is not necessary to decide the ABA issue to resolve this case, because of the conclusions already discussed, the hearing officer cannot imagine an appropriate program for the student that does not include the ABA methodology as a major component of the plan. Further, since the ABA method is based upon "peer-reviewed research", as required by the IDEA and state special education regulations, has already been shown to be effective with The student and was enthusiastically endorsed by Gail Hamilton, a former special education teacher at the school now serving as the consultant/supervisor of the TLC program, there [sic] no educational reason not to continue using ABA methods. The school gave no reasonable explanation nor produced any evidence at the hearing to support the decision not to include explicit ABA programming in the IEP. The position the school took vis-à-vis the family regarding ABA programming - which was to refuse to discuss it, saying repeatedly that methodology is not part of the IEP - is particularly puzzling given the content of Ms. Hanson's letter of September 4 which appeared to describe ABA methods in the program offered to The student. The record of this hearing fully describes the particular needs of this student and the remarkable progress he has made over the past two years in an ABA program. It is clear to the hearing officer that the student's xx IEP should include ABA programming as a component and that the program should [sic] implemented by appropriately trained and qualified educators.

at SE 149-150, both as updated by the student's current set of needs for a supported and gradual transition into the new educational environment;

2. Develop an IEP for the student that is appropriate given his current educational needs and which includes an initial placement in the regular education classroom with appropriately qualified and trained 1-to-1 am/pm aides who are appropriately qualified and trained to implement his program, with pull out services to TLC as appropriate; and
3. Include in the program ABA methods of implementation that are based on peer-reviewed research and have been demonstrated to be effective with this student. Staff implementing the program should, of course, be appropriately trained and certified.

The IEP Team should meet, and the IEP should be developed, as soon as possible. The implementation of the transition should begin without delay and should proceed at a pace that will be determined by the student's adjustment to his new educational environment.

Peter H. Stewart
Hearing Officer

Date