

**STATE OF MAINE**

**SPECIAL EDUCATION DUE PROCESS HEARING**

June 20, 2008

Case No. 08.049H, *Parent v. Surry School Department* and  
Case No. 08.051H, *Surry School Department v Parent*.<sup>1</sup>

FOR THE FAMILY:            Student's Mother  
FOR THE SCHOOL:           Eric R. Herlan, Esq.  
HEARING OFFICER;        Peter H. Stewart, Esq.

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**INTRODUCTION**

This hearing was conducted, and this decision written, pursuant to 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

This case involves the student, (DOB: xx/xx/xxxx) who lives with her mother in Surry, Maine. She is eligible to receive special education services under the rubric of multiple disabilities. She is blind, hard of hearing, and has been diagnosed as having autism, mental retardation, seizure disorders and profound difficulties with both communication and behavior. In August of 2007, her receptive language skills were tested as within the 10 to 11 month range while her expressive language skills were within the 9 to 10 month range. The Surry School department bears the educational responsibility for the student and she attended Surry schools from her first xx year, school year 1999-2000, through school year 2004-2005. For school year 2005-2006, her Pupil Evaluation Team (PET) placed her in the Perkins School for the Blind where she

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<sup>1</sup> These cases were consolidated by the Maine Department of Education and were heard by the hearing officer as such. This decision resolves both cases.

experienced difficulties in making the transition to a residential school but made good progress educationally. In November of 2005, the student began to present problematic eating behavior, lost weight and became somewhat dehydrated. Perkins staff and the student's mother agreed she should return to her home.

The student remained at home, out of school, recovering her health until March of 2006, when she returned to Perkins. This attempt lasted only a few days until she was again removed from Perkins by her mother, who was disturbed by the self-injurious behaviors displayed by the student. Returning to Maine, the student stayed home until May of 2006 when she began to attend the Surry Elementary School. This enrollment lasted about eight school days when her mother removed her from school once again because she was uncomfortable with both Surry staff and the program being provided to the student. The student attended an ESY program developed and implemented at the Surry Elementary School in the summer of 2006. The student did well and seemed to enjoy the ESY program. She started her school year 2006-2007 in September 2006 and attended for about three weeks after which her mother, who had become dissatisfied with the program at Surry, removed her from school. The student has not returned to school at all since September 22, 2006. She has been at home, receiving in-home services provided by a number of public agencies including United Cerebral Palsy. Throughout the remainder of school year 2006-2007, the school consistently maintained that it was prepared to provide the student with an appropriate education at the Surry Elementary School, while the student's mother has just as consistently maintained that the program offered by the school was inappropriate and has kept the student at home.

Over the course of the spring and summer of 2007, a series of IEP team meetings was convened in an attempt to develop an IEP for the student and to find and agree upon an appropriate placement in which to implement the program. The IEP was quickly developed and agreed upon but the parties could not agree upon the setting in which the program would be implemented. The school offered a variety of placements. In the order in which they were offered to the student, the placements were: the Perkins School for the Blind in Massachusetts, two different private day-treatment programs in Maine (Stillwater Academy and Kids Peace) and, finally, a life-skills program to be implemented in the Surry Elementary School. As each placement was offered, the

student's mother rejected it as inappropriate for her daughter and refused to allow her to attend. Throughout all these proceedings, including the hearing itself, the student's mother has maintained that the only appropriate placement for her daughter is in a life skills program implemented in a public school setting.<sup>2</sup>

The parties remain at impasse. The school remains willing to implement and fund any of the options discussed above. The student's mother remains convinced that none of those options is appropriate for her daughter. Through all this, the student remains at home, not enrolled in any school program, where she has been since late November of 2005.<sup>3</sup>

This hearing was initiated on November 21, 2007, when the student's mother filed a Hearing Request Form with the Maine Department of Education. The school filed its own Hearing Request Form on November 30, 2007. The Due Process Office of the Maine Department of Education consolidated the two cases. On December 7, 2007, the hearing officer received the school's motion to dismiss certain aspects of the family's due process hearing request, primarily the family's request that the hearing officer enforce the requirements of a Corrective Action Plan contained in a Complaint Investigation Report involving the school's treatment of the student at issue in this due process hearing. On December 12, 2007, the hearing officer ruled on the school's motion and dismissed the family's enforcement request on the basis that a due process hearing is not the appropriate forum in which to seek enforcement of such a corrective action plan.

A pre-hearing conference was held on January 8, 2008. The hearing itself required all or part of nine days of testimony: January 22, 25, 28 & 29; February 21; March 17, 18, 19 and 26. At the hearing, the family presented 10 witnesses and admitted a series of documents, pages 1-202, Documents 1-27 and 29-33, and Document 34, a video tape recording of the student approximately one half hour long. The school

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<sup>2</sup> The student's mother consistently wanted her to be placed in the Mount Desert Island High School, the secondary school with which the Surry School Department has contracted to educate its high school students. As is not unusual in Maine, Surry operates a K-8 school system and pays the tuition for its 9-12 students, who attend out-of-district high schools.

<sup>3</sup> There are some exceptions to this characterization of the student's status since November of 2005. She attended the Perkins School for about 8 days in March of 2006 and attended Surry Elementary School for about three weeks in September of 2006.

presented 12 witnesses and admitted 849 pages of documents and an audio CD. Hearing Officer's Exhibits 1-8 were also admitted. In addition, the hearing officer ordered that a verbatim transcript of the entire proceeding be prepared and distributed to the parties and the hearing officer. That transcript amounted to 1965 pages. After receipt of the transcript, the parties wrote and submitted closing arguments, the last of which was received by the hearing officer on May 6, 2007. The record was closed on that date.

In late May, the hearing officer noticed that an exhibit referred to by the family in its written closing argument was not in the record of the case, though it was referred to in the family's index of documents. The exhibit was a CD recording of a PET meeting during the summer of 2007. Further investigation revealed that CD recordings of other PET meetings were included in the family's index of documents but were not in the hearing officer's record of the case. After discussion with the parties, and with the consent of the school, the hearing officer admitted exhibits identified as Documents 31, 32 and 33 into the record. Document 28 was excluded. The record in the case was opened to admit this evidence and the closed on June 5, 2008. The decision is due to be issued on or before June 20, 2008.

## **ISSUES**

The issues to be resolved in this consolidated hearing are:

1. Whether the 2007 Extended School Year (ESY) program developed by the school for the student is appropriate under Act; and
2. Whether the 2007-2008 Individualized Education Program (IEP) developed by the school for the student could be implemented appropriately in the Surry Elementary School or in any of the other placements offered by the school?<sup>4</sup>

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<sup>4</sup> It should be noted that, at the pre-hearing conference held on January 8, 2008, the parties stipulated that "the contents of the 8/23/07 IEP [for the 2007-2008 school year] were not at issue except where the placement of the child is described to or referred to in the document." See Pre-Hearing Conference Summary Memorandum, 1/15/08.

## FACTUAL FINDINGS

1. The student in this case, the student (DOB: xx/xx/xxxx), lives with her mother in Surry, Maine. She is eligible for special education services as having multiple disabilities that include blindness, partial hearing loss, autism, mental retardation, and speech and language impairment. She is largely non-verbal, has a seizure disorder and presents a range of persistent behavioral issues, which can be resistant, disruptive and injurious to herself and/or others. In March of 2005, when she was xx years old, her adaptive behavioral skills tested at a 1 year 8 month level, her communication skills at the 1 year 1 month level and her daily living skills at the 1 year 11 month level. She attended school in the Surry school system from school year 1999-2000 through school year 2004-2005. During these years, the student's adaptive behavior skills, which include communication, daily living, social and motor skills, improved by approximately 6 months. The most important skills the student needs to improve while she is still in school relate to her ability to communicate and to control her behavior, skills which are closely related. The student has always had difficulty when making a transition from one setting to another. Her sensory impairments make it difficult for her to function in a situation, or with people, with which she is not familiar. Those impairments also mean that it takes a relatively long time for her to become familiar or comfortable in a new situation with new people. Further, her ability to communicate is severely limited. In August of 2007 when she was xx years old, her receptive language skills were determined to be within the 10 to 11 month range while her expressive language skill were within the 9 to 10 month range. She has developed a kind of private language with her caregivers at home, though it is not useful in the larger world. While she often seems to know what she wants to say, her inability to use language to express herself leads to frustration which can lead to tantrums or other violent behavior, either directed at herself or at others around her, such as kicking, biting, scratching and hitting. She has a long history of engaging in resistant

or self-injurious behavior, especially during times of transition or other stressful situations. (Testimony of Mother, Grueneich, Fox, Hennig/Bishop)

2. For school year 2005-2006, the Surry PET placed the student in the Perkins School for the Blind in Watertown, MA, a residential school specializing in the education of blind children, that offers a program designed for students who, like the student here, have disabilities in addition to their visual impairment. Perkins educates approximately 50 students from ages 3-22. In addition to special education teachers experienced in the education of blind students, Perkins has, on staff and on site, a wide range of specialists including OTs, PTs, S/L, audiologists, psychologists, behavioral and communication specialists as well as a medical office on campus. An outside behavioral consultant also visits the school twice a month, and is available on call. These specialists work on the Perkins campus and are available to respond to a student's needs, or to questions from the staff working with the student, in real time. The staffing ratios at Perkins are impressive: a three-student class has one teacher and one aide, a four-student class has one teacher and two aides, and 1-on-1 services are common. Despite the intense and highly coordinated programming at Perkins, the student initially experienced some difficulty in making the transition to Perkins. After a relatively short period of adjustment, she rather quickly began to respond well to the educational part of the Perkins program. While she made good progress educationally, her transition to residential life at Perkins was more problematic and appeared to be made more difficult by the fact that her mother took her home, back to Maine, nearly every weekend. Each return to Perkins presented another difficult transition for the student; one of her evaluators stated that she could not tolerate the changes involved in the visits home. After her return to Perkins after being home for Thanksgiving of 2005, the student began to present problematic eating behavior, lost weight, became somewhat dehydrated and experienced tremors. Perkins staff and her mother agreed she should return home. There was no clear diagnosis of the source of

the student's health issues at this time, though one of her doctors stated that it was "possible" that she was having an "adjustment reaction". The student remained at home, out of school, until March of 2006 when she returned to Perkins for a few days. Her mother took her out of Perkins again because of her concern that the student was engaging in problematic self-injurious behavior during her second stay at Perkins. There is no medical evidence describing or explaining the student's withdrawal from Perkins in March of 2006. All witnesses who testified about the educational program at Perkins agreed that it had been very successful for the student; one witness described it as "the best, the gold standard of programs". (Testimony of Mother, Maddocks, Fox, Rogers, Grueneich, Jones; J Sears Report at Rec. 476, Family Document 31, disc 1)

3. After leaving Perkins in March of 2006, the student stayed at home and did not attend any school until May, when she began to attend the Surry Elementary School. This enrollment lasted about eight school days, at which time her mother removed her from the Surry program because she was dissatisfied both with the staff working with, and the program being provided to, the student. The student did not return to Surry, or enroll in any other school program, until the summer of 2006, when she attended an Extended School Year program developed and implemented at the Surry Elementary School. Both the family and school agreed that this program, largely composed of activities selected by the child as the day went on, was a success; the student participated and seemed to enjoy herself during the summer. (Testimony of Mother, Hennig/Bishop, Erlenbacher)
4. The student began her 2006-2007 school year in the Surry Elementary School pursuant to an IEP developed for her. She attended for about three weeks until her mother removed her from school because she had become dissatisfied with the program provided by Surry. The student has not returned to school at all since September 22, 2006. She has been at home since then, receiving

services in-home provided by a number of agencies including United Cerebral Palsy (UCP). Throughout the remainder of school year 2006-2007, the school consistently maintained that it was prepared to provide the student with an appropriate program at the Surry Elementary, if the student were to come to school. The student's mother has just as consistently maintained that the program offered by the school was inappropriate for her daughter and has kept the student at home. (Testimony of Mother, Boothby Erlenbach )

5. On June 21, 2007, Surry convened a PET meeting attended by the student's mother, among many others. The Team reached agreement on the content of an Extended School Year program for the student. It was to run for 8 weeks, five days a week and four hours a day. It provided: 30 minutes of OT direct services and 30 minutes OT consult weekly, 30 minutes of PT direct services and 30 minutes PT consult weekly, 30 minutes of S/L direct services and 30 minutes S/L consult weekly, and 60 minutes of Music Therapy weekly. The 2007 ESY program was to be implemented at the Surry Elementary School. (School's Exhibits 112- 114)
6. In the context of selecting a placement in which to implement the student's IEP for 2007-2008, her mother has consistently and vigorously insisted that the only appropriate placement is a public high school, with appropriately trained staff and consultants. Mount Desert Island High School (MDIHS) is the secondary school with which the Surry School Department has contracted to educate its high school students. Surry operates a K-8 school system and pays the tuition for its 9-12 students who attend out-of-district high schools, a structure which is not uncommon in Maine. The student's mother has argued consistently that the student should be educated in a life-skills program at MDIHS. Consequently, she wanted the 2007 ESY program to be designed as a transitional program into MDIHS. At the June 21 PET meeting, the mother learned that MDIHS special education staff did not think that the student could not be appropriately educated in a life-skills program there because her level of need required a more intensive program, either a residential or day-



treatment program with a full set of specialists on-site and available in real time. (Testimony of Mother, Sanford; SE 113)

7. Over the course of the spring and summer of 2007, a series of PET and IEP team meetings was convened to develop an IEP for the student and to select an appropriate placement in which to implement the program. The IEP was quickly developed and agreed upon. At the hearing, the parties stipulated that the IEP was appropriate as written and was not at issue in this proceeding. The school offered a series of placements in which to implement the program: an out-of-state residential placement at the Perkins School for the Blind, two day-treatment facilities, in Maine, Stillwater Academy and Kids Peace, and a life-skills program at the Surry Elementary School. The placements were offered in that order, in an attempt to find a placement that the student's mother would accept. As the first three placements were offered, the student's mother rejected each in turn as inappropriate for her daughter. Finally, about October 1, the student's mother agreed to the Surry placement. The school began to make an appropriate space for the student, which involved converting the computer room into a classroom for the student. The school also continued to train the special education teacher and the educational technician it had hired earlier in the year and assigned to work with the student. In mid-October, when the room was nearly ready, the student's mother had the student come to the school for a very brief and essentially unscheduled visit, which did not go well. While the mother interpreted the student's somewhat distressed behavior during the visit to the school as evidence that she had been traumatized at the school at an earlier time, that interpretation has no persuasive support from other sources. Prior to the visit in mid-October, 2007, the student had not been in any school at all since September of 2006. Further, she has not had any successful school experience since the 2004-2005 school year at Surry, with the single exception of the 2006 ESY program in which she was the only student, with two adults, in a program that was essentially facilitated play activities chosen by the

student. Other than that, she had been mostly at home, in familiar surroundings with a few familiar people, largely her family members and UCP workers. Since this visit, the student's mother has kept the student at home and has declined to bring her to Surry Elementary School. At the time of the hearing, both the space created in the school for the student and the staff hired to work with her are still there and available for the student should she attend. (Testimony of Mother, Boothby, Elrlenbach, Woodeye, Fox, Rogers, Grueneich)

## **DISCUSSION**

### **I.**

The first issue to be resolved in this hearing is:

Whether the 2007 Extended School Year (ESY) program developed by the IEP team for the student was appropriate under the Act?

The Extended School Year program for the summer of 2007 was developed and agreed upon by the PET meeting on June 21, 2007. Services were to be provided to the student for four hours a day, five days a week and the program was scheduled to run for eight weeks. The services to be provided were:

- 1) Occupational Therapy – 30 minutes of direct services and 30 minutes of OT consult weekly for 8 weeks;
- 2) Physical Therapy – 30 minutes of direct services and 30 minutes of PT consult weekly for 8 weeks;
- 3) Speech and Language – 30 minutes of direct services and 30 minutes of S/L consult weekly for 8 weeks;
- 4) Music Therapy – 60 minutes direct service once a week for 8 weeks; and,
- 5) Deaf/Blind Consultant – 5 hours of D/B consult available each week for 8 weeks.

The program was to be implemented at the Surry Elementary School.<sup>5</sup> The question is whether the program, if implemented as written at the Surry Elementary School, would have met the requirements established under the Act for ESY programs<sup>6</sup>.

For the reasons discussed below, the hearing officer determines that the 2007 ESY summer program developed by the PET and adopted at the June 21, 2007 PET meeting, if implemented as written at the Surry Elementary School, meets the standards under which such programs are measured. First, the set of services provided in the program - OT, PT S/L Music Therapy, all provided in the context of consultation from a qualified professional with extensive experience with deaf/blind students - is well designed to meet the needs of this student. The school hired two educational technicians to work directly with the student, and had organized training sessions with Nancy Godfrey, the deaf/blind consultant, and with B. J. Hennig/Bishop, one of the student's former teachers. The ESY program would run 4 hours a day, 5 days a week, for 8 weeks. All the participants in the June 21 PET, including the student's mother, agreed that the contents of the program were appropriate for her. After participating in the development of a program, and then agreeing that the proposed program is appropriate for the student, a family cannot successfully argue, months later and after never allowing the student to attend the program, that the program is flawed in design. Further, the family's contention that the program went awry in its implementation is totally undercut by the undisputed

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<sup>5</sup> From the beginning of the PET process to develop the student's 2007-2008 IEP, the student's mother expressed a strong preference that the IEP be implemented in a life-skills program at Mount Desert Island High School; indeed, it was the only placement the mother was willing to accept through most of the process. Consequently, she wanted the 2007 ESY program to be designed as a transition toward the student's enrollment at MDIHS in September of 2007. At the 6/21/07 PET meeting, the special education director of MDIHS declared that (1) she did not think the student could be appropriately educated at MDIHS and (2) the 2007 ESY program could not be implemented there because of an already full summer schedule. The only other site available was the Surry Elementary School, where the student's 2006 ESY program had been implemented successfully.

<sup>6</sup> See, MUSER X (7) which describes a "regression/recoupment" standard that applies to ESY programs: an eligible child must receive sufficient services in the summer to prevent regression beyond that which can be recouped in a reasonable period of time upon returning to school in the fall. This standard is somewhat difficult to apply to the student in this case because (1) she was out of school for most of the 2006-2007 school year and (2) she did not return to school in the fall for the 2007-2008 school year.

fact that the student's mother refused to allow her to participate in the program. While it is true that there were some problems at the onset of the program - some family concerns about the condition of the classroom, a misunderstanding about who would transport the student to and from school and a staff training issue – they were relatively minor in impact and were swiftly remedied by the school; all were resolved before the end of the first week. These slight mishaps do not render the ESY program inappropriate.<sup>7</sup> For the reasons stated above alone, the hearing officer concludes that the 2007 ESY program was appropriate under the IDEA and regulations enacted pursuant to it.

There is further support for this conclusion. The student attended an ESY program in the summer of 2006. That program was developed by a Surry PET and implemented at the Surry Elementary School. Everyone involved with the student recognized that this program achieved good results; all regarded this program as a huge success with this very needy student. Yet the 2006 ESY program, which was implemented in the same location proposed for the 2007 program, provided for fewer hours of direct service to the student, as it was at least a week shorter and did not contain OT, PT or any consultative services from a Deaf/Blind consultant. Also the 2006 program was delivered to the student by an educational technician and a college student, while the 2007 program would have been implemented by two educational technicians who had been trained by, and had access to, Nancy Godfrey, the Deaf/Blind consultant hired by the school to help design and implement the ESY program.<sup>8</sup> The family and school agreed that the 2006 ESY program was a solid success. It is, in fact, the last positive experience that the student has had in an educational program. The 2007 ESY program provides more kinds of service, more hours of service, makes more professionals available as consultants, and would have been delivered by more highly credentialed individuals than the “successful” 2006 ESY program. It also would have been held at the Surry Elementary School, the same site used for 2006 program as well as

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<sup>7</sup> Indeed, had the student attended the program from the first scheduled day, the hearing officer finds that she would have had an appropriate program delivered to her from the beginning, notwithstanding the modifications the school needed to make early in the week. *See*, Caron letter, SE `122-124. But, even after the room was rearranged, the transportation provided and the staff training completed, the mother never allowed the student to attend the summer program.

<sup>8</sup> In both years, a special education teacher would have supervised the ESY program.

the school where the student spent most of her elementary school years. The 2007 ESY program provides more services, both quantitatively and qualitatively, than the 2006 ESY program and, therefore, the hearing officer concludes that the 2007 ESY program developed by the PET for the student was appropriate under the Act.<sup>9</sup>

## II.

The second issue to be resolved in this hearing is:

Whether the 2007-2008 Individualized Education Program (IEP) developed by the IEP team for the student could be implemented appropriately in the Surrey Elementary School or in any of the other placements offered by the school?

### A.

From June to August of 2007, the school convened a series of IEP team meetings to develop both the 2007 ESY program and the 2007-2008 IEP for the student. At the first such meeting, on June 12, the team came to agreement on the content of the 2007-2008 IEP based heavily on an earlier IEP developed by the Perkins School for the Blind (Perkins). No agreement on placement was reached at this meeting. The issue of an appropriate placement was discussed on June 21 at the next meeting. The school first offered Perkins as a placement for the student. The student's mother rejected Perkins, stating that both Perkins staff and the student's neurologist had advised against it because of the difficulties the student experienced with the residential component of the Perkins program. The family again requested that the student's IEP be implemented in a Life Skills program at the Mount Desert Island High School (MDIHS). This suggestion was rejected both by the Surry School and by the special education director of MDIHS, who believed that the student's needs for intensive and very specialized programming made MDIHS, a public high school with six or seven hundred students in downeast Maine, an inappropriate placement for this student to receive her education.

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<sup>9</sup> This student participated in a 2002 ESY program developed and implemented by Surry. That program was reviewed in a due process hearing and found to be appropriate for the student by the hearing officer. The 2007 program provides for more kinds of services, the same amount of hours of service per week and runs one week longer than the 2002 program. See, Surry School Department, 37 IDELR 176 (SEA Me 02.160, 6/26/02).

The school next offered to implement the IEP in either of two day-treatment programs, Stillwater Academy or Kids Peace.<sup>10</sup> The school hired and began to train both a special education teacher and an educational technician who would work with the student to implement her IEP in the day treatment placement. The student's mother rejected Stillwater as a placement because she believed Stillwater's students, some of whom were emotionally or behaviorally disturbed, were not appropriate for the student. The school then offered to implement the IEP at Kids Peace, in a new autism program that was being developed there. As part of the Kids Peace placement, the school hired and began to train both a special education teacher and an educational technician to work with the student there. Her mother rejected the Kids Peace program because of her concerns that the autism program there was new, not fully ready at the beginning of the 2007-2008 school year, and that the student would not have access to non-handicapped peers.

The school's final offer, made in response to a suggestion from the family's representative<sup>11</sup>, was to implement the student's IEP in the Surry Elementary School. In response to this suggestion, the school began to prepare a physical location within the school building in which to implement the student's IEP, with the idea that the teacher and educational technician then in training to work with the student at Kids Peace could implement her IEP in the Surry Elementary School where she had been in school for most of her elementary years. In mid-October of 2007, the student made a brief and essentially unscheduled visit to the Surry Elementary School, which did not go well. Her mother believed that the student's behavior during that single visit to the school was evidence of some earlier trauma incurred by the student there. Consequently, since this visit, the student's mother has kept the student at home and has refused to allow her daughter to return to the Surry Elementary School.

The school's general position is that all of the placements offered to the student for school year 2007-2008 are appropriate settings in which to implement the student's

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<sup>10</sup> Stillwater Academy is located in Brewer, Maine; Kids Peace is in Ellsworth, Maine.

<sup>11</sup> For a time during the fall of 2007, an attorney from a disability rights agency in Maine represented the family. During discussions with the school in late September 2007, that attorney suggested that the Surry Elementary School could be an appropriate placement for the student. In response, the school undertook the efforts described above.

IEP. More specifically, the school believes that, given her complex set of handicapping conditions, profound sensory deprivation, cognitive deficits, difficulties with communication, and persistent behavioral problems - all combined with the fact that she has been largely out of school since early December of 2005 - the student requires an intense, highly sophisticated educational placement in which her IEP is implemented by a team of experienced educators and appropriate specialists who can deliver a fully coordinated program in a consistent setting. The school believes that, in order for the student to receive meaningful educational benefit - to learn the skills necessary for her to have an opportunity to achieve at least some independence in her adult life - the student needs an intensive program in the remaining years of her education<sup>12</sup>. The school further believes that the placement in which the student can receive meaningful educational benefit is the Perkins School for the Blind, a residential program, in which the student has already had some success educationally. Perkins offers a fully coordinated educational and residential program with support provided by a complete team of experienced professionals on staff and available on site and in real time. Given the complexity and severity of the student's set of disabilities, combined with the fact that she has been essentially out of any school-based programming since the fall of 2005, the school asserts that Perkins is the appropriate placement for her to learn the communicative, social, behavioral skills, as well as the basic self-care life-skills, that she needs to have as tools for her adulthood.

The school advances a similar argument in favor of the appropriateness of the day-treatment programs, Kids Peace and Stillwater Academy, though recognizing the difficulty of assembling a staff comparable to that at Perkins. While Kids Peace has some specialists – behavioral consultants, for instance - on staff, there is no one with expertise or experience in the education of blind and/or deaf students. That expertise would have to be obtained from an outside consultant. The school argues that an appropriate staff could be put together in some combination of Kids Peace employees, a teacher and an educational technician hired, funded and trained by Surry, and outside consultants to provide specific expertise that is needed to implement the student's IEP.

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<sup>12</sup> The student will be xx in November of 2008. She will be eligible to receive educational services through the school year in which she has her 22nd birthday.

Finally, the school argues that the program it created at the Surry Elementary School was also an appropriate placement in which to implement the student's IEP. The Surry program had the advantage of being the student's local school in which she had spent most of her early elementary school years until she left to attend Perkins for her xx grade year. As a public elementary school, however, Surry does not have on staff the specialists needed by the student pursuant to her IEP; like most Maine schools, Surry contracts with the various specialists to provide the services needed by its special education students. Those specialists then either come to the school to visit the children at appropriate intervals or the students are transported to them. While this method of providing services to special education students seems to work well with many students, the school asserts that a child with the level of need presented by the student here would do better in a more intense, more coordinated, more responsive program such as is available at Perkins or one of the day treatment options. Notwithstanding that belief, the school asserts that the student would have received some level of meaningful educational benefit had her IEP been implemented at the Surry Elementary School for school year 2007-2008.

## **B.**

The student in this case has been determined to be eligible for special education services and is therefore entitled under state and federal law to receive a free appropriate public education “...designed to meet [her] unique needs and prepare [her] for further education, employment and independent living.” 20 USC 1400 (d)(1)(A) (emphasis added). It has long been established in the First Circuit that the standard on this issue is whether the individualized educational program (IEP) is reasonably calculated to enable the student to receive meaningful educational benefit. *Rowley v. Board of Education*, 458 U. S.176, 207 (1982). It is clear that a school is not required under federal or Maine law to offer an IEP that provides the “highest level...or even the level needed to maximize the child's benefit.” in order to comply with the IDEIA. *Id.* It is also clear that “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 9 (D. Me 1993) The educational benefit provided to the child must be demonstrable,



meaningful and real, and not trivial or *de minimus*, in nature. *Burlington v. Department of Education*, 736 F2d 773, 788 (1st Cir. 1984). In order to carry out the purposes of the IDEA, the benefit provided to the child must be ‘a great deal more than a negligible benefit.’ *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F 2d 171, 181-182 (3<sup>rd</sup> Cir. 1988). Further, the level of benefit provided to the child that is required to comply with the IDEA varies from child to child and is dependent upon the needs and abilities of the child. *Rowley*, at 202.

The specific question to be answered in this matter is whether any of the placements offered by the school in which to implement the IEP developed by the PET/IEP team in the summer of 2007 are appropriate placements under the IDEA<sup>13</sup> which requires, in part, that a student should be removed from the regular classes he or she would attend if without disabilities only when “the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 USC 1412(a)(5)(A); 34 CFR 300.114(a)(2)(ii). The First Circuit, however, has stated that this “mainstreaming” preference “must be weighed in concert with the Act’s mandate for educational improvement”.<sup>14</sup> Thus, when determining the appropriateness of an educational placement, the balance between educational benefit and least restrictive environment is always critical.

In my view, this balancing requirement means that an eligible student should be educated in the least restrictive educational environment in which he or she can receive an appropriate education. Courts have followed this principle, particularly in instances where the students are faced with profound challenges that can best be addressed in an intense, service-rich educational environment with well-coordinated services provided to the student both in and out of school. In *Abrahamson v. Hirschman*, 701 Fed 223 (1<sup>st</sup> Cir. 1983), the Court found in favor of a residential placement sought by the family over a day-treatment program offered by the school, stating, in part, that

Where what is being taught is how to pay attention, talk, respond to words of warning, and dress and feed oneself, it is reasonable to find that a suitably staffed and structured residential environment providing continual training and

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<sup>13</sup> The content of the IEP is not at issue in this proceeding; the parties have stipulated that the program described in the IEP is appropriate under IDEA standards.

<sup>14</sup> See, *Roland M.*, 910 F. 2d 883 (1<sup>st</sup> Cir., 1990)

reinforcement in those skills serves an educational service for someone like [the student]...Congress established a priority under the Act for the most severely retarded children... for many of whom, certainly, education will not consist of classroom training but rather training in those very basic skills...

*Id.* Maine hearing officers too have found more restrictive placements appropriate when less restrictive placements either have failed, or seem likely to fail, to provide an eligible student with sufficient educational benefit to pass muster under the standards set forth above. In *MSAD No.37*, 43 IDELR 133 (SEA Me 04.141, 12/10/24), in a case where the parents were seeking a placement for their child in the local public school, the hearing officer found a day treatment program offered by the school to be the appropriate placement for the student.<sup>15</sup> No existing program was appropriate for the student and the parents wanted the school to create a program for him. The hearing officer stated, in part, that

...the capacity of the district to create a new program to meet the agreed upon needs of this student is limited...the district has a shared guidance counselor...and a behaviorist on contract two days/month...space for another classroom is not currently available...specialized positions are difficult to fill in the district. If the student is to receive meaningful benefit it will not be in a cobbled-together program in the [district]...

The law and the courts have made clear that placement in a location other than the school the student would normally attend may be required when “the nature or severity of the disability” is such that education in the student’s neighborhood school cannot be satisfactorily achieved. MSER 11.2(C).

The hearing officer went on to point out that federal regulations do not require local schools “to duplicate highly specialized education programs at the student’s base school.”<sup>16</sup> The hearing officer held that the school’s offer of a placement in the Kids Peace day-treatment program was appropriate, given the nature and severity of the student’s disability.

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<sup>15</sup> The student was eligible as emotionally disabled and was diagnosed with ADHD.

<sup>16</sup> See also, *MSAD No. 22*, 43 IDELR 269 (SEA Me, No 04.165, 7/24/05).

### C.

The hearing officer's conclusion that Perkins is an appropriate placement for the student is based upon, first, the nature and severity of her disability and, second, the minimal amount educational benefit that she received in the Surry Elementary during the period of December of 2000 through March of 2005.

The student in this case is a profoundly disabled child. She has multiple developmental and medical handicaps, including total blindness since her premature birth, partial hearing loss, autism, serious mental retardation and possibly a seizure disorder as well. She is essentially non-verbal, as might be expected from her sensory and cognitive challenges. Communication is a large problem for her and those difficulties often lead to frustration that leads to inappropriate and frequently violent behavior, including tantrums, kicking, biting, and scratching. She has a pattern of engaging in self-injurious behavior, particularly in times of stress, but can also direct her aggression toward others. There is a close link between the student's inability to communicate and her inappropriate behavior. She has a particularly hard time transitioning from one situation to another, especially when she is unfamiliar with the environment she is entering. Her severe sensory limitations make it very difficult to perceive the "new" environment and therefore make it very hard for her to be comfortable in it. Her typical reaction to the stress caused by transitions is to engage in behavior which is both resistant and self-injurious. In March of 2005, when the student was xx, her adaptive behavior skills were tested and found to be in the severely impaired range; she was functioning at an age equivalent of 20 months, with "global impairment of her adaptive skills, including communication, daily living, social and motor skills."<sup>17</sup> Drs. Talbot-Fox, Grueneich and Rogers<sup>18</sup> testified that the student was among the most profoundly involved and complex children with whom each had ever worked, because of the way the extensive set of disabilities came together in a single individual. No one professional has the qualifications to deal with all aspects of the student's multiple disabilities; she requires a team of educational, behavioral, communicative and therapeutic professionals familiar

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<sup>17</sup> See, Report of Grueneich, p. 4.

<sup>18</sup> All are Ph.D. level psychologists.

with her to design and implement an educational program that will help her learn the skills she needs to cope better with her life. Further, because the goals for this student involve the acquisition of basic life-skills, the student can benefit greatly from a residential program that is coordinated with her educational program, is delivered by residential professionals familiar with the content and methods of implementation of the educational program and with easy access to the appropriate professional specialists.

A demonstration of why the hearing officer concludes that the Perkins placement, a 24/7 program with appropriate professionals on staff and on site, is the appropriate placement for the student is found by reviewing the minimal progress she made from 2000 to 2005, when she was educated primarily within the Surry public schools. Dr. Royal Grueneich performed neuropsychological evaluations of the student in December of 2000 and then again in March of 2005. In 2000, he found the student's adaptive behavior skills, including communication, daily living, social, and motor skills, were at an age equivalent of 20 months. By March of 2005, nearly five years later, he found that those skills had improved somewhat, but only by approximately 6 months. The hearing officer concludes that this level of educational benefit does not amount to "meaningful educational benefit" as required by the IDEA.<sup>19</sup>

The Perkins School for the Blind (Perkins) is located in Watertown, Massachusetts and has been a pioneer in the education of blind and visually impaired people since the 19<sup>th</sup> century. It continues to be a leader in the education of blind children in the 21<sup>st</sup> century. Its current spectrum of programs includes a residential program designed specifically for blind children with developmental disabilities and behavioral issues. The Perkins staff is highly skilled and experienced with such children. Perkins employs not only highly experienced teachers of blind students but also has on staff and on site, the full spectrum of specialists – S/L, OT, PT, psychologists, communication specialists, behavioral consultants, audiologists, and deaf-blind

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<sup>19</sup> By this finding, the hearing officer does not intend to criticize the Surry Elementary School. Rather, the hearing officer concludes only that this student needs more in the way of services than any public elementary school, especially one in Hancock County, Maine, can be expected to provide. The school, of course, agrees with this conclusion which is why it offered Perkins as the recommended placement for the student at the beginning of the PET process in June, 2007.

specialists – necessary to design and implement the program needed by this unique and complicated student. Because they are on the Perkins staff, these specialists are available in real time to deal with whatever situation that may arise during the school day or at night.

Further, because Perkins is a residential institution, it is possible for the residential staff to coordinate with the teachers and specialists to reinforce and support, during the hours outside of school, the skills and lessons worked on during the school day. This is the educational setting in which this profoundly challenged child can receive FAPE and learn the life-skills she needs to learn in order to have even a chance at an adult life with some independence and social interaction. Every witness, both for the family and the school, who testified about Perkins described it as having simply the best program available for a child such as the student in this case<sup>20</sup>. Further, the educational aspect of the Perkins program has already been proven to be effective with this student; shortly after a somewhat problematic transition into the Perkins, she settled in and prospered in the educational setting there, making significant progress toward mastering the life-skills that are appropriate for her. The acquisition of these basic life skills is critically important to a child with the profound needs of this student, who has been out of school for most of the last three school years and has a limited amount of time remaining in an educational situation. Clearly, Perkins is a place that has already demonstrated that it can successfully educate the student. Just as clearly, the educational component of a Perkins placement is the appropriate placement in which to implement the student's IEP.

While the student was very successful in the educational part of her program at Perkins, she encountered some difficulties in the residential setting there. In discussions prior to the time the student began her stay at Perkins in September 2005, Perkins staff suggested that her initial placement there be about a month, with no weekend visits home, on the theory that it is better to make one clean transition from home to Perkins, Such an approach would allow Perkins some uninterrupted time to help the student make a full transition to her new situation without a series of weekend transitions back and forth, between home and school. The student's mother declined this suggestion and, on most

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<sup>20</sup> One witness called Perkins the “gold standard” of programs for the student.

weeks, drove from Maine to Perkins on Friday to pick up her daughter and bring her home for the weekend, returning to Perkins on Sunday afternoon. One of the student's evaluators explained that she just couldn't make the transition back to school after her visits home. This pattern continued throughout the fall of 2005. Shortly after returning to Perkins from the Thanksgiving holiday, the student began to display abnormal eating and drinking patterns<sup>21</sup> that concerned both Perkins staff and her mother. The student's mother brought her home to Maine about December 1. She stayed home, out of school, until March of 2006 when she returned to Perkins for a few days, after which her mother removed her from the Perkins and brought her back to her home in Maine. Except for a few weeks, when she attended the Surry Elementary School, the student has not been in any educational program since leaving Perkins in March of 2006.

It is clear to the hearing officer that the student's mother is convinced that the student cannot thrive living away from home and, therefore, that Perkins should not be considered as a placement, notwithstanding the unanimity of expert opinion that Perkins offers an appropriate educational program for her daughter.<sup>22</sup> There are several factors that lead the hearing officer to conclude that Perkins remains an appropriate placement for the student, despite her earlier difficulties in the residential program there. One factor is the absence of any clear medical diagnosis directly linking the residential program to the symptoms displayed by the student during her time at Perkins. At best, the medical record supports only the "possibility" of such a causal link. Secondly, even if the student's symptoms – "episodes of tremulousness, weight loss, and appetite loss" – in the fall of 2005 when she first enrolled at Perkins were related to her living away from home, that experience is nearly three years ago. The student was xx when she entered Perkins and will have her xx birthday this fall. All of us who have raised children know that there is a world of difference between an xx year old and a xx year old; what may then have

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<sup>21</sup> There was never any clear diagnosis made of the student's condition in November of 2005, though one of her doctors, who saw her in early December 2005, said that her symptoms "...raise the possibility of an adjustment reaction." (J. Sears, MD, Record at 476)

<sup>22</sup> Everyone who testified at the hearing about the kind of program the student required to learn the skills she will need to have an opportunity to live with some independence after she completes her education agreed that Perkins offered the best possible educational program for this student.

been too much for the xx year-old version of the student may now be well within her tolerance and coping skills as a xx year-old. In any event, there was no persuasive evidence presented as to the student's inability to be successful in the residential living situation. Finally, there was no testimony presented from the staff members at Perkins who knew and worked with the student during her time there. The possibility of presenting such witnesses was discussed during the hearing and, indeed, times were scheduled during the hearing to have Perkins staff testify via telephone. However, no such testimony was ever presented by the family, though it would have been very instructive to hear the opinions of Perkins staff members on the issue of the student's chances to succeed as a residential student in 2007-2008, given the difficulties she experienced in 2005-2006. However, there was simply no persuasive evidence offered at the hearing that established any inability of the student to live successfully in the residential cottages at Perkins during school year 2007-2008.

The hearing officer concludes that the Perkins School for the Blind was the least restrictive educational environment in which this student could receive an appropriate education and, therefore, was an appropriate placement in which to implement the student's IEP for school year 2007-2008.<sup>23</sup>

### **ORDER**

For the reasons discussed above, the hearing officer concludes that the Perkins School for the Blind is the least restrictive educational environment in which the student can receive an appropriate education, as required by the IDEIA, and was therefore an appropriate placement in which to implement the student's IEP for school year 2007-2008. Given the posture of this case, no remedial order need be issued.

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Peter H. Stewart, Esq.  
Hearing Officer

Date

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<sup>23</sup> Given the hearing officer's conclusion that Perkins was the appropriate placement in which to implement the student's IEP, it is not necessary to review any of the other placements offered by the school.

## WITNESSES

### FAMILY:

Anita Gilley	United Cerebral Palsy worker; Educational Technician
Royal Grueneich,	Ph.D (Psychology) and Neuropsychological Evaluator
Jeffery Jones	Caseworker, Division for the Blind, Me. Dept. of Labor
Sara McCubbin	Former United Cerebral Palsy worker
Elesia Moore	United Cerebral Palsy Case Manager
Linda Mosley	United Cerebral Palsy Program Supervisor Student's Mother
Nancy Talbot-Fox	Ph.D (Psychology) and Psychological Evaluator
Alan Wittenberg	Music Therapist
Kysha Woodeye	United Cerebral Palsy Day Habilitation Worker

### SCHOOL:

Bobbi Jo Bishop	Special Education Teacher
Melissa Beckwith	Special Education Director, School Union 92
Tim Boothby	Superintendent, School Union 92
Donna Jo Coleman	Nurse, Surry Elementary School
Elizabeth Dyer	Speech and Language Pathologist
Elizabeth Erlenbach	Principal, Surry Elementary School
Danica Frederick	Occupational Therapist
Nancy Godfrey	Deaf/Blind Consultant
Lynn Maddocks	Special Education Director



Tim Rogers	Ph.D. and Evaluator
Kelly Sanborn	Special Services Director, Mount Desert Island H. S.
Rebecca York	Special Education Teacher

## **DOCUMENTS**

### **FAMILY:**

The family admitted documents in several formats, which are listed below:

- I. Two packets of documents with pages numbered consecutively:
  - a. First packet – pages 1 through 102;
  - b. Second packet – pages 103 through 220.
  
- II. A series of documents identified as Documents 1 –27; Documents 29 - 33 and Document 34, a video tape recording of some of the student’s recent activities.
  
- III Documents identified as Family Exhibits A and B.

### **SCHOOL:**

The school admitted three volumes of documents numbered consecutively as A-1 through A-326 (A-326 is the cover letter, dated 1/24/08, for a 19 page Psychological Report, the pages of which are not numbered in this sequence.), followed by pages numbered 1- 848.

### **HEARING OFFICER EXHIBITS 1 - 8**