

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

August 15, 2008

08.073H – Parents v. MSAD #6

REPRESENTING THE FAMILY: Diane Smith, Esq., Staci Converse, Esq.

REPRESENTING THE SCHOOL: Amy Tchao, Esq., Abigail Greene Goldman, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on June 12 and 16, 2008, at the Maine Department of Labor in Portland, Maine. In addition to counsel¹ and the hearing officer listed above, the Student’s mother (henceforth “the Mother”), and Jennifer Donlon, Co-Director of Special Education for MSAD #6 (henceforth “the District”), were present for the entire proceeding. Testifying at the hearing under oath were:

The Mother
Vicki Pratt, Service Provider, Momentum
Kimberly Tibbetts, In-home Support, CASA, Inc.
Martha McCahill, Case Manager, Community Counseling Center
Rhonda Lausier, Program Administrator, Momentum
Jennifer Donlon, Co-Director Special Education, MSAD #6

I. PROCEDURAL BACKGROUND

The Student’s parents (henceforth “Family” or “Parents”) filed a request for this due process hearing on April 28, 2006. Hearing Officer Rebekah Smith, Esq., issued a decision on August 17, 2006. The Family appealed this decision to the Federal District Court for the District of Maine (henceforth “Court”). On March 17, 2008, U.S. District Court Judge D. Brock Hornby

¹ Attorney Converse was not present at the hearing.

adopted the recommended decision of Magistrate Judge David M. Cohen, granting the Family's request under Count I of their complaint for compensatory education, and denying the remainder of the complaint. Judge Hornby remanded the case to the Department of Education for assignment to a hearing officer for a determination of the issues set forth below. The relevant findings and conclusions of Hearing Officer Smith, Magistrate Cohen and Judge Hornby are set forth below. The findings in these decisions are cited as follows: (1) decision of the Hearing Officer as "HD"; (2) Recommended Findings of Fact and Conclusions of Law of Magistrate Cohen as "RD"; and (3) Memorandum Decision and Order Adopting the Recommended Decision of the Magistrate Judge as "MD".

Following the remand, Hearing Officer Smith held a prehearing conference on April 28, 2008. The Family then filed a motion requesting that Hearing Officer Smith recuse herself, which Ms. Smith granted. Shari Broder, Esq., was subsequently appointed as Hearing Officer.

On May 20, 2008, a prehearing conference was held at the Offices of Drummond, Woodsum in Portland, Maine. Participating in the conference were: the Mother, who participated by telephone; Diane Smith, Esq., counsel to the parents; Amy Tchao, Esq., and Abbey Greene-Goldman, counsel to the District; Jennifer Donlon, Special Education Director; and Shari Broder, Hearing Officer. The Family submitted 54 pages of documents. The District submitted approximately 1100 pages of documents and a tape recording of a PET meeting. The entire record from the hearing, including all Court filings, documents and decisions, is a part of the record on remand as well.

The hearing was held on June 12 and 16, 2008, at the Maine Department of Labor in Portland, Maine. Both parties requested and were granted leave to file written closing arguments. Due to a leave of absence, Ms. Smith requested an extension of the due date for

closing arguments. By agreement, closing arguments were due on August 1, 2008, at which time the record closed. The Family submitted a 40-page memorandum, and the District submitted a 58-page memorandum.

II. ISSUES

- a. What is an appropriate supplemental compensatory educational remedy for the stay-put violation that occurred from February 1, 2006 until April 10, 2006?
- b. How long did the stay-put violation that began on April 11, 2006 last and what, if any, is an appropriate compensatory educational remedy?

III. FINDINGS OF FACT

1. The Student is xx years old (DOB xx/xx/xxxx) and lives with his family in Standish, Maine. He has been educated in the District since xx. The Student is eligible for special education and supportive services under the category of multiple disabilities, due to autism, mental retardation, and speech impairments. [RD 2 ¶2] Although the Student received special education and related services pursuant to an IEP, he has not accessed those services since the Family removed him from his Extended School Year (“ESY”) program in July 2006. He has not attended school since that time.
2. The Student’s autism causes diminished motor, social, coping and verbal skills. He is particularly sensitive to touch, sounds, and excessive visual stimuli, all of which provoke emotional responses. He requires repetition of routine and has unpredictable moods. The Student’s limited coping skills make it difficult for him to deal with change, disappointment, and excitement. The Student exhibits anxiety by speaking loudly or yelling, engaging in repetitive talk, and speaking to himself out loud. He also throws objects, such as pencils or his glasses, when expressing frustration. [HD 4-5 ¶2, RD 2-3 ¶2]

3. The Student performs at a kindergarten to grade 3 academic level. His cognitive ability is within the moderate range of mental retardation, with a full scale IQ of 47. [17] He has consistently required support to maintain attention and complete activities, and is easily distracted. [HD 5 ¶4]
4. When the Student began xx grade at Bonny Eagle High School (“BEHS”), he attended mainstream classes for health, physical education, and art, but was otherwise educated in the Therapeutic Life Skills (TLS) room. His teacher was Carla Turner. The Student typically produced many more academic assignments than other students in the Therapeutic Life Skills program. The Student would normally do forty to forty-five assignments per quarter in each math and English, the two academic subjects on which he focused. The Student often selected the quiet room for academic work that required reading and writing, routinely spending up to fifty percent of his individual academic work time in the quiet room. [HD 6 ¶9, RD 5 ¶10]
5. When the Student started xx grade, his mother and Mrs. Turner had a friendly relationship. They worked together to further the Student’s education and they saw each other socially on a few occasions. [HD 6 ¶10, RD 5 ¶11] This relationship soured over time, but did not undermine the District’s ability to provide the Student with FAPE commencing in the fall of 2006. [RD 49 ¶27]
6. The Student’s IEP for the period of February 4, 2005, to February 3, 2006 (“2005-2006 IEP” or “stay-put IEP”), called for him to be educated in the TLS classroom for all of his life skills and core classes and to receive occupational therapy (OT) consultation, speech therapy, and one-on-one support. The PET minutes noted concerns about the Student’s

“behavioral outbursts due to anxiety” as well as his “access to mainstream peers and friends.” [HD 6 ¶11, RD 5-6 ¶12]

7. On January 24, 2006, the Student’s PET met and drafted an IEP covering the period of January 25, 2006, to January 24, 2007. [HD 13 ¶30, RD 13 ¶29] The IEP called for the Student to receive OT, speech therapy, and direct special education instruction. New goals for educational performance were drafted in the areas of computer technology, functional life skills, reading and language comprehension, and speech. Although the IEP did not specify mainstream classes, it appeared that the Student was to continue in mainstream art and physical education. [RD 13-14 ¶29, HD 13 ¶30]
8. Following a few behavioral incidents in November 2005 and January 2006, in which the Student jeopardized the safety of himself, his classmates and teacher, the Student was given an in-school suspension for 12 days. [RD7-11] Following the suspension, another PET meeting was held on February 1, 2006, at which the team discussed the Student’s new placement in a red portable classroom outside BEHS. [RD 15 ¶34] The team also agreed to have a behavioral consultant from Woodfords Family Services (“Woodfords”) begin working on the Student’s plan immediately. Woodfords assigned Mark Geren, M.S., BCBA, to be the Student’s behavioral analyst. Mr. Geren had been a behavioral consultant for eighteen years, working extensively with teens and children with autism for the last seven years. Mr. Geren has created functional behavioral assessments and behavioral intervention plans through observation and data collection for schools, hospitals, treatment centers, and other organizations. [RD 15 ¶34, 17 ¶37, HD 14-15 ¶¶33, 36]

9. Prior to January 9, 2006, the Student's access to non-disabled peers consisted mainly of physical education and art classes, as well as interaction in passing in the hallways and while delivering announcements. While he was in the red portable, the Student was not allowed into the TLS classroom, Room 120, unless his peers were absent, although he went into the school building for speech therapy in Room 121 several times a week. Halfway through his 12 days in the red portable, he began delivering announcements in the main school building, attending gym or taking a walk, and having lunch in Room 120 when his peers were absent. While the Student was not a candidate for more instruction in mainstream classes, his interaction with peers, both mainstream and non-mainstream, was "very limited" during this period. [HD 44]
10. The Mother, concerned about the appropriateness of the Student's placement in the red portable and the Student's wellbeing, kept the Student out of school from Friday, February 17, 2006 until Wednesday, March 8, 2006, a week of which was February vacation. [RD 18-19 ¶¶ 40 & 41] On February 21, the Family filed a request for a complaint investigation and mediation with the Due Process Office of the Maine Department of Education. [HD 16 ¶40, RD 19 ¶41]
11. Following the March 6, 2006 PET meeting, the District removed the Student from art class, due to the presence of dangerous items in the classroom. [HD 16 ¶44, RD 20 ¶43]
12. When the Student was returned to school on March 8, he was placed in Room 120A, a small windowless room outside Room 120 that had previously been used as an office. The door to Room 120 was locked so that the Student could not go into the classroom. [RD 21 ¶45, HD 18 ¶46] Between March 8 and March 21, the Student completed written math and English assignments, and continued to receive OT and speech therapy. [RD 23

¶50] He did not, however, work on many of his life skills, did not receive mainstream art or swimming, and missed three field trips. [RD 23 ¶50]

13. On March 21, 2006, the Mother again removed the Student from school and would only return him if he could be educated in Room 120. [HD 19 ¶51, RD 22 ¶49] On April 5, Mr. Geren submitted his “Initial Behavior Treatment Plan.” Under the plan, the Student would be offered continuous access to the widest possibly array of preferred items and activities. He would be observed constantly and cued every five minutes to make a choice from an array of possibilities including English, math, life skills, leisure activities, sitting on a beanbag, playing cards, drawing, listening to music, having a snack, folding towels, doing math, sitting, chatting, reading, listening to a story, and walking. The Student was not to be prompted to pick any particular activity. The plan sought to reduce aggression and environmental disruption to zero and then slowly increase academic demands to eventually return the Student to his full curriculum. In Mr. Geren’s experience, this approach was more likely to be successful than a plan that would create consequences for negative behavior. [RD 24-25 ¶54, HD 20-21 ¶56] The Mother had concerns about this plan. [HD 22 ¶57]

14. On April 10, Student’s Mother reluctantly returned Student to school, and the implementation of the behavioral plan began. [HD 22 ¶58] The behavioral intervention plan was incorporated into Student’s IEP with the addition of a behavioral goal on April 10, 2006, drafted by Mrs. Turner without review by the Student’s PET, that the Student would “communicate his needs for change without disruption in a socially appropriate way 100% of the time.” [HD 22 ¶59, RD 27 ¶59] The behavioral intervention plan was

applied, with a minor revision, until the end of the school year on June 12, 2006. [RD 27-28 ¶¶60, HD 23 ¶¶61]

15. Sometime in April, the Student's IEP was scored to reflect progress towards particular goals. Patricia Milligan, the Student's speech therapist, graded the Student's speech goals with four grades of "1," indicating poor progress, three grades of "2," indicating average progress, and one grade of "3," indicating above average progress. Mrs. Turner scored the Student with complete zeros, reflecting no progress, in all other objectives, attributing this in part to the Student missing 23 days of school during the quarter. [HD 22-23 ¶¶60, RD 29 ¶¶63]
16. During the first quarter of his xx grade year, the Student produced forty-one math assignments and fifty-four English assignments. During the second quarter, the Student completed fifty math assignments and fifty English assignments. During the third quarter (approximately January 23 to March 31), including the time the Student spent in the central office, in the red portable classroom, and in Room 120A, the Student completed thirty-six math assignments and forty-five English assignments, despite his absence for twenty-three days.
17. Following the introduction of the Student's behavioral plan on April 10, 2006, the choices offered to him contained most of the programming in his IEP, except for cooking and mainstream art. [RD 28 ¶¶61, HD 50] He was included on field trips, participated in the Special Olympics, and delivered announcements every day. [RD 28 ¶¶61] Although the Student choose functional math activities in time, money, or measuring nearly every day, his daily log sheets showed few instances in which he chose cooking, used appliances or the computer. [HD 54, RD 28 ¶¶61] During the fourth quarter

(approximately April 3 to June 12), the Student produced seventeen math assignments, sixteen written English assignments and many oral English assignments, often selecting Room 121 as a place to do academic work although it is not as private as the quiet room or Room 120A. [HD 23 ¶62, RD 28-29 ¶62]

18. Since the application of the behavioral plan, the Student has been able to remain free of major incidents at school and has voluntarily utilized quiet space in order to calm himself. [HD 24 ¶64, RD 43 ¶18] By the end of the school year, the Student made above-average progress in his paramount goal, behavior improvement, earning a score of 3. [RD 43 ¶18] While the IEP contemplated that some of the Student's other IEP goals might be neglected, the Magistrate Judge noted that it was remarkable the degree of progress the Student was able to make, given that the behavior plan allowed him to freely choose non-IEP activities like sitting in a beanbag, rather than IEP activities, without negative consequences. [RD 44 ¶19] He made progress on other IEP goals, such as English, math and on-the-job training. [RD 46 ¶22]

19. The Family accepted the District's offer to provide the Student with ten weeks of STRIVE summer camp, including tuition, transportation, and an adult aide, to compensate for the weeks that the Student was out of school due to the family's frustration. [HD 26-27 ¶73, RD 33, ¶73] STRIVE is not run by the District, but provides children with disabilities a summer camp experience, including considerable social interaction. [Testimony of J. Donlon] The Student went on field trips, participated in arts and crafts, and did some food preparation and shopping. [1-356-374] The District provided one-on-one support for the Student at the STRIVE program through Tracy

Welch, an educational technician at BEHS, and Holly Marston², who was hired by the District on a limited basis as an aide for the Student's STRIVE and ESY programs. [HD 26-27 ¶73, RD 33, ¶73] One of the conditions of the Student's attendance at STRIVE was that it not interfere with the Student's ESY program included in his IEP. [Testimony of J. Donlon]

20. On June 22, Mrs. Turner brought the Geren behavioral intervention plan to the STRIVE camp and asked Ms. Welch and Ms. Marston to implement it with some modifications. [RD 33 ¶74, HD 26 ¶74] Ms. Welch roughly implemented the behavior plan that afternoon. [RD 33 ¶74, HD 26 ¶74] The Mother did not want the behavioral plan implemented at STRIVE or during the Student's ESY program, and it was not used for the rest of the week of June 22 or the next week. [RD 33 ¶74, HD 26 ¶74, Testimony of Mother] When Ms. Donlon encouraged the Mother to allow the behavioral intervention plan to be employed at STRIVE, the Mother assured her that STRIVE was fun for the Student, who was allowed to opt out if he wanted, so no plan was needed. [RD 33 ¶74, HD 26 ¶74]

21. On June 29, 2006, the Student had a behavioral outburst in which he struck camp counselor Rebeckah Perry. [RD 34 ¶75, HD 27 ¶76] He approached Ms. Welch at the drawing table and asked for his glasses, which he then threw them while yelling a profanity. [RD 34 ¶75, HD 27 ¶76] The Student then mumbled further profanity and returned to the couch. Rebeckah Perry asked Ms. Welch if she could approach the Student, given that she had been able to calm him during his outburst a few days earlier. Ms. Welch agreed, and Ms. Perry approached the Student to ask if she could sit down.

² Ms. Marston was engaged to a member of the Student's family, and was hired by the District at the family's request.

The Student agreed. They began to talk and the Student asked Ms. Perry if he would be able to go to the mall, to which she replied that she did not think so but she was not sure. The Student then began to hit Ms. Perry in the ear and head with his hand, yelling that he wanted to go to the mall. He then pivoted and kicked her in her upper arm with his feet several times. [RD 34 ¶75, HD 27 ¶76] The Student then began to cry and removed his sock and shoe, biting his toe and yelling. He also stuck his fingers in his mouth and tried to gag himself. [RD 34 ¶75, HD 27 ¶76]

22. Mr. Geren found the June 29 assault by the Student to be functionally consistent with his prior aggressive behavior. [RD 35-36 ¶78, HD 29 ¶79] He believed that with modifications of the activities offered, his behavioral intervention plan could be used at STRIVE and it would probably have prevented the assault. [RD 35-36 ¶78, HD 29 ¶79]
23. To address the Family's concerns about the behavior plan, Ms. Donlon offered to invite a private consultant, Mark Steege, Ph.D., selected by the Mother, to provide input on this issue. [S-144] Ms. Donlon made it clear that she would need the Family to sign a release to allow her to provide information about the Student to Dr. Steege, and enclosed one in her July 19, 2006 letter. [S144, P-52] The Family did not return the release. [Testimony of J. Donlon, S-99] The meeting scheduled for July 27, 2006 with Mark Geren and Mark Steege was cancelled at the Mother's request.³ [P-35 ¶24, P-52, Testimony of Mother]
24. The Student's ESY program was scheduled to take place four days each week from July 10, 2006 to August 11, 2006 at Bonny Eagle Middle School. [P-34, Testimony of Mother, J. Donlon] The program implemented components from his IEP, including academics, physical therapy, OT and field trips. [Testimony of J. Donlon] The Student

³ The Mother told caseworker Jennifer Stanford that Ms. Turner was not invited to this meeting, and "I will not attend with her present." [1-45]

attended for one week. When the Mother learned that Ms. Turner was implementing the behavior plan, she removed the Student from his ESY program. [Testimony of Mother, S-143] The Family requested a Complaint Investigation to contest the District's implementation of the behavior plan during the Student's ESY program. The Complaint Investigator found no violation.⁴ [P-40]

25. The Student returned to STRIVE camp from August 14, 2006 through August 30, 2006, although his attendance during that period was intermittent. [Testimony of Mother, J. Donlon] The Mother would only send the Student when Holly Marston was there. [Testimony of Mother] At STRIVE, the Student played sports, went on field trips, played games, and did art projects. [I-356-374]

26. On August 17, 2006, Hearing Officer Rebekah Smith rendered a decision in *Parents v.*

MSAD #6, case number 06.024AH, in which she reached the following conclusions:

1. I hold that MSAD #6 violated the IDEA and Maine special education law by failing to educate Student in the least restrictive environment from February 1 until February 21, {2006} thus denying him FAPE during that period.

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

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

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

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

⁴ The Complaint Investigator concluded that the behavior plan was part of the Student's IEP and was used to enable him to learn. If the PET believed it should not have been used during the ESY program, it would have determined this. [P-41]

As a remedy, the Hearing Officer ordered the District to provide the Student with the balance of ten weeks at the STRIVE summer camp, including tuition, transportation, and adult aides, and to reconvene the Student's PET to consider the recommended modifications to his January 2006 IEP. The Family appealed this decision to Federal District Court.

26. Around that time, the Mother requested a PET meeting to discuss an out-of-district placement for the Student. [S-135] The Mother continued to oppose the Geren behavior plan and any placement with Ms. Turner. [Testimony of Mother] Although the District scheduled a PET meeting for September 12, 2006 to discuss how to implement the Hearing Officer's order, the Mother wanted assurances that the District would support an out-of-district placement before committing to attend the meeting. [Testimony of Mother, S-123] Ms. Donlon agreed to put the item on the agenda, and also honored the Mother's request that Ms. Turner not be present at the meeting. [S-122, S-114, P-37 ¶36] Ms. Donlon also contacted the Student's caseworker, Jennifer Stanford, for assistance in getting the Student back in school. [S-134] Ms. Stanford thought the District was doing all it could. [S-134] She added that the Student needed a "really strong behavior plan," and acknowledged that even with this, the Student could still have outbursts. [S-134] Ms. Stanford said, "It's just so hard because now there appears to be a great deal of parent emotion wrapped up into all of this as you know, and it seems to be all directed at the classroom teacher . . ." ⁵ [S-134] She encouraged the Mother to consider an appropriate program in Ms. Turner's classroom, and to attempt to mend the situation with Ms.

⁵ On several occasions in August and September of 2006, the Mother told Jennifer Stanford that she did not want the Student going to BEHS with Ms. Turner as his teacher. [1-48, 1-50]

Turner, because Ms. Stanwood was very concerned about the Student not receiving the services he needed if he did not attend school. [1-52]

27. At the September 12, 2006 PET meeting, the team discussed the behavior plan. In response to the Mother's concerns that the Student would be isolated under the plan, Mr. Geren explained that during the spring, the Student began selecting to be less isolated, and the plan would allow him to continue to be increasingly less isolated as he selected to spend more time in the classroom with his peers. [S-114-115] After discussing placement options, the PET determined that the Student's needs could best be met in Ms. Turner's TLS classroom. [S-115] The Mother said she would not allow the Student back at BEHS if he were in Ms. Turner's class, and walked out of the meeting. [S-115, Testimony of Mother] The Family chose not to send the Student to BEHS for the 2006-07 school year, and he did not attend school at all that year. [RD 37 ¶81, S-135]
28. On November 20, 2006, Ms. Donlon wrote to the mother telling her that the District "would be happy to have its behavioral consultant" assess the student's readiness for participation in the Portland Arts and Technology High School (PATHS) program, and offered to convene a PET meeting. [S-99] The District's behavioral consultant, Dr. Lennox, had expertise in the area of Autism. [Testimony of J. Donlon] She also offered to reconvene the PET at any time to discuss effectively transitioning the Student back to school. [S-99]
29. The District scheduled an IEP team meeting on January 3, 2007 for the Student's annual review and to discuss steps to transition him back to school. [S-97-98] Although the District invited Mark Steege to the meeting at the Mother's request, he could not attend. [Testimony of J. Donlon] The meeting was a long and difficult one. [Testimony of J.

Donlon] Although most of the team members tried to gear the discussion towards possible changes to the Student's goals and objectives, the Mother wanted a different placement. [Testimony of J. Donlon, S-76] She would not consider any placement in which Ms. Turner would be the Student's teacher. [Testimony of J. Donlon, S-71-75, S-78, S-80] The Mother wanted the Student in Mr. Swick's class, but the students in that class had considerably higher academic abilities than the Student, and the Team did not consider this an appropriate placement. [Testimony of J. Donlon] The team discussed providing the Student with OT and speech services, and the Mother asked whether he could participate in the PATHS program. [Testimony of J. Donlon, S-71] Ms. Turner said that attendance at PATHS was possible. [S-71] The team developed an IEP at the meeting, and Ms. Donlon sent a copy to the Mother, but did not hear back from her about it. [Testimony of J. Donlon] The IEP was very similar to the 2006-2007 IEP, although the behavioral goal was changed to be that the Student would be free of aggression and environmental disruption for two consecutive months by June 8, 2007. [Testimony of J. Donlon, S-84-95]

30. Following the IEP meeting, the Mother sent several E-mails to Superintendent of Schools Suzanne Lukas complaining about Ms. Turner and Ms. Donlon, and stating that she would be enrolling the Student in regular education. [S-57-62] The Superintendent encouraged the Mother to work out an acceptable placement for the Student and return him to school. [S-59, S-62-63] On January 5, 2007, Ms. Donlon responded to these letters, offering to schedule a PET meeting to consider the Mother's request to terminate special education services and discuss further evaluations for the Student. [Testimony of J. Donlon, S-55-56] The Mother did not respond. [Testimony of J. Donlon]

31. On March 21, 2007 and May 9, 2007, Ms. Donlon sent the Mother copies of the STRIVE camp schedule, offering to enroll the Student and provide him with the remedy ordered by the Hearing Officer, 32 days of STRIVE, plus three additional days to make seven complete weeks. [S-43-44, S-47-48] Ms Donlon asked the Mother to notify her in writing of which sessions the Student would attend so she could register him and arrange for ed tech coverage and transportation, which the District would provide. [S-43, 47] The Family did not respond to either of these letters. [Testimony of J. Donlon]
32. In June 2007, Momentum began providing services to the Student. [Testimony of R. Lausier] Momentum is a social service agency providing support services for disabled young adults. [Testimony of R. Lausier, V. Pratt] MaineCare pays for the Student's participation, and a Department of Health and Human Services (DHHS) caseworker decides how many hours the Student needs. [Testimony of R. Lausier] He currently attends 20 hours per week. Although the Student learns computer skills and has physical exercise, his providers are not trained as teachers, and do not provide instruction in reading or math. [Testimony of R. Lausier] The Student may be read to, or play games involving math skills. [Testimony of K. Tibbetts] He has a set of goals, and each day, he may freely choose on which goals he will work, and can refuse any activities. [Testimony of R. Lausier, V. Pratt] He is offered the opportunity to play various sports, cook, shop, socialize with peers, and go out into the community to volunteer or engage in other activities. [Testimony of R. Lausier, V. Pratt] Rhonda Lausier, a program administrator at Momentum, explained that these goals are structured to prepare the Student for adulthood and independence, and believes the goals cover all of the Student's needs in that respect. [Testimony of R. Lausier] Ms. Lausier has observed that the Student has gained social

and communication skills in the Momentum program. [Testimony of R. Lausier] One of the Student's caregivers, Kimberly Tibbetts, noticed that the Student's language skills improved over the months she worked with him. [Testimony of K. Tibbetts] The Student has had a few behavioral incidents while involved in Momentum activities. [Testimony of R. Lausier, K. Tibbetts, 1-80-83, 1-76-79]

33. Although Momentum offers vocational and job training, the Mother did not want these services, as she did not believe the Student was ready yet. [Testimony of Mother, R. Lausier, M. McCahill]

34. The Student also receives in-home support and other services through CASA, Inc., for about 20 hours each week. Holly Marston provided services to the Student through CASA, Inc. [Testimony of Mother] These services are also provided at no cost to the family. [Testimony of Mother]

35. On January 16, 2008, the IEP team met for the annual review of the Student's educational program. [S-41] The Family did not personally attend the meeting, but attorney Diane Smith attended on their behalf. [S-15] There was no new information on the Student's present level of performance, as he had not attended school for over a year. [S-19] The IEP team drafted an IEP continuing the Student's placement in the TLS classroom, with speech, adaptive physical education, ESY, and an added OT consult of 15 minutes per week for sensory goals, and direct OT of 30 minutes per week. [S-14, S-16-39] The Family was only interested in having the Student attend PATHS, so the team discussed having a behavioral consultant assess the Student's readiness to attend this program. [S-14, S-17, Testimony of J. Donlon] The team also discussed the possibility of

modifying the Student's behavior plan after Dr. Gretchen Jefferson of Woodfords had the opportunity to observe the Student. [Testimony of J. Donlon]

36. On November 28, 2007, U.S. Magistrate Judge David M. Cohen issued Recommended Findings of Fact and Conclusions of Law in the Family' appeal. Judge D. Brock Hornby adopted the Magistrate's recommended decision on March 17, 2008. His conclusions are set forth in the Discussion section of this decision below.

IV. POSITIONS OF THE PARTIES

Parent's Position: As the Federal Court concluded, the Student is entitled to an award of compensatory education beyond the ten weeks of STRIVE camp ordered by the Hearing Officer for the stay-put violation that occurred from February 1, 2006 to April 10, 2006⁶. He should receive ten weeks of behavioral support services and job coaching to place him in the same position he would be in, had he received an appropriate educational program.

Additionally, the Student's stay-put rights were violated from April 11, 2006 through March 17, 2008 because the District continued to offer the Student the identical Geren continuous choice plan to which the Parents objected as inappropriate, and refused to work cooperatively with the Parents during that period. As the IDEA's stay-put provision requires the student to remain in the current educational placement during the pendency of any IDEA administrative or judicial proceeding, the Hearing Officer should conclude that the District's stay-put violation continued until the conclusion of the District Court's proceedings on March 17, 2008.

The Student has made no progress on his IEP goals, and is unprepared for any sort of employment or independent living. The family seeks compensatory services to allow him to

⁶ The parties have referred to this time period as the Third Quarter, and I will refer to it as such.

reach those goals, including speech therapy, OT consultation services, a behavioral evaluation and plan that would provide the Student with coping skills and strategies, a behavioral aide, job coaching and transportation. He should receive eight weeks of job coaching and behavior support for the remainder of the 2005-2006 school year after April 11, 2006. Thereafter, he is entitled to sixty-seven weeks of speech therapy, OT consultation, job coaching, and behavioral services to compensate for the weeks he missed at school.

When the student is an adult, the courts and hearing officers have required that the compensatory education services be provided in an adult setting. The Hearing Officer should award these services as the monetary equivalent so the Parents can procure the services in an adult setting in the Student's community.

District's Position: The Student received the vast majority of services from his 2005-2006 IEP during the Third Quarter and while at STRIVE. The family has failed to meet its burden of establishing that the Student was harmed in any way by whatever minimal discrepancies there may have been in program delivery. At most, the Hearing Officer should order minimal services to account for the twenty-two days during which the family refused to send the Student to school during the Third Quarter, and which were not compensated for by the District's STRIVE offer. The District's outstanding offer to provide the Student with all of the services from his 2005-2006 IEP at BEHS for a full quarter beyond his eligibility for special education is generous and reasonable to address any compensatory education obligation from the District's stay-put violations.

There is no evidence of educational harm to the Student during the Fourth Quarter (April 11, 2006 to the end of the school year) caused by the District's failure to implement the 2005-

2006 IEP. The Hearing Officer should therefore order no additional compensatory education for that period, particularly as it is undisputed that the Student received FAPE during this period.

For the period from the summer of 2006 through March 17, 2008, the dispute exists only because the Mother has refused to allow the Student to return to any program involving Ms. Turner, even though the Student has had a positive relationship with Ms. Turner. The Hearing Officer and Court determined that this program would provide the Student with FAPE, and that the Student did not require either an out-of-district placement or another teacher. Given that compensatory education is an equitable remedy, the Hearing Officer should reject the Family's claim for the period from summer of 2006 until March 2008, during which the Family refused the District's reasonable programming offers.

V. DISCUSSION AND CONCLUSIONS

The Federal Court opinion in this case, which is binding on remand, holds that the standard for what constitutes a free appropriate public education (FAPE) in *Board of Education v. Rowley*, 458 U.S. 176 (1982) remains applicable today. Although the Family argued throughout its Memorandum about the inadequacy of the 2006-07 IEP, both the Court and the Hearing Officer concluded that this IEP, as amended in April 2006, conferred the Student with FAPE as implemented in the Fourth Quarter of the 2005-06 school year, and was reasonably calculated to confer FAPE for the 2006-07 school year. In making this determination, the Court noted that the Hearing Officer "supportably rejected the Family's argument that the sour relationship between Ms. Turner and the family undermined the ability of the District to provide the Student with a FAPE commencing in the fall of 2006." [RD 49] Nonetheless, the Court also held that the District violated the Student's stay-put rights by implementing the amended 2006-07 IEP without the approval of his parents after the Family requested due process. Even though

the Court noted that implementation of the Geren plan did not effectuate changes quite as sweeping as the Family claimed, it concluded that the program offered to the Student after April 10, 2006 differed materially from that offered in the last agreed-upon IEP, and the Hearing Officer erred in deeming the Student's program after April 10 to be substantially similar to the last agreed-upon placement. [RD 51-53] The Court also concluded that the compensatory education award was inadequate, as the STRIVE program did not compensate for the full scope of harm caused by the stay-put violation. [RD 56] Because it was unclear from the record the extent to which the programming shift harmed the Student educationally or the manner in which such harm might be remedied, the Court remanded the case for a determination by the Hearing Officer on this issue. [RD 54] The conclusions of the Hearing Officer not reversed on appeal and the decision of the Court are final and binding. They must be followed in all subsequent proceedings in the same case. *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007), *see also United States v. Vigneau*, 337 F.3d 62 (1st Cir. 2003) The appropriate remedy for the stay-put violation and the duration of the stay-put violation are the only issues to be decided in this hearing.

A. Third Quarter

As noted above, during the Third Quarter, the Student was denied FAPE, and the change in his placement violated the IDEA's stay-put provision. The Hearing Officer and the Court set forth the deficiencies in the Student's program during that period. He was not educated in the least restrictive environment (LRE) while either in the red portable classroom or Room 120A, and his interaction with his peers, both mainstream and not, was very limited. He also did not work on many of his life skills during that time, did not participate in mainstream art, and missed three field trips and a swimming program. [RD 23 ¶50]

The purpose of compensatory education is “to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516, 518 (D.C. Cir. 2005). The Student’s stay-put IEP called for direct instruction with the special education teacher for three daily blocks of eighty- four minutes as well as assistance from an educational technician for two daily blocks, one hour of speech therapy and an occupational therapy consultation for fifteen minutes each week. [HD 47] The Student’s goals included developing basic computer skills; learning to tell time, count money, and measure; improving his independent living skills in the areas of cooking and appliance use; improving his comprehension and writing skills to demonstrate greater independence; and improving his language competence. [HD 47] The Student completed almost as many reading and math assignments as he would have under the stay-put IEP. After the Student returned to school on March 8, he completed written math and English assignments and continued to receive OT and speech therapy.

The Student’s attendance at STRIVE camp compensated for the lack of interaction with peers, allowed him to go on field trips, do art projects and work on some cooking. [Fact #18] Because, during the Third Quarter, he received somewhat less instruction in math and reading, computer skills and life skills, an appropriate compensatory education remedy would provide the Student with tutoring in the areas to make up for that difference. Based upon the evidence, I conclude that fourteen hours of direct tutoring would sufficiently compensate the Student for the direct instruction he missed. Because he did not complete the STRIVE program, I order the District to provide him with an additional seven weeks at STRIVE, if that program is still appropriate for him, or an equivalent program.

B. Fourth Quarter:

As discussed in Fact #17 above, the Student produced about one-half of his usual written English and math assignment than he did in previous quarters, although he chose math almost daily. [Fact #17, RD 52, ¶35] He began choosing to spend increasing periods of time in the TLS classroom, and had increased interaction with his special education peers. [HD 23 ¶62, RD 29 ¶¶61 & 62, Fact #17] As quoted above, the behavior plan did not present such a vast change in the Student's program as the Parents claimed, and the Student continued to receive speech and OT, went on field trips, and delivered announcements. [RD 51 ¶33] The Hearing Officer and Court concluded that the Student continued to make academic progress during the fourth quarter of the school year. Specifically, he made above-average progress on his behavior goal, and the Court considered his progress on other IEP goals "remarkable," given the Student's freedom to choose non-IEP activities. [Fact #18] The Court, however, concluded that the Student received very little instruction in functional life skills, did no cooking or work with appliances and rarely used the computer. [RD 52 ¶36] A student does not have to progress in every area of IEP instruction in order to attain an educational benefit. *See, e.g., Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000) The Court and Hearing Officer both agreed that the Student was not deprived of FAPE during that period.

The Court emphasized that the Magistrate Judge concluded the District violated the Student's stay-put rights based upon the differences between the prior placement and the 2006-07 IEP. [MD 7, RD 49-55] "Specifically, a number of educational benefits he received under the previous placement were not provided by the Amended 2006-07 IEP." [MD 7, RD 52] To remedy that discrepancy, the Student should receive additional direct instruction in functional life skills, computers, math and English.

An award of compensatory education need not be an hour-for-hour replacement for lost time or opportunity; instead, a compensatory education award should be designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” *Parents of Student W. v. Puyallup Sch. Dist.* #3, 31 F.3d 1489, 1497 (9th Cir. 1994). An award of compensatory education should be fact-specific, depending on the child’s needs. *Reid*, 401 F.3d 516 at 518.

As the Magistrate noted, “the Record yields little insight into the extent to which that programming shift harmed him educationally or the manner in which such harm might be remedied.” [RD 54 ¶38] The evidence introduced at the hearing did not support a conclusion that the Student received anything beyond the harm of not receiving the same amount of instruction as under the 2005-06 IEP in a few discrete, albeit important, educational areas, while receiving increased benefits in other areas. The Family asks for eight weeks of job coaching and behavior support to place the Student in the position he would have been in, had BEHS not violated his stay-put rights during this quarter. I do not believe the record supports such a remedy. The Student made the most impressive progress toward his behavior goal during that time. Despite the Family’s feelings about the behavior plan, the evidence supports a conclusion that the plan was effective, and the Student made good progress in addressing his behavior issues. The Magistrate Judge said

When all is said and done, [the Student] was judged at the end of the school year to have made above-average progress in his paramount goal (behavioral improvement), as evidenced by his score of a 3. The Record amply bears out that the high mark was warranted. [The Student] exhibited only one instance of aggressive behavior – throwing his glasses – at BEHS once the plan was implemented. There was anecdotal evidence that he was beginning to learn to calm and prepare himself prior to exciting or stressful events such as field trips. When [the Mother] prevented [the Student’s] aides from implementing the behavioral plan at summer camp, a serious incident of aggression again occurred – one that Geren testified his behavioral plan might have averted. [RD 43-44 ¶18]

I find that 40 hours of instruction, the equivalent of approximately one hour per school day, in the areas listed above in which the Student's instruction was lacking compared to the 2005-06 IEP, would ensure that the Student was appropriately educated during that period. This also takes into account the fact that he received FAPE even without this instruction, made progress in his area of "paramount" need, and made progress in most areas of his stay-put IEP.

C. June 17, 2006 through March 17, 2008

The District asserts that I should reject the Family's claim for additional compensatory education during this period because the Family unreasonably and consistently refused the appropriate placement offered by the District. The Family requests compensatory education for sixty-seven weeks of school, during which time the Family elected to keep the Student out of school.

"Compensatory education is not an automatic entitlement but, rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA." *C.G. v. Five Town Community Sch. Dist.*, 513 F. 3d 279, 290 (1st Cir. 2008). The Magistrate Judge pointed out

While the stay-put provision *permits* an award through "the present" – that is, through the conclusion of the instant judicial proceedings, *see, e.g.*, 20 U.S.C. §1415(j), *Diaz-Fonseca*, 451 F.3d at 32 N. 23 (1st Cir. 2006)⁷ – it does not *compel* such an award. Compensatory education is an equitable remedy; accordingly, equitable considerations, including the conduct of the parties, bear upon the scope of relief to be awarded . . . Inasmuch as the Record is barren of any evidence concerning the Parents' decision to refrain from sending [the Student] to BEHS during the 2006-07 school year, this timing issue should form part of the compensatory-relief question to be determined by an MDOE hearing officer on remand.

RD 55, n. 35.

⁷ *Diaz-Fonseca v. Puerto Rico*, 451 F. 3d 13 (1st Cir. 2006).

As discussed above, the conclusions of both the Hearing Officer and Court that the 2006-07 IEP provides the Student with FAPE, that the Geren behavior plan is suitable and effective, and that Ms. Turner's TLS classroom is an appropriate placement are now beyond dispute. The District continued to offer the Student the 2006-07 IEP, with some minor revisions and amendments approved by the IEP team, during the Student's ESY program in the summer of 2006, and for the 2006-2007 and 2007-2008 school years. The Family consistently rejected this program, chiefly because the Mother refused to consider any placement whatsoever in which Carla Turner was the teacher. Despite the Mother's testimony to the contrary at the remand hearing, I believe the entire record of this proceeding makes it eminently clear that the crucial factor for rejecting the 2006-07 IEP was that Ms. Turner would be the Student's classroom teacher. For this reason, it is reasonable to conclude that the Mother would have kept the Student out of school, had the District reintroduced the stay-put IEP, because Ms. Turner would have continued to be the Student's teacher. Thus, while it is difficult to determine precisely when the stay-put violation ended, it most likely ended when the Mother declared that she would not allow the Student back at BEHS if he were in Ms. Turner's class, and walked out of the September 12, 2006 IEP team meeting.

While it is understandable that the Mother did not want the Student placed with a teacher she did not like, the sour relationship between Ms. Turner and the Mother did not affect the Student's relationship with Ms. Turner, nor did it undermine the ability of the District to provide the Student with FAPE in her classroom. [RD 49] "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). Furthermore, the law is well settled that school districts have the sole discretion to assign staff to a student's educational

program, and that a hearing officer does not have authority to order the school to remove particular personnel. *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp.2d 880 (D. Minn. 2003); *Freeport Sch. Dist. #145*, 34 LRP 189 (Ill. SEA 2000) (noting that “the selection or retention of an aide to assist a student with disabilities is an administrative function and not subject to review under the IDEA” unless the selection deprives a student of FAPE). At BEHS, Ms. Turner’s classroom was the only appropriate placement for the Student. The District was not unreasonable in refusing the Mother’s demands for an outside placement, which would not meet the IDEA’s LRE requirement, or an inappropriate one⁸ because of the Mother’s hostility towards the teacher.

The Mother also disagreed with the Geren behavior plan. At the September 12, 2006 PET meeting, in response to the Mother’s concerns that the Student would be isolated under the plan, Mr. Geren explained that during the spring, the Student began selecting to be less isolated, and the plan would allow him to continue to be increasingly less isolated as he selected to spend more time in the classroom with his peers. [Fact #26] Additionally, over time, the Student would return to his full academic schedule. [Fact #13] Despite a Hearing Officer decision (and ultimately a Court decision) that the behavior plan was appropriate, the District made several attempts to address the Family’s concerns about it, offering different behavior consultants, including those of the Family’s choosing. The Family did not return the release needed to allow behavioral consultant Mark Steege to review the Student’s behavioral needs, and did not take the District up on its offers for other behavioral consultants.

The IDEA requires the District to provide Student with a free appropriate public education. 20

U.S.C. § 1412(a)(1)(A); *MSER* §§ 1.3 & 11.1. This does not equate to a perfect program, or one that is precisely what a parent would choose for his or her child. The District

⁸ Although it is unknown whether PATHS could provide an appropriate program for the Student, the District was willing to consider having a behavioral consultant determine whether the Student was ready for the program, but the Mother did not follow up with this. [Testimony of J. Donlon, Facts # 28, 29, 35]

offered the Student a program that would provide him with FAPE. It made numerous efforts to return the Student to school, and was willing to consider anything it could offer that would be appropriate for the Student. Because the District could offer the Student FAPE, it was not required to provide an out-of-district placement, nor would such a placement be the least restrictive.

The District argues that the Family has the burden of proving that the Student suffered educational harm,⁹ and that they have failed to meet that burden. The only evidence of educational harm is the assumption that the Student suffered educational losses because he did not receive services the IEP team determined were required to provide the Student with FAPE. The Family's own witnesses, however, testified that the Student was receiving benefits from the services he has been receiving through Momentum and CASA, Inc. The goals at Momentum were structured to prepare the Student for adulthood and independence, and those goals covered all of the Student's needs in that respect. [Fact #32] The Student's providers at Momentum¹⁰ observed that he has gained various skills in this program, including social and communication skills. [Fact #32] Momentum also offered vocational and job training, but the Mother elected not to access these services. [Fact #33] On the other hand, the Student has not received instruction in math or English, nor has he received OT or speech therapy. Assuming that the Student continued to require those services through March of 2008 to prepare him for adulthood and independence, any harm he may have suffered was the direct result of the Family's refusal to allow him to access these services, which have continuously been offered by the District. While the Hearing Officer concluded that removing the Student from school in the spring of 2006 did not obstruct the District's ability to meet its obligations under the IDEA [HD 61], the same

⁹ *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

¹⁰ It is interesting to note that Momentum offered the Student a free choice of activities, and he could refuse any activity, similar to the Student's behavior plan in his IEP.

cannot be said for the Parents' decision to keep the Student out of school following the Hearing Officer's determination that the District's program was appropriate, even though the Parents were challenging that decision. At this point, the District was guilty of neither nonfeasance nor malfeasance in connection with its obligations under the IDEA. *See C.G. v. Five Town Community Sch. Dist.*, 513 F. 3d 279, 290 (1st Cir. 2008). In light of this, and the Family's steadfast refusal to consider any educational placement involving Carla Turner, even though such placement would have provided the Student with FAPE, any award of compensatory education would inappropriately reward the Family's unreasonable stubbornness, while penalizing the District for appropriately exercising its rights to make staffing decisions under the IDEA. Therefore, no compensatory education is awarded for the period beginning on June 17, 2006.

VI. ORDER

After consideration of the evidence presented during this due process hearing, the Hearing Officer orders as follows:

1. Because the District violated the Student's right to have his current educational placement maintained under 20 U.S.C. § 1415(j) and *MSER* § 12.12(A) during the so-called Third Quarter of the 2005-06 school year, the District is ordered to compensate the Student by providing him with seven weeks at STRIVE camp at the District's expense, including tuition, transportation, and adult aides, if that program is still appropriate for the Student. If it is not appropriate for the Student's age and needs, the District shall provide an equivalent program. Additionally, to compensate for the lack of instruction in certain academic areas during the stay-put violation, the District shall provide fourteen hours of direct tutoring in reading, math, computer skills and independent living. The

District may either provide these services directly, or allow the Family to arrange for them. If the Family arranges for these services, the bills shall be sent directly to the District for payment. If these services are obtained outside of York County, Maine, the District shall be liable for a maximum of the average hourly rate paid to special education tutors in York County, multiplied by fourteen.

2. To remedy the District's stay-put violation for the so-called Fourth Quarter of the 2005-2006 school year, the District shall provide 40 hours of tutorial instruction to the Student in functional life skills, computer skills, English and math. The District may either provide these services directly, or allow the Family to arrange these services. If the Family arranges these services, the bills shall be sent directly to the District for payment. If these services are obtained outside of York County, Maine, the District shall be liable for a maximum of the average hourly rate paid to special education tutors in York County, multiplied by forty.

3. No compensatory education is appropriate or awarded for the period beginning on June 17, 2006 and ending on March 18, 2008.

SHARI B. BRODER. ESQ.
Hearing Officer