

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

September 15, 2010

10.096H - Sanford School Department v. Parents

REPRESENTING THE SCHOOL: Eric Herlan, Esq.; Sarah Stewart Hellstedt, Esq.

REPRESENTING THE FAMILY: Robert Powers, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on July 8, 2010, at the offices of the Department of Health and Human Services in Biddeford; on July 14, 2010, at the offices of the Department of Health and Human Services in Sanford; and on August 4, 2010, at the offices of the Department of Health and Human Services in Biddeford. Present for the entire proceeding were counsel for the school department; counsel for the family; the student's mother; and Stacy Bissell, Director of Special Education, Grades 7 to 12, Sanford School Department. Also present for part of the proceeding was the student's father.

Testifying at the hearing under oath were:

Stacy Bissell, Director of Special Education, Grades 7 to 12, Sanford School Department
Fran Bodkin, M.A., CCC-SLP, Speech Pathologist
Tammy Delaney, M.Ed., Special Education Consultant
Joann Frankhouser, Psy.D., Psychologist
Robert Kemper, Ph.D., CCC-SLP, Clinical Psycholinguist
Parent
Tim Rogers, Ph.D., Psychologist

I. PROCEDURAL BACKGROUND

The school department filed a request for a hearing on May 17, 2010. On June 4, 2010, the school department's uncontested continuance requested was granted. A prehearing conference was held on June 30, 2010. The school submitted 178 documents and 2 DVD

recordings of IEP Team meetings. The parents submitted 62 documents and 6 tape recordings of IEP Team meetings. On July 7, 2010, the parents' contested continuance request to postpone the first day of hearing, scheduled for the following day, was denied.

At the close of testimony, the parties jointly requested that the record remain open until August 30, 2010, for the submission of written closing briefs. On August 29, 2010, the school department's uncontested request for an additional day to submit closing briefs was granted. The record closed with the hearing officer's receipt of both parties' briefs on August 31, 2010.

II. ISSUES

The issues identified in the prehearing conference order are:

1. Whether the school department committed procedural violations such that it failed to provide the student with a free, appropriate public education in developing his June 2008 Individualized Education Program ("IEP") and his October 2009 IEP.
2. Whether the IEP and placement proposals that the school department offered the student for the 2008-2009 and 2009-2010 school years were reasonably calculated to provide the student with educational benefits in the least restrictive environment.
3. In the alternative, whether the family's decision to home school the student for the 2008-2009 and 2009-2010 school years terminated the school department's obligation to provide the student with a free, appropriate public education during those school years.
4. If the family is due a remedy, what remedy is appropriate and should the remedy be modified for equitable reasons?

III. FINDINGS OF FACT

1. The student is xx years old. He has been identified as a student with multiple disabilities, eligible for special education services. (S. 4.) He lives at home in Sanford with his parents and his younger brother. (Testimony of Parent.)
2. The student attended Sanford public schools through his xx grade school year, 2005-2006, at Sanford High School. (Testimony of Bissell; Parent.) The student's parents perceived the student's xx grade year to be unsuccessful, noting that he experienced increased anxiety during the year. (Testimony of Parent.) School staff believed that the

student's xx grade year was successful, reporting that he made progress with his goals and objectives, enjoyed the social milieu, and was excited to be with his peers in the special education and mainstream settings. (Testimony of Delaney.) After a meeting on August 16, 2006, at which the student's mother concluded that the IEP offered to the student for his xx grade year would be inappropriate and Sanford High School was not an appropriate placement for him, the student's mother withdrew the student from school.

(S. 188; Testimony of Parent.)

3. In March 2008, the school department and the parents had their first contact since August 2006 when the school district contacted the family to set up an IEP Team meeting. (Testimony of Parent.) In April 2008, the parents retained legal counsel, who has remained involved since that time. (S. 205.)
4. In the spring of 2008, the school department believed, based on information the student's mother had provided to the student's case manager, that the student had been home schooled since the start of the 2006-2007 school year. (Testimony of Bissell.)
5. Prior to the June 2, 2008 IEP Team meeting, the school department provided the parents with a draft IEP, with the recommendation that it be implemented in the STARS program at Sanford High School as a 30-day diagnostic placement. (S. 203.) Because the school district had not worked with the student for almost two years, it proposed a diagnostic placement to better assess his needs and develop an IEP to meet those needs. (S. 203.) Stacey Bissell, the special education director for grades 7 to 12,¹ believed that the IEP Team should create global goals to be undertaken during the 30-day evaluation; she believed this was a reasonable and ethical approach to developing the student's IEP given the two-year gap in services. (Testimony of Bissell.)

¹ Although Ms. Bissell had been a special education director for Sanford High School for several years, Ms. Bissell had not been a part of the student's IEP Team prior to June 2008 because Betsy St. Cyr, also a director of special education for the district, had fulfilled that role. (Testimony of Bissell.)

6. Ms. Bissell, who was new to the student's IEP Team, invited Michael Opuda, Ph.D., who had been involved with the student's IEP Team before, to facilitate the June 2 meeting, so that she could take notes, participate fully in the Team meeting, and make a connection with the parents. (Testimony of Bissell.) Ms. Bissell perceived the meeting to be for the purpose of hearing the parents' concerns, getting an update on the student's needs and progress, and developing the student's IEP. (Testimony of Bissell.) Besides the parents, Ms. Bissell, and Dr. Opuda, Jan Haley-Kirkbride, a Sanford High School special education teacher, and Marcia Kapinos, a Sanford High School guidance counselor, attended. (S. 188.) Dr. Opuda introduced himself as a special education consultant with Drummond Woodsum, the school's law firm, who had been asked by the school department to run the meeting. (Recording of 6/2/2008 Meeting.) The student's mother was angry that Dr. Opuda was going to be facilitating the meeting, feeling that he was not a neutral party and that he would try to move the Team through the agenda generated by the school, regardless of the parents' desire to discuss issues not on the agenda. (Testimony of Parent.)
7. Dr. Opuda began the meeting by outlining a proposed agenda, which would have started with the parents stating their concern, then updating the Team on the student's progress since August 2006. (Recording of 6/2/2008 Meeting.) Dr. Opuda proposed that the Team then discuss whether any evaluations were needed, followed by a review of the draft IEP that had been proposed for the 2006-2007 school year, and discussion of transition planning, including a referral to vocational rehabilitation and guardianship, since the student was then xx. (Recording of 6/2/2008 Meeting.) The student's mother rejected Dr. Opuda's agenda, indicating that if the student's placement was going to remain at Sanford High School, as indicated in the draft IEP forwarded to the family prior

- to the meeting, there was no possibility of agreement. (S. 188; Recording of 6/2/2008 Meeting.)
8. As to the school district's request to update the evaluations of the student, the student's mother indicated that she did not believe any further evaluations were necessary because the student had been evaluated by Dr. Kemper and Dr. Frankhouser two years ago and both recommended residential placements; the student's father indicated that the student had lost ground in his final year at Sanford High School. (Recording of 6/2/2008 Meeting.) Ms. Bissell informed the parents that there were new programs at Sanford High School since the student had been removed from school, including the STARS program. (Recording of 6/2/2008 Meeting.)
 9. Ms. Bissell asked the Team to generate a list of the student's current needs and stated that the school was obligated to obtain information about the student's level of present performance in academic and cognitive areas. (S. 188; Recording of 6/2/2008 Meeting.) Ms. Bissell explained that from that definition of the student's needs, his goals and objectives would be determined, and finally his placement would be considered. (Recording of 6/2/2008 Meeting.) The student's mother disputed that the purpose of the meeting should be to develop an IEP; she indicated that she would prefer that the school department put forward an already developed IEP. (Recording of 6/2/2008 Meeting.) The parents refused to provide information about activities, behaviors, or services the student had received over the two years he had been out of school and indicated that his needs had not changed since he left Sanford High School in June 2006. (S. 188; Recording of 6/2/2008 Meeting.)
 10. The student's mother indicated that only a language-based program would be appropriate for the student. (Recording of 6/2/2008 Meeting.) Dr. Opuda responded that the school department could not propose an IEP, including placement, until they had updated

information about the student. He suggested that information provided by the Center for Communication, which had provided speech-language services to the student for several years, including during his time as a home schooled student, would help them obtain such information. (Recording of 6/2/2008 Meeting.) Ms. Bissell indicated that other areas of likely evaluation for the student would include: adaptive behavioral assessment, academic achievement, anxiety assessment, prevocational assessment, and possibly cognitive testing. (S. 189; Recording of 6/2/2008 Meeting.) The student's mother indicated that she did not believe there was any program at Sanford High School that could meet the student's needs. (Recording of 6/2/2008 Meeting.)

11. The student's mother reiterated that the bottom line was placement; she felt the school department was putting up unnecessary roadblocks. The student's mother also felt the student's needs were clearly stated in the 2006 evaluations and said she would not go forward with the IEP Team meeting because there would be no agreement on placement. (Recording of 6/2/2008 Meeting.) Responding to the parents, Dr. Opuda invited the parents to discuss their view on an appropriate placement. (Recording of 6/2/2008 Meeting.) The parents expressed frustration that they were being asked to discuss placement again but briefly explained that they believed a residential placement for the student. (Recording of 6/2/2008 Meeting.)
12. The parents rejected the suggestion that the student be placed in a 30-day diagnostic placement in the STARS program at Sanford High School. (S. 189; Recording of 6/2/2008 Meeting.) The parents felt that the proposed diagnostic placement would not provide the school with sufficient information about the student's current needs; they simultaneously felt that the student's needs had not changed since he had been removed from school. (S. 183; Testimony of Parent.) The student's mother felt that Dr. Opuda dismissed her concerns, treated her unfairly, did not have any knowledge about the

- student, was there to represent the school department's interests, and put her on the defensive. (Testimony of Parent.) The parents were frustrated that their goal of discussing a residential placement for the student had not been met. (Testimony of Parent.) During the meeting, the student's father reminded the student's mother that they had come to the meeting for one purpose, which was not being met, although he declined to elaborate on what the one purpose was. (Recording of 6/2/08 Meeting.)
13. The parents subsequently signed a release for the Center for Communication to share information about the student with the school department but did not consent to any further evaluations. (S. 166; S. 167.)
 14. In July 2008, at the parents' request and expense, Dr. Robert Kemper, who had evaluated the student in 2002 and 2005, reevaluated the student. (S. 99-100.) Dr. Kemper, previously the director of the department of language, speech, and hearing at Children's Hospital, maintains a private practice conducting psycholinguistic evaluations to students suspected of having learning disabilities. (Testimony of Kemper.)
 15. Dr. Kemper administered a series of tests to the student. He found that the student's intelligibility of speech had improved dramatically since 2005. (S. 100.) Overall, however, Dr. Kemper found that the student had not made much progress since his prior testing in 2005. (Testimony of Kemper.) Dr. Kemper found that the student was functioning in the well below average range for his age in vocabulary knowledge, fundamental and higher order language processing and expression, and listening comprehension and oral expression skills. (S. 107-08.) Regarding social language skills, Dr. Kemper found that the student tended to misinterpret questions and as a result provide inappropriate information. (S. 108.) In reading and written expression, the student also functioned in the well below average range for his age. (S. 108-09.)

16. Dr. Kemper believed that the student's slow language processing speed hid the student's strengths. (Testimony of Kemper.) Dr. Kemper concluded that the student continued to present with an autistic disorder, which "coexists as a part of a pervasive and global language-based learning disability." (S. 107.) Dr. Kemper found that the student's language-based learning disability had been "especially debilitating, because it [had] affected his ability to process and express language effectively and efficiently across academic and social contexts." (S. 107.) Dr. Kemper concluded that the student's language-based learning disability was distinct from his autism and mental retardation. (Testimony of Kemper.) Dr. Kemper acknowledged that this conclusion was not based on any particular test results but instead was based upon his observations of the student in unstructured settings. (Testimony of Kemper.)
17. As in 2005, Dr. Kemper recommended that the student take part in a residential program specifically geared to students with language processing disorders, where language development was the overriding purpose of the program, language was being generalized and reinforced throughout the curriculum, and the environment was engineered to reinforce language learning throughout the day. (S. 109; S. 110; Testimony of Kemper.) Such a program would typically be co-taught by a speech-language pathologist and a teacher with a certificate in language-based learning disabilities. (Testimony of Kemper.) Dr. Kemper noted that the student's program did not have to be residential but that it should be language-based, citing a day program in New Hampshire that maintained a staff of four speech-language pathologists, which he noted was too far from the student's home to allow daily attendance. (Testimony of Kemper.) Dr. Kemper also made a series of specific recommendations regarding the student's receptive and expressive language functioning, processing and use of higher level linguistic information, reading, written language expression, and pragmatic language. (S. 111-20.)

18. Also in July 2008, at the parents' request and expense, Dr. Joann Frankhouser, who had evaluated the student in 2003 and 2005, reevaluated the student. (S. 140-49.) Dr. Frankhouser has had a private neuropsychology practice for 18 years in which she consults with schools and works with children with disabilities. (Testimony of Frankhouser.) Dr. Frankhouser concluded that the student had significant language-based weaknesses, particularly with regard to expressive language, and had been diagnosed with autism. (S. 144.) She found that the student had shown gains in his reasoning skills, some aspects of attention and executive functioning, and spelling and the application of phonics. (S. 144.) These gains in ability, however, had not translated into progress in academic or adaptive skill development. (S. 144.) Dr. Frankhouser found that the student continued to show a profile of significant neurocognitive difficulties reflecting problems with abstract reasoning, integration, and managing multiple dimensions in his mind, which impacted his ability to learn. (S. 144.) Dr. Frankhouser observed that the student's verbal skills tended to fall short, from which she concluded that he had an underlying problem processing verbal information. (Testimony of Frankhouser.) Dr. Frankhouser found that verbal processing was a core weakness for him. (Testimony of Frankhouser.) She concluded that although she would expect language difficulties in a student with autism, the student's difficulty with processing seemed worse than other students with autism. (Testimony of Frankhouser.)
19. Dr. Frankhouser recommended specialized instruction in core content areas of academics as well as functional life skills. (S. 145.) To meet these needs, Dr. Frankhouser recommended an educational program that took place in a milieu setting where the programming was comprehensive, language-based, and covered formal academic instruction as well as social, emotional, and adaptive needs, in order to prepare the student for adult living. (S. 145.) Dr. Frankhouser could not imagine a nonresidential

- placement that would be appropriate for the student. (Testimony of Frankhouser.) Dr. Frankhouser also provided a series of specific recommendations relative to the student's general program, classroom environment, and instruction. (S. 145-49.)
20. Dr. Kemper conducted an observation of the STARS program, specifically the STARS classroom, at Sanford High School on November 17, 2008. (S. 118.) Dr. Kemper found the programming to lack the specific elements of a language-based program, which made it inappropriate for the student in his opinion. (Testimony of Kemper.) He found that the teaching he observed was passive, relied excessively on worksheets, and would be inappropriate to meet the student's academic and social needs. (S. 120.)
21. Dr. Frankhouser conducted an observation of the STARS program at Sanford High School on November 18, 2008. (S. 122.) Dr. Frankhouser noted that although the program would provide the student with individualized instruction and the opportunity to work at his own pace, it would provide him with only a very limited peer group for addressing his social needs. (S. 123.) She opined that the student also needed direct skill instruction and reinforcement during after-school and community-based activities, which she believed would not occur in the STARS program. (S. 123.) She concluded that the STARS program would not offer the student the sort of comprehensive and integrated learning community, presented in a milieu setting, which she believed the student needed. (S. 123.) Dr. Frankhouser did not observe any special education or mainstream settings outside the STARS classroom. (Testimony of Frankhouser.) Her observation report was provided to the school department by the parents on February 5, 2009. (S. 98.)
22. The school department had staff conduct parallel observations, consistent with its usual practice, for the observations of Dr. Kemper and Dr. Frankhouser. (S. 126; S. 135-37; Testimony of Bissell.) Ms. Delaney, who co-observed with Dr. Kemper, noted that because Dr. Kemper was late, he had only 15 minutes to observe students in the STARS

- classroom; that several students were not there that day, which provided an inaccurate picture; and that she suggested that Dr. Kemper return and observe some of the other classrooms where the student would also spend time. (Testimony of Delaney.) Dr. Kemper disagreed that he only observed the classroom for 15 minutes. (Testimony of Kemper.) The student's mother felt that the school department's decision to have school staff conduct parallel observations was upsetting and indicative of a lack of trust between the family and the school department. (Testimony of Parent.)
23. In November 2008, the school district was provided the evaluations of Dr. Kemper and Dr. Frankhouser, although several pages of Dr. Kemper's evaluation were missing and were not provided until February 2009 due to an oversight by the parent's counsel. (S. 138; Testimony of Parent.) The parents requested an IEP Team meeting as soon as possible after the Team members had had an opportunity to review the two evaluations. (S. 131; S. 138.) The attorneys for the parents and the school had multiple contacts between November 2008 and January 2009. During that time, an IEP Team meeting was scheduled for February 13, 2009. (S. 127-34).
24. Prior to the February 13, 2009 meeting, the parents provided the school department with a statement of parental concerns. (S. 97.) The parents expressed hope that the student would utilize the final years of his educational programming to making progress in reaching his full potential, becoming self-sufficient, and functioning productively in society. (S. 97.) The parents requested that the Team develop an IEP that took into consideration his classification as a student with autism and his present level of academic achievement and functional performance and provided measurable annual goals, special education and related services, postsecondary goals and transition services, and an appropriate placement. (S. 97.) Finally, the parents requested that the IEP Team fully review the most recent evaluations and recommendations of Dr. Kemper and Dr.

Frankhouser regarding teaching the student socio-communicative skills by using a multi-sensory, language-intensive model; provide the student with specialized instruction to enable him to acquire academic, vocational, social, emotional, adaptive, and life skills; and utilize a comprehensive programming model that addressed both in-school and after-school aspects of the student's day. (S. 97.)

25. Although the February 5, 2009 IEP Team meeting was not audio recorded, the minutes indicate that the following individuals were present: the parents; Dr. Kemper; Dr. Frankhouser; Stephanie Boissonneault, STARS teacher; Fran Bodkin, speech language pathologist; Stacey Bissell; the parents' attorney; and the school department's attorney. (S. 93.) The parents felt that this was the most productive IEP Team meeting regarding the student they had ever attended. (Testimony of Parent.) Dr. Frankhouser and Dr. Kemper were offered the opportunity to review their evaluations as well as their observations. (S. 94.) Fran Bodkin, who had worked with the student for several years as a speech language pathologist at the Center for Communication, reported on the student's progress in his speech-language program. (S. 94; Testimony of Bodkin.) The parents reported on the student's home school programming and his behavior at home. (S. 95.) The Team discussed the statement of parental concerns, although the parents felt that there was insufficient discussion of their concerns. (S. 95; Testimony of Parent.) The parents were invited to share their opinions about the kind of placement the student required. (S. 96.) The school department proposed again the 30-day diagnostic placement in the STARS program at Sanford High School, a review of the evaluations of Drs. Kemper and Frankhouser by the school department's neuropsychologist, and completion of any additional assessments recommended by the neuropsychologist. (S. 96.) The student's mother expressed concern that the 30-day diagnostic placement would

- cause the student anxiety; Dr. Kemper agreed that a “fishbowl” placement where the student was being observed was not in his best interests. (S. 96.)
26. Dr. Kemper and Dr. Frankhouser were allowed to structure their presentations however they desired and were not given any time limits on their presentations. (Testimony of Kemper; Testimony of Frankhouser.) Dr. Frankhouser felt that she was able to discuss her evaluation thoroughly, that she could have discussed the recommendations, and that Team members were listening to her and considering her opinions. (Testimony of Frankhouser.)
27. The IEP Team determined that the school department would send consents for additional evaluations to the parents and Ms. Bissell would conduct an observation at the Riverside School, a residential program in Massachusetts in which the parents were interested. (S. 96.)
28. Following the meeting, Ms. Bissell forwarded the parents, through their attorney, a request for consent to an observation consisting of a 30-day placement in the STARS program, which the school department felt “would give us the best picture [of] his level of need and the ability of the providers in that program to service his needs.” (S. 90.) As an alternative, if the family was unwilling to consent to the 30-day diagnostic placement, the school department requested observation of the student by two Team members in three settings: at the Center for Communication during the provision of his speech services; in the home; and in a structured community setting. (S. 90.)
29. The parents responded, through counsel, that they were willing to place the student in the diagnostic placement but only for a ten-day period, which the parents felt would be sufficient time for observation since the evaluations of Dr. Kemper and Dr. Frankhouser were already available. (S. 86; Testimony of Parent.) The parents also believed that the school department had indicated at the Team meeting that a range of time would be

appropriate for the placement, from 10 days to 30 days, although this is not reflected in the meeting minutes and is disputed by the school department. (S. 93-96; Testimony of Parent; Testimony of Bissell.) Although the parents' counsel indicated that the parents would agree to a review of the student's prior evaluations by the school's neuropsychologist, the consent form that the parents returned to the school in late March withheld consent for that review. (S. 85.)

30. In February, Dr. Frankhouser visited Riverview School at the parents' request. (P. 70.)

Dr. Frankhouser concluded that the Riverview School would offer the student the sort of comprehensive and integrated learning community that she believed he needed, while she did not believe that the STARS program at Sanford High School could offer him such a program. (P. 71.)

31. On March 9, 2009, Ms. Bodkin provided a statement of the student's present level of

performance in speech-language skills. (P. 69; Testimony of Bodkin.) Ms. Bodkin found that the student required support in the generalization of language comprehension and processing, expressive language, decoding skills, and social pragmatic skills to settings outside of the clinical setting since the student was unable to spontaneously utilize them. (P. 69.) Ms. Bodkin found that the student had significant language deficits that accompanied his autism, which impacted his ability to understand language, interact socially, and solve problems. (Testimony of Bodkin.) Given his profile, Ms. Bodkin concluded that the student's educational programming should focus on vocational and independent living skills due to his age. (Testimony of Bodkin.) Ms. Bodkin did not perceive that the student's language processing difficulties were separate from his autism, but instead believed they were part of his autism, which also had cognitive impacts. (Testimony of Bodkin.)

32. In early April 2006, the school department indicated to the family that it did not believe that a 10-day placement would be of value. (S. 79.) Instead, the school department proposed that the IEP team meet to go forward with IEP development, albeit without the evaluative data the school department was seeking. (S. 79.)
33. On June 2, 2009, the school department provided the parents a proposed IEP prior to a resolution session held regarding a due process hearing request the family had filed, which was subsequently dismissed. (S. 2; Testimony of Bissell.) The June 2 resolution session functioned as an IEP Team meeting, resulting in the agreed-upon cancellation of an IEP team meeting scheduled for June 3. (S. 21; S. 75; Testimony of Bissell.) The IEP proposed by the school department in June called for specially designed instruction for three 78 minutes blocks per day, consultation with a special education consultant 5 hours per week, speech-language services, and pragmatic language instruction, all to be provided through placement in the STARS program. (S. 59-60.) The IEP proposed that additional data to further develop the student's IEP should be obtained through assessment in an educational environment. (S. 55.) As such, his academic performance and functional needs were to be assessed during the first 30 days of the placement. (S. 55.)
34. The parents rejected the proposed IEP. (S. 1.) The school department suggested that the student's IEP could be fully implemented at Sanford High School but that, in addition, transitional portions could be implemented through a combination of a program at the high school and partial day placement at a transitional work program. (S. 2.) The school department rejected the Riverview School as a placement on the grounds that it was not the least restrictive setting appropriate for the student, its location out of state removed the student from his home community, and it would not be sufficient to prepare the student for community involvement after high school. (S. 2.)

35. The parents subsequently consented to a series of evaluations for the student, including academic testing, intellectual testing, speech/language testing, a psychological evaluation, an interest and aptitude assessment, and an observation. (S. 1124-57.)
36. Ms. Bodkin provided a speech-language evaluation of the student in which she indicated that the student's autism spectrum disorder was accompanied by a language disorder that was characterized by difficulty in the areas of language comprehension and processing, expressive language, and social pragmatic language skills. (S. 1120.) She recommended speech-language services to address language comprehension, expressive language, auditory processing, and social pragmatic language skills. (S. 1121.)
37. Tim Rogers, Ph.D., licensed psychologist, conducted an evaluation of the student in July 2009. Dr. Rogers, previously the director of developmental pediatrics at Eastern Maine Medical Center, provides psychological and consultation services to 20 school districts in Maine. Eighty percent of Dr. Rogers' caseload consists of students with autism, which includes a language processing disorder; five percent of his caseload is comprised of students with language-based disorders who are not on the autism spectrum. (Testimony of Rogers.) After a delay in the return of a questionnaire submitted to the parents, Dr. Rogers issued his report in September 2009. (S. 1088-1104.) Dr. Rogers tested the student's comprehension (non-verbal) skills, cognitive (verbal) skills, academic functioning, and adaptive functioning. (Testimony of Rogers.) Based on his evaluation, Dr. Rogers recommended that the student be identified as a student with an autistic disorder as well as mild mental retardation. (S. 1102.) Dr. Rogers recommended that the student's programming utilize real world experiences because rote practice would not be functional for the student unless it had an application to his life. (S. 1102.) Dr. Rogers noted that continued efforts to address the student's language challenges, a part of his autism diagnosis, would also be necessary and should be done in "real world" contexts

such as group activities which were goal directed and focused on the acquisition of language and communication skills. (S. 1103.) Dr. Rogers found that the student was deficient in a variety of life skills and recommended that a comprehensive assessment of his life skills be undertaken. (S. 1103.) Dr. Rogers also recommended the development of the student's community skills, including job placements and community experiences. (S. 1103.)

38. Dr. Rogers reviewed the student's records, including Dr. Frankhouser's and Dr. Kemper's evaluations, and sought to use testing instruments that had not previously been administered to the student in order to create as comprehensive a view as possible. (Testimony of Rogers.) Dr. Rogers concluded that his test results were commensurate with those of Dr. Kemper and Dr. Frankhouser. (S. 1102; Testimony of Rogers.) Dr. Rogers opined that although a component of a diagnosis of autism is necessarily a speech-language communication disorder, he had hoped that the student would perform better on non-verbal assessments (the Leiter), which would indicate that his speech-language disorder caused his cognitive testing scores to be suppressed. (Testimony of Rogers.) Dr. Rogers concluded from the testing, which found that the student did not have other cognitive abilities in the normal range, that the student's cognitive impairment was global and that a language processing disorder was not the student's major impairment. (Testimony of Rogers.)
39. Dr. Rogers noted that students with language-based learning disorders usually score higher in tests of adaptive behaviors, other than communication, but the student did not do so here. (Testimony of Rogers.) In fact, Dr. Rogers noted, the student's language scores were nearly the reverse of what he would expect to see in a student with a language-based learning disability. (Testimony of Rogers.) Dr. Rogers concluded that based on his assessment of all the student's evaluations, including his own, he would not

- recommend programming that was based upon a language-based learning disability; instead, he would recommend programming that, although it incorporated speech-language services and support, focused on the student's dual diagnoses of autism and mental retardation. (Testimony of Rogers.) Dr. Rogers opined that the student's educational goals should be driven by the need to help him obtain as much independence as possible as an adult. (Testimony of Rogers.)
40. Although Dr. Kemper was not licensed to administer the Leiter, he frequently interpreted Leiter test scores, and he was critical of the results of the Leiter administered by Dr. Rogers to the student because even though the test was non-verbal, it required the student to verbally mediate the instructions in his head, which was difficult for the student. (Testimony of Kemper.) Dr. Frankhouser found that she was not surprised by the student's low scores on the Leiter because it included abstract geometric concepts, with which he would have struggled. (Testimony of Frankhouser.)
41. Another IEP Team meeting was held on September 25, 2009. (S. 1080.) Another draft IEP was distributed prior to the meeting by the school department. (S. 1066-79.) The draft incorporated more of the data from the evaluations of Dr. Kemper and Dr. Frankhouser within the section explaining recent evaluations, at the parents' request. (S. 1067-68.)
42. The September 25 meeting was facilitated by Dr. Opuda. (S. 1084.) Also present at the meeting were: the student's mother, Dr. Frankhouser, Dr. Kemper (by phone), Dr. Rogers; Ms. Bodkin; Ms. Delaney; Ms. Boissinault; and Ms. Bissell. (S. 1084.) At the start of the meeting, Ms. Bissell stated that the purpose of the meeting was to review the three evaluations that had been conducted over the summer and make appropriate changes to the IEP as a result of the evaluators' recommendations. (Recording of 9/25/10 Meeting.)

43. At that meeting, the IEP Team agreed to change the student's eligibility classification from autism to multiple disabilities, including autism, speech and language disorder, and mental retardation. (S. 1081.) Dr. Rogers indicated that he felt that the student's speech and language disorder was part of his autism, which required a speech and language deficit in order to qualify for the diagnosis. (Recording of 9/25/09 Meeting.) Dr. Kemper indicated that he felt that the student had a speech and language disorder that was separate from his communication impairment as part of his diagnosis on the autism spectrum disorder and required separate treatment. (Recording of 9/25/09 Meeting.)
44. At the meeting, Dr. Rogers reviewed his evaluation and recommendations; Ms. Bodkin reviewed her evaluation and recommendations; and Ms. Bissell reported the results of the interest inventory. (S. 1081.) The Team, and evaluators, agreed that the student needed to develop functional skills for independent living. (S. 1081.) The school members of the Team as well as Dr. Rogers concluded that the student's needs could be met within a community-based functional skills setting, which could include language as a focus while developing the student's independent living skills. (S. 1081.) Ms. Bissell felt that the IEP should also heavily emphasize transition planning, given that the student was nearing the end of his eligibility for special education services and significantly lacked independent living skills. (Testimony of Bissell.) Dr. Kemper concluded that the student's needs should be addressed through a language-based program. (S. 1081.)
45. During the meeting, Dr. Opuda and Ms. Bissell asked the student's mother how she wished to proceed in terms of reviewing the IEP. (Recording of 9/25/10 Meeting.) The student's mother requested that the individual recommendations of each evaluator be discussed to determine if they should be included as a goal in the student's IEP. (Recording of 9/25/10 Meeting.) Dr. Opuda suggested that the Team review the IEP goals and with each goal, turn to Dr. Kemper and Dr. Frankhouser for input. (Recording

- of 9/25/10 Meeting.) The student's mother then objected to the review of the IEP goals because she had not been involved in the development of the draft IEP. (S. 1083.) Dr. Opuda indicated that the draft IEP was open to changes and input from all Team members, including the parents. (Recording of 9/25/10 Meeting.)
46. Subsequently, the student's mother agreed to review the IEP page by page and her suggestions and those of Drs. Kemper and Frankhouser were solicited and considered by the Team. (Recording of 9/25/10 Meeting.) The student's mother continued to request that the Team review each recommendation of Dr. Kemper and Dr. Frankhouser; Dr. Opuda and Ms. Bissell felt that instead the Team should review each goal and consider it in light of the recommendations of evaluators. (Recording of 9/25/10 Meeting.) The student's mother rejected Ms. Bissell's suggestion that the parents, in consultation with Dr. Kemper and Dr. Frankhouser, provide a written response of their suggestions for the IEP for all of the Team to review at the next IEP Team meeting. (Recording of 9/25/10 Meeting.) The student's mother felt that any work done outside the Team process on the student's IEP was inappropriate because it was not done as a full Team. (Recording of 9/25/10 Meeting.) Dr. Opuda polled Team members as to how they would like to proceed. (Recording of 9/25/10 Meeting.) Dr. Rogers felt that moving through the goals and allowing each of the three primary evaluators, then present, to provide input on each goal would be useful. (Recording of 9/25/10 Meeting.)
47. Dr. Frankhouser suggested that a particular curriculum be stricken from the IEP and the Team agreed. (Recording of 9/25/10 Meeting.) Dr. Kemper argued that a language-based program should be employed and that most of the goals in the IEP were more functional skills-based. (Recording of 9/25/10 Meeting.) Dr. Rogers responded that the student required significant improvement to be able to live independently and was approaching the expiration of his eligibility for special education; as such, Dr. Rogers

found the goals to be very appropriate for the student. (Recording of 9/25/10 Meeting.)

Dr. Rogers expressed that the goals, even though oriented to the acquisition of functional life skills, included language skills that were also essential to the student; he noted that he did not draw a stark line between a life skills program and a language-based program.

(Recording of 9/25/10 Meeting.)

48. At the conclusion of the meeting, Dr. Opuda and Ms. Bissell suggested that the parents review the IEP with Dr. Kemper and Dr. Frankhouser and provide their comments, concerns, and additions to Ms. Bissell by October 9. Ms. Bissell stated that the school department would revise the IEP after reviewing the comments and the Team would then reconvene. (S. 1048; Recording of 9/25/10 Meeting.) The student's mother disagreed with that approach because she felt that everything should be considered by the Team as a whole and individuals should not be working in small groups outside the IEP Team meetings. (Recording of 9/25/10 Meeting.) Nevertheless, each evaluator was offered the opportunity to provide written comments on the draft IEP for the school department's review prior to the next IEP Team meeting. (Recording of 9/25/10 Meeting.) Dr. Opuda indicated that he would provide the Team with a list of the recommendations being made by each evaluator, whether the recommendation was reflected in the IEP, and if not, why not. (Recording of 9/25/10 Meeting.) The student's mother continued to protest the process that was outlined and Ms. Bissell indicated a desire to have the school department's counsel speak with the parents' counsel about how to conclude the process of finalizing the draft IEP. (Recording of 9/25/10 Meeting.)
49. Prior to the meeting, the school department provided the family with a revised draft of the student's IEP and a document referenced as the Crosswalk Comparison. (S. 1017-43.) Ms. Bissell and Dr. Opuda drafted the Crosswalk Comparison, which detailed each recommendation of Dr. Frankhouser and Dr. Kemper, the school department's response

- to each, and the rationale behind each response. (S. 1030-43; Testimony of Bissell.) The document was intended to show that many of the recommendations of Dr. Kemper and Dr. Frankhouser were included in the draft IEP and those that were not had been considered but rejected. (Testimony of Bissell.) In total, the school department agreed with 63 of the 81 recommendations of Dr. Kemper and Dr. Frankhouser. (S. 1030-43.) Many of the recommendations with which the school district disagreed related to whether the student required a residential setting and whether the focus of his program should focus on remediation of a language-based disorder as opposed to the development of functional life skills. (S. 1030-43.)
50. On October 21, the student's mother wrote to the school district to highlight what she felt were mischaracterizations in the minutes from the September IEP Team meeting and to emphasize her desire to be treated as an equal member of the student's IEP Team. (S. 1046.) The student's mother also provided the school with input on the draft IEP from Dr. Frankhouser. (S. 1044-45.) Dr. Kemper did not provide any written response to the invitation for comments on the draft IEP. (S. 1014; Testimony of Kemper.)
51. On October 30, 2009, another IEP Team meeting was held. (S. 1063.) Ms. Bissell perceived the purpose of the meeting to be the finalization of the student's IEP. (Testimony of Bissell.) The parents selected the meeting date out of several options even though some Team members would be available for only an hour that day. (Recording of 10/30/09 Meeting; Testimony of Bissell.)
52. Dr. Opuda again facilitated the meeting. (S. 1016.) Also present were: the student's mother; Dr. Kemper (by phone); Dr. Frankhouser (by phone); Ms. Delaney; Ms. Boissonneault; and Ms. Bissell. (S. 1016.)
53. At the start of the meeting, Dr. Opuda described the purpose of the meeting as the review the draft IEP created by the school department, which revised the student's goals based

on the prior meeting and the evaluations that had been conducted. (Recording of 10/30/09 Meeting.) The student's mother expressed concern that she was not involved in the development of the Crosswalk Comparison. (Recording of 10/30/09 Meeting.) Dr. Opuda relayed that the Crosswalk Comparison was intended to be explanatory, indicating that he did not want to use the Team's time to review it. (Recording of 10/30/09 Meeting.) The student's mother disagreed with Dr. Opuda's efforts to return the discussion of the IEP, the student's goals, and the student's placement. (Recording of 10/30/09 Meeting.) Dr. Opuda reiterated that the Team had been attempting to draft an IEP over the course of several meetings and the school district wanted to be able to conclude the meeting with a presentation to the family of a draft IEP. (Recording of 10/30/09 Meeting.) The student's mother repeatedly sought to return to discussion of the Crosswalk Comparison. (Recording of 10/30/09 Meeting.) The meeting became contentious and the student's mother and Dr. Opuda began to talk over each other. (Recording of 10/30/09 Meeting.) Dr. Opuda attempted to summarize the IEP and the parent, repeatedly interrupting, requested that Dr. Opuda cease talking. (Recording of 10/30/09 Meeting.)

54. The student's mother then took a break to contact her legal counsel. (Recording of 10/30/09 Meeting.) Following the break, Dr. Opuda reiterated the purpose of the meeting to be to review the draft IEP. (Recording of 10/30/09 Meeting.) The student's mother continued to raise concerns about the Crosswalk Comparison. (Recording of 10/30/09 Meeting.) When the student's mother sought to engage Dr. Kemper and Dr. Frankhouser in a discussion of their recommendations, Dr. Opuda asked them to redirect their attention to the goals in the IEP. (Recording of 10/30/09 Meeting.)

55. Dr. Frankhouser opined that safety skills should be included as goals and the Team agreed. (S. 1014; Recording of 10/30/09 Meeting.) The student's mother interrupted Dr.

Frankhouser to return to her concern that the Crosswalk Comparison was not created as a Team; she stated her belief that the Team was going down the wrong road by discussing the student's goals. (Recording of 10/30/09 Meeting.) The student's mother repeatedly declined to engage in discussion of goals and continued to ask individual Team members if they had been involved in the development of the Crosswalk Comparison. (Recording of 10/30/09 Meeting.) Dr. Kemper expressed his belief that the school district was disingenuous, the meeting was "disgusting," and the school district was trampling on the student's rights, behaving in an "awful" manner, and should "be ashamed" of itself. (Recording of 10/30/09 Meeting.) Dr. Kemper expressed his concern that the school district had predetermined the student's program and placement and the final IEP was not a consensus document. (Recording of 10/30/09 Meeting.) Dr. Frankhouser expressed her concern that the IEP did not reflect an appropriate Team process and did not take into account the student's needs that underlay her recommendations. (Recording of 10/30/09 Meeting.) The student's mother expressed the belief that she, Dr. Kemper, and Dr. Frankhouser were not treated as integral members of the Team. (S. 1015.)

56. At that meeting, the IEP Team determined that the IEP goals, services, and accommodations, as amended during the Team meeting, could be provided through a placement at Sanford High School, although clearly consensus was not reached. (S. 1014.)
57. The final 2009-2010 IEP, forwarded to the family after the October 2010 IEP Team meeting, called for specially designed instruction for three 78 minute blocks each day. (S. 1008). The IEP also called for five hours per week of consultation with the school department's special education consultant, 3 hours of speech-language services per week, and 90 minutes of pragmatic language instruction by the STARS social worker each week. (S. 1008.) As part of the student's program, all service providers and teachers

were to meet together for two hours a week in order to ensure that the student's services were consistent and comprehensive. (Testimony of Bissell.) The student's goals focused on social skills, communication skills, daily living skills, functional academic skills, and vocational skills. (S. 1005-1007.) Prior references to a particular curriculum were removed at the suggestion of the independent evaluators. (S. 1005-07.) The IEP included an extensive list of supplementary aids, services, modifications, and supports. (S. 1009-10.) The student would be in the STARS program for 3 of the 4 blocks in each school day. (S. 1011.) Although some of his programming would take place in the STARS classroom, the student's special education programming would also occur in other special education classrooms. (Testimony of Delaney.) He would have an educational technician with him when he went into mainstream settings, including for a daily health class. (S. 1011.) The student's pragmatic language instruction would be conducted in a group of like peers. (Testimony of Bissell.) The student's transitional services, to be provided by school district special education staff, the special education consultant, and vocational staff, included community-based social and recreational activities, and a pre-vocational assessment. (S. 1012.)

58. The parents believe that the student's program should focus on his language processing disorder and that functional life skills are only part of the programming the student requires. (Testimony of Parent.) Dr. Frankhouser felt that the IEP did not adequately project a sense of who the student was and what his needs were. (Testimony of Frankhouser.) She perceived that when the student's goals were modified from prior versions of the IEP, in response to her concerns that the goals were tied to a curriculum that was not appropriate, significant information was lost. (Testimony of Frankhouser.) Dr. Frankhouser and Dr. Kemper felt that Sanford was not acting in good faith and had not adequately discussed their recommendations; they felt that the lack of collaboration

with the parents and the two of them was detrimental to the school district's ability to meet the student's needs. (P. 21 & 34.) Dr. Kemper felt that the student was being "sold down the river." (Testimony of Kemper.) Dr. Kemper noted that even though he had the opportunity to voice his concerns, he was frustrated that the final IEP was not reached by consensus. (Testimony of Kemper.) Dr. Frankhouser perceived that Dr. Opuda was a "parliamentarian," who made people follow the rules and disregarded comments that were not pertinent to the agenda. (Testimony of Frankhouser.) Although Dr. Frankhouser came to the October 2010 Team meeting prepared to give a response to the Crosswalk Comparison document, she did not feel that she was not afforded the opportunity to do so. (Testimony of Frankhouser.)

59. Ms. Bissell, Ms. Delaney, and Dr. Rogers concluded that the IEP's goals and objectives, service levels, and educational supports were appropriate and the IEP was reasonably calculated to provide the student with educational benefit. (Testimony of Bissell, Delaney, Rogers.) Ms. Bodkin concluded that the communication goals in the student's final IEP were based on her evaluation reports and identification of areas of need. (Testimony of Bodkin.) Ms. Bissell, Ms. Delaney, and Dr. Rogers concluded that the STARS program would be able to successfully implement the student's IEP. (Testimony of Bissell, Delaney, and Rogers.)

60. The student's eligibility for special education expires in June 2011. (S. 96.)

IV. DISCUSSION AND CONCLUSIONS

A. Special education standards.

1. Burden of proof

Although the Individuals with Disabilities Education Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is

closely balanced,” lies with the party seeking relief. Schaffer v. Weast, 126 S.Ct. 528, 537 (2005). In this case, the school district, as the party requesting the hearing, bears the burden of proof.

2. Substantive special education requirements

The parties agree that the student qualifies for special education and related services as a student with multiple disabilities. See Maine Unified Special Education Regulations (“MUSER”) § VII.2.H. As such, the student is entitled to a free appropriate public education (“FAPE”) provided by the school district. 20 U.S.C. § 1412(a)(1)(A); 20 M.R.S.A. § 7201; MUSER §§ I & II.13. When reviewing an IEP, the first question for consideration is whether the IEP was developed in accordance with procedural requirements; the second question is whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). When deciding whether a student received a FAPE, a hearing officer may make a decision based only on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). If procedural violations are alleged, a hearing officer may find that a student did not receive a FAPE as a result only if the procedural inadequacies: 1. impeded the student’s right to a FAPE, 2. significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or 3. caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

A student’s IEP should be designed to provide the student “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Rowley, 458 U.S. at 203. An IEP must include the student’s present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward his goals, make progress in the general education curriculum, participate in nonacademic activities, and be

educated with other children with disabilities as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); MUSER § IX.3.A.

Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student's individual potential. Rowley, 458 U.S. at 203. A student's program must be geared toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs." Town of Burlington v. Dep't of Educ., 736 F.2d 773, 788 (1st Cir. 1984), aff'd, 471 U.S. 359 (1985); see also Sanford Sch. Dep't, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student's specific area of need). Because there is no "bright-line rule on the amount of benefit required of an appropriate IEP," each situation requires a "student-by-student analysis that carefully considers the student's individual abilities." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3^d Cir. 1999) (holding that the "meaningful benefit" standard requires "significant learning" (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3^d Cir. 1988))).

Further, the IDEA requires that students be educated with non-disabled peers "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); MUSER § X.2.B. As such, a public school may remove a child with disabilities from the regular educational environment only when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); MUSER § X.2.B. The educational benefit and least restrictive environment requirements "operate in tandem to create a continuum of educational possibilities." Roland M. v. Concord Sch. Comm., 910 F.2d 928, 993 (1st Cir. 1990).

C. Whether the family's decision to home school the student for the 2008-2009 and 2009-2010 school years terminated the school department's obligation to provide the student with a free, appropriate public education during those school years.

The school department argues that because the student was home schooled, he does not have a right to a free appropriate public education. The school department notes that the IDEA

does not impose obligations upon public school systems regarding home schooled students. The school department contends that although Maine regulations provide more for home schooled students than federal law, they do not require public schools to provide special education services to students who are not enrolled in at least some public school classes. The school department contends that even for home schooled students who are enrolled in some public school classes, which the student in the present proceeding was not, Maine law provides the school district with discretion in determining what services will be provided to such students, who do not have an individual right to any particular service. The school department argues that it was uncontroverted that from 2006 until the present time, the student was home schooled and did not attend any public school classes, and for that reason, is not entitled to special education and related services.

The parents' brief argument on this issue is limited to the contention that the student should not be classified as home schooled because the parents did not provide the school department and the Commissioner of the Department of Education with notice of their decision to provide home instruction, which is required by the compulsory attendance provision in Maine law. The parents assert that because the student was not enrolled in an approved home instruction program, the student still maintained a right to special education and related services.

The IDEA and its implementing regulations require states to locate and make expenditures on behalf of disabled children who have been placed by their parents in "private elementary schools and secondary schools." 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.130 to 300.147. The IDEA defines "elementary school" to mean a nonprofit institutional day or residential school that provides elementary education. 34 C.F.R. § 300.13. Because the IDEA does not impose upon states the obligation to provide special education services to home schooled students, the decision as to whether a home school qualifies as a "private school or facility" is left to states. Hooks v. Clark County Sch. Dist., 228 F.3d 1036, 1045 (9th Cir. 2000)

(stating that “we hold that the IDEA leaves discretion to the States to determine that home education that is exempted from the State’s compulsory attendance requirement does not constitute an IDEA-qualifying ‘private school or facility’”).

Maine law requires public schools to make their resources and services available to students enrolled in home instruction. 20-A M.R.S.A. § 5021. In particular, students who are home schooled are “eligible for special education services, as provided under federal regulations, in accordance with Section 5001-A and relevant department procedures and standards.” 20-A M.R.S.A. § 5021(3). Section 5001-A provides an exception from compulsory attendance at school for home schooled students but requires the parent of a home schooled student to file notice with the Department of Education and the school district within 10 days of beginning home instruction. 20-A M.R.S.A. § 5001-A(4)(a). The United States District Court for the District of Maine, in 2004, held that Section 5021 entitled home schooled students to rights under the IDEA such that they could state an IDEA claim. Fitzpatrick v. Town of Falmouth, 321 F. Supp.2d 119, 124-25 (D. Me. 2004) (holding that “given the federal and state statutory language and the Ninth Circuit’s recognition that the IDEA permits the states to define what is a ‘school’ . . . I conclude that a Maine home-schooled student can state an IDEA claim”).

Maine regulations provide more precise standards regarding home schooled students than Maine statutes. School districts are required to identify, locate, and evaluate all home schooled students. MUSER §§ IV.2.A. & IV.4.H.2. If a student who is instructed at home seeks to access special education and related services in a public school while taking part in home instruction, the requirements of 20-A M.R.S.A. § 5021 apply, which broadly reference eligibility under federal regulations. MUSER § IV.4.H.1. Maine regulations clarify that students enrolled in home school programs do not have an individual right to receive some or all of the special education and related services that they would receive if they were enrolled in a public school. MUSER § IV.4.H.3. The regulations further state that if a home schooled student enrolls in specific day

school classes at a public school and requests access to special education services, the provisions of 20-A M.R.S.A. § 5021 shall apply and the student's IEP Team will meet to develop an individual service plan for services provided in public school. MUSER § IV.4.H.3.²

In the present case, the uncontroverted record, including evaluations, IEP team meeting minutes and recordings, and testimony, repeatedly references the student's status as home schooled. (S. 140 (Dr. Frankhouser evaluation); S. 155 (Dr. Kemper evaluation); S. 1083 (Minutes of 9/25/09 Meeting); S. 1015 (Minutes of 10/30/09 Meeting); Testimony of Bissell; Testimony of Parent; Recording of 6/2/2008 Meeting; Recording of 9/25/09 Meeting; Recording of 10/30/09 Meeting.) The family informed evaluators, service providers, and the school district that it was homeschooling the student. (Testimony of Parent; Testimony of Bissell.) Further, the student's mother testified about the student's home school program, which began in August 2006 and included reading, math, health, and an auditory processing program. (Testimony of Parent.)

Nevertheless, the student remained eligible for special education during the years encompassed in this appeal. After the student first began home schooling in 2006 because of the parents' feeling that the student's special education programming and placement for the coming school year were not going to be appropriate, the parents and the school had no contact until the spring of 2008. Beginning in April 2008, however, the parents began to engage with the school regarding a special education program for the student, with the apparent intention of reenrolling the student in public school and accessing special education and related services for the student if an IEP were established with which they agreed. It was clear that the parents were not seeking to supplement their home school instruction with special education services provided by the public school, but were instead seeking to alter the student's status from home school to public school.

² Neither party cited Section 20-A M.R.S.A. § 5021 or the case law interpreting it, nor did either party provide argument as to the interaction of the Maine statute and regulations, which could be interpreted as at odds. Because the interaction does not impact the analysis here, I do not address it.

As of April 2008, therefore, the parents signaled a desire to reenroll the student and gain access special education and related services for the student. The parents' continued home schooling of the student resulted from their disagreement with the programming and placement offered by the school department. As such, the student's status as a home schooled student did not deprive him of his rights under the IDEA during the timeframe at issue in this hearing.³

D. Whether the school department provided the student with a free, appropriate public education during the 2008-2009 and 2009-2010 school years.

1. Procedural errors

The family contends that procedural inadequacies resulted in a deprivation of educational benefit to the student in his 2008-2009 and 2009-2010 IEPs because they did not allow significant parental input into the IEP goals and objectives and predetermined the student's placement in the STARS program.

The school district denies any procedural violations and asserts that even if a procedural violation occurred, the family is not entitled to a remedy since there is no evidence that any violation resulted in a loss of educational opportunity for the student, seriously deprived the family of their participation rights, or caused a deprivation of educational benefits.

a. Dr. Opuda's involvement

The family argues that Dr. Opuda was brought in by the school department to manage the meetings because the parents were considered "problem parents" and to tightly control the agenda so that the parents' participation was limited, insuring the student's predetermined placement in the STARS program. The family points to federal IDEA guidance indicating that attorneys should be discouraged from attending IEP Team meetings because the presence of the attorney would create an adversarial atmosphere that would not necessarily be in the best interests of the

³ The fact that the parents did not file the required paperwork with the school department or the Department of Education impacts the analysis only to the extent that it provides support for the conclusion that the school district was not exempted from its obligation to meet the student's special education needs.

child, citing 34 C.F.R. Part 300, Appendix A, Question 29. The family contends that this provision should be extended to Dr. Opuda, an agent of the school district's law firm, and that his presence created a severe imbalance of power weighing against the parents.

The school department contends that Dr. Opuda was appropriately invited to facilitate the IEP Team meetings as a discretionary Team member. It argues that the regulations regarding IEP Team membership should be broadly interpreted since there is a strong policy argument, and common practice, of inviting discretionary members who become valuable Team members. The school district argues that the intent of the regulations regarding mandatory and discretionary Team members was not to exclude but to include certain membership.

The school district contends that Dr. Opuda had the requisite "knowledge and expertise" to qualify as a discretionary Team member because he possesses a specific skill set regarding conducting IEP Team meetings and he was involved in several of the student's prior IEP Team meetings. The school district argues that even if Dr. Opuda did not meet the definition of a discretionary Team member, his attendance was appropriate because he was invited in part because of his expertise, as a Ph.D. level special educational consultant, in the development of an appropriate IEP for the student. The school district further maintains that Dr. Opuda's attendance at the student's Team meetings in no way impeded the family's ability to participate in the IEP development process.

A school district must include certain individuals, including the parents, on the student's IEP Team. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); MUSER § VI.2.B. In addition to the mandatory members, a school district or a parent may include "other individuals who have knowledge or special expertise regarding the child." 20 U.S.C. § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6); MUSER VI.2.B.5. The IDEA's IEP Team member provisions are "broadly worded . . . and do not give any party the authority to veto attendance by persons whom another party wants to have present." Horvan v. Bd. of Educ. of Toledo Pub. Sch. Dist., 53 IDELR 79

(Oh. Ct. App. 2009) (noting that the IDEA leaves to the parties the determination of whether an individual has the requisite knowledge and expertise).

Dr. Opuda's inclusion as a discretionary Team member was not a violation of the IDEA because of his expertise in special education, his skills as a facilitator, and his prior involvement with the student's IEP Team. Moreover, although Dr. Opuda did attempt to control the Team's discussion, the student's mother recognized that that Dr. Opuda's role was to make sure the meeting went smoothly and guide the Team back to its agenda. (Testimony of Parent.) Dr. Frankhouser testified that Dr. Opuda was a "parliamentarian," "neutral," and "facilitator." (Testimony of Frankhouser.) Dr. Kemper felt that he had the opportunity to voice his concerns. (Testimony of Kemper.) Further, the audio recordings of Team meetings display that despite the significant tension and verbal sparring between the parties at the Team meetings, Dr. Opuda repeatedly attempted to return the Team's attention to the student's IEP. (Recording of 6/2/08 Meeting; Recording of 9/25/09 Meeting; Recording of 10/30/09 Meeting.)

b. Parental participation and predetermination

The parents argue that the school department violated IDEA procedural requirements in October 2009 by preventing them and the independent evaluators from discussing the student, his program, the recommendations in the evaluations, and the Crosswalk Comparison. The parents allege that the school department managed the IEP Team meetings with the intent of creating an imbalance of power with the purpose of ultimately controlling the student's placement. In addition, the parents assert that the school department circumvented IEP procedures by determining that the student should be placed in the STARS program before the student's goals and services had been developed and disallowed the IEP Team process to be completed so that the student's placement could appropriately be determined.

The school department contends that it fully met its legal burden to consider the evaluators' reports by discussing them at the start of the development of the student's 2009-2010

IEP, in February 2009, and incorporating many of the resulting recommendations, while excepting some. The school district contends that it disagreed with the evaluators' recommendations regarding a residential placement because school department staff felt such recommendations derived from a misguided diagnosis of the student's language-based learning disability.

The school department also argues that there are no statutory or regulatory provisions regarding "predetermination" of a student's program or placement and, further, it did not predetermine the student's program or placement prior to the IEP Team meetings for either the student's 2008-2009 or his 2009-2010 IEP. Further, the school district contends, it repeatedly sought parental input and in no way eclipsed the parents' right to participate.

A school district is required to consider independent evaluations in any decision that relates to the provision of FAPE to the student. 34 C.F.R. § 300.502(c)(1). In addition, a school district must allow the student's parents the opportunity to take part in the decision making process. 20 U.S.C. § 1415(f)(3)(E)(ii); see also Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004) (holding that there was no meaningful parental involvement when the parents' participation was "after the fact involvement"); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) (holding that there was no meaningful parental participation when the school district independently developed the student's IEP without input of the parents and other Team members and subsequently refused to consider alternative placements). With regard to placement, a school district must determine the child's placement based on the student's IEP and must select a placement that is as close as possible to the student's home. 34 C.F.R. § 300.116(b)(1) & (2).

The record reflects that in the present case the school district sought meaningful parental participation in the development of the student's IEP. The parents have not always been willing to provide the input sought. When the parents first reengaged with the school department in the

spring of 2008, they refused to provide information about the student's home school program and his goals. The evaluation of their experts and the experts' observation reports were not provided to the school district for several months after their completion. The parents delayed in responding to a questionnaire from Dr. Rogers, which in turn delayed his report. In addition, the parents have been inconsistent in their expectations of how the Team process should proceed. Although at times the parents have requested that the school district present them with an IEP at a Team meeting, at other times they insisted that no work on the IEP be done outside of the Team setting and have refused to discuss draft IEP goals when they were not involved in the drafting. (Recording of June 2, 2008 Meeting; Recording of September 25, 2009 Meeting; Recording of October 30, 2009 Meeting.)

Despite the significant tension at Team meetings, Dr. Opuda repeatedly requested suggestions from the parents, Dr. Kemper, and Dr. Frankhouser for draft IEPs at meetings subsequent to the February 2009 meeting when both doctors were invited to discuss their evaluations in full. (Recording of 9/25/09 Meeting; Recording of 10/30/09 Meeting.) At the September 25, 2009, meeting, Dr. Opuda asked the student's mother to provide suggestions on each page of the IEP. (Recording of 9/25/09 Meeting.) Ms. Bissell invited the parents, in consultation with Dr. Frankhouser and Dr. Kemper, to provide written comments and concerns about the draft IEP for the full Team's consideration. (S. 1048; Recording of 9/25/09 Meeting.)

Even though the school department's desire to push the IEP development process to conclusion, including the possibility of having work on the IEP be done outside Team meetings for later consideration by the Team, clashed with the parents' perception in 2009 that every aspect of IEP development should be done with the full Team in attendance, the parents were requested to participate throughout the process.

With regard to the Crosswalk Comparison, its intended purpose was to provide the parents with a clear understanding of the school district's response to the recommendations of the

family's two evaluators. In fact, as Ms. Bissell testified, it was intended to show the parents how many of the recommendations were reflected in the IEP, to alleviate the parents' concerns. As Ms. Bissell testified, in retrospect, it was not helpful to create the document because it created additional dissension. Further, the school district's refusal to allow conversation about the Crosswalk Comparison at the October 30, 2009, meeting fueled the fire. Nevertheless, at that time, after two Team meetings and a resolution session designed to create the student's IEP, the school district understandably felt an urgency to complete the student's IEP so that the family would have a document upon which to base its decision whether to return the student to school. Despite the school department's refusal to discuss the Crosswalk Comparison in detail at the final Team meeting, Dr. Frankhouser felt that she was able to discuss her evaluation thoroughly, that Team members were listening to her, and her opinions were being considered by Team members. Similarly, Dr. Kemper concluded that he had the opportunity to discuss his concerns, even though the final IEP was not a consensus document.

Further, contrary to the parents' assertions, the school department, at the outset, in June 2008, outlined a Team process by which current information about the student's needs and performance levels could be gathered, goals and objectives could be determined, and finally a placement would be decided upon. The parents refused to discuss anything other than placement at that meeting, however, and expressed frustration that the school district did not have a finalized IEP to present to them. The school department resisted the parents' request that placement be determined immediately. When the parents withheld consent for the diagnostic placement, the school district offered alternative methods of obtaining information about the student that would allow the Team to fully develop the student's IEP. The development and distribution of draft IEPs were intended to move the Team forward in the process of creating an appropriate program for the student. See *Brown v. Bartholomew*, 2005 WL 552194 (S.D. Ind. 2005) (finding no violation of IDEA when school district did not alter proposed placement but developed other

components of IEP with input of parents and their representatives).

The school district sought parental and evaluator input into each draft of the IEP inside of IEP Team meetings as well as between meetings. The parents presented statements of concern, Dr. Frankhouser provided written input, and the evaluators provided input at Team meetings, all of which the Team considered and much of which was adopted. (Testimony of Frankhouser.)

Although the school district refused the student's mother's continued efforts to approach the IEP by returning to the recommendations of the evaluators, the Team was not averse to the input of evaluators, but was trying to structure the conversation in a way that would more likely result in finalization of the IEP in a timely manner.

Despite the fact that not all of the recommendations of Dr. Frankhouser and Dr. Kemper were adopted, the school district met its IDEA obligations to consider those recommendations. As the First Circuit Court of Appeals has explained, when an evaluator's report was considered at an IEP Team meeting, and some of the evaluator's recommendations were included in the student's draft IEP, no IDEA violation occurred. G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991) (finding no violation of predecessor statute to IDEA when evaluator's report was discussed at Team meeting although his recommendations for a language-based program were not included in the student's IEP); see also Evans v. Dist. No. 17 of Douglas County, Nebraska, 841 F.2d 824 (8th Cir. 1988) (holding that when school district agreed with evaluation but disagreed as to evaluator's recommendation for placement, it had adequately considered the evaluation); K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR 215 (D.C. Minn. 2010) (finding no IDEA violation when the IEP Team considered the evaluator's recommendations but disagreed with some based on independent observations of student's needs).

In conclusion, the record does not support a finding that the school district committed procedural errors in the development of the student's programming and placement.

2. 2008-2009 and 2009-2010 IEPs and placements

The parents' argument regarding the substance of the student's IEPs is that the IEPs did not provide the student with appropriate programming based on his language-processing disorder and did not designate an appropriate placement that took into account all of his educational needs. The parents do not provide any particularized argument with regard to the services, classroom modifications and accommodations, or goals and objectives in the student's IEPs.

The school district contends that the student's IEPs for the 2008-2009 and 2009-2010 school years were reasonably calculated to provide the student with educational benefit in the least restrictive environment. With regard to placement, the school district maintains that the STARS program was an appropriate placement and the family has not identified an appropriate alternative.

a. 2008-2009 program and placement

The school department acknowledges that the student's IEP Team was not able to fully develop his 2008-2009 IEP, including present levels of performance, goals and objectives, and service levels, but argues that the incompleteness of the 2008-2009 IEP is the result of the family's outright refusal to cooperate in the IEP development process.

In June 2008, the IEP Team discussed a draft IEP, which called for a diagnostic placement in the STARS program. The parents refused to provide information on the student's needs and progress at the Team meeting, were unwilling to consent to evaluations, and delayed in providing the evaluations and observations that were performed by Dr. Frankhouser and Dr. Kemper. I hold that, as such, the school department, having not served the student for two years and lacking any significant information about his current needs and abilities, had progressed as far as it was able in creating a draft IEP for the student for the 2008-2009 school year.

b. 2009-2010 program and placement

The school district contends that the 2009-2010 IEP, as fully developed, provides appropriate goals and objectives, service levels, and accommodations that reflect the student's

identified areas of need. The school district contends that the student's schedule was designed to provide him with the opportunity to generalize his functional academic skills in the greater community and to interact with non-disabled peers when appropriate. With regard to the student's placement in the STARS program, the school district argues that the placement was appropriate because the STARS program was developed specifically for students on the autism spectrum and relies on several extremely experienced educators to provide direct instruction in functional academics, applied behavioral analysis, social pragmatics, and speech-language therapy. Further, the school district contends, the classroom's design, allowing students to transition to mainstream as well as alternative special education settings through the school day, was appropriate for the student.

The family and the school district have a fundamental difference of opinion as to which of the student's needs should take precedence. Dr. Kemper and the family believe that the student has a severe language-based learning disability that is distinct from his autism diagnosis and that the student requires a language-based program, which the STARS program is not. Dr. Frankhouser's opinion buttresses that of the parents. Although Dr. Kemper recommended a residential language-based program, he could envision a non-residential program for the student, although he did not identify any near the student's home. Dr. Frankhouser, on the other hand, could not imagine an appropriate program for the student that was not residential. The basis for Dr. Kemper's conclusion that the student has a severe language-based learning disability that is distinct or more pronounced than other students with autism was not based on any particular testing results or other analysis, although he referenced his observations of the student as supporting his conclusion.

The school district, on the other hand, believes that the student's cognitive abilities are significantly impacted by his autism and mental retardation and has recommended a program that focuses on functional academic skills and facilitates interactions with non-disabled peers. The

school district's conclusion is founded on Dr. Rogers' opinion that the student's language-based disorder is a component of his autism and that the focus of his program should not be addressing a language-based disorder but instead should focus on the student's dual diagnoses of autism and mental retardation. Ms. Bodkin's opinion, that the student's language processing disorder was not separate from his autism and that his program should focus on vocational and independent living skills, was consistent with the recommendations of Dr. Rogers. The student's performance on the Leiter test, a nonverbal test of intellectual potential given to students suspected of having a language-based disability, was in the extremely low range. A high score, on the other hand, would have indicated that a language-based disability, as opposed to autism or mental retardation, was more likely the cause of the student's consistently low scoring on standardized tests. Dr. Rogers concluded from the testing that the student's cognitive impairment was global. Based on these test results, Dr. Rogers proposed that the student's program should focus on life skills and the practical application of educational components of the program and the student's academic goals should be driven by the need to make him as independent as possible. Given these recommendations, Dr. Rogers concluded that the goals and objectives developed in the student's 2009-2010 IEP were in the five critical areas he would expect and were appropriately focused on functional skill development; the accommodations and modifications were important and appropriate for the student; and the combination of special education and mainstream settings would be beneficial for the student and was very similar to his experience with other students like the student.

In terms of the student's placement, Dr. Rogers believed, along with Ms. Bissell, Ms. Delaney, and Ms. Bodkin, that the STARS program at Sanford High School would be able to meet the student's programming needs. Although the school district initially proposed the STARS placement as a diagnostic placement from which it could gather information, the school district ultimately proposed the STARS program as the student's placement for his 2009-2010

IEP, a conclusion supported by Dr. Rogers, Ms. Bodkin, and the school members of the Team.

In conclusion, I hold that the school department did not fail to offer the student a FAPE in either the 2008-2009 or 2009-2010 school years. /The student's IEPs contained all the necessary components, considered the student's individual abilities, and were reasonably calculated to provide the student with educational benefits; as such, they offered the student a FAPE.

3. If the family is due a remedy, what remedy is appropriate and should the remedy be modified for equitable reasons?

Because no IDEA violations are found, no remedy is required.⁴

V. ORDER

Sanford School Department provided the student with IEPs designed to provide him with a FAPE during the 2008-2009 and 2009-2010 school years and did not commit procedural violations in the development of those IEPs. Therefore, no remedial order need be issued.

Rebekah J. Smith, Esq.
Hearing Officer

⁴ The parents seek an order that Dr. Opuda and the parties' attorneys be excluded from IEP Team meetings. Because no IDEA violations have resulted, the hearing officer has no basis upon which to issue such an order. Nevertheless, the hearing officer notes that the Team meeting that the parents found to be most productive was the one attended by counsel for each party, which may be the most beneficial approach for the parties in future IEP Team meetings.