

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 17, 2010

11.011H— Parent v. Regional School Unit No. 21

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

REPRESENTING THE DISTRICT: Eric Herlan, Esq., and Mark Paige, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing took place on September 20 and 28, 2010, and October 14 and 15, 2010 at the Department of Health and Human Services in Biddeford, Maine. The hearing was concluded on October 20, 2010 at the offices of Drummond Woodsum in Portland, Maine. Those present for the entire proceeding were the Parent, Attorney O’Meara, Susan Mulsow, Director of Special Education, Attorney Herlan, and the undersigned hearing officer. Testifying at the hearing were:

The Parent	
Laura Slap-Shelton, Psy.D.	Psychologist
Krysten Harper	Spurwink Services Case Manager
Elizabeth Fagan, Ph.D.	Speech/Language Pathologist
Donald Burgess, M.D.	Pediatrician
Susan Mulsow	Director of Special Education
Julie Olsen	Assistant Director of Special Education
Christine Peskurich	Special Education Teacher, Consolidated School
Kristine Casey	Special Education Teacher, Kennebunk Elementary
Joseph Wojcik, Ph.D.	School Psychologist
Guilia Fornara	Physical Therapist
Stephanie Einsiedler	Speech Pathologist
Susan Richardson	Occupational Therapist
Kathy Cmaylo	XX Teacher, Consolidated School
Julie Urban	XX Grade Teacher, Consolidated School
David Crandall	Principal, Consolidated School

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On August 10, 2010, the Parent filed this hearing request on behalf of her son (“Student”). On September 13, 2010, a prehearing conference was held at the Department of Health and Human Services (“DHHS”) in Biddeford, Maine. Participating in the conference were: the Parent; Richard O’Meara, Esq., counsel to the Parent and Student; Eric Herlan, Esq., and Mark Paige, Esq., counsel to Regional School Unit #21 (“District” or “RSU #21”); Susan Mulsow, Special Education Director; Julie Olsen, Assistant Special Education Director; and Shari Broder, Hearing Officer. Documents and witness lists were exchanged in a timely manner. The Parent submitted approximately 205 pages of exhibits (herein referenced as P-#), and the District submitted approximately 610 pages of exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of five days. Both parties requested to keep the hearing record open until November 3, 2010 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 32-page memorandum and the Parent submitted a 50-page final argument. The record closed upon receipt of these documents on November 3. The parties further agreed that the hearing officer’s decision would be due on November 18, 2010.

II. ISSUES:

1. Did the District commit procedural violations in the formulation of the Student’s 2010-2011 IEP and placement offer by predetermining his placement prior to development of his IEP at the team meeting on May 13, 2010, and/or by failing to evaluate the Student in all areas of suspected disability in connection with this determination?
2. Are the IEP and placement for the 2010-2011 school year reasonably calculated to provide the Student with a free appropriate public education (FAPE) in the least restrictive environment?
3. Has the District engaged in adverse actions against the Student and Parent in retaliation for filing this due process complaint?

4. If the hearing officer finds a violation of any of the above, what remedies are appropriate?

The District questioned whether the hearing officer had authority to rule on the third issue, and objected to consideration of this issue. The District also questioned whether the special education teacher's filing of a request for protection from harassment was District action. These issues are addressed below.

III FINDINGS OF FACT

1. The Student is a XX year old boy (DOB: xx/xx/xxxx), who lives with his mother (the Parent) and xx year-old sister in Cape Porpoise, Maine. Both the Student and his sister attend Kennebunkport Consolidated School ("Consolidated"), which is their neighborhood elementary school.
2. The Student is currently eligible for special educational and related services under the category of Other Health Impairment (OHI).
3. When the Student was xx old, he was placed with the Parent in foster care. The Parent adopted the Student when he was xx years old.
4. At age xx, Child Development Services (CDS) conducted testing to determine whether the Student was eligible for services under the Individuals with Disabilities Education Act (IDEA). His speech/language evaluation included the Preschool Language Scale-3, where his total language score was in the first percentile, indicating a significant delay in language skills in both expressive and receptive language. [S-268] His occupational therapy evaluation showed moderate delays in fine motor development, but he was processing most types of sensory input appropriately. [S-278] Alan Fink's psychological evaluation revealed a 68 IQ equivalent on the Slosson test, placing the Student in the second percentile. [S-272] Dr. Fink recommended a developmentally therapeutic preschool program with emphasis on general

language, cognitive enrichment and building of attention span. [S-274] The Student was eligible for special services as a student with a speech-language impairment.

5. During the 2007-08 school year, the Student attended Child's Journey Preschool in Arundel, a developmental preschool, and received speech/language and occupational therapy services. After Child's Journey closed, the Student attended the Spurwink Therapeutic Preschool, a highly structured program for children with disabilities. The Student attended Spurwink's program for three hours each day, five days a week, and his program consisted of specially designed instruction, speech, occupational and physical therapies. [S-183] His classroom had a ratio of three adults for six children, with one-on-one assistance as needed. [*Id.*] During an observation there on March 16, 2009, the Student appeared to be happy and doing very well, and this was consistent with the views of the Parent. [S-183, Testimony of Parent] In this program, the Student made significant gains and enhanced his language development. [S-162, 186-187, 213, 227] At Spurwink, the Student had an individualized behavior management plan containing intervention strategies to address certain behavioral problems. [S-167-168, 227-228]
6. In September 2008, the Student was referred to the Pediatric Evaluation for Development Solutions Program (PEDS) for evaluation due to concerns around his developmental delay, hyperactivity, and previous evaluations indicating possible mental retardation. [S-236] Donald Burgess, M.D., the Student's pediatrician, conducted part of this evaluation. Laura Slap-Shelton, Psy.D., conducted part of the PEDS evaluation as well. [S-230-235] Dr. Burgess's medical assessment contained the following diagnoses: ADHD-combined type, anxiety disorder NOS, low average cognitive ability, global developmental delay, mixed expressive and receptive language disorder, phonological disorder, fine and gross motor

delays, a history of recurrent otitis media-status post PE tube placement and adenoidectomy, history of ankyloglossia-status post frenectomy, and mild persistent asthma. [S-241-242] The Student's scores on the Wechsler Preschool and Primary Scale of Intelligence were a verbal IQ of 83, performance IQ of 82, and full-scale IQ of 80. [S-232] This placed him in the low average range for cognitive abilities. While being somewhat higher than his earlier testing, Dr. Slap-Shelton thought that this score likely underestimated the Student's cognitive abilities "secondary to the effects of his receptive language difficulties, attention, and our difficulties in always understanding what he was saying when responding to questions." [S-232]

7. In preparation for the Student's transition to xx, the Parent wrote a letter to the IEP team elaborating upon the Student's needs, and offering her perspective about what has helped him. [S-176-178, 265-66] She expressed her view that "[the Student] copies behaviors, so inclusion with a regular classroom is very important. I do not want him in a behavioral classroom." [S-178, 266]
8. In the spring of 2009, Kristine Casey, the special education teacher who runs a program at Kennebunk Elementary School ("KES") for students with behavioral challenges, observed the Student in his program at Spurwink. When she read the Parent's letter described in Fact #7 above, she thought it sounded like a great description of her program at KES. Ms. Casey's program serves 11 students in grades K-3. All students are assigned to the mainstream classroom, and each attends at least once a day, but some spend more time in the mainstream. Lunch and recess are with mainstream peers. As students meet their goals, they get mainstreamed more using a "level" system. Ms. Casey uses parts of regular curriculum in class, although some students receive this instruction in the mainstream, and some subjects

are modified for students with learning differences. Two of the students on her caseload are in consultation status, attending mainstream classes all the time, and others are served in both. Each child has behavioral challenges, including autism, ADHD, anxiety, and emotional disabilities. She works with these students to help them manage their behaviors. Students who initially spend a lot of time in her classroom move on once they have the tools to manage their behaviors. Ms. Casey has four educational technicians (“ed techs”), and they each work with all of the students, and team with regular education teachers and specialists. Her team includes an occupational therapist, physical therapist, school psychologist, speech/language therapist, and a social worker. The ed techs are trained to work with students with behavioral needs, and they have worked in her program longer than she has.

9. On May 19, 2009, the District convened an IEP team meeting to consider the Student’s transition to xx. At the meeting, Special Education Director Susan Mulsow suggested placing the Student in Ms. Casey’s program at KES because it was similar to the Student’s program at Spurwink in which he was doing so well. Her experience was that children who succeed in those programs do well transitioning into similar programs, and then can be shifted into the mainstream if appropriate. The Parent, however, was adamantly opposed to this, and wanted the Student to be given a chance to attend the less restrictive program at Consolidated. A majority of the team members agreed to try this placement with ed tech support for six to eight weeks, and then reassess the Student’s progress. [Testimony of S. Mulsow] Christine Peskurich, the resource room teacher at Consolidated, was assigned to be the Student’s case manager. The Student was to be mainstreamed, but with 6.5 hours per day of ed tech support, and the following services: 90 minutes per week of speech therapy; 60 minutes per week of occupational therapy; 30 minutes per week of physical therapy; 30

minutes per week of social work services, and one hour of special education consultation. [P-42] At this meeting, the Student's eligibility category was changed from Speech and Language to Other Health Impaired, based upon the PEDS diagnoses. In the "Consideration of Special Factors" section of the IEP, the form reads, "In the case of a child whose behavior impedes the child's learning or that of others consider the use of positive behavioral interventions and supports and other strategies to address the behavior . . . If needed, indicate where it is addressed in the IEP." [P-35] In response, the IEP read "See # (LRE explanation)(9/10/2009 PBSP on file)" [Id.] Although there was an LRE explanation [P-43], none of the witnesses at the hearing knew to what the "9/10/2009 PBSP on file" referred.¹

10. The Student was placed in Kathy Cmaylo's xx class, where Ms. Cmaylo immediately faced challenges with the Student's inability to comply with directions or stay on task. [Testimony of K. Cmaylo] Compliance problems affected his entire day. For example, when asked to come to the carpet, he would refuse, and would not move. [Id.] The ed tech would try to engage him or cajole him into coming, but often this would not work. When confronted directly, the Student would escalate in his response with behaviors like foot stomping, or becoming louder in an effort to not comply. [Id.] Sometimes, he would try to get out of the classroom. Often, Ms. Cmaylo, who had 16 or 17 students in the class, would have to deal with the Student directly, as he was more likely to respond to her than to an ed tech. Ms. Cmaylo initially had two ed techs assigned to support three students. When their efforts did not work, Ms. Cmaylo would have Ms. Peskurich come to her classroom to help with the Student so Ms. Cmaylo could focus on her other students. [Id.] The noise created by the Student, and the time Ms. Cmaylo needed to spend directly with him interfered with the

¹ Adding to the mystery of the PBSP was the fact that its date was several months *after* this IEP team meeting. This reference continued to appear in the Student's IEPs, and remained a mystery unexplained by any of the District's witnesses at the hearing.

learning of the other students. The Student also needed support once given a task. The Student heard what she said, as he would often repeat it back to her, but she wondered whether he didn't understand enough of it to comply. Because the Student did not completely understand the directions, Ms. Cmaylo would have to repeat them again, then either she or an ed tech would have to begin the task with him. It also helped to break the task down into many small steps, but to give the Student only one or two steps at a time. The Student also desperately wanted a friend, but had difficulty engaging with peers. For example, he wanted to be first to go to lunch, but when it was not his turn, he would go to the front of the line anyway. If another student told him it was not his turn, the Student would refuse to move, and do other things like shake a fist in the other child's face, or push his classmates. Consequently, other children were afraid to play with him.

11. After a few weeks of school, Ms. Peskurich sought help from Ms. Casey, the teacher who ran the behavioral program at KES. [S-149-155] She reported to Ms. Casey that she was having a very difficult time with the Student, who was refusing "to do anything, pushing and hitting other students, when I/ed tech work with him, he always has to be in control. I am at a loss for words right now." [S-155] She asked Ms. Casey for suggestions, and perhaps an example of a behavior plan. [*Id.*] Ms. Peskurich runs a resource room with approximately 20 children in grades K-5, most of whom have learning disabilities. Ms. Peskurich is certified in many reading and math programs, and the students with whom she works come into her classroom for specialized instruction in these subjects. She does not have specialized training in working with children with behavioral problems. Two ed techs assist her in the resource room. Ms. Casey gave Ms. Peskurich some advice. Ms. Peskurich then turned to school psychologist Joe Wojcik for a behavior plan. Dr. Wojcik observed the Student on four

occasions. [S-126-139] He noted that the behaviors needing to be addressed were speaking out of turn and refusing to comply with teacher directions. [S-138] He recommended developing a behavior plan to address these issues, and made a number of other suggestions for providing positive reinforcement and praise. [*Id.*] Ms. Peskurich then incorporated these suggestions into a “positive behavioral support/intervention plan” form she downloaded from the Internet.

[Testimony of C. Peskurich, J. Wojcik, S-343] She did not conduct a formal functional behavior assessment (FBA) as defined in the Maine Uniform Special Education Regulations, and has never been involved with an FBA. Although she did not share this document with the Parent or Dr. Wojcik, she used it regularly in working with the Student, and prepared data collection charts to test the effectiveness of the interventions. [Testimony

of C. Peskurich, S-344-401] The Student also had a quiet area in Ms. Cmaylo’s room, and one in Ms. Peskurich’s room, and she or another staff member provided support to him whenever he needed it. [Testimony of C. Peskurich]

- 12.** Due to the death of the Student’s cousin, who was also a student at Consolidated, the IEP team was unable to meet to review the Student’s progress in October as originally planned.
- 13.** The IEP team met on December 17, 2009. [S-90] The team discussed how the Student was progressing in school, and discussed his behavioral challenges. Although Ms. Peskurich did not share her behavior intervention plan form, she shared data charts she and her staff had compiled of the Student’s challenging behaviors. The team agreed that the Student would begin receiving math and reading instruction for 45 minutes per subject per day in the Resource Room. [S-91] There was discussion that the Student did not have a one-on-one ed tech, but that he had such support as needed within the classroom, specials and recess. [*Id.*] The team also agreed that the Student should go to the Resource Room at the end of the day

with the classroom ed tech to process the day and his behavior of the day. [*Id.*] He received rewards under Ms. Peskurich's system of positive behavioral supports, such as additional computer time, bubbles, and the like. [Testimony of C. Peskurich] Other methods for addressing the Student's behavior challenges were also discussed. [*Id.*]

- 14.** Throughout the rest of the school year, the Student's behavior continued to be a problem.

The data collected by Ms. Peskurich and other staff showed wide fluctuations from day to day, and did not indicate any real improvement. [Testimony of C. Peskurich, S-344-401, 560-580] The Student liked working towards stickers in both the Resource Room and regular classroom, which led to various tangible rewards, but sometimes these interventions did not work. [Testimony of C. Peskurich] The Student continued to refuse to do things, push his classmates, leave the classroom, and yell that he did not want to do as asked, both in the Resource Room and regular classroom. [*Id.*] Other staff would try to de-escalate the Student's behavior, but if that did not work, Ms. Peskurich would have him sit quietly for five minutes, then talk about his actions. [*Id.*] Sometimes, he would refuse to leave the regular classroom, and Ms. Peskurich would have to leave her groups to address the Student's needs. She generally had a good rapport with the Student. The two made four rules together, and worked on following them: (1) hands and feet to self; (2) use kind words; (3) walking feet; and (4) ready to work. [*Id.*] Ms. Peskurich praised the Student when he made a good choice, and praise worked very well with him. Nonetheless, Ms. Peskurich felt that her behavioral plan was not working overall, and was very frustrated because she wanted to help the Student, but did not see things as improving measurably.

- 15.** At the January 25, 2010 IEP team meeting, the team agreed to evaluate the Student in the areas of academic development and intellectual testing, and conduct a formal classroom

observation to gain a better understanding of the Student's abilities. [S-88] The report of these evaluations was dated April 15, 2010, and was shared with the Parent in preparation for the April 29, 2010 IEP team meeting. [S-59] The report mentions the Student's behavioral difficulties throughout the school year, including speaking out of turn, refusal to comply with teacher demands, and peer conflicts. [S-59] Ms. Peskurich's behavior plan was also mentioned as being utilized to increase on task behavior. [Id.] The behavioral observation stated that while the Student's speech was at times garbled, he was generally understandable and his thoughts were logically connected. [S-60] During formal testing, he was at times fidgety, seemed to tire and lose interest, and appeared to not always be giving his best effort. [Id.] The WISC-IV scores were as follows: verbal comprehension-85, perceptual reasoning-73, working memory-74, processing speed-94, and full scale IQ-76.² [Testimony of J. Wojcik, S-62] Attention/comprehension index scores suggested that distractibility and lack of effort might have contributed to the poor scores. [S-64] The behavior rating scores showed that the Student was experiencing noteworthy behavioral difficulties both in the classroom and at home. [S-64] The behavior rating scales completed by the Parent, ed tech Ms. Raymond, and Ms. Cmaylo all indicated serious problems with aggression, hyperactivity, impulsivity, and peer relationships, with all but the Parent indicating issues with depression. [S-64] Dr. Wojcik thought the Student needed a teacher with expertise in behavioral management. [Testimony of J. Wojcik]

16. On April 26 or 27, 2010, the Parent and Krysten Harper, the Student's Spurwink case manager, met with Ms. Peskurich to discuss the evaluation report. [Testimony of Parent, K. Harper, C. Peskurich] Ms. Peskurich felt very emotional and teary during this meeting, and

² During his testimony, Dr. Wojcik corrected errors in the reported test scores.

testified that she had been feeling this way since March, as she felt overwhelmed by her duties, including her responsibilities towards the Student. [Testimony of C. Peskurich] Ms. Peskurich cared very much about the Student, but felt intimidated by the Parent, and also felt that the Parent made her feel like she had failed the Student and did not care about him. Ms. Peskurich remarked that she could have coordinated better with Ms. Cmaylo, and this would have helped Student somewhat, but she touched base with Ms. Cmaylo every day, and did not have time to do more than this. [Id.] Ms. Cmaylo, who was not at the meeting, testified that she felt the same way. She thought that she made a Herculean effort with the Student, but that it was unsuccessful, and what they tried to do was not enough to meet the Student's needs. [Testimony of K. Cmaylo] During this meeting, Ms. Mulsow called, and told Ms. Peskurich that she should not be having such a meeting with the Parent by herself. [Id.] Ms. Peskurich also reported that Ms. Mulsow thought the Student should be placed in the self-contained program at KES. [Testimony of K. Harper, Parent] The Parent, however, expressed her strong opposition to this placement. [Testimony of C. Peskurich, K. Harper]

17. At the IEP team meeting on April 29, 2010, the team discussed the Student's annual review, recent evaluation, and previous IEP goals. [S-44] Ms. Mulsow had followed the reports about the Student, and thought that although he was making some progress, it was not enough. [Testimony of S. Mulsow] Despite the school's best efforts, everyone agreed that what they were doing was failing. Consequently, Ms. Mulsow and Dr. Wojcik proposed that the Student would benefit from the self-contained program at KES. [Testimony of C. Peskurich, J. Wojcik, S. Mulsow, S-45] They felt it would be in the Student's best interest to be in a smaller, very structured setting, with a team-based approach. [Testimony of S. Mulsow] Ms. Mulsow felt the resource room model was not designed for students with significant,

complex disabilities, but was more of a tutorial model. The Parent did not agree with this placement, so the team did not write an IEP that day. [S-45] Ms. Mulsow asked the Parent to visit the KES program to observe and speak with the teacher, and the IEP team would reconvene thereafter. [S-45] At the meeting, Ms. Cmaylo reported on the Student's behavioral difficulties, particularly his refusal to work, and added that although she saw him making some gains, his progress was inconsistent and not at the rate the District would have liked to see. [S-45] The Parent said that she wanted more positive behavioral supports in the classroom and a written behavioral plan. [S-46, Testimony of Parent] She was not aware of the plan Ms. Peskurich and Dr. Wojcik had developed, and felt like the school year was wasted. [Testimony of Parent] The team agreed that it would compile a list of the Student's educational needs prior to reconvening in May. [S-33-35]

18. On May 10, 2010, the Parent visited the program at KES, and wrote a letter to Ms. Mulsow to say that she thought such a placement for the Student was premature and would not be a good fit at that time. [S-31] Among the Parent's concerns were that the activity she observed seemed young and reminded her of preschool, the program was geared towards behavior first and academics second, and the ed techs at both Consolidated and KES had the same training. [S-31] The Parent felt that the Student's behaviors were secondary to his learning needs.

[S-31]

19. The IEP team met again on May 13, 2010. Although there was little disagreement about the proposed IEP, drafted by Ms. Peskurich, the Parent disagreed with the rest of the team on the issue of placement. [S-7] The team determined that the Student had not made sufficient progress with his current IEP, and that the placement at Consolidated was not working for him. [S-7, Testimony of K. Casey, C. Peskurich, S. Mulsow] In the new IEP, services

included two 30-minute sessions per week of speech and language services, 30 minutes per month consult for social skills, physical therapy for 30 minutes per week and 30 minutes per month consult, two 30-minute sessions per week of occupational therapy, and 4.5 to 6.5 hours per day in the special education setting. [S-7] Most of the team thought the Student would benefit from social work services, particularly for his social skills. The Parent declined these, as she felt the social worker, Beverly Dow³, did not know the Student well, and it would just result in one more pull-out. [Testimony of C. Peskurich, Parent] With the exception of the Parent, the team believed that the KES program was most appropriate for the Student, as he would benefit from a smaller group setting that specifically targeted behavioral interventions throughout the school day, and the student to teacher ratio was lower. [S-7] The staff in the KES program had a higher skill set necessary to address the Student's behavioral issues, and had more experience with children with his needs. [Testimony of K. Cmaylo] Ms. Casey did not think giving the Student more ed tech time would work, even with a "super ed tech," because the team approach was necessary. [Testimony of K. Casey] They also agreed that the Student should have a maximum opportunity to be mainstreamed with support throughout his day. [S-7] The Parent felt strongly that the Student should remain at Consolidated in the Resource Room program with one-on-one ed tech support in the mainstream classroom. [Testimony of Parent, S-7]

- 20.** The Student had a history of ear infections, as discussed in Dr. Burgess's report. On May 26, 2010, the Parent brought the Student to Marti Andrews for an audiological evaluation. [P-144] Ms. Andrews, a Board certified audiologist, found that the Student had a moderate hearing loss in both ears, which loss was conductive in nature. [P-144] Andrews' opinion

³ At KES, the Student would have a different social worker.

was that with that degree of loss, the Student was unable to hear about 85% of conversational-loudness speech sounds within a few feet from the speaker. [P-144] She recommended a medical/otological examination of the ears, reevaluation following medical intervention, and preferential seating in school until the hearing loss could be resolved.

21. At Ms. Mulsow's invitation, the Parent again visited KES for an observation prior to the end of the school year. [Testimony of Parent] This did not, however, cause the Parent to change her views, as she felt there was no evidence that the Student could not get the same educational program in the regular education classroom. [Testimony of Parent]
22. Throughout the year, Ms. Cmaylo's grade reports showed that the Student was making progress in the classroom, and did not reflect the difficulties he was having. [Testimony of K. Cmaylo, P-151-152] Ms. Cmaylo explained her philosophy that when a report card showed only a student's difficulties, it undermined his willingness to try harder. [Testimony of K. Cmaylo] She saved those comments for conferences with parents, and refused to prepare a report card that contained mostly "needs improvement." Ms. Cmaylo was not satisfied with the Student's progress over the course of the school year, and felt he did not get what he needed from xx due to the challenges presented by his disabilities. [*Id.*]
23. The Parent pursued an independent evaluation with neuropsychologist Laura Slap-Shelton in July 2010. Although Dr. Slap-Shelton did not complete her evaluation or report in time for the hearing⁴, she prepared a summary of her evaluation to date, and testified about her recommendations for the Student. [Testimony of L. Slap-Shelton, P-190-198] She noted the Student's serious behavioral challenges, and found that the Student's academic achievement was in the low average range, which was commensurate with his cognitive abilities.

⁴ Dr. Slap-Shelton had not done a classroom observation or made all of the collateral contacts she planned to make.

[Testimony of L. Slap-Shelton] Dr. Slap-Shelton noted the Student's difficulty processing spoken language, and would expect many problems with compliance because of this. [Id.] She recommended, among other things, that the school conduct a functional behavioral assessment of the Student, and referred the Student to Elizabeth Fagan, a speech and language pathologist, for an auditory processing evaluation. [Id.] Dr. Wojcik felt that these test results showed that the Student's behavior problems both at home and school were getting worse. [Testimony of J. Wojcik]

24. Elizabeth Fagan administered the SCAN-3 test for auditory processing disorders (APD), and concluded that the Student had such a disorder. [Testimony of E. Fagan] She tested the Student's hearing while he had otitis media, then again after the infection was gone. At the second test, he did not have any hearing loss. [Id.] She recommended that the Student be seen by an audiologist once he reaches age 7, and made numerous other recommendations for the Student's programming, including direct therapy three to five times per week. [P-181-183]
25. After reviewing the results of Dr. Fagan's testing, Dr. Slap-Shelton concluded that the Student's "significant language processing impairments, documented hearing loss, and APD are likely to play a substantial role in his behavioral difficulties in the classroom setting, and will need to be addressed and appropriately accommodated by his school." [P-197] She also urged strong consideration of the recommendations in Dr. Fagan's report. [P-197] It was Dr. Slap-Shelton's opinion that the Student did not need to be in a self-contained classroom. [Testimony of L. Slap-Shelton] She thought he should be in a regular education classroom with some pullouts and support with social pragmatics and speech/language issues. [Id.] Dr. Slap-Shelton recommended that a well-trained ed tech work with the student most of the day, and that this person be trained to respond to the Student's behavior plan. [Id.]

- 26.** The Parent challenged the appropriateness of the IEP drafted in May 2010, and requested a due process hearing on August 6, 2010. She invoked the Student's stay-put rights so the Student would remain at Consolidated when he began xx grade.
- 27.** For xx grade, the Student was assigned to Julie Urban's class at Consolidated. There are 17 students in this class, and the Student has a one-to-one ed tech. Ms. Peskurich remained the Student's special education teacher.⁵ Ms. Peskurich's staff of ed techs has been reduced to two, Gloria Bennett and Dana Ruel. The staff continues to monitor the Student's behaviors, and compile narratives of the Student's day. [S-599-595] Ms. Urban reported similar problems to those the Student encountered in xx, including trying to bolt from the building, pushing classmates out of the way to be first in line, and the need to do things his own way. [Testimony of J. Urban] Each child has his or her own square on the rug in the classroom, but at least two or three times a week, the Student is on someone else's square, which upsets the other students. If they ask the Student to move, he refuses. [*Id.*] Because of the number of pullouts, the Student's day is very disjointed, and he has many transitions, which are a problem for him. When the class is doing a task he does not like, he is disruptive. Ms. Urban did not feel the school was meeting the Student's needs, and that he would do better in an environment in which there were fewer students, and with a joint team effort. [*Id.*]
- 28.** Although Ms. Peskurich started out having a good relationship with the Parent, she became intimidated because the Parent was asking for things Ms. Peskurich could not do, and she was the person to whom the Parent spoke when angry. [Testimony of C. Peskurich]
- 29.** On Friday mornings, the whole school attends a morning meeting in the gym. After the morning meeting on Friday, September 10, 2010, the Parent went to Ms. Urban's classroom,

⁵ The only other special education teacher in the school runs a life skills program for students who are lower functioning than the Student.

at which time Ms. Urban called Principal Crandall and asked for help. On his way to the classroom, Principal Crandall ran into the Parent. He stopped to speak with her, and instructed her not to have discussions with teachers in their classrooms, but to come to the office. He would then call the teachers into his office, where they could discuss the Student in private. [Testimony of D. Crandall] He did not want these conversations taking place where students could witness them. Mr. Crandall assumed that the Parent was then going to leave the school. Instead, despite Principal Crandall's instructions, the Parent went to see Ms. Peskurich in her classroom. The Parent entered the classroom, then stood in the doorway to Ms. Peskurich's office, handed her Dr. Fagan's report, and said in an angry tone, "Make sure everybody gets this." [Testimony of C. Peskurich, P-214] Students were in the vicinity, at least one who was paused at the door because the Parent was blocking it. [*Id.*] The Parent pointed her finger at Ms. Peskurich and said in what Ms. Peskurich felt was a demeaning tone, "I'll say this once and only once. You should all be ashamed of yourselves." [*Id.*] The Parent then exited the classroom. [P-214] Ms. Peskurich was very upset and embarrassed, particularly as the Parent did this in the presence of students and ed techs. Ms. Peskurich told ed tech Dana Ruel that she was not going to put up with the Parent's treatment of her anymore, and left the room. [P-216] Ms. Peskurich immediately reported the incident to Principal David Crandall, who observed that Ms. Peskurich was very upset and crying. [Testimony of C. Peskurich, D. Crandall] Ms. Peskurich said she felt intimidated by the Parent. Later that morning, she spoke to her union representative, and reported the incident to Ms. Mulsow. Because of the high degree of anxiety Ms. Peskurich experienced in dealing with the Parent regularly, and the fact that she felt bullied by the Parent, she decided to take her union representative's advice and go to the local police station, where she made a report, and

requested a protection from harassment order. [Testimony of C. Peskurich, P-214] Before doing so, she also consulted with the school resource officer. She did not ask Mr. Crandall for his permission to do this, but simply informed both him and Ms. Mulsow of her plans. Following this incident, Mr. Crandall began acting as the go-between for communications between the Parent and the Student's teachers.

30. Ms. Peskurich uses the Wilson reading program with the Student, which seems to be helping him to make progress. He has also improved some of his math skills, but has not met his goals. [Testimony of C. Peskurich] Two ed techs work with him in the Resource Room, but do not have specific training in behavior intervention. When the Student needs to leave Ms. Urban's classroom for behavioral reasons, he comes to the Resource Room. This is also a preferred activity for him, and it is a reward to go there and play on the computer. [*Id.*] His behavior has not, however, improved.

31. On September 24, 2010, Krysten Harper observed the Student in Ms. Urban's classroom. During circle time, the Student was fidgety, and although he was having trouble controlling his body, he was quiet. He then began a writing activity, and stayed on task for 20-30 minutes. There was a short incident between the Student and a classmate, but overall, Ms. Harper thought the Student did well, and did not witness unmanageable behaviors during the observation. [Testimony of K. Harper] She also did not see any ed techs working with the Student.

32. When Dr. Burgess saw the Student recently, it was unclear how well the Student could hear, due to ear infections. He explained that auditory processing issues could have a lot of causes, but in the Student's case, it is due to the brain not being well developed and hearing loss. Because the Student had an ear infection during this particular visit with Dr. Burgess, his

behavior escalated. [Testimony of D. Burgess] Dr. Burgess notes that the Student has a language-based disorder, and difficulty understanding so that it is necessary to repeat things multiple times for the Student to hear it. Although he did not have an opinion regarding whether the KES program was appropriate, any program for the Student would have to work on language at the same time as behavior. [Id.] While acknowledging that the Student had a lot of challenging behaviors which make it difficult for him to be in a mainstream classroom, Dr. Burgess did not think the Student should be in a program that had a purely behavioral approach, as a creative approach was necessary to get the Student to be compliant most of the time. [Id.] He added that the Student needed constant redirection, but that this was difficult because he did not understand social rules, even though he knew them. [Id.] Dr. Burgess recommended trying to mainstream the Student as much as possible, if he were not too disruptive, to enable the Student to model behavior of nondisabled peers.

- 33.** The Student's speech and language therapist for both xx and xx grade, Stephanie Einsiedler, felt that the Student needed help with expressive and receptive language, articulation, following directions or listening skills and social pragmatic skills. [Testimony of S. Einsiedler] She works with the Student for 30 minutes 3 times each week in these areas. His IEP, however, only lists one speech therapy goal. [S-19] Ms. Einsiedler believes more speech goals should be added to the IEP, but this was not done because the IEP team meeting in May broke up abruptly. At KES, social pragmatic goals would be administered as a team effort, rather than by the speech therapist. [Testimony of S. Einsiedler] This is why the disputed IEP reduced the Student's speech therapy to twice per week. Ms. Einsiedler had concerns about the Student's refusal to complete work, even when simplified, and his general noncompliance with adult requests. Although he frequently listened to Ms. Cmaylo as an

authority figure, he was inappropriate with other adults, including ed techs and specialists.

[*Id.*] The Student's anxiety, attentional problems, and fine motor problems make much of the curriculum difficult for him. Ms. Einsiedler noted that the Student's self esteem was an issue because he would try to do his best, but his work would not look like that of the other children. Ms. Einsiedler also took issue with Dr. Fagan's report. Dr. Fagan is a speech pathologist, not an audiologist, and the American Speech-Language-Hearing Association (ASHA) says that only audiologists can diagnose auditory processing disorders. [*Id.*] Ms. Einsiedler has experience working with children with such disorders, but could not agree with an auditory processing disorder diagnosis made by a speech pathologist, and an audiologist would not make such a diagnosis before a child reached age seven. She took issue with many of Dr. Fagan's methods, such as not getting an audiological evaluation by an audiologist before administering the SCAN-3 test, not specifying how she gave the test (i.e. in a sound booth or with headphones), and not stating what the scores meant in her report. [*Id.*] She does, however, agree with some of Dr. Fagan's recommendations, and that some of them should be added as accommodations immediately.

- 34.** Guilia Fornara, the Student's physical therapist, felt that having physical therapy once per week was appropriate for the Student. [Testimony of G. Fornara] She thinks the Student would be better served at KES, a program in which Ms. Fornara worked previously. She described it as an excellent program with a great team approach for working with children whose behaviors interfere with their learning. [*Id.*] Ms. Fornara explained that the Student is a sweet child who wants to succeed, but the program at Consolidated does not meet his needs. While the special education teacher at Consolidated has a large caseload, and cannot

drop everything and deal with problems that arise, the teacher at KES can, as she only has 8-12 students on a caseload. [*Id.*]

35. Susan Richardson, the Student's occupational therapist, initially worked with the Student once per week in class and once outside of class. Partway through the year, she asked to stop working in the classroom because the Student would refuse to work with her because, in his words, "You are not my teacher." [Testimony of S. Richardson] He was very productive in her room, however. He also had difficulty with transitions, initially not wanting to leave the classroom, then not wanting to leave the OT setting. She observed him having difficulty with multistep instructions, taking things away from other students, and leaving the classroom when he should not because he was "done." [*Id.*] Ms. Richardson does not think the Student's current arrangement provides the Student with enough support, and that he would do much better with the more structured approach in Ms. Casey's program.

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parent: The District committed fatal procedural errors in the formulation of the Student's IEP and placement offers by not evaluating the Student in all areas of suspected disability, and not properly evaluating and addressing the Student's behavioral needs. Although the District was well aware of the Student's receptive and expressive language issues, and viewed him as a behavior problem, there was no excuse for the District's completely omitting any testing of the Student's speech-language skills, how these difficulties may affect the Student's behavior, or conducting an FBA as part of the District's 2010 evaluation. The District also violated the IDEA by predetermining the Student's placement in developing its May 2010 IEP offer. Both IEP team meetings in the Spring of 2010 were infected by a predetermination to place the Student at KES.

Neither is the Student's proposed IEP substantively appropriate. It lacks a behavioral support/intervention plan, which is a critical omission, given the role of the Student's behaviors in the District's decision to place him at KES. There is also no evidence that the Student requires the high degree of segregation from the mainstream called for in his IEP. This is not the least restrictive environment, as required by law. The District has yet to attempt any of the following, which could allow the Student to be successful in a less restrictive program: a proper FBA, proper development and implementation of a BIP, enhanced services and accommodations to improve the Student's receptive language and auditory processing skills, use of professional behavioral consultation services, and staff training in behavioral techniques, among other things. Third, there are inadequate speech/language goals and services. The hearing officer should vacate the IEP and placement offered for xx grade, and order the team to reformulate the IEP with appropriate supplementary aids and services to be implemented in a supported mainstream setting at Consolidated.

The District has also engaged in retaliatory actions against the Parent and Student for filing a due process complaint. They have done this to make the Student's placement at Consolidated untenable and undesirable by preventing the Parent from communicating directly with the Student's teachers.

B. Brief summary of the position of the District:

The hearing officer should not set aside an IEP based upon procedural violations absent a rational basis to believe these inadequacies compromised the Student's right to an appropriate education or caused a deprivation of educational benefits. With respect to the issue of whether the Student had a proper evaluation, the Parent abandoned this issue at hearing, and they failed to produce any evidence to support this allegation.

The self-contained program at KES is the right placement for the Student. The Student's low cognitive abilities, significant behavioral challenges and attention issues require a well-structured, intensive program with mainstreaming opportunities and a team approach, which is what KES offers. This conclusion is supported by his performance last year at Consolidated, where he made no improvement in his behavioral management, despite a valiant effort by all of the staff with whom he worked. Virtually all of the students in the resource room were there for academic needs, rather than behavioral ones. This setting serves many students, and does not give the Student the individual attention he needs. The Parent's response that the District could have done more would merely result in a re-creation of the KES program at Consolidated, which the law does not require. The Student's 2010-2011 IEP and placement are reasonably calculated to provide him with educational benefits in the least restrictive environment, and the hearing officer should uphold this determination.

The hearing officer has no jurisdiction to determine the Parent's claim of retaliation. In any event, this claim was baseless, as there was no evidence that the District had anything to do with Ms. Peskurich's decision to file for a protection from harassment order against the Parent. Principal Crandall's decision to have the Parent's concerns come through him was not made to punish the Parent for filing her due process complaint, which occurred at least a month earlier, but to help manage a situation in which the Parent was making the staff feel very uncomfortable.

1. Did the District commit procedural violations in the formulation of the Student's 2010-2011 IEP and placement offer by predetermining his placement prior to development of his IEP at the team meeting on May 13, 2010, and/or by failing to evaluate the Student in all areas of suspected disability in connection with this determination?

A. Evaluations

Procedural violations in the IEP process may undermine the integrity of an IEP and thus be a violation of FAPE if there is "some rational basis to believe that procedural inadequacies

compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) A procedural fault rises to this level when a school fails to conduct proper assessments and consequently provides inadequate services. *Dracut Sch. Comm. v. Bureau of Special Education Appeals*, 110 LRP 50313 (D. MA. 2010) *citing N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008)(Failure to diagnose student with autism prevented IEP team from developing plan reasonably calculated to provide educational benefit). On the other hand, the failure to put a behavior intervention plan (BIP) into writing and attach it to a student's IEP does not constitute a FAPE violation, as long as the BIP was implemented. *School Bd. of Indep. Sch. Dist. No. 11 v. Renollett by Renollett*, 440 F.3d 1007 (8th Cir. 2006)

Both Maine and Federal regulations require that a child be evaluated in all areas of suspected disability, including "hearing, social, and emotional status, general intelligence, academic performance, communicative status and motor abilities." Maine Unified Special Education Regulation (MUSER) §V(2)(C)(4); 34 CFR §300.304(c)(4). At the January 25, 2010 IEP team meeting, the team proposed evaluating the Student in the areas of academic development, intellectual abilities, and a formal classroom observation to gain a better understanding of the Student's abilities. [S-88] Although the testing included the completion of behavior rating scales, and behavioral observations, no functional behavioral assessment has ever been done. Additionally, although it was noted in the psychological evaluation that the Student had speech problems, there was no specific evaluation of his speech and language needs or abilities. [S-60]

Reevaluations are just as important as initial evaluations under the IDEA, but the law does not require that every time a school does an evaluation of an eligible student that is not a triennial evaluation, it must do a complete one in all areas of suspected disability. Schools commonly retest in specific areas when needed. On the other hand, given the Student's difficulties with language and the fact that his behaviors were a major impediment to his learning, it is unclear why the District did not evaluate him in those areas. The Student's behaviors even made it difficult to obtain accurate WISC-IV and CMS test results.

The IDEA requires the IEP team, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 USC §1414(d)(3)(B)(i). The regulations state that a school district must consider a student's need for a BIP under these circumstances. 34 CFR 300.324(a)(2)(i). OSEP has stated that a district's obligation to consider a BIP for a student whose behavior impedes his own learning or the learning of others exists regardless of whether the district has contemplated disciplinary action for the student's behavior. *Letter to Shows* 33 IDELR 223 (OSERS 2000).

A method often used for evaluating student behaviors to develop a BIP is the functional behavioral assessment. FBAs are usually done in association with the removal of a student from school for behavioral reasons, and the IDEA only *requires* them in connection with serious disciplinary matters. *See* 34 CFR 300.530(f). This does not mean, however, that a school department cannot choose to use FBAs in situations like this one. The general purpose of an FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with problem behaviors, especially when they interfere with a child's education. *Independent*

Sch. Dist. No. 2310, 29 IDELR 330 (SEA MN 1998). In its comments, the Department of Education emphasized that the IDEA took a proactive approach to behavior issues, stating,

as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change of placement. In fact, the Act emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, 'the use of positive behavioral interventions, and other strategies to address the behavior.' . . . This provision should ensure that children who need behavior intervention plans to succeed in school receive them.

71 Fed. Reg. 46721 (2006).

Although there is no single prescribed method for conducting an FBA, MUSER defines it as including:

direct assessments, indirect assessments and data analysis designed to assist the IEP Team to identify and define the problem behavior in concrete terms, identify the contextual factors (including affective and cognitive factors) that contribute to the behavior, and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior. Formal documentation of the assessment by appropriately qualified individuals becomes part of the child's educational record and is provided to the IEP Team.

Although Ms. Peskurich and Dr. Wojcik created a behavior plan that sought to assist the Student with his behavioral difficulties, it was not done by a behavioral expert, with the thoroughness required of an FBA, or even with any direct involvement from the IEP team.⁶ Although the plan had many interventions, it was treated in such an informal way that it was not shared with the rest of the IEP team, including the Parent, who had no knowledge of its existence, or with the classroom teacher. During the April 29, 2010 IEP meeting, the Parent

⁶ In *Letter to Janssen*, 51 IDELR 253 (OSERS 2008), OSERS states that there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA unless state law requires it. Although the IDEA does not state who may conduct FBAs, districts must ensure that those who do conduct them are adequately trained. Although Dr. Wojcik testified that he has conducted an FBA or two for another district, and went to a workshop where FBAs are discussed, he was not a behavior specialist, and Ms. Peskurich had no experience in this area. [Testimony of J. Wojcik, C. Peskurich]

asked for a written BIP and more behavior supports, and she had requested an FBA previously. [Fact #17] There was no explanation why no one told the Parent of the existence of Ms. Peskurich's plan at that time. At the hearing, this plan was something of a mystery to everyone other than its creators.

The District clearly felt that the Student's behaviors were sufficiently serious that he needed to be placed in a self-contained behavioral program. Yet the IEP team never ordered an FBA, nor did it take a formal look at the Student's behaviors, and agree to a plan for addressing these behaviors. Consequently, we do not know whether the Student would have experienced a greater degree of success in his educational program, if he had had the benefit of a BIP developed in accordance with the IDEA law and rules. This is the sort of procedural defect that, in a case like this one, could compromise the Student's right to an appropriate education, and is therefore a violation of the IDEA.

It is unclear why the District did not evaluate the Student's speech and language progress, but given Ms. Einsiedler's work with the Student, this does not seem to have resulted in a deprivation of educational services. Nonetheless, to avoid an IDEA violation, it would be wise for the IEP team to meet to revisit the Student's speech and language goals to reflect the work Ms. Einsiedler is doing with the Student.

The fact that Dr. Fagan diagnosed the Student with an auditory processing disorder, however, does not indicate that the District violated the IDEA by failing to evaluate for this. I share Ms. Einsiedler's concerns about the appropriateness of Dr. Fagan's evaluation and diagnosis⁷, and note that neither Dr. Slap-Shelton nor Dr. Burgess recognized this potential issue

⁷ Ms. Einsiedler testified that only an audiologist may make the actual diagnosis of APD. The hearing officer takes official notice of Chapter 5 of the Code of Maine Regulations 02-296, governing the practice of speech-language pathology and audiology, which only permit audiologists to evaluate and manage children and adults with central auditory processing disorders. This is the position held by ASHA, which explains that while various

when doing the PEDS evaluation. The District should continue to monitor the Student's auditory processing difficulties, and have appropriate evaluations done by qualified professionals in accordance with professional standards and Maine law so that his educational program can address his needs in this area.

B. Predetermination of Placement

The Parent alleges that the District developed the May 2010 IEP based upon a predetermined placement, rather than focusing on the Student's individual needs. Predetermination is a procedural violation of the IDEA, and can deprive a child of a FAPE where the parents are effectively deprived of meaningful participation in the IEP process. *Deal v. Hamilton Co. Bd. Of Education*, 392 F.3d 840, 855 (6th Cir. 2004) Predetermination is not, however, synonymous with preparation or with stating an opinion. Federal law "prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N.L. ex rel. Mrs. C. v. Knox County Sch.*, 315 F.3d 688, 694 96th Cir. 2003); see also 34 C.F.R. § 300, App. A, No. 32. Participation must be more than mere form, it must be *meaningful*." *Deal*, 392 F.3d at 858 (emphasis original).

I cannot conclude that the Parent was deprived of meaningful participation in determining the Student's placement. When the Student's transition to the District was first considered, some

professionals, including teachers, psychologists, and speech-language pathologists may investigate aspects of a child's auditory processing difficulties, and professionals may actually use test tools that incorporate the terms "auditory processing" or "auditory perception" in their evaluation, or may even suggest that a child exhibits an "auditory processing disorder," however valuable the information from the multidisciplinary team is in understanding the child's overall areas of strength and weakness, none of the tests used by these professionals are diagnostic tools for APD, and the actual diagnosis of APD must be made by an audiologist.

District employees felt that the Student would do better in the KES program, but they listened to the Parent's concerns and decided to give the Student an opportunity to be in the less restrictive program at Consolidated, which was the Parent's choice. By the April 2010 IEP team meeting, all members of the team agreed that the Student's program was not working. Several team members felt the Student's needs would be better met at KES. They discussed the differences between the two programs, and the challenges the Student faced. Because the Parent disagreed with the KES placement, the team decided to compile a list of the Student's needs and meet again for further discussion in a few weeks. The Parent agreed to observe the KES program.

At the second IEP team meeting, the team agreed on everything in the IEP except the placement. After observing the Student's struggles and lack of adequate progress at Consolidated, staff members who had agreed to that placement a year earlier now felt the Student needed a more structured setting. Simply because the parties held different views on this issue, and ultimately came to a different decision than the Parent does not mean that there was a predetermination in violation of the IDEA. The evidence shows that the Parent had meaningful input in this process, and the District has shown its openness to consider different options. Other changes were made at the Parent's request, such as the elimination of social work services, despite most of the team believing this would benefit the Student. Furthermore, there is a difference between a predetermination and preparation. Here, Ms. Mulsow and Dr. Wojcik considered the Student's placement in preparation for the IEP team meeting. It is impossible for team members to have a productive meeting if they arrive having given the Student's programming no thought in advance. There was no evidence that the other team members were pressured to support this placement, and they all had thoughtful reasons for their decision. I cannot conclude that the District's conduct was a violation of the IDEA.

2. Are the IEP and placement for the 2010-2011 school year reasonably calculated to provide the Student with a free appropriate public education in the least restrictive environment?

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The hearing officer must examine whether the Student's educational program contained in his IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The First Circuit elaborated that the student's educational program must guarantee "a reasonable probability of educational benefits with sufficient supportive services at public expense." See *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law does not

promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

998 F.2d 1083, 1086 (1st Cir. 1993).

The law is also clear that special education programming must be delivered in the least

restrictive environment. 20 U.S.C. § 1412(a)(5); MUSER §X (2)(B). What is least restrictive depends upon an individual's needs. The goal is to educate the Student, whenever possible, with nondisabled students, and as close as possible to the child's home. MUSER §X(2)(B). The regulations also state that the school must ensure that "the child is educated in the school that he or she would attend if nondisabled," unless the IEP necessitates a more restrictive placement. 34 CFR §300.116(c); MUSER §X.2.B. The U.S. District Court in Maine, in *Millay v. Surry*, recently cited the following standard,

The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995). "Mainstreaming may not be ignored, even to fulfill substantive educational criteria." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990).

07-CV-178-B-W (Dec. 22, 2009), 109 LRP 79729. On the other hand, "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).

Here, the Parent has felt very strongly since her first contact the District about the Student's transition to xx that the Student should remain in his neighborhood school and be mainstreamed to the extent possible. The District, on the other hand, believes that such a plan was attempted in the 2009-2010 school year, and all parties agree that this did not work. Consequently, the District has proposed placing the child in a program for students with behavioral problems that impede their ability to learn. This program is at KES, another school in a neighboring town within the District, but is not the school the Student would attend if he were not disabled.

The District introduced a wealth of evidence about the wonderful staff and programming in Ms. Casey's self-contained program at KES, and of how this program would benefit the

Student. This program would help the Student manage his behaviors which are interfering with his education. I would conclude that this program could provide the Student with FAPE, except that I do not know whether this is the least restrictive setting in which the Student can be educated because he has not been given a chance to achieve meaningful educational progress in the less restrictive environment at Consolidated with the benefit of an FBA and a BIP drafted by the IEP team for implementation there. This was the one significant step that the IEP team did not take. For the reasons discussed above, this was a substantial omission in the IEP process in the spring of 2010. Despite Ms. Peskurich's valiant efforts at implementing her behavior plan, she did not have the expertise or training in this area needed to develop the type of plan that someone with the Student's behavioral issues required. To do this job properly, the Student needs a proper behavioral assessment and BIP that should be developed by the IEP team with input from a behavioral expert and implemented in both the mainstream and special education settings.

This does not mean that the District has to recreate the KES program at Consolidated. The District cites a 2004 Maine hearing officer decision regarding a student in a rural school district, in which the hearing officer held that the student was not likely to receive meaningful benefit in a "cobbled-together program" in the rural town, noting the limited ability of the district to create a new program to meet the agreed-upon needs of this student, particularly when it was difficult to fill specialized positions. *M.S.A.D. No. 37*, 43 IDELR 133 (Me. SEA 2004). The hearing officer cites a Fourth Circuit decision holding that the IDEA does not require a school district to duplicate in the student's neighborhood school a highly specialized education program because the student's neighborhood school is a few miles closer to his home than the school with

the specialized program. *M.S.A.D. No. 37, citing Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991).

If, after the District conducts the necessary behavioral assessment and determines the types of supports needed by the Student, it is necessary to essentially recreate the KES program for the Student to succeed at Consolidated, then the Student shall attend the program at KES. The Student's program is already considerably fragmented, and he has difficulty with transitions, so further "cobbling together" of his program simply to keep him at Consolidated is not in his best interest. If it appears that the Student may be successful at Consolidated with some changes that do not go so far as to recreate the KES program, the District must provide that. While it remains to be seen what the results of the behavioral assessment will be, I would like to provide some guidance to the parties of which changes to the Student's program at Consolidated would be reasonable, and which would go too far. It would be reasonable to provide a one-to-one ed tech with training in working with students with behavioral challenges, some consultation time with a behavioral specialist, and accommodations of the Student's auditory needs. More than that, including hiring another special education teacher with skills like those of Ms. Casey, goes too far, and if that degree of change is needed, the Student should be placed at KES.⁸ Once the BIP is implemented, the District shall track the Student's behaviors in accordance with the recommendations of the behavioral specialist, using measurable goals, for a period of 90 days. If the Student is making reasonable documented educational and behavioral progress during this period, he shall remain at Consolidated. If not, then the Student cannot receive FAPE at

⁸ There was also no evidence that the Student would do better with the other xx grade teacher at Consolidated, who is his aunt. It is possible that the District specifically chose not to place the Student in a relative's class, as school districts sometimes avoid doing so. In any event, staffing choices, including the Student's mainstream classroom teacher, are District decisions.

Consolidated at this time, and shall be placed at KES. The evidence supports a conclusion that both his behavioral and educational needs can be met there.

Given the nature of this dispute, it is with some reluctance that I order additional assessments and a subsequent reconsideration of the Student's IEP by the IEP team, as I would prefer to provide greater specificity to avoid the possibility of a further protracted dispute between the parties. It is not in the Student's best interest for the relationship between the Parent and the Student's teachers to be as poor as it is, and litigation does not improve this relationship.

3. Has the District engaged in adverse actions against the Student and Parent in retaliation for filing this due process complaint?

Although the District argues that the hearing officer has no jurisdiction to hear the Parent's claim of retaliation, I agree that the case cited by the Parent, *Hesling v. Avon Grove Sch. Dist.*, 47 IDELR 256 and its progeny⁹, among other cases, support the Parent's right to bring a retaliation complaint under the IDEA. I do not, however, believe that the Parent has produced evidence showing that the District has retaliated against her for filing her due process complaint.

The evidence at the hearing demonstrated that Ms. Peskurich acted purely of her own volition in deciding to go to the Kennebunkport Police Department and seek a protection from harassment order against the Parent. There was no evidence that any school official prompted or in any way encouraged her to do this. The Parent's conduct on September 10 was simply the proverbial straw that broke the camel's back. The Parent's allegations of retaliation were merely speculation on her part unsupported by factual evidence.

Principal Crandall's decision to have all communication between the Parent and the Student's teachers go through him appears to have been based, not upon the Parent's exercising her rights under the IDEA, but because the Parent's conduct was disruptive to the classroom,

⁹ 286 F.App'x 773 (3rd Cir. 2008), 54 IDELR 284 (ED PA June 30, 2010).

intimidating to the Student's teachers¹⁰, and because she had conversations in front of students and staff that should be kept in private. [Facts #28 & 29] While I understand the Parent's concerns about the effect of the principal's decision, this is a matter to be resolved between the principal and Parent, but at this point, does not implicate the Parent's due process rights.

4. If the hearing officer finds a violation of any of the above, what remedies are appropriate?

I cannot conclude that the IEP and placement resulting from the May 13, 2010 IEP meeting educates the Student in the least restrictive setting for the reasons set forth above. The District is ordered to take remedial action set forth in section V below.

V. ORDER

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

1. The May 13, 2010 is hereby vacated, and the stay-put IEP shall remain in place until such changes are made in accordance with this order, as set forth below.

2. The District shall obtain a functional behavioral assessment conducted by a Board Certified Behavior Analyst or similarly qualified professional as soon as possible, but no later than 45 days from the date of this decision. Upon receipt of the FBA report, the IEP team shall meet and draft a behavior intervention plan, which shall be added to the Student's IEP. This plan shall be implemented at Consolidated, assuming this can be done by making reasonable but limited changes to the Student's stay-put program, as set forth above, such as hiring an educational technician with experience or training (which the District can provide, if necessary) in working with students with behavioral problems. Once the BIP is implemented, the District

¹⁰ This does not mean that the Parent was trying to intimidate the Student's teachers, but she had that affect upon Ms. Peskurich at the very least. The Parent was trying to be a good advocate for her son's educational needs, but apparently this was a very emotional issue for both her and the special education teacher, with unfortunate results.

shall track the Student's behaviors in accordance with the recommendations of the behavioral specialist, using measurable goals, for a period of 90 days. If the Student makes reasonable documented progress in both his behavioral and educational goals during this period, he shall remain at Consolidated. If not, then he shall transfer to the behavioral program at KES.

SHARI B. BRODER. ESQ.
Hearing Officer