

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING
April 12, 2011

11.039H – Parents v. East Millinocket School Department

Representation

Family:	None
School District:	Eric Herlan, Esq.
Hearing Officer:	Sheila Mayberry, 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 February 7, February 8, and March 16, 2011 in Millinocket, Maine. Present for the entire proceeding were Eric Herlan, Esq., counsel for the East Millinocket School Department (“District”); Jane Disselkamp, the Director of Special Education for the District; and the Student’s parents (“Parents”). The Parents were unrepresented in this proceeding. The Hearing was open to the public at the request of the Parents.

Testifying at the hearing were:

Angela Adams	xx Grade Teacher
Evelyn Beaulieu	Principal, Opal Myrick School
Cynthia Clukey	Special Education Teacher
Jane Disselkamp	Director of Special Education
Parent	The Student’s Father
Parent	The Student’s Mother
Andrea Gray	Clinical Supervisor, United Cerebral Palsy
Kim Ingalls	Behavior Health Professional, United Cerebral Palsy
Lisa Keyser	Supervisor, United Cerebral Palsy
Pamela Paige	Family Outside Support
Angela Stubbs	Behavioral Health Professional, United Cerebral Palsy

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On November 26, 2010, the Parents requested a due process hearing regarding their son. The District submitted a Motion to Dismiss, a Sufficiency Challenge, and an objection to the automatic “stay put” requirement. On December 11, 2010, an order was issued denying the District’s Motion to Dismiss and Sufficiency Challenge. The order also denied the objection to the automatic stay put requirement and ordered the continuation of the delivery of services provided by the United Cerebral Palsy Association of Maine (“UCP”). On December 13, 2010, a clarification of the order was issued. On the last day of the hearing, the Parents requested that the Hearing Officer issue a Cease and Desist order requiring the District to discontinue its repeated requests to UCP for documentation pertaining to the student’s programming. The Hearing Officer refused to issue such an order and recommended that the Parents seek relief in state or federal court.

On January 11, 2011, a prehearing conference was held in Millinocket, Maine. Participating in the conference were: the Parents; Jane Disselkamp, the District’s Director of Special Education; and Eric Herlan, Esq., counsel to the District. Documents and witness lists were exchanged in a timely manner. The Parents submitted 72 documents (683 pages, herein referenced as P. – #)¹ and one video recording constituting the first 41 minutes of the Individualized Education Program (“IEP”) Team meeting on November 22, 2010. The District submitted 32 documents (199 pages, herein referenced as S. – #).²

At the close of the testimony on March 16, 2011, the parties requested to submit written briefs. A scheduling order was issued on March 17, 2011, permitting the submission of briefs, due on or before March 28, 2011. Both parties submitted briefs and the record was closed per a March 29, 2011 order.

¹ The Hearing Officer has submitted a revised index of the Parents’ documents, correcting page numbers.

² On the last day of hearing, the Parents offered a Report Card for the second trimester of the 2010-2011 school year. The District had no objections and the Report Card was included in the Parents’ submission as P. - 680-683.

II. ISSUES

1. Whether or not the student's IEP, as amended on November 22, 2010, is appropriate for him.
2. Whether the IEP Progress Report for the second trimester of the current school year (2010-2011) amounted to a change in the IEP without parent involvement, in violation of the Individuals with Disabilities Act ("IDEA").³

III. FINDINGS OF FACT

1. The student is xx years old (DOB xx/xx/xxxx) and lives with his parents and two brothers in East Millinocket, Maine. He began xx in the fall of 2008 at St. Joseph School in Baltic, Connecticut, prior to the family's move to Maine in August 2009. He adjusted well and performed successfully in all areas. (P. – 5-23) However, starting in March 2009, he became emotionally "dysregulated" in the classroom. (P. – 5-23) His behaviors included shoving his desk, knocking over a chair, and repeatedly threatening to squeeze or throw a banana. (P. – 5-23) Thereafter, the District informed Parents that it could no longer accommodate the student's needs and that he could not return to the school. (P. – 5-23)
2. In May 2009, the student was referred to Children's Neurology Services, LLC, in Middletown, Connecticut. No standardized assessments were completed and further evaluations were recommended. He was referred to the Yale University School of Medicine, Department of Genetics to test for Fragile X syndrome, which was ruled out after testing. (P. – 5).
3. In July 2009, the student was referred to Dr. Mayas Akbar, Ph.D. of the Integrated Wellness Group, in New Haven, Connecticut, where a psycho-educational evaluation was performed. (P. – 5-23) At that time, he was reported to engage primarily in self-play, and did not appear to be interested in social interactions. He repeated phrases, was sensitive to loud noises, and demonstrated odd hand and body mannerisms. (P. – 5-23)
4. The psycho-educational evaluation included family and medical history, educational history, a review of previous assessments, and the use of various assessments tools. These included

³ This issue was added on the last hearing day, as both parties agreed to have it addressed by the Hearing Officer.

the Wechsler Preschool and Primary Scale of Intelligence, 3rd Edition (“WPPSI-III”); Wechsler Individual Achievement test, Second Edition (WIAT-II); the Comprehensive Assessment of Spoken Language (“CASL”); Social Communication Questionnaire (“SCQ”); Vineland-II; Sensory Profile; Behavior Rating Inventory of Executive Functioning (“BRIEF”); Global Executive Composite (“GEC”); Behavior Assessment System for Children, Second Edition (“BASC-2”); and Autism Diagnostic Observation Schedule (“ADOS”). (P. – 5-23)

5. In summary, Dr. Akbar determined that the student’s overall cognitive abilities were in the Average range. However, it was notable that his nonverbal problem-solving skills fell in the Superior range and were considerably better developed than his verbal abilities, which fell in the Average range. This suggested that he was more efficiently able to problem-solve using abstract categorical reasoning and concept formation without the use of words, rather than through the use of words. He was better able to complete tasks by relying on his ability to visually scan and decode information, rather than on his verbal conceptualization skills. (P. – 5-23)

6. Academically, the student’s scores in Reading, Writing, Mathematics, and Oral Language fell in the Average range. (P. – 5-23) He had developed age-appropriate word recognition and reading comprehension skills. However, his phonological awareness and decoding skills were identified as a relative weakness. Related to mathematics, the student’s skills were solidly developed. His writing skills were also at grade level. While still in the Average range, his Oral Language skills were somewhat less developed relative to his other academic abilities. (P. – 5-23)

7. Dr. Akbar concluded that a diagnosis of Pervasive Developmental Disorder (“PDD”), ruling out Sensory Integration Disorder, was appropriate given his atypical behaviors. This was based upon his repetitive speech patterns; limited social skills; limited capacity to play using imagination; unusual sensitivities to loud noises, certain foods, and environments; odd hand mannerisms when he is excited; becoming extremely rigid and tense, and fisting his hands at

his side when he is angry; and becoming emotionally “dysregulated” when routines are not followed or sustained. (P. – 5-23)

8. Dr. Akbar recommended that an appropriate team be convened to determine the student’s eligibility for special education services; that he undergo an occupational therapy evaluation; and that he begin the school year assisted by an individual aide. The recommendation stated, “The role of this person should not be to serve as the student’s shadow that steps in and helps whenever a problem arises. Instead, the aide is most helpful when she or he assists in developing and implementing the structure (schedules, modifying assignments, checklists, etc.) that will be useful in increasing the child’s independence.” (P. – 5-23)
9. Dr. Akbar’s recommendations for creating the appropriate educational environment included creating a specialized and individualized curriculum that could benefit from professionals knowledgeable of the learning styles of children with social disabilities, and prioritizing efforts on increasing social communication. It was also recommended that his program allow him to gradually increase the portion of his day spent in productive learning. Variables to consider included student/teacher ratio, individual and small group settings, and intensive coordination of his program across settings and people. Finally, it was recommended that the person responsible for the student’s program communicate with the family in order to ensure that skills acquired at school are generalized to other environments, such as the home. (P. – 5-23)
10. Teaching strategies that were recommended included use of visual aides combined with verbal cues, and very explicitly teaching reasoning processes. Educational principles, such as maintaining consistent routines, socialization techniques, and ensuring consistent educational interventions, were recommended as well. (P. – 5-23)
11. Dr. Akbar’s recommendations included the suggestion that a list of behavioral reinforcement techniques be developed to reward the student’s desirable behaviors, and practicing the functional use of behaviors so that skills learned are used spontaneously in order to achieve goals that have value to him. (P. – 5-23)

12. Socialization techniques were recommended to reduce the student's feelings of social isolation at school. These included preparing and transitioning him to voice situations gradually; exposing him to new activities, teachers, classes, and schools; talking him through stressful situations or removing him from those situations; providing personal space in designated areas for regrouping and relaxation; involving him in a social skills training group, if available; pairing him with a "good role model" to learn appropriate behaviors; and allowing him to verbalize and receive verbal feedback in order to learn appropriate social interactions. Another recommendation was that he be allowed to have structured opportunities to interact with peers to develop social skills with an assigned buddy in less structured situations. (P. – 5-23)

13. Dr. Akbar recommended that frequent communication should occur between all parties involved in the student's program in order to ensure that treatment efforts and approaches were consistent. He emphasized that it was vitally important to have communication between home and school in order to manage the student's behavior and foster new learning. He recommended that there be close contact between the home and school, including periodic visits, a book with notes going back and forth daily, and specific consultation regarding special problems and consistency of approach. (P. – 5-23)

14. In August 2009, the Parents decided to move to a family home in East Millinocket, Maine, after the father was laid off. (Testimony of the father) Upon arrival to Maine in late August 2009, the Parents contacted the District to enroll the student and his brothers in school. (Testimony of the father) At that time, the student did not have an IEP. When the Parents met with the District staff, it was agreed that an IEP meeting would convene on September 3, 2009. (Testimony of Clukey) Prior to the IEP meeting, the Parents indicated that, although he had special needs, they believed the student could be placed in a regular educational setting. (Testimony of Clukey, Beaulieu) At that point the student's educational records were not available. (Testimony of Clukey, Beaulieu) The student was assigned a case manager, Elizabeth Kennedy, a special education teacher. (Testimony of Clukey, Disselkamp) As case

manager, Ms. Kennedy was responsible for overseeing the student's educational program.
(Testimony of Disselkamp)

15. The student began school at the District's Opal Myrick Elementary School ("Opal Myrick") on August 27, 2009. On August 28, 2009, the student had been assigned to an educational technician in the morning. (Testimony of Clukey) Ms. Kennedy was not there that day. (Testimony of Clukey) At some point during the morning, the student became upset and was brought to Cynthia Clukey, a special education teacher. (Testimony of Clukey) Once he calmed down, she brought him to the cafeteria for lunch. (Testimony of Clukey) When Ms. Clukey made sure the educational technician was aware that he was in the room, she left to go to the bathroom. (Testimony of Clukey) When she returned a few minutes later, she saw that the student was gone and that no one knew where he was. (Testimony of Clukey) She immediately went to the office to call the Parents. (Testimony of Clukey) She contacted the Mother who told her that, as they were speaking, the student was walking up the driveway of their home. (Testimony of Clukey)

16. In a letter to Principle Beaulieu, dated August 31, 2009, the father expressed his concern regarding the incident on August 28, 2009 and reiterated the need for keeping the student safe. He included a photo of the student with which to familiarize the staff of his appearance.
(P. – 513)

17. During the first week of school, after outbursts, the student was restrained by District staff and at times taken to a different room. (Testimony of the father) Opal Myrick had a room traditionally used as a space for students to de-escalate from an emotional outburst. (Testimony of Disselkamp, Clukey.) The floors and walls were padded for safety purposes. (Testimony of Disselkamp). According to the father, the student called the room he went to, "The Bad Room." (Testimony of the father) During the 2010-2011 school year, the student was taken to the auditorium when he needed to calm down. (Testimony of Adams, Clukey)

18. An IEP meeting was convened on September 2 or 3, 2009. (P. – 514, 516; S. - 54)⁴ The Written Notice, produced as a result of that meeting, stated that the student qualified for special education and related services under the exceptionality of Autism. (P. – 514) Occupational therapy, physical therapy, and specialized interventions that included behavioral supports in a regular and special education setting, were planned. (P. – 514) It was agreed that the student required a structured day in order to access the regular education curriculum. (P. – 514) He also needed “concrete guidelines for work and answers, since it was harder for him to wait when people were around.” (P. – 514) Kelley King, the student’s regular education teacher, reported that a routine was being established. (P. – 515) She stated that the student could do literacy activities quickly and that he was a good listener in math. However, his writing skills were weak. He tended to play alone, and he did not like to take turns. She also reported that the student had bolted from the classroom and had been sent to the special education room. (P. – 515) The father shared that a low key, structured setting was needed; that verbal usage from an adult needed to be firm; and that restraints could be used to keep him safe and prevent bolting. (P. – 515) The Parents also stated that they wanted the student to have a 1-on-1 educational technician to help him adjust to classroom routines. (P. – 515) It was noted that a communication notebook with an “observation snapshot” would be sent home. (P. – 515) The IEP document noted that, “the student’s behavior has gotten progressively worse than what has been seen this summer. There is concern over his safety since he has left the building.” (P. – 517)

19. The IEP included the following measurable annual goals:

- Given a predictable visible schedule, developmentally appropriate learning tasks, and a motivating reinforcement plan, the student will complete 85% of the daily scheduled expectations without significant behavioral incidents.
- Given structured social interactions, the student will demonstrate the following social language skills: a) turn taking; b) expressing wants and needs; c) expressing dislikes and frustrations in desired and non-desired tasks. (P. – 519)

20. The IEP included the following special education services:

- Specially designed instruction in a special education setting for 6.5 hours per day.
- Adaptive physical education in the gym for 30 minutes per week. (P. – 518)

⁴ The Written Notice and IEP document have different days listed for when the IEP meeting occurred.

21. Related services in the IEP included a behavior specialist in a special education setting, with a special education teacher being responsible. (P. – 520)
22. The IEP provided for supplementary aids, services, modifications, and supports, including:
- Educational technician support in all settings for 6.5 hours per day;
 - Short concrete directions;
 - Verification of directions;
 - Modified assignments as needed;
 - Resource room available for special projects;
 - Extended time for assignments;
 - Alpha smart for writing. (P. – 519)
23. The IEP indicated that, due to his high level of distractibility and challenging behaviors warranting individual attention and ongoing follow-up, the student would be with non-disabled peers 0% of the time. (P. – 520)
24. Robin H. Fugazzi, OTR, completed an Occupational Therapy Evaluation on October 15, 2009. (S. – 73-74) She summarized that the student appeared to have difficulty processing auditory, touch and oral input. In addition, he had difficulty modulating his response to movement input, visual input, and body position input. She believed that these difficulties may result in inappropriate emotional, social, and behavioral responses. (S. – 74) In a letter, dated January 7, 2010, Jane Disselkamp followed up a conversation she had with the Parents regarding the OT evaluation, reminding the Parents to contact her to work on a plan to implement the recommendations. (S. – 69)
25. A progress report for the first trimester of the school year, completed on November 2, 2009, indicated that the student met or exceeded expectations in Mathematics. He partially met expectations in Reading. In English Language Arts, he partially met expectations in Language (spelling and grammar) and Listening and Speaking. However, he did not meet expectations in Writing. With respect to Interpersonal Skills, the student partially met expectations regarding respect for others; following school rules/demonstrating safe behaviors; and following instructions. However, he did not meet expectations regarding accepting responsibility for his personal behavior, producing work to the best of his ability, working independently, and completing work in a timely manner. (P. – 601-603)

26. In early November of 2009, the Parents contacted Regional School Unit No. 67 (“RSU 67”) to inquire about the possibility of transferring the student from the District. (P. – 604) However, based upon the student’s needs, RSU 67 did not have an existing program for him. (P. – 604-605; S. – 80-81)
27. On November 10, 2009, the father submitted a letter to the District’s Superintendent, Sara Alberts, notifying the District of Parents’ intent to home school the student for the balance of the 2009-2010 school year. (P. – 606-608, S. – 82-83) The Parents believed that the District’s staff did not understand how to manage the student and that he was not getting the appropriate supports. (Testimony of the Father)
28. A Written Notice, dated November 19, 2009, indicated that the student’s IEP would be changed to reflect that he would have a home-based academic program, be provided with occupational therapy once a week for 30 minutes at school, and have a physical therapy evaluation. He would also be able to participate in music class at school after January 1, 2010. Physical education would take place at the Schenk High School during a time when the gym was available. (P. – 609-601; S. – 75)
29. An IEP meeting was held on January 21, 2010. The Written Notice indicates that the student would be attending public school for the 2010-2011 school year, and that a meeting would be convened on May 6, 2010 to discuss his progress. It also indicated that the father reported that the student’s behavior had improved, that there were no outbursts, and that he was verbally expressing his frustrations. (S. – 63-64)
30. An IEP meeting was held on May 6, 2010. The Written Notice from that meeting indicated that the student was to continue home schooling for the balance of the 2009-2010 school year, and that he would be attending public school for the 2010-2011 school year. (S. – 52-53, 60-61)

31. The father testified that during the home schooling portion of the 2009-2010 school year, the student did well as long as his behavior was under control. The Parents wanted him to go back into public school the following school year because, although there were few distractions in his highly structured plan, he had no peers. The father stated that in July 2010, they had found a State program that allowed outside providers to administer behavioral health services within the public schools. (Testimony of the father)

32. During the summer of 2010, upon the recommendation of one of the student's advocates in a community non-profit organization called WINGS, the Parents contacted UCP about services for the student's brother. (Testimony of the mother) In July 2010, the mother met with Andrea Gray, a UCP Clinical Team Leader. (Testimony of the parents) Ms. Gray informed the mother about new Maine State legislation that permitted outside providers to administer behavioral health services within the public school system, directly funded by Medicaid (or "MaineCare"). (Testimony of the parents) Upon further inquiry, the mother was told that UCP could provide services to the student at his school. (Testimony of the mother) At that point she contacted Jane Disselkamp, the District Special Education Director, to discuss the possibility of amending the student's IEP to include a behavioral day treatment plan serviced by UCP. (Testimony of the mother)

33. Jane Disselkamp testified that a few days before the beginning of the 2010-2011 school year, she received a phone call from the mother informing her of the behavioral day treatment program that could be administered by UCP in the classroom and directly funded by MaineCare. Ms. Disselkamp stated that she contacted Ms. Gray from UCP and discussed the details of the program. Ms. Disselkamp spoke to the District's superintendent about it and was told that she should pursue the program, since UCP would be paid directly by Medicaid (or "MaineCare"). (Testimony of Disselkamp)

34. The plan offered by UCP included behavioral supports provided a Behavioral Health Professional ("BHP"). BHP is a term used by the Maine Department of Health and Human Services ("DHHS") for medical reimbursement billing purposes. (Testimony of Disselkamp,

Keyser; S. – 104-105; P. – 480) BHPs provide behavior support to children in schools and at home. (Testimony of Disselkamp, Keyser; S. – 104-105; P. – 480)

35. DHHS has two levels of training requirements for BHP “certification,” depending upon the candidates’ level of college education. For “Section 28” BHP school-based certification, the provider needs a high school diploma and 28 hours of BHP training. (S. – 104-105) For “Section 65” BHP school-based certification, the provider needs 90 general college credit hours and the same 28 hours of BHP training. (S. – 104-105) There is no requirement for BHP training in either state or federal special education regulations.
36. An IEP meeting was convened on or about September 2, 2010. (S. – 30) The IEP Team agreed that a Behavior-Based Day Treatment plan, funded and provided through UCP, would be added to the student’s IEP. (S. – 31) The Written Notice also indicated that “Home schooling was considered, but rejected as his parents would like him to be in a regular classroom with education technician support.” (S. – 31)
37. The IEP created pursuant to the IEP meeting on or about September 2, 2010 was based upon the evaluations performed in the summer of 2009 (S.-33) The Annual Goals did not change from those listed in the IEP dated September 2, 2009. (S. – 33, 54) In section 7 of the IEP, dated September 1, 2010, Special Education Services were indicated as providing “Consultation,” and “Other-Adaptive PE.” (S. – 36) Related Services included “Other-Behavior Specialist through UCP.” (S. – 36) A “Behavior Health Professional” was listed for the position responsible for this service. (S. – 36) The setting for the service was the “Regular Education Setting” (S. – 36) and was to be scheduled for 390 minutes each day. (S. – 36) The Supplementary aids and services were identical to those listed in the IEP dated September 2, 2009, except for the elimination of the educational technician support and the addition of the provision for earphones needed to filter noise and technology to redirect or complete a task. (S. – 37) Finally, with respect to provisions for the least restrictive environment, the IEP stated, “The student’s access to a Behavioral Health Professional and Behavioral Health Clinician through UCP allow for a more inclusive placement. He will be with non-disabled children up to 100% of the time.” (S. – 38)

38. The behavioral day treatment program designed and provided by UCP used Applied Behavioral Analysis (“ABA”) methodology. (Testimony of Keyser) ABA is the process of systematically applying interventions based upon the principles of learning theory to improve socially significant behaviors to a meaningful degree, and to demonstrate that the interventions employed are responsible for the improvement in behavior. (P. – 40-105: “Report of the MADSEC Autism Task Force,” 2000) Many studies have shown positive results from the use of ABA methodology (P. – 37-39, 40-105, 129-138, 139-151) In Maine, as of 2009, there were only 26 certified ABA practitioners, most located in southern counties (P. – 268) UCP personnel who use ABA methodology are trained by Lisa Keyser, Director of Behavioral Health for UCP. (Testimony Keyser)
39. Once the IEP Team approved UCP services, UCP completed a Behavioral Health Assessment. (P. – 314-323) Andrea Gray, M.Ed., LRPC/L, who performed the assessment, summarized the student’s struggles with transitions, physical aggression, and bolting. (P. – 318) Her recommendations include a treatment plan to target increased use of positive coping skills and verbal communication when upset, as well as increased ability to transition with minimal prompts. She recommended BHP support to allow increased mainstream classroom time, along with clinician observation, suggestions, and sessions as appropriate. (P. – 318)
40. Ms. Gray also created a “Treatment Plan/90 Day Review,” dated September 2, 2010. (P. – 324-325) This included goals and objectives for the student to obtain. Two “Problem” areas were stated as follows: 1) “The student has difficulty with transitions; he has become aggressive or run (sic) away from school when worried, scared, or over-stimulated”; 2) “The student has difficulty switching cognitive sets when actively frustrated.” Long and short-term goals were also stated. (P. – 324)
41. The student started xx grade at the Opal Myrick Elementary School in September 2010. His teacher was Angela Adams and his case manager was Ms. Clukey. (Testimony of Adams, Clukey) Once the IEP was in place, UCP assigned two BHPs to be with the student: Angela Marie Stubbs and Kim Ingalls. (Testimony of Stubbs, Ingalls)

42. Ms. Stubbs' background includes a Bachelor of Arts in mental health and human services, 60 credits towards a Masters degree in mental health counseling, and conditional BHP certification. She has experience providing direct care for persons with Autism spectrum disorders. (Testimony of Stubbs) Ms. Ingalls has a Bachelor of Arts degree in mental health and human services. She is a certified BHP, and is certified to train others. Although she had been certified as a social worker conditional, she failed to renew her status in 2009. (P. – 329; Testimony of Ingalls) Ms. Stubbs provides BHP services for the student in the morning in the regular classroom and Ms. Ingalls provides these services in the afternoon. (Testimony of Stubbs, Ingalls) Their supervisor is Andrea Gray. (Testimony of Gray)
43. From September through mid-November 2010, the student spent only limited time in the classroom due to negative behaviors, including outbursts, inappropriate interactions with other students, aggressive behaviors directed at the BHPs, including lashing out, hitting, shoving, and bolting. (Testimony of Adams, Ingalls, Stubbs) He did not want to join “rug time,” did not have many friends, and would abruptly leave the room. (Testimony of Adams.) At times the student would need to be taken out of the room in “a hold” by the BHPs. (Testimony of Adams)
44. In response to concerns by the District staff on how to interact with the UCP staff working with the student, Evelyn Beaulieu, the Principal at Opal Myrick, agreed with UCP not to have District staff intervene with the work the BHPs were doing with the student (Testimony of Beaulieu; S. – 103) In a memorandum dated September 14, 2010, addressed to Jane Disselkamp, Ms. Beaulieu explained the “Protocol” to follow regarding the BHP in the school. (S. – 103) It stated that
- The student has two components to his educational plan at Opal Myrick:
 - Opal Myrick provides his educational instruction.
 - Behavioral specialists work with the student on his behavior instruction.
 - It is helpful for Opal Myrick staff to follow this protocol for the student:
 - Do not interfere with the behaviorists when they are working one-on-one with the student.
 - If the behaviorists require assistance, they will say, “I need staff.” At that time Opal Myrick staff will ask what assistance they need and proceed with their request.

45. In or around mid-October 2010, the State of Maine terminated direct payment to providers for BHP services to schools. (S. – 151-153; Testimony of Disselkamp, Keyser) UCP informed the District that payment of services could no longer be directly billed to the State, and therefore, a contract for services, to be paid directly from the District, would be required to continue the services. (Testimony of Disselkamp; P. – 481) The District would thereafter be reimbursed from the State. (Testimony of Disselkamp) UCP would charge \$57 an hour for BHPs and \$93 for clinicians. (S. – 160) Ms. Disselkamp scheduled an IEP meeting to discuss the issue.
46. Also by mid-October 2010, the District became concerned about the limited administrative oversight it had over UCP services. (Testimony of Disselkamp) Ms. Disselkamp, Ms. Clukey, and Ms. Beaulieu were concerned that no information about the student’s progress was being submitted to the District. (Testimony of Disselkamp, Clukey, Beaulieu) The District was not given a copy of the UCP treatment plan or any other written information UCP had regarding the student. (Testimony of Disselkamp) The only information Ms. Clukey had, as the student’s case manager, was based upon her personal observations, made during the fall 2010. (Testimony of Clukey) There was no way for Ms. Beaulieu, as Principal of Opal Myrick, to supervise or otherwise oversee the work of the BHPs. (Testimony of Beaulieu) She did not have the authority to supervisor, discipline, receive any formal feedback from the BHPs, or be permitted to review the resumes and training histories of the BHPs. (Testimony of Beaulieu; S. – 119) Although the treatment plan appeared to be working, there was no feedback to the District staff on any objective results. (Testimony of Beaulieu)
47. Lisa Keyser, Director of Behavioral Health Services for UCP, testified that UCP had been advised by its attorney not to release any of the data, progress reports, or any other written information obtained concerning the student’s behavioral services without written parental consent. (Testimony of Keyser) UCP staff took this position based upon the belief that the information and records were considered confidential medical records and the consent of the Parents was required to release them to the District pursuant to the Health Information Portability and Accountability Act (“HIPAA”). (Testimony of Keyer; S. – 192) Up until

November 17, 2010, the Parents refused to consent to allow UCP to release any records related to the student's programming. (S. – 18, 190, P. – 680) The Parents withdrew consent sometime in January 2011. (P. – 680, Testimony Disselkamp).

48. The District expected UCP to address the student's IEP goals as stated in the IEP. (Testimony of Disselkamp, Clukey) Ms. Gray testified that she has not shared written documentation with the District, nor did she believe she had an obligation to pursue the goals under the student's IEP, since they were not part of UCP's treatment plan. (Testimony of Gray)

49. On November 10, 2010, Ms. Disselkamp informed Andrea Gray that the District would not be contracting with UPC for services. In an e-mail, dated November 10, 2010, Ms. Disselkamp stated

After talking to the superintendent and looking at the current budget, I would have to find between \$80, 000 and \$100,000 to cover services for the 2 boys at Opal. We decided this was not the time to scrape up the funds, so we will not be contracting with you for this year. It's unfortunate that this is the outcome, but we have no way of funding this program. Even though we would get reimbursed from Medicaid, the money goes to a general carryover fund and can't be used this year. This is something we have to plan for during the development of the next year's budget. I can have the school board consider it for next year, but not this year. We need to have IEP meetings on the student to make the changes to their IEPs. I really need input from you or your personnel on behavior charts for the xx grader. The staff is very concerned about safety for the adults that will be with him. I left a message for you yesterday. Thanks for everything, Jane. (S.-147)

50. In an e-mail dated November 11, 2010, the father summarized his perspective for the need to provide the services offered by UCP for the student. (S. – 143-146) He referenced an offer of services made by the District in an e-mail, dated November 8, 2010, and replied to it as follows

Although you offered through an email dated November 8, 2010 to modify the student's IEP to 'reflect ED-tech support with a behavioral plan, similar to his current plan', this idea is unacceptable. Ed-tech support for the student does not, and can not (sic), cover his medical needs. We tried ed-tech support through Union 113 and Opal Myrick last year with disastrous results, eventually pulling the student out of school to home-school him starting in early November 2009. That is not a viable option for this school year. Union 113 does not have a certified BHP who has the training to cover the student's medical needs, and it's my understanding that no plans are in the works to hire one. It's also my

understanding that MaineCare allows patients (or their representatives – i.e. parents) the choice of providers. We choose to use United Cerebral Palsy. We feel that the student needs to be in a school setting, not only for his academic development, but also for his social development as well. Unfortunately, we can't take the chance that his medical needs won't be met during the school day. Until this issue is resolved, I have informed Dr. Beaulieu that I will be "holding out" the student on a day-by-day basis, starting Monday. She has promised to provide me with daily class work so he doesn't fall behind academically. Andrea Gray, the UCP clinician in charge of the student's treatment program, has serious concerns about his social development and coping skills if he does not return to school soon. The documented progress he's made thus is in serious jeopardy if we don't settle this issue quickly. I also know that the student himself enjoys going to school and being with his classmates every day. (S. – 145-146)

51. Ms. Disselkamp responded to the father's e-mail dated November 11, 2010, stating that an IEP team meeting was necessary if UCP services were to stop. (S. – 135-138) On November 18, 2010, Ms. Disselkamp informed the Parents that an IEP meeting was scheduled for November 22, 2010. (S. - 132)

52. On November 12, 2010, UCP terminated its services due to the lack of funding by the District. (P. – 379-384) A "Discharge Summary/Notice of Discharge" report was submitted to the District that incorporated UCP's assessment of the student's progress. In relevant part, the report stated that between September 7, 2010 and November 10, 2010, the student showed marked improvement in his ability to transition between activities and environments, used his words to identify how he was feeling and the trigger for that feeling, and engaged in positive coping skills when frustrated. Triggers for negative emotions appeared to include frustration when he could not meet his own expectations and difficulty being away from his mother. UCP recommended that he continue to receive 1-on-1 BHP support to target continued decrease in aggression, bolting, and property destruction, and continued increase in his use of positive coping skills and verbal communication to get his needs met. UCP recommended that this work would be most effective when support services were supervised by a licensed clinician who has experience and/or education in ABA. (P. - 379)

53. In a letter, dated November 21, 2010, from the Parents' Family Physician, Dr. Nicole Smith stated that, due to the student's diagnosis of PDD-NOS, it was her opinion that behavioral health services were medically necessary to aid in his development and education. She stated that the services could help address his social interactions; his ability to express himself;

establish routines; help to prevent bolting or aggression; and develop positive coping skills.
(S. – 17).

54. An IEP meeting was held on November 22, 2010. Forty-one minutes of the IEP meeting were recorded. At that meeting, Ms. Disselkamp informed the Parents that, due to the fiscal policies of the District and the lack of a contingency fund to pay for unforeseen programming services, the District was unable to directly pay for services provided by UCP. The Parents underscored the availability of funds from MaineCare in order to get reimbursed for the direct payment to UCP. However, Ms. Disselkamp stated that direct payment to UCP was not an option at that time. She stated that Ms. Clukey would be trained in January 2011 to become a certified BHP under the new Maine Department of Education program to provide such training. Thereafter, she would also be trained as a BHP trainer, and train three educational technicians in BHP skills. At that time, the District would be able to assign a BHP to the student. Ms. Disselkamp stated that in the meantime, Ms. Clukey would be working with the student 1-on-1 and was able to do so based upon her experience and prior training. The Parents stated that until such time as certified BHPs were available, they felt they needed to remove the student from the District for his own safety and the safety of other children. Ms. Disselkamp acknowledged that there was no certified BHP available, but that attempts would be made to reach out to those in the community who she believed had such certification. The Parents reiterated that the student was not going to be attending school until he had certified BHP support. They continued to question why UCP services could not be provided, especially if MaineCare could reimburse them. (P. – Video recording)

55. During the IEP meeting on November 22, 2010, Ms. Disselkamp also raised a problem with information sharing between UCP and the District. She stated that it was very difficult for the IEP team to make any decisions based only upon the observations of the District staff. She stated that up until that day, the IEP team had never been given any data regarding the student's progress, including a copy of UCP's day treatment plan. She stated that the team did not have the information on what triggers impacted the student. The mother stated that since the data was an outgrowth of the student's medically-based behavior plan, the information was medical in nature and she would not consent to provide it to the District.

However, the Father acknowledged that if the District was going to pay UCP directly, then he could understand that written documentation would be needed. He stated that he did not believe the behavior plan was an educational issue, but purely a medical one that did not impact the student's ability to learn. He stated that it was his belief that the student needed medical support in an education setting and that was what UCP had provided through the BHPs. (P. – video recording)

56. A third issue was raised at the IEP meeting on November 22, 2010 by Angela Adams, the student's xx grade teacher, regarding the kind of restraints UCP was using. At that meeting, Lisa Keyser stated that the BHPs were using the "MVP" restraining methodology. (P. – Video recording) Ms. Disselkamp stated that this was the same method used by Ms. Clukey. (P. – Video recording)

57. An amended IEP was developed on November 22, 2010, after the IEP meeting. (S. – 8-13) Section 7 of the IEP, which details the Special Education and Related Services provided, was changed to add specially designed instruction. The BHP services provided by UCP were deleted from the Related Services section. Section 9, relating to the least restrictive environment requirement, was changed to state that, "The student's access to a special educator will allow for a more inclusive placement. He will be with non disabled children up to 100% of the time daily." The IEP remained the same in all other respects. (S. – 8-13)

58. The Written Notice produced after the IEP meeting on November 22, 2010 stated that the District would contact its attorney and Maine Department of Education ("DOE") about its responsibility for providing BHP services in a school setting for the student, and that schoolwork would be sent home for him since the Parents indicated he would attend school only when BHP-specific services were in place. (S. – 15) The Written Notice also stated that data from UCP was shown to the IEP team, but was not offered as part of the written information for the student's school file. (S. – 15) The Written Notice stated that, "Having the student receive school based support provided by a special educator with a Masters degree in Education who is certified in Managing Violent Patients ("MVP") and Building a Therapeutic Alliance ("BTA") training was offered by the school, but rejected by the

student's parents due to their request of BHP specific services. The school also offered partial attendance to maintain social connections, which will be further discussed by the parents at home.” (S. – 15)

59. The Written Notice also stated, in relevant part, that, “Ms. Clukey will be participating in Department of Education sponsored training as given by the Behavioral Health Services Institute in January 2011. She will train the school support staff as appropriate for Section 28 and Section 65 certification.” (S – 15)

60. Ms. Clukey is a certified special education teacher (S. – 106) She has taught at the Opal Myrick Elementary School since 2002. She has worked with students with all types of disabilities, including Autism (S. – 106; Testimony of Clukey) She supervises paraprofessionals who provide instruction and support to students. (S. – 106) In addition to receiving continuing training in the field of children with disabilities, and specifically children with Autism, she has also been trained in behavioral development, behavioral interventions, and therapeutic restraint methods, including BTA and MVP (S. – 106; Testimony of Clukey) On January 13, 2011, Ms. Clukey completed a 28-hour School-Based Behavioral Health Professional Train the Trainer course. (S. – 188).

61. After the November 22, 2010 IEP meeting, the Parents requested a due process hearing. An order and clarification regarding the District's obligation to maintain the status quo of the student's programming during the due process proceeding was issued, which required the District to continue services provided by UCP during the pendency of the due process hearing process. (Hearing Officer Order, December 11, 2010, and Clarification of Order, December 13, 2010) Thereafter, UCP resumed providing services for the student. (Testimony of Disselkamp)

62. Ms. Clukey was responsible for reporting trimester progress information on the student's IEP goals. (Testimony of Clukey) To do so, she used progress notes provided during the limited period of time UCP submitted them to the District, in addition to her personal observations of the student. (Testimony of Clukey) This progress was noted in the student's IEP. (P. – 680)

63. On December 28, 2010, Ms. Disselkamp, reiterating the District's intent on providing BHP support to the student, informed the Parents of the District's offer to provide the student with 1-on-1 BHP services by District staff members once their training is completed and they are BHP-certified. (S. – 1)

IV. POSITION OF THE PARTIES

A. Position of the Parents

1. Whether the Amended IEP is appropriate

The Parents are clear in their perspective that the IEP developed on September 2, 2010 has provided the student with the behavioral support services that he needs to be able to progress in a regular educational setting. They have seen marked progress since the 2009-2010 school year, during which he had no such services. They believe that UCP has the knowledge, experience and expertise needed to provide the student with an individually designed specialized day treatment program using well-established methodologies. The Parents argue that the amended IEP cannot meet the student academic and behavioral needs in the least restrictive environment because it has no measurable goals, no scientific basis, no data tracking method, no clinical support team, and fails to implement a recognized and accepted treatment method for helping children with Autism.

In addition, the Parents argue that the need for behavioral support in school is a medical need, not an educational need. Therefore, the District has no authority to deny such services in a school setting. (P. – 486)

They also suggest that Ms. Clukey, the special education teacher who would be assigned as the student's full-time 1-on-1 support person has a full load of special education students and a number of other special needs children under her direct or indirect supervision in the school, and cannot possibly provide the 1-on-1 services needed. They argue that she does not have the training or understanding of ABA techniques, and that the proposed training she would receive is insufficient to instill an adequate basis to be able to provide ABA services.

The Parents are concerned about Ms. Clukey's past experience with the student. They cite the event in the fall of 2009, two days after school began, when the student left the school without any staff members knowing that he had done so. Ms. Clukey had had direct charge of him at the time of the incident. The Parents believe that the incident was a direct result of Ms. Clukey's inattentiveness, and is an indicator of her inability to manage the student. The Parents cite occasions when the student was held in a restraint, and then sent to the "Bad Room" due to negative behaviors, without documentation of the events. The Parents fear that inexperienced, untrained, and uneducated staff at Opal Myrick will be unable to appropriately handle the student's behavioral needs and the events of 2009 will be repeated.

The Parents assert that the true reason the District refuses to have UCP provide BHP services is its unwillingness to fund the services directly. The Parents state that, although these services were reimbursable through MaineCare, the District still refused to agree to have the services provided by UCP.

2. Whether use of UCP progress reports violated the IDEA

The Parents argue that the District unilaterally changed the student's IEP during the due process hearing by using progress data from UCP to evaluate the student's progress on his IEP goals. In doing so, the Parents allege that the District violated IDEA's prohibition on unilaterally changing an IEP without parental participation and notification.

B. Position of the District

1. Whether the Amended IEP is appropriate

The District acknowledges that the present levels of performance, the annual goals, the classroom accommodations and supports, and the frequency of service are all appropriate for the student. The only dispute, it asserts, is over the provider of the services in question.

The District argues that when the only dispute regarding an IEP is over which providers will be assigned to implement the services in that IEP, a hearing officer, as a matter of law, has

to defer to the school district in the determination of which staff will provide the service. Citing *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d. 880 (D. Minn. 2003) (“School districts have the sole discretions to assigned staff.”); and *Regional School Unit No. 16*, 111 LRP 8815. (“A hearing officer does not have authority to order a school district to assign or remove any particular personnel to fulfill a role in a student’s IEP.”) The District asserts that the hearing officer can only require that the provider be appropriately certified under state special education rules. However, even if the provider is not certified, the hearing officer would not have authority to determine who will deliver services, only to order that an appropriately certified provider be assigned. In this regard, the District argues that the assignment of Ms. Clukey to provide the services noted in the IEP is appropriate because she is certified as a special education teacher by the Maine Department of Education. In addition, she has extensive experience and training working with students with behavioral challenges and students with Autism. Specifically, she is certified to restrain students and train others to restrain students and has had extensive training in behavioral intervention approaches, including ABA.

In addition, the District emphasizes that Ms. Clukey’s other assignments as case manager for other District children will be reassigned to different staff in order for her to provide the 1-on-1 services required under the student’s IEP. She will be covered during lunch breaks with staff having the necessary skill set to provide oversight during brief breaks. Therefore, her assignment to provide the student with 1-on-1 services is reasonably calculated to provide the student with educational benefits.

The District assures that any transition of services from UCP staff to District staff would be accomplished via appropriate methods. The District staff would communicate with UCP staff about its services, methods, and data, and gradually transition from UCP staff to District staff. District behavioral consultants will also be on hand for any difficulties that may arise during the transition process.

The District next argues that even if the proposed IEP is inappropriate, the UCP model for service delivery cannot be maintained because UCP is not delivering services in a manner that is consistent with the District’s responsibilities to administer the student’s IEP. Specifically,

the District cites the lack of information being provided by UCP to the District without which the District cannot assess the student's IEP goals. The District asserts that UCP is mistaken about their legal responsibility to provide records and other information relating to the administration of IEPs. The District argues that despite UCP's view that the records may be medical information, as defined under HIPAA, if the information intersects with the provision of a free and appropriate public education ("FAPE"), they are also designated as educational records under the definitions of FERPA and the IDEA. Citing Maine Unified Special Education Regulation ("MUSER") XIV.3; 34 CFR § 99.3; 45 CFR § 160.103.

2. Whether use of UCP progress reports violated the IDEA

With respect to whether the District was required to convene an IEP meeting to determine how to assess the student's second trimester progress, the District argues that the additional level of detail used to evaluate the student's trimester progress without informing or securing the consent of the parents is not a change in the IEP. The sources of information used to make the assessment included Ms. Clukey's own observations and UCP logs that had been provided for a brief period of time. The District asserts that nothing in the IDEA or MUSER prohibits the use of additional information to make these assessments, and that the District is allowed some level of flexibility in determining what is included in them. Citing MUSER IX.3(A)(2)(a); 20 U.S.C. 1414(d)(1)(A)(ii)(I). Therefore, the District maintains that the use of information that Ms. Clukey had at the time to make her assessment of the student's progress, including the use of UCP logs, is not a violation of the IDEA.

V. DISCUSSION AND CONCLUSIONS

A. Applicable Law

The Individuals with Disabilities in Education Improvement Act entitles students who are eligible for special education services 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 Student's educational program contained in his IEP must be "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 Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993), that 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). In *Roland M. v. Concord School Comm.*, the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990). As the First Circuit explained

The issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate education" as defined in federal and state law . . . For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C, Question 38. *Id.*

“Education” has a broad meaning under the IDEA, and is not limited to academic progress, as the IDEA requires the IEP team to consider the “academic, development, and functional needs of the child.” 20 U.S.C. §1414(d)(3)(9)(A). Accordingly, the IEP must be designed as a package to target “all of a child’s special needs . . . whether they be academic, physical, emotional, or social.” *Lenn v. Portland Sch. Comm.*, *supra*, 998 F.2d at 1089. The IEP must also be developed in accordance with the procedures set forth in the IDEA. *Rowley*, *supra*.

An IEP must include the student's present levels of performance, annual goals, and short-term objectives, as well as address the special education and supportive services necessary to help the student advance toward those goals, make progress in the general education curriculum, participate in nonacademic activities; it must also provide an educational placement that can implement the plan in the least restrictive environment for the child. 20 U.S.C. §§ 1414(d)(1)(A); 1412(a)(5); 34 C.F.R. §§ 300.114-116; MUSER § X.3.B.

The Supreme Court has set out a two-part standard for determining the appropriateness of an IEP and placement. The Court asks first whether the IEP was developed in accordance with the IDEA's extensive procedural requirements. Second, the Court asks whether the IEP is reasonably calculated to enable the child to receive some education benefit. See *Rowley, Id.*; *Lessard, Id.*, and *Warwick, Id.* When determining whether the IEP meets this standard, the Court must view the IEP decisions not in hindsight, but in terms of what was reasonable "at the time the IEP was promulgated." *Roland M.*, 910, F2d at 992. The Court in *Lessard* also advised that the IEP is to be judged as a unitary whole, and not piecemeal. Just because some portion of the IEP might not be as strong as it could be, the IEP will still pass legal muster if the overall document is reasonably calculated to provide educational benefits. See *Lessard*, 518 F.3d at 30. *Lenn*, 998 F.2d at 1089-90.

Also, when parents request that a particular teacher or provider be assigned to the student, courts and state departments of education have ruled that they do not have the right to select providers to deliver instruction or services. *Slama v. Indep. Sch. Dist. No. 2580*, supra ("School districts have the sole discretion to assign staff.") (and cases cited therein); *Regional School Unit No. 16*, 111 LRP 8815 (SEA Me. 2010) ("A hearing officer does not have authority to order a school district to assign or remove any particular personnel to fulfill a role in a student's IEP."); *Los Angeles Unified Sch. Dist.*, 54 IDELR 269 (SEA Ca. 2010); *Duxbury Pub. Sch.* 107 LRP 22731 (SEA Ma. 2007); *Marple Newtown Sch. Dist.*, 46 IDELR 295 (SEA Pa. 2006).

B. Burden of Proof

Although the 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).

C. Issues

1. Whether or not the student’s IEP, as amended on November 22, 2010, is appropriate.

The parties agree that the Student qualifies for special education and related services as a student with Autism. Autism is a developmental disability significantly affecting verbal and non-verbal communication and social interaction, generally evidenced before age three that adversely affects educational performance. See MUSER § VII.2.A. The Student is thus entitled to a FAPE provided by the District. 20 U.S.C. § 1412(a)(1)(A); 20 M.R.S.A. § 7201; MUSER §§ I & II.11. Since there are no issues relating to procedural defects in the IEP process, the question is whether the IEP dated November 22, 2010 is reasonably calculated to enable the student to receive educational benefit.

The Parents base their assertion that the amended IEP is inappropriate on three underlying arguments: a) it lacks a proven and accepted methodology; b) the District is required to provide medically necessary BHP behavior support services; and c) the District lacks trained staff.

a. Methodology

The IDEA requires that an IEP include a statement of the special education, related services, and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or support for the school personnel that will be provided to the child. 34 CFR 300.320(a)(4). However, nothing in the IDEA or the Part B regulations requires an IEP to identify the specific methodology that a school district will use to provide those services. Because the IDEA states that districts have no duty to include information that is not expressly required by the statute (34 CFR 300.320(d)(1)), a school district does not need to identify a particular methodology in a child's IEP to comply with federal law. The DOE adopted this view

in the official comments to the 2006 Part B regulations, noting that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46,665 (2006). See also *Mr. and Mrs. C. ex rel. K.C. v. Maine Sch. Admin. Dist. No. 6*, 107 LRP 69092 (Me. 2007).

When parents and a school district cannot agree on the design of a student's program, and where consensus cannot be reached, "the IDEA confers primary responsibility upon state and local educational agencies to choose among competing pedagogical methodologies and to select the method most suitable to a particular child's needs." *Lessard*, 518 F.3d at 28. Neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. *Rowley*, 458 U.S. at 208.

The proposed IEP includes Specially Designed Instruction, defined as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under Part B of IDEA, the content, methodology, or delivery of instruction to address the unique needs of the child that results from the child's disability, and to ensure access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the SAU that apply to all children [34 CFR 300.39(b)(3)]. Specially designed instruction is instruction provided to children ages three to twenty by an appropriately certified or licensed special education professional or an appropriately authorized and supervised educational technician consistent with a child's IEP. The design and delivery of services is uniquely designed to assist children to meet the goals of the child's IEP. MUSER X.2.A(2).

There is no dispute that the student needs 1-on-1 behavior support if he is to access his public education in the least restrictive environment. This was the view of the IEP Team at the meeting on November 22, 2010, based upon the apparent success the student was having with the BHPs working with him. When it became apparent in October 2010 that direct payment to UCP from MaineCare would be eliminated and the UCP model of delivery was frustrating the District's ability to monitor and assess the student's progress, the IEP Team needed to re-evaluate how the student was going to receive 1-on-1 behavior support. There were two options discussed at the IEP meeting on November 22, 2010: 1) pay UCP directly and thereafter be reimbursed by MaineCare; or 2) provide specially designed instruction by Ms. Clukey, a special education teacher, while she and other District staff received training and certification as BHPs through a program offered by the Maine Department of Education. The IEP Team dismissed the

first option when Mrs. Disselkamp reported that the school board would not pay for the services directly, regardless of the ability to be reimbursed for the service; this was due to how the District's budget had been previously formulated for the school year and the lack of a contingency fund to cover the cost for UCP services.

Since the IEP Team members concluded that they wanted to continue with 1-on-1 behavior support, the second alternative was deemed appropriate: provide 1-on-1 specialized instruction to the student while District staff was trained and certified by the DOE to become behavior health specialists. Specialized instruction would allow him to be in the regular education setting with access to his peers, allowing him to receive educational benefit. Based upon the decision to provide him with specialized instruction, it was unnecessary for the IEP to specifically identify what strategies or methodologies would be used. The Team discussed the benefits of using ABA methodologies, but there was no requirement to specifically identify it in the IEP.

It should be noted that MUSER IX.3.B (3) allows for alternative service options to be implemented when qualified staff is unavailable. In this case, since the specialized instruction would still allow the student to receive a FAPE in the least restrictive environment, it was an appropriate service option. The measurable goals in the proposed IEP remain the same, and they were not at issue among members of the IEP Team. The language of the IEP made it clear that specialized instruction would allow the student to be with non-disabled peers up to 100% of the time. This was the central reason the Parents wanted to have the student back in the public school. In addition, the strategy of providing specialized instruction while staff members were being trained and certified would allow the District to have control over the program being provided to the student. This is in contrast to the lack of control the District had over UCP services, due the agency's refusal to provide information about the student's progress, including copies of its Day Treatment Plan, daily logs, and data sheets.⁵ It also alleviated the concern about

⁵ UCP refused to provide this information to appropriate District staff based on its belief that the information constitutes confidential medical information requiring Parental consent to release the information to the District. Since the Parents refused to give UCP consent, UCP believed it was prohibited from doing so. UCP was advised by its attorney that if consent by the Parents was not provided, it was prohibited under HIPAA from providing the information. Determining whether the information also constitutes "educational records" under FERPA and HIPAA, and is exempted from the requirement to obtain parental consent, is not an issue under the jurisdiction of the hearing

UCP's lack of knowledge and understanding about the student's IEP and the IEP process itself. This lack of understanding of the role UCP staff play in the IEP process, especially with respect to information sharing with the District, prohibited the District from meeting its responsibilities to ensure that the student's IEP goals and objectives are being met. MUSER § IV.4.A. Therefore, by having in-house staff provide the appropriate behavior support to the student, the District would be able to provide progress reports, assess the success of the IEP goals, and consider any necessary changes to the IEP.

An underlying concern of the Parents is the lack of any specified clinical supervision in the amended IEP. Since the District is not required to identify any specific methodology regarding the provision of specialized instruction, it is unnecessary to include such language within the body of the IEP. However, clinical consultants, including Betsy Field, M. Ed., Dr. Robert Peddicord, and Dr. Christine Fink, are available if any difficult issues arise. (Testimony of Disselkamp). Therefore, any concern regarding clinical issues that may arise is unfounded.

The Parents' desire to have UCP continue to provide BHP services is understandable, since there is general agreement that the student's behavior has improved over the course of the 2010-2011 school year. However, I find that the amended IEP is equally appropriate, and perhaps more so, given the increased control the District would have over the delivery methods. Therefore, based upon the above, I find that the amended IEP, dated November 22, 2010, is reasonably calculated to provide FAPE.

The only point of clarification that needs to be made is that the intent to provide BHP support services to the student, as stated in Ms. Disselkamp's letter, dated December 28, 2010 to the Parents, needs to be clearly reflected in the IEP and Written Notice, dated November 22, 2010. Therefore, the District must amend the body of the IEP and Written Notice to reflect this intent. An IEP Team meeting is not necessary for this purpose.

officer, since jurisdiction is limited to deciding issues only under the IDEA. However, guidance in this area can be found in the *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, November 2008, (jointly published by the U.S. Department of Education and U.S. Department of Health and Human Services.)

b. Access to a Trained Special Educator

The Parents assert that the assignment of Mrs. Clukey to provide specialized instruction is inappropriate because she lacks BHP certification and training in ABA methodology, and her responsibilities as case manager for other students do not allow her to provide 1-on-1 instruction. The District is free to assign any qualified staff person it chooses to implement a student's IEP. Slama, supra. The District's plan to assign Mrs. Clukey to provide 1-on-1 specialized instruction to the student is consistent with staff qualification requirements. (MUSER X.2.A). Mrs. Clukey has a "highly qualified" special education teacher designation, and has years of experience providing instruction and services to children with disabilities, including those with Autism. In addition, she has used a variety of data gathering systems, behavior intervention plans, and positive behavioral supports to redirect behaviors. She is certified to restrain students, and is also certified to train others in various restraint methods. Her course work includes ABA methodology and, at the time of the due process hearing, she had completed the 28-hour school-based BHP training program. The assignment of Mrs. Clukey is clearly appropriate since it is established that she is qualified to provide the 1-on-1 specialized instruction to the student.

The Parents cite the incident in September 2009, when the student left the school grounds unattended while under the watch of Mrs. Clukey, as evidence of her inability to manage the student. The incident, which occurred two days after the student initially enrolled at Opal Myrick, is insufficient to point to any lack of ability on the part of Mrs. Clukey. There was not an IEP and no warning from the Parents that he tended to bolt. She was neither the student's case manager nor responsible for his programming during that year. She was asked to intervene on that single day when his case manager was absent, and to no other extent. Ms. Disselkamp stated to the IEP team that strategies had been put into place since the incident to prevent it from occurring again. Therefore, the evidence is inadequate to find that she lacks the ability to manage the student on a 1-on-1 basis.

With respect to her other case management and teaching duties, Ms. Disselkamp testified under oath that those duties will be reassigned. There is no evidence that this would not occur.

c. Medically v. Educationally Necessary Behavior Support Services

The Parents argue that clinically supervised BHP services is medically necessary, separate from his educational needs, and therefore the District is required to provide them to the student. This argument is flawed and cannot withstand scrutiny. First, it is unnecessary to determine whether any other services are required within the confines of the amended IEP, which I find is already reasonably calculated to provide educational benefit by the inclusion of specialized instruction.

Secondly, a determination of whether a service is required above and beyond any other “related services,” as defined by the IDEA and MUSER, is outside of the jurisdiction of the hearing officer. The Parents cite *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) and *Cedar Rapids Community School District v. Garret*, 526 U.S. 66 (1999). (P. - 638-657)⁶ These cases discuss the need for “nursing services,” which are considered “related services” under the IDEA.⁷ “Medical services” are also included as a “related service.” MUSER XI. However, “medical services” are limited only to evaluations and diagnostic services performed by a licensed physician. MUSER XI.

If any other service does not fall within the category of “related services” delineated under the IDEA and MUSER, the District is not obligated to provide it within the context of the IEP. Therefore, if the Parents wish to pursue any other services beyond what is required under the IDEA, they must do so outside of the IEP process.

2. Whether the IEP Progress Report for the second trimester of the current school year (2010-2011) amounted to a change in the IEP without parent involvement, in violation of the Individuals with Disabilities Act (“IDEA”).

⁶ Under *Tatro* and *Garret*, the Supreme Court defined related “nursing services” to include services that can be performed by a nurse or other qualified persons, not those that must be performed by a physician. In *Tatro*, since a nurse could insert a catheter, it was not considered a “medical service” under the IDEA. In *Garret*, the Supreme Court determined that a school district was required to provide a ventilator-dependent student with certain “nursing services” during school hours as a related service in order to guarantee that like students are integrated into the public schools.

⁷ Other related services include audiology, counseling, hearing aids, interpreting services, orientation and mobility services, occupational and physical therapy, rehabilitation counseling, school health and nursing services, social work, assistive technology, speech-language pathology services, transportation and IEP case manager services. MUSER XI.

On the last day of the hearing, the Parents raised an issue, claiming that a procedural violation had occurred during the pendency of the due process hearing, whereby the IEP was changed when Ms. Clukey used data provided by UCP in order to gauge the progress of the student's IEP goals during the second trimester of the 2010-2011 school year. The District had no objection to having this issue put before the hearing officer during these proceedings.

A violation of the IDEA's procedural requirement may be found to be a failure to provide a FAPE only if it impeded the student's rights to FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE, caused a deprivation of educational benefits. 20 USC 1415(f)(3)(E)(ii). With respect to reporting on progress towards IEP goals, an IEP is required to have a description of how the child's progress towards meeting annual goals will be measured, and when periodic reports on the progress towards meeting those annual goals will be provided. 20 U.S.C. §1414(d)(A)(III); MUSER IX.3(A)(1)(c). That is all that is required. 20 U.S.C. § 1414(d)(A)(ii)(I); MUSER IX.3(A)(2)(a).

As stated above, the District has an obligation to monitor the progress the Student is making on IEP goals. The District had difficulty in assessing the student's program during the fall of 2010 due to the lack of cooperation by UCP, which declined to provide information on the student's progress. During a short period of time in the trimester, the Parents agreed to release the information. Thereafter, they again refused to consent to release the information and UCP believed it was obligated to withhold it from the District. With little information to go on, and few opportunities to see the student's progress, Ms. Clukey gleaned the status of the student's progress from the information provided from UCP. She used this data to formulate her assessment of his second trimester progress and noted it in the IEP. She used the same "grading" rubric that had been used in the prior trimester. Based upon all the information she had, she graded the student a "2," on both measurable goals, indicating that he partially met his goals.

I find that this assessment did not represent a change in the IEP, but rather aided in the District's requirement to monitor the implementation of the IEP. When it first entered into the agreement to have UCP provide behavioral support, the District was under the impression that

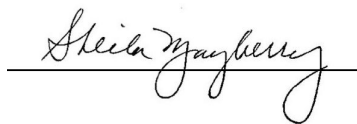
UCP would provide data to assess the student's process. Due to the lack of data from UCP, the District was forced to do the best they could with the information they had at the time. If UCP had provided all the data they had, the District would have been able to perform a more objective informal assessment of the student's progress. Based upon the above, I find no procedural violation of the IEP by using limited data provided by UCP to help instruct the District on the progress the student made during the second trimester.

VI. CONCLUSIONS

Based upon the above, I find no violations of the IDEA and that the IEP, as amended on November 22, 2010 is appropriate for the student. Also, I find no procedural violation of the IEP process by using limited data provided by UCP to help instruct the District on the progress the student made during the second trimester of the 2010-2011 school year.

VII. ORDER

The District must amend the body of the IEP and the Written Notice to reflect the intention of the IEP Team to provide BHP support services to the student, as stated in Ms. Disselkamp's letter to the Parents, dated December 28, 2010. An IEP Team meeting is not necessary for this purpose.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Esq.
April 12, 2011