

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

November 29, 2011

12.008H— Parents v. RSU No. 51

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

REPRESENTING THE DISTRICT: Eric Herlan, 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 12, October 3 and October 31, 2011 at the offices of Drummond Woodsum in Portland, Maine. Those present for the entire hearing were the Parents, Attorney O’Meara, Attorney Herlan, and the undersigned hearing officer. Ann Nunery, special services director, was present for most of the hearing, although Penny Wheeler Abbott, assistant principal at Greely Middle School, was present on Ms. Nunery’s behalf on October 3. Testifying at the hearing were:

The Mother

The Father

Elizabeth Millett, LCPC

Barbara Freethy

Mary Duggan, LCSW

Christopher Kaufman, Ph.D.

Barbara Melnick

David Chatalbash, LCSW

Linda Naaman, Ph.D.

Ann Nunery

Neurofeedback provider

Social cognitive therapist

EMDR therapist

Psychologist

Director, Aucocisco School

Social worker, Aucocisco School

Clinical psychologist

Special services director, RSU No. 51

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On July 28, 2011, the Parents filed this hearing request on behalf of their son (“Student”). On September 1, 2011, a prehearing conference was held at the offices of Drummond Woodsum in Portland, Maine. Participating in the prehearing conference were: the Parents, Richard O’Meara, Esq., counsel to the Parents and Student; Sara Stewart Hellstedt, Esq., counsel to RSU No. 51 (“District”); Ann Nunery, special services director for the District; and Shari Broder, Hearing Officer. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 1271 pages of documents and District submitted approximately 1127 pages of documents, and several additional exhibits were introduced at the hearing.

The hearing took place over the course of three days. After the first day of hearing, the District offered to continue the Student in his placement at the Aucocisco School at the District’s expense. This prompted the District to file a Motion to Amend Issues Statement, requesting that this issue be dismissed as moot. After allowing the parties to file position papers on this issue, I ruled that the placement issue was now moot, but there remained the issue of whether the IEP was appropriate, including the provision of related services, and if not, whether the Parents were entitled to a remedy.

At the conclusion of the testimony, both parties requested to keep the hearing record open until November 14, 2011 to allow the parties to prepare and submit closing memoranda. The District submitted a 12-page closing argument and the Parents submitted a 30-page closing argument. The record closed upon receipt of these documents on November 14, 2011. The parties and the hearing officer further agreed that the decision would be due on November 29, 2011.

II. ISSUES:

1. Are the District's proposed 2011-2012 IEP and placement offered to the Student reasonably calculated to provide him with a free appropriate public education in the least restrictive environment?
2. If not, what remedies are appropriate?

III. FINDINGS OF FACT

1. The Student is xx years old. He lives with his family in North Yarmouth.
2. The Student is currently eligible for special education and related services under the categories of Autism and Emotional Disturbance.
3. The Student began attending school in the District in xx. Because he was struggling with reading and writing, was frustrated easily and had disruptive behaviors, he was referred for an evaluation to see whether he was eligible for special education. [S-663] Dr. Farhana Shah diagnosed the Student with Disruptive Behavior Disorder [S-665], and the Pupil Evaluation Team consequently identified him as eligible for special education under the Individuals with Disabilities in Education Act (IDEA) in April 2006, when he was in xx grade. He received services under the category of Other Health Impairment (OHI). [Testimony of Mother]
4. During xx grade (2006-2007), the Student did fairly well with his teacher, Candy Allen. The Student responded well to Ms. Allen's warmth and her "stop and think" discipline system. [Testimony of Mother] He did well academically but continued to have frustrations socially, along with some behavioral incidents. [S-618]
5. For xx grade (2007-08), the Student attended a different school in the District, the Drowne Road School. He did not do well with his teacher, Molly Russell, who was described by the Mother as "rigid and inflexible." [Testimony of Mother] The Mother felt it was not a good combination to have both a rigid teacher and a rigid student. Discipline was a "three strike"

system. This did not work well with the Student. For example, he was told he would not be allowed to go trick or treating if he did not have a no strike day. The Student became so upset that he ran out of school and into the woods. [Testimony of Mother] In November, the Parents asked to change the Student's teacher, as they felt it was a bad match, but the principal talked them out of it. The Student began declaring that he hated school, refusing to attend, and getting in trouble more often. [*Id.*]

6. In March 2008, Laura Kavesh, Ph.D., a licensed psychologist, diagnosed the Student with Asperger's Disorder, ADHD-Hyperactive/Impulsive Type, Oppositional Defiant Disorder, and Tourette's Syndrome. [S-390-392] Dr. Kavesh made a number of recommendations, including changing the category of the Student's disability and consequently his services. [S-393] She reported that the Student needed intensive interventions, particularly in social skills training and behavioral self-regulation, as well as with his learning needs. Dr. Kavesh believed that the Student required a school-based behavior plan that could also be implemented and reinforced at home. She recommended a program like Michelle Garcia Winner's "Social Thinking." [*Id.*]
7. The District also had the Student evaluated by Peggy Bickford, a licensed psychological examiner. [S-526] Ms. Bickford reached some of the same conclusions as Dr. Kavesh. She noted that the Student should have behavior management and positive behavior strategies to improve the Student's coping skills around transitions and increasing compliance. [S-537] Ms. Bickford specifically noted that goals should be stated positively and to collaborate in a problem solving approach. [*Id.*]
8. Dr. Kavesh referred the Student to social cognitive therapist Barbara Freethy for involvement in a social thinking group. On March 30, 2008, Ms. Freethy conducted a social cognitive

evaluation of the Student. [S-479] She recommended the use of the Collaborative Problem Solving (CPS) approach to teach the Student thinking and behavior skills. [*Id.*] Collaborative Problem Solving engages a child in discussing what is upsetting him and working with an adult to solve the problem in lieu of engaging in negative behavior. Ms. Freethy did not think that traditional behavior modification plans would likely be effective with the Student because his response to a rigid system was to become more rigid himself. [S-479, Testimony of B. Freethy]

9. At the time of the evaluation, Ms. Freethy found the Student had difficulty picking up on social nuances, and he was a very black and white thinker. She began working with the Student, teaching him how to stay calm in the midst of frustration and to be more flexible. [Testimony of B. Freethy] At the time, Ms. Freethy believed the Student was not able to handle the demands placed upon him by his school. She explained that the Student easily went on “sensory overload,” which set up a “fight or flight” response, causing him to become more upset. [*Id.*] As people became more rigid with the Student, the Student became more rigid in return.
10. Around the same time, the Parents requested a functional behavioral assessment of the Student, and the District agreed. This was following two incidents at school in which teachers attempted to move the Student, with very negative results. [Testimony of Mother] The Student despised being touched, and the Mother specifically asked to have staff refrain from touching him. Noreen McDaniels-Doran, Ph.D., a behavior strategist, conducted the assessment, and made a number of recommendations for addressing the Student’s behavior issues, including that the staff only physically move the Student as a last resort, increased services by a behavior strategist, and consultation with an Autism specialist. [S-383-384]

11. At a meeting held on April 1, 2008, the Student's IEP team changed his eligibility category from OHI to Autism. [S-454] The team also decided that the Student's speech language evaluation supported services for pragmatic language skills.
12. For xx grade (2008-2009), the Student began attending the North Yarmouth Memorial School (NYMS). Although the year started out fairly well, the Student did not make a connection with anyone there. [Testimony of Mother] Behavioral incidents then started, with the Student being physically aggressive, damaging property, leaving the school, and causing disruption. [S-198] The District and the Parents had very different views on how to deal with the Student's behavior issues. Sometimes, the Student was physically restrained or given detention, and was even suspended. The Mother explained to school officials that touching or holding the Student caused him to go into a "fight or flight" mode, and the approach the school was using was increasing the Student's anxiety about school and having a negative impact on the Student's mental health and well being. [Testimony of Mother, S-193, S-234] The Parents explained their successful use of the CPS model, and expressed their disagreement with portions of the Student's behavior plan that involved holds and detentions, and that they did not support the District's suspension policy. The Student liked being suspended from school because he did not have to attend school when suspended. His school avoidance became so serious that on December 1, 2008, he ate fluoride pills in an effort to become too sick to go to school. [Testimony of Mother, S-234]
13. On December 17, 2008, Barbara Freethy observed the Student for 75 minutes at school. During that time, the Student refused to do a writing assignment, instead choosing to draw pictures of guns. He told Ms. Freethy that he did not write essays. Although a staff member tried to encourage the Student to write and to help him choose a topic, the Student remained

resistant and the incident ended with the Student walking out of the school building. The staff member used his arm to block the Student from leaving. [Testimony of B. Freethy] Ms. Freethy did not agree with the school's approach, and thought a proactive approach should have been used. After observing this incident, she did not think the Student's placement at NYMS was workable, particularly as the District's response was to propose placing the Student in a very restrictive setting in which he was alone in a conference room near the principal's office, accompanied by an educational technician. [S-195, 199] Ms. Freethy felt this plan was wrong and would have had long-term adverse effects. This plan never went into effect, however. [Testimony of Mother]

- 14.** The Parents decided to remove the Student from NYMS. Based on a recommendation from Ms. Freethy, and after notifying Ms. Nunery in writing, the Parents unilaterally placed the Student at the Aucocisco School ("Aucocisco") in Cape Elizabeth. [P-323] Initially the director, Barbara Melnick, said Aucocisco did not accept students with aggressive behaviors. Nonetheless, the family applied, and the Student was accepted and began attending school there on January 12, 2009. [Testimony of Mother] The entire staff at Aucocisco was trained in CPS and in the social thinking skills curriculum of Michelle Garcia Winner.
- 15.** The Student was initially afraid to go to Aucocisco. Kathy Condon, the Student's teacher, was very nurturing and knew that she needed to earn the Student's trust. [Testimony of Mother] When behavior analyst Gretchen Jefferson, Ph.D. completed a Functional Behavior Assessment of the Student in April 2009, the Student had been attending Aucocisco for about three months. [S-127-151] Ms. Condon reported that although the Student refused adult directives and hesitated to engage in group instruction, he had not been aggressive, and had not tried to destroy property, run away, or be persistently defiant. [S-127] Dr. Jefferson noted

that the Student did not respond well to a directive, authoritative style from adults who had not established a relationship with him. [S-132] She explained that the Student was making improvements in a number of areas, and noted that at Aucocisco, the Student appeared to be comfortable in his classroom environment. [S-139] Ms. Condon reported that the Student preferred to arrive early at school and situate himself in the empty classroom before other students arrived. [*Id.*] Although the Student took a long while to adjust to school, after a few months, he learned to trust the staff members, and began to thrive at Aucocisco.

16. Pursuant to agreements between the Parents and District, the Student continued to attend Aucocisco through xx grade, with the District paying for the Student's tuition and transportation. [P-436, 490] These agreements acknowledge that the Parents' placement at Aucocisco is a private placement, and not an IEP team decision.
17. Over time, the Student began making consistent progress through xx (2009-2010) and xx grade (2010-2011) at Aucocisco. [Testimony of Mother, B. Freethy] When Ms. Freethy came to observe the Student there in May 2009, the Student was excited to show her his school. [Testimony of B. Freethy] The Student participated, raised his hand to answer the teacher's questions and did not become upset when a toy he wanted was unavailable. Ms. Condon told Ms. Freethy that the Student was doing increasingly well with his adjustment to Aucocisco. [P-1139] Ms. Melnick thought the Student had matured significantly and taken on a role of leader with new students there. Academically, he had kept up with his classes, and had not had any major behavioral issues. Ms. Melnick has seen the Student struggle with "getting stuck," which she sees as a minor issue, and he is able to process these and move on much faster than previously. [Testimony of B. Melnick]

18. Ms. Freethy observed the Student again on April 15, 2010. She reported that the Student had made a lot of progress in school. [P-1132-1133, Testimony of B. Freethy] The Student reported many positive things about his Aucocisco experience, and Ms. Freethy observed this as well, and concluded that the Student appeared to be thriving. [*Id.*] A year later, Ms. Freethy noted that the Student had made significant progress in all of the areas she had identified for his therapy. [P-1131, Testimony of B. Freethy] Although the Student continues to have difficulties, Ms. Freethy is confident he will continue to progress using the CPS approach.

19. The District paid for the Aucocisco placement and for the Student's transportation there. Initially, the District provided a bus, and the Student was the only one who rode it. However, on any day that there was a change or glitch in the Student's transportation, he became upset. [Testimony of Mother] One day, a driver came in a private vehicle, and the Student refused to get in it. Two other students began taking the Student's bus, and each went to different schools. At first, the Student was the last to be picked up and the first dropped off, and this worked well for him, as he was only on the bus for 35 minutes. His round-trip to school is approximately 37 miles. [Testimony of Father] This schedule changed, and sometimes, the Student had to wait for other children who were not ready when the bus arrived. The unpredictability and longer bus ride¹ upset the Student, and caused him to arrive late to Aucocisco on a number of occasions. [Testimony of Mother, P-577²] This made him very anxious. By the end of 2011, it had become a significant problem, which prompted the Mother and Ms. Melnick to write Ann Nunnery about the adverse affect the Student's transportation was having on his education. [P-573-576] Ms. Melnick explained that the

¹ The Student's bus ride, which had been 35 minutes, sometimes lasted an hour or longer.

² P-577 is an exhibit that does not show the Student's arrival time each school day, but is selective and prepared for this hearing. Therefore, it does not give a complete view of the Student's arrival situation, but does show that he began arriving late for school and his transportation time got increasingly longer.

erratic nature of the trip caused the Student to be unprepared to begin his day upon arrival, and his schedule had to be adjusted. [P-575] When the Student arrived at school upset from his bus ride, he needed a cool down period. When his transportation was not a problem, he could enter the classroom like other students. The Student's frustration with his transportation also caused behavior problems. [Testimony of B. Melnick] Consequently, the Mother requested an alternative transportation arrangement.

- 20.** In September 2010, the Student saw Mary Duggan, LCSW, for Eye Movement Desensitization and Reprocessing therapy (EMDR) because the Student was still very distressed about the experiences he had while in public school. [Testimony of M. Duggan] Ms. Duggan explained that EMDR did not erase traumatic memories, but helped the Student process these events and reach a resolution. Ms. Duggan was concerned that changing the Student's school setting could reopen his wounds if he were in a setting where physical holds and restraints were used, even if he only witnessed them. The Student currently feels that he is in a safe place where people listen to him. [*Id.*]
- 21.** In March 2010, the District had clinical psychologist Linda Naaman evaluate the Student at Aucocisco. [S-101-118] For the Student's June 2011 IEP team meeting, Dr. Naaman did a shorter triennial evaluation and observed the Student at Aucocisco. [S-37-45] Dr. Naaman felt the IEP goals and objectives were reasonable and appropriate, and did not take exception to any of them. [Testimony of L. Naaman] Although Dr. Naaman noted that the Student had made improvements in a variety of areas, including academic productivity, being less anxious and more spontaneous, as well as comfortable at Aucocisco, she continued to think that the Student would benefit more from a therapeutically intensive program to help him become better able to function in a wider range of environments where the demands and expectations

would be greater than at Aucocisco. [S-44] Dr. Naaman also felt that CPS was good for the Student, and that he should not be approached physically unless absolutely necessary.

[Testimony of L. Naaman] She had heard that Sweetser frisked students for the first 30 days of attendance at the school, and would not recommend that for the Student.

22. At the Student's annual review IEP meeting held on June 15, 2011, the Parents expressed their concern that the District's transportation arrangements for the Student were having a highly negative effect on his school experience and further poisoning his view of the District. [P-1274] The participants also discussed the Student's progress and programming for xx grade. Because Ms. Condon was on medical leave, Aucocisco did not provide the academic testing that Ms. Condon planned to conduct. The IEP team changed the Student's disability to Multiple Disabilities: Autism and Emotional Disturbance. [P-1273] The IEP said that the Student was parentally placed at Aucocisco, but that he needed a highly structured, therapeutically intensive day treatment setting. [P-1292, S-6-7] This was based upon Dr. Naaman's psychological evaluations. [Testimony of A. Nunery] The Parents and the Student's therapists disagreed with this conclusion. The Parents felt that the matter of the Student's placement was decided before they entered the room. [Testimony of Mother] Ms. Freethy thought this placement decision went against everything she knew about special education, and that the current environment was working well. [Testimony of B. Freethy] She did not, however, feel that there was an openness to look at the Student's situation differently. The IEP also called for occupational therapy for 60 minutes per week, social work services for 90 minutes per week, and a number of consultation services. [P-1290] There is no mention of transportation in the Student's IEP. Special services director Ann Nunery testified that this was an oversight, and that the District was willing to transport the Student at the District's

expense. [Testimony of A. Nunery] Although there are two behavioral and two social work goals, there is no mention of CPS. There is also no behavior plan. The IEP left the means of addressing the Student's behavior issues within the discretion of the school at which he would be placed. [Testimony of A. Nunery] Dr. Naaman and Ms. Nunery did not see this as a problem because in a specialized setting, behavioral matters were integrated into the day, and at Aucocisco, the Student was not having behavioral issues that required a special plan. [Testimony of L. Naaman, A. Nunery]

- 23.** The Parents, in consultation with the professionals who have worked with the Student, decided to reject the IEP and change of placement, and continue the Student in his unilateral placement at Aucocisco. Additionally, they arranged a private transportation service, Elite Taxi, to transport the Student to school. The school day starts at 8:15 a.m., and Elite Taxi picks up the Student at 7:25 a.m. and brings him to school around 8:00 a.m. or 8:05 a.m. The taxi costs \$40 per trip. [Testimony of Mother] With this arrangement, the Student has been able to arrive at school and begin his day like the other students, without the need for a cool down period. [Testimony of B. Melnick, Mother] It is difficult, however, to put a time limit on transportation, as there are variables such as traffic and weather. [Testimony of A. Nunery] The District normally makes arrangements for transportation, and hires people to transport students who meet certain qualifications.
- 24.** At Aucocisco, the Student sees social worker David Chatalbash every week for one half hour, and he also receives occupational therapy. Mr. Chatalbash has been responsible for the emotional and behavioral atmosphere at Aucocisco for 15 years. He spends at least one day per week there, and prepares behavior plans, runs social skills groups, consults with staff, and provides individual counseling to students. [Testimony of D. Chatalbash] Mr. Chatalbash is

responsible for teaching the Student self-regulatory skills, and believes that regulating the Student's anxiety is very important if he is to be able to access his academic and social education. The Student receives social thinking instruction, executive function and study skills coaching as part of his day at Aucocisco. [Testimony of B. Melnick]

25. The Parents recently asked psychologist Christopher Kaufman to conduct an independent evaluation of the Student. Dr. Kaufman has experience with children with Autism and his doctoral training focused on behavioral issues. [Testimony of C. Kaufman] His evaluation had not been completed by the date of the hearing. Although Dr. Kaufman felt that the IEP had a number of strengths, he thought some of the goals were too general, and should specify what the Student would actually be doing. [*Id.*] Dr. Kaufman likes the CPS approach for the Student, and believes it helps him build trust and reduce his anxiety. Dr. Kaufman also recommended specific self-regulation training strategies for managing anxiety, frustration and anger, including role-playing, social drama and thinking, and stories. Regarding behavioral interventions, Dr. Kaufman thought the Student needed a more explicit plan for responding to his behaviors, and that the IEP should include a selection of behavioral interventions the Student could use that were not open to interpretation. [*Id.*] Regarding transportation, Dr. Kaufman felt that how the Student was transported to school was important, given his anxiety, rigidity, and lack of cognitive flexibility. He opined that if the Student arrived at school in a frustrated, agitated state of mind, it could affect how the Student did in school that day. Although the Student's transportation does not need to be ideal, he should not arrive at school agitated due to his transportation, as he does not bounce back quickly. [*Id.*] Consequently, Dr. Kaufman recommended that the IEP specify special transportation designed to limit the

Student's frustration and agitation as he enters the school day. He should also be taught to better manage his frustration and agitation regarding his transportation. [*Id.*]

26. The Student began attending xx grade at Aucocisco. On September 12, 2011, this hearing commenced, and the Parents presented four witnesses, including Elizabeth Millett, a neurofeedback counselor who had worked with the Student on his anxiety and inflexibility, Mary Duggan and Barbara Freethy. All of these witnesses discussed why they believed it would be detrimental to the Student to place him in one of the therapeutically intensive day treatment programs the District had considered in its proposed IEP. They all discussed how much progress the Student had made with his therapies, and how he was thriving at Aucocisco.
27. On September 19, 2011, the District's legal counsel moved to amend the issues in the hearing, representing that the District would agree to continue the Student's placement at Aucocisco. This was confirmed by letter dated September 21, 2011, in which Ann Nunery wrote to the Parents to let them know that the District had decided not to move ahead with the therapeutic day treatment placement, and that it was willing to continue the Student's placement at Aucocisco at the District's expense. [S-1128] She added that she believed such a placement could be continued under the current IEP, and asked the Parents whether they or the Aucocisco staff would object to that. She also offered to schedule an IEP team meeting to see whether changes were needed to the IEP, in light of the District's willingness to continue the Student's Aucocisco placement. Lastly, the District offered to continue to make transportation available and provide OT and social work services at the level included in the IEP. [*Id.*]

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parents: The Parents are entitled to an order reimbursing them for all expenses associated with the Student's unilateral placement at Aucocisco or an order concluding that the District has conceded this relief. Such an award is important for both monetary relief and to afford "stay put" protection to the Student in his placement. The District has conceded the inappropriateness of its placement offer and the appropriateness of the Parents' Aucocisco placement by agreeing to reimburse the Parents for these costs.

The IEP offered in June 2011 was inappropriate not only because it was designed to match a predetermined placement, but because it ignored the Student's need for specific behavioral support and interventions, such as CPS, and for special transportation as a related service. Both of these are critical to the Student's educational success. In fact, had the Student's need for CPS and a non-physical behavioral approach been included in the IEP, the District's predetermined plan to place him in a therapeutic day treatment program would have failed from the outset. Furthermore, the Student specifically needs transportation that will not cause him to arrive at school agitated and anxious, as this detracts from his ability to learn. This does not mean he requires a private taxi service, but that method of transportation has worked well for him.

B. Brief summary of the position of the District: The Student's IEP is reasonably calculated to provide him with educational benefits, and the Parents failed to prove otherwise. None of the Parents' witnesses testified that the overall IEP was inappropriate for the Student, and only Dr. Kaufman said that it was his preference that the IEP goals be more prescriptive. The District's witnesses testified that they believed the IEP was reasonably calculated to provide the Student with educational benefits, and that all participants at the IEP team meeting agreed with

the present levels, goals and service levels in the IEP.

The Parents also criticize the IEP for failing to list transportation as a related service.

There is no dispute that the District has provided and will continue to provide transportation to the Student at the District's expense. The District asserts that this is merely a "technical glitch" in the document.

1. Are the District's proposed 2011-2012 IEP and placement offered to the Student reasonably calculated to provide him with a free appropriate public education (FAPE) in the least restrictive environment?

A. Placement

When this hearing began on September 21, 2011, the main issue was whether the District's proposed IEP, which called for placement in a therapeutic day treatment setting, was reasonably calculated to provide the Student with FAPE in the least restrictive setting. The primary reason this hearing was requested was because the Parents disagreed with the placement proposed by the District, and believed the Student should remain at Aucocisco.

Before the second day of hearing commenced, the District withdrew its intent to pursue the day treatment placement, and expressed its willingness to continue the Student's Aucocisco placement. The District then asked that I dismiss the placement issue as moot. As the District agreed to continue the Student's Aucocisco placement at its expense, and pay for the Student's tuition and transportation from the start of the school year, the District therefore agreed to provide the relief sought by the Parents with respect to the Student's placement. I did not dismiss the issue, but ruled that the placement issue was moot because there was no longer a dispute about the Student's placement, and therefore no need for additional testimony on the subject.

I agree with the Parents that because the District has conceded the Parents' placement and reimbursement claim, as stated in its September 21, 2011 letter, thus eliminating the need for

additional evidence on the subject, that concession should have the same legal effect as if I made this determination on the evidence. This placement shall therefore be included in the Student's IEP.

B. Appropriateness of the IEP

It is the role of the hearing officer to 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). A 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). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. 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). This means that the District must meet the unique needs of each student with a disability through specially designed education tailored to meet their needs. *Rowley*, 458 U.S. at 201. Furthermore, as the term "education" has a broad meaning under the IDEA, the IEP must be designed to meet "all of a child's special needs, whether they be academic, physical, emotional, or social." *Lenn v. Portland School Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993).

An IEP that fails to state all the related services needed by a student fails to meet both the procedural and substantive requirements of the IDEA. Additionally, an IEP that fails to clearly specify the type of services to be provided is inadequate. See, e.g., *Board of Educ. of Carmel*

Cent. Sch. Dist., 21 IDELR 633 (SEA NY 1994). The Parents have the burden of proving that the IEP is inadequate. *Schaffer v. Weast*. 546 U.S. 49 (2005).

Although Dr. Kaufman testified that he thought the goals were too general, and that his preference was for more specific goals about the Student's specific activities, this did not render the IEP inadequate. On the other hand, the Student's IEP does not meet the requirements of the IDEA because it does not include transportation as a related service, and fails to specify the behavioral supports and interventions that are crucial to the Student's success.

Transportation to school is a related service that must be included in a student's IEP if the service is required to help the student benefit from special education. Maine Unified Special Education Regulations (MUSER) §XI. *See also* 20 U.S.C. §1401[26]. MUSER states that the IEP team must specify special education transportation in the student's IEP when the team determines that it is necessary for the child to benefit from an educational program. Thus, contrary to the District's assertion, this is not a mere "glitch" in the IEP document. Although there is no dispute that the District will provide portal-to-portal transportation to Aucocisco, I conclude that the Student's IEP must be amended to include this service.

The more difficult issue is what type of transportation is appropriate. There was considerable evidence that, due to the Student's disability, his transportation must be of the kind that will not cause him to become anxious and agitated. Although it is impossible to assure that he will arrive at school on time every day, due to uncontrollable factors such as traffic and weather, the transportation arrangement should assure that he arrives on time and ready to learn except in exigent circumstances. A failure to arrive at school on time on a few occasions would not be a material violation of the IEP.

School districts have been required to have so-called “last-on, first-off” transportation if there are medical reasons to support such a practice. *Board of Education of Smithtown Central School District*, 30 IDELR 562 (SEA NY 1999). I concur with Dr. Kaufman’s recommendation for transportation contained in Fact # 25 above. Although, as Dr. Kaufman noted, the Student does not need a form of ideal transportation, such as his own private taxi, he should not arrive at school agitated due to his transportation. Dr. Kaufman also recommended that the Student be taught to better manage his frustration and agitation regarding his transportation. Therefore, the Student’s IEP must be amended to contain a mode of transportation that will allow the Student to arrive at school on time, except in exigent circumstances, and that will not cause him undue anxiety. The IEP team should also consider adding a goal for the Student to manage his frustration and agitation regarding his transportation.

Regarding whether the IEP must include a behavior intervention plan (BIP), 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). The Office of Special Education Programs 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).

In June 2011, the IEP team changed the Student’s eligibility to include the category of Emotional Disturbance. The U.S. Department of Education rejected the notion that school districts should be required to develop behavior plans for all students with emotional

disturbances, but has said a student's need for behavior interventions and supports must be decided on an individual basis by the IEP team. 71 Fed. Reg. 46,683 (2006). There was much uncontested evidence that the Student required certain specific behavioral supports to benefit from his educational program, and that a system using CPS and one that prohibited school staff from using physical restraints was not only best for this Student, but had already proved very successful at Aucocisco. It was clear that the Student's behaviors were a major impediment to his ability to learn. It was also uncontested that the Student had a serious aversion to being touched, and both the Parents' and the District's witnesses who were mental health professionals agreed that it was traumatic for the Student to be approached physically, and that this should be avoided except when absolutely necessary.

Based on the uncontroverted evidence, the Student requires considerable behavior supports to be able to benefit meaningfully from his education. This points to the conclusion that he should have a behavior plan in his IEP. *See New York City Dep't of Educ.* 49 IDELR 270 (SEA NY 2008).

The District notes that hearing officers only order the development of behavior plans in situations where the student is failing or struggling to progress, and that none of this is true here. The reason the Student is no longer struggling to progress, however, is because Aucocisco is already implementing its own plan for dealing with the Student's behaviors, and it is successful and contributing to his progress. The Student's IEP should be amended to include these successful interventions, and take into account the recommendations of the Student's mental health providers.

2. What remedies are appropriate?

The District has already agreed to pay the costs of tuition at Aucocisco and the related services the Student is receiving there, which are included in his IEP. Regarding transportation, the District shall pay the costs incurred by the Parents until such time as the District provides alternative transportation consistent with this decision.

The IEP shall be amended as set forth below.

V. ORDER

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

1. The District has conceded the appropriateness of the Student's unilateral placement through its willingness to continue this placement at its expense, thereby agreeing to the remedy sought in the Parents' complaint. Therefore, the District shall pay the Student's tuition and related services at Aucocisco, retroactive to the start of the school year. The Student's IEP shall be amended to state that the IEP is being implemented at the Aucocisco School.
2. The District shall convene an IEP team meeting within 14 days of the date of this decision to amend the IEP to include:
 - (a) Transportation to and from school designed to allow the Student to arrive at school on time and to limit his anxiety and frustration so that he is prepared to participate in the regular school program upon entering school. This may mean that he must be the last student to be picked up in the morning and the first to be dropped off from his school bus, or that he may be transported in another manner consistent with this decision; and
 - (b) A behavior intervention plan containing CPS and requiring school staff to avoid physical restraints and holds.

SO ORDERED.

SHARI B. BRODER. ESQ.
Hearing Officer