

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING
Case No. 14.035H**

Parent and Parent v. SAD 75

REPRESENTING THE FAMILY: **Parent**
REPRESENTING THE DISTRICT: **Daniel Nuzzi, Esq.**
HEARING OFFICER: **Sheila Mayberry, Esq.**

This hearing was held and this decision is issued pursuant to Title 20-A, MRSA §7202 et. seq., 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing took place on February 6 and 24, 2014.

Those present for the proceedings included student’s mother. (“Mother”); student’s father (“Father”), who is also representing the Family; Patrick Moore, Director of Special Education for School Administrative District 75 (“District”); Daniel Nuzzi, Esq. and Nathaniel Bessey, Esq., representing the District; and the undersigned Hearing Officer.

The following individuals testified at the hearing:

The Mother	
Barbara Linnehan-Smith	Adaptive Physical Education Teacher
Tanji Johnston	District’s Special Education Coordinator

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On December 11, 2013, the Parents filed a due process hearing request on behalf of their son, student (“Student”). On January 15, 2014, a prehearing conference was held by telephone. Documents and witness lists were exchanged in a timely manner. However, additional documents were submitted during the hearing with the agreement of the Parties.

The Parents submitted 60 exhibits (herein referenced as “P-#”), of which the following were admitted into the record¹: P-20, P-21, P-22, P-23, P-26, P-27, P-38, P-39, P-40, P-44, P-48, P-51, P-54 (non-stricken portion), P-56, P-58 (non-stricken portion), P-59, and P-60.

The District submitted 53 exhibits (herein referenced as “S-#”), of which the following were admitted into the record: S-5, S-7, S-17, S-18, S-22, S-19, S-21, S-31, S-32, S-33, S-34, S-35, S-36, S-37, S-40, S-41, S42, S-43, S-44, S-47, S-48, S-49, S-52, and S-53.

Final written arguments were submitted by the District (totaling 60 pages) and the Parents (totaling 46 pages²). The record closed upon receipt of these documents. The parties agreed that the Hearing Officer’s decision would be due on March 28, 2014.

II. PRELIMINARY MATTERS

A. Subpoenas

On January 21, 2014, the Acting Commissioner of Education of the Maine Department of Education issued subpoenas to several District personnel. On January 29, 2014, the District submitted a Petition to Vacate and/or Modify subpoenas issued to Gina Stokes and Nancy DiGirolamo-Bastin, and subpoenas for documents issued to Patrick Moore and Jessica Fournier. The Parents submitted a written response on February 5, 2014. The Parents withdrew their subpoena issued to Nancy DiGirolamo-Bastin at that time. Oral argument was heard on February 6, 2014, the first day of the hearing. I concluded that the testimony of Gina Stokes may be relevant only to rebut the District’s claim that the Mother did not disrupt staff during a fire drill. With respect to subpoenaed documents, I found:

1. Documents relating to communications between the District and the Union representing the District’s employees, regarding the Student, the Parents, or Ms. Fournier may be relevant, but only in redacted format, and only to rebut the District’s claim that employees fear for their employment due to the Parents’ actions. Therefore, they must be produced.

¹ Exhibits P-51 through P-61 were made available to the Parents pursuant to their subpoena for documents. They were provided to the Parents after the first day of hearing. The relevance of the documents was discussed on the second day of the hearing. The Parents subsequently withdrew P-52, P-53, P-54, P-57, and P-61.

² The Parents also attached a partial transcription of an IEP meeting and a case from the Federal District Court of Maine, *Sanford Schl. Comm. v. Mrs. and Mr. L.*, Civil No. 00-CV-113-P-H.

2. All documents, in any form, including emails that are the Student's educational records, must be produced.

The Parents withdrew their request for the following documents:

1. Policies and rules regarding student and visitor accommodations;
2. Appointment books, logs, and calendars from January 1, 2013 to the present showing Parents' appointments to visit teachers or attend school activities at the Middle School;
3. Visitor logs or sign-in sheets from January 1, 2013 to the present;
4. All records related to the disbanding or termination of the "writing group" in the Community Experiential Program.

The balance of the Parents' request for subpoenaed documents was vacated based upon my determination that the documents were irrelevant to the issues in dispute.

B. Motion in Limine

On February 3, 2014, the Parents submitted a Motion in Limine requesting that the hearing officer exclude evidence that referred to any statement or conduct of the Parents that the District claimed caused any type of discomfort or distress to its employees, or any negative emotional state of the District's employees caused by the presence of either Parent. Upon consideration of written arguments, I denied the Motion.

III. ISSUES³

1. Did the IEP Team agree to include the Student in Monday lunch outings with his class?
2. If so, did the District violate the IEP by not including the Student in Monday lunch outings with his class? If so, what remedy is appropriate?
3. If so, did the District fail to provide a free appropriate public education ("FAPE") in the least restrictive environment by taking the Student to the Monday lunch outings with his speech pathologist and special education coordinator as an alternative placement to being with his class for Monday lunch outings? If so, what shall be the remedy?

³ On February 6, 2014, the first day of hearing, the Parents withdrew the following issue: Did the District violate the Individuals with Disabilities Education and Improvement Act ("IDEA") by not allowing the Parents to have unannounced visitation rights in the Student's classroom for purposes of observing and verifying the implementation of the IEP? If so, what shall be the remedy?

IV. FINDINGS OF FACT

1. The Student is xx years old (DOB: xx/xx/xxxx). He is eligible for special education and related services under the category of Multiple Disabilities. (S-36). He attends Mount Ararat Middle School (“Middle School”) and is in the xx grade. (S-36). His current IEP has an effective date of November 13, 2013. (S-36).
2. The IEP summarizes assessments performed in 2011. The Student had a full scale standard score of 37 on the Wechsler Nonverbal Scale of Intelligence. His perceptual reasoning score was 49 and his processing speed was 50 on the WISC-IV assessment. His Adaptive Behavior Composite score was 51 by his teachers and 53 by his Parents on the Vineland Adaptive Behavior Scales-II. He scored high for “Probability of Autism” on the Autism Index GARS-2. The Behavior Symptoms Index score was 64 by his teachers and 52 by his Parents. The Student has significant cognitive delays, with an overall nonverbal ability falling in the 3-5 year range and receptive language skills estimated to be in the 2-4 year range. (Yale). His pragmatic skills are variable, but he demonstrates a clear concept of reciprocity. He does not communicate his own thoughts and feelings well, but is aided by a communications device. Although the Student does not readily initiate social interaction with others, he remains very responsive to the instructions and “social bids” of others. Providing him with opportunities to practice social skills with typical peers is necessary to teach concepts and sustain social initiations. (S-36).
3. The IEP states that the academic needs of the Student must focus on learning functional skills in a natural environment to help him become more independent. He needs visual supports for understanding directions and concepts, as well as verbal directions and feedback. (S-36).
4. Functionally, the Student is highly idiosyncratic. Objects, noises, and his own thoughts distract him. He requires frequent re-focusing and redirection throughout the day. New skills should be taught in his natural environment to avoid the need to incorporate separate generalization procedures. (S-36).

5. In July 2013, Educational Consultant Candice Bray, ScD., performed a literacy consultation. Among the many recommendations in her report, Ms. Bray recommended that the Student, “Work on reading menus from places he eats with his family as well as the great work being done with his own school cafeteria. Some places they shared include Friendly’s, FatBoys, McDonalds, Subway. You can also include other language lessons with the lessons: categorize by meaning: desserts, drinks, main meal, vegetable, meats, etc. This should support not only meaning, but reading.” (S-31, p.3-4). She also recommended that the Student use his Vantage communications device as much as possible. (S-31).
6. The Student’s IEP includes eight annual goals and many short-term objectives. He has specially-designed instruction for 1075 minutes in three out of every four weeks, five days a week. His related services include speech and language; occupational therapy; physical therapy; applied physical education (“APE”); aquatics; and autism consulting. His IEP also includes several supplementary aids and services, including visual supports; a reinforcement schedule; motor breaks; use of the Vantage Lite Support; educational and transactional support; and consultation on his communications device. Training for the Parents is also included as a supplementary service. (S-36).
7. The Student is with non-disabled peers approximately 20 percent of the school week. The IEP reflects that, while full inclusion in the general education setting is not appropriate for the Student, targeted and meaningful inclusion opportunities in social and non-academic activities continues to be important in supporting the Student’s growth in the areas of social communication. It notes that opportunities with his general education peers also increase his background knowledge and are an essential component of increasing literacy skills. (S-36). The Student attends lunch at the school with his non-disabled peers and also has non-disabled peer helpers. (S-52, Mother’s testimony, Johnston testimony). He also interacts with his peers during advisory period, dismissal, motor breaks, and art. (P-59).
8. The Student receives his special education and related services in the Community Experiential Program (“CEP”) at the Middle School in the resource room. There are four students in the CEP, including the Student, as well as a full-time teacher, related specialists,

and four educational technicians. (Mother's testimony, Johnston testimony). The Student does not have extensive social or communicative interaction with other students in the CEP. (Mother's testimony, Johnston testimony).

9. Katie Anderson, the Student's assigned Special Education teacher, works with the Student in the resource room, as do two additional educational technicians. He has a one-on-one educational technician with him throughout the day. (S-52). Another teacher, Jessica Fournier, is the Special Education teacher for the other three students. She is not responsible for the Student's programming, except in case of an emergency. (Mother's testimony).
10. The Student is a very happy boy and needs no behavior plan at school. (Mother's testimony). He is easy to work with and the staff love working with him. (P-59, Mother's testimony, Johnston testimony).
11. The students in the CEP often go on outings for different activities. Community outings include trips to Target, Petco, Renys, the library, the post office, and the bank. The purpose of these outings is for each student to work on specific IEP goals. (Mother's testimony).
12. One activity is to go swimming at Bowdoin College on Mondays. After the swim class, the students go to a local restaurant for approximately 30 minutes. (Mother's testimony, Johnston testimony). They sit at different tables most of the time and work with their own educational technician on their skills development. (e.g., counting change, ordering from a menu). (Mother's testimony, Johnston testimony).
13. Other than swimming at Bowdoin College, the Student has not participated in these outings at the Parents' request. (S-52, Mother's testimony). However, by xx grade, she believed that the Student had progressed enough in his literacy skills to be included in some of the outings. (Mother's testimony).
14. During xx and xx grade, the Student's special education teacher was Jessica Fournier. (S-5, S-7, Mother's testimony). During that time, the Parents developed a negative view of Ms.

Fournier's teaching abilities and came to distrust her as the Student's teacher. (S-5, S-7). They requested that the Student be reassigned from Ms. Fournier to another teacher due to their negative opinions of her (S-5, S-7, Mother's testimony). A negative relationship between the Parents and the District escalated over the course of the next few years due to conflict over this issue. (S-5, S-7, S -21, Mother's testimony). The Parents questioned Ms. Fournier's teaching competency and requested that the Student not have contact with her. (S-18, S-19, Mother's testimony). At some point, the issues culminated in an independent investigation of whether the Student was harmed by Ms. Fournier or any other personnel at the Middle School. (Mother's testimony). The Parents also initiated a separate due process hearing request against the District in 2013. (Mother's testimony). In addition, legal claims and counter claims were filed against the Parents and Ms. Fournier, and threats of additional legal action were made during this period of time. (S-5, S-7, S-17, S-21, S-33, S-34, S-48).

15. Due to her distrust of the District staff, the Mother uses her smartphone to record her conversations with them without their knowledge. (Mother's testimony). She states that she does this because she does not want to be misquoted if the contents of any conversation were to become an issue. (Mother's testimony).

16. In an email to Ms. Anderson, dated October 29, 2013, the Parents indicated a desire to have the Student participate in the Monday lunch outings. (P-26). On October 30, 2013, Ms. Anderson forwarded the request to Barbara Piccirillo, the Student's occupational therapist, Kelly Allen, the Student's case manager; Sarah McLaughlin, the Student's Speech Language Pathologist; Tanji Johnston, the Middle School Special Education Coordinator. (P-60). She also copied Ms. Fournier in a separate email. (P-56). Ms. Fournier organizes and supervises the Monday lunch outings for the other three students in the CEP. (S-52, Mother's testimony, Johnston testimony). Ms. Johnston replied to everyone, except Ms. Johnston, and including Patrick Moore, the District's Special Education Director, stating, "Let's pause for a moment. More later." (P-60).

17. On November 1, 2013, in an email reply to the Parents, Mr. Moore stated that, while he was happy to hear that the Parents wanted the Student to participate in the Monday lunch outing,

“We are not prepared to initiate this program change yet. As you know, Jes is the teacher and you have made your wishes known about Jes not instructing or supervising (the Student) except in an emergency. We can address this program change at the IEP team meeting on Monday.” (P-27).

18. It was understood that the Mother would attend the Monday lunch outings because she would be driving the Student back from swimming, as she does in the normal course of events. (Mother’s testimony). She provides the Student’s transportation for all educational purposes. (Mother’s testimony).

19. The Student’s annual IEP meeting was held over the course of two days, October 28 and November 12, 2013.⁴ (S-32, S-35, S-36). Most of the discussion on the first day of the IEP meeting included discussion of the Student’s goals and objectives, including the recommendations made by Ms. Bray. On the second day of the IEP meeting, November 12, the IEP Team continued to discuss the Student’s goals in literacy and math. Related services were also discussed. All the IEP issues were discussed and agreed upon. At the end of the meeting, Mr. Moore raised the suggestion made by Parents that the Student takes part in Monday lunch outings. (S-37, S-52-audio recording). The IEP Team endorsed the idea that the Student could work on his IEP goals in a community setting, specifically in a restaurant. Mr. Moore asked whether the idea was for the Student to participate with his classmates. The Mother replied, “I figured he’d be going where the rest of the kids are.” Mr. Moore raised the issue of whether or not there would be a problem with this, since Ms. Fournier would be the supervising teacher on the outings and the Parents have had an ongoing request to not have her interact with the Student. The Mother replied that it would not be a problem, since another educational technician would be present and that she would also be present if she needed to remove the Student to “get him out of harm’s way if I need to.” During the discussion, the Father also clarified the Parents’ desire to have the Student participate with

⁴ While the audio recording (S-52) indicates that there was agreement on the first day of the meeting to meet on November 4th, the Written Notice indicates that the second day of the IEP meeting was on November 12. Both the Advance Written Notice and the IEP itself, as well as the Father’s comment while signing the 7-Day Waiver Notice, as heard on the audio recording (S-52), indicate that the second day of the IEP meeting was held on November 12, 2013.

CEP classmates. He stated, “Well, we were thinking of participating with the other students.” (S-52).

20. Mr. Moore then stated that he thought there was some apprehension on the part of Ms. Fournier, the supervising teacher during the Monday lunch outings, but that he would talk to the Parents about it. He stated, “I think that the expectation though is that he’s participating in that group activity with the other guys, whether they’re at separate tables or not. So, it would be kind of recognized that Jessica is the one that supervises that program, yet it would be an independent activity for (the Student) in terms of the goals that he’s working on in his IEP.” The Father stated, “Right.” (S-52).

21. Ms. Johnston, who also attended the meeting, stated that she was worried about the dynamics between the Mother and Ms. Fournier. She stated that she saw a potential “issue” due to their historical relationship and “the way that that’s played out.” The Mother replied, “Well, I have no intention of interacting with her.” (S-52). Ms. Johnston stated that this issue “does not have to do with (the Student)...” (S-52).

22. Based upon this concern, Ms. Allen asked the Parents if they would still be interested in having the Student go to a restaurant without his classmates in order to practice his skills.

The discussion went as follows:

Ms. Allen: “So, if there is an issue, would you guys still be interested in going to a restaurant not necessarily the one that the other boys are going to, to practice these skills as well?”

Ms. Johnston: “... with a staff ...”

Ms. Allen: “With a staff person?”

Mother: “I suppose.”

Father: “Maybe, yeah.”

Ms. Allen: “OK.”

Mother: “I mean, again, the rest of them don’t make or break (the Student’s) education, right?”

Ms. Allen: "Right. It's still the experience. OK."

Ms. Johnston: "No. I love the experience."

Father: "Uh huh."

Ms. Allen: "I do too. OK."

Ms. Anderson: "Yeah, I think it's going to be [unintelligible]."

Ms. Allen. "OK"

Mr. Moore: "And we want this to work."

Unidentified speaker: "Yeah."

Mr. Moore: "Well, for everybody."

23. The Written Notice of the IEP meeting, dated November 26, 2013, states, in relevant part, that, "The Parents are happy with the academic progress that (the Student) is making. They are interested in (the Student) accessing restaurants in the community on Mondays." (S-37, p. 3).

24. In an email to the Parents, dated November 25, 2013, Ms. Johnston discussed the options for including Sarah McLaughlin, the Student's Speech Language Pathologist, in the Monday lunch outings. Ms. Johnston stated the following:

It has taken a bit of time to come up with the ideas for integrating some of (the Student's) goals into the community.

Sarah is able to do the December dates: Dec 2, 9, and 16, and is excited to work on some of the language goals in the community. She is hoping that you can pick one restaurant for those three weeks so that she can figure out menu items for the Vantage and work on the familiarity of one restaurant. Is noon the correct meeting time?

When Katie returns, she will be able to do Mondays, and will work on supporting speech and literacy goals. (She also suggested that we do a rotation of one restaurant a month.) Due to the issues we briefly discussed at the IEP, the individualized approach will be the best way to address community goals.

I will be joining, and look forward to learning myself. If you could let us know your restaurant choice and the best time, we will see you Monday. If you have thoughts for restaurants after the Winter Break, we can plan to get menus ahead of time.
(P-44).

25. In a reply email to Ms. Johnston, dated November 25, 2013, the Father stated the following:

Let's start with something easy for the first month: McDonald's in Topsham. Noon is correct. And if Sarah does this, (the Student) still gets his speech at 1:00 and the lunch time is not speech therapy pursuant to the IEP, right?

We remember you vaguely mentioning some issue with Jessica at the IEP meeting. But you did not describe exactly what harm you are seeking to prevent by putting (the Student) in a more restrictive environment and prohibiting him from being with the rest of his class, or why the risk (whatever it purportedly is) to Jessica is more important than the factors directly concerning (the Student's) education.

Please tell us in detail the reasons that you have unilaterally decided that this placement for the community outing is "the best way to address community goals" and the reasons why you determined that placing him with the rest of class in those outings is inappropriate.
(P-44).

26. In a reply email to the Parents, dated November 26, 2013, Ms. Johnston stated the following:

Thank you for your help.

Great... we will look forward to McDonald's at noon Monday the 2nd. Sarah is going to connect with parent about menu preferences for Vantage programming and will send along the speech goals (sic) she is looking forward to working on in the community. And, yes, (the Student) will still have speech at the regular time.

Yes, I did refer to the historical difficulty of the relationship between parent and Jess, the teacher for the other students.

It is not the intention to make any decision unilaterally... rather, the intention is to figure out how best to support the IEP goals in the community in the context of some rather difficult dynamics.

We can talk more about this at our next parent meeting if you would like. I hope you all have a Happy Thanksgiving.
(P-44).

27. The Mother testified that no one from the District contacted her or the Father before Ms.

Johnston informed them on November 25, 2013 that the Student would not be participating in the Monday lunch outings with his classmates. (Mother's testimony).

28. On or about December 3, 2013, the Mother brought the Student to lunch at McDonald's. He

sat a table with Ms. Johnston and Ms. McLaughlin. The Mother sat at another table while they ate with the Student and did not interfere. (P-44, Mother's testimony). The Mother

believed that the outing was successful, but she also felt that the Student was being segregated from the rest of his classmates. (Mother's testimony).

29. Ms. Johnston testified that her understanding of the agreement reached at the IEP meeting on November 12, 2013, was to have the Student work on his IEP goals in a community setting. She stated that she did not believe that socializing with his classmates was a priority for the Parents. She stated that her job included finding the right mix and balance among staff members to carry out students' IEPs. In that regard, she stated that, due to the difficult relationship between the Mother, Ms. Fournier, and other support staff, she needed to find staff members who were comfortable being in close proximity with her during the Monday lunch outings. In finding the right mix of staff, she concluded that she and Sarah McLaughlin would be a good match. She stated that Ms. McLaughlin was an appropriate choice because she was able to help the Student with his literary skills in a restaurant setting. (Johnston's testimony).

30. Ms. Johnston stated that as soon as she heard the idea that the Parents were interested in having the Student participate in the Monday lunch outings, she was concerned that there may be issues with staff if the Mother also attended the outing. She therefore raised the issue at the IEP meeting on November 12, 2013. Ms. Johnston stated that she was keenly aware of the history of the difficult relationship between the Parents and the staff. She stated that staff had reported to her that, as educators, they felt they were not trusted by the Mother, due to her accusations that the Student was harmed at school by a staff member, and the fact that she was recording their conversations in the school. Ms. Johnston stated that there was no "veto" by Ms. Fournier regarding whether the Student should be included with his classmates in the Monday lunch outings. She stated that her decision was based on the context of supporting the Student's IEP in the community setting and balancing the needs of the staff to feel secure in their working environment.

V. SUMMARY OF THE PARTIES' ARGUMENTS

A. Parents' Argument

- a. The IEP Team agreed to include the Student in Monday lunch outings with his class.

The Parents argue that the IEP Team agreed on November 12, 2013 to have the Student join the other students in the CEP for the Monday lunch outings, citing the audio recording of the IEP Team meeting on that date (S-52). They emphasize that they were told that if there were any "issues" with the outings, they and the District would meet to talk further about the outings. They assert that there was an effort to steer the conversation away from having the Student participate in the group, but that they were clear they wanted him to be able to go with the rest of the CEP class, and stated that Mr. Moore acknowledged this clarification. The Parents point out that the discussion about logistics was about the group, using the word "they" and the term "if there are four kids and four adults." The Parents state that the dialogue would not have made sense if it were referring only to the Student going on outings without the other students.

The Parents characterize Ms. Johnston's worries about the difficult relationship she discussed at the IEP meeting as nothing more than minor concerns. They state that her concerns do not invalidate the agreement that the Student would be participating with his classmates on the Monday lunch outings. They assert that the agreement was in place at that point, and that if there were any issues with Ms. Fournier, Mr. Moore would discuss them with the Parents.

- b. The District violated the IEP by not including the Student in the Monday lunch outings with the class.

The Parents argue that the District violated the Student's IEP by not including him in the Monday lunch outings with students in the CEP. It asserts that the District's unilateral decision not to comply with its agreement violated the IEP.

- c. The District failed to provide a FAPE in the least restrictive environment.

The Parents argue that the District violated the IEP by not including the Student in Monday lunch outings, and therefore failed to provide a FAPE in the least restrictive

environment. The Parents cite *Sanford Sch. Comm. v. Mrs. Mr. L.*, No. 00-cv-113-P-H WL 103544 (D. Me. Feb 1, 2001) (Kravchuk), affirmed, Feb. 27, 2001, for the proposition that a school district cannot unilaterally change an IEP for purely administrative convenience or any reason not based on the needs of the student. The Parents argue that, as in *Mr. L.*, the District made its decision regarding the Student's "placement" in the Monday lunch outings solely to serve administrative convenience because of the District's staffing difficulties, even though those problems were purportedly due to the "relationship" between the District and the Parents.

The Parents also assert that the District made the decision not to include the Student in the Monday lunch outings with the students in the CEP before the IEP meeting on November 3, 2014. They claim that Ms. Johnston spoke to staff before the IEP meeting, citing the email exchange from October 30, 2013. They state that Ms. Johnston decided that the outings could not happen after speaking to Ms. Fournier.

Finally, the Parents argue that, without the CEP students, the setting of the Monday lunch outings is not provided in the least restrictive environment, citing cases 34 CFR §300.115(a), and 34 CFR §300.320(a)(4)(iii). They assert that the individualized approach to providing the Student with a community outing deprives him of contact with his disabled peers. They compare that scenario to homebound instruction that is more restrictive than trips with his peers, which are more like resource room instruction.

B. District's Argument

a. The IEP Team Did Not Agree on a Specific Programming Methodology

The District argues that the IEP Team did not agree on a specific programming methodology in at the IEP meeting on November 3, 2013. It acknowledges that the Parents preferred to have the Student join the CEP students for the Monday lunch outings. However, the District made it clear that they were concerned about covering the Monday lunch outings with the current staffing in light of the historically difficult relationship between the Parents and Ms. Fournier. The District highlights the portion of the IEP Team meeting when the Parents were asked if they would be interested in a separate trip, stating that the Parents indicated they would

be interested, since each student works one-on-one with an educational technician and not necessarily sit at the same table with other students.

The District rebuts the Parents' argument that the District's plan to have the Monday lunch outings structured as an individual activity was a unilateral change in placement. It asserts that each of the four students in the CEP has an IEP and works one-on-one with an educational technician for nearly the entire day, including the lunch outings. It notes that the Student has never participated in any field trips with the CEP students, other than swimming, because the Parents have never given permission.

The District claims that social interaction was not the goal of the Monday lunch outings. Instead, they were meant to allow the students to work on their IEP skills and goals separately and individually. It points out that the Student is with his disabled peers in the resource room five days a week and has other opportunities built into his IEP to socialize with his peers, such as lunch on the remaining four days of the week.

b. The Parents are not entitled to dictate specific services as long as a FAPE is provided

The District argues that the Parents are not entitled to dictate specific services, as long as a FAPE is provided. It asserts that it appropriately sought to provide the educational benefit agreed upon by the IEP Team in a configuration that best utilized the available District resources while also allowing it to fulfill its obligations to the other students. It claims that it cannot ignore the reality that there is a difficult relationship between the Mother and District staff. Understanding that the situation could create a stressful atmosphere for educational technicians and teachers, the District insists that it was entitled to consider how to organize and staff the Monday lunch outings in order to best provide the services in the Student's IEP. It cites *Greenbush Schl. Comm. v. Mrs. K.*, 934, 942 (D. Me. 1996) for the proposition that it may consider the effect of parental antagonism on its staff, which in turn affects the ability of students to receive educational benefit.

The District states that it is not attempting to use staff discomfort to justify the delivery of anything less than a FAPE. It asserts that the alternative Monday lunch outing configuration represented a significantly greater commitment of resources and services than the Parents' idea.

c. The District provided a FAPE in the least restrictive environment

The District asserts that the Student's Monday lunch outings provide a FAPE in the least restrictive environment. It points out that the Parents have not alleged that the Student's IEP is not reasonably calculated to achieve educational benefit, and that they have stated that he is making progress.

The District argues that the Monday lunch outings are not intended to remove the Student from his least restrictive placement in the resource room. The least restrictive environment ("LRE") requirement does not admonish activities that advance a student's IEP goals. It points out that the Student is with his peers in the resource room for almost the entire day. It asserts that, based upon the entirety of the IEP and the services provided, the Parents' argument, that he is not being provided educational benefit in the least restrictive environment, cannot withstand scrutiny.

IV. LEGAL STANDARDS

A. Burden of Proof

Although the Individuals with Disabilities Education Improvement Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). As such, the Parents bear the burden of persuasion in this matter.

B. Standard for the provision of a FAPE

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

... promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.
998 F.2d 1083, 1086 (1st Cir. 1993).

In *Roland M. v. Concord School Comm.*, the First Circuit described the goal as providing 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, supra*, 998 F.2d at 1089.

The law is also clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. §1412(a)(5); 34 CFR §300.110; Maine Unified Special Education Regulations (MUSER) §§1.2, X.2.B. What is least restrictive depends upon an individual’s needs. The goal is to educate the Student, whenever possible, with non-disabled students, and as close as possible to the child’s home. 34 CFR §300.114(a)(2)(i)(ii); 20 USC §1412(a)(5); MUSER §X.2.B. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum of placements required must include those listed in the definition of special education under 34 CFR §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). 34 CFR §300.115. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and other services and activities set forth in 34 CFR §300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of the child. 34 CFR §300.117.

VI. ANALYSIS

A. Did the IEP Team agree to include the Student in the Monday lunch outings with his class?

I find that the IEP Team agreed to include the Student in the Monday lunch outings with his class. This finding is based upon the dialog of the IEP Team participants at the IEP meeting on November 12, 2013. The Parents clearly stated that they wanted to have the Student join the other CEP students in the Monday lunch outings. The District staff, while raising concerns about the historical difficult relationship between the Mother and certain staff, did not unequivocally

state that the outings could *not* happen with his class for this reason. Mr. Moore told the Parents that *if* there were any problems, he would talk to them. The logical presumption from this statement is that the lunch outings would occur unless they were otherwise notified. The Parents therefore reasonably concluded that the Student would attend the Monday lunch outings with his class.

B. Did the District violate the IEP by not including the Student in the Monday lunch outings with his class?

The Supreme Court has prescribed a two-part test for analyzing challenges to an IEP and educational placement. “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive education benefits?” *Rowley*, 458 U.S. at 206-207. The First Circuit suggests that the first part of this test is more instructive than dispositive, and that compliance with the second part is likely to nullify a violation of the first. See *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984). (“The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.”) Pursuant to that standard, procedural violations will undermine an IEP only if there is “some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Roland M.*, 910 F.2d at 994.

I find that the District violated procedural requirements in developing the Student’s amended IEP. First, the District did not include the Monday lunch outings in the Written Notice, dated November 26, 2013, to insure that it reflected the agreement by the IEP team to initiate the activity. The contents of a Written Notice must, among other things, explain why the District proposes or refuses to take action. It also must include a summary of comments made by the parents. 34 CFR §300.503.

The only mention of the Monday lunch outings in the Written Notice was the statement: “The parents are happy with the academic progress that (the Student) is making. They are

interested in (the Student) accessing restaurants in the community on Mondays.” (S-37, p.3). I find that this statement does not sufficiently describe the agreement made at the IEP meeting. This is important because of the specific discussion during the IEP meeting about whether the Student would be with his classmates.

I also find that the District committed a procedural violation by not including the Monday lunch outings in the written IEP document as a related or supplemental service. 34 CFR §300.324(a)(6).

Finally, I find that there was a procedural violation by the failure of the District to contact the Parents, as agreed upon, to discuss the circumstances that led to the decision not to have the Student participate in the Monday lunch outings with the other students in the CEP.

C. Did the District fail to provide a FAPE in the least restrictive environment by taking the Student to the Monday lunch outings with his speech therapist and special education coordinator, as an alternative to joining the rest of the CEP class?

a. Did the procedural failure amount to a failure to provide a FAPE?

Under the second prong of the Supreme Court’s FAPE analysis, there must be a finding that procedural inadequacies compromised the Student’s right to a FAPE. *Roland M.*, 910 F.2d at 994. (“There must be some rational basis to believe that procedural inadequacies compromised a student’s right to a FAPE.”) The issue in this matter is whether the District’s unilateral decision to implement the agreed-upon Monday lunch outings without the other CEP students failed to provide the Student with a FAPE.

There is no rational basis to find that the failure to include the Student in the Monday lunch outings with the other CEP students deprived the Student of a FAPE. A review of the IEP in its entirety reflects that virtually all aspects of the Student’s educational needs are being met. The Parents have acknowledged this. It is uncontested that the Student is making educational progress. The failure to include him from the Monday lunch outings with the other CEP students does not weaken the strong IEP in place. I find that his program is stronger because of the

activity itself, which allows him to develop literary skills in a community setting, even if not in the company of other students. As the Mother acknowledged in her testimony, the Monday lunch outing she attended at McDonald's was a success.

Furthermore, the Parents and the District agreed that the purpose of the Monday lunch outings was to have the Student work on his individual IEP goals in a community setting. While the Parents preferred that the Student attend with the other students in the CEP, developing socialization skills was not a priority for this activity. The Mother acknowledged this point by her statement that being with the other students would not "make or break" the Student's educational progress.

The Parents' argument that this case is analogous to the one in *Mr. L, supra*. is misplaced. In *Mr. L.*, the court held that there was no evidence that the out-of-district placement of the student would provide any educational benefit for him, or that the Pupil Evaluation Team ("PET") ever discussed whether the out-of-district placement was individually suited to the Student. The Court found that the out-of-district placement was made purely for administrative convenience without regard to the student's educational needs.

In this case, the evidence is clear that the Monday lunch outing would provide educational benefit to the Student. The IEP Team discussed how the Student could work on his IEP goals and skills, as recommended by Ms. Bray. The Team whole-heartedly endorsed the idea. The Parents agreed that even if the staffing issue was not going to work out, having the Student engage in the activity on an individual basis would be suitable, if not preferable.

I find that the provision of the Monday lunch outings was appropriately implemented with the staffers who normally work with the Student. Despite the concerns about the dynamics between the Mother and certain staff members, the logistics for implementing the outings were proper. Ms. Johnston credibly testified that, as the special education coordinator, it was her job to schedule staff in order to implement the Student's IEP, regardless of any negative relationship that may exist or how other educational staff feel about being in close proximity to the Mother. Ms. Johnston stated that she believed the appropriate choice of staff for the outings was the

Student's speech therapist and herself. There is no evidence that the District attempted to deny the Student the opportunity to attend the lunch outings. In fact, every attempt was made to provide the lunch outings as requested by the Parents and agreed upon by the District. However, as stated above, while the Parents preferred to have the Student join the CEP students, it was not a priority. The priority was to have the student practice his skills in a community setting.

The law is clear that a hearing officer does not have authority to order a school to remove or add particular personnel. *Slama v. Independent Schl. Dist. No. 2580*, 259 F. Supp. 2d 880 (D. Minn. 2003) (holding that school districts have the sole discretion to assign staff); *Freeport Sch. Dist. #145*, 34 LRP 189 (Ill. SEA 2000) (noting that the selection or retention of an aide to assist a student with disabilities is an administrative function and not subject to review under the IDEA unless the selection deprives a student of a free appropriate public education); *C.S.D. 18*, 102 LRP 4378 (Me. SEA 1998) (There is no basis in education law or regulations which allows parents to have employment jurisdiction over staff who serve their special education children.)

Therefore, I find that there is no evidence that the District implemented the Monday lunch outing as an individual activity for purely administrative convenience.

The Parents also argue that there was a predetermination that the Student would not join the CEP students. While it is apparent that Ms. Johnston had information about how the District staff felt about being in close proximity to the Mother, there is no evidence that a decision to exclude him was made prior to the IEP meeting. The dialog from the meeting clearly indicates that the IEP Team considered the options and concerns about the Monday outing. The discussion was vigorous and robust. In fact, while there was agreement to implement the Monday lunch outing with the CEP students, Mr. Moore reserved the right to contact the Parents if he found there were still issues regarding staffing. Therefore, I find that there was no predetermination of the outcome of the request to have the Student join the Monday lunch outings.

Based upon the above, I find that the District was able to provide a FAPE to the Student despite the apparently difficult dynamics between the Parents and the District staff.

b. Were the Monday lunch outings to be provided in the least restrictive environment?

The Parents argue that the unilateral decision to change the Monday lunch outings from a group to an individual activity violates the District's mandate to provide the activity in the LRE because it deprives the Student from participating with his disabled peers. This argument lacks merit. The IDEA requires that the District ensure that students with disabilities participate with *non-disabled* students in the regular education environment, including extracurricular services and activities (e.g. lunch and field trips) to the maximum extent appropriate to the needs of that student. 34 CFR §§300.114, 300.117, MUSER §X.2.B. Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with non-disabled peers. *Oberti v. Board of Educ. of Borough of Clementon Sch. Dist.*, (3d Cir. 1993), 995 F.2d 1204, 1216. While the IDEA does not require disabled students to be given opportunities to engage with their disabled peers, it does require that schools to ensure that a "continuum" of alternative placements is available to meet the needs of the Student. 34 CFR §§300.115(a), 300.116, MUSER §X.2.B. The concept of the continuum is defined in the statute to include the regular education setting, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR §§300.39, 300.115. The continuum includes supplementary services in resource rooms in conjunction with regular education placements. *Id.*⁵

I find that the District has complied with the LRE requirement by incorporating various levels of participation by the Student in the continuum. It is uncontested that the Student is with his non-disabled peers for approximately 20% of his school week in non-academic activities, such as lunch, motor breaks, advisory periods, and art class. He also has non-disabled peer helpers. The balance of his school week is spent in the special education setting (the resource room) and includes supplemental services, such as a weekly swimming class and the Monday lunch outing.

⁵ The Parents cite 34 CFR §300.320(a)(4)(iii) for its view that the IDEA and accompanying regulations require disabled students to be educated and participate with other disabled children as part the LRE requirement. That section of the regulations, however, is meant to instruct the IEP teams on what information is to be included in the written IEP. It does not require that a school ensure that disabled children participate with other disabled children as part the LRE mandate. The Student's IEP sufficiently includes a statement of his level of participation with his peers.

The Monday lunch outings are specifically designed to be carried out in the community in order for the Student to practice his literacy skills. While the IEP Team considered whether the Student would benefit socially from the outings with the other disabled students, it determined that there is minimal interaction between the CEP students during the outings, as they are each working with their educational technicians on their individual skills (e.g., counting change and reading the menu). In fact, they sit at separate tables most of the time. The Team ultimately concluded that the priority was not whether the Student would be participating with the other disabled students, but on the value of making progress on his skills in a community setting. The IEP Team agreed that in order to work on the Student's IEP goals in the community, it would have to reduce the amount of time the Student is with his non-disabled peers by 30 minutes a week – the time spent in his Monday lunch in the regular education setting. The Parents agreed to this, in fact it was their proposal. While their preference was to have the Student go with his disabled peers, the District was not mandated to agree with it since the IDEA does not require inclusion with disabled peers in extracurricular activities or outings.

Based upon the above, I find that the implementation of the Monday lunch outings as an individual activity does not impact the Student's programming in the least restrictive environment.

VII. CONCLUSION

I find that the District did not fail to provide a FAPE in the least restrictive environment by changing the Student's Monday lunch outings to an individual activity instead of a class activity with the students from the CEP.

VIII. CORRECTIVE ACTION

Corrective action in this matter is warranted due to the District's procedural violations:

- A. Failing to properly state that an agreement had been reached by the IEP Team to include the Student in the Monday lunch outings with the CEP students;
- B. Failing to include the activity in the written IEP;
- C. Failing to contact the Parents to discuss alternative plans to implement the Monday lunch outing.

Therefore, the following corrective actions must be taken within 30 days of the date of this decision:

1. Convene an IEP meeting to discuss implementing the Monday lunch outings as an individual activity;
2. Properly reflect any agreement in a Written Notice;
3. Amend the IEP to include any revised plan for conducting the Monday lunch outings as a supplemental service or activity.



Sheila Mayberry
Hearing Officer

Portland, Maine
March 28, 2014