

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

**December 13, 2014**

**15.003H— Family v. Portland School Department**

**REPRESENTING THE FAMILY:           Stacey Neumann, Esq.**

**REPRESENTING THE DISTRICT:       Eric Herlan, Esq.**

**HEARING OFFICER:                   Shari Broder, Esq.**

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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 was held on September 30, October 7, 21, 29, November 3 and 7, 2014 at the offices of the Drummond Woodsum in Portland, ME. Present for the entire proceeding were: the Mother; Attorney Neumann; Kaitlyn Wright, Esq of Murray, Plumb & Murray; Tina Kenney, the Parents’ advocate; Sharon Pray, Director of Special Education for the Portland School Department (“District” or “Portland”); Attorney Herlan, and the undersigned hearing officer. Pauline Lamontagne, Esq., of the Due Process Office and hearing officer Melanie Frazek, Esq., also observed portions of the hearing. Testifying at the hearing were:

The Mother	
Barbara Ferguson	Teacher of the Visually Impaired
Allyson Feltis	Case Manager & Special Education Teacher at Margaret Murphy Center for Children (“MMCC”)
Seth Vincent, M.S.	BCBA-D at MMCC
Elizabeth Cameron, Psy.D.	BCBA-D at MMCC
Sharon Pray	Director of Special Education
Bruce Chemielski, Ph.D.	Psychologist
Terese Pawletko, Ph.D.	Psychologist
Theresa Moran	Special Education Teacher, Ocean Avenue School
Sandra Titcomb	Special Education Teacher, Lyman Moore Middle School

All testimony was taken under oath.

## **I. PROCEDURAL BACKGROUND:**

On July 21, 2014, the Parents filed this hearing request on behalf of their daughter (“Student”). On August 29, 2014, a prehearing conference was held at the offices of Murray, Plumb & Murray in Portland, Maine. Participating in the conference were: the Mother; Richard O’Meara, Esq.; Eric Herlan, Esq.; Sharon Pray, special education director; and Shari Broder, hearing officer. Pauline Lamontagne, due process consultant for the Maine Department of Education, and Melanie Frazek, hearing officer, attended as observers. Documents and witness lists were exchanged in a timely manner, although certain documents from MMCC were produced by agreement to waive the five-day rule. The Parents submitted approximately 655 pages of exhibits (herein referenced as P-#), and the District submitted approximately 3400 pages of exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of six days. Both parties requested to keep the hearing record open until November 28, 2014 to allow them to prepare and submit closing memoranda. The District submitted a 36-page memorandum and the Parents submitted a 44-page memorandum. The record closed upon receipt of these documents on November 28, 2014. The parties further agreed that the hearing officer’s decision would be due on December 13, 2014, 15 days from the date the record closed.

## **II. ISSUES:**

1. Was the Student’s IEP and placement for the 2012-13 school year reasonably calculated to provide her with a free, appropriate public education in the least restrictive environment?
2. Is Portland’s proposed 2014-15 IEP and placement for the Student reasonably calculated to provide her with a free, appropriate public education in the least restrictive environment? Was Portland’s proposed change of placement pre-determined by Portland in violation of state or federal special education law?

3. Did Portland fail to implement any related services components of the Student's 2013-2014 IEP?
4. If Portland violated state or federal special education law, what remedies are appropriate?

The Parents are not contesting the Student's IEP goals and objectives, which were drafted by MMCC.

These issues are addressed below.

### **III FINDINGS OF FACT**

1. The Student is xx years old (DOB: xx/xx/xxxx), and lives with her mother ("Mother"), father ("Father") and two siblings in Portland, Maine. She is a triplet who has an identical twin sister and a fraternal triplet brother. The Student attends school at the Margaret Murphy Center for Children (MMCC), and receives special education and related services under the category of multiple disabilities. She began receiving special education services as a xx through Child Development Services. The Student has been diagnosed with Pervasive Developmental Disorder (PDD-NOS), moderate intellectual disability, anxiety disorder of childhood, attention deficit hyperactivity disorder (combined type), cortical visual impairment (CVI), speech and language disorder, cerebral palsy, juvenile rheumatoid arthritis and several other medical conditions.
2. The Student attended Portland's Hall Elementary School for xx (2006-07), where her teachers found her to be very sociable. Minutes from an early Pupil Evaluation Team meeting stated, "other children are a very powerful force" for the Student. [P-5] Due to her difficulties in xx the IEP team agreed that she should complete a second year of XX in 2007-08.
3. Because the Student has CVI, she has worked with Barbara Ferguson, teacher of the visually impaired (TVI), since preschool. CVI affects what the brain does with visual information,

and glasses do not correct it. [Testimony of B. Ferguson, T. Pawlekto, S-395-396] It is a very complex disorder that affects almost everything the Student does. It requires her to be in a setting with reduced visual distractions. [Testimony of B. Ferguson]

4. In 2007, when the Student was xx years old, Beverly Strzok, Ph.D., conducted a psychological evaluation of her, including a cognitive evaluation using the Stanford Binet Tests of Intelligence, Fifth Edition. [P-11] Dr. Strzok observed that the Student's speech was limited, her articulation was poor, and her verbal responses sparse. [P-12] The cognitive testing yielded an age-equivalent score of xx years, xx months, and a Full Scale IQ of 48. This placed her performance in the moderate retardation range, below the 1<sup>st</sup> percentile. Barbara Ferguson observed the Student in the classroom, and reported that she was very distracted by both visual and auditory stimuli. [P-21] Ms. Ferguson recommended that for maximum visual attention, the Student should be taught new skills in an individual setting with minimal distractions.
5. The Student attended school in Portland through xx grade. The Parents had wanted the Student and her twin sister to attend MMCC for xx grade, and sent the Student there for an eight-week summer program following xx grade. [Testimony of Mother] The Mother was pleased with the Student's progress there.
6. The Student attended xx through xx grades at the Riverton School. Although the Mother had concerns about the Student's educational program in Portland schools, she was pleased with the Student's xx grade program (2011-12). [Testimony of Mother] That year, the Student transitioned to the BEACH program, a day treatment program with up to eight children at Ocean Avenue Elementary School. Her teacher was Theresa Moran, who had a lot of experience teaching children with Autism and visual impairments. Ms. Moran had been a

teacher for the visually impaired, and had experience working with lower-functioning students with Autism, emotional disabilities and severe behavioral problems. Ms. Moran was assisted by a team that included six ed techs who she rotated among the students so each would become used to all of the ed techs, plus a treatment team that included a psychiatrist from Spring Harbor Hospital, and Board Certified Behavior Analyst (BCBA) Jonathan Kimball, Ph.D. [Testimony of T. Moran] The Student did a lot of discrete trial learning in this program. Ms. Moran thought the Student was a lot of fun, very funny and social. Some days, the Student would have no behavioral issues, and other days, she would do things like flop onto the ground. The Mother thought Ms. Moran was a skilled and conscientious teacher who was interested in collaborating with the family. [Testimony of Mother] Consistent with Ms. Moran's detailed report, the Student did very well in this program. [S-905-929] The Mother told the IEP team at the March 2012 annual meeting that she was pleased with the program. [S-855]

7. In March of 2012, the District conducted several evaluations of the Student. Ms. Ferguson noted that the Student's keyboard was appropriately adapted to resolve the cortical vision issues, and therefore, she recommended reducing her consultations from monthly to quarterly. [Testimony of B. Ferguson, S-883] Ms. Ferguson thought the adaptations were better at Ocean Avenue than they had been at the Riverton School. [Testimony of B. Ferguson] Lisa Dillon conducted a psychoeducational evaluation of the Student. [S-890-894] Ms. Dillon recommended that the Student would learn best in a highly structured, predictable learning environment with minimal distractions and multi-sensory instruction. [S-894] The occupational therapy (OT) assessment concluded that the Student should continue to receive OT to address self-help skills, fine motor coordination, sensory processing and visual motor

integration. [S-899] There was also a recommendation to begin a keyboarding program to further develop this skill and use it as a primary means of written communication. [S-899] Ms. Ferguson thought this was a very important skill for the Student, as she did not have the visual motor skills to write by hand. [Testimony of B. Ferguson]

8. At the annual IEP meeting in March 2012, the team continued the Student's placement in the BEACH program for the next IEP year (through March 2013). [S-853-855]
9. In the Student's new IEP, she attended art and music with her mainstream peers. [S-849] The Student loved to sing. For lunch, she invited two peers to join her. [Testimony of T. Moran, S-849]
10. Early into the Student's xx grade year (2012-13), the Mother emailed Ms. Moran with questions from the Student's doctor, Dr. Hubbard, who wanted additional information about when the Student refused to follow directions. Ms. Moran responded that there was no pattern to this. The Student's neurologist, Dr. Reynolds, wondered whether the Student's slow down with programming, which started in February 2012, was related to her arthritis medication which was started around that time. [A-399] Ms. Moran confirmed that the Student's programming did start slowing down in February, and that she had seen very little growth since then. [A-399] The Mother thought it was admirable that Ms. Moran would bring this to her attention. [Testimony of Mother]
11. On September 24, 2012, Ms. Moran emailed the Mother about the Student's day, which was very good. [A-388] She added that the Student no longer had a 1:1 aide at recess, and that one ed tech covered both the Student and a classmate, which Ms. Moran said was a violation of the Student's IEP. This problem lasted only about a week, however. [Testimony of T. Moran] During that time, there was an incident during which a child wandered off, and the

Student was left unattended for a few minutes while the ed tech went to find the other student. [Testimony of T. Moran] Ms. Moran also acknowledged that the Student was no longer in the lunch group on Monday, Wednesday and Friday due to staffing changes. [Testimony of T. Moran, A-388] The Mother brought her concerns to the attention of Sharon Pray, director of special education, saying that the situation was unsafe and that she was keeping her children home. [A-386-387] Ms. Pray addressed those concerns, explaining that they had a substitute filling a vacant position in the BEACH program, and a total of 11 ed techs supporting the program, along with two teachers, OT, speech therapist, social worker and BCBA. [A-386, testimony of T. Moran, S. Pray]. The Mother was also concerned that the Student was putting her hands in her pants in school. [A-385] Ms. Moran agreed that this needed to be addressed, and that the Student was increasingly exhibiting behaviors to get attention. [A-385]

12. In her November 2012 report, Ms. Ferguson recommended a desktop computer for the Student, and discussed the advantages of having one. [P-282] Her December 2012 report noted her concerns about the Student's ability to remain focused enough on her work to make significant educational gains, despite her room being designed to minimize distractions. [P-284] Ms. Ferguson felt that the Student's classroom materials were appropriate for her CVI. Her observations of the Student that month included her doing activities such as typing spelling words and sentences on the computer, having snack in the mainstream xx grade classroom, and receiving math instruction. [P-284] Ms. Moran noted that the Student loved spending time in the mainstream xx grade classroom, which she did for snack and some special subjects. [Testimony of T. Moran] She had some friends who looked out for her and served as peer models.

13. Portland kept data on the Student's behaviors, tracking hyper arousal, refusal dropping, whining, and aggression. [P-285] On some days, the Student had no behaviors, but other days, she would. [Testimony of T. Moran] Data kept between September of 2012 and the end of February 2013 showed that the Student's hyper arousal levels increased, and were very high on a daily basis. [P-285-286] The Student had a three-tiered behavior plan that Ms. Moran developed with Mr. Kimball. The Mother asked Ms. Moran about the Student's progress in reading, and whether the Rigby test was still being given. Ms. Moran replied that the Student was still at the same reading level, which was xx. [A-286]
14. At the March 28, 2013 IEP team meeting, the Mother presented a statement of numerous parental concerns for enhancing the Student's education. [S-770] The main concern was that the Student had "failed to reach math and reading goals that should have been mastered in 2010." The Parents were concerned about the Student's lack of progress in math and that her math program was not appropriate. [S-770] They wanted Lori Coffin to return to working with the Student as a reading consultant, and were concerned that the Student was still reading at a xx level, and actually regressed. The Parents were also concerned about the lack of assistive technology, the lack of a new O&M specialist after the previous one moved, and that she needed physical therapy (PT) more than the two times per week she had been receiving. [S-772] Although the Student had been making progress in PT in all areas, an evaluation conducted by Sophie Herr on March 13, 2013 recommended that the Student have physical therapy three times a week to gain range of motion in her joints and return them to the normal range. [S-762, P-296, Testimony of T. Moran] This was added to her program. [S-761] In Ms. Moran's annual IEP progress note, presented at the March IEP team meeting, she wrote that the Student mastered only eight new words on the Dolch Primer list, in



contrast to 37 words the prior year. [P-297, S-741] It took her seven months to learn four new words. She had difficulty with passage reading. Her typing was inconsistent due to computer issues in the classroom, but that a new computer had been ordered. [P-297, S-741] The lack of a functional keyboard for the entire school year was a particular concern of the Parents, particularly in light of the Student's inability to write by hand. [Testimony of Mother, T. Moran<sup>1</sup>, B. Ferguson, S-771] The Student made some progress on her math goals, and when she did not make progress on +2s, her program was revamped. [P-297, S] She was making good gains in the area of expressive communication. [S-762] The Student made good progress in counting and number sequencing, but did not make progress on her new coin identification program, days of the week, and calendar skills. [S-743-744] The Parents compared the Student's progress on a number of math goals, which showed very limited progress since 2010. [S-773] Ms. Moran's report also said that when "it was noticed that [the Student] had not made progress, it was brought to the parents and their educational consultant [sic] attention." [S-744] Ms. Moran's behavioral data showed that the Student was making improvements in her behavior, specifically refusals and refusal duration, dropping and aggression. [S-744] The team agreed to meet again on April 4, 2013 to discuss the Student's behaviors.

15. At the April 4 meeting, Jonathan Kimball, the BCBA who had been working with the District on the Student's behavioral challenges, recommended an experimental design to see if the setting impacted the Student's behaviors and ability to learn. She would be separated from all distractions, and consistent with the Mother's request, she would have the same ed tech working with her all of the time. Dr. Kimball felt the current behavior plan was appropriate.

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<sup>1</sup> Ms. Moran testified that keyboarding was very important for the Student's communication. [Testimony of T. Moran]

[S-746] The Mother expressed her concern about the amount of time the Student was losing due to her behaviors. [S-746] Ms. Moran testified that the Student's interfering behaviors were significantly increasing towards the end of xx grade. [Testimony of T. Moran] This was when the Student began disrobing.

16. The IEP team met again on April 10, 2013. [S-708] At that meeting, the team decided to have Lori Coffin complete a speech/language evaluation and a reading achievement evaluation of the Student. [S-708] It was also determined that a math achievement assessment would be done, and the ABLLS-R completed. Ms. Moran explained that this was a test especially for children with Autism, and has various sections about academics, social, play, dressing, toileting, PT and OT. [Testimony of T. Moran] Ms. Moran was only able to do the math and reading testing, as the experimental design was taking a lot of time. Ms. Moran testified that the testing showed the Student was "making gains, although not huge." [Testimony of T. Moran] The team agreed to look into sending the Student to MMCC for the summer, depending on the results of the evaluations. [S-708]

17. Although the Student's IEP called for eight hours of orientation and mobility (O&M) during the year, she did not receive this service because the provider had moved. In the spring of 2013, Hannelore Roesch did an O&M evaluation of the Student and reported her results on June 3, 2013. She recommended that, as the Student transitions to xx school, she should have numerous opportunities to gradually preview her new school to become oriented and feel more comfortable. [S-698] Ms. Roesch also recommended an environmental assessment to mark any potentially hazardous areas.

18. In a letter to the Student's team dated May 8, 2013, the Parents noted that Ms. Moran tried to help the Student make progress by changing programs throughout the year when she had not

seen results, but that the Student had difficulty meeting many of her IEP goals. [P-306] She pointed out how the Student's Rigby level was the same as it was in 2010, she only mastered eight new Dolch Primer words this year, and her Personalized Alternate Assessment Portfolio (PAAP) scores in reading have been flat for two years. [P-306, P-270-272, S-798-801] Her PAAP math scores went down.<sup>2</sup> The Parents made an appeal to send the Student to MMCC, where she had done well a few years earlier. The Parents wrote

. . . it is extremely troubling to know that during these vital foundational years of education, she has not met yearly goals for 3 years now. We are not willing to continue with the same programming until we understand better what works for her and make those adjustments in her program. We believe the most expedient and cost effective way to do this is to immerse her in the Margaret Murphy program again this summer. They would develop and monitor her program and make specific recommendations going forward into next year. [P-307]

19. Lori Coffin's evaluation of the Student, dated June 3, 2013, involved several classroom observations, a playground observation, and administration of the Clinical Evaluation of Language Fundamentals test (CELF-4) and the Woodcock Reading Mastery Tests Form G (MRMT-R). Ms. Coffin found it difficult to assess the Student's literacy skills, given her issues with attention, vision and behaviors, but Ms. Coffin found that these skills were extremely low. [S-693] She was unable to obtain a score on five of the eight WRMT-R subtests. [S-692] Ms. Coffin noted that although the Student's standardized testing scores in literacy were very low, her actual ability to read and understand a passage at her grade level did not appear as low. She felt that the methods used by Ms. Moran were a better way to assess the Student. [S-693] Ms. Coffin said, "It is expected that her progress will be slow and laborious" given extraneous factors, and that one could not expect to see grade level standardized scores increase dramatically or quickly, but data can show eventual

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<sup>2</sup> PAAP scores in the record were for xx and xx grades.

improvement over time. [S-694] Ms. Coffin expressed concerns about the Student's behavior during recess of constantly pulling her pants up to her chest, pulling up her shirt and exposing her stomach and chest, and touching her privates. [S-690] She made recommendations in the areas of pragmatics/social language which included use of appropriate greetings and salutations, taking turns in conversations, personal space, and appropriate touching, including pulling on clothes. [S-694] She recommended the *Social Thinking* program of Michelle Garcia Winner, use of the Edmark program, and developing sight words directly connected to the Student's life. The school started using Edmark again. [Testimony of T. Moran]

20. Ms. Ferguson's June 2013 Trimester Report stated that the Student's teacher consistently carried out Ms. Ferguson's recommendations so the Student could maximize her functional vision and have enough time to process visual material. [P-323] During the majority of Ms. Ferguson's visits, ed techs were actually working with the Student, and Ms. Moran was a manager and supervisor. [Testimony of B. Ferguson]
21. At the June 4, 2013 IEP team meeting, the team determined that, due to the Student's behaviors and attention issues, she would be placed at MMCC for her extended school year program (ESY). [S-684] The team also reviewed the experimental design, and Dr. Kimball concluded that it did not show the Student doing better isolated in a small room, and he felt there was no compelling reason to use an isolated space for the Student. [S-685] Other determinations made at this meeting included: (1) to send the Student to MMCC for ESY; (2) Lori Coffin will work with the implementation of reading/language goals next year; (3) reading and math goals will be based on the AGLES and ABLLS-R; (4) ABLLS-R will be completed for progress reporting each trimester; (5) Terese Pawletko, Ph.D., will do a

psychological and intellectual evaluation, as well as an academic evaluation, if she feels it will be helpful; and (6) the transition meeting with MMCC will take place in August to discuss the Student's xx grade year. [S-684-685]

22. The Student's summer program at MMCC went very well. [Testimony of Mother] She was at the Rodman Center building of MMCC, a facility approved by the State of Maine for students in grades xx through xx [Testimony of A. Feltis, E. Cameron, S. Pray] The Student loved going there. [Testimony of Mother] The Student attended this program four days per week for three hours per day, and focused on following the Student's IEP. [S-583] The Student made progress in reading, beginning the Edmark program at lesson 40 and completing lesson 81 by the end of the summer. [P-334] In math, she made good progress in six out of eight areas, but regressed in the other two areas. Although socially her progress was very limited, she made progress on her behavior goals, but increased in active refusals. [P-334-338] The Student had a positive behavior support plan there, with the goal of increasing her engagement in learning opportunities and decrease interfering behaviors. [P-349] Elizabeth Cameron, a BCBA with a Ph.D. in psychology<sup>3</sup>, oversees the administration of psychological services at MMCC, and the Student was one of the 40 students in her caseload. [Testimony of E. Cameron] Seth Vincent was the Student's BCBA. The behavior analysts developed a safety care program at MMCC that has worked well. [Testimony of E. Cameron] Ms. Cameron felt that the Student needed a learning environment that was not busy, as she was more likely to engage in escalating behaviors in a busy area. [Testimony of E. Cameron] Also, because change tended to trigger hyper arousal in the Student, Dr. Cameron anticipated that the Student would have struggles with changes in her schedule.

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<sup>3</sup> Dr. Cameron received her Ph.D. in school psychology in 2010 or 2011, and became a BCBA around five years ago. She has been working at MMCC since 2008, when she was a pre-doctoral intern. [Testimony of E. Cameron]

23. At the IEP team on August 26, 2013, staff from MMCC attended to share information about the Student's summer and to review the Student's program. [S-582] Although Ms. Moran could not attend, she shared her opinion that the Student should remain at MMCC until the newly hired teacher, Sarah Bruno<sup>4</sup>, who would be the Student's teacher, had a chance to set up her room and get up to speed at Lyman Moore Middle School (LMMS), and to allow time to plan the Student's transition from MMCC to LMMS. [S-587, testimony of T. Moran] Ms. Moran thought it was important for a smooth transition to have a period of observations, shadowing and assistance from the MMCC staff. [Testimony of T. Moran, S-584] The IEP team decided that the Student should remain at MMCC, and to convene another IEP team meeting in five or six weeks to revisit the situation. [S-584]
24. The Student began her xx grade year (2013-14) at MMCC in September of 2013. Her group classroom at MMCC has two windows. She shared a 1:1 classroom with another female student who was a year younger, and was verbal. The Student ate breakfast often with two or three peers and their ed techs in the functional life skills (FLS) kitchen. Two of these students were verbal and one was nonverbal. [Testimony of A. Feltis] She also visited the playground, OT room, Allyson Feltis's office, the library and the stairs for PT. [Testimony of S. Vincent] Beginning in the fall of 2013, Allyson Feltis became her case manager at MMCC. The Student received individual instruction in the small 1:1 classroom from two ed techs, one who taught her in the morning, and the other in the afternoon. These ed techs have ed tech training, safety training, and behavioral health training. The Student does not receive direct instruction from a certified teacher. [Testimony of A. Feltis] Ms. Feltis supervises and

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<sup>4</sup> Ms. Bruno was working at the May Institute, which serves students with Autism, and had to give them 60 days' notice that she was resigning. [Testimony of S. Pray]

oversees the work of the ed techs. She feels that the Student would have difficulty getting things done in a big classroom with more than one other child. [Testimony of A. Feltis]

25. As planned at the August IEP team meeting, the IEP team held a meeting on October 2, 2013. The stated purpose of the meeting was to review IEP goals proposed by MMCC and discuss placement and transition to LMMS. The team reviewed and approved updated IEP goals at that meeting, and discussed how the Student had been doing at MMCC. [S-549-533] Ms. Bruno asked about the noise levels while the Student was participating in a shredding activity in the proposed goals. The MMCC staff responded that the noise did not bother her. [S-550] The MMCC staff explained that the Student was currently reading at the end of xx grade level (C level), and she continued to use the Edmark program. [S-550, Testimony of Mother] Ms. Bruno explained that she also used Edmark in the FLS program at LMMS. MMCC also used the Math in Focus program, which Ms. Bruno said would be used at LMMS. The Student was at the xx grade level in math, and at the end of xx level on the Dolch list words. [S-550] Ms. Bruno was confident that the goals proposed by MMCC were reasonable and could easily be implemented in the FLS program at LMMS. MMCC had not begun the proposed OT goals yet, although the Student was receiving OT services. The Student also was not receiving speech and language therapy (SLP) or PT at MMCC as required in her IEP because they did not have SLP staff at MMCC. [S-551] There was no explanation of why the Student was not receiving PT. The LMMS therapists said they could accommodate the Student there, and planned to observe the Student at MMCC. [S-550] Ms. Pray expressed her desire to have the Student transition back to LMMS, believing that the initial placement at MMCC was not intended to be long term. She proposed a number of transition possibilities, which were thoroughly discussed at the meeting. [S-552; testimony

of S. Pray] The Mother and advocate Tina Kenney said they did not want to move the Student because there is a BCBA on staff at MMCC, the Student was making academic progress there, and they did not think the environment at the LMMS FLS program was appropriate for the Student at that time. [S-551] The Student's physician, Dr. Hubbard, submitted a letter recommending that the Student remain at MMCC, comparing the program there with LMMS, although she had not yet spoken with the staff at LMMS, nor had she visited that program at that point, and had no knowledge about the staff expertise there. [S-573, 552] The Mother also shared a letter from the Student's endocrinologist showing that the Student's growth had increased over the summer and her anxiety levels decreased since enrolling at MMCC. [Testimony of Mother, S-552] Ultimately the team agreed to have MMCC complete a functional behavior assessment (FBA) before the Thanksgiving break and an evaluation by Dr. Terese Pawletko, a psychologist with expertise in working with children on the Autism spectrum and who are blind and visually impaired, including with brain-related visual impairments, on that same time line. Dr. Pawletko also has experience as a TVI and school psychologist. [Testimony of T. Pawletko] As Barbara Ferguson testified, Dr. Pawletko has an excellent level of expertise for blind students on the Autism spectrum. [Testimony of B. Ferguson] With no agreement on when the Student should return, Ms. Pray set a date for her return on December 2, 2013, after the planned completion of the FBA and Pawletko evaluation. [S-553, testimony of S. Pray] The team also determined that Dr. Bruce Chemielski would become familiar with the Student's case through observations and record review. [S-549] Dr. Chemielski is a psychologist whose specialty was behavioral programming, and he works to transition children from more restrictive to less restrictive settings. [Testimony of B. Chemielski] He is the clinical director and senior psychologist for



Spring Harbor Academy. The Mother strongly objected to the planned transition, and felt very frustrated about the emphasis on transitioning the Student to LMMS, when she thought the team should have been discussing what is the appropriate placement for the Student.

[Testimony of Mother]

26. Dr. Pawletko conducted her psychological evaluation of the Student in October and early November of 2013. [S-392-416] In her very detailed report, she noted the Student's "extremely complicated and lengthy" history. Dr. Pawletko explained that while it was her impression that the Student had limitations in her cognitive abilities, it was difficult to assess the extent of this. [Testimony of T. Pawletko] Dr. Pawletko explained that many of the measures used to evaluate the Student in the past should be viewed with considerable caution because they failed to take into account the impact of her CVI, her highly anxious responses to changes in her environment at every level, and her significant dyspraxia. [S-393, Testimony of T. Pawletko] She said that the Student is a "real sweetheart," describing her in her report as follows:

[The Student] is an endearing, socially interested, and motivated xx with an extremely complex set of diagnoses including: cerebral visual impairment, dyspraxia, intellectual disability, autism spectrum disorders, sensor sensitivities, deficits in executive functioning (e.g., directing attention, sustaining attention, shifting attention), and juvenile rheumatoid arthritis. In addition she demonstrates significant difficulties in the area of emotional and physical regulation (e.g., anxiety, arousal level). They impact in ways that are multiplicative, rather than simply additive, and will require a team and setting that can balance and integrate and respond to her learning challenges in a coordinated and responsive way.

[S-411; testimony of T. Pawletko, B. Chmielski] She did a full file review, spoke with the Mother about how the Student was functioning at home, spoke with Ms. Moran and the Student's MMCC teachers, and did observations at MMCC before working with the Student. [Testimony of T. Pawletko] Dr. Pawletko noted that the

Student heard every noise and person's voice within her immediate area and beyond, and used a white noise machine to block off competing auditory stimuli. While Dr. Pawletko was at MMCC, she observed that the Student's desk had a lot of visual clutter on it, and that there was noise in the hallway as staff were passing through, while another child was having difficulty. [Testimony of T. Pawletko] The Student needed support in how to direct her attention effectively. [S-395-396] Dr. Pawletko also explained that the Student needed a team approach with as much integration as possible, and her environment must take into account her visual, sensory and motor needs. She believed this could be done in a public school setting with coordination of services, integration and collaboration. [Testimony of T. Pawletko]

27. The team reconvened on November 15, 2013 to review Dr. Pawletko's evaluation results. [S-379, 392]. Dr. Pawletko explained that the Student had three different types of days depending upon her level of regulation, and that these should be planned for in advance so staff can adjust their plans according to how the Student is doing on a given day. [Testimony of T. Pawletko] MMCC had not completed the FBA, but did provide an update on its status. [S-380-381, testimony of S. Vincent]. The IEP team planned to meet again when this was completed. The Student continued to receive no SLP or PT services. She was on a waiting list at MMCC for SLP. [S-381] The Mother asked about the status of ABLLS testing, to which the MMCC staff responded that although ABLLS was a good tool, there might be other assessments that were better suited to the Student. [S-381] Ms. Pray stated her intention to hold to the December 2 return date, which led to an outburst from the Mother and an end to the meeting. [Testimony of S. Pray, Mother, S-381] The Mother was extremely frustrated because Ms. Pray kept talking about when the Student would be transitioned to LMMS, even

though the Student was at MMCC because of her behaviors, was not making much progress on them and was having more behaviors, and all of the reports that were going to be used to determine an appropriate placement were not complete. [Testimony of Mother] She felt that Ms. Pray was not listening to her, and that the Student's transition should only happen when the Student's behaviors were stable and there was a program and environment in place in Portland to meet her needs. [Testimony of Mother]

28. On November 19, 2013, the Mother filed a due process hearing request. [Testimony of Mother] The parties met in mediation in mid-December to resolve the issues in the pending hearing request. The parties reached an agreement at mediation<sup>5</sup> to have the Student remain at MMCC for the time being, and that Portland would ensure that MMCC officials completed the FBA no later than the end of January 2014. [S-329] Once the FBA was complete, Portland would schedule an IEP meeting to make any programming or placement decisions that were necessary in light of the results.
29. The FBA was actually completed on December 9, 2013, although Portland did not receive a copy until after the mediation agreement was reached. [Testimony of Mother, S. Pray, S-331] The Mother and Ms. Pray corresponded about the upcoming January 9, 2014 IEP team meeting, and the Mother said she'd "like to be sure" that Dr. Pawletko and Dr. Chmielski would be in attendance. [A-119, testimony of Mother] Ms. Pray responded that at the next meeting following the January 9 meeting, "we can discuss the transition plans from MMCC to LMMS." [A-119] This was upsetting to the Mother, as she thought the mediation agreement was about making placement decisions, not transition. [Testimony of Mother]

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<sup>5</sup> The Parents signed the mediation agreement on December 15 & 16, 2013.

30. Barbara Ferguson first observed the Student at MMCC on January 15, 2014. The Student received most of her instruction in a small room with a beanbag chair, a rug, and a desk facing the wall. Ms. Ferguson felt the size of the room was appropriate, especially because of acoustics, and there was a noise machine. [Testimony of B. Ferguson] Ms. Ferguson thought the room was kid friendly, had appropriate lighting, and she did not notice hallway noise. During a short walk to the supply room, she observed the Student was easily distracted by what was going on around her, and needed to be reminded to stay on task, but was cooperative. [Testimony of B. Ferguson] Ms. Ferguson thought the Student would benefit from using a slant board and reading stand, and recommended that any word cards be made with black markers, and not laminated, as it created glare that made the print harder to read. She also recommended an assistive technology assessment because the Student's visual/motor issues affected typing. [Testimony of B. Ferguson, P-430]

31. The team then held a series of IEP meetings to develop a new annual IEP and to decide upon placement. The first of those meetings occurred on January 9, 2014 [S-321]. The second was on February 26, 2014. At that meeting, the team agreed upon many aspects of the Student's IEP, including the following service levels (S-205):

Specially designed instruction	– 6.5 hours per day
Occupational therapy	– 60 minutes/week, 60 minutes/month consult
Speech pathology	– 90 minutes/week, 60 minutes /month consult
Physical therapy	– 90 minutes/week, 60 minutes /month consult
Vision services	– 60 minutes consultation/observation
O & M consult	– 60 minutes/month direct, 30 minutes/month consult
Psychological services (behavioral)	– 1.5 hours per week consultation
Psychological services (vision)	– 1.5 hours per week consultation

At the March 19, 2014 IEP team meeting, the team agreed to 40 hours per quarter of BCBA services, and psychological services of 36 hours per academic year. [S-132] Although AllTech did a technology assessment in November 2013, the report had limited information,

so Portland agreed to have Mark Hammond, a speech and language therapist who also conducted augmentative and alternative communication evaluations, do a more thorough assessment. Portland subsequently made a referral for this. [S-132] Although the team discussed the Student's placement, the team agreed that it could not reach a final decision on that issue until after a transition plan was developed to govern the Student's move, if one should occur. [S-132] The IEP included the behavior plan developed by MMCC.<sup>6</sup> [S-45-121, 122 -127].

32. On February 20, 2014, MMCC sent Ms. Pray an IEP progress report. [S-263-312] At this point, the Student had been at MMCC for approximately nine months. She had many functional life skills goals and social skills goals, and was making some progress on approximately half of her short-term objectives, and had mastered a handful of them. At that point, the Student was still at reading level C. [S-263, S-282]
33. The District created an interdisciplinary team that included Dr. Chemielski, Mark Hammond, Dr. Pawletko, the Student's lead teachers, OT, PT, SP, Barbara Ferguson, and the Student's ed techs. They met at least monthly and sometimes weekly, with each discipline providing a brief update. [Testimony of B. Chemielski] Dr. Chemielski thought Dr. Pawletko was a great asset to any team with a child with a visual impairment. Dr. Pawletko noted that the team of experts at LMMS operated as a group, and would be there for the Student, should she attend LMMS. [Testimony of T. Pawletko]
34. Dr. Chemielski visited the Student at MMCC on March 7 and again on July 9 during her ESY program. [Testimony of B. Chemielski] He felt that MMCC had done a good job figuring out what the Student's triggers were, but he thought that the model in the program

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<sup>6</sup> There is no dispute in this case that the behavior plan as ultimately revised by MMCC most recently in September 2014 would follow the Student with her IEP. [S-2-8; testimony of S. Pray].

being offered by the District would also work well for the Student. [Testimony of B. Chmielski]

35. Dr. Chmielski and Dr. Pawletko developed a draft transition plan for the Student, dated March 31, 2014, and mapped out what needed to be in place, including physical space, staffing, and crisis management. [Testimony of T. Pawletko] They were planning for the worst-case scenario. [Testimony of B. Chmielski] They shared the plan with the Mother and MMCC, asked for their input and subsequently integrated some of their suggestions. [Testimony of T. Pawletko, S-34-38] The team met on April 30 and reviewed the transition model proposed by Dr. Chmielski and Pawletko, with some revisions. Dr. Pawletko and Chmielski both believed that the transition and placement could satisfactorily occur, and that the plan was appropriate for the Student's transition. [Testimony of T. Pawletko, B. Chmielski] The team concluded that the Student could satisfactorily transition into the FLS day treatment program at LMMS under the approved IEP, behavior intervention plan (BIP), and transition plan once all aspects of it were in place. [Testimony of S. Pray] The family disagreed, as did MMCC staff. [Testimony of Mother, S. Vincent] MMCC had its own guidelines for transition readiness, and according to these guidelines, neither Mr. Vincent and Ms. Feltis believed the Student was ready to leave MMCC. [Testimony of S. Vincent, S-39-40] Dr. Chmielski thought that Mr. Vincent's assessment that the Student needed another year at MMCC was arbitrary. [Testimony of B. Chmielski] Dr. Pawletko thought the Student's proposed IEP and program at LMMS were appropriate, although she had some concern about the handwriting goal. Dr. Pawletko and Dr. Chmielski expected that the plan would provide the Student with educational benefit, although she would have transitional difficulties. [Testimony of T. Pawletko, B. Chmielski] The plan recommended "duck-in"

spaces along the Student's travel routes in the event of dysregulation or disrobing.

[Testimony of T. Pawletko] Dr. Pawletko visited the classroom at LMMS, and thought it could be a productive workspace for the Student, but she should do a "dry run" to see whether it would work. [Testimony of T. Pawletko, B. Chemielski] She also noticed that the blower in the room was quite loud and could be auditorily draining, so it should be addressed. Otherwise, it is a fairly quiet space at the end of a hallway, with easy access to the building. [Testimony of T. Pawletko, B. Chemielski] Dr. Pawletko had other suggestions for making the classroom and work areas more conducive to the Student's learning. She also noted that there were benefits to the Student attending a community-based school with access to local resources and children she would be around in the community. Children like the Student need the opportunity to generalize their skills, and it is good to have a typically developing population for language modeling. [Testimony of T. Pawletko] Both Dr. Pawletko and Dr. Chemielski felt that the Student's behaviors could be addressed at LMMS, and that she did not need to remain at MMCC. Dr. Chemielski was very impressed with Sarah Bruno, the FLS teacher. He believed the clinical components of the transition plan were appropriate. [Testimony of B. Chemielski] Under the transition plan, Dr. Chemielski would be observing the Student for an hour each week initially. The Student also had the opportunity for mainstream classes at LMMS, and a lunch club with a couple of other kids. [Testimony of B. Chemielski]

36. At the April 30, 2014 IEP team meeting, the team determined that the Student's transition plan would be complete by the end of the Student's ESY program, and that she would be fully enrolled at LMMS by the first day of school in the fall of 2014 (S-27). After considering whether the Student should remain at MMCC for another year, the IEP team

made this determination because it felt that LMMS was the least restrictive environment in which the IEP could be implemented. The Mother did not agree with this determination, as she did not think LMMS was an appropriate placement for the Student. [S-28, testimony of Mother] The Mother preferred the much smaller scale of MMCC, and thought it was more comfortable and effective. She thought it was the perfect placement for the Student, and that she could progress there. The Mother had lost faith in the District's ability to educate the Student. [Testimony of Mother]

37. On June 12, 2014, the Mother emailed Ms. Pray to request an IEP team meeting to work on the transition plan. She had reviewed it with the staff at MMCC, and there were things she wanted to discuss to assure a smooth transition. [P-570, testimony of Mother] The Parents followed up on June 17, 2014 with an email detailing the concerns about the transition plan and requesting an IEP team meeting. [P571-576] Ms. Pray emailed the Mother on June 19, stating that she had to check on the availability of Ms. Ferguson, Dr. Pawletko, Dr. Chemielski, Ms. Bruno, and Eric Herlan. [P-577] Because the Parents did not receive another reply from Ms. Pray, they filed this request for a due process hearing on July 14, 2014. [Testimony of Mother]

38. Barbara Ferguson scheduled a visit to LMMS on June 19, 2014 to observe the room but the principal was not there, and the receptionist said she did not have permission to show Ms. Ferguson the room. Fortunately, the Mother was there and was able to take Ms. Ferguson there. Dr. Chemielski was in the hallway. [Testimony of B. Ferguson] All of the rooms were in close proximity to one another so the Student would not be subjected to multiple distractions of walking through long hallways. The Student's individual classroom was at least twice the size of the one at MMCC, but could be divided. Like MMCC, there was no



outside window. [Testimony of B. Ferguson, P-578] Ms. Ferguson recommended that fluorescent lights be replaced by full spectrum lights to help the Student's visual challenges. Ms. Ferguson was concerned about the windows in the FLS room and OT, PT and SLP areas, as this would interfere with the Student's ability to stay focused on her work. [P-579] The bathroom in the FLS room has a similar set up to the one at MMCC. Ms. Ferguson recommended that the transition team would benefit from a visit to MMCC to view the Student's learning areas there. [Testimony of B. Ferguson, P-579]

39. At MMCC, the Student is currently in a classroom called the Pond, consisting of four students between the ages of xx and xx. The Student is the oldest, and her classmates are ages xx and xx. [Testimony of S. Vincent] The Student would normally be in MMCC's secondary program, but it is full, and the MMCC staff think it would be good for the Student to stay where she is.<sup>7</sup> [Testimony of A. Feltis] Dr. Chemielski thought that MMCC had a nice set up and the Student seemed happy there. [Testimony of B. Chemielski]
40. When the Student first arrived at MMCC in the summer of 2013, she was at Level C in Reading A to Z. At the time of the hearing, she was reading at Levels D&E. [Testimony of S. Vincent] The Student's reading fluency objective was to read D-E level guided reading texts at 90% accuracy by June of 2014. By June, she was reading level D with 91% accuracy. [P-632] The second short-term objective was to read at levels F-G at 90% accuracy by September 2014. By August, she was reading level D at 88% accuracy, and level E at 82% accuracy. [P-632] She did not meet her reading comprehension objectives, initially making progress and then regressing during the summer. [P-632] This was a pattern of the Student's, both in Portland and at MMCC. [P-623-640] In the Edmark program, however, she was

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<sup>7</sup> A question was raised during the hearing regarding whether the Rodman Center had received a waiver from the State of Maine to educate a xx grade student in its facility. Sharon Pray testified that it was not approved for xx grade or higher. [Testimony of S. Pray] There was no evidence introduced during the hearing to the contrary.

exceeding expectations, and the same was true in spelling. [P-633] Although she was making some progress in math, she was progressing a little more slowly at achieving these objectives. [P-634-636] Regarding her behavior goals, the Student met the goals MMCC set for her in six out of eight behaviors, and had a decrease in hyper arousal, although she did not meet the goal in that area. Student was making improvement in all but one of her target behaviors, verbal perseveration. [Testimony of B. Chmielski, P-595-603, P-636-639, B-125-136, B-222-223, S-45]

41. The Student's considerable behavior problems continued to be a focus at MMCC. She is the only student at MMCC exhibiting hyper arousal and disrobing. Once a week, the Student goes on shopping trips with another student and her 1:1 ed tech. The Student becomes very anxious for these trips, as well as other changes. [Testimony of S. Vincent] During February of 2014, the Student exhibited a very high level of anxiety due to snow days, holidays, birthday parties and other events. [B-1535] Her high anxiety levels led to increases in problem behaviors, but these decreased in March. This caused Mr. Vincent to recommend that the Student receive 40 hours per quarter of BCBA consultation services. [B-1536] Most students at MMCC need approximately 12-20 hours of BCBA services per quarter. [Testimony of S. Vincent]

42. There continue to be concerns about the Student's ability to remain focused on her work to make significant educational gains. [Testimony of B. Ferguson] Her physical environment at MMCC was designed to avoid distractions, but she was sometimes distracted in spite of this. [Testimony of B. Ferguson] Ms. Ferguson visited the FLS room at LMMS in late September of 2014. There was a desk for the Student, a beanbag chair and a table for meeting with other Students. The teacher told Ms. Ferguson that there would be a rug in the room to help with

acoustics. Although it had more of an institutional feel than MMCC, Ms. Ferguson felt the room was suitable. She did not think the smaller classroom at LMMS was appropriate because of the acoustics, as it lacked carpeting and had a noisy vent. [Testimony of B. Ferguson] It was her opinion that this would affect the Student's ability to stay focused.

43. On July 21, 2014, Ms. Pray notified the Student's team that the District hired Sandra Titcomb to be the Student's teacher and case manager. [A-21] Ms. Titcomb has a B.S. in special education, a Master's degree in counseling, and is a certified special education teacher. She has experience in Applied Behavior Analysis (ABA), and is a certified safety care trainer. Although she has completed all of the supervision required to be certified as a BCBA, she has not yet passed the examination.<sup>8</sup> The District hired Devin Mulcunry to be the Student's BCBA. [Testimony of S. Titcomb] Ms. Titcomb has observed the Student at MMCC nine times, and has reviewed the Student's file, MMCC documentation, the IEP, transition plan, FBA and behavior plan, among other things. [Testimony of S. Titcomb] During her observations, she observed the Student's behavioral issues, including some that were very challenging. Ms. Titcomb noticed that the Student was rather compliant, however, and easily redirected. [Testimony of S. Titcomb] The Student was often distracted when she heard staff talking in the hallway at MMCC. She also observed that the Student had very little social interaction with other students there, aside from morning meeting. [Testimony of S. Titcomb]
44. Ms. Titcomb was confident that LMMS could implement the Student's transition plan and IEP. She will be implementing the Student's educational program at LMMS and overseeing the ed techs who will assist her in providing instruction to the Student. The program will use discrete trial training for academic tasks. [Testimony of S. Titcomb] Although the Student

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<sup>8</sup> In Ms. Pray's letter, she represented that Ms. Titcomb had recently become a BCBA. [A-21] Ms. Pray was incorrect, and Ms. Titcomb clarified that she is not a BCBA, but is a special education teacher. [Testimony of S. Titcomb]

requires a very restrictive setting, LMMS can provide her with reverse mainstreaming so she can benefit from interacting with typically developing peers, and get the social interaction she craves. [Testimony of S. Titcomb] Although Ms. Titcomb anticipates there would be a spike in the Student's behaviors initially, the team at LMMS is prepared to meet her needs. At LMMS, the Student would go on outings. The FLS program goes swimming on Tuesdays and there are field trips on Fridays. The FLS room has seven students, four ed techs, and one other teacher, Sarah Bruno. Most of the students are verbal, but two are not. Two students have similar verbal skills to the Student. [Testimony of S. Titcomb]

45. In addition to Ms. Titcomb, a number of people from the District have visited MMCC. The OT, PT and SLP therapist came to visit together in the spring of 2014, and Ms. Pray came for a tour in April 2014. [Testimony of S. Vincent] Dr. Chemielski has observed the Student at MMCC. [Testimony of T. Pawletko, B. Chemielski]

46. Portland has taken most of the key steps in the transition plan to ready LMMS for the Student. Dr. Chemielski and Dr. Pawletko felt that a few more changes were needed, such as rugs on the tile floor and a white noise machine, to make the room ready for the Student. [Testimony of B. Chemielski, T. Pawletko] The Student's clinical team will make decisions about details such as outings, whether and when the Student will go to assemblies, and so forth. [Testimony of S. Pray] Ms. Pray made it clear that Portland will not complete the Student's move to LMMS until all aspects of the Student's transition plan and program are in place. [Testimony of S. Pray]

#### **IV. DISCUSSION AND CONCLUSIONS**

##### **A. Brief summary of the position of the Parents:**

Portland failed to provide the Student with FAPE during xx grade, for which she is

entitled to a compensatory remedy. In nearly every respect, her xx grade IEP and placement failed to meet the IDEA's requirement for appropriateness. The Student did not receive key services required by her IEP, including ABLLS testing, keyboarding instruction, and 1:1 services. The IEP, as designed and implemented, caused the Student to regress both academically and behaviorally.

Numerous instances of not having 1:1 support amount to a substantial FAPE violation. During xx grade, the Student's math and reading levels were reported as being significantly lower than in previous years. Because the Student was not adequately assessed in these areas, the District could not develop appropriate programs to meet her needs. There was ample evidence from her teachers and from other measures that she did not make progress in some areas, and actually regressed in others. Furthermore, the Student's behavioral difficulties increased substantially during xx grade, and Portland did not appropriately address this. She only improved after transferring to MMCC.

An appropriate remedy for these failures to provide FAPE is compensatory education services to restore the Student to the level of skill and function she would have attained, had proper services been delivered in a timely fashion.

The District also violated the IDEA by pre-determining the Student's placement at LMMS. Although the IEP team decided in August 2013 to continue the Student's placement at MMCC, just two months later, Sharon Pray began discussing transitioning the Student to LMMS, despite having no new assessment information, no new plans, and no discussion of how LMMS could accommodate the Student's significant needs. Ms. Pray continued to insist upon this at subsequent IEP team meetings without any discussion of whether such a placement was appropriate. The Parents had no meaningful input into this decision.

There are numerous reasons why the LMMS placement would not provide the Student with a FAPE. Inexperienced providers would run the Student's program, and there was a lack of information about what BCBA services the District purports to have in place. Critical members of the team will be off-site consultants who are not available every day, unlike the on-site team at MMCC. Furthermore, as Barbara Ferguson testified, the facility is inappropriate to meet the Student's needs.

The District's attempts to supplement its inappropriate placement offer with testimony about what the placement will become, as opposed to what it is, is inappropriate and should not be entertained by the hearing officer. At this point, the District is not ready to receive the Student, as there is no evidence as to what her program would look like if she attended LMMS right now.

The Student has progressed in MMCC's highly structured program, and the hearing officer should order that she remain in that placement.

**B. Brief summary of the position of the District:**

The Student's IEP itself is plainly appropriate and was not disputed. The Parents stipulated to the appropriateness of the goals and objectives, there were no disputes about the accommodations, or the extensive list of special education and related services set forth in the IEP. Highly qualified personnel would deliver the services.

The IEP team approved the Student's transition plan, and there was no criticism of the proposed plan. If the hearing officer rules in favor of Portland's placement, Ms. Pray testified that the Student would only return in accordance with that plan.

The placement at LMMS is plainly less restrictive than MMCC. It is much closer to the Student's home and has opportunities for the Student to interact with non-disabled peers. The

Student loves social interaction, and she will have more opportunities for engagement at LMMS. The move to LMMS is exactly what the IDEA's LRE requirement and mainstreaming are all about.

Although the Student had a beneficial year at MMCC, Portland has in essence recreated the substantive elements of this program at LMMS and improved upon it. The key differences between the two programs weigh in Portland's favor. At LMMS, the level of direct instruction is higher than at MMCC. The people providing the Student's direct instruction will be a certified master' level special education teacher with extensive training in behavioral interventions, including ABA, and an experienced ed tech III. At MMCC, the direct instruction is provided by ed tech IIIs, not certified special education teachers.

LMMS also has a stronger consultation team. Although MMCC has a psychologist with five years of experience available as a behavior consultant, LMMS is offering two of the most experienced psychologists in the state, one of whom has a long history of working with students with Autism, behavior needs and CVI. MMCC was unable to deliver that level of psychological services to the Student.

Lastly, MMCC is unable to serve this Student at its xx grade program. Her current attendance is in a program not approved for xx grade students.

On the issue of predetermination, it is not a violation of the IDEA for school officials to have strong opinions about what an appropriate program or placement should be. Predetermination only occurs when the parent is denied meaningful participation in the IEP team process. There is no evidence at all that this parent was denied meaningful participation in the process, and there is evidence to the contrary.

Portland's 2012-13 program met the IDEA standards, as it was based upon a reasonable

calculation that the continuation of the successful BEACH program placement from the prior year would be appropriate. A report at the March 2013 annual IEP team meeting showed that the Student was making gains both academically and behaviorally. When difficulties arose, the team agreed to place the Student in the more restrictive program at MMCC requested by the Parent for the summer.

### **C. Discussion of Issues:**

As the U.S. Supreme Court has held, in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005), *Regional School Unit No. 51 v. John Doe*, 60 IDELR 163 (D. ME. 2012); *DB ex rel Elizabeth v. Esposito*, 675 F. 3d 26, 35 (1<sup>st</sup> Cir. 2012). Therefore, the Parents must prove that the evidence supports their position on the issues before the hearing officer.

#### **1. Was the Student's IEP and placement for the 2012-13 school year reasonably calculated to provide her with a free, appropriate public education (FAPE) in the least restrictive environment?**

The IDEA is a "comprehensive statutory scheme" which Congress enacted to ensure that all children with disabilities are accorded a free, appropriate public education, and that both their rights and those of their parents are protected. 20 U.S.C. § 1400(d)(1)(A)-(B); *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 58 (1st Cir. 2002). To provide a free, appropriate public education, a school must create and then follow an "individualized education program" (IEP) for each disabled child. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). The IEP is "a written statement for each child with a disability that is developed, reviewed, and revised" in accordance with the IDEA. 20 U.S.C.A. § 1414(d)(1)(A). The IDEA imposes additional procedural and substantive requirements with regard to the IEP. *See Roland M. v. Concord School Comm'n*, 910 F.2d 983, 987 (1st Cir. 1990). For example,



parents have the right to be part of the IEP "team" along with the teachers and other educational professionals charged with formulating a child's particular IEP. 20 U.S.C.A. § 1414(d)(1)(B); *Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 23 (1st Cir. 2008). The purpose behind such procedural safeguards is to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993).

An IEP is reviewed first for consideration of whether it was developed in accordance with procedural requirements and, second, whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). An IEP must be designed to provide a student with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. In addition, an IEP must include the student's present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward his goals, make progress in the general education curriculum, participate in nonacademic activities, and be educated with other children with disabilities as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); *MUSER* § IX.3.A.

As the First Circuit Court of Appeals has explained, the IDEA

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.

*Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993). Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student's individual potential. *Rowley*, 458 U.S. at 203. A student's program must be geared toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs." *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff'd*, 471 U.S. 359 (1985); *see also Sanford Sch. Dep't*, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student's specific area of need). The First Circuit has also stated that an IEP can be appropriate even if it is not "the *only* appropriate choice, or the choice of certain select experts, or the child's parents' *first* choice, or even the *best* choice." *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1<sup>st</sup> Cir. 1991).

In addition to developing an IEP that is reasonably calculated to provide meaningful educational benefits, *Esposito*. at 34-35, a school district is required to implement the IEP in accordance with its requirements. *Doe ex rel. Doe v. Hampden-Wilbraham Regional School Dist.*, 715 F.Supp.2d 185, 195 (D. Mass. 2010) (citing 20 U.S.C. § 1401(9)(D)). Although perfect implementation is not necessarily required, courts have found that "the failure to implement a material or significant portion of the IEP can amount to a denial of [a free, appropriate public education]." *Sumter County School Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). *See also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("a material failure to implement an IEP violates IDEA.").

The legal question of whether the Student's lack of progress on her academic goals, and the lack of keyboarding instruction and O&M services amount to a deprivation of FAPE is a difficult to analyze for many reasons. The Student's progress and abilities were difficult to assess, her needs were very complex, and her progress was generally slow, with some regression.

Although the Parents point to the failure of the District to complete ABLLS testing, this does not seem to be significant in terms of the Student's lack of progress. Lori Coffin discussed how standardized testing was not the best measure for the Student, and MMCC staff also did not complete ABLLS testing while the Student was there, noting at an IEP team meeting that although ABLLS was a good tool, there might be other assessments that were better suited to the Student. [Fact #27] Ms. Coffin's report said the methods used by Ms. Moran were a better way to assess the Student than standardized tests.

The Parents have alleged that during the Student's xx grade year in the BEACH program, she did not receive key services required by her IEP, did not make adequate academic progress, and regressed behaviorally, as well as in some academic areas. During the first month of xx grade, the Mother corresponded with Ms. Moran, who acknowledged that the Student's programming had "slowed down" since the previous February, and the Student had very little growth since then. [Fact #10] At the time of this correspondence, the Student had shown very little growth for six months. This limited growth continued through the school year. Although the Student made progress in most SLP and PT goals, I conclude that she did not make reasonable progress academically or overall. Well before the March 28, 2013 IEP team meeting, it was apparent that the Student was not meeting many of her academic goals. [Fact #14] There were no graded IEPs in evidence from this period, and the types of data provided were often different and therefore difficult to compare from one year to the next. Ms. Moran's narrative reports were helpful, but she was not able to show much progress on several important academic areas, particularly in reading and some areas of math. [Fact #14]

The Parents noted that Ms. Moran tried to help the Student make progress by changing programs throughout the year when she had not seen results, but this did not result in the Student

meeting her IEP goals. [Fact #18] Thus, while the District correctly quoted the holdings in *Roland M* and *Lessard*<sup>9</sup> as viewing IEP decisions in terms of what was reasonable “at the time the IEP was promulgated,” this does not mean that the District can take no action when there are indications early in the school year that an IEP is not providing the intended results. It also does not take into account services that were not delivered to the Student. The Parents actively advocated for the Student, and expressed their concerns throughout the school year about the lack of certain services, behavioral issues, and the lack of educational progress. Although Ms. Moran was a dedicated teacher and a very credible witness, she seemed frustrated that the administration was not as concerned about the Student’s needs the way she was. [A-384, Testimony of T. Moran] While Ms. Moran tried her best to educate the Student, when she was not making adequate progress, it was the District’s responsibility to convene an IEP team meeting to evaluate the Student’s program and consider other options. This did not happen until the Student’s annual review in March of 2013.

At the March 2013 IEP team meeting, the District agreed to the Parents’ request to have Ms. Coffin evaluate the Student for her reading issues, and to have Jonathan Kimball try an experimental design to see if the setting impacted the Student’s behaviors and ability to learn. Ultimately, when the District was unable to address the Student’s behaviors and lack of academic progress, the team agreed to send her to MMCC for the summer to see whether that

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<sup>9</sup> The District’s closing argument includes this citation:

Actual educational progress can (and sometimes will) demonstrate that an IEP provides a FAPE. *See, e.g., Rowley*, 458 U.S. at 209-10, 102 S. Ct. 3034; *see also Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 609 (6th Cir. 2006); *see also Roland M.*, 910 F.2d at 991 (explaining that “actual educational results are relevant to determining the efficacy of educators’ policy choices”). But to impose the inverse of this rule – that a lack of progress necessarily betokens an IEP’s inadequacy – would contradict the fundamental concept that “a [n] IEP is a snapshot, not a retrospective.” *Roland M.*, 910 F.2d at 992. Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology *ex post* merely because the disabled child’s progress does not meet the parents’ or the educators’ expectations. *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008).

program could help her. This was an appropriate action to take under the circumstances, but the District should have acted before an entire year had passed.

Although the Student made some progress at MMCC, her experience there illustrated what Ms. Coffin said in her evaluation: that the Student's progress would be "slow and laborious," but data can show eventual improvement over time. [Fact #19] The Student remained at MMCC beyond the ESY session originally determined by the IEP team, and was still at reading level C nine months after arriving there. [Fact #32] That is slow progress. During the summer of 2013, the Student made reasonable progress in six out of eight math areas, but regressed on her other two math objectives. Although socially her progress was very limited, she made progress on her behavior goals, but her active refusals increased. In other words, the Student's significant needs made it difficult to develop programming for her, she sometimes had very slow and uneven progress, and some regression under the best of circumstances.

The District also failed to provide certain services, particularly O&M and keyboarding instruction. There was a lot of evidence introduced about the importance of keyboarding instruction, and Ms. Moran reported that the Student's typing was "inconsistent." These omissions, along with the lack of academic progress, add up to a failure to provide the Student with a FAPE during xx grade.<sup>10</sup>

**2. Is Portland's proposed 2014-15 IEP and placement for the Student reasonably calculated to provide her with a free, appropriate public education in the least restrictive environment? Was Portland's proposed change of placement pre-determined by Portland in violation of state or federal special education law?**

As noted in the issues listed above, there is no dispute about the content of the Student's IEP. The only issues before me for the 2014-15 school year are where the IEP should be

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<sup>10</sup> There was also very short period during which the Student did not have a 1:1, but the District took immediate action to remedy the situation.

delivered and whether Portland pre-determined the Student's placement in violation of the IDEA.

#### **A. Predetermination of Placement**

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

The Parents allege that the Student's placement was predetermined because Ms. Pray "jumped right to talking about transitioning and placing [the Student] at LMMS on a specific date" before the team had new assessment information or decided whether the Student was ready to transition. [Parents' closing argument p. 32] Although Ms. Pray initially assumed that the Student's placement at MMCC was just for the summer of 2013 and believed that the Student could be educated in the FLS program at LMMS, other facts demonstrate that neither her

position nor that of the District was set in stone, and the Parents were not deprived of meaningful participation in determining the Student's placement.

It is understandable that each time Ms. Pray set a new deadline for the transition, the Mother felt that a decision had already been made to bring the Student back to Portland schools. The Mother was frustrated and felt like she was not being heard. Regardless of Ms. Pray's reason for setting the deadlines or that she may have believed that LMMS could provide the Student with a FAPE, the IEP team, including the Mother, had a great deal of input on the issue of the Student's placement. There were many IEP team meetings where the team discussed evaluations, where the team agreed to the Mother's requests for certain evaluations, and where the Mother's views were heard and affected the outcome.

In light of the evidence, I cannot conclude that the Parents were denied meaningful participation in the IEP team process for determining the Student's placement. There was no evidence that the other team members were pressured to support a certain placement, and they all had meaningful input. While it initially may have appeared, from Ms. Pray's conduct, that the Student's placement was predetermined, the evidence does not bear that out.

## **B. Placement**

The main issue for the current school year is whether the Student's IEP can be implemented and provide the Student with a FAPE at LMMS.

The IEP calls for the Student to receive specialized instruction for all of her school day. Her teacher at LMMS would be Sandra Titcomb, a Masters level special education teacher who has considerable experience working with students with Autism and other behavior challenges, and who has completed all of the requirements to become a BCBA except for passing the

licensing exam. As she would not be the Student's BCBA<sup>11</sup>, passing the exam is not relevant, but her BCBA training is. Ms. Titcomb would have a very small caseload of two students, and would be assisted by an experienced ed tech. The Student would receive some of her direct instruction from a certified teacher, in contrast to MMCC, where all direct instruction is done by ed techs.

The District has put together an excellent team, both clinical and otherwise, at LMMS to provide the Student with all of the services called for in her IEP. Barbara Ferguson would continue to be the Student's TVI, and Mark Hammond would consult on augmentative communication and communication devices. The psychology services provided at LMMS would be hard to surpass. Both psychologists, Dr. Pawletko and Dr. Chmielski, are very highly respected, and Dr. Pawletko is renowned for her expertise in working with visually impaired children with Autism.

There was no dispute that the Student would likely have some difficulty with the transition to any new school, but the transition plan approved by the IEP team addresses this. Both Dr. Chmielski and Dr. Pawletko drafted the plan, with input from the IEP team, and both testified that the transition and placement could satisfactorily occur, and that the plan was appropriate for the Student's transition. [Fact #34] The Mother and MMCC staff preferred that the Student remain at MMCC and did not feel she was ready to leave that school, although she made progress on almost all of the behavioral goals which formed the basis of her attendance there in the first place. [Facts #22, 40] The rest of the team concluded that the Student could satisfactorily transition into the FLS day treatment program at LMMS under the approved IEP,

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<sup>11</sup> The Student would receive 40 hours of BCBA services per quarter from Devin Mulcunry, who is Board certified.



BIP, and transition plan once all of the elements were in place.<sup>12</sup> There was no evidence that the transition plan was inappropriate or inadequate.

Both the IDEA and Maine regulations require that students must be educated to the maximum extent appropriate with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [20 USC 1412(a)(5) and 34 CFR 300.114] MUSER X.2 (B). There is also a requirement that the child's placement be as close as possible to the child's home, and unless the IEP of a child with a disability requires some other arrangement, the child should be educated in the school that she would attend if not disabled. MUSER X.2 (B) The educational benefit and least restrictive environment requirements "operate in tandem to create a continuum of educational possibilities." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1<sup>st</sup> Cir. 1990).

LMMS is a less restrictive placement than MMCC. The FLS program at LMMS is a day treatment program within a public school where the Student, when appropriate, will have the opportunity to interact with typically developing peers. She does not have that opportunity at MMCC. During the hearing, there was considerable evidence of how very social the Student is and how much she enjoyed spending time with her mainstream peers. She needs a balance between healthy social interaction and concentrated learning time without distractions, and the FLS program at LMMS can provide that. Because I conclude that the Student's IEP can be implemented there and provide the Student with a FAPE, the law requires that this is where the Student must be educated.

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<sup>12</sup> Even if the Student were to remain at MMCC, she would have to transition to a different school, as the Rodman Center is not approved by the State of Maine for xx grade students.

The Parents have been very happy with the Student's placement at MMCC, and there is evidence that the Student has had a good experience there. They argue that MMCC is a better program for the Student's profile. Even if I were to conclude that MMCC were a superior program, an issue that I need not reach, Portland has essentially recreated the substantive elements of the Student's MMCC program in a school in the Student's town, and that is where the law requires her to be educated under the IDEA. As the First Circuit in *Abrahamson v. Hershman* explained, "A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential." *Abrahamson v. Hershman*, 701 F.2d 223 227 (1<sup>st</sup> Cir. 1983).

Lastly, the Parents argue that the District is not ready to receive the Student. The District has the staff and almost every element, aside from a few classroom items that can easily be obtained by the District, such as a rug and white noise machine. The Student shall transition to this program as soon as all elements are in place, in accordance with the transition plan approved by the IEP team.

### **3. Did Portland fail to implement any related services components of the Student's 2013-2014 IEP?**

After the close of the hearing, counsel for both parties represented that they had reached an agreement as to the physical therapy and speech and language therapy services claim covering the summer of 2013 and the 2013-14 school year. Therefore, that issue does not need to be addressed in this decision.

#### **4. If Portland violated state or federal special education law, what remedies are appropriate?**

It is very difficult to craft a remedy for the Student for the District's failure to provide her with reasonable educational benefit during xx grade. When a student is deprived of FAPE, she is entitled to "such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Compensatory educational services are one possible remedy.

The First Circuit case of *Pihl v. Mass Dep't of Education* is recognized authority in this Circuit that, "a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time." 9 F.3d 184, 198 (1<sup>st</sup> Cir.1993). The First Circuit explained, "[t]he nature and extent of compensatory education services which federal courts have recognized varies according to the facts and circumstances of a given case." *Pihl*, 9 F.3d at 188, n. 8. For a student who has been denied appropriate services in the past, an award of compensatory educational services is designed to place her in the same position she would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). Although an IEP need only provide some benefit, "compensatory awards must do more – they must compensate." *Id* at 525. *See also MSAD #22*, 43 IDELR 268 (Me. SEA 2005) (stating that the typical compensatory education award is an award of "services in an amount sufficient to make up for the past educational deficiencies.") An award of compensatory education should be fact-specific, depending on the child's needs. *Reid*, 401 F.3d 516 at 524; *Pihl*, 9 F.3d at 188 n.8.

It is clear that the Student should receive eight hours of O&M services for the services she did not receive that school year. More complicated, however, is how to figure out what amount of keyboarding instruction to order, as there was no amount specified in the IEP and no

evidence of how much she missed, or how to compensate for the lack of academic progress, particularly in language arts and reading.

The Parents assert that an appropriate compensatory award should take the form of placement of the Student for an additional year at MMCC. I do not believe it would be appropriate to order that she continue to be educated in the more restrictive MMCC setting, and this may violate Student's rights under the IDEA to be educated in the least restrictive environment.

To remedy the lack of keyboarding instruction, the District shall provide the Student with a desktop computer deemed appropriate for her by Barbara Ferguson, and ten hours of keyboarding instruction.

The Student shall also be provided, at the District's expense, with 20 hours of compensatory instruction in language arts/reading.

All services shall be provided by individuals qualified (and licensed, where applicable) to provide these services to a child with the Student's level of disability, and shall be provided by August 31, 2015, unless the Parents choose to receive the services at a later date.

## **V. ORDER**

1. During the 2012-2013 school year, the District violated state or federal special education law by failing to provide the Student with a free, appropriate public education because it did not provide all of the services required in the Student's IEP, and the Student did not make reasonable educational progress in her program. To compensate for the lack of services, the District is ordered as follows:
  - A. To pay for the cost of eight hours of orientation & mobility training in addition to what will be provided in the Student's IEP this year.
  - B. To provide the Student with a desktop computer deemed appropriate for her by Barbara Ferguson for use in her school program and ten hours of keyboarding instruction.

- C. The District shall provide the Student with twenty hours of language arts or reading tutoring at prevailing rates for a tutor qualified to teach this skill to a person with the Student's level of disability.
  - D. All compensatory services shall be provided by August 31, 2015, unless the Parents choose to have the services provided at a later time.
  - E. The providers of these services shall be qualified to teach the applicable skill to someone with the Student's disabilities.
  - F. If the Parents elect to arrange these services on their own, they shall cooperate with the District about the District's preferred method for payment of the services.
  - G. The Parents shall be reimbursed for mileage, when applicable, for transporting the Student to receive the above services.
2. Portland's proposed 2014-15 IEP and placement for the Student at Lyman Moore Middle School is reasonably calculated to provide her with a free, appropriate public education in the least restrictive environment. When all of the elements of this program are in place, the Student shall transition from her current placement at MMCC to LMMS in accordance with the transition plan approved by the IEP team.

SO ORDERED.

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SHARI B. BRODER. ESQ.  
Hearing Officer