

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

June 4, 2009

09.043H - Parent v. Surry School Department

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE FAMILY: Pro Se

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on March 19, March 25, March 26, April 7, April 9, and April 22, 2009, at the offices of the Department of Health and Human Services in Ellsworth, Maine. The final day of hearing was held on April 24, 2009, at the office of the Education Cooperative in Ellsworth, Maine. In addition to counsel for the school department and the parent, those present for part of the proceeding were Melissa Beckwith and Lynn Maddocks, both Directors of Special Education for the Education Cooperative.

Testifying at the hearing under oath were:

Melissa Beckwith, Special Education Director, Educational Cooperative
James Boothby, Former Superintendent, School Union 92
Elizabeth Dyer, Speech Pathologist
Elizabeth Ehrlenbach, Principal, Surry Elementary School
Danica Frederick, Occupational Therapist
Royal Grueneich, Ph.D., Clinical Neuropsychologist
Zsuzsanna Gurdonyi, Case Worker, United Cerebral Palsy Agency
Jeffrey Jones, Rehabilitation Specialist, Division for the Blind
Lynn Maddocks, Special Education Director, Educational Cooperative
Parent
Elesia Moore, Case Manager, United Cerebral Palsy Agency
Linda Mosley, Director of Case Management, United Cerebral Palsy Agency
Terese Pawletko, M.S., Ph.D., Psychologist
Kelley Sanborn, Director of Special Services, School Union 98
Mary Talbot-Fox, Ph.D., School Psychologist, Perkins School for the Blind
Kysha Woodye, Case Worker, United Cerebral Palsy Agency

I. PROCEDURAL BACKGROUND

The parent of the student (date of birth xx/xx/xxxx), filed a request for a due process hearing on January 13, 2009. On January 26, the school department filed a challenge to the sufficiency of the parent's complaint as well as an alternative motion to dismiss several of the claims in the complaint. The sufficiency challenge was denied on January 28, and the school department filed a motion for reconsideration on the same date. On February 9, the parent filed a response to the school department's motion to dismiss as well as its motion for reconsideration, to which the school department filed a reply on February 12. On February 26, the hearing officer issued a decision dismissing the parent's claims regarding the 2005-2006, 2006-2007, and 2007-2008 school years due to principles of res judicata and mootness. Although the parent requested a stay put order, the hearing officer declined to enter one on the basis that a federal district court order had issued a stay put ruling in October 2008. The federal court order identified the student's stay put placement as that defined by the State Department of Education Complaint Investigation Report of July 2007, the Surry Elementary School. The hearing officer also held that, even absent the federal court order, she did not have sufficient evidence before her at that time to rule on the student's stay put placement. The parent's renewed request for a stay put order, made during hearing, was denied on the basis that there had been no agreed-upon placement since the October 2008 federal court order, which remained in effect despite the parent's request for reconsideration.

On March 11, the school department moved to continue the hearing dates to allow for mediation in a federal court case involving the student's education during the 2007-2008 school year. A prehearing conference was held on March 12. Present were Parent, Melissa Beckwith, and Eric Herlan. The school department submitted a prehearing memorandum at the conference; the parent submitted a prehearing memorandum on March 16. Documents and witness lists were exchanged in a timely manner. Also on March 16, the hearing officer issued a post-prehearing

memorandum order the issues for hearing and denying the school department's renewed motion to continue.

At the prehearing conference, the school department submitted 409 documents, all of which were accepted into the record without objection, as well as a CD recording of five Individualized Educational Program (IEP) Team meetings related to the development of the student's 2008-2009 IEP.¹ On March 12, the parent provided to the school department documents she wished to submit, as well as a video of the student. The parent's documents and video were also admitted without objection, although some had not been provided to the school department five days prior to the start of hearing. On May 11, prior to the close of the record, the hearing officer admitted into the record eight additional pages of a transcript of a 2008 due process hearing concerning the student that had been inadvertently left out of the school department's documents as originally submitted.

The scheduling of this matter required many alterations, which are detailed in multiple scheduling orders. On April 21, the hearing officer issued an order denying the parent's request for summary judgment and setting the final hearing days for April 22 and 24. Despite scheduling additional hearing days, at the conclusion of the hearing late in the evening on April 24, the parent had not completed her testimony. The parent filed the remainder of her testimony by affidavit on March 1. Both parties filed written closing arguments and reply briefs. The record was closed upon the hearing officer's receipt of the final reply brief on May 20, 2009.

II. ISSUES

1. Did Surry School Department violate state or federal special education law by failing to provide the student with a free appropriate public education during the summer of 2008 or the 2008-2009 school year?
2. If not, what would be an appropriate remedy?

¹ The school department later supplemented the CD consolidating the recordings with individual CD's for each IEP Team meeting at the request of the parent.

III. FINDINGS OF FACT

1. The student is xx years old and lives in Surry, Maine, with her mother. She is the youngest of twelve children, nine of whom, like the student, are adopted, and several of whom live at home. The student was adopted at age xx from an orphanage in Nicaragua. (Testimony of Parent.) She was born prematurely and was blind from birth from bilateral cataracts, Vitamin A deficiency, and retinal detachments. (S. A-37.) The student has multiple disabilities, including blindness, mild to moderate hearing loss, mental retardation, and a seizure disorder. (S. A-36.)
2. The student enjoys music, rocking in a small boat set up in her home, taking baths, going outside, spending time in pools, and eating meals with her family. (Testimony of Gurdonyi.) The student is able to brush her hair and teeth with verbal or physical prompts and dress herself with assistance. She currently speaks approximately fifteen to twenty words. (Testimony of Woodye.) She has a sweet disposition and enjoys being around other people. (Testimony of Gurdonyi; Woodye.)
3. Surry is a rural town in Hancock County. It maintains an elementary school through Grade xx but no high school. It has a contract for services for students in grades xx through xx with Mount Desert Island Regional High School, although Mount Desert maintains that it is not required to accept all Surry students under the contract. (Testimony of Beckwith; Boothby; P. 9-10). Surry is a member of the Educational Cooperative with other towns, both within and outside of School Union 92. Melissa Beckwith is the Special Education Director for students in towns that comprise School Union 92, including Surry. (Testimony of Beckwith.)
4. The student attended Surry Elementary School through June 2005. For the 2005-2006 school year, the student's IEP Team agreed to place her at the Perkins School for the Blind in Watertown, Massachusetts, which she attended as a residential student from

- September through November 2005. Although the student succeeded academically at Perkins, she encountered personal and medical difficulties. (Testimony of Parent.) In November 2005, the student was evaluated for episodes of shaking, along with symptoms of reduced appetite and lethargy. No specific medical cause was identified, although one evaluator noted that the student had shown an escalation of self-injurious behavior and suggested the possibility that the student was experiencing an adjustment reaction. (P. 23; S. 476-78.) The parent removed the student from Perkins at that time. Although a trial return was attempted in March 2006, the student again exhibited difficulty and was removed by her parent. (Testimony of Parent.)
5. In May 2006, the student returned to Surry Elementary School for eight days, after which the parent removed the child due to concern about the program and the special education teacher. (Testimony of Parent; S. 192.) The student attended an Extended School Year program at Surry Elementary School during the summer of 2006. (Testimony of Parent.) The student returned to Surry Elementary School in September 2006. On September 22, the parent again removed the student. (Testimony of Parent; S. 210.) A Department of Education Complaint Investigation Report found multiple IDEA violations by the school department during the period of spring 2006 through the summer of 2007. (S. 211-35.)
 6. The student has not been in an educational setting or accessed services in her IEP since September 2006. (Testimony of Parent.)
 7. Since September 2006, the student has received services from United Cerebral Palsy Agency (“UCP”) for approximately 60 hours per week. (Testimony of Parent; Moore.) The goal of UCP’s day habilitation services is to advance the student’s life skills, which can include safety, community, socialization, communication, and recreation. (Testimony of Mosley.) The student’s particular UCP service goals include dressing herself, indicating bathroom needs, and utilizing communication devices. (Testimony of

Woodye.) UCP workers provide services in the student's home and also take her on community outings to the pool, playgrounds, beaches, restaurants, and shopping.

(Testimony of Parent; Woodye.)

8. For the 2007-2008 school year, the student's IEP specified KidsPeace, a local day treatment program, as her placement, but the school department also offered the student an alternative day treatment program, Perkins School, and Surry Elementary School as optional placements. (S. 46; S. 1009.) Although the IEP Team agreed on the substance of the student's 2007-2008 IEP, the parent did not accept any of the placements offered by the school department, instead seeking a public high school placement. The parent filed a due process hearing request, and that decision is now on appeal in federal district court. (Testimony of Parent; S. 1004.)²
9. In September 2007, the school department hired a special education teacher (Rebecca York) and an educational technician in September 2007 to work with the student and provided them with significant training, including multiple trips to Perkins School for programs or conferences. (Testimony of Beckwith; Pawletko; Gurdonyi; S. 2246-48.) The school department would have utilized Ms. York as the student's teacher if the student had been placed in any local placement and also anticipated that if she were placed outside the district, the accepting school could hire Ms. York as a teacher well-trained to work with the student. At the time of hearing, the school department continued to employ Ms. York in anticipation of the student's return to an educational program.

(Testimony of Beckwith.)

² On the first day of the hearing, the parent sought to raise claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The hearing officer ruled that the parent waived these issues by not identifying them in her complaint or at the prehearing conference. The hearing officer further noted that, even if the claims had been preserved, she did not have jurisdiction over alleged violations of either statute except to the extent that they impacted a student's rights under the IDEA. The parent also asserts that the school department's forwarding of the student's records without parental assent to KidsPeace

10. In March 2008, the student's IEP Team began to develop her IEP for the 2008-2009 school year. Because the Team had many members and it was difficult to schedule a meeting where all could attend, Ms. Beckwith invited Team members to sessions on April 9 and 10, with some attending only one and some attending both. (Testimony of Beckwith; S. 1253.)
11. Besides the parent, Team members invited to attend the April 9 and 10 meetings were: Royal Grueneich, Ph.D., Clinical Neuropsychologist; Kelley Sanborn, Director of Special Services, Mount Desert Island Regional High School; Roberta Raymond, Special Education Teacher, Mount Desert Island Regional High School; William Ward, Orientation and Mobility Evaluator; Jeff Jones, Rehabilitation Specialist, Division of Blind; Mark Hammond, Speech-Language Pathologist; Chuck Anderson, Educational Supervisor, KidsPeace; Dr. Mary Talbot-Fox, Consulting Psychologist, Perkins School for the Blind; Martha Majors, Educational Supervisor, Perkins School for the Blind; Tim Rogers, Ph.D., Psychologist; Rebecca York, Special Education Teacher, Surry School Department; Elizabeth Ehrenlenbach, Principal, Surry Elementary School; Betsy Dyer, Speech Pathologist; Danica Frederick, Occupational Therapist; Lisa Jones, Physical Therapist; James Artesani, Ed.D., Educational and Behavioral Consultant; Alan Wittenberg, Music Therapist; Jeff Jones, Case Manager, Division of the Blind; Linda Mosley, Supervisor, United Cerebral Palsy; Kysha Woodye, Day Habilitation Caseworker, United Cerebral Palsy; Elesia Moore, Case Manager, United Cerebral Palsy; Maria Timberlake, Center for Community Inclusion; Lynn Maddocks, Special Education Director, Ellsworth; an unspecified regular education teacher from the Surry School Department; and Eric Herlan, the school department's attorney. (S. 1254.)

violated the student's rights under the Family Educational Rights and Privacy Act ("FERPA"). The hearing officer does not have jurisdiction over the parent's FERPA claims.

12. Prior to the April 9 and April 10 meetings, Ms. Beckwith circulated to participants a draft IEP, a draft behavioral plan, and a transition plan for advance feedback as well as recent evaluations of the student. (Testimony of Beckwith; S. 1253.)
13. The draft IEP circulated by Ms. Beckwith prior to the April 2008 IEP Team meetings imported goals and objectives from the student's IEP developed at Perkins School for the Blind and suggested consultation from a psychologist, a behavioral consultant, a deaf-blind consultant, an orientation and mobility provider, and multiple support services. The draft IEP called for the student to receive instruction in functional academics, daily living skills, social, emotional, and behavioral needs, adapted physical education, and speech/language therapy. It did not specify a placement. (S. 1139; S. 1195-218.)
14. All of the invitees except Roberta Raymond, Martha Majors, and Kysha Woodye were able to attend either the April 9 or 10 IEP Team meetings or both. (S. 1137; S. 1143).
15. At the April 9 IEP Team meeting, the Team discussed the student's then-current level of functioning, with the parent explaining that she felt the student had regressed in many ways having been out of school for such a long time but had progressed in areas of daily living and communication. (S. 1138.)
16. At the April 9 meeting, Royal Grueneich, Ph.D., described the neuropsychological evaluation that he had conducted in September 2007. (S. 1139-40.) In his report, Dr. Grueneich noted that, as reported by the parent, the student sometimes exhibited physical forms of aggression when upset, such as pushing someone's hand away, but did not deliberately attempt to hurt others and that the student infrequently exhibited self-injurious behaviors. (S. A-37.) Dr. Grueneich reported to the Team that the student did not respond well to pressure and that she might deteriorate when pressured. (S. 1139.)
17. In his report, Dr. Grueneich also noted the student's history of behavioral difficulties in school, particularly with respect to avoidant and self-injurious behaviors, and

recommended that the student be offered a safe space of her own to retreat to when upset. In addition, he suggested that staff establish a daily routine and be prepared to take immediate steps if the student began to exhibit self-injury, such as allowing her to retreat to a safe space and using a gentle restraint if necessary. Dr. Grueneich suggested that goals for reducing aggressive and self-injurious behavior should be a central component of her behavior plan. Dr. Grueneich noted that it would be essential for staff working with the student to be well-trained and highly consistent with respect to management of her behavior. Dr. Grueneich found that the student's overall level of adaptive behavior skills, including communication, daily living, socialization, and motor skills, fell in the severely impaired range, with an average age equivalent of twenty-two months (the student's 2005 evaluation had assessed her overall adaptive behavioral skills to be at the twenty-month level). Dr. Grueneich opined that the student would require psychology services on a consulting basis to help develop and monitor a behavior plan. He also recommended non-academic opportunities for mainstreaming. (S. A-36 to A-44.)

18. Also at the April 9 Team meeting, Mark Hammond, M.A., CCC-SLP, reviewed the augmentative communication evaluation of the student he had performed in September 2007. He recommended that a specialist skilled in Applied Behavior Analysis be thoroughly involved in the student's program to analyze behavior effectively and regularly. (S. 1140.) In his report, Mr. Hammond found that the student utilized a variety of strategies in an attempt to gain access to desirable items, reject items that were nondesirable, and control her environment. Mr. Hammond observed that the student utilized limited signs, vocalizations, words, word approximations, and gestures to communicate. Mr. Hammond noted that the previous evaluation found that the student's receptive language age was less than one year. (S. A-30 to A-38.)

19. At the IEP Team meeting, Mr. Hammond recommended that the Team have a kingpin with strong behavioral experience overseeing the behavioral part of her program, who would get input from a consultant with deaf-blind expertise. Team members discussed the need for significant training of staff, consistent staffing, and on-site consultations. Dr. Grueneich noted that he was not skilled at detailed behavioral programming and it was observed that Dr. Talbot-Fox, even if she were available, was too far away to do hands-on training and consultation. Dr. Grueneich also opined that it would be useful to have the whole consultant package available at one location. (S. 1140-42.)
20. Team members were also asked to provide feedback on the behavior and transition plans that were under consideration. The parent expressed a desire for someone who knew the student well to oversee the transition plan; Dr. Grueneich, who had evaluated the student several times, declined on the basis that he did not have sufficient availability. (S. 1138-42.)
21. At the April 10 IEP Team meeting, Mary Talbot-Fox, Ph.D., of Perkins School reviewed her November 2007 psychological evaluation of the student. (S. 1144.) In her report, Dr. Talbot-Fox noted that the student demonstrated agitated behavior during the evaluation and engaged in self-hitting and attempted aggression. Dr. Talbot-Fox concluded that the student demonstrated developmental skills that ranged from the eighteen-month level to slightly above the two-year level. Based on prior evaluations, the student was slowly expanding her skills, including being able to make more verbal requests and developing more social interaction and verbal request skills. Dr. Talbot-Fox noted that behavioral challenges continued to impact the student's learning and functioning in a significant way. The student's scores on behavior scales indicated that she required support in the range of the maximum level. Dr. Talbot-Fox emphasized that the student's behaviors

- should not be permitted to allow her to get out of school early, which would cause negative reinforcement. (S. A-332 to A-333; S. A-341.)
22. In her report, Dr. Talbot-Fox noted that the parent had reported that on a typical day at home, the student would average one behavioral episode per day, which could be ameliorated by calming strategies such as allowing her to rock in her boat or listen to music. The student received “clinically significant” and “elevated” scores on portions of an index of maladaptive behaviors. Specifically, the parent reported that the student engaged in self-injurious behavior of hitting or biting herself or banging her head one to six times a week in a very serious manner. The parent also rated the student’s aggressive behavior toward others, primarily scratching and pinching, as one to six times a week and the severity as very serious. Likewise, the parent rated the student’s tendency to throw objects as occurring one to six times per week and being very serious. (S. A-335 to A-336).
23. Dr. Talbot-Fox recommended that the student attend a program that would be appropriate for the next several years, specifically a program for adolescents with developmental disabilities and behavioral challenges. Dr. Talbot-Fox recommended that a behavioral consultant, who could be available for regular on-site observation and Team consultation, should help establish the student’s daily schedule; oversee the day-to-day implementation of her program; recommend the design of an appropriate calming space for the student; and develop an initial plan for staff to respond to the student’s self-injurious or aggressive behaviors. (Testimony of Talbot-Fox; S. A-338). Dr. Talbot-Fox believed that the psychologist would need to be available for consultation on a weekly basis after the first few weeks, during which consultation might need to occur nearly daily, but declined to opine on whether the psychologist would need to be on-site. Dr. Talbot-Fox testified that she would triage the student’s needs as, first, behavioral; second, developmental

- disabilities and communication techniques for the blind; and, third, autism. She suggested that all the experts involved should have regular dialogue. (Testimony of Talbot-Fox; S. 1145-46.) Dr. Talbot-Fox noted that the student would benefit from interaction with students with disabilities, such as taking turns or sharing snacks, and then graduate to interaction with non-disabled peers. (S. A-339.)
24. Also at the April 10 meeting, Dr. Artesani expressed his belief that whether the student interacted with disabled or non-disabled peers was not relevant as long as she was able to practice social skills. He opined that the Team's behavioral consultant needed to be available at least weekly at the beginning and should work closely with the special education teacher as well as other consultants. (S. 1146.) The Team noted the lack of deaf-blind expertise among the consultants available to work with them, despite the inclusion of Maria Timberlake of the Center for Community Inclusion on the Team, whose role was to provide assistance in locating deaf-blind consultation services. (Testimony of Beckwith.)
25. Also at that meeting, the parent noted a concern that the time frames in the transition plan were too limited. Dr. Talbot-Fox opined that the transition plan wisely set out steps for the student to make a gradual transition back to a school program. (S. 1144; S. 1151.)
26. Based on the discussion at the two April meetings, Ms. Beckwith concluded that the kingpin for the student's IEP Team would ideally be a psychologist, who was readily available, with expertise in autism, visual impairment, communication and behavioral issues. (Testimony of Beckwith.) Ms. Beckwith revised the student's speech and orientation and mobility goals, service levels, and present level of performance in the draft IEP and recirculated it to the Team, noting that it was for the Team's consideration at the May meeting, when it would be finalized and placement would be determined. (S. 1218.)

27. Another IEP Team meeting was set for May 8 to finalize the student's IEP and determine placement for the 2008-2009 school year. Because the parent canceled the IEP Team meeting scheduled for May 8 due to a medical emergency, the meeting was rescheduled for May 27. (Testimony of Beckwith; S. 1192.)
28. Present at the May 27 meeting were: Melissa Beckwith; Parent; Eric Herlan; Kelley Sanborn; Lynn Maddocks; Danica Frederick; Lisa Jones; Elizabeth Ehrlenbach; Jeff Jones; Doug Carey, Regular Education Teacher, Surry Elementary School; Alan Wittenberg; Chuck Anderson; Elesia Moore; and Linda Mosley. (S. 1149.) Others who were invited to the meeting included Dr. Grueneich; Roberta Raymond; William Ward; Mark Hammond; Dr. Talbot-Fox; Martha Majors; Dr. Rogers; Rebecca York; Betsy Dyer; Dr. Artesani; Kysha Woodye; and Maria Timberlake. All invitees were requested to provide written comments in advance of the meeting. (S. 1194.)
29. At the May 27 IEP Team meeting, the Team expressed general support for the draft IEP goals and objectives, although the parent was concerned that no deaf-blind consultant had reviewed the IEP. With regard to service levels, the parent objected to the designation of psychological services once a week and behavioral management services three times a week, which she felt was unnecessarily high. The parent also felt that the kingpin position should be held by someone with an expertise in deaf-blindness. She also advocated for an increase in the level of deaf-blind consultation to forty-five hours a year and stated that she could not agree to any IEP that did not identify the deaf-blind consultant. School staff and several consultants, either earlier or at the May Team meeting, expressed the belief that the kingpin should be a person who could provide the psychological and behavioral management support, who would receive consultation from the deaf-blind expert, notably limited in the region. (S. 1141-42; S. 1150-55.)

30. Because of the disagreement as to who should lead the Team and how much psychological/ behavioral services were needed, [sic] suggested that the IEP list psychological and behavioral management consultant services for ten to fifteen hours per week initially and then five hours per week after that for assistance with social, behavioral, communicative, and cognitive programming. It was also suggested that the IEP list deaf-blind consultation for between one and fifteen hours a month initially, with the Team reviewing that service level after the student had been in school for a month. With those modifications, the Team was generally in agreement as to service levels, with the exception of the parent. (S. 1153-56.)
31. The Team discussed the transition plan, which began with school staff observing the student with her UCP workers during the summer. It was generally agreed that the student's Extended School Year program for the summer of 2008 would essentially be the implementation of her transition plan. (S. 1155-56.)
32. The parent expressed her opinion that the student should be in the life skills program at the Mount Desert Island Regional High School. Ms. Beckwith responded that she did not feel any of the programs in Hancock County could provide the services called for in the student's IEP, but that a day treatment program could provide essential on-site psychological/behavioral service providers, staff extensively trained in behavior management techniques, overlap if staff absences occurred, and wrap-around services. (S. 1154-55.)
33. Mr. Anderson, Educational Supervisor at KidsPeace, stated that he felt that KidsPeace could develop a program for the student that would meet her needs in an appropriate, safe, and supportive placement. (S. 1154.) KidsPeace provides psychological services and behavioral consultants on staff as well as staff that is extensively trained in behavioral interventions. KidsPeace operates a program for students with emotional

- disabilities and a smaller program for students with autism. The school department had arranged for KidsPeace to move a two-room modular building next to the building currently housing the autism program. KidsPeace would then have utilized one room in the modular for some of its lower-level-skilled autism students, where the student would attend regularly, and the other room would be used as a quiet and safe space for the student to be used as necessary. (Testimony of Boothby; Beckwith; Maddocks.)
34. Many Team members supported a KidsPeace placement while some felt that a public school setting could work, although no particular public program was identified as available. Because the Team could not agree on a placement, Ms. Beckwith, as the individual responsible for designating a placement in the absence of consensus, selected the day treatment program at KidsPeace. (S. 1149-56.)
35. The student's final IEP called for an educational technician to provide one-on-one support for the student in a day treatment program at KidsPeace. The IEP called for consultation from a psychologist with an autism/behavior specialty for five hours a week as well as from a deaf-blind consultant for ten to fifteen hours during the transition period and at the level recommended by the consultant after that. Supportive services for the student included occupational therapy, speech/language therapy, music therapy, physical therapy, and augmentative communication consultation. (S. 1157-62.) The transition plan suggested a two-month transition in the student's return to school, with each stage closely monitored for the student's ability to move forward. (Testimony of Beckwith; S. 1183-86.) The behavioral plan, modified as a result of IEP Team input, detailed proactive and reactive strategies to be employed by the teaching staff. (S. 1178-82.)
36. The parent rejected the KidsPeace placement and felt that, as a result, there was no point in beginning the transition plan. (Testimony of Parent; s. 1093.) School staff felt that the transition plan could begin because it was anticipated that Ms. York would be the

- student's teacher if her placement were in the area, including KidsPeace. Although the school attempted to implement the transition plan in the summer and fall of 2008, the parent refused. (Testimony of Beckwith; S. 1088; S. 1091; S. 1093; S. 1094; S. 1100; S. 1108; S. 1111.) In addition to expressing concern that no final placement was agreed upon for the student, the parent expressed doubt that Ms. York was qualified to teach the student. (Testimony of Parent; S. 1100.)
37. In June 2008, the due process hearing decision reviewing the 2007-2008 school year issued, concluding that the school department had not violated state or special education laws. The hearing officer concluded that the Perkins School for the Blind was the least restrictive environment in which the student could receive an appropriate education and would therefore have been an appropriate placement in which to implement the student's IEP for the 2007-2008 school year. (S. 1023.)
38. Ms. Beckwith set up an IEP Team meeting in July 2008 to review the hearing decision. Ms. Sanborn of Mount Desert Island Regional High School declined to attend on the basis of her conclusion that the student's needs were too complex to be met at Mount Desert Island Regional High School. (S. 1120.) Dr. Tracy Luiselli, the Outreach Consultant at Perkins School and a new Team member, opined at the meeting that the student's staff would require intensive, daily training in order to meet the student's needs at the start of the program and that there should be coaching for the staff in the classroom. She noted that her organization could not provide on-going weekly training, much less daily training. She believed that the student's staff would require intensive, ongoing training over several years. (S. 1113.)
39. At that meeting, the school offered Perkins as an alternative placement to the KidsPeace placement. (S. 1110.) The parent believes that the student's difficulty eating, caused by stress at being away from home, resulted in her medical problems at Perkins and she is

- not willing to attempt another residential placement for the student. (Testimony of Parent; S. 1113.)³
40. In the summer of 2008, the school department contracted with Terese Pawletko, M.S., Ph.D., to provide psychological/behavioral services to the student's Team. Dr. Pawletko specializes in working with children with autism spectrum disorders and visual impairments. (Testimony of Pawletko.) In the fall of 2008, the school department contracted with Dr. Susan Bruce, a consultant in deaf-blind instruction from Boston College. (Testimony of Beckwith.) Ultimately, the school department identified Margaret Fernald, Ph.D., (a local psychologist) as the kingpin, with assistance from Dr. Pawletko, Dr. Talbot-Fox, and Dr. Bruce. Ms. Beckwith continued to be concerned that Dr. Fernald would not have sufficient availability to guide the Team adequately. (Testimony of Beckwith.)
41. On October 28, 2008, the federal district court issued an order designating the Surry Elementary School as the stay-put placement for student. The school department prepared a classroom at Surry Elementary School and clinical members of the student's team also met with teaching staff to address the structure of the room and program delivery. (S. 1041; S. 1080.)
42. Ms. Beckwith scheduled another IEP Team meeting for November 18, which was rescheduled to December 16. (S. 1065; S. 1068.) The parent did not attend. (S. 1043.)

³ In the fall of 2008, following the due process hearing decision of June 2008, the school department submitted an application to Perkins for the student and was subsequently notified that Perkins did not feel that it would be an appropriate placement option for the student and was not able to offer admission at that time. (S. 1081; S. 1102.) In a follow-up phone call with Ms. Beckwith, a member of Perkins' staff indicated that they were concerned about managing the student's behavioral and medical needs. (S. 1040.) Thereafter, the school department forwarded a de-identified application to Crotchet Mountain Rehabilitation Center in Greenfield, New Hampshire, which offered the student admission. (Testimony of Beckwith; S. 1052.) The school department continues to offer Crotchet Mountain as an alternative placement for the student. (Testimony of Beckwith.)

43. In the spring of 2008, Ms. Beckwith met with special education staff at Bangor High School, approximately an hour from the student's home, to review the program as a possible placement for the student. (Testimony of Beckwith; Parent.) In May 2008, the parties agreed that the student should attend Bangor High School, which had recently accepted her and it is anticipated that her placement there will begin before the end of the 2008-2009 school year. (Testimony of Parent; Beckwith.)

IV. DISCUSSION AND CONCLUSIONS

A. Burden of Proof.

Although the Individuals with Disabilities Education 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). In this case, the parent requested a due process hearing and thus bears the burden.

B. Whether the School Department Developed an IEP that Was Reasonably Calculated to Provide the Student with a FAPE During the Summer of 2008 and the 2008-2009 School Year.

The parties agree that the student qualifies for special education and related services as a student with multiple disabilities. See MUSER § VII.2.H. As a qualified student, she is entitled to a free appropriate public education ("FAPE") provided by the Surry School Department. 20 U.S.C. § 1412(a)(1)(A); 20 M.R.S.A. § 7201; Maine Unified Special Education Regulation ("MUSER") §§ I & II.11. A school district provides a FAPE when it complies with the procedures of the IDEA and develops an individualized educational program that is reasonably

calculated to enable the child to receive educational benefits. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA).

A student's IEP should be designed to provide the student "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. An IEP must include the student's present levels of performance, annual goals and short-term objectives, and the special education and supportive services necessary to help the student advance toward those goals, make progress in the general education curriculum, participate in nonacademic activities, 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.

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 (1st 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). Because there is no "bright-line rule on the amount of benefit required of an appropriate IEP," each situation requires a "student-by-student analysis that carefully considers the student's individual abilities." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3^d Cir. 1999) (holding that the "meaningful benefit" standard requires "significant learning" (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3^d Cir. 1988))).

Further, the IDEA requires that students be educated with non-disabled peers "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); *MUSER* § X.2.B. As such, a public school may remove a child with disabilities from the regular educational environment 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 U.S.C. § 1412(a)(5)(A); *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 928, 993 (1st Cir. 1990).

i. 2008-2009 School Year

The parent’s primary objections to the student’s IEP are the level and characteristics of psychological/behavioral services and the student’s placement at KidsPeace.

a. Consultation Service Levels in the IEP

The parent objects to the level of psychological/behavioral support services listed in the student’s 2008-2009 IEP as being too intensive and disputes the conclusion that a psychological and behavioral expert is required to serve as a kingpin of the student’s IEP Team.⁴ The parent does not raise any particular objection to the goals and objectives in the IEP.⁵

At the May 2008 IEP Team meeting, the parent stated her belief that the psychological/behavioral services could be delivered once per week with additional availability of the provider by phone or email. (S. 1152.) The parent also requested that the kingpin be an expert in deaf-blindness. (S. 1152.) The parent points out that over a two-year period in which UCP has been providing habilitation services to the student, only two behavior incidents, neither recent, have been noted. The parent is concerned that the school department has exaggerated the student’s negative or disruptive behaviors in order to avoid placing her in a public school setting.

(Testimony of Parent.)

The school department notes that IEP Team participants agreed that a kingpin model of

⁴ The only other specific objection that the parent makes to the substance of the IEP regards the student’s grade level, which was blank in the draft IEP and listed as Grade xx in the final IEP for the 2008-2009 school year. (S. 1157; S. 1195.) Although in previous years, the student’s grade level was apparently disputed, the parent agreed that the student should be designated as Grade xx for the 2008-2009 school year. (Testimony of Parent; Beckwith.)

⁵ At Team meetings, the parent requested that deaf-blind consultation services be increased. As a result, the service level was increased from ten to fifteen hours per year to ten to fifteen hours over the two-month transition period, with further services to be added at the level suggested by the consultant. (S. 1199; S. 1160.)

service delivery, in which the kingpin was an expert focusing on behavior, was necessary. The school department believes that the behavioral/psychological consultant's key tasks will be to be available for all needs that arise; to advise on difficulties that arise in the reintegration and behavior plans; to reinforce good techniques among staff and coach on less positive techniques; to monitor data; to train staff; and to consult on crises. The school department argues that having a psychologist under contract as a consultant is insufficient to meet the needs of the student due to lack of availability "as needed" by phone or email and difficulty scheduling meetings due to significant other demands on the consultant's time.

The school department notes that several Team experts recommended that behavioral services be available every week, be provided by someone not far away who could be readily available, and be provided with a heavy training component and structure for teaching staff. Dr. Talbot-Fox believed that the service might need to be provided on an almost daily basis for the first few weeks and then weekly at the very least. (S. 1144.) Dr. Artesani stated that the service should be available weekly. (S. 1146.) Mark Hammond asserted that this provider should be "thoroughly involved." (S. 1140.) Dr. Grueneich noted that it would be best if the psychological/behavioral services provider were on-site and that phone training was not particularly useful. (S. 1141.) Dr. Rogers agreed that five hours of the service weekly was appropriate. (S. 1233.) Dr. Pawletko believed that the provider would need to work directly with the student at times and be able to meet with teaching staff sometimes on a daily basis. (Testimony of Pawletko.)

The school department also notes that several Team experts, including Dr. Grueneich, Dr. Talbot-Fox, Dr. Rogers, and Dr. Artesani, stated that they could not undertake the role of kingpin as a consultant, due to insufficient time or skills or excessive distance. (Testimony of Beckwith; S. 2382; S. 1233; S. 1141-42.) The school department argues that it reasonably concluded that the behavioral/psychological intervention needed to be available on-site and that the five weekly

hours designated in the student's IEP was an appropriate estimate for as-needed, on-site support.

The school department also contends that staff can suffer a "shock factor" when they unsuccessfully address challenging behavior that is difficult to understand or interpret, and then address the same behavior again the next day without supports; the school argues that this leads to staff becoming scared, a program spiraling out of control, and all progress being lost.

As the student's Team appeared to agree, the student's multiple disabilities are best addressed by experts with a primary focus on behavior, followed by developmental disabilities, then autism. (Testimony of Talbot-Fox.) Dr. Talbot-Fox noted that the student's behavioral challenges significantly impacted the student's learning and required maximum support. (S. A-332.) Dr. Pawletko opined that it was critical that the student's behavior be recognized as being a form of communication. (Testimony of Pawletko.)

Moreover, Dr. Grueneich had observed that the student did not respond well to pressure and Dr. Pawletko expressed concern that the student has been out of a controlled, structured program for two and a half years, thereby generating a large gap in information about her current needs and abilities and how she will react in the conditions of an educational setting. (S. 1139; Testimony of Pawletko.) Dr. Pawletko opined that the student's recent experiences attending evaluations, where she was nervous and unable at times to participate, indicated that the transition back to a school setting will be very difficult for her. (Testimony of Pawletko.) This is particularly so given that UCP staff members working with the student for the past two and a half years have not placed any demands on her. (Testimony of Moore.)

The hearing officer holds that the school department reasonably relied upon the evaluations of multiple Team experts that the student's Team required a leader with expertise in psychological/behavioral services who could spearhead the program, train staff, and be readily available to assist staff in interpreting and responding to the student's behavior. Although some Team members felt that psychological/ behavioral services could be provided at a less intense

level, all Team members generally supported the idea of a kingpin behavioral expert providing services and none was available to undertake this role. The student's behavioral plan, focusing on communication systems, appropriately recognizes the communicative intent of much of the student's behavior, and suggests that efforts to teach the student alternative methods to meet her communication needs would "lead to significant reductions in aggressive and self-abuse behaviors." (S. 1182.)

By ensuring that the student had access to an appropriate level of psychological/behavioral services, the school department met its IDEA obligation to provide support services that will allow the student to benefit educationally from her instruction. See Rowley, 458 U.S. at 203.

b. Placement Determination

The parent's objection to the level of psychological/behavioral services in the IEP is closely linked to her major disagreement with the student's IEP, which is its placement determination. The parent alleges that the school district made decisions that were contrary to the student's evaluations and failed to provide a continuum of placements. The parent highlights the beliefs of Dr. Talbot-Fox, Dr. Grueneich, Elesia Moore, and Jeff Jones that the student could succeed in a public school setting. (S. 1040; S. 1144; Testimony of Jones; Moore.) The parent feels strongly that the student would succeed in a public high school and has been particularly upset by the decision of Mount Desert Island Regional High School, where one of the parent's other adopted children takes part in the special education program, not to accept the student. Bangor High School, approximately an hour from the student's home, is the parent's second choice for a public high school. (Testimony of Parent.) Although the parent will not return the student to the stay put placement at Surry Elementary School, she asserts that the student successfully attended Surry Elementary School in a classroom with peers, including her sister, for several years.

The parent argues that the placement at KidsPeace is not appropriate or safe for the student. During a trip to KidsPeace in the fall of 2007, the parent witnessed a child in the program for children with emotional disturbances exhibit aggressive behavior. (Testimony of Parent.) Zsuzsanna Gurdonyi, a UCP worker who had been hired and trained as an educational technician to work with the student in the school setting for the 2007-2008 school year, also expressed concern about the safety risk posed by students in the separately-housed emotional disabilities program. (Testimony of Gurdonyi.) The parent is also concerned that at KidsPeace, the student would be exposed to loud noises that would be frightening to her and she would not have the opportunity for reverse mainstreaming experiences with typically-developing peers. (Testimony of Parent.) She argues that the Applied Behavioral Analysis method in which KidsPeace staff is trained is designed primarily for students with autism and is inappropriate for the student, given the fact that her autism diagnosis is questionable and is not the primary disability which should be addressed among her complex needs. The parent also shares the concern of Jeff Jones that the student would be more segregated than necessary at KidsPeace. (Testimony of Jones.)

The school department argues that although it continues to believe that a residential placement is best suited to meet the student's needs, the day treatment program is the only local model that can provide some level of wrap around, transdisciplinary, milieu model programming, with its own expertise and staffing being in the behavioral area that many of the consultants and educators involved felt was a critical asset for the Team leader. The school department relies on a ruling of the Eleventh Circuit Court of Appeals, in which the court held that the school's offered placement in a school with only special education students was the least restrictive environment for the student even though the family sought placement in a local public school. Michael P. v. Indian River County Sch. Bd., 37 IDELR 186 (11th Cir. 2002) (holding that the IDEA does not require a school district "to equip a classroom with the facilities necessary to execute an IEP for a

handicapped student on a regular campus, when those facilities are already in place elsewhere”).

The school department also points to a 2004 Maine hearing decision regarding a student in another rural school district, where the hearing officer held that “the capacity of the district to create a new program to meet the agreed upon needs of this student is limited” since, among other things, specialized positions were difficult to fill in the district. M.S.A.D. No. 37, 43 IDELR 133 (Me. SEA 2004). In that case, the hearing officer held that the student was not likely to receive meaningful benefit in a “cobbled-together program” in the rural town. Id. The school department contends that the student in this case has far more significant needs than the child in M.S.A.D. No. 37.

In addition, the school department argues that the student’s program required many parts and providers and that it therefore needed to be provided through a team, or milieu, model of delivery that could not be provided in any local public school utilizing independent contractor models. Both special education directors within the Education Cooperative testified that they did not believe that any of the high schools in Hancock County could provide the team model of services that they believed the student required. (Testimony of Beckwith; Maddocks.) The school department points out that although Dr. Talbot-Fox and Dr. Grueneich stated beliefs that the student could be educated in a public school, they also acknowledged that they did not know any of the public or private programs that were available and declined to make a recommendation for any particular placement. (S. 1140; S. 1144; Testimony of Fox; Grueneich.)

The school department argues that the experts at KidsPeace could discuss the student’s program with teachers regularly and be available as needed, often in the moment of the crisis or question. The school department contends that the student’s high level of needs, creating a very low frequency combination of challenges, is accentuated by the fact that the student has not attended school for over two and a half years, so that a return to school will present its own challenges. The school department also contends that the student did not in fact make sufficient

progress in earlier public school programs, but rather that she has succeeded only at the Perkins School.

The student's progress at Surry Elementary School, gaining six months of basic adaptive skills in five years, was likely insufficient to qualify as a "meaningful benefit." Although the parties agree that a residential placement would be the best setting for the student to realize her potential, a residential placement was not a viable option for the student when it was last tried. The school's offer of the day treatment program at KidsPeace as an alternative to the offered residential placements was intended to approximate the wrap around services, high level of team services and intervention, and on-site and regularly available psychological and behavioral services available in a residential facility, while allowing the student to return home each day.

The school department's conclusion that the program at KidsPeace provided the environment in which the student was most likely to succeed among the available options was intimately tied to the statements of many IEP Team members that they were not available enough of the time, close enough, or adequately skilled to serve as the Team leader. Ms. Beckwith sought advice from Team members to identify someone who could serve as Team leader, to no avail. (Testimony of Beckwith.) Knowing from experience that it would be very difficult to contract with any individual to serve such a significant role, and understanding that the experts already involved had demurred when asked if they could provide such a service, the school was justified in seeking a placement where such a provider would be available on-site.

Although the parent expressed concern, supported by experts, that autism should not be the primary focus of the student's programming, the KidsPeace program was planned to be designed specifically for the student. With regard to potential isolation, although the student would have her own space at KidsPeace, as was recommended by several experts, she would be taught primarily in a space with students from the autism program's classroom. (Testimony of Beckwith.) With regard to safety, Ms. Beckwith testified that in the two years since the autism

program began at KidsPeace, she was not aware of any incidents of violence regarding the children she oversees who are placed there. (Testimony of Beckwith.) Further, the student's program would be physically separate from the program for students with emotional disabilities. (Testimony of Beckwith.)

Although the parent seeks a public school placement in a local high school, it is not clear that any area school could implement an IEP to allow the student to make meaningful progress. Ms. Beckwith testified that she finds that consultants are difficult to find in the rural area of Surry. (Testimony of Beckwith.) Kelley Sanborn testified that Mount Desert Island Regional High School contracts with a local psychologist for behavioral/psychological services and that he is frequently inaccessible; he usually returns calls within a few days but is not available on site and is not available on an as-needed basis. (Testimony of Sanborn.) Further, Ms. Beckwith testified that in her role as special education director overseeing students in many different local and regional placements, she finds that contracted consultants, many of whom are from outside the region, are often not able to provide timely assistance. (Testimony of Beckwith.) Moreover, Dr. Pawletko noted that she and other experts, although originally contracted for a certain amount of time to work with the student's Team, having since undertaken other obligations, thereby limiting the time they now have available, since the student's program was not being put into effect and highlighting the problem faced by the school department here. (Testimony of Pawletko.)

Finally, the school department has no high school and has no guaranteed access for students to attend Mount Desert Island Regional High School. Despite feeling strongly that no area public school could meet the student's needs, the school department, through Ms. Beckwith, Mr. Herlan, and Superintendent Boothby, sought a placement for the student at multiple area high schools, knowing that the parent would accept only such a placement. (Testimony of Beckwith;

Boothby; P. 135-36.) Mount Desert Island Regional High School refused,⁶ as did multiple area high schools contacted by the school department, to allow the student to be placed with them, either due to concern that they could not meet her needs or the fact that she was not from within their district.

With regard to the Bangor High School placement that the student appears likely to be entering, the school department's attorney had contacted Southern Penobscot Regional Program for Children with Disabilities (a regional program whose board was comprised of the superintendents of several towns with southern Penobscot County, including Bangor) in November 2007. The school department requested an exception to the general exclusion of students who were not within the region, sought a placement in one of the many programs run by the Regional Program, and included a deidentified memorandum about the student that stated her dire need to return to a school setting, but was denied. (S. A-13; S. A-61 to A-64.) It was not until the Maine Department of Education became involved in the federal court mediation at the court's request that Bangor High School, a member of the Southern Penobscot Regional Program that rejected the student in late 2007, became a possible placement for the student. (Testimony of Beckwith.)⁷

By offering KidsPeace as an alternative to a residential placement, the school department met its obligation to identify a placement where the student's program could most likely be implemented to allow the student to make demonstrable improvement in her areas of special needs. See Burlington, 736 F.2d at 788; Ridgewood Bd. of Educ., 172 F.3d at 248.

⁶ Although the parent asserts that Mount Desert Island Regional High School's refusal to accept the student was a violation of the Americans with Disabilities Act (ADA"), the hearing officer has no jurisdiction over the high school, which is not a party to this proceeding, or over ADA violations.

⁷ Neither party put forth details about the Bangor High School placement at the hearing. Regardless, the school department reasonably believed that it was not an option for the student's 2008-2009 IEP based on the refusal of the Southern Penobscot Regional Program for Children, whose Board is comprised of superintendents at the member schools, including Bangor High School, to accept the student despite the school department's portrayal of the situation as critical. (S. A-61 to A-64.) IEP decisions must be reviewed in terms of what was reasonable at the time the IEP was created. Roland M., 910 F.2d at 992; see

c. Procedural Issues

The parent also alleges that the school district violated procedures required by state and federal special education laws in five regards. A school does not provide a FAPE when it commits procedural errors that compromise the student's right to FAPE, seriously hamper the parents' opportunity to participate in the IEP development process, or cause a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(2); Roland M., 910 F.2d at 994 (holding that strict scrutiny of procedural integrity of IEPs must be tempered by fairness and practicality).

First, the parent alleges in her complaint that the school department failed to invite mandatory persons to IEP Team meetings, referencing the May 2008 meeting at which the student's 2008-2009 placement was determined. The school department argues that all mandatory participants were at the meeting and contends that the inability of several Team members to make the meeting was due to the parent's need to reschedule it from May 8 to May 27. The school department also notes that Team members were polled for three alternative dates in May and June, with May 27 likely to get the highest attendance.

The student's IEP Team was required to include: the child's parents; at least one regulation education teacher for the child; at least one special education teacher, or where appropriate, the special education provider of the child; a representative of the school administrative unit who is qualified to provide or supervise specially designed instruction, who is knowledgeable about the general education curriculum, and who is knowledgeable about the availability of resources of the local educational agency; and an individual who can interpret the instructional implications of evaluation results (this person can also fill another mandatory role). 20 U.S.C. § 1414(d)(1)(B); *MUSER* § VI.2.B. Team members meeting these criteria must be present at an IEP Team meeting, unless the parent and the school agree that the member need not attend because the member's area of curriculum or related service is not being discussed or

also Lessard v. Wilton-Lindeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008).

modified at the meeting. 20 U.S.C. § 1414(d)(1)(C)(i); *MUSER* § VI.2.E. Further, Team members may be excused when the parent and the school consent to the excusal and the member submits input into the development of the IEP prior to the meeting. 20 U.S.C. § 1414(d)(1)(C)(ii); *MUSER* § VI.2.F.

Present at the May 2008 meeting were the parent, Doug Carey (regular education teacher at Surry Elementary School); Elizabeth Ehrlenbach (regular education teacher and principal at Surry Elementary School); Melissa Beckwith (who met the requirements for the school administrative unit representative); and Lynn Maddocks, Kelley Sanborn, Alan Wittenberg, Jeff Jones, and others (individuals capable of interpreting various evaluation results). Lynn Maddocks and Kelley Sanborn were also certified as special education teachers. (Testimony of Maddocks.) The student's designated special education teacher, Rebecca York, had planned to be present, but was unable to attend at the last minute due to illness. Although it would have been preferable for Ms. York to be present, her contact with the student had been minimal compared to that of Ms. Maddocks and her inability to attend was unforeseen.⁸ Because all essential roles were filled at the May 2008 IEP Team meeting, the hearing officer finds that no violation occurred.

Second, the parent alleges that the school district created misleading IEP Team meeting minutes and failed to respond appropriately to her requests to amend the meeting minutes. The school department responds that the minutes were not inaccurate or misleading.

Although the parent made multiple requests to amend meeting minutes prior to the 2008-2009 IEP Team meetings, the only such request in the record related to the 2008-2009 school year, filed in September 2008, sought changes to the written notice from the July 2008 IEP Team meeting. (S. 1098). The school provided a detailed denial of the parent's request. (S. 1085-86.)

Maine special education regulations allow a parent who believes that information in a student's educational records are inaccurate or misleading to request that those records be

⁸ Although the school department asked the parent to sign a form agreeing to the excusal of Ms. York, the

amended. *MUSER* § XIV.8.A. After reviewing a CD recording of the July 2008 Team meeting, the hearing officer concludes that the meeting minutes were not inaccurate or misleading and therefore were not required to be amended.

Third, the parent asserts that the IEP Team process was not conducted so as to promote an open dialogue. The school department responds that it promoted open dialogue at meetings and notes that all evaluations, draft IEPs, and finalized IEPs were sent to all participants before and after meetings, with requests for input each time.

The record reflects that Melissa Beckwith requested input on IEP documents from all Team members prior to Team meetings and incorporated written input as well as oral input from IEP Team meetings into the student's IEP, behavioral plan, and transition plan. Further, the CD recordings spanning most of the IEP Team meetings reflect that although tensions were often high, the meetings moved forward with an agenda but also with the opportunity for input from all of the many parties involved. The hearing officer finds no violation in the school department's management of the IEP Team meetings.

Fourth, the parent contests the school department's decision to move forward with an IEP Team meeting on December 16, 2008, which she could not attend. The school department asserts that the parent made the scheduling of a meeting in the fall of 2008 very difficult because of her request for a six-week period of protection due to her seasonal wreath business. The school department asserts that it understood, although possibly incorrectly, that the parent would be available as of December 16. The school argues that its immediate offer of a follow-up meeting to the parent remedied any error in holding the meeting on December 16.

The parent informed the school department on November 4 that she could not attend an IEP team meeting during "the weeks of November 10th through December 15th," and had previously indicated that she did not see the need for a Team meeting since she was not planning

parent refused. (S. 1095.)

to access the stay put placement at Surry Elementary School and the parties were deadlocked on alternative placements. (S. 1071; S. 1073.) Ms. Beckwith read the parent's letter to indicate that the parent was available the day after December 15; the parent intended the letter to mean that she was not available until the week following the week of December 15 (a Monday). (Testimony of Beckwith; Parent.) After receiving the parent's letter, Ms. Beckwith asked the parent if she could reschedule the November 12 IEP Team meeting, scheduled primarily to discuss whether the student would return to her the stay put placement of Surry Elementary School identified by the federal district court, for several days during the week of December 15. (S. 1070.)

Receiving no response, on November 10, Ms. Beckwith sent out an advance notice of the IEP Team meeting for December 16. (S. 1065.) The parent quickly responded that she could attend an IEP Team meeting for the student on December 18, 22, 23, or 24, implying but not specifically stating that she was not available for the December 16 date. (S. 1064.) On November 20, Ms. Beckwith informed the parent that most of the professional staff who needed to attend could not attend on the four December dates that the parent had proposed as alternatives and asked if the parent could make herself available on December 16. (S. 1054.) On December 1, the parent sent a response that December 16 was a workday for her, although it is not clear when Ms. Beckwith received this. (S. 1054.) On December 3, Ms. Beckwith sought clarification as to whether the parent could attend an IEP Team meeting on December 16. (S. 1063.) On December 10, Ms. Beckwith informed the parent that the school department planned to go ahead with the IEP Team meeting on December 16 and hoped the parent could attend. (S. 1053.)

On the evening of December 15, by which time at least one consultant had already traveled to the area for the meeting, the parent went to Ms. Beckwith's office to ask her not to hold the meeting the following day. (Testimony of Beckwith; Parent.) Ms. Beckwith felt that in light of the facts that consultants had traveled to Maine and that other experts and staff were scheduled to attend, the IEP Team meeting should go forward. (S. 1045; Testimony of

Beckwith.) On December 16, the same day that the meeting was held, Ms. Beckwith forwarded the parent a CD recording of the meeting and informed her that the IEP Team would review all the items discussed on December 16 at a subsequent meeting and would reconsider any issue the parent requested. (S. 1049.) She also offered several meetings dates in January or February when the Team could reconvene. (S. 1045.) The parent did not respond. (S. 1037.)

Maine special education regulations require a school unit to take steps to ensure that a parent can attend an IEP Team meeting by “[n]otifying parents of the meeting early enough to ensure that they will have an opportunity to attend [and] [s]cheduling the meeting at a mutually agreed on time and place.” *MUSER* § VI.2.H. An IEP Team meeting may occur without a parent “if the public agency is unable to convince the parents that they should attend.” *MUSER* § VI.2.H.4.

Here, the parent and school department had an extensive record of contact regarding the date for the IEP Team meeting. The school department apparently misunderstood the parent’s request not to hold a meeting until after the week of December 15, but gave the parent significant notice that December 16 was the only December date available for many of the Team’s experts. The size of the Team also complicated the school department’s planning. Although the parent left the school department no doubt on the evening of December 15 that she was not able to attend the following day,⁹ at that point, the Team was already assembling in Maine. Further, the school department offered to essentially redo the Team meeting in January and revisit any issue the parent wished at that time.¹⁰ Although the school department apparently misunderstood the

⁹ Although the parent asserts that she told Ms. Beckwith on December 15 that her son had been in the hospital, an additional reason she could not attend on December 16, Ms. Beckwith testified that she did not hear the parent say that. (Testimony of Parent; Beckwith).

¹⁰ The essential determinations of the IEP Team at the December 2008 meeting were to seek consent from the parent for physical and occupational therapy evaluations seek a provider for an audiological evaluation; maintain the student’s triennial review date; replace Perkins School with Crotchet Mountain School as a residential placement option; provide an additional year of special education eligibility as compensatory education ordered under the Complaint Investigation Report of July 2007; and seek to get the student into her stay put placement. (S. 1038-39.)

end date of the parent's request to continue the IEP Team meeting for a lengthy period, it notified the parent significantly in advance of the date of the meeting, alerted her that consultant Team members could not attend the alternative dates she proposed, and made multiple attempts to gain the parent's attendance.

The hearing officer holds that the scheduling of the school department's decision to conduct the IEP Team meeting on December 16, 2008, was not procedurally defective.

Fifth, the parent asserted at hearing that the KidsPeace placement offered by the school department was not actually secured and available for the student if the parent had decided to move forward with the placement. The school department responds that the placement at KidsPeace had been secured for the student for the 2008-2009 school year.

Ms. Beckwith testified that the school system does not utilize a formal application with KidsPeace because the two have a close relationship. Ms. Beckwith also testified that she requested that the school superintendent, Mr. Boothby, confirm that the KidsPeace placement was still available in the spring of 2008. Mr. Boothby, in turn, confirmed this with KidsPeace and reported this back to Ms. Beckwith. (Testimony of Beckwith.) Further, KidsPeace representative Chuck Anderson attended all three 2008 meetings to develop the student's IEP and determine her placement, stating that he felt that the KidsPeace placement could meet the student's needs. There was no significant evidence to counteract the evidence that a placement at KidsPeace had in fact been secured for the student.¹¹

As such, the school department did not commit any procedural violations that would invalidate the student's 2008-2009 IEP.

d. Summer 2008

¹¹ Attached to her motion for judgment during the hearing, the parent submitted a brief email from KidsPeace Executive Director to the parent, in which the Executive Director states that she has copies of IEP Team meeting minutes regarding the student but no further records. Even if the email were admissible, which it was not due to the five-day rule prohibition in *MUSER* §XVI.14.A.3, there is insufficient context in the email to determine whether it supports the parent's position.

The parent also objects to the school department's plan for transitioning the student back into an educational setting. The parent argues that the transition plan relied nearly entirely on the efforts of United Cerebral Palsy Agency staff in violation of UCP rules. She also objects to the transition plan's use of her home as a space to be used during the transition work by school staff.

The school department responds that the student's ESY needs were unique. The school notes that although it originally proposed an extensive ESY program to be delivered in a traditional manner at either Surry Elementary School or KidsPeace, the parent rejected both of these locations. (S. 1200.) The school contends that the concept of using the ESY program to introduce the transition plan arose from the parent herself and that the student's IEP Team agreed. (S. 1151-52; S. 1155.)

Extended school year ("ESY") services must be provided beyond the normal school year if the services are necessary for the provision of FAPE after the student's IEP Team's consideration of: relevant assessments, parent reports, observations and documentation; the significance of the child's disability and her progress toward IEP goals; and the impact of previous service interruptions and the probability that the child is unable to recoup, in a reasonable amount of time, skills previously mastered. *MUSER* § X.2.A.7.

In this case, the parties agree that ESY services were necessary. In the draft IEP developed by Ms. Beckwith and circulated in advance of the April 2008 meetings, more traditional ESY services such as four hours a day of special education instruction, occupational therapy, physical therapy, speech language therapy, and music therapy were proposed. (S. 1200.) During the April 2008 meetings, however, it became clear that the transition plan needed to be implemented to get the student back in a school setting before ESY or regular IEP services could begin.

As a result of Team input, the draft transition plan was amended to take place over two months instead of two weeks, with each stage overseen by a psychologist. With a transition plan

slated to take at least two months to execute, it was not possible for another ESY program to be accomplished during the summer of 2008.

Even though the ESY plan became the implementation of the transition plan, the parent refused to allow its implementation. The final transition plan removed the parent's home as a service location and reduced the role of UCP workers in response to comments at IEP Team meetings. The parent continued to refuse implementation of the transition plan on the basis that no end placement was agreed-upon. As such, the school department did not fail to provide the student with appropriate ESY services for the summer of 2008 when it designated, with the Team's agreement, the student's ESY services to be the implementation of her transition plan, with the goal of introducing her to full implementation of her 2008-2009 IEP as soon as possible.

C. Whether the Student is Entitled to a Remedy of Compensatory Education.

Because no violation has been found, no compensatory educational remedy is due.

V. ORDER

Surry School Department provided the student a FAPE during the summer of 2008 and the 2008-2009 school year and therefore did not violate state or federal special education laws or regulations. Therefore, no remedial order need be issued.

Rebekah J. Smith, Esq.
Hearing Officer