

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

July 30, 2009

Case No. 09.078H, Parents v. Orono School Department.

Representing the Family: Timothy A. Pease, Esq.

Representing the School: James S. Schwellenbach, Esq.

Hearing Officer: Peter H. Stewart, Esq.

INTRODUCTION

The hearing in this matter was conducted pursuant to the provisions of Title 20-A 7207-B et seq. and 20 USC 1400 et seq., and the regulations accompanying each.

The student involved in this case is the Student (D.O.B: XX/XX/XXXX) who lives with her parents in Orono, Maine. She entered school in early September of 2006 when she began to attend the regular education xx class at the Asa Adams Elementary School, her neighborhood school operated by the Orono School Department. The student has been diagnosed as having Pervasive Developmental Disorder (PDD) and Attention Deficit Hyperactivity Disorder (ADHD) and was determined eligible to receive special education services under the category of Other Health Impaired (OHI).

The parents and school have been in fundamental disagreement about the nature and extent of the student's educational abilities and needs since her earliest days in xx. This dispute came to a head in late March of 2009, when the IEP team met and developed an IEP calling for a change in the student's placement from the Asa Adams School to the Old Town Regional Special Education Program (OTR), a nearby¹ public day treatment program. The IEP team made the change of placement proposal having concluded that the student's behavioral issues had become so intense, frequent and problematic that (1)

Old Town and Orono are just over four miles apart, about a ten-minute drive. See., Mapquest.

the school could no longer manage or modify the student's behavior, (2) because of her uncontrollable behavior, the student was not able to access her curriculum and (3) she was not receiving any meaningful academic benefit from her program at Asa Adams. The parents disagreed with this conclusion. They believed then, and still believe now, that the least restrictive environment for her is the Asa Adams school where they assert she could receive and benefit from the set of special education services described in the March IEP.² Consequently, the parents filed a due process hearing request form on April 23, 2009 with the Maine Department of Education, challenging the proposed change of placement. The filing triggered the stay-put provisions of the IDEA and the student remained at Asa Adams in her self-contained classroom for the rest of her xx grade, ending in June of 2009.

The hearing officer held a pre-hearing conference on June 1, 2009 with representatives of both parties. The parties exchanged documents and witness lists. The hearing required three days of testimony, June 10, 18 and 19. At the hearing, the parents offered 24 pages of documents marked as PE-1 through PE-5 and presented testimony from seven witnesses. The school offered 600 pages of documents marked as SE 1- SE 181 and presented evidence from six witnesses. The hearing officer admitted all the offered documents into evidence, there being no objection. The parties requested the opportunity to prepare written closing arguments that were received by the hearing officer on July 10.

ISSUE AND STIPULATION

Prior to the hearing, the parties agreed that the single issue to be resolved here is:

Whether the School's proposed placement for the student at the Old Town Regional Day Treatment Program is reasonably calculated to provide her with educational benefit in the least restrictive setting?

² The parents challenge only the placement of the student at OTR; they are not challenging the special education services described in the March 2009 IEP.

The parties also agreed to the following stipulation: The individualized educational program developed as a result of the IEP team meeting held on March 26, 2009 is appropriate except as it refers to the placement of the student.

FINDINGS OF FACT

The hearing officer has considered both the documentary evidence and testimony presented in this matter and makes the following findings of fact:

1. The student involved in this case is the Student (DOB XX/XX/XXXX) who lives with her parents in Orono, Maine. She entered xx in September of 2006 when she was enrolled in the Asa Adams Elementary School, her neighborhood school. With certain interruptions described below, she attended Adams Elementary School from xx through the end of her xx grade in June of 2009. (Testimony of Brady, Hearing Request Form)

The xx regular education teacher immediately observed that the student displayed behavioral, cognitive and social deficiencies as compared to her classmates and, in mid-September, recommended that she be evaluated to determine her eligibility for special education services. Her parents consented to a speech and language evaluation and classroom observation but did not consent to the other evaluations. Pending completion of the speech and language evaluation report, the school and parents agreed that the student would be in a 60-day diagnostic placement with an Educational Technician (Ed Tech) assigned to work with the student on a full-time, one-on-one basis. The speech and language report found the student's Expressive Language to be in the 25th percentile and her Receptive Language to be in the 2nd percentile compared with her peers.

On November 16, the parents consented to a series of evaluations to be done by Dr. Tim Rogers: Intellectual, Learning Development, Psychological, and Behavioral. They also agreed to further classroom observation; the behavior observed included "11/27 – 11/30/06 – non-compliance/each day-average 3 - returned with counting"; "12/1/06 – running away – returned with counting – ran

away 3 times”; “1/3/07 – 8 min screaming in room – left to go to RR – physically fell on floor screaming...I want to go home”; “1/3/07 – wouldn’t share with other children - would not go to office – cried profusely for 20 minutes...back to class room – within 10 minutes she was under the table refused to come out – Did eventually come to the office crawled around on floor and repeatedly tried to push her way out the door.” The last week of school prior to the holiday vacation in late December was particularly difficult at school. On Monday, the student spent most of the day in the principal’s office because she “refused to do anything the teachers asked her to do...she would not sit down, would not do any school work, got down under tables and refused to come out, made two or three attempts to run out of the room and cried loudly and profusely.” The rest of the week was also difficult and on Friday she simply refused to do anything the teachers asked her to do, so the principal called her parents to come and take her home. The Ed Tech who had been assigned to the student resigned and did not return to school after Christmas. From 12/15/06 through 1/23/07, the student was dismissed early or suspended from xx 12 times.

An IEP team meeting was convened on 1/23/07 to review the Rogers evaluation reports, make an eligibility determination and develop an IEP based on those reports. The school members of the team determined that the student was eligible for special education services under the category of emotional disability, and recommended that the student receive her special education services in a self-contained classroom for most of her school day. The parents disagreed with this recommendation, did not consent to the proposed special education placement and never allowed the student to return to school after the 1/23/07 IEP team meeting. In a 2/1/07 letter to the parents, Sharon Brady, the school’s director of special education, summarized the school’s concerns and conclusions about the student: the regular education setting places demands on the student that she cannot handle given her delayed language abilities and limited coping skills. The resulting stress produces significant, non-compliant behaviors such as frequent loud crying, bolting from staff and agitation when asked to engage in learning activities. All these behaviors increased in frequency, intensity and duration over the course of

the xx year. (SE 340-342, SE 381-401, SE 426-468, SE 471-473, SE 477-478, SE 486-492, SE 535-545; Testimony of Brady)

2. The student entered xx grade at Asa Adams in September and was again placed, at the request of her parents, in a regular education classroom where her behavioral issues quickly surfaced both as various kinds of noncompliance and in instances of physical aggression toward other students such as pushing and kicking. On 10/22, the student was suspended from school for three days (10/22-10/24) for “unsafe and uncooperative behavior...not being safe to herself and others, not cooperating with requests from staff, hitting students, throwing objects [books and chair...], leaving the classroom without permission and attempting to flee the school building.” On 10/24, the xx grade teacher referred the student to the IEP team for evaluation because, despite the efforts made by the school to accommodate her needs, the student was still not meeting grade level expectations and her behaviors were interfering with her ability to learn as well as the ability of her classmates to learn. The parents were notified of the referral but again did not consent to further evaluation; they also did not give consent for the student to receive special education services. The parents also declined Title One services.

The student’s behavior in school continued to be difficult throughout the fall of 2007 with frequent instances of bolting, hiding and direct non-compliance with staff requests. Her behavior became increasingly physical and aggressive, with instances of intentional touching and patting of her teacher’s buttocks and breasts, crawling between the teacher’s legs even after being told not to, spitting at other students and picking her nose then rubbing the resulting mucus or blood on the bodies and clothing of herself and others. In January 2008, the school hired another Ed Tech to work with the student in the regular education classroom. Early in March, the student had frequent and loud tantrums in the classroom and struck one of her student teachers. She began shaking her fist at both adults and other students, consistently refused to do her school work, avoiding it by crawling around on the floor and crying when school staff tried to redirect her back to the task. Often, if school staff insisted she refocus on her

work, she would have a tantrum. The student was suspended from school from 3/18–19 because of non-compliant and disruptive behavior in the classroom. She returned to school on 3/20; during that day, she did a “dead drop” onto a classmate injuring the other child’s wrist. Later that day, she became physically aggressive with her teacher and the building principal. She was suspended from xx grade for at least five days with her return to school dependent upon working out, with her parents, a plan to deal with her increasingly problematic behavior issues. The student never returned to her xx grade classroom.

On the Developmental Reading Assessment given to all xx graders at Asa Adams in late February, the student performed at a xx level and received the lowest scores of any xx grader not identified as eligible for special education. On the DIBELS test, administered at the same time, the student also performed at a xx level. In late May, the parents gave consent to have the student evaluated by Christine Fink, PhD., who conducted the evaluation on August 20, 2008. (SE 160-181, SE 197-229, SE 264-267, SE 280-283, SE 294, SE 299-301; Testimony of Brady)

3. The parents did not enroll the student in xx grade at the beginning of the fall term. The school convened a meeting of the IEP team on September 22 to review Dr. Fink’s evaluation and develop an IEP for the student’s xx grade year based upon Dr. Fink’s evaluation that, in part, showed the student to be significantly below xx grade level across the range of academic skills measured. Her measured social skills placed her in the 7th percentile; her measured behavioral skills placed her in the 1st percentile, in a clinical range of severity. The 2008-2009 IEP called for her to be placed for 24 hours each week in a self-contained special education classroom with an Ed Tech assigned to her on a full-time, one-on-one basis; she would be with the regular education xx grade class for recess, lunch and specials activities such as music, art and gym for the remaining 6 hours of the school week. Her Ed Tech would travel with her to the regular education classroom. The parents did not consent to this placement at the IEP team meeting. On October 29, at a meeting convened by a Maine Department of

Health and Human Services case manager and attended by the parents and school staff, the parents gave, for the first time, their consent for the student to receive special education and related services.

The student began to attend xx grade on November 3rd. Initially, she did relatively well in the self-contained classroom; she seemed interested in much of her program and did not display as much of the non-compliant and aggressive behavior as in prior years. After the Thanksgiving vacation, she became less compliant, less engaged and more aggressive. Her behavior continued to deteriorate through December at which time the school began to track and record her behavioral incidents by type, frequency and duration. The type of behaviors tracked included aggressive acts, bolting, dropping, tantrums, throwing things, whining, crying, kicking, nose picking, smearing bodily fluids on herself and others, hiding, biting and yelling. Those behaviors became much more frequent in January of 2009 when the student was observed to engage in aggressive behavior, for example, on between 15 and 20 separate occasions in a single day, including instances of biting, spitting, hitting, kicking and head butting. The Maine Department of Health and Human Services reopened activity with the family and placed the student in foster care for a brief time in late January. An IEP team met on February 2; the team shortened the student's school day to a 9:30 – 1:00 schedule, modified this shortened day to soften the academic demands and to include more preferred activities, and discussed the possibility that the student would need a more restrictive placement unless she learned to control her physically aggressive and non-compliant behavior.

On March 26, the IEP team met to review a report prepared by Dr. Christine Fink who had visited the school earlier in March to do an in-school observation and follow-up psychological evaluation of the student. Dr. Fink concluded that notwithstanding the many measures taken by the school – a shortened school day, a 1-1 Ed Tech in the context of a self-contained classroom with other highly skilled educators, a positive behavior plan and token system all consistently implemented – the student had made no gains between August 2008 and March 2009 toward controlling her behavior and that her volatile behavioral

and emotional status has adversely effected her ability to learn. Consequently, the gap between the student's skills, on one hand, and age and grade expectations on the other, has continued to widen. Dr. Fink joined in the conclusion of other team members that the student needs a more intensive set of services from a Day Treatment Program such as the Old Town Special Education Program. Dr. Rogers, who evaluated the student in January 2007 and had seen the student in his role as a consultant to the special education program at Asa Adams, concluded that the student had made "no progress" since he evaluated her in January of 2007 toward controlling her behavior and further concluded that he "can't see her making any academic progress at Asa Adams – she needs to get her behavioral issues under control before she can even attempt the academic part of her program." This conclusion was also supported by Laura Better, the student's special education teacher who did an observation on March 10 after which she concluded that the student "is not able to do any independent work...[her] behaviors are so severe that they are interfering with her ability to access any form of curriculum on a consistent basis." (SE 45-49, SE 71-72, SE 83-84, SE 103-126, SE 553-599, SE; Testimony of Brady, Better, Rogers, Fink)

4. Dr. Tim Rogers received a Ph. D. in Psychology in 1983 and has been practicing in Maine since 1986. He is currently the president of Eastern Maine Counseling and Testing Services, located in Bangor, Maine. He has served as a consulting psychologist and /or evaluator for more than twenty Maine school units, supervised a program that provides in-home services to autistic children and their families and also does consultation and evaluation for private clients. He is a consultant for the Old Town Regional Special Education Program, the proposed placement at issue in this matter. He also has an on-going contract with the Orono School Department, evaluated the student about halfway through her xx year and also observed the student in school during xx and xx grade in his capacity as consultant to Asa Adam's special education program. Dr. Rogers initially conducted a full cognitive and behavioral evaluation in 12/06 and 1/07. The Full Scale IQ, as measured on the Stanford Binet Intelligence Scales, Fifth Edition is

derived from the results of all the tasks on which the student was evaluated and provides a “summary of current general level of intellectual...and has been found to be the most effective predictor of long-term educational attainment, school based achievement and vocational advancement...” (SE 429-430) The student’s Full Scale IQ was 72, placing her in the 3rd percentile and within the Borderline range. The student also displayed behavioral characteristics associated with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, high levels of emotional reactivity, mood changes and disruptive behaviors. He offered a diagnosis of Pervasive Developmental Disorder NOS with significant cognitive impairments and a likelihood of Asperger’s Syndrome. Given this, the student requires intensive special education programming in a small group setting for most of her school day with the goal of attaining compliance being more urgent than making strong academic gains.

Dr. Rogers frequently consulted with the Asa Adams special education staff, has talked to her teachers over the course of the student’s time there and has reviewed the data collected by the school regarding her behavioral and academic performance. He has observed her in class and was involved in interventions involving the student. He knows the student, the school and the program the school has set up for the student. Although the student is in a highly structured, high-energy program at Asa Adams, Dr. Rogers concluded that the program there was simply not working for the student. He found that she had made “no progress” toward controlling her behavior since he first evaluated her in xx more than two years ago and concluded that the student would not learn anything – would not even be able to access her academic curriculum – until her behavioral issues were under control. Given the demonstrated failure of the program at Asa Adams, the student required a higher, more intensive level of services such as those offered at a day treatment program. The services should include on-site full time mental health staff of various levels of certification trained to respond to behavioral crises in real time, as well [sic] as more children similar to the student so that social skills can more easily be learned and group work can be effective. The program should be focused upon helping the student learn how to direct and

control her behavior; when sufficient progress toward that goal is reached, the student could return to Asa Adams and be able to access the curriculum there. (SE 426-434; Testimony of Rogers)

5. Dr. Christine Fink received a Ph. D. in Clinical Psychology in 1999. She is a licensed psychologist and has worked in private practice in Maine for the last 13 years. She is a contract consultant with the Orono School Department and was selected by the student's parents to evaluate the student. The evaluation took place in August of 2008 and Dr. Fink issued her report on September 5, 2008. Dr. Fink's conclusions were consistent with those reached by Dr. Rogers in his January 2007 evaluation: she recognized that the student presented both cognitive deficits and behavioral challenges, diagnosed her as having ADHD and PDD NOS, noted a potential risk for an emerging learning disability and expressed a concern about a lack of development of the student's executive function. At the March 26 IEP team meeting, Dr. Fink agreed with the recommendation that the student be placed at the OTR because her data indicated that the student was not making any progress in the Asa Adams program and, consequently, the gap between the student and her peers was getting wider behaviorally, academically and socially. Dr. Fink agreed with the recommendations of Dr. Rogers and the March 26, 2009, IEP team that to benefit from her education the student needed to receive her special education services in a more intensive, structured, and therapeutic environment available in a specialized day treatment program. Dr. Fink supported the student's placement at OTR. (SE 45-49, SE 137-156; Testimony of Fink)

6. Karen Boyce is the director of the Sylvan Learning Center in Bangor, an organization aimed at providing supplemental education to children from pre-k through high school. Sylvan has about 25 students currently. Ms. Boyce worked with the student on her reading one hour a day for three days a week at first; later, the student came four days a week. While the student displayed significant resistance to the reading instruction initially, displaying such behaviors as

whining, stomping feet and being both demanding and defiant, her behavior and attitude improved after Ms. Boyce set up a structured behavior modification program using tokens as a reward for good behavior. The student became increasingly interested in her work and her behavior improved significantly at Sylvan. Most of the time, Ms. Boyce worked with the student one-on-one with her at a desk with no other students in the room. Ms. Boyce remains willing to discuss her methods with teachers in the public schools though, in her experience, the Sylvan methods are not always successful there because “they have 20 students in the room, not just 1.” Ms. Boyce did not go to the Asa Adams to work with or observe the student there. (PE 5, pps. 16-24; Testimony of Boyce)

7. Jonathan Bowen is a licensed certified professional counselor (LCPC) who holds a Master’s Degree and is working on a Ph.D. in Educational Counseling at the University of Maine. He is employed as a family counselor by Community Care of Bangor and provides in-home counseling service to families. He began to work with the student and her family in May of 2009. The primary goals of his work with the student involved the development of age appropriate verbal communication skills and age appropriate recognition for the physical boundaries of others. Mr. Bowen works with the family once a week for 2 1/2 – 3 hours, one hour of that time being 1-1 therapy with the student. Mr. Bowen talked to both the special education director and the student’s teacher at Asa Adams, he did not observe the student while in school. Mr. Bowen has worked with 20 or 25 students in the past year. About 8 or 10 of those, all of whom have behavioral issues, are still attending public schools; 2 of those students have behavioral issues more severe than the student. (PE 4, pps.9-15: Testimony of Bowen)
8. Elizabeth Lander has a Master’s of Social Work degree and has been a licensed certified social worker (LCSW) in Maine since 1993. She is a therapist with a private practice in individual and family therapy; she has considerable experience with children, aged 3 to 18, who carried a wide variety of diagnoses

including Asperger's Syndrome and other Autism Spectrum Syndrome, Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder and behavioral, bipolar and mood issues. Ms. Lander first met with the student on February 5, 2009 and has met weekly with her since that time. The student's parents engaged Ms. Lander to help the family with the transition of the student from a DHHS foster placement back into the family home. The family had a goal of keeping the student in the Asa Adams School and Ms. Lander's work toward that goal was focused on helping the student learn to manage her behavioral problems, physical boundary issues and social interaction issues. Ms. Lander has not attended any of the student's IEP team meetings. On May 14, 2009, Ms. Lander observed the student for one hour at school in a 1-1 setting and did not observe the student engaging in any violent, aggressive or disruptive behavior. The student did refuse, for about 6 minutes, to participate in a reading activity, then she returned to task when her teacher mentioned the reward she would get for finishing her work. Ms. Lander believes the student is capable of doing the work the school is asking her to do and supports continuing the placement in Asa Adams School. When asked by the family's attorney to assume that the school's reports of the student's behavior were true, Ms. Lander was asked if she would "still stand by" her placement recommendation. Ms. Lander said that she would have to reconsider her support for the Asa Adams placement, particularly if the student's behavior was aggressive in nature. In that case, the level of services would need to be much higher, maybe more than the school could provide. (PE 2, pps. 7-8;

9. Albert Adams, M.D., is the student's pediatrician. He has a general pediatric practice with a particular interest in developmental issues of children and adolescents. He received his medical degree in 1993 and completed a pediatric residency in 1997. He has significant experience treating children with ADHD, ODD, conduct disorders, anti-social behavior and ASD/Asperger's Syndrome. The student's first contact with Dr. Adams was on October 7, 2008. He attended the IEP team meeting of February 2, 2009; he wanted to serve as an advocate for the student, to inform the team of his perceptions of the student's

needs and to explain why she might not be able to stay in Asa Adams. He also discussed beginning a trial of medications for the student. Over the course of the spring of 2009, Dr. Adams prescribed first Abilify, added Zoloft and later a ADHD medication, with frequent modulations of dosage as the student's response to the medications required. Dr. Adams agrees with the diagnoses of Drs. Rogers and Fink that the student has ADHD and PDD, with perhaps some component of anxiety as well. He is familiar with the program offered at OTR and has several patients there; he called it a "great program...with good people trained in controlling hard to manage behavior...lots of 1 – 1 time...". Dr. Adams never observed the student behaving aggressively; he never observed the student while she was at Asa Adams. (PE 1-6); Testimony of Adams)

10. The student's mother and father testified at the hearing. After earlier denials, both came to accept that their daughter has significant issues, both behavioral and cognitive, and therefore needs special education and related services. Their acceptance of the student's needs came sometime in the fall of 2008, the student's xx grade year, after receiving the report of Dr. Fink, the psychologist whom the parents selected to evaluate their daughter. The parents are united in their support for the student and have been active in seeking ways outside of school to help her make progress. They have arranged for in-home family counseling services through Community Care, have engaged a private therapist for their daughter, have taken her to the Sylvan Learning Center for help with reading and have established an active and supportive relationship her pediatrician. Both parents believe that the student has made progress at Asa Adams and should continue to go to school there. Both disagree with the placement recommendation made by the IEP team in March. (Due Process Hearing Requests Form; Testimony of mother and father.)

DISCUSSION

A.

The student in this case has been determined to be eligible for special education services and is therefore entitled under federal and state law to receive a free appropriate public education in the least restrictive environment, 20 USC 1400 (d)(1)(A). That education should be “designed to meet their unique needs and prepare them for employment and independent living...”. *Id.* In the First Circuit, the standard used to determine the appropriateness of either the program or placement aspects of an IEP is whether the IEP is reasonably calculated to enable the student to receive meaningful educational benefit. *Rowley v. Board of Education*, 458 U.S. 176, 207 (1982). . It is clear that a school is not required to offer an IEP that provides “the highest level...[of services]...or even the level needed to maximize the child’s benefit.” *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). It is also clear that “parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan...” to an eligible student. *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me 1993). The educational benefit provided to the child must be demonstrable, meaningful and real, and not trivial or *de minimus* in nature. *Burlington v. Department of Education*, 736 F. 2nd 773,788 (1st Cir. 1984) . In order to carry out the purposes of the IDEA, the benefit provided to the child must be “a great deal more than a negligible benefit.” *Polk v. Central Susquehanna Intermediate Unit*, 853 F. 2d 171, 181-182 (3rd Cir. 1988). Finally, in this matter the burden of proof rests with the parents, as the party seeking relief. *Shaffer v. Weast*, 546 U.S. 49, 62 (2005).

The specific question to be answered in this case is whether the placement at the OTR to implement the IEP developed by the March 26, 2009 IEP team meeting is appropriate under the IDEA which requires, in part, that a student should be removed from the neighborhood school only when “the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 USC 1412(a)(5)(A); 34 CFR 300.114(a)(2)(ii). However, the First Circuit Court of Appeals has stated that the “mainstreaming” preference “must be weighed in concert with the Act’s mandate for educational improvement.” *Roland M.*, 910 F. 2d 883 (1st Cir. 1990) . Thus, when determining the appropriateness of an educational placement, the balance between educational benefit and least restrictive environment is always critical.

This balancing requirement means that an eligible student should be educated in the least restrictive environment in which she can receive an appropriate education. Courts and state special education due process hearing officers have followed this principle, particularly in instances where the student is faced with challenges that can best be addressed in a relative intense, service-rich environment where well-coordinated services can be provided to the student.³ Maine hearing officers have found more restrictive placements appropriate when less restrictive placements have failed, or seem likely to fail, to provide an eligible student with sufficient educational benefit to pass muster under the standards set forth above. In a Maine due process decision involving a factual situation strikingly similar to the instant case, the family was seeking placement in the local school and asking the school to create a new program specifically for their child while the school offered a placement in an already existing day treatment program. The hearing officer found the day-treatment program appropriate, though more restrictive, stating, in part, that

...the capacity of the district to create new program to meet the agreed upon needs of this student is limited...the district has a shared guidance counselor...and a behaviorist on contract two days/month...space for another classroom is not currently available...specialized positions are difficult to fill in the district. If the student is to receive meaningful benefit it will no be in a cobbled-together program in the [local school]

The law and the courts have made clear that placement in a location other than the school the student would normally attend may be required when “the nature or severity of the disability” is such that education in the student’s neighborhood school cannot be satisfactorily achieved. MSER 11.2(C)

MSAD No. 37, 43 IDELR 133 (SEA ME 04.141, Lenna, 12/10/04). The hearing officer went on to point out that neither state nor federal special education law requires local

³ See, e.g. *Abrahamson v. Hirschman*, 701 F. 2d 223 (1st Cir. 1983), where the court found in favor of a “suitably staffed and structured residential environment” sought by the family over a day-treatment program offered by the school.

schools to “duplicate highly specialized education programs at the student’s base school.”⁴

B.

The single issue to be resolved here is whether the student’s placement at the Old Town Regional Program (OTR) set forth in her IEP developed in March of 2009 is reasonably calculated to provide her with educational benefit in the least restrictive environment (LRE). Her parents argue that federal and state special education law, both of which refer to LRE, require that she be educated in Asa Adams unless the school can show that she requires a more restrictive placement such as OTR and further argue that the school has failed to do so. Therefore, they assert, the student should return to Asa Adams next September to begin her xx grade year and receive the services set forth in the IEP in her neighborhood school. The school, while accepting its obligation under the IDEA to comply with the LRE standard, asserts that it has done so in proposing OTR as the placement in which the student receives the special education services described in her current IEP. The school contends OTR is the LRE for the student because her behavioral issues during her time at Asa Adams interfered so profoundly with her education that the student was not able to receive the “meaningful educational benefit” required by the IDEA. The school asserts that the student’s behavioral and attitudinal issues must be resolved, or at least progress toward resolution must be made, before the student will be able to receive educational benefit from the services in her IEP. The school further argues that it has made a serious, consistent and energetic effort to help the student learn to modify her behavior in school – she is in a self-contained classroom with 2 or 3 other students for most of her shortened school day, with a full-time one-on-one aide assigned to her as well as a special education teacher who spent about 80% of her

⁴ See, MSAD No. 22, 43 IDELR 259 (SEA Me No. 04.165, 7/24/05), a special education due process hearing decision in which the hearing officer found an out-of state private residential placemen [sic] offered by the school appropriate over the family’s request for placement in a nearby public day program. This decision was based upon the complexity and severity of the student’s disabilities and the hearing officer’s finding that the residential placement at least offered the student an opportunity to receive meaningful educational benefit.

day with the student - but that effort has not been successful. The school asserts that the student's behavior at school has become more problematic, not less, over the years; she remains uncooperative, at times aggressive and inappropriate, inattentive, prone to tantrums and bolting, and is generally unwilling or unable to participate in most of her academic program. The school contends that, given her lack of progress at school, the student is not receiving educational benefit that is meaningful or demonstrable and, therefore, that Asa Adams Elementary School is not an appropriate placement for her. The school's position is that the student requires the more intensive, more structured, service-rich environment offered by OTR in order for her to learn to regulate her behavior so that she can access her academic curriculum.

After considering the evidence produced at the hearing, the arguments of the parties and the relevant law, the hearing officer concludes that the decision of the March 26, 2009 IEP team to place the student at the Old Town Regional Special Education Program is consistent with the mandate expressed in both federal and state special education law that every special education student receive a free appropriate public education in the least restrictive environment.

C.

The IEP team proposed to place the student in the OTR, a publicly funded day treatment program for special education students, for school year 2009-2010, having concluded that she required this more restrictive service-rich placement to make progress toward accomplishing the goals of her IEP, something she had not been able to do in the program at Asa Adams. Her parents have challenged that placement on the grounds that it is not the least restrictive environment in which the student can be educated; they urge the hearing officer to find the placement inconsistent with the FAPE /LRE guarantee set forth in the IDEA and to order her return to her neighborhood school for her xx grade year. State and federal special education laws provide that every eligible student receive a free appropriate public education in the least restrictive educational environment. That statutory guarantee has been interpreted to mean that every special education student is entitled to a program that is reasonably calculated to enable her to receive meaningful

educational benefit. The hearing officer concludes that the student did not receive such meaningful educational benefit in the program at the Asa Adams Elementary School and, therefore, that her placement at OTRP does not violate the LRE requirement of the IDEA.

The overwhelming weight of the evidence produced in this hearing supports conclusion that during her time at Asa Adams the student had not made any significant progress toward learning how to control her behavior in school to a degree that would allow her to benefit from her curriculum.⁵ While her behavior at school was challenging from her earliest days in xx, it became even more challenging and difficult as the years went by. In xx, her behavior was noted as follows:

11/27 – 1/30/06 – non-compliance/each day-average 3 – returned with counting; 12/1/06 – running away – returned with counting – ran away 3 times; 1/3/07 – 8 min screaming in room – left to go to RR – physically fell on floor screaming I want to go home; 1/3/07 – wouldn't share with other children – would not go to office – cried profusely for 20 minutes – back to classroom, within 10 minutes she ws under table and refused to come out,,,{in office] crawled around on floor and repeatedly tried to push her way out the door....

From 12/15/06 through 1/23/07, the student was dismissed early or suspended from xx 12 times. At an IEP team meeting on 1/23/07, the team recommended placing the student in a self-contained classroom where she would receive her special education services⁶. Her parents refused to consent to that placement and did not return the student to school for the rest of the xx.

⁵ Indeed, there is no persuasive evidence to the contrary. The family's witnesses – Boyce, Lander, Bowen, Adams, her parents – described their experiences with the student in a way that described a child very different than the one described by the school's witnesses. However, the family's paid professional witnesses encountered the student in one-on-one situations for short periods of time in out-of-school settings with no other students present. Consequently, the opinions offered by these witnesses as to the likelihood that the student's could learn in the school setting was not persuasive. Her parents did spend some time with the student at school; their testimony was more heartfelt and hopeful than factually significant.

⁶ At that meeting, IEP team reviewed an evaluation report prepared by Dr. Tim Rogers, He diagnosed the student as having PDD NOS and ADHD/ODD. Her Stanford Binet Full Scale IQ was 72, placing her in the 3rd percentile and within the Borderline range. Dr. Rogers recommended a self-contained classroom as a placement for the student.

When the student entered xx grade in September of 2007, she was again placed in the regular education classroom at the request of her parents. As in xx, her behavior continued to interfere with her education. The student engaged in repeated instances of noncompliance and attempts to escape, both behaviors aimed at avoiding, or “not doing”, her school work. In xx grade, she began to display physical aggression toward other students such as pushing and kicking. In October of 2007, she was suspended from school for three days for, “unsafe and uncooperative behavior...not being safe to herself and others, not cooperating with requests from staff, hitting students, throwing objects (books and a chair...)...leaving the classroom without permission and attempting to flee the school building...” Her behavior became increasingly inappropriate, physical and aggressive, with instances of intentional touching and patting of her teacher’s breasts and buttocks, crawling between her teacher’s legs after being told not to, sitting at other students and picking her nose then rubbing the resulting mucus or blood on herself and others. Her resistant behavior made it difficult to make progress toward acquiring academic skills; on a reading assessment given to all xx graders, she performed at a xx level and received the lowest score of any xx grader not identified as eligible for special education. The student was suspended from xx grade from 3/18-19 because of another episode of non-compliant and disruptive behavior in the classroom. She returned to school on 3/20 and, during that day, did a “dead drop” onto a classmate that injured the other child’s wrist. She was again suspended, with her return to school dependent on the school working out an agreement with her parents on how to deal with her increasingly problematic behavioral issues. The parents never returned the student to her xx grade classroom.

The student did not enroll in xx grade until November 3, 2008 because her parents would not consent to her placement in the self-contained placement recommended by the school.⁷ In late October 2008, more than two years after the school first referred the

⁷ In May of 2008, the parents had given consent for the student to be evaluated. Dr. Christine Fink did a neuropsychological evaluation and prepared a report that the school received in September. Her report essentially confirmed Dr. Rogers 2007 evaluation. Dr. Fink found the student to be significantly below grade standard in all academic skill areas tested, found her social skills to be in the 7th percentile and her behavioral skills to be in the 1st percentile. After reviewing the Fink report, the IEP team again determined the

student to the IEP team, at a meeting of the student's parents with family case workers from the Maine Department of Health and Human services and school staff, the parents consented to the placement of their daughter in the self-contained composite classroom at Asa Adams. Initially, the student did relatively well in that setting; she appeared interested in much of her program and did not display as much the non-compliant and disruptive behavior as in earlier years, But by late November, her behavior had begun to deteriorate and she became less compliant, less engaged with her program and more aggressive. In December, the school began to track and record the student's behavioral incidents by type, frequency and duration; the types of behavior tracked included aggressive acts such as throwing things, hitting, pushing, kicking, biting, and head butting, as well as bolting, dropping, tantrums, whining, hiding, nose picking, and "finger-painting" herself and others with bodily fluids such as mucus and blood. These behaviors became more frequent in January 2009, when on some days the student engaged in aggressive acts between 15 and 20 times.⁸

In response to the escalation of the student's behavior, an IEP team met in early February; the team shortened the student's school day to a 9:30 – 1:00 schedule, modified the content of the shorter day to ease the academic demands and increase her preferred activities in an attempt to lessen stress, and began to discuss the possibility that she might need a more restrictive placement unless she could learn to control her physically aggressive and non-compliant behavior.

The modifications of the school day did not have a significant effect on the student's behavior and on March 26, the IEP team met again. Dr. Fink, who had

student to be eligible for special education and recommended she be educated in the self-contained classroom at Asa Adams. Her parents again refused to give their consent.

⁸ Due to domestic problems in the family home, the Maine Department of Health and Human Services reopened activity with the family and placed the student in foster care for a brief time in late January. The student continued to attend the Asa Adams school when she was in foster care; she was returned to her family home and has been there since. The family argues that this domestic turmoil, now resolved, was the cause of the student's aggressive and disruptive behavior in January 2008. The hearing officer rejects this contention; the student has engaged in disruptive behavior in school since xx. While her domestic situation must have been stressful for her and may have added to the frequency and intensity of her behavioral incidents in January, it cannot be considered as the source of her problematic behavior.

evaluated the student in the summer of 2008, told the team that in her March 24 observation of the student she did not see any progress toward reducing non-compliant behaviors but did notice both a regression of functional skills (bladder control) and increased escape behaviors like nose picking and smearing of blood. Dr. Fink recommended a “more intensive program to keep [her] safe...while her behavioral issues are addressed.” Dr. Fink agreed that the student should receive “more intensive Day Treatment Program Services such as those provided through the Old Town Regional Program.” Dr. Rogers had already told the team that he had not seen any progress, academic or behavioral, made by the student since his January 2007 evaluation, that she would not be able to do any productive academic work until her behavioral issues were dealt with and she needed a more intensive program to enable her to obtain some degree of control of her behavior. He recommended OTR as good place for the student to gain those skills. The hearing officer finds his testimony credible and persuasive not only because of his long experience with school children with disabilities similar to this student but also because of his contact with the student over a long period of time. His professional opinion is particularly useful regarding the kind and amount of progress the student may have made during her time at Asa Adams. Laura Betters, the student’s special education teacher, did a formal observation of her on March 10, after which she concluded that the student, “is not able to do any independent work...her behaviors are so severe that they are interfering with her ability to access any form of curriculum on a consistent basis.” In short, every professional member of the March 26 IEP team who was familiar with the student and her behavior within the school setting agreed that she had failed to obtain meaningful benefit behaviorally, academically or socially, since entering Asa Adams in the fall of 2006. There was also agreement that the student’s behavioral issues had to be dealt with before academic progress could even be attempted and the student needed a more intensive service-rich program to help her deal successfully with her behavioral problems.

The hearing officer finds that the March 26, 2009 IEP team’s conclusions were supported overwhelmingly by the evidence available to it. The program at Asa Adams had demonstrably failed to provide the student with any meaningful educational benefit. Indeed, not only did she fail to make sufficient progress since entering xx, her behavior

WITNESS LIST

FAMILY:

Sharon Brady	MS, Director of Special Education, Orono School Department.
Karen Boyce	BS, Director, Sylvan Learning Center, Bangor, Maine.
Jon Bowen	MS, Family Counselor, Community Care, Bangor, Maine.
Elizabeth Lander	LCSW, Brewer, Maine. Student's therapist.
Albert Adams	MD, Brewer, Maine. Student's pediatrician.
	Student's mother.
	Student's father.

SCHOOL:

Tim Rogers	Ph.D, Licensed Psychologist, Eastern Maine Counseling and Testing Services.
Christine Fink	Ph.D, Licensed Psychologist, Neuropsychological Services, Bangor, Maine.
Sharon Brady	MS, Director of Special Education, Orono School Department.
Paula McHugh	MS, Principal, Asa Adams Elementary School.
Laura Betters	BS, Special Education Teacher, Asa Adams Elementary School.
Renee Perron	MSSW, Program Coordinator, Old Town Regional Program

DOCUMENTS

FAMILY

Parent's Exhibits: PE-1 through PE-5, consisting of 24 pages numbered consecutively, admitted without objection.

SCHOOL

School Exhibits: SE1 through SE-181, consisting of 600 pages numbered consecutively, admitted without objection.