

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

**October 31, 2017**

**17.052H— Parents v. Falmouth School Department**

**REPRESENTING THE PARENTS:        Richard O’Meara, Esq.**

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

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

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This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on September 18, 19, 21 & 25, 2017 at the offices of the Drummond Woodsum in Portland, ME. Those present for the entire proceeding were the Mother, the Father, Attorney O’Meara, Beatrice Adams, an intern at Murray, Plumb & Murray, Gene Kucinkas, director of special services, Attorney Herlan, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Lori Coffin	Speech Language Pathologist, Literacy Specialist
Barbara Melnick	Director of Aucocisco School
Lisa Murphy	Faculty at Aucocisco School
Karen Dunn	Special Education Teacher, Falmouth School Department
Elizabeth Westra	Classroom Teacher, Falmouth School Department
Lesley Fitzgerald	Behavior Strategist, Falmouth School Department
Emily Klaczynsky	School Psychologist, Falmouth School Department
Gene Kucinkas	Director of Special Services

All testimony was taken under oath.

**I.        PROCEDURAL BACKGROUND:**

On March 3, 2017, the Parents filed this hearing request on behalf of their son (“Student”). On May 9, 2017, a prehearing conference was held at the offices of Drummond Woodsum in Portland, Maine. Participating in the conference were: the Parents; Richard

O'Meara, Esq., counsel to the Parents and Student; Eric Herlan, Esq., counsel to the Falmouth School Department ("District" or "Falmouth"); Gene Kucinkas, director of special services; and Shari Broder, hearing officer. Counsel for the parties agreed to a postponement of the hearing until September. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 79 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1700 pages of exhibits (herein referenced as S, SA, SB, and SC-#).

As noted above, the hearing took place over the course of four days. Both parties requested to keep the hearing record open until October 13, 2017 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 49-page closing argument and the Parents submitted a 53-page closing argument. The record closed upon receipt of these documents on October 13, 2017. The parties further agreed that the hearing officer's decision would be due on October 31, 2017.

The parties agreed that claims shall extend back no further than October 24, 2014, two years prior to the initial filing date of this due process hearing request. The parties have also agreed to toll the statute of limitations in October of 2016 to allow time for testing of the Student by an independent evaluator. [S-414]

## **II. ISSUES:**

1. Did the Student's Individualized Education Program ("IEP") as developed and implemented for the 2014-2015 school year provide him with a free, appropriate public education ("FAPE") in the least restrictive environment from October 2014 forward?
2. Did the Student's IEP as developed and implemented for the 2015-2016 school year provide him with a free, appropriate public education in the least restrictive environment?
3. Was the District's proposed IEP and placement for the 2016-17 school year reasonably calculated to provide a free, appropriate public education to the Student in the least restrictive environment?
4. If the hearing officer concludes that the District did not provide or offer the Student FAPE during any of the periods in question, is the Student entitled to compensatory

education or other remedies, which may include reimbursement for the costs associated with his placement at or services provided by the Aucocisco School?

These issues are addressed below.

### III FINDINGS OF FACT

1. The Student is [REDACTED] years old (DOB: [REDACTED]), and lives with his Parents and [REDACTED] [REDACTED] in [REDACTED], Maine. He is currently eligible for special education and related services under the category of multiple disabilities, comprised of a Specific Learning Disability and Other Health Impairment based upon Attention Deficit Hyperactivity Disorder (“ADHD”).
2. The Student started school in [REDACTED], where he had difficulty learning to read. Initially, the [REDACTED] School where he was a student developed a “personal literacy plan” for him. [S-1] That plan noted “vast regression over summer” between [REDACTED] and [REDACTED] grade and stated that the Student “will receive ESY<sup>1</sup> services to off-set summer regression. He is reading a year below grade level.” [S-3-4]
3. When the Student was in [REDACTED] grade (2012-2013), due to his parents’ concerns about his academic struggles and the school’s response, they arranged for him to have an educational evaluation with the Center for Learning and Psychological Services. [S-15] This included a neuropsychological evaluation. On these tests, the Student scored in the average range on phonological awareness and phonological memory, but in the low average range on rapid naming. His overall reading on the Wechsler Individual Achievement Test (WIAT-II) was in the low average range. [S-17] The neuropsychological evaluation included the administration of the Wechsler Intelligence Scales for Children (WISC-IV), on which the Student obtained a full-scale IQ of 100, squarely in the average range. [S-21] His processing speed, however,

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<sup>1</sup> Extended School Year services

was in the borderline range. [S-23] Dr. Brown, who administered the neuropsychological examination, diagnosed the Student with Anxiety Disorder, NOS, Trichotillomania (hair pulling), ADHD, NOS Mild, and Learning Disabilities, NOS, in reading, written language and mathematics. [S-32]

4. On March 7, 2013, a reading recovery report stated that the Student began receiving services on the first day of the 2012 school year. Over the summer, he had regressed from a Developmental Reading Assessment (“DRA”) reading level 10 (BAS<sup>2</sup> Level F) in June to a Level 5 (BAS Level D) on the DRA, but that he “made steady progress. . . up to Level J, which is considered beginning second grade level.” [P-1] The Parents, however, did not think this program made any appreciable difference. [Testimony of Father] The Student’s strengths were listed as a well-developed oral vocabulary and that he expressed himself well. The Student’s challenges were with “reversible words, transpositions and inversions,” and that when there was any kind of “cognitive pressure,” he “cannot control for letter or word reversals . . . . When composing there are too many demands on [the Student’s] working memory. Written sight words previously known may be forgotten and spelled as it sounds rather than how it looks.” [P-1-2] The report also noted the Student’s frustration when other children are far ahead of him and he was trying so hard to catch up, and that his anxiety manifested in pulling out his hair.
5. At an IEP Team meeting in late May of 2013, the school found the Student eligible for special education as a student with a specific learning disability (“SLD”) in basic reading and reading fluency. [S-49] The team meeting minutes note that the Student “has a neurological-based reading disorder/disability that significantly impacts his education,’ and that “ESY

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<sup>2</sup> Benchmark Assessment System by Fountas and Pinnell is a measure of a student’s reading level.

(Extended School Year) is being recommended to maintain skills.” [S-49] At that time, the Student’s present level of reading performance was at DRA Level 18, BAS Level J. [S-61]

This would be a late ■■■ grade or early ■■■ grade level. [S-99]

6. The Parents did not think their daughters were being sufficiently challenged in school and that the Student’s needs weren’t being met, so they began searching for other public school systems that seemed better. [Testimony of Father] In November of 2013, during the Student’s ■■■ grade year, the Student and his family moved to Falmouth, Maine. One of the reasons the Parents chose Falmouth was because they were impressed with the services available in the public schools there. [Testimony of Father]
7. Falmouth convened the Student’s first IEP team meeting on November 19, 2013. The Student’s specially designed instruction contained 45 minutes per day in language arts and 30 minutes, three times per week in mathematics. One of his instructional goals was to increase his overall reading skills by one year from approximately an end of ■■■ grade level to an end of ■■■ grade level by November of 2014. [S-105] Karen Dunn was the Student’s case manager and special education teacher. [Testimony of K. Dunn] Ms. Dunn has Highly Qualified Teacher status, and a Master’s degree in educational leadership with a focus on educational literacy. She has taught for 28 years in the Falmouth schools, primarily working with learning disabled students. She had Wilson reading training and certification in 1996, training in the SPIRE reading program, in Everyday Math, and ongoing professional development. [Testimony of K. Dunn, S-A-23-37]
8. Ms. Dunn instructed the Student using the Wilson Reading program, a systematic and structured 12-step reading program. She began working with the Student at Level 1. Ms. Dunn saw the Student as very positive and eager to learn. He was upbeat, curious about learning, and did not complain or show frustrations with his challenges. He had a good

vocabulary and great penmanship. [Testimony of K. Dunn] His challenges were his “real weakness in orthographic processing” but had reasonable phonemic awareness skills. Ms. Dunn noticed that the Student might recognize a word in one sentence and come across the same word two lines later, and not recognize it. Ms. Dunn also found the Student to be highly distractible, and had a weakness in executive functioning. In her view, this was a large part of his struggles. She used more technology with him because it kept his attention. [Testimony of K. Dunn]

9. The Parents read at home with the Student on a nightly basis. [Testimony of Father]
10. In March of 2014, the IEP was amended without a meeting to add two-hours of twice weekly ESY programming for the summer of 2014, because the IEP team was concerned that the Student regressed over summer vacation, and as his skills were already weak, it would be detrimental to his progress to not receive these services. [Testimony of K. Dunn, S-109-110] The Parents declined that service because they viewed school as a very unpleasant experience for the Student, and he was pulling out his hair, so they wanted to give him a meaningful break. The Parents thought it was more important for the Student to go to Rhode Island for the summer to be with his family, be involved in a sailing program and enjoy the season. They also did not think it would make much difference, as the Student made so little progress during the school year. [Testimony of Mother, Father]
11. In June of 2014, Ms. Dunn reported that the Student’s goal of increasing his overall reading skills by one year from approximately the end of [REDACTED] grade to the end of [REDACTED] grade level by November of 2014 was likely based upon false information. [Testimony of K. Dunn, S-133] At that time, the Student tested at a Level J on the BAS, which is what his [REDACTED] school reported was his level a year earlier. When Ms. Dunn began working with the Student in November, he could not read BAS Level J books. She reported that the Student has

definitely made progress, but this assessment did not reveal it. [*Id.*] The Parents also noticed some improvement, but thought it was obvious that the Student was still having a lot of difficulty and was frustrated. [Testimony of Father] They wanted to give Falmouth a fair chance and give the program some time, and believed that Falmouth had the Student's best interests at heart. [Testimony of Mother]

12. When the Student began [REDACTED] grade (2014-2015) at Falmouth [REDACTED] School, Jen Merrifield was his classroom teacher and Ms. Dunn was his special education teacher.
13. The IEP team held its annual meeting on November 14, 2014 to review the Student's program. At that point, the Student was at BAS instructional level K. His NWEA scores placed him in the 6<sup>th</sup> percentile for reading. Although the IEP team noted that he had made progress on his IEP goals, "it has been somewhat less than anticipated given the level of services he has been receiving." [S-135] The Written Notice explained that the Student's understanding of math computation concepts was stronger than what he can perform consistently in the classroom, and that he required multiple repetitions to master new skills. After learning new information, he struggled with recalling it. The Written Notice also reported that his "performance in a smaller setting where a consistent structure is provided is better than that of the whole classroom setting. [The Student] knows all the phoneme sounds in isolation, but he has a great deal of difficulty breaking down words into chunks and applying his decoding strategies." [S-135] It noted that he required a lot of teacher support and guidance to work toward his IEP goals, especially in writing, and that his distractibility and impulsivity significantly impacted his educational performance. [S-135] Mrs. Merrifield added that the Student was like her son, and that he needed medication to be successful. [Testimony of Mother] The Parents talked to the Student's pediatrician, and elected against it, as they did not feel the Student's behavior was the main issue. They believed that the

Student did not learn the same way as other kids, and that if he were properly taught, the behavior issues would take care of themselves. [Testimony of Father] At this meeting, the team developed an IEP with goals in math, writing, spelling and reading. [S-140-142] Ms. Dunn recommended that the Student's goal for reading skills would be for a nine-month increase in his reading level because he was more likely to reach that goal. She thought this was more realistic, although it would result in him falling further behind his mainstream peers in his reading skills. [Testimony of K. Dunn, S-141] The team increased the Student's math services from 1 ½ to 2 ½ hours per week, and his weekly language arts direct instruction from 3 1/2 to five hours. [S-146] The IEP also included ESY of 2 hours twice each week for the summer of 2015.

**14.** The Parents were concerned about the Student socially, as he did not appear to be making friends. His older [REDACTED], on the other hand, integrated into the Falmouth schools quickly and were challenged academically. [Testimony of Father] The Student reported feeling like an outcast because of his learning issues, and that other kids would do things like break down his snow forts, and would tell him he was a bad runner or make fun of his shoes at cross country. [Testimony of Mother] The Student also did not have after school playdates and was not invited to birthday parties. [Testimony of Father]

**15.** The Parents were also concerned that the Student was not making any meaningful academic progress. Consequently, at the end of fourth grade, they spoke with the school principal, John Flaherty. The Parents wanted the Student to have a different special education teacher because they thought that whatever Ms. Dunn was doing was not working, and that the Student might respond better to a male teacher. The Principal responded that the Student's classroom teacher for [REDACTED] grade, Beth Westra, was excellent. Ms. Dunn asked to continue working with the Student, as she felt they had a good rapport and starting with someone new



would be detrimental. [Testimony of Mother, Father] The Parents agreed to the school's assignment, but requested that Ms. Dunn and Ms. Westra provide weekly communications concerning the Students assignments and progress.

16. During [REDACTED] grade, the Student did not accomplish his IEP goal in reading. He was falling further behind, and would begin [REDACTED] grade reading at a mid-second grade level. [S-197]
17. The Student did not access the ESY services provided in the IEP during the summer of 2015.
18. Ms. Westra, the Student's [REDACTED] grade (2015-16) classroom teacher, has a Master's degree in literacy and 19 years of teaching experience. She spoke with Ms. Dunn after school every Monday about the Student, and communicated daily with her in some form. Ms. Westra thought the Student was very hand-on, always listened closely and understood things verbally. He had a real interest in science and seemed to understand it well. The Student was well-mannered, very personable and good with adults. To Ms. Westra, he appeared happy at school and enjoyed being with the other students. Although she noticed that he had issues with attention, the Student was never disruptive in class. Ms. Westra had to refocus a lot of students and he did not stand out in this respect. Refocusing the Student was not as necessary when he was working on hands-on projects. Although the Student had Unified Arts daily for an hour, on two of those days, half of the hour was when he would have had Spanish. Instead of Spanish, the Student worked with Ms. Dunn on math. [Testimony of K. Dunn] He worked with Ms. Dunn three times a week for writing, and stayed in Ms. Westra's class for writing on the other two days. [*Id.*] Writing was also very challenging for him.
19. A few weeks into the Student's [REDACTED] grade year, the Mother received an email from Ms. Dunn recommending that the District's behavior strategist, Lesley Fitzgerald, observe the Student in class and make recommendations about how to help him be more successful. [Testimony of Mother, Father, P-5] Although the Parents initially wanted to wait, they

consented to the observation, which took place on October 19 & 22, and November 2, 2015. Ms. Fitzgerald observed the Student in Ms. Westra's classroom and at recess. Although she observed some attentional issues, the Student was not "off the charts," and she did not observe any red flags. [Testimony of L. Fitzgerald] When observing the Student using technology on an iPad, he was focused, on task, and able to maintain his attention longer. Although he made noises on occasion, he did not appear to do this for attention, and his classmates did not seem distracted by it. When he began his math lesson, he seemed to know what was going on, but as the problems got harder, he checked his neighbors' work and was not an active participant during the lesson. [Testimony of L. Fitzgerald, S-178-179] During recess, he was an active participant in a soccer game, and seemed to enjoy his time outside. Ms. Fitzgerald thought that the Student needed movement, and recommended scheduled movement breaks for regulation. She also recommended using intermittent technology as a reinforcement and providing as many lessons using technology as possible. [S-180]

**20.** The Parents also agreed to an increase in the Student's math services from 2 ½ to 3 hours per week, and from 5 to 6 hours of language arts instruction. [S-173-174] This was because the District thought the Student required more small group instruction to make progress. Given Ms. Dunn's concern about the Student's behavior in the classroom, the Mother questioned whether more pull-outs was a good idea if the Student needed to learn to behave in the classroom. She told Ms. Dunn that overall, the Student comes home from school very happy and enthusiastic. [P-10]

**21.** On November 12, 2015, the IEP team met for the Student's annual review. Ms. Dunn reported that the Student had passed BAS Level L on his reading, which was a mid-second grade level. The Student had made limited progress on his standardized reading growth goal, and on his structured reading goal, having met 80% of his reading progress, although the goal

was for 90%. Ms. Dunn added that the Student had difficulty demonstrating complete independence with his reading. Although his NWEA scores fell from the 10<sup>th</sup> percentile to the 2<sup>nd</sup> percentile<sup>3</sup>, Ms. Dunn thought he “appears to have made overall reading progress.” [S-185, 193] She again recommended an IEP goal of increasing reading skills by 9 months from a beginning [REDACTED] grade instructional level to an end [REDACTED] grade instructional level. [S-193] The Student met his spelling goal, but writing was a significant challenge for him, and he showed less than expected growth in math, despite having some strong math thinking skills. [S-186] The new IEP for [REDACTED] grade continued the services agreed upon the prior month, and included 30-minutes per week with Ms. Fitzgerald to build self-regulatory skills and strategies, and ESY services at the same level as previously offered. The team also agreed to move up the Student’s triennial evaluation, which was due in May. [S-185] At the meeting, the Parents talked about the Student’s successes in Falmouth, saying that he is much happier in the Falmouth schools that he was at any other point in his school career, that he liked school, was excited about some of the projects he had been working on, he enjoyed running cross-country, and that he was having more success in general. [S-186] Although the Student continued to pull his hair, he was doing that less frequently. While trying to focus on the positive, the Parents were concerned about a number of problems, such as the Student losing recess for inappropriate behavior, especially as Ms. Fitzgerald said he needed more movement, his continued difficulty with word endings and some short words, and they suspected that there was some bullying in the classroom. The Mother requested more frequent updates. [S-186] Additionally, given the Student’s slow progress, the Parents were very concerned about his ability to succeed in [REDACTED] school at a [REDACTED] grade reading level, and asked whether there was anything that could be done differently with respect to his

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<sup>3</sup> Score dropped from 181 in the spring to 174 in the fall.

reading instruction. [S-186, testimony of Father, Mother] [REDACTED] grade has more of a reading component, quite a bit more work, and the social studies program required a lot of reading and writing. [Testimony of E. Klaczynsky, L. Fitzgerald, G. Kucinkas] The Mother began speaking with other parents who had children with learning disabilities to see what she could learn. [Testimony of Mother]

**22.** Following this meeting, the IEP drafted stated that the Student's present level of academic performance was very inconsistent from one work product to another. He was not able to complete major writing assignments independently, and was reading at BAS Level L. Ms. Dunn wrote, "While he is successful in participating in group projects and group learning activities, he is not able to show that he is truly learning and retaining information for he is not able to perform successfully on written assignments and assessments related to learning. He requires small group instruction and close teacher guidance in order to show true progress." [S-197] Ms. Dunn continued to use primarily Wilson Reading with the Student as his systematic reading program, which she supplemented with computer-based Lexia, word lists, and SRA. [Testimony of K. Dunn]

**23.** By late November and December of [REDACTED] grade, the Student became more resistant to doing his homework, and acted frustrated about school when asked to do academic work. [Testimony of Mother] On December 4, Ms. Dunn told the Mother that the Student had a tough week, and that working in groups larger than two is difficult for the Student. [Testimony of Mother, P-12]

**24.** Soon after the IEP team meeting, a friend of the Parents who was working towards a Master's degree in special education recommended speaking with people at the Aucocisco School ("Aucocisco") in Cape Elizabeth about tutoring. Aucocisco is a private, special purpose school approved by the State of Maine that serves students who learn differently.

[Testimony of B. Melnick] Aucocisco attempts to help children with learning difficulties to “fill the gap” so students can catch up and access the general education curriculum. The school uses methodologies like the Lindamood-Bell reading system and Sharma math. [*Id.*] Because the Parents were very concerned about the Student’s lack of reading progress, the Mother contacted Aucocisco on November 18, hoping to find other methods of instruction that might work for the Student. [Testimony of Father, Mother]

**25.** The Mother had wanted an educator other than Ms. Dunn to do the Student’s academic testing. She thought it would be best to have an unbiased opinion, rather than someone who had been working with the Student so much. Before she could share these views with the District, Ms. Dunn had already begun the testing process, having administered the WIAT-III. [Testimony of Mother, P-13]

**26.** On January 30, 2016, the Student began math tutoring at Aucocisco with Ted Dalton, a teacher who was certified as a special education teacher and as a teaching principal in Maine. [S-C-79] Coming home from his first session, the Student excitedly told his mother that he thinks he “gets division.” [Testimony of Mother, B. Melnick] He had been trying to understand it since [REDACTED] grade, and remarked to his mother, “Gee, I thought I was so dumb.” The Mother was thrilled that the Student was feeling so successful. [Testimony of Mother, S-C-35] He was tutored in math for one hour each week for a total of nine sessions that winter and spring. [Testimony of Mother, B. Melnick, S-C-30]

**27.** Ms. Dunn issued a report of her academic evaluation in early February 2016. The Student’s scores on the WIAT-III were in the average range for listening comprehension, in the 66<sup>th</sup> percentile. That was his highest score on this administration of the WIAT. He also scored in the average range on Math Problem Solving, numerical operations, sentence composition, essay composition, and reading comprehension. His “below average” scores with their

percentiles are as follows: word reading (5), pseudoword decoding (13), oral reading fluency (3), spelling (5) and math fluency composite (5). The Student's scores on the Comprehensive Test of Phonological Processing (CTOPP) were average for phonological awareness, below average for phonological memory, and very poor, the 1<sup>st</sup> percentile, for rapid naming, which is directly related to fluency. [S-261-262, testimony of B. Melnick] Ms. Dunn noted, "This struggle of automatic, accurate retrieval of information is clearly reflected in his daily reading, spelling, and math skills." [S-264] She concluded that the Student's "deficit appears to be linked to challenges with rapid automatic naming/orthographic processing as well as some difficulties with distractibility, executive functioning and memory." [S-264] She then recommended continuing

direct instruction in word identification and spelling to include both a phonological/phonics piece with an increased focus on the visual/orthographic piece. This could include work in a systematic reading program as well as a systematic approach and strategies to increase visualization of words. [S-264-265]

Falmouth did not change the Student's reading program.

- 28.** Emily Klaczynsky, Falmouth's school psychologist, conducted a psychological evaluation, and issued a report dated February 5, 2016. Ms. Klaczynsky conducts around 60 such evaluations each year. She administered the WISC-V test of cognitive ability, and the Student's full-scale IQ was 88. [S-217] This was a 12-point decline from his previous cognitive testing in [REDACTED] grade, taking him from squarely in the average range to the low average range. His verbal comprehension index, however, was 106, in the 66<sup>th</sup> percentile, and he excelled when asked to verbally define words. Ms. Klaczynsky also administered the Test of Orthographic Competence to gain an understanding of the Student's ability to understand letters, spelling, punctuation and symbols related to writing. He performed within the Very Poor range overall, which showed that writing was an area of great concern. [S-219] Ms.

Klaczynsky explained that the Student's brain takes longer than most to recognize, recall and properly sequence symbols. This is an orthographic processing disability. She also observed a lot of fidgeting and many off-topic comments during the testing. She explained that the Student's performance was inconsistent, and that on some days, he might be right on target and do well, and other days, he could not recall things he learned previously. [Testimony of E. Klaczynsky]

- 29.** At the February 11, 2016 IEP team meeting, the team reviewed the Student's triennial evaluation results. The team decided to change the Student's eligibility to multiple disabilities due to the combination of his learning disability and other health impairment based upon his ADHD. The team completed the learning disability evaluation report, finding that he was not achieving adequately in six of the eight areas listed on the Maine Learning Disability Evaluation Report: written expression, basic reading, reading fluency, reading comprehension, mathematics calculation, and mathematics problem solving, noting that he was making slow progress. [S-266-268] His anxiety and trichotillomania symptoms were being well managed, and were not areas of concern. [S-276] On the Form for the Determination of Adverse Effect on Educational Performance, it was noted that the Student's NWEA reading was in the 2% range, and that he had been making limited progress in literacy. [S-274] At the meeting, the Parents reiterated their concern with the limited progress the Student had made, and again asked whether there was a different approach that could be tried with his instruction. They thought it might be time to change the techniques and tools being used, and were concerned with the school's focus on behavior rather than his processing issues. [Testimony of Mother, Father, S-277] No changes were made to the level or type of services the Student was receiving.

**30.** Later that February, the Parents asked Aucocisco to provide additional testing of the Student.

This was done by Lisa Murphy, a special education teacher there who had experience as a Lindamood-Bell consultant and supervised the Aucocisco Lindamood-Bell staff. [Testimony of B. Melnick, L. Murphy] Ms. Murphy conducted her testing on February 29, 2016. The purpose of this testing was to fill gaps in the District's testing, to further tease out where the Student's deficits were and determine the best way to address them. [Testimony of B. Melnick] As Aucocisco did not want to repeat tests, Ms. Murray administered the Kaufman Test of Educational Achievement ("KTEA") and the Gray Oral Reading Test (GORT-5) to hear him read out loud, and found that the Student was many years below his grade level, consistent with Ms. Dunn's results on the WIAT-III. His orthographic processing composite was very low, in the 2<sup>nd</sup> percentile. [P-16] The Student's oral reading accuracy was in the first percentile. His reading comprehension was at the 16<sup>th</sup> percentile. [P-17]

**31.** On March 14, 2016, the Mother emailed Ms. Dunn and asked her whether there was another method other than Orton Gillingham that could be tried, as the Student did not seem to be making progress. [Testimony of Mother, P-18] She added that the Student told her that he hated most parts of school, was sad, and wondered why he was not like the other kids. [P-19]

**32.** On April 11, 2016, Aucocisco sent the Parents a recommendation for what it believed was very intensive remediation the Student needed to address symbol imagery and improve recognition and fluency. Ms. Melnick recommended a summer program for the Student consisting of 120-140 hours of direct one-to-one reading instruction using the Lindamood-Bell Seeing Stars ("Seeing Stars") program to remediate decoding, sight word, and fluency difficulties, and 37 hours of one-to-one mathematics instruction using the Sharma methods. [Testimony of B. Melnick, S-C-24] All Aucocisco tutors receive a minimum of 40 hours initial Lindamood-Bell training and do a lot of observation before starting to work with



students, and they are supervised by Ms. Murphy. Aucocisco also employs eight certified teachers. [Testimony of B. Melnick] The Parents had friends whose children had success with Seeing Stars, so decided to try this proposal as a partial day placement during May and June 2016. [Testimony of Mother] They sent the District a notice requesting reimbursement for this placement on April 14, 2016. [S-291] The notice also said that the Student would be attending Aucocisco from 7:45 a.m. until 11:45 a.m., beginning on May 2, and that he would return to Falmouth at 12:15 p.m.

- 33.** In light of the Parents' plans, Falmouth called an IEP team meeting on April 28, 2016 to see whether there were any changes that should be made to the Student's IEP, based upon the Parents' concerns, and to see what supports might be necessary for his transition to Falmouth in the afternoon. [S-298] At the meeting, Falmouth offered to add to the Student's IEP one hour per month of reading strategist consultation time with the Student's special education and general education teachers. Ms. Dunn reported that she had increased the time dedicated to the Student's reading, and that they had made progress with his engagement in reading. She added that although his percentage score on the NWEA had not grown, his individual scores had, and he had made progress in the Wilson program. She reported that his BAS testing the day before came out at an independent Level M, end of second grade level, with 99% accuracy and excellent comprehension. [S-301, 338] His SRA level in April was green, which is grade 2.6. [S-B-285] On April 29, the Student's reading rate was 57 words per minute. [Testimony of K. Dunn, S-B-154] The Father reiterated what he said were the Parents' ongoing concerns for the past year that "the right tool was not being brought to bear to support [the Student's] reading, writing and math instruction." He added that he was appreciative of the resources and time spent working with the Student, but that it hasn't been appropriate for him. [Testimony of Father, S-302] Ms. Dunn testified at the hearing that there

was no doubt that the Student's progress had been slow, especially in [REDACTED] and [REDACTED] grades, and that he was very inconsistent. She explained that sometimes he did not perform well, and sometimes that was when doing an assessment, but he definitely made progress. [Testimony of K. Dunn]

**34.** After the Student began his partial day program at Aucocisco, he did not receive any specially designed instruction in Falmouth. [S-319] Because he needed non-instructional time for lunch and recess, he stayed at Aucocisco until 1:00 p.m., and did not arrive in Falmouth until 1:30. [Testimony of B. Melnick, K. Dunn, Mother] Consequently, he only attended social studies class there.

**35.** The Aucocisco program was five hours each day, four of which were instructional.

Approximately 80% of the Student's time was one-to-one Seeing Stars instruction to develop foundational decoding skills. Seeing Stars is a different approach from Wilson Reading. Seeing Stars specifically helps students who know phonics and can sound out words, but still have difficulty reading because they struggle with symbol imagery, remembering sight words, and spelling. This program focused on helping the Student develop his symbol imagery; that is, to image and recognize symbols, specifically letters, and groups of symbols to improve reading decoding skills. [Testimony of B. Melnick, L. Murphy] It incorporates orthographic processing from an early stage by using techniques like air writing so recognition becomes automatic, leading to reading accuracy and fluency. [Testimony of L. Murphy] The remaining instructional time was on Sharma math. The Student was working with three tutors, and changed tutors every hour to keep the instructional approach fresh. [Testimony of B. Melnick, L. Murphy] He immediately seemed very comfortable at Aucocisco and was very friendly. He had lots of energy and needed to move around between tasks, but used fidgets appropriately. [Testimony of B. Melnick, L. Murphy]

36. Within a couple of weeks, the Parents saw changes in the Student. He was enthusiastic about going to Aucocisco, and his resistance to reading was rapidly diminishing. The Parents noticed him reading signs and menus without prompting, and that his skills were improving.

[Testimony of Mother, Father]

37. On June 14, 2016, the IEP team met to discuss Falmouth's proposal for [REDACTED] grade and for the Student's transition to Falmouth [REDACTED] School. For math, the team ordered 30 minutes a day (2.5 hours a week) of pull-out service, plus 60 minutes a week of in-class support in a regular education math class. [S-330, 345] The IEP included 7 hours a week of specialized instruction in language arts, specifically 250 minutes of reading and 170 minutes of writing. The IEP continued one hour per month of reading consultation with the reading specialist, but removed the direct behavior support service and replaced it with consultation for 30 minutes per month. [S-345] The proposed IEP contained many classroom accommodations and modifications. [S-343-344, 346] The team agreed to exempt the Student from Social Studies, which required a lot of reading and writing, English/Language Arts ("ELA") and foreign language to provide him additional time for special education services, but he would continue to receive some math, science, Unified Arts and study hall in the general education setting. [Testimony of Mother, E. Klaczynsky, S-330] The Student was again offered ESY services at the same level as past years, but the Parents again declined to access them. Ms. Westra noted that the Student was transitioning well into his Falmouth classroom after his morning at Aucocisco, and seemed happy. [S-330] The Parents fully participated in the IEP team discussion, and had questions for Christine Labbe, who was to be the Student's [REDACTED] grade special education teacher at Falmouth [REDACTED] School. Ms. Labbe had not looked at the Student's file, however, and could not answer specific questions about the Student's programming. [Testimony of Mother, Father] She did not have Lindamood Bell training, but

mentioned that Tammy Paul, a [REDACTED] grade teacher who has that training, would also work with the Student. [Testimony of G. Kucinkas] The Parents shared that things were going very well for the Student during his time at Aucocisco, and that in the past month, they had seen him reading with confidence. The Student told them that he did not feel different there, which he did at Falmouth. The Parents remarked that the Student's growth had been incredible. [S-331] The Parents chose to reject Falmouth's IEP proposal, and provided written notification at the meeting that they were rejecting the offer as inappropriate to address the Student's needs. The notice also said that they were placing the Student at Aucocisco for the 2016-17 school year, and intended to seek reimbursement from Falmouth for this expense. [P-25]

- 38.** On June 26, 2016, Ms. Melnick again administered some KTEA and GORT subtests to assess the Student's progress in the areas on which he was tutored following the May and June intensive he received in reading. On the KTEA, Ms. Melnick saw very healthy gains in the visualizing component. The Student's biggest gains were in nonsense word decoding, where he went from a score of 74 to 103, which was a jump from the 4<sup>th</sup> to the 58<sup>th</sup> percentile. [Testimony of B. Melnick, S-372, S-C-150] Approximately 70% of the first 120 hours of the Student's tutoring was spent on decoding nonsense words. [Testimony of L. Murphy] His word recognition fluency increased from the 3<sup>rd</sup> to the 10<sup>th</sup> percentile, and his decoding fluency from the 2<sup>nd</sup> to the 10<sup>th</sup> percentile. On symbol imagery, he had significant gains, going from the 7<sup>th</sup> to the 32<sup>nd</sup> percentile. [S-372, S-C-150] It still took the Student longer than normal to learn some things, but the Aucocisco staff saw the Student making considerable gains in decoding and sight words. [Testimony of L. Murphy, S-372-373] Oral reading on the Slosson test went from 76 to 82, and his GORT-5 scores increased as well. [S-373]

- 39.** On August 24, 2016, the Parents send the District a letter stating that, despite the Student's remarkable growth his literacy skills during his intensive program at Aucocisco in May and June, his reading, writing and math skills still lagged significantly behind his grade peers. They notified the District that they were enrolling the Student full time at Aucocisco, and would be seeking reimbursement from the District for all costs associated with their unilateral placement. [P-34]
- 40.** Attending Aucocisco, the Parents saw the Student gain confidence socially, and avoiding reading was no longer an issue. For the first, time, the Student began seeing himself as a reader. During the summer, he was able to play Monopoly and read the cards. [Testimony of Mother]
- 41.** The Student began his [REDACTED] grade year at Aucocisco full time. He was happy and popular there. He did not get into trouble and had no behavior issues. [Testimony of Mother, B. Melnick] The Student stopped pulling his hair out and was allowed to grow it longer. [Testimony of Mother] He responded very well to the Aucocisco structure and consistency. Ms. Melnick thought he had excellent social skills, and was a quiet leader. His peer group at school was seven students who comprised the [REDACTED] school group. The Student's schedule at the start of the school year included two reading and language arts tutorials each day using Seeing Stars, but because he needed a high level of intensity until his reading became better established, a third daily tutorial was added. [Testimony of B. Melnick] The tutorials were delivered by tutors with the training set forth in Fact #32 above, and Ms. Murphy tried to sit in on the Student's tutorials every other day. [Testimony of L. Murphy] He also had technology weekly, science three days each week and part-way through the year, social studies was added three times weekly. The Student had coaching first thing each morning with Mr. Dalton to address his executive functioning, organization and behavior needs using

positive behavior interventions and supports. The Student did very well with these, and was “super motivated” by the behavior system approach of rewards. [Testimony of L. Murphy] His academic performance continued to be very inconsistent from day to day, so when he was tested, the results depended on what kind of day he was having. Aucocisco’s long-term daily data records showed that he was making progress. [Testimony of B. Melnick] Ms. Murphy explained that she wanted him to be able to access the curriculum in other subjects, and to do that, she was aiming for a big gain in sight words and fluency, acknowledging that fluency required a lot of time and practice. Vowel sounds were very difficult for the Student, but he kept practicing them until he got them. [Testimony of L. Murphy] The Parents continued to see the Student grow as a reader and in math, as well as in his overall self-confidence. [Testimony of Mother]

- 42.** The Parents had filed their request for a due process hearing on October 24. On October 27, 2016, Special Education Director Gene Kucinkas conducted an observation of the Student at Aucocisco. [S-378-380] The Parents agreed to a proposal from Mr. Kucinkas to have an independent evaluator complete a literacy assessment of the Student. [S-417] Mr. Kucinkas gave the Parents a choice of two possible evaluators, and they chose Lori Coffin. [Testimony of G. Kucinkas, S-395-396] The parties agreed to toll the statute of limitations period to permit this testing. [S-414]
- 43.** On November 10, 2016, Falmouth held the Student’s annual review of his IEP. In the proposed IEP, Falmouth offered to provide 7 hours and 50 minutes per week of special education instruction in reading, writing, and spelling, but otherwise kept the service levels the same as what was offered at the June IEP team meeting. [S-390, 408] The Student’s proposed program included Everyday Math in the regular education classroom, and in-class support in math for two 30-minute periods each week. He would have science daily in the

mainstream in a class with approximately 20 children. [Testimony of G. Kucinkas] The Parents responded that they were pleased with the progress they have seen the Student make at Aucocisco, and that they now read with him every day. The Father explained that although his [REDACTED] have thrived in the Falmouth [REDACTED] School math classes, he was concerned about the Student's ability to access that level of math. [S-391]

44. Lori Coffin is a literacy specialist with an MS in speech language pathology, and a Masters of Education in literacy. She works 10 hours each week at Deering High School in Portland, and does evaluations for families privately or through schools. Ms. Coffin is trained in Seeing Stars and Visualizing and Verbalizing, another Lindamood-Bell program. [Testimony of L. Coffin] On January 9, 2017, she conducted an observation of the Student at Aucocisco, interviewed him, and did some brief testing. Because the Student had a considerable amount of testing over the previous year, Ms. Coffin was very selective about her test choices. [Testimony of L. Coffin, S-419] When she spoke with the Student, he told her that he made great improvements in reading over the past year and was proud of his accomplishments. He reported having "a lot of really great friends" at Aucocisco, and was enjoying attending there. [S-424] It was her opinion that the Lindamood-Bell programs were appropriate for the Student's needs, noting, "there was no question about the appropriateness of the instruction, or that he was benefitting from it." She described the instruction as very skilled and exactly what she would be doing. [Testimony of L. Coffin] During her observation of the Student in the classroom, he appeared engaged and confident while doing spelling and reading of three syllable real and nonsense words. He was able to break the words down into syllables, and spell and decode the words with great success. [S-425] He read two non-fiction passages, one at a grade [REDACTED] level, which he read untimed with no errors, and one at a grade [REDACTED] level. [S-C-308] He then read a series of sight words, and commented about how proud he was because

he had learned so many new words in such a short time. Then he read a non-fiction passage for fluency, and commented on how much he had accomplished from the book he was reading. [*Id.*] During the observation, the Student was in a one-on-one setting, and appeared to be attentive and participating. Although he fidgeted with different items, it did not appear to hamper his learning. Ms. Coffin thought the one-on-one learning environment was optimal for the Student. [S-425]

45. Ms. Coffin administered the Gray Diagnostic Reading Test-2 and the DRA. Ms. Coffin had the Student read something he had not seen before, and read at DRA Level 20, with 98% accuracy and 91.2 words per minute. His total DRA score of 58 placed him at a transitional DRA stage at mid-█ grade level. Ms. Coffin reported, “He demonstrated relatively strong skills in his ability to summarize, predict, interpret, reflect and use metacognitive awareness.” [Testimony of L. Coffin, S-426] She was surprised, however, that he was unable to tackle more difficult DRA passages because she had just observed him reading more difficult material successfully. As part of the DRA, Ms. Coffin administered the Student Reading Survey. The Student reported that he was currently reading *The Hardy Boys*, which was a █ grade level book, and *Tin Tin*. [Testimony of L. Coffin, S-426] He was very proud that he was now able to read several books on his own, as he enjoyed reading. His goals were to increase his fluency and to read at grade level, and said he could achieve those goals by “practicing them a lot.” [S-426] The Student performed better on the Gray test, and Ms. Coffin was very impressed with his phonological awareness and vocabulary, which were in the average range. He was below average on Rapid Naming, with a percentile ranking of 9, but this was considerably better than he did on the Rapid Naming test administered as part



of the C-TOPP a year earlier, when he scored in the first percentile.<sup>4</sup> [S-262, 427] Ms. Coffin concluded that the Student continued to demonstrate significant difficulties in the area of literacy, but he also had “many positive prognostic indicators for successful reading including his work ethic, sense of pride, strong will to improve, love of reading, strong receptive vocabulary skills and comprehension strategies.” [S-428] As he had made progress in all areas over the past year, her prognosis for his continued improvement was excellent. [Testimony of L. Coffin, S-428]

46. Aucocisco responded to the results of the Coffin assessment by changing the Student’s schedule, removing him from the regular ELA rotation and providing him with more intensive daily practice on decoding skills. [Testimony of B. Melnick, S-C-59] Ms. Murphy, like the other teachers in the Student’s past, described him as consistently inconsistent, and she was surprised at his test results, as they did not match what she was seeing in the classroom. She observed that his fluency fluctuated wildly, but was improving. [Testimony of L. Murphy] Ms. Murphy did not think the Student had regressed in his reading. When he began attending school at Aucocisco, he could not read [REDACTED] and [REDACTED] grade material, but now he could read and understand it. He also continued to make sight word gains. [*Id.*] Ms. Murphy acknowledged that oral reading fluency will never be the Student’s strong suit, but his comprehension score kept improving, so he was getting more meaning from what he read. [*Id.*] Ms. Melnick did not question the test results, but also reported that the Student was inconsistent in his reading and that was part of who he was. [Testimony of B. Melnick, S-437]

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<sup>4</sup> These are two different tests, so a strict comparison of these scores is not possible.

47. On February 15, 2017, the IEP team met to review the Coffin evaluation. At the meeting, the team decided to add a fluency goal to the Student's IEP, based upon the evaluation results. Mr. Kucinkas also shared a schedule for the Student's programming, were he to attend Falmouth ██████ School. [S-437, 452] The schedule included one half hour of Seeing Stars with Mrs. Mahoney<sup>5</sup>, although this methodology was not included in the IEP, as the District had a practice of not including methodologies in IEPs. [S-452, testimony of G. Kucinkas] The Father explained that they have seen the Student "making progress unlike they have seen before." He was excited to go to school, and the Parents found him reading without fear and asking about books. [Testimony of Parents, S-438] When the Student was at Falmouth, they felt as though a key or tool was missing, but at Aucocisco, they have found that key.
48. In March of 2017, Aucocisco asked the Student to read a ██████ grade passage with which he was unfamiliar while being timed, using the EasyCBM program. The Student's reading was videotaped, and showed him reading fluently. [P-41] His progress reports show him doing well and making progress in his educational program. [S-C-60-76] On the Slosson Oral Reading Test, he was reading at a grade 6.5 equivalent, which is a large increase from the 3.7 grade equivalent where he started on this measure in February 2016. [Testimony of L. Murphy, S-C-97, S-457] His sight vocabulary improved greatly. Although Ms. Melnick would have recommended a summer program for the Student, his teachers did not see him losing significant skills over the summer, but he did experience some sight word regression. [Testimony of B. Melnick, L. Murphy]

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<sup>5</sup> Mr. Kucinkas explained that Mrs. Mahoney was an experienced teacher who had Seeing Stars training, but possibly only two days of it, and he did not know whether she had ever taught students using this method. He explained that Mrs. Mahoney was a consulting teacher who was chosen to work with the Student because she had the flexibility to fit into the Student's schedule. [Testimony of G. Kucinkas]

49. Aucocisco administered the GORT-5 and KTEA-3 in February of 2016, before the Student began attending classes there, in June 2016, following his intensive tutoring and while he was receiving no special services in Falmouth, and in March 2017, after he attended Aucocisco as a full-time student for six months. The test results were as follows:

	Feb. 2016	June 2016	March 2017
<b>GORT-5 (percentiles)</b>			
Rate	2 <sup>nd</sup>	5 <sup>th</sup>	9 <sup>th</sup>
Accuracy	1 <sup>st</sup>	16 <sup>th</sup>	16 <sup>th</sup>
Fluency	2 <sup>nd</sup>	9 <sup>th</sup>	9 <sup>th</sup>
Comprehension		25 <sup>th</sup>	25 <sup>th</sup>
Symbol Imagery Test:	7 <sup>th</sup>	32 <sup>nd</sup>	35 <sup>th</sup>
Slosson Oral Reading: (scores and grade level equivalents)	76---3.7	108---5.4	---- 6.5
<b>KTEA-3 (percentiles)</b>			
<b>Academic Skills Battery:</b>			
Letter & Word Recognition	5 <sup>th</sup>	12 <sup>th</sup>	16 <sup>th</sup>
Spelling	4 <sup>th</sup>	3 <sup>rd</sup>	4 <sup>th</sup>
Nonsense Word Decoding	4 <sup>th</sup>	58 <sup>th</sup>	30 <sup>th</sup>
Word Recognition Fluency	3 <sup>rd</sup>	10 <sup>th</sup>	4 <sup>th</sup>
Decoding Fluency	2 <sup>nd</sup>	10 <sup>th</sup>	10 <sup>th</sup>

50. The Student finished his school year having made progress on and becoming proficient in most of his math goals, mastered being able to decode three and four syllable words and being able to recognize the first 1000 sight words. [S-C-72-76] Ms. Murphy considered the Student reading on a [redacted] grade level. [Testimony of L. Murphy]

51. During the summer of 2017, Ms. Dunn and Ms. Seeker had two days of Seeing Stars training at Falmouth Elementary School. [Testimony of K. Dunn, G. Kucinkas] They are just beginning to use it, and do not have a supervisor who has been trained in this method. [Testimony of K. Dunn]

52. The Student began attending Aucocisco in September of 2017 for [redacted] grade. This year, he has a lot more independent reading expectations. He is back to having two reading

tutorials because he is able to make progress without as intensive a level of support.

[Testimony of B. Melnick] He is attending regular ELA class, and being instructed in

Visualizing and Verbalizing. [Testimony of L. Murphy] He is currently reading a [REDACTED] grade level book, *Bearhaven*, and this seems like a very comfortable instructional level for him.

[Testimony of B. Melnick, S-C-811] Ms. Murphy observed that the Student was very excited about *Bearhaven*, and is a totally different student now, noting that he would have never attempted a book like that in the past. Although both Parents hope the Student will return to the public school system in the future, their priority is for him to be able to read at grade level. [Testimony of Father, Mother]

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

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

Falmouth failed to provide the Student with an appropriate placement for [REDACTED] and [REDACTED] grades. The Student's proposed IEPs and placements failed to meet the legal test for substantive appropriateness. The standard should be whether the Student's IEP and placements were reasonably calculated to remediate his disability to permit him to participate and progress in the general education curriculum and advance successfully from grade to grade.

When the Student arrived in Falmouth early in [REDACTED] grade, he was reading at a beginning [REDACTED] grade level. Although his teacher, Ms. Dunn, identified the source of his reading difficulty as an orthographic processing weakness, she provided instruction using the phonics-based Wilson Reading Program because that was what she knew how to do. His progress slowed to a crawl. By the time the Student left Falmouth 2 ½ years later, he had not yet completed level 9 of a 12-level program that is designed to be completed in two years, and had fallen three years behind his peers in reading and writing skills. By then, he was far less able to participate successfully in mainstream learning environments than he had been three years earlier. Aside

from his orthographic processing disability, there is no reason to conclude that the Student, who is of average intelligence, lacks the cognitive potential to do grade level work.

The Student's IEP and placement demonstrate a lack of reasonable calculation necessary to meet the substantive appropriateness standard set forth in *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). With the knowledge that Falmouth had after instructing the Student for one year, it had a duty to engage in a reasonable calculation to develop programming necessary to assist the Student in participating and progressing in the general curriculum. The question, therefore, is whether it is a "reasonable prospect" for the child to "aim for grade level advancement." *Id.* Only if a child's disability makes it unreasonable to expect advancement on par with grade-level expectations does the Individuals with Disabilities Education Act ("IDEA") permit use of a lower standard; even then the "educational program must be appropriately ambitious in light of his circumstances" and provide a "chance to meet challenging objectives." *Id.* This lower standard still requires a higher level of benefit than the former standard of a "meaningful, non-trivial benefit," which no longer has any place in the analysis of FAPE.

Ms. Dunn did not consult with anyone more experienced in dealing with orthographic processing, and although she was aware of Seeing Stars, she took no steps to have the IEP team consider this program for the Student, but continued the same program with which the Student failed to make reasonable progress in [REDACTED] grade. Without a different instructional approach, increasing the Student's literacy instruction would not help the Student participate or advance in the general curriculum.

By November of [REDACTED] grade, the Student had only attained an instructional reading level of BAS Level L, mid-[REDACTED] grade. His progress had been glacial over the prior two years, and his reading fluency was terrible at 55 words per minute. Once again, Falmouth did not explore alternative programming, and again recommended an annual goal of less than one year's growth

using the same reading program that had failed to produce results, taking no steps to address the Student's deficits in orthographic processing. All of the Student's services for reading instruction remained the same, despite his triennial evaluation recommendation of "an increased focus on the visual/orthographic piece."

The Parents are entitled to a compensatory remedy for failure to provide the Student with an appropriate education during [REDACTED] and [REDACTED] grades. Compensatory awards must be designed to restore the affected student to the levels of skill and function he would have attained had proper services been delivered in a timely fashion. Reimbursement of educational expenses may be awarded as such compensatory relief when the Parents have acted unilaterally to compensate their child for past IDEA violations, and provided proper statutory notice. It doesn't matter whether the parent first purchases the needed services and then seeks reimbursement, or first commences a due process hearing seeking those services. The Student is entitled to compensatory services designed to close the gap in his academic performance that opened up and grew during those years in Falmouth.

Falmouth also failed to provide the Student with an appropriate IEP and placement for [REDACTED] and [REDACTED] grades. The Student was not prepared for the demands of [REDACTED] school. He was able to read only picture books, could not compose a sentence, was behind in mathematics, and had no group of school friends.

Had the Student attended Falmouth [REDACTED] School, his [REDACTED] grade special education teacher had no training or experience in delivering the Seeing Stars program, which was working well for the Student at Aucocisco. His program failed to offer specialized instruction designed to target his specific orthographic processing deficit, and was not reasonably calculated to assist the Student in participating in or advancing in the general curriculum. Although the IEP proposed at the November 4, 2016 IEP team meeting increased his pull-out time for literacy instruction, it

did not change the focus. The IEP was amended on February 8, 2017, and despite verbal and written promises to provide Lindamood-Bell reading instruction, the amended IEP did not require such instruction. In accordance with First Circuit case law, the hearing officer may not credit Falmouth with offering Seeing Stars instruction in the 2017 amended IEP.

Reimbursement of the Parents' expenses to send the Student to Aucocisco is the appropriate remedy. The Parents' burden is to show that the private school placement is reasonably calculated to enable the child to receive educational benefit. In granting such a remedy, the private school need not be the "least restrictive environment." Aucocisco easily satisfies the liberal test established by the courts for determining whether a unilateral placement is "proper under the Act." The Student responded well immediately to the placement change, and his confidence about reading and learning soared. By January of [REDACTED] grade, he was capable of reading [REDACTED] and [REDACTED] grade materials with confidence.

For the foregoing reasons, the Parents request that the hearing officer award them all of the costs they have incurred for tuition, transportation and other expenses in connection with the Student's unilateral placement at Aucocisco for the end of [REDACTED] grade, [REDACTED] and [REDACTED] grades.

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

The burden of proving any IDEA violation rests squarely with the Parents, and they must establish any entitlement to a remedy. This is important in this case because the Parents presented no evidence on any of the key issues in the case, particularly in regard to their assertion that Falmouth's programming has been in any manner inadequate. No one attacked the wording or content of the IEPs, or testified that the reading programs or methods used were inappropriate, or that the Student should have made more gains than he actually did.

The testimony of a parent without any qualifications or credentials is insufficient to meet this burden that the school failed to provide the student with FAPE. Having failed to provide

testimony against Falmouth on the key issues, the Parents have not carried their burden of proof.

The two-part standard for determining the appropriateness of the IEP is whether it was developed in accordance with the Act's extensive procedural requirements and whether it is reasonably calculated to enable the child to receive educational benefits. The Supreme Court, in *Andrew F.*, repeatedly emphasized that the IEP must be individualized to the child's unique circumstances. Courts have refused to find FAPE violations simply because there may be a growing gap between the child's performance in his area of disability and the performance of nondisabled peers. When determining whether the IEP meets the two-part test, the hearing officer must view what was reasonable at the time the IEP was promulgated.

In many ways, this is a dispute about educational methodology, yet Maine courts have ruled that parents do not have a right under the IDEA to compel a school district to employ a specific methodology in providing for their child's education. The First Circuit has also ruled that the IDEA does not require schools to include specific methodologies in an IEP.

There seems to be no challenge at all to virtually any element of the IEPs at issue. No one offered testimony against any of the goals or accommodations, not did anyone state that there were areas that should have been addressed in the IEP but were not. The same is true for the IEP offered by Falmouth for [REDACTED] grade. Not a single witness nor document stated at any point that the Falmouth program fell short. The mere fact of slow growth in a given school year is not evidence of inappropriate programming, absent testimony that this should not have been the case, given the Student's circumstances.

Although the Student arrived in Falmouth for [REDACTED] grade essentially a non-reader, Ms. Dunn advanced him, slowly at first, then more quickly as the basics became locked in. Each year he made progress. For example, on the BAS, he progressed as follows: from being a non-reader to Level J by the end of [REDACTED] grade; from J to K in [REDACTED] grade, although he was unable to pass



that level by the end of the year; from Level K to N in [REDACTED] grade, when his growth started to gain some speed. He achieved close to a year's gain in [REDACTED] grade, ending the year at about a mid-[REDACTED] grade level. Ms. Dunn began the Wilson reading program with the Student at Level 1, and he was working at Level 9.1 by the end of [REDACTED] grade. Over the roughly 2 ½ years in question, every school measure showed gains.

Each year at issue was complicated by the Parents's own refusal to permit the Student to access ESY services, given his undisputed regression issues. It is not only a situation of obstruction, but his gains each year were impacted by the need to make up for this significant regression each summer. The Student likely made less gain each year than he otherwise would have, had the Parents permitted him to participate in ESY services.

On the other hand, the data shows that the Student made slow gains at Aucocisco, and possibly even regression. The Parents witness testimony to the contrary were only assertions. Aucocisco staff administered portions of the KTEA academic test, often choosing subtests in a way that would fail to generate composite scores which are more reliable for measuring progress than individual subtests. Barbara Melnick even testified that the reason she did not administer the third subtest necessary to generate an orthographic processing composite was that it would have brought down the Student's overall performance! Additionally, Parents witnesses failed to offer any evidence for why the Student's movement should be attributed to Aucocisco services rather than the services provided by Falmouth during the first part of 2016. The data from the March 2017 testing shows essentially flat performance over a period when Aucocisco was solely responsible for the Student's literacy program—the period from September 2016 to March 2017.

Even if the hearing officer finds that Falmouth's programming came up short, the Parents have failed to show that the Student's placement at Aucocisco was proper under the IDEA. There are several reasons why it does not meet this requirement of the law. First, it is not the least

restrictive programming, and there has been no showing that the Student requires this restrictive a placement. Second, it is hard to imagine approving as compensatory education a private placement that has had no more educational success than Falmouth did, and apparently has had less success. When the reason for the placement is to address alleged weaknesses in the public school educational program, it would be wrong to uphold a private placement that does no better.

Third, the programming at Aucocisco also appears to be delivered by an ever-changing collection of educational technicians. The testing and data practices at the school are inexcusable, selectively choosing which subtests to administer and which ones not to, without regard to whether they are obtaining composite scores and without consistently using measures across time for comparison purposes.

Lastly, the Parents failed to show any educational harm to the Student. Therefore, the hearing officer should deny the Parents' request for reimbursement of the costs of attendance at Aucocisco.

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

As a preliminary matter, the U.S. Supreme Court has held that in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005) *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35, n. 3 (1<sup>st</sup> Cir. 2012). Therefore, the Parents must establish any IDEA violations and their entitlement to a remedy.

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The hearing officer must examine whether the Student's educational program contained in his IEP

was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). Recently, the Supreme Court addressed the "more difficult problem" left open in *Rowley* of establishing the legal test for substantive appropriateness of IEPs. *Endrew F.*, 137 S. Ct. at 993, 998. The Court explained that the IEP must be "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances" and that a student's

. . . educational programming must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.* 137 S. Ct. at 1000 (2017). The Court noted that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001.

The Supreme Court has explained that the "reasonably calculated" standard of *Endrew* means that crafting an appropriate program of education requiring "prospective judgment" is a "fact-intensive exercise" that must be "informed not only by the expertise of school officials, but also by the input of the child's parents." *Id.* at 999.

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 983, 993 (1<sup>st</sup> Cir. 1990). As such, schools must make a continuum of placement options available. 34 C.F.R. § 300.115; *MUSER* § X.2.B.

In this case, there was no issue of procedural violations, so the focus is on the Student's programming.

The Student has average cognitive abilities and is a bright boy who can aurally receive and orally express grade level information. He is a very motivated student and is willing to work hard in class. Therefore, the Parents assert that despite the need to remediate his orthographic processing disability, it is a "reasonable prospect" for the Student to "aim for grade level advancement," under the *Endrew* standard. They contend that only if his disability makes it unreasonable to expect advancement on par with grade-level expectations does the IDEA permit the use of a lower standard, but this still requires a higher level of benefit than the former standard of "meaningful, non-trivial benefit." The Parents also argue that school districts must not profit from aiming at lower targets when it is their own chronic failure to program appropriately that results in students falling multiple years behind their peers in literacy skills.

The District, on the other hand, contends that the *Endrew* standard does not mean that there is a denial of FAPE simply because there is a growing gap between the Student's performance in the area of his disability and that of his nondisabled peers.<sup>6</sup>

Although undoubtedly the courts throughout this country will spend time in the coming years further teasing apart the meaning of the *Endrew* standard, the decision as it applies to the Student means that the Student's IEP and placements must be reasonably calculated to enable him to make progress appropriate to his circumstances; that is, he must be instructed in how to read using appropriate and effective methods that take into account his unique disabilities with the aim being that he may access the general education curriculum so that he can meet the

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<sup>6</sup> The District cites *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5<sup>th</sup> Cir. 2000); *El Paso Indep. Sch. Dist. v. Robert W.*, 898 F. Supp. 442 (W.D. Tex. 1995) in support of this position.

educational standards that apply to all children with the District. *See* 34 CFR 300.39 (b)(3).

Although the Student had ADHD and some executive functioning issues, he certainly had a very “reasonable prospect” of aiming for grade level advancement as long as he could learn how to read well enough to access the general curriculum. He was curious about learning and was willing to work hard. The main barrier to advancement was his orthographic processing deficit.

**1. Did the Student’s IEP as developed and implemented for the 2014-2015 school year provide him with a free, appropriate public education in the least restrictive environment from October 2014 forward?**

In November of [REDACTED] grade, the Student was reading at a mid-[REDACTED] grade instructional level K on the BAS. [ S-133] One year later, his IEP had his present level of performance at a BAS instructional level L, which was a later mid-second grade level. [S-197] Taking into account the Student’s erratic performance on assessments, and despite the good intentions of the District, the facts are undisputed that the Student was making very little progress in improving his ability to decode words and thus read during [REDACTED] and [REDACTED] grades while he was being instructed by Ms. Dunn using primarily the Wilson reading program, supplemented by a few other reading and spelling tools. There was considerable testimony and other evidence, including Ms. Dunn’s own testimony, that his progress toward his IEP goals was consistently less than expected. It was apparent that the Student did better in a smaller setting with consistent structure, rather than in the mainstream classroom. He required a lot of teacher support, especially with writing. There was also evidence that he showed less than expected growth in math, despite having some strong math thinking skills.

At the [REDACTED] grade annual review in November of 2014, Falmouth chose to address the slow progress in two ways: (1) by increasing the Student’s direct instruction time from 3 ½ hours per week in reading to 5 hours and his math direct instruction from 1 ½ to 2 ½ hours per week; and (2) by lowering expectations so that his reading goal would be to increase his reading level

by nine months during the coming year, instead of a full school year. Unfortunately, the Student was unable to achieve even that goal with the instruction provided by Falmouth.

As the District argued, in some situations, it may be appropriate to change a student's goal so that it is consistent with what the IEP team believes is appropriate progress for a particular student. While that may be true for students with disabilities more severe than this student's, it was not justified here. Falmouth moved very quickly to lower the bar, rather than first exploring why the Student was doing poorly and what could be done to remedy it. On cross-examination, Ms. Dunn's testimony gave the impression that reaching the stated IEP goal so that she did not have to mark the Student's IEP with "unsatisfactory progress" was sufficiently important that it was necessary to lower the expectations for this student. As an experienced professional, she should have considered *why* he was making such slow progress and tailored her instruction more towards his unique areas of need, rather than changing his goal to one that was not sufficiently ambitious for someone with his intellect, work ethic, determination and other strengths. In [REDACTED] grade, she knew precisely what the Student's reading challenges were. He had the hallmarks of an orthographic processing disorder, as he "might recognize a word in one sentence and come across the same word two lines later, and not recognize it." [Fact #8] At the November 2014 IEP team meeting, she shared that the Student knew "all the phoneme sounds in isolation, but he has a great deal of difficulty breaking down words into chunks and applying his decoding strategies." [Fact #13] Despite having this knowledge, there was no evidence that she altered her reading instruction to take into account the Student's unique learning needs. Ms. Dunn testified that she was aware of the existence of other methodologies that targeted these deficits, but did not consider such programming for the Student. At the time the [REDACTED] grade IEP was drafted, it was not reasonable for the District to assume, based upon the Student's slow progress in one year using instructional methods that did not target his orthographic processing

disability, that the Student could not make a full year's progress. He had progressed faster when he was in [REDACTED], moving from a BAS Level D to a BAS Level J, than he did in Falmouth.

The District did not give any satisfactory explanation as to why it continued to offer most of the Student's instruction using Wilson Reading when it did not focus on these deficits. This is not to say that Wilson is not a good reading program. It is an excellent one for many students, but it does not focus on orthographic processing. There is an expression that when all you have is a hammer, everything looks like a nail. So it was with the reading instruction chosen for the Student. Additionally, despite the Student's slow progress, the IEP team did not add a fluency goal for [REDACTED] grade, nor did it consider the services of a reading strategist until late in [REDACTED] grade when the Parents gave notice that they were placing the Student in the Aucocisco tutoring program. Before deciding to lower the bar and relegate the Student to an educational experience in which he would fall further behind his peers every year, and thus become less able to access the general curriculum, Falmouth should have explored these other possibilities.

The District's other response was to increase the Student's level of services. Although it turned out that the Student needed a more intensive level of direct instruction than what the IEP contained for [REDACTED] grade, the additional hours at this point were a reasonable step. It took two more years of the Student's snail-like progress, however, for Falmouth to figure out that the Student needed more intense direct instruction.

Two other issues require discussion here. The first is the difficulty in gauging the Student's progress. As everyone agreed, the Student was consistently inconsistent in his academic performance, and he was also that way when he was tested. His various test results showed very little growth during his almost three years in Falmouth schools. Ms. Dunn explained that she witnessed the Student making progress, but his assessments did not confirm that. Even assuming that Ms. Dunn's conjecture that the Student was not actually reading at BAS

Level J when he arrived in Falmouth was correct, and he arrived at Falmouth reading at a late [REDACTED] grade level, two and one-half years later, he was only reading at a late [REDACTED] grade BAS Level M. As we see throughout the Student's educational career both in Falmouth and at Aucocisco, only so much weight could be placed in formal assessments, as they were often not a very reliable measure with this young man. Nonetheless, there was scant evidence that he was making any real progress in his three years in Falmouth in the areas where he needed the most help. The Parents saw him continue to struggle with learning to read, and although they tried to help him, he resisted reading more as time went on.

One other issue that bears mentioning when discussing the Student's progress is the Parents' decision not to make the Student available for the ESY program Falmouth offered each year. There was evidence from his school in Rhode Island that although the Student experienced "vast regression" between the summers of [REDACTED] and [REDACTED] grade from BAS Level F to a BAS Level D, he progressed back to a BAS Level J by the end of [REDACTED] grade. In other words, he recouped the losses and still made gains despite the regression. There was agreement among the witnesses from both Falmouth and Aucocisco that the Student would benefit from summer programming. Falmouth offered no specific evidence, however, of the amount of regression the Student may have experienced between the end of one school year and the beginning of the next, but he did not make much in the way of gains during the school year. While at Aucocisco, although the Student did experience some sight word regression and Ms. Melnick thought he would have benefitted from summer programming, neither she nor the Student's teachers there saw him losing significant skills over the summer. Based upon the evidence, I cannot conclude that the Parents' decision to refuse ESY services was a significant contributing factor to the Student's inordinately slow reading progress in Falmouth. The most significant factor was not properly addressing his orthographic processing deficit.



The Student's [REDACTED] grade IEP was not reasonably calculated to provide the Student with FAPE. Lowering the expectations was not an acceptable response for this student before exploring why he was not making progress and other ways to support him. Although the Student's learning profile was not one of the more "garden variety" reading disabilities, that is why the IDEA requires that the adequacy of a student's IEP turns on the unique circumstances of the child for whom it is created.

**2. Did the Student's IEP as developed and implemented for the 2015-2016 school year provide him with a free, appropriate public education in the least restrictive environment?**

After two years of very slow progress in reading, and in light of this young man's cognitive abilities and his strengths, the District was overdue for a meaningful exploration of what it was about the Student's program that was not allowing him to make reasonable progress and what kind of changes were needed for the Student to be able to learn how to read. Yet Falmouth was resistant to the Parents requests for such changes. Unhappy with the Student's lack of progress and his resistance to reading, the Parents suggested that the Student might do better with a different reading teacher and asked the school principal whether this was possible. With all due respect to Ms. Dunn, and whatever success she may have had with other students, sometimes change can be good and even necessary. Certain teachers do not work as effectively with some students as they do with others.

The Parents were concerned that Ms. Dunn was placing the focus on the Student's behavior rather than on his processing issues. Ms. Dunn was experiencing behavioral problems with the Student that his classroom teacher was not. According to Ms. Westra, the Student did not have behavioral problems in the regular classroom. Ms. Westra had mostly positive things to say about the Student, including that he always listened closely, had a real interest in science and seemed to understand it well. She discussed the Student's good manners, and although she

noticed his attention issues, he was never disruptive in class and her need to refocus him did not stand out in comparison with his classmates. When Ms. Fitzgerald did her behavioral assessment, she did not find serious attention and behavior problems either, and saw “no red flags.” This should have, however, raised a red flag causing Falmouth to consider whether the Student may have fared better with a change of reading instructor. Ms. Dunn pressed to continue working with the Student, and no change was made here. She remained his reading teacher during [REDACTED] grade, and more of the same produced more of the same lack of progress.

Consequently, as noted above, by the time the IEP team met in November of 2015, the Student was only reading at a late mid-[REDACTED] grade level. His reading fluency was a very slow 55 words per minute, yet he still had no reading fluency goal in his IEP. Again, Ms. Dunn recommended setting a goal for nine month’s growth, which would, if achieved, have meant the Student would have been reading at a beginning [REDACTED]-grade level by the end of [REDACTED] grade when he would be preparing to transition to the more rigorous [REDACTED] school program. The Parents’ concerns about this were very understandable, but again their requests to look at different approaches, such as a different teacher or different methodology, were not explored by the District. The Student made limited progress on his reading goals and showed less than expected growth in math, despite his strong math thinking skills. He could not write independently. He became more frustrated about academic work at school, and more resistant to reading and doing his homework.

The increases in service hours Falmouth offered were insufficient to remedy the problem. The Student needed even more intensive instruction, but more importantly, he needed instruction in a method that would specifically address his orthographic processing issues. The Student’s triennial evaluation in February of [REDACTED] grade reinforced what Falmouth had known for over 2 ½ years: that the Student’s main challenges were in orthographic processing. Ms. Klaczynsky

recognized this in her psychological evaluation. His scores for rapid naming, which was directly related to reading fluency, were in the 1<sup>st</sup> percentile. Although the District argued that the Student's progress in reading really stepped up in [REDACTED] grade, the evidence did not support that conclusion. By the end of April 2016, the Student was still only reading a very slow 60 words per minute on a good day, and according to the BAS measure discussed above, was reading at a late [REDACTED] grade level. In other words, in almost three school years in Falmouth, the best case scenario was that he had progressed barely one grade level.

Despite Ms. Dunn's own reevaluation recommendation of an increased focus on visual/orthographic processing and the Parents' continued request to change the techniques and tools being used, changes were not made to the Student's program to address those concerns. Even after the Parents gave Falmouth notice in April 2016 of a partial day unilateral placement at Aucocisco, the only change made to the Student's program was one hour per month of long-overdue consultation with a reading strategist.

Based upon the Student's lack of reasonable progress, particularly in his area of highest need, and the District's continuation of the same programming that produced unacceptably slow progress, I conclude that the IEP was not reasonably calculated to enable the Student to make appropriate progress in his areas of disability.

**3. Is the District's proposed IEP and placement for the 2016-17 school year reasonably calculated to provide a free, appropriate public education to the Student in the least restrictive environment?**

Although the Parents framed this issue as including the Student's [REDACTED] grade placement, that was not one of the issues identified for hearing. As the hearing request was not amended to include it, I will not address it in this decision.

At the June 14, 2016 IEP team meeting to discuss Falmouth's offer of programming for [REDACTED] grade, Falmouth proposed a plan that exempted the Student from the general education

curriculum for social studies, ELA and foreign language so that he could receive additional specialized instruction consisting of 30 minutes each day for math and seven hours a week of specialized instruction in reading and writing, a one-hour increase over the [REDACTED] grade level. The rest of his proposed schedule would consist of one hour a week of math in the mainstream classroom with in-class support, science, study hall, and unified arts classes.

It wasn't until [REDACTED] grade—[REDACTED] school—that Falmouth offered reading and writing services at double the hours the Student was offered in [REDACTED] grade. While it may not have made much of a difference, had the Student continued to be taught reading without addressing his orthographic processing deficit, it was at the very least an acknowledgement that he required more intensive services to make reasonable gains in reading. Unfortunately, it came at a time when he should have already made sufficient gains to access the general education program in [REDACTED] school. Despite the Student having the intellect to do well in science and social studies, two subjects that he particularly enjoyed because of the more hands-on experience offered in those classes, reading at a late [REDACTED] grade level, he would have required a great deal of support to access those classes at Falmouth [REDACTED] School.

Falmouth argued that “special educators at Falmouth [REDACTED] School would have continued with the same programming that had been working for [the Student] the previous year,” but as has been discussed earlier, the evidence does not support a conclusion that this program worked well at all. Wilson Reading is different from the Seeing Stars program, the latter of which focused on helping children with the Student’s specific disability--orthographic dyslexia. The Student had good phonemic awareness, but still had difficulty reading words because he could not remember visual patterns of words, and struggled with remembering sight words. The special educator who would be instructing the Student in reading at Falmouth [REDACTED] School, Christine Labbe, had no training or experience delivering the Seeing Stars

program. There was no evidence that anyone at Falmouth ██████ School had experience actually delivering the Seeing Stars program.

The District argues that this is a dispute about educational methodology. That is certainly part of it. The District quotes the *Rowley* holding that under the IDEA, the primary responsibility for choosing the most suitable educational methodology lies with the local educational agency, *in cooperation with the parents or guardians of the child*. *Rowley*, 458 US at 207 (emphasis added). I agree that in many cases, the use of one methodology over another will not be the difference between whether a student receives an appropriate education. *E.g.*, *Rowley*, 458 U.S. at 209-10. On the other hand, sometimes specific instructional methods are necessary for a child to receive FAPE. The Ninth Circuit held that school districts should specify a teaching methodology for some students, unless such specificity is not necessary to enable those students to receive an appropriate education.” *JL and ML ex rel KL v. Mercer Island Sch. Dist.*, 575 F. 3d 1025 (9<sup>th</sup> Cir. 2009), *citing* 64 *Fed. Reg.* 12,552.

While school departments generally have the discretion to select the educational methodology to implement a student’s IEP, that methodology must be effective in addressing the Student’s unique needs and allowing him to make appropriate progress in light of his circumstances. As the Parents note, educational methodology is one of the key facets of programming that must be “specially designed” to meet the unique needs of a child:

“Specially designed instruction” means “adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child’s disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).

In some instances, a student may need a particular methodology to receive educational benefit. 71 *Fed. Reg.* 46.665 (2006) A Federal court found that a school district denied FAPE

to a student with severe dyslexia when it continued to use an educational methodology that had proven highly ineffective the previous year, and did not address his specific deficits, then developed an IEP for the following year that failed to exclude the use of that methodology. *I.S. v. School Town of Munster*, 64 IDELR 40 (N.D. Ind. 2014). The Court held as a matter of law, that because the IEP left open the possibility that the Student would receive inappropriate instruction, it was substantively deficient.

The same is true in the case before me. After three years of instruction that was ineffective in remediating the Student's orthographic processing disability and therefore allowing him to making reasonable progress in learning how to read, the IEP could not leave open the possibility that the Student would continue to receive inappropriate instruction. Doing so rendered it substantively deficient.

At Aucocisco, the Student's reading program was intensive. He showed a good deal of growth initially on a number of subtests, but that growth flattened out or even fell back on a couple of the KTEA subtests. The District also questioned why only certain subtests were given, intimating that Aucocisco cherry-picked tests to produce desired results. Although Aucocisco's witnesses explained why the tests were chosen, the District offered credible evidence that this selectivity was not the best testing practice, and that obtaining composite scores was more useful and accepted as a practice. As a hearing officer, I approach with skepticism the results of selective testing that is not conducted in accordance with accepted practices or test protocols, and understand Falmouth's concern. Here, however, it was apparent that the Student's standardized testing of his academic and even his cognitive abilities was consistently erratic, regardless of which school he attended and who tested him. Consequently, while test results were of some value, they had to be considered along with other evidence in the record and observations. I believe the evidence plainly supports a conclusion that the Student was making considerably

better progress in reading at Aucocisco than he was in Falmouth. This is no surprise because he was receiving more intensive instruction, and this instruction was using a methodology geared specifically toward addressing his orthographic processing disability.

There was credible and compelling testimony from the Parents, Ms. Murphy and Ms. Melnick about the changes in the Student and his approach to reading and learning generally, which became apparent almost immediately upon receiving tutoring at Aucocisco. From the Student's first math tutoring session, Ted Dalton of Aucocisco was able to approach division in such a way that the Student could understand it for the first time. The Parents, who were very credible witnesses, testified about how, within a couple of weeks of attending the intensive tutoring program at Aucocisco, they saw changes in the Student as a reader. He was no longer reading-averse, and his own perspective of himself changed from non-reader to reader. By the fall when he was a full-time student at Aucocisco, he actually loved reading. I believe that they really wanted things to work out for the Student in the Falmouth schools<sup>7</sup>, and tried to remain positive about this for as long as possible. It was the intensity and the methodologies used at Aucocisco that the Student needed to finally learn how to decode, begin making real progress, and stop being afraid of reading.

The District argues that the Parents' testimony without any qualifications or credentials is insufficient to meet the burden that the school failed to provide the student with FAPE, but the Parents' testimony is not the only evidence. Not only did Ms. Melnick and Ms. Murphy testify about how the Student became a confident reader when given appropriate instruction, but compelling testimony came from Lori Coffin. While the District may argue that Aucocisco is biased and chose certain tests to show the Student in the best light, it did not make that argument

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<sup>7</sup> The Parents were very pleased with the education their two typically-developing children were receiving in Falmouth, and felt they were being appropriately challenged. [Testimony of Mother, Father]

about Ms. Coffin. She is a well-respected professional and straight-talker who both parties agreed was qualified to assess the Student's reading at Aucocisco. She corroborated what the Parents and Aucocisco witnesses had said about the Student having made great improvements in his reading and about his new-found enthusiasm for reading. Ms. Coffin also testified that there was no question that the Student was benefitting from his instruction. Half-way through █ grade, she saw him break down words into syllables, spell and decode words with great success, and read grade █ and █ level passages with no errors. In light of her own observations of the Student reading these materials, Ms. Coffin was surprised that the Student was unable to do well on the DRA passage she had him read, although he read at a rate of 91.2 words per minute, a more than 50% increase from the 57-60 words per minute he was reading with Ms. Dunn before he started his reading program at Aucocisco. That in itself is an objective indicator of his progress. Ms. Coffin's testimony about the Student's progress that she personally witnessed was very credible.

Looking at the Student's unique needs and Falmouth's experience with him for almost three years, I conclude that the June 2016 IEP offered by Falmouth would not have provided the Student with FAPE. As noted above, although it included more reading instruction, there was no reason to believe that more of the same instruction would have helped the Student gain the skills he was acquiring at Aucocisco, and that he required to access the mainstream curriculum.

Following the Parents' filing of this due process hearing request, Falmouth added 50 minutes more of reading instruction, but the IEP had no goal for reading fluency and there was no promise that any new or different methods of instruction would be used. This proposed November 2016 IEP remained inadequate. Despite having three years of experience with this Student, Falmouth was still not thinking outside of its usual box of tools.



Finally, at the February 15, 2017 IEP team meeting convened to discuss the results of Ms. Coffin's assessments, Mr. Kucinkas offered a proposed schedule for the Student that included "90 minutes per week of Lindamood Bell instruction." [Fact #47] The resulting amended IEP did not mention the Lindamood-Bell methodology, despite Falmouth's verbal promise and statement in the Written Notice. As counsel for both parties in this case know well, the First Circuit held earlier this year in a case involving Falmouth that the Written Notice spells out *nonbinding* proposals for implementing a student's IEP, and as long as the IEP does not contain the methodology, failure to offer that instruction is not a denial of FAPE. *Ms. M. v. Falmouth Sch. Dep't*, 847 F. 3d 19 (1<sup>st</sup> Cir. 2017). As noted in the case law cited earlier, while the IDEA does not require the IEP to include specific instructional methods, and Falmouth may choose to never make any exceptions to its policy of not including methodology in the IEP, Falmouth's offer to provide Lindamood-Bell instruction is not enforceable and provided them with no guarantees that the Student would receive the instruction he required to make progress in reading. Because the IEP left open the possibility that the Student would receive inappropriate instruction, it was substantively deficient.

This is not a situation in which the Parents' preferred methodology would allow the Student to maximize his gains, which can be the case in disputes over methodology. This dispute is between a methodology that has not addressed the Student's most outstanding area of disability and a methodology that does. Although the Student may never excel in reading or spelling, he does deserve the opportunity to be taught how to read sufficiently well so that he can access the general education curriculum and meet the educational standards that apply to all children with the District. Consistent with the case law quoted above, given the Student's critical and immediate need for effective reading programming specifically focused on his orthographic processing disability, this IEP had to be specific regarding the methodology to be used. Without

that specificity, I cannot conclude that the IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.

**4. If the hearing officer concludes that the District did not provide or offer the Student FAPE during any of the periods in question, is the Student entitled to compensatory education or other remedies, which may include reimbursement for the costs associated with his placement at or services provided by the Aucocisco School?**

Because the District denied the Student FAPE during 2014-15, 2015-16 and 2016-17, he is entitled to a remedy. There was no dispute that the Parents gave the District notice required under the IDEA.

When a student is deprived of FAPE, he is entitled to “such relief as the court deems is appropriate.” 20 U.S.C. § 1415(i)(2)(B)(iii). Compensatory educational services requested by the parents are intended to place the Student in the same position he would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). The Supreme Court case of *Burlington School Comm. v. Department of Education* is authority that reimbursement of private school costs is an appropriate remedy when a school district’s IEP and placement fails to provide an appropriate education and the parents’ unilateral private placement is “proper under the Act.” 471 US 359, 370 (1985) Private school tuition reimbursement is available as a remedy under the IDEA where a hearing officer finds that: 1) the school department did not make FAPE available to the student in a timely manner prior to the private enrollment; and 2) the private placement is determined to be appropriate. 34 CFR 300.148, *Florence County Sch. District Four v. Carter*, 510 US 7 (1993).

A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the local school department. Under the holding of *Florence County*, parents must demonstrate that the public school did not provide a free, appropriate public education, *and* that the private school placement

is proper, which means, “education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Florence County*, 510 U.S. at 11. It is not necessary that this unilateral placement be in the least restrictive setting. The Third Circuit Court of Appeals noted that imposition of the least restrictive environment requirement on such a placement “would vitiate the parental right of unilateral withdrawal,” and that “the test for the parents’ placement is that it is appropriate, and not that it is perfect.” *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 84 (3d Cir. 1999).

The District, in its closing argument, contends that there are several reasons why the Aucocisco placement is not appropriate. One is that it is not the least restrictive programming, but as set forth above, that is not a requirement for a unilateral placement to be appropriate under the IDEA.

The District’s second objection is that Aucocisco has had no more educational success with the Student’s reading deficits than Falmouth did, and argues that in fact Aucocisco has had less success. The evidence supports a contrary conclusion. As discussed earlier, there was considerable evidence, both in formal assessments and from observations, that after beginning instruction at Aucocisco, the Student went from being a non-reader and reading-averse to someone who could read materials that are [REDACTED], [REDACTED] and [REDACTED] grade levels and who now loves reading. This is a complete turnaround from the Student’s performance in Falmouth where he hated reading and was progressing at a snail’s pace. Some of the testing supports this, although there was no dispute that standard assessments can prove to be a tricky means of evaluating this student. Significantly, literacy expert Lori Coffin concluded in February of 2017 that the Student had made progress in all areas, and her prognosis for his continued improvement with the instruction he was receiving at Aucocisco was “excellent.” [Fact #46] In addition to the indicators of progress set forth in my discussion of Issue #3, it was Ms. Coffin’s opinion that the

one-on-one learning environment was optimal for the Student, which was consistent with the opinions of Falmouth personnel that the Student fared better in a smaller setting with consistent structure, rather than in the mainstream classroom, and that he required a lot of teacher support, especially with writing. [Fact #13]

The third District criticism of Aucocisco's program was that it was "delivered by an ever-changing collection of educational technicians." Ms. Coffin testified that the Lindamood-Bell programs were appropriate for the Student's needs, adding, "There was no question about the appropriateness of the instruction, or that he was benefitting from it." She described the instruction at Aucocisco as very skilled and exactly what she would be doing. [Fact #45] The educational technicians delivering the program were being directly supervised by Lisa Murphy, who had a good deal of experience both in delivering and supervising such instruction. Under those circumstances, I had no concerns about the qualifications or abilities of these paraprofessionals, as an educational technician with considerable training, experience and supervision may be better qualified to deliver Lindamood-Bell instruction than a certified teacher with just two days of instruction in this methodology, no experience delivering the programs, nor any experienced supervision.

Lastly, the District alleged that the Parents failed to present evidence of actual educational harm. I found this contention confusing. Does the District seriously believe that there is no educational harm when a bright [REDACTED] grader cannot read above a [REDACTED] grade level? As Ms. Dunn explained, "While he is successful in participating in group projects and group learning activities, he is not able to show that he is truly learning and retaining information for he is not able to perform successfully on written assignments and assessments related to learning." There is educational harm when the Student is less able to participate in the mainstream environment, such as when he has to forego a subject like social studies in [REDACTED] grade, partly so

that he could receive the intensity of reading instruction that he should have had years earlier, and partly because he is unprepared for the amount and complexity of the reading and writing involved. This is not to say that Falmouth's decision to substitute more reading instruction for social studies was flawed. That was a good decision, but it would not have been necessary, had Falmouth made FAPE available to the Student in a timely manner.

The Parents' burden is to show that the private school placement is reasonably calculated to enable the child to receive educational benefit. Aucocisco easily satisfies that test and is "proper under the Act." Reimbursement of the Parents' expenses to send the Student to Aucocisco is the appropriate remedy. The Student immediately responded well to the placement change, and his confidence about reading and learning soared. By January of [REDACTED] grade, he was capable of reading [REDACTED] and [REDACTED] grade materials with confidence.

For the foregoing reasons, an appropriate remedy to compensate the Student for not having an educational program that would allow him to make appropriate progress, particularly with his reading and writing but also with mathematics, is to reimburse the Parents for the costs incurred in their unilateral placement at Aucocisco School. Aucocisco is providing the Student with the necessary services to allow him to learn to read so that he may access the general curriculum.

The District is ordered to take remedial action set forth in section V below.

## **V. ORDER**

1. Falmouth violated state or federal special education laws by failing to provide the Student with a free appropriate public education for the 2014-15 and 2015-16 school years.
2. Falmouth violated state or federal special education laws by failing to offer the Student an IEP and placement for the 2016-17 school year reasonably calculated to provide him with a free appropriate public education.

3. Falmouth is ordered to reimburse the Parents for the cost of the Student's tuition at Aucocisco for May and June of 2016, for the 2016-17 school year plus transportation expenses permitted under the IDEA as compensatory educational services for the failure to provide the Student with FAPE during the 2014-15 and 2015-16 school years.
4. Falmouth is ordered to reimburse the Parents for the cost of the Student's tuition at Aucocisco for the 2017-18 school year plus transportation expenses permitted under the IDEA as compensatory educational services for the failure to offer the Student an educational program for the 2016-17 school year that was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. If the Parents have not paid all of the tuition to Aucocisco for this year, then Falmouth may elect to pay the remainder directly to Aucocisco.

  
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SHARI B. BRODER, ESQ.  
Hearing Officer