STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

October 31, 2006

06.056H—Adult Student v. Sanford School Department

REPRESENTING THE FAMILY: **Richard O'Meara, Esq.**

REPRESENTING THE SCHOOL: **Katherine Bubar, Esq.**

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

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, 20 & 21, 2006, the first two days at the Department of Health and Human Services in Sanford, Maine, and the final day at the Goodall Memorial Library in Sanford. In addition to counsel and the hearing officer listed above, those present for the entire proceeding were the adult student, her parents, and Elizabeth St. Cyr, Director of Special Education for the Sanford School Department ("District"). Judy Kuczwara, an advocate intern from Murray, Plumb & Murray, observed part of the hearing. Testifying at the hearing were:

The mother	
Steve Krom	Public School Liaison, Landmark School
John Hicks	Psychologist, Evaluator, Landmark School
Carol Donnelly	Director of Early Literacy, Landmark School
Mary "M.G." Foster	Case Manager, Landmark School
Charles Whitehead, Ph.D.	Neuropsychological Evaluator
Stacey Bissell	Sanford High School Special Education Coordinator
Rita Pender	Sanford High School English Teacher
Ed Rogowski	Student Assistance Counselor
Bruce Chemelski, Ph.D.	Psychologist
Patricia Jackman	Reading Specialist
Katrina McCall	Special Education Teacher and Case Manager
The mother's sister	

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

The adult student requested this due process hearing on June 29, 2006. The case involves the adult student (henceforth "the Student"), whose date of birth is xx/xx/xxxx. The prehearing conference, originally scheduled for August 3, 2006, was rescheduled to August 16, 2006 at the request of the District's counsel. On August 16, 2006, the parties and their counsel attended a prehearing conference. Present were: the Student, the mother and father; Richard O'Meara, Esq., counsel for the family; Katherine Bubar, Esq., counsel for the District; Elizabeth St. Cyr, Director of Special Education; Stacey Bissell, Special Education Coordinator; and Shari Broder, Esq., Hearing Officer. Documents and witness lists were exchanged in a timely manner. The Student submitted 60 exhibits constituting approximately 240 pages, and the District submitted approximately 110 exhibits constituting 437 pages. Additionally, the parties agreed that the Hearing Officer would address the following legal issues prior to the hearing:

1. Did the family meet the IDEA notice requirements for their reimbursement claim for the 2005-2006 school year?

2. Are the Student's claims of failure to provide a free, appropriate public education from 2001-2004 barred by the statute of limitations?

These issues were addressed in a preliminary ruling dated September 8, 2006, and are incorporated into this decision. The Hearing Officer denied the Student's motion to reconsider the ruling on the second issue.

The parties agreed to extend the hearing date, and the hearing was held, as noted above, on September 18, 20 & 21, 2006. Both parties requested and were granted leave to file written closing arguments, which were submitted on October 17, 2006, and the record closed at that time. The Student submitted a 44-page memorandum, and the District submitted a 43-page memorandum.

II. ISSUES:

In addition to the issues noted above, this hearing addresses the following issues;

1. Was the IEP developed for the 2005-2006 school year reasonably calculated to provide a free, appropriate public education to the Student?

2. If not, is the family entitled to reimbursement of costs for the Student's unilateral placement at Landmark School?

3. Is the Student entitled to continue her placement at Landmark School for the 2006-2007 school year at the District's expense, or is she entitled to any other form of compensatory education?

4. Did the IEP and placement for the Student's 2004-2005 school year fail to provide the Student with a free, appropriate public education? If not, what remedy is appropriate?

III. FINDINGS OF FACT

1. The Student is xx years old. She lives with her parents in Sanford, Maine.
2. The Student is identified as eligible for special education because she has a severe learning disability. She has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). [S-351]
3. During her elementary years, the Student attended a private parochial school, St. Thomas, but received reading remediation services from the District, beginning in xx grade and continuing through xx grade.
4. The Student entered public school at Sanford Junior High for xx grade, the 2000-2001 school year. Her IEP called for direct instruction in language arts through LD Resource. [S-304] As part of her triennial review, cognitive and achievement testing was done in January 2001. This showed that the Student's overall intellectual functioning [sic] at 107, within the average range. [S-286] Her achievement in certain areas, however, was well below grade level, particularly in the areas of incomplete words, letter-word

identification and dictation. [S-289-290] The parents did not understand the scores, but received positive reports from the Student's teachers. [Testimony of mother]

5. On June 7, 2001, the PET met and developed an IEP for the Student's xx grade year. The IEP noted the Student's poor standard score of 77 in basic reading, and set a goal to improve this score to 92. [S-252]. The IEP further recognized that "multi-sensory approaches and small group instruction" were necessary to address the Student's long-term memory and processing speed difficulties. [S-252] Consequently, the Student was to receive one hour of direct instruction in the resource room daily. [S-253] Her modifications included a multi-sensory approach, and biweekly progress reports. [S-255-256]

6. During xx grade, the mother worked with the Student for two or three hours five nights each week doing homework, and they read together each night. [Testimony of mother] The mother was very dedicated to helping the Student succeed, and reported the amount of home support at parent-teacher conferences. [Testimony of mother]

7. The PET met on November 29, 2001, but the parents were not present.[1] At that meeting, the PET determined to change the Student's IEP to all mainstream classes, and to place the Student on monitoring status. [S-240] The parents agreed to this, based upon the recommendations of the educators. [Testimony of mother] There was no mention in the records of whether the Student had received the multi-sensory reading program called for in her IEP, or whether she made any progress in that program. There was also no indication that the parents ever received biweekly progress reports required in the IEP.

[1] Under "Attempt to include parent in this meeting, if not present," the minutes simply read "not here." [S-239]

The Student continued to work very hard, and earned As and Bs in her classes that year. [S-407]

8. Although the Student was on monitor status, at a xx grade PET meeting in November 25, 2002, the Student's English teacher, Ms. Bouchard, expressed her concern about the Student's reading, particularly in light of the more difficult material she would be receiving that year. [S-220] Ms. Bouchard said that the Student would need an alternative reading text, such as a side by side/abridged version. [S-220] At that meeting, two teachers pointed out the Student's distractibility and lack of focus. [S-220] The math teacher said that the Student tried really hard, but her test scores were in the C range, with a recent take over test raising her grade from a 51 to a 67. [S-220] There was no administrator present at this PET meeting.
9. The Student planned to attend college, hoping to become a physical or occupational therapist, and was taking college preparatory level classes.
10. At the end of xx grade, the Student was tested with the Woodcock-Johnson III Reading Achievement subtests. [S-214-216] Her decoding skills were extremely low, with letter word identification in the first percentile, and word attack in the third percentile and broad reading in the seventh percentile. [S-215] The evaluator recommended that the Student would benefit from a reading class that emphasizes [sic] decoding strategies, and introducing new vocabulary words, and that these might increase the Student's comprehension skills. [S-216] Consequently, the PET determined to place the Student in a new reading program in which the Student would receive direct instruction emphasizing decoding skills. [S-203-204] Her IEP called for 30 minutes of direct instruction in

reading two to three times each week with "Spec. Ed/V. Payeur[2]." [S-207] There was no reference to the LiPS program. [Testimony of S. Bissell]

11. During xx grade, the 2003-2004 school year, the Student did not receive the reading instruction required in her IEP. [Testimony of mother] The mother continued to provide the Student with a lot of support at home, as neither the mother nor the Student wanted to see the Student fail. [Testimony of mother]

12. In March 2004, the Student was again tested, and the testing showed that her reading achievement [sic] dropped to the lowest level yet. In letter word identification, the Student was in the .3 percentile, and broad reading [sic] dropped a percentage point to the 6th percentile. [S-199] Despite the fact that the Student has [sic] a history of problems with word attack, the evaluator, Katrina McCall, did not give the Student the word attack subtest[3]. [Testimony of K. McCall] The Student's spelling was in the 4th percentile, and her math fluency dropped to the 3rd percentile. [S-199] Ms. McCall noted that the Student did not have the word attack skills to identify unfamiliar words, and was reading at a frustration level when placed at grade level. [S-200] Additionally, the Student was dependent on classroom discussions, lectures and context clues to derive meaning. [S-200] Ms. McCall recommended remedial instruction for the Student. [S-200] Although the Student's reading was very poor, she continued to work very hard, and with home support, received good grades in school.

[2] The mother did not even know who V. Payeur was, but Stacey Bissell testified that she was an ed tech. [Testimony of mother, Stacey Bissell]

[3] When Ms. McCall was asked on cross-examination why she did not give the Student the word attack subtest, she did not know.

13. The Student also had cognitive testing that spring, which showed a full scale IQ of 104. This was discussed at a June 4, 2004 PET[4], along with the results of the Student's achievement tests. [S-185-185A] There was discussion about providing a reading program, such as Wilson, for the Student. [S-185A] The PET determined that the Student would receive direct instruction or consultation dependent upon her program in summer tutorial sessions in a phonics-based reading program. [S-185A] The Student also took the PSAT, and was in the first percentile for verbal and the 23rd percentile for math.

14. Because the Student's reading was so poor, the parents arranged for her to receive private tutoring. [P-208-209, testimony of mother] The Student received 1½ hours of tutoring weekly for a total of 20 hours of service. [Testimony of mother]

15. The PET met on September 7, 2004 to discuss the Student's program for xx grade. [S-171] Ms. McCall ran the meeting, but there was no authorized District administrator present. [S-171][5] There was concurrence that the Student's word attack skills were very low, and that she struggled with reading. [S-171] The mother pointed out that the Student expected to go to college. [S-171] The photography teacher offered to allow the Student to be pulled out of photography class during the beginning of the semester to receive reading help. [S-171] The PET determined that the Student should have "A program in the Resource Room designed to improve (the Student's) ability to read words in isolation including a Wilson phonics instruction to be 78 minutes, 4 days a week." [S-171] This would continue until November 11, at which time the Student would be tested. [S-171] Ms. McCall also said that pretesting should be done. [S-171] The Student was

[4] This was the first PET meeting attended by Stacey Bissell. [Testimony of S. Bissell]
[5] Ms. McCall did not have full authority required by MSER §8.6(D)(4) to obligate the District's resources, and was only authorized to obligate in-house resources.

also to receive a speech and language evaluation, and the parents would get biweekly reports. [S-171] The District never drafted an IEP to reflect these changes.

16. The Student did not receive a speech and language evaluation, nor was there any pretesting done. In xx grade, the Student began attending a resource room class taught by Douglas Casement instead of attending of [sic] her photography class four days each week, but she never received Wilson reading instruction.[6] [Testimony of mother] In addition to the Student, the class contained three students who could not read at all, and one student with Down's syndrome. [Testimony of mother] The Student was not receiving any benefit, as the teacher was spending time with the other students. [Testimony of mother] The mother called Stacey Bissell, the Special Education Coordinator for Sanford High School, and told her that this was a waste of time, and

asked her to observe the class. [Testimony of mother] Ms. Bissell never did so, but said that the Student was misplaced. [Testimony of mother] Ms. Bissell did stop in one day when the Student was not there, and Mr. Casement told her the Student was not in the Wilson reading program. [Testimony of S. Bissell] The mother said that this inappropriate program was breaking the Student's spirit, and that she wanted the Student removed from the class. [Testimony of mother] The mother did not want to terminate special education services, but wanted an alternative. [Testimony of mother] The District did not offer one, but without calling a PET meeting, wrote an IEP dated September 7, 2004 that discontinued the Student's reading services, purportedly at the mother's request. [S-172-173] This IEP was never signed by either parent. [S-172-177] The Student's transitional goal was "will have a successful transition to adulthood." [S-

[6] As the family's counsel pointed out, there was no evidence that Mr. Casement was certified to provide Wilson instruction.

176] It noted, however, that the Student wanted to go to college and become a physical or occupational therapist, yet provided no programming to address the Student's reading deficits. [S-176] Accommodations contained in the IEP included allowing tests to be read to the Student. [S-177] The mother expressed her frustration to Ms. Bissell, who offered to reimburse the parents for three weeks of tutoring to make up for the time the Student was in class and not receiving services. [Testimony of mother, S. Bissell]

17. The District arranged to have Bruce Chemelski, a psychologist, evaluate the Student. At a staffing held on November 1, 2004, Dr. Chemelski, who had not yet evaluated the Student, pointed out that the six-point drop in the Student's symbol search subtest was clinically significant. [S-157] He was not an expert in determining appropriate reading programs, and assumed that the Student was receiving direct instruction for her reading deficits between the November 1, 2004 meeting and the March 2005 PET meeting to discuss his evaluation results. [Testimony of B. Chemelski]

18. Dr. Chemelski evaluated the Student on November 11, 2004. This assessment was not intended to provide the PET with any advice about the selection or provision of a specialized reading program suitable for the Student, but was intended to determine whether there were other psychological functioning problems to account for her lack of progress in reading. [Testimony of B. Chemelski] Nothing that he did had anything to do with the Student's phonological awareness or reading skills. [Testimony of B. Chemelski] Dr. Chemelski thought the Student would receive a formal reading program from the District, such as Lindamood or Wilson, and that she should receive these services five days a week. [Testimony of B. Chemelski] His report was not made available to the parents until the March 8, 2005 PET meeting, and did not contain any

recommendations for reading services for the Student. [Testimony of mother, S-123-132] Dr. Chemelski reviewed the Student's previous testing, and noted that she had not made progress in decoding, and her letter word identification actually dropped. [Testimony of B. Chemelski] Dr. Chemelski also testified that the Student had "deep holes in her phonological awareness." [Testimony of B. Chemelski]

19. The PET met on March 8, 2005. No special education teacher was present.[7] [S-118] Dr. Chemelski felt that the Student needed regularly scheduled, direct service in the Resource Room. The PET determined that she would receive instruction in the Resource Room two days per week for 78 minutes each day, and that biweekly progress reports would be sent home to the mother. [S-120] Although the District amended the IEP to include the two periods of direct instruction each week, the parents never received a copy of the new IEP. [P-225, testimony of mother] The only goal even somewhat related to providing the Student with a phonetically-based, multi-sensory reading program was,

> Given mainstream vocabulary tests and Resource Room support, (the Student) will develop ways to integrate these words into her own vocabulary, given such strategies as: visual cues, key words, flash cards, as well as assistance with syllabication in order to read the words aloud, as measured by her mainstream test scores.

[S-155] Dr. Chemelski also recommended accommodations in his report, which were not incorporated in the Student's IEP. [S-131, Testimony of K. McCall]

20. Ms. McCall was assigned to instruct the Student, but was not certified to teach Wilson or the Lindamood Phoneme Sequencing Program (LiPS) reading programs at that time. [Testimony of K. McCall] She did not send home biweekly progress reports. [Testimony of mother]

[7] Ms. Bissell testified that it was a snow day, and people were released at 1 p.m., but she chose to continue with the meeting nonetheless.

21. The Student's aunt recommended to the parents that they enroll the Student at the Landmark School's ("Landmark") summer program for the summer of 2005, which the parents did. [P-172] Landmark, which is located in Prides Crossing, MA, is a private school with a high school enrolling just over 300 students, all of whom are diagnosed with language-based learning disabilities, and average to above-average intelligence. [Testimony of S. Krom] Landmark offers linguistically controlled programs which teach students remedial strategies and techniques to help them get past their disability. [Testimony of S. Krom] On April 20, 2005, the parents brought the Student to Landmark for an admission screening and interview for attendance at Landmark's summer program. [P-140] John Hicks, a psychologist, evaluated the Student, administering the Woodcock Reading Mastery Test-Revised (WRMT-R) the Grey Oral Reading Test (GORT), and the Lindamood Auditory Conceptualization Test (LAC-3), and others. [P-140-170, P-42] The Student's reading scores on the GORT ranged from reading at a first grade level to a third grade level. [P-152] She was at or below the first percentile on all GORT scores. Her scores [sic] on the WRMT-R subtest for word identification was the 1st percentile, and her word attack subtest was in the 4th percentile. [P-152] Mr. Hicks could not establish a solid foundation of reading, and concluded that the Student had a very profound reading disability. [Testimony of J. Hicks] He cried when he came out of the evaluation, and thought it was pretty significant for a late high school student to be reading at a lower elementary level. [Testimony of J. Hicks] On April 21, 2005, Landmark notified the parents that the Student was accepted into the summer program. [P-139]

22. In January of xx grade, the Student took the SAT, and scored 210 on critical reading, and 390 in math. [P-132] She took the test again in May, and received a 290 in critical reading, and 410 in math. [P-132]

23. The parents paid the full tuition for the Landmark summer program on July 1, 2005. This was not an alternative to attending school in the District, as the District did not offer summer programming for the Student. The parents reserved their decision regarding whether the Student should attend Landmark during the following school year until after they had an opportunity to evaluate the Student's experience in the summer program.

24. The Student did well at Landmark during the six-week summer program. [Testimony of mother] The parents had explored other possible placements for the Student, but liked the fact that Landmark had extracurricular activities, and formal homework time when teachers were available to help. [Testimony of mother] They wanted to hold a place for her for the school year, and on July 21, 2005, they paid Landmark a deposit for the fall of 2005. They also signed a document entitled "Private Enrollment Agreement." [P-1, P-125] The agreement provided that an enrollment deposit was paid when the Student accepted an invitation to enroll at the school. [P-127] In other words, this deposit held a place for the Student at Landmark. Although the enrollment deposit was not refundable, the agreement did not require the Student to attend. In fact, the Student could not attend classes unless an additional $20,000 of the $47,700 in tuition was paid by the start of classes on September 6, 2005. [P-127] The Student still had the right to attend public school in the District, and could elect not to attend Landmark in the fall.

25. By letter dated August 9, 2005, the parents notified the District that they were "rejecting as inappropriate the IEP and placement offered to" the Student for the 2005-2006

academic year, enrolling the Student at Landmark on September 6, 2005, and seeking reimbursement for the Student's Landmark tuition. [S-106] The IEP in place at the time was the one developed at the March 8, 2005 PET meeting, which called for two periods of direct instruction per week.[8]

26. In August 2005, Charles Whitehead, a psychologist, evaluated the Student. He administered both cognitive and academic achievement testing, as well as executive function and neuromotor screenings. [S-42] Because his report would not be ready by the September 1, 2005 PET meeting, Dr. Whitehead gave the mother an informal summary of his findings. [P-221, testimony of mother] He told the mother that the Student was conceptually bright and capable, and had good comprehension skills, but her reading ability was significantly impaired. [Testimony of C. Whitehead] Despite having average cognitive abilities, the Student's letter-word identification was in the 1st percentile, word attack was in the 3rd percentile, and broad reading in the 7th percentile. [S-45] Reading fluency and vocabulary were both in the low average range. [S-45] Despite having completed xx grade, the Student's pseudoword decoding and spelling skills were at a third grade level, and other reading skills were well below her grade level. [S-50] He concluded that the Student's dyslexia and ADHD aggravated each other in terms of her ability to be successful academically. [Testimony of C. Whitehead] Dr. Whitehead said, "her age and current grade level (12), in tandem with her post-secondary aspirations . . . demand she have an intense, well-crafted, and highly structured program that comprehensively addresses her multiple needs." [S-57] The Student had made minimal progress in school, and had consistently low scores, despite good intellectual

[8] As noted above, the parents were never given a copy of this IEP. [P-225]

abilities. [Testimony of C. Whitehead] He thought she would be "better suited toward individualized direct instruction around her dyslexia with similarly impacted peers." [S-57] He also felt the Student's "direct instruction and mainstream curriculum should be provided in a very small group setting where feedback is immediate, distractions few, and with significant organizational support." [S-57] Dr. Whitehead explained that the Student needed 180 minutes per day of intensive instruction in a multi-sensory program. [Testimony of C. Whitehead] He did not think that what the District offered her in the past was sufficient. [Testimony of C. Whitehead]

27. On September 1, 2005, the PET met to discuss the Student's placement for her xx year. The District employed Michael Opuda, Ph.D., a special education consultant with the law firm of Drummond, Woodsum & MacMahon, to run the meeting. The mother felt that she was being ignored, that the tone of the meeting was hostile, and that Dr. Opuda kept pursuing his own agenda. [Testimony of mother] She wrote a letter to Elizabeth St. Cyr, Director of Special Education, expressing her concerns about how Dr. Opuda treated her during the meeting. [S-62] The District said it could offer the LiPS program, but could not name any qualified person who would be available to teach the Student. [Testimony of mother] The IEP that was the result of this meeting provided one 78-minute block per day of direct instruction to address both the Student's reading needs and organization [sic] skills. [S-67, S-69] The proposed IEP also offered 60 minutes per week of speech and language therapy. [S-69] The speech and language services were not included in the "Parental Change of Program Notice." [S-67]

28. Although the Student was reluctant to leave Sanford High School for her xx year, her parents convinced her that this would be her best alternative educationally. [Testimony

of mother] They did not believe that the IEP offered by the District could meet the Student's needs. [Testimony of mother] The Student began attending Landmark on September 6, 2005. Her courses included advanced math, anatomy and physiology, drums, language arts, language arts tutorial, reading literature and study skills. [P-2] Because her reading skills in decoding and fluency were so poor, she was placed in the early literacy program, which contained a one-to-one tutorial. [Testimony of C. Donnelly, P-92] This was offered to the 20% of students who could not read text for meaning very well. [Testimony of C. Donnelly] There was only one other student in this program who began with scores as low as the Student's. [Testimony of C. Donnelly] The Student began the year with a fourth grade reading level book. [Testimony of C. Donnelly] She worked hard, and earned mostly As, with Bs in study skills, and a C+ in anatomy and physiology. [P-2]

29. The cost of tuition, room and board at Landmark for the 2005-2006 school year was $47,700.

30. In November 2005, the District hired Patricia Jackman, a certified literacy specialist with experience in remedial reading programs, to provide a reading assessment to the Student. [Testimony of P. Jackman] Ms. Jackman was not certified to teach Wilson, Lindamood, or Orton-Gillingham reading methods, as these programs went beyond the realm of remedial [sic]. [Testimony of P. Jackman] In her assessment, the Student was only able to reach an instructional level on the second and third grade tests, and scored at the frustration levels for word lists for fourth grade and higher. [S-36] She could not achieve an independent reading level at any grade level. [S-35]

31. In April 2006, Mr. Hicks readministered the GORT, LAC-3, and WRMT-R to the Student. [P-210] In every measure, the Student increased her ability to manage sound symbol tasks. [Testimony of J. Hicks] Her most significant leap was on the LAC-3, where her standard score increased 70 percentage points, from the 3rd percentile to the 73rd in one year. [P-213, P-215, P-41] On the WRMT-R, the Student's standard score on word attack went from a 74 to a 92. [P-41] Her ability to decode novel and unfamiliar words increased over one standard deviation in one year. [P-213] The Student's accuracy for decoding contextual information increased the equivalent of over three grades. [P-213] In 2005, the Student reached a frustration level on the GORT at story 5, but in 2006, did not reach frustration level until level 9, which was four years more difficult than story 5. [Testimony of J. Hicks] Dr. Whitehead thought the Student had made remarkable progress at Landmark, and was surprised at how much she had grown on word attack, where she went from borderline to the lower end of the average range. [Testimony of C. Whitehead] He thought the Student's conceptual skills were good enough to pull up her mechanical skills. [Testimony of C. Whitehead] Although her phonics and fluency problems should have been addressed earlier, she could and was narrowing the gap. [Testimony of C. Whitehead] Patricia Jackman, the District's literacy specialist, testified that the longer students go without help, the harder it is to teach them. [Testimony of P. Jackman] By repeating her xx year, the Student could receive more of what she would need to be successful in college. [Testimony of C. Whitehead] Despite her impressive gains, the Student had not yet consolidated her skills into a reading fluency above the first percentage of her peers. [P-213] Dr. Chemelski

also agreed that the Landmark assessment and summary captured, better than anything, the Student's learning disability and needs. [Testimony of B. Chemelski]

32. Although the primary reason the family decided to send the Student to Landmark was to learn to read, the Student has made other gains as well. [Testimony of mother] The Student keeps a daily planner, and is happier, [sic] relaxed, and much more confident. [Testimony of mother] She has also started reading for pleasure. [Testimony of mother] In light of Dr. Whitehead's recommendation, the parents thought it would be a good idea for the Student to repeat her xx year at Landmark. [Testimony of mother] The Student agreed to do this, and is currently enrolled for the 2006-2007 school year. Tuition, room and board are $52,500. Transportation is 160 miles round trip, plus $5.50 in tolls. The Student is able to drive herself to school this year.

IV. DISCUSSION AND CONCLUSIONS

Position of the Parents: The Student has a severe learning disability with a particular deficiency in the area of reading decoding. Nonetheless, the District never offered her a phonetically based program, or much in the way of special education services at all. Consequently, she did not learn how to read, and made no progress over the years in this area. Although she received good grades, it was due to her own perseverance, and a great deal of support from her parents. Her IEPs were inadequate, and often were not implemented. As the evidence shows that the District failed to implement the IEP, and did not offer the Student a free, appropriate public education , the family is entitled to recover the costs for the Student's 2005-
2006 and 2006-2007 unilateral placements at Landmark, either as compensatory education for past violations of her rights, or as reimbursement in accordance with the U.S. Supreme Court's *Burlington* decision. To compensate the Student for the lack of a meaningfully beneficial

education in the District, she should be permitted to continue her placement at Landmark at District expense.

Position of the District: The District believes that it has provided the Student with a free, appropriate public education over the years in question, and therefore has no duty to reimburse the family for the cost of Landmark. The Student's xx grade IEP was reasonably calculated to provide her with educational benefit in the least restrictive environment. The obligation for least restrictive programming will outweigh placement in a more restrictive setting that may offer greater academic benefits, as long as the less restrictive setting provides educational benefit. The Student earned good grades in school, and was able to get meaning from her reading. She certainly received educational benefits during the relevant years, earning an 88 average in college preparatory classes. Therefore, the Hearing Officer should reject the family's claims for relief.

I. The Student's claims of failure to provide a free, appropriate public education from 2001-2004 are barred by the statute of limitations

Section 1415(f)(3)(C) of IDEA 2004 requires a "parent or agency" to request a hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. The IDEA defers to state law if the state has set an explicit time limitation for requesting such a hearing.

The family made several arguments about why this statute of limitations was inapplicable: (1) it only applied to federal IDEA claims, not parallel state claims that were subject to Maine's general statute of limitations; (2) it did not apply to claims brought by adult students; and (3) federal common law tolled the statute of limitations. The Hearing Officer was not convinced that law supported any of these arguments.

The IDEA gives parents and educational agencies the right to request a hearing, not students. As set forth in Section 1415(m) and the new implementing regulations[9], states may provide for the transfer of parental rights to adult students upon reaching the age of majority, but that does not create new rights for the Student that the parents did not have. They have no independent right under IDEA that would be tolled. There are a few cases in which parents have argued that the statute of limitations was tolled by virtue of the child's minority, but the courts have uniformly rejected this theory[10]. Therefore, the requirement that a hearing must be requested within two years of the alleged violation is equally applicable to the Student, and begins to run at the time of the violation, not when the Student reaches the age of majority.

Regarding claims under the parallel Maine law, the IDEA two year requirement is applicable, unless Maine law explicitly states a different time limitation for requesting a due process hearing. Maine has not done this. Consequently, claims for violations of a student's right to a free appropriate public education under Maine's Title 20-A are subject to the same limitation as under the federal IDEA.

II. The IEPs developed for the 2004-2005 and 2005-2006 school year were not reasonably calculated to provide a free, appropriate public education to the Student

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)

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[9] §300.520 Transfer of parental rights at age of majority. (a) *General.* A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)--(1) (i) The public agency must provide any notice required by this part to both the child and the parents; and (ii) All rights accorded to parents under Part B of the Act transfer to the child . . .

[10] *Strawn v. Missouri State Bd. Of Educ.,* 210 F.3d 954 (8th Cir. 2000)(tolling of statute of limitations while child is minor would frustrate the policy of IDEA); *Alexopulos v. San Francisco Unified School Dist.,* 817 F. 2d 551 (9th Cir. 1987)(Statute not tolled by child's minority because IDEA is designed to assure that representative of the child will promptly assert the child's educational rights.)

(emphasis added). The First Circuit elaborated that the student's educational program must guarantee "a reasonable probability of educational benefits with sufficient supportive services at public expense." *See G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). It is well established that a school is not obligated to offer an IEP that provides the "highest attainable level (of benefit) or even the level needed to maximize the child's benefit" in order to comply with the IDEA. *Id.* Furthermore, "parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth,* 823 F. Supp. 9 (D. ME 1993). The educational benefit must be meaningful and real, and not trivial or de minimus, in nature.[11] The family has the burden of proof that the Student's educational programming was inappropriate. *See Schaffer v. Weast,* 126 S. Ct. 528, 537 (2005).

Thus, the hearing officer must examine whether the Student's educational program contained and implemented through her IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The IDEA requires that an IEP must enable a student to receive "a great deal more than a negligible benefit" and further provides that the appropriateness of the benefit "be gauged in relation to the child's potential" for academic growth and achievement. *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171,182, 185 (3rd, Cir. 1988). In *Town of Burlington v. Department of Education,* the First Circuit explained that an appropriate education must be directed toward "the

[11] As the First Circuit stated in *Lenn v. Portland School Comm.*, "The law does not " [sic] promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.[sic] 998 F.2d 1083, 1086 (1st Cir. 1993). In *Roland M. v. Concord School Comm* the First Circuit described the goal is to provide the student with "demonstrable" benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990).

achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The Court in *Polk* said, "A key concern of and primary justification for the [IDEA] lay in the important goal of fostering self-sufficiency" of children with disabilities. *Polk,* 853 F.2d at 181-182. Thus, to have received a free, appropriate public education, the Student must have made demonstrable improvement in her reading, which was her specific area of need.

There is no dispute that the Student had a severe reading disability, and that the District was well aware of this, as the Student's test scores placed her in the bottom 1% in some of her reading skills. Throughout the Student's years in the District's schools, there was repeated mention in the PET minutes and IEPs that the Student required a multi-sensory approach to reading. Nonetheless, there is little evidence that the Student ever received much in the way of individualized reading instruction, let alone the kind of reading program that she needed to address her deficits. Despite setting a goal in June of 2001 to improve the Student's reading score from a 77 to a 92 during xx grade, the PET, at a meeting without the parents present, placed the Student on monitor status. [S-232, S-240]. There was no evidence, however, that the Student ever received the program discussed at the June 2001 PET, or that she made any progress whatsoever. Thus, despite having very poor decoding and word attack skills, the Student received little or no reading assistance in xx or xx grades. Consequently, at the end of xx grade, the Student's reading achievement subtests were extremely low. [Fact 10].

During xx grade, although the Student's IEP required reading instruction, she received none, and in March of that year, her achievement test scores reached a new low. [Fact 12]

The Student's xx grade year, 2004-2005, was no better. It was Dr. Whitehead's opinion that the programming offered to the Student in her IEP was insufficient. The District failed to properly implement the IEP in any event, so the Student did not receive the Wilson phonics instruction due her, and her reading teacher was not even certified to provide Wilson instruction. [Fact 20] In addition to failing to implement the Student's xx grade reading program, the District consistently committed procedural violations set forth in the facts[12], and neglected to provide the Student with a speech and language evaluation called for in the IEP. Although the District proffered an array of excuses as to why this happened, the District must "implement services in accordance with the IEP, and assist the child in a good faith effort to achieve the goals of the IEP." *Rome Sch. Comm. V. Mrs. B.,* 2000 WL 762027 (D. Me. 2000). The District failed to do this.

The record in this case is one of broken promises regarding reading services that were either not provided at all or not provided in accordance with the IEP. The District essentially abdicated its responsibility for the Student's education to the Student and her parents. As long as the Student received good grades, the District apparently did not think it had a responsibility to provide reading services, regardless of whether the Student was making gains in her identified area of need. Consequently, despite taking college preparatory classes, the Student was not remotely prepared to be admitted, let alone succeed, in college, when as a high school xx, she was reading at a second or third grade level. Even the District's own evaluator, Dr. Chemelski, noted that the Student had no [sic] made progress in decoding, and that her letter word

[12] Some examples of this include: (1) at the November 25, 2002 and September 7, 2004 PET meetings, there was no District administrator properly authorized under the Maine Special Education Regulations present, and the District did not draft an IEP to reflect changes to the Student's program made at this meeting [Fact 15]; (2) the District then changed the IEP without the benefit of a PET meeting [S-172]; (3) at the March 8, 2005 PET meeting, no special education teacher was present, and the parents did not receive Dr. Chemelski's report in advance [Fact 19]; and (4) the District did not share with the parents the resulting IEP amendment [P-225].

identification scores actually dropped. [Fact 18]. He thought the Student needed a Lindamood or Wilson reading program five days a week, and yet the Student received no reading program during September through March of her xx year. [Fact 18] Additionally, Pat Jackman's evaluation, which tested the Student early in her xx year, also showed the Student reading at a second or third grade level. [Fact 30][13]

The Student's grades were the product of her determination to work hard, and the dedication of her parents to help her succeed, in spite of the District's failure to see that she received the services she needed. Yet the purpose of the IDEA is to foster self-sufficiency and to allow children to become independent adults.[14] The District did not do anything to foster the Student's self-sufficiency, but seemed content to allow her parents to carry the burden of the Student's inability to read above an early elementary level. It is unclear how the District imagined the Student would achieve her goal of going to college, where her parents would not likely be present to help her with her assignments.

The District attempted to couch this as a case in which the family was attempting to '"close the gap," but it is not. The Student is merely attempting to access the reading instruction that the District did not provide her over the years. There was no dispute in the evidence that the Student made no gains, let alone demonstrable gains, in the educational skills identified as the Student's special needs. *See Burlington, supra.* Because the District did not implement the Student's IEP, and she made no gains in her area of need, the District did not provide the Student with a free, appropriate public education during the 2004-2005 school year.

At the time the family was trying to make a decision about the Student's xx year placement, the IEP in place called for two periods of direct instruction per week. Although it

[13] See also Facts 21 and 26, which show the Student reading at a first to third grade level.
[14] *E.g., Polk, Burlington.*

was difficult for the parents to evaluate the actual program because of the lack of a written IEP, there was no dispute that Ms. McCall was not certified to teach either Wilson or Lindamood reading, the phonetically based, multi-sensory programs acknowledged to be what the Student needed. Dr. Whitehead's evaluation found that the student's letter word identification and word attack skills were extremely deficient, and that the Student had made minimal progress in school, despite having good intellectual abilities. [Fact 26] He recommended 180 minutes per day of intensive reading instruction focusing on phonemic awareness and phonological decoding skills, and written language instruction, with a mainstream curriculum provided in a very small group setting with few distractions and significant organizational support. [Fact. 26]

After the parents rejected the IEP in favor of sending the Student to Landmark, the PET met on September 1, 2005 to discuss the Student's program for her xx year. This IEP again fell short of the Student's needs. The District offered 78 minutes per day of combined reading instruction utilizing the LiPS program, and organizational skills, but was unable to identify anyone who was qualified to provide LiPS. Although the District correctly points out that the IDEA does not require the IEP to include the service provider, given the District's past track record of not being able to provide the Student with a Wilson or Lindamood reading program, it was reasonable for the family to want this information to determine whether the District was making yet another hollow offer of reading services. In fact, the District's testimony on this point, primarily from Stacey Bissell, gave the Hearing Officer the impression that the District was unable to quantify how it would deliver these services.[15] The services offered fell far short of Dr. Whitehead's recommendation. Based upon the evidence, the District's offer for the Student's xx year was not adequate to meet the Student's considerable need to learn how to read

[15] Additionally, although at the PET meeting, the District offered an hour of speech and language services each week, this was not included in the "Parental Change of Program Notice." [S-67]

independently. The IEP would not have provided the Student with a free, appropriate public education.

III. Remedies for failing to provide the Student with a free, appropriate public education

In light of the Hearing Officer's conclusion that the District failed to implement portions of the Student's IEP in xx grade, and failed to provide her with a free, appropriate public education, as well as the conclusion that the IEP offered for the Student's xx year was not adequate, it is necessary to decide what remedies are appropriate.

It is well established that the IDEA provides parents of students with disabilities with a "self-help" remedy when the school district fails to offer them a free, appropriate public education in a timely manner. 34 C.F.R. § 300.403(c), *Burlington*, 471 U.S. 359 (1985), *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993). Parents have a legal right both to place the student in an appropriate private school and to seek reimbursement from the school district for the costs of the student's education. *See, e.g., Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1st Cir. 2002), *citing Florence County*, 510 U.S. at 13-15.

As a preliminary matter, the District argued that the parents did not provide proper notice of their intent to place the Student at Landmark. Neither party disputes that the IDEA contains a specific notice provision which states that the right to reimbursement for a unilateral private school placement may be reduced or denied if, within ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency. Notice consists of informing the school of (a) the parents' disagreement with the school district's decision, (b) the intention of the parents to enroll the child in a private school, and (c) the intention to seek reimbursement. MSER § 12.11(S); see also 34 C.F.R. 300.403(d)(1)(i). As both parties noted, Maine law calculates the

time periods in question with reference to the student's enrollment in private school, rather than removal from the public school. MSER 12.11(S). *Mr. and Mrs. I v. Maine School Administrative Dist. # 55,* 416 F. Supp. 2d 147, 169 (D. ME. 2006).

The Student attended school in the District through the end of xx grade. On April 21, 2005, On April 21, 2005 [sic], Landmark notified the parents that the Student was accepted into the summer program. [Fact 21]. The parents paid the full tuition for this program on July 1, 2005. [Fact 23] This was not an alternative to attending school in the District, as the District did not offer summer programming for the Student. The parents reserved their decision regarding whether the Student would attend Landmark during the following school year until after they had an opportunity to evaluate the Student's experience in the summer program.

Although the parents paid Landmark a deposit for the fall of 2005 on July 21, 2005, and signed an enrollment agreement, this held a place for the Student at Landmark, it did not require her to attend. In fact, the Student could not attend classes unless an additional $20,000 of the $47,700 in tuition was paid by the start of classes on September 6, 2005. [P-127] It is not unusual for private schools to require such a deposit. The Student still had the right to attend public school in the District, and could elect not to attend Landmark in the fall.

The District asserts that by [sic] the parents gave notice on August 9, 2005, the Student had already been enrolled at Landmark, thereby rendering the notice untimely. The District takes the position that the timing of the notice should run in relation to the Student's first enrollment in the program in question, which was for the summer program. It is unclear whether, under the District's reasoning, the Student was first "enrolled" in this program when she applied and was accepted in April 2005, or when she actually began attending in July. The family was not required to give the requisite notice before either date.

The Student's attendance at the Landmark summer program is neither equivalent to withdrawal from public school nor enrollment at Landmark for the 2005-2006 school year. Her attendance there was a separate event unrelated to her program in the District, as the District did not offer her summer programming. There was nothing preventing the Student from attending this program and returning to the District's school in the fall. Therefore, the parents were not required to give notice under MSER §12.11(S) because the Student applied for or attended the Landmark summer school.

The District asserts, in the alternative, that the family was required to give notice ten days before July 21, 2005, when it signed the enrollment agreement and paid a deposit to hold a place for the Student in the fall, as this is when she "enrolled" at Landmark. If signing up to attend the program is when "enrollment" occurred, then the Student was both "enrolled" in the Landmark summer program and Sanford High School simultaneously in April 2005. This interpretation is clearly subject to illogical results. Therefore, it is necessary to determine what "enrollment" means under MSER §12.11(S).

The example above illustrates just one problem inherent in interpreting the term "enrollment" in the Maine Special Education Regulations as meaning paying a deposit and signing an agreement to hold a place for the Student at Landmark. If the District's interpretation of "enrollment" were correct, it could result in curtailing rights under IDEA because enrollment would often occur before removal, thus requiring parents to give notice sooner. It is well established that "a state is free to exceed, both substantively and procedurally, the protection and services" provided by "a federal minimum floor," but states cannot reduce those protections. *Town of Burlington v. Dep't of Educ.,* 736 F.2d 773, 791-92 (1st Cir. 1984), aff'd*,* 471 U.S. 359 (1985). Maine, in fact, has a notice policy that has been construed as more protective of parents

than the federal policy. *See Mr. and Mrs. I, supra.* Hence, the District's interpretation is contrary to both Maine and the federal IDEA.

Throughout the Regulations, the terms "enrolled" and "enrollment" are used in a way that is synonymous with attending the school, not just thinking about, signing up or setting the groundwork for possible attendance. As the District correctly points out, the purpose of the notice requirement is to allow the District an opportunity to respond to the family's complaint about the proposed IEP before the District can be found liable for costs of a private placement. Construing "enrollment" to be when the Student begins attending a school allows parents the opportunity to explore alternatives to what they believe is an unsatisfactory program for their child while continuing to work with the school district to develop an acceptable program. The August 9 notice, given more than ten days before the Student began attending Landmark, and more than ten days before the start of the District's term, did not deprive the District of this opportunity, and the parties continued to meet and discuss the Student's IEP after notice was given.

The case of *Sarah M. v. Weast,* 111 F. Supp. 2d 695 (D. Md. 2000) cited by the parents undertook a similar analysis and arrived at a similar conclusion. That case involved a notice requirement similar to Maine's[16], and is factually similar to the case at hand in that it involved a student whose parents, dissatisfied with her educational program, began exploring private school placements months before placing the student in private school. Like here, the parents in *Sarah*

[16] Md. Code Ann., Education § 8-413(i) (1999), provides in pertinent part: If the parent or guardian of a student with disabilities, eligible to receive special education and related services from a county board, enrolls the child in a non-public school, the county board is not required to reimburse the parent or guardian for tuition or related costs associated with the enrollment if: (1) The parent or guardian does not provide the county board prior written notice rejecting the program proposed by the county board, including the reason for rejection, and stating an intention to enroll the student in a non-public school.

M. signed an enrollment agreement at a private school, and paid a deposit to hold a place for the student for future possible attendance, and the school district argued that this constituted enrollment in the private school.[17] The Maryland Federal District Court disagreed, noting that such an interpretation could result in the state requirement truncating the federal right, such as when actual removal of a child from a school comes later than when the parents sign an enrollment contract and pay a deposit for private school. The Court explained,

> While the deadline may operate as a restriction on the parents for the benefit of the school authorities, looked at from another standpoint it also establishes the parents' right to delay up to a certain point, perhaps to weigh their options, without having to give notice and without forfeiting their claim.

This is what the parents in the case at hand have done. The *Sarah M.* court discussed in some detail its reasons for rejecting the interpretation of "enrollment" put forth by the school district.

> It is particularly difficult to conceive of a child as "enrolled" in a private school and "removed" from a public one when her parents remain uncertain whether the child will eventually be placed in the private school option, even though in the meantime they may act to preserve the private school and sign an enrollment contract. Any suggestion that the signing of the enrollment contract for a private placement equals "removal" is unpersuasive.
>
> School authorities undoubtedly have good reason to want to know what the parents intend for their child. But the point is that defining enrollment in terms of the mere act of registering or inscribing the child in private school is problematic. It makes sense to equate actual physical enrollment in private school with actual physical removal from public school. In that case, the notice of intended enrollment in the one and intended removal from the other relate to reasonably certain events, events not only likely to occur but likely to occur more or less simultaneously. On the other hand, equating "removal of the child from the public school" with the act of inscribing the child in a private school several weeks or months earlier for possible attendance several weeks or months later at the very least tortures the meaning of the word "removal."

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[17] In *Sarah M.,* the student was still attending public school when her parents signed the enrollment agreement. Therefore, like the example discussed earlier, the definition of enrollment put forth by the school district would have resulted in the absurd conclusion that the student was "enrolled" in both public and private school simultaneously.

The Court concluded, "If the decision to enroll in private school occurs during a summer recess, the ten business days mark from the beginning of the public school year (or sooner if the child is physically placed in private school)."

The reasoning of the *Sarah M.* court, applied here, means that the parents were only required to give notice ten business days before either the start of the public school year or when the Student began attending private school, whichever came first. Therefore, the parents notified the school in a timely manner consistent with the requirements of the IDEA.

The District also contends that the notice given by the parents is inadequate, as it did not provide a description of the family's actual concerns about the Student's proposed IEP. As the court in *Greenland School District v. Amy N.* said, "These statutory provisions make clear Congress's intent that before parents place their child in private school, they must at least give notice to the school that special education is at issue." 358 F.3d 150, 159 (1st Cir. 2003). The parents here did so by notifying the District in writing that they were rejecting the IEP and the proposed placement as inappropriate. The District knew that special education was at issue. Neither party cited any cases requiring a particular level of specificity about the parents' "disagreement with the school district's decision." The notice given by the parents was adequate under both Maine and Federal law to allow the District to respond to the family's complaint about the proposed IEP before the District could be found liable for costs of a private placement.

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. The First Circuit Court of Appeals cited the *Florence County* decision in holding that this issue is viewed

more favorably to the parents than the question of whether a residential placement was required in order to provide a free, appropriate public education. *Mrs. B. v. Rome Sch. Comm.*, 247 F.3d 29, 34 n.5 (1st Cir. 2001).

Placement at Landmark was certainly appropriate for the Student. She received both a well-rounded education and individualized intensive instruction for her reading deficits, as recommended by Dr. Whitehead. As the Student's placement is appropriate, she is entitled to reimbursement of the costs incurred in attending Landmark during the 2005-2006 school year. The Federal regulations provide: "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 (1999). Thus, the Student is entitled to all costs permitted under IDEA, including transportation costs necessary to transport her to Landmark.

As the Student's educational program during xx grade did not provide her with a free, appropriate public education, the usual remedy under the IDEA for a student who has been denied appropriate services in the past is an award of compensatory educational services to place her in the same position she would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia,* 401 F.3d 516, 24 (D.C. Cir. 2005). The First Circuit has reaffirmed that a student eligible under IDEA may be entitled to additional services in compensation for past deprivations when a child is receiving no real educational benefit. *MSAD No. 35 v. Mr. and Mrs. R.,* 321 F.3d 9 (1st Cir. 2003). The First Circuit said

> We know that a child eligible for special education services under the IDEA may be entitled to further services, in compensation for past deprivations, even after his or her eligibility has expired. *See, e.g,. Adams, 159 F. 2d at 682n.1; Pihl v. Mass Dep't of Educ., 9 F3d 184, 188-189 & n. 8 (1st Cir . 1993* [sic]

Maine School Administrative District No. 35, 321 F. 3d 9 at17-18. Thus, the Student is entitled to compensatory education for past deprivations that occurred from the failure of the District to implement her xx grade IEP. The District contends that the family does not have available a reimbursement order for 2006-2007 as a form of compensatory education, citing *Ms. M. v. Portland School Committee,* 360 F. 3d 267 (1st Cir. 2004). The Hearing Officer agrees with the result in *School Administrative District #22* 43 IDELR 268 (ME 2005). In that case, the hearing officer concluded that the remedy should serve to compensate the student for the damage done by the school's failure to provide the student with a free, appropriate public education. Here, the District's failure to provide the Student with a free, appropriate public education has left her unable to independently decode words beyond the early-elementary level.

In *School Administrative District #22*, the hearing officer distinguished *Ms. M* as primarily involving questions about whether certain exceptions to the notice provisions of 20 USC 1412(a)(10)(C)(iii) were applicable, and noted that the *Ms. M* court specifically declined to determine "when claims of compensatory education are generally cognizable." 360 F. 2d at 274. The First Circuit in *Pihl* was clear that, "a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time.[sic] *Pihl,* 9 F.3d at 198. The Court cited *Miener v. State of Missouri,* 800 F.2d 749, 753 (8th Cir. 1986), saying, "In likening compensatory education to the tuition reimbursement allowed in *Burlington,* the Eighth Circuit reasoned that 'imposing liability for compensatory educational services on the defendants 'merely requires [them] to belatedly pay expenses that [they] should have paid all along.' Here, as in *Burlington,* recovery is necessary to secure the child's right to a free appropriate public education." *Miener,* 800 F.2d at 753

Consequently, the hearing officer determines that, under the circumstances presented in this case, the Student is entitled to compensatory education services for the past deprivations described above. The District, however, has not shown that it is capable of providing these services. Landmark, on the other hand, has helped the Student make gains where the District has failed. Therefore, the Student is entitled to compensatory education in an amount equal to the costs associated with her attendance at Landmark for the 2006-2007 school year. Based on the evidence produced on this issue, the hearing officer finds the costs associated with the Student's attendance at the Landmark School to be $52, 500 plus transportation.

V. ORDER

After consideration of the evidence presented during this due process hearing, the Hearing Officer orders as follows:

1. The District failed to provide the Student with a free, appropriate public education during 2004-2005, and failed to offer her an educational program for the 2005-2006 that would provide her with a free, appropriate public education. For the latter violation, the District is therefore responsible for the cost of the student's unilateral placement at Landmark for the 2005-2006 school year, including transportation costs[18]. For the former violation, the District is ordered to provide $52,500 plus transportation costs documented by the Student to fund compensatory educational services for her.
2. The Student's claims for 2001-2004 are barred by the statute of limitations.

SHARI B. BRODER. ESQ.
Hearing Officer

[18] Tuition and fees for the 2005-2006 school year were $47,700, plus transportation costs set forth in fact 32 above.