

**Complaint Investigation Report**  
**Parents v. Cape Elizabeth**

November 2, 2009

Complaint #10.019C

Complaint Investigator: Jonathan Braff, Esq.

**I. Identifying Information**

Complainants: Parents  
Address  
City, Zip

Respondent: Alan Hawkins, Superintendent  
320 Ocean House Rd.  
Cape Elizabeth, ME 04107

Director of Instructional Support: Dominic DePatsy

Student: Student  
DOB: xx/xx/xxxx

**II. Summary of Complaint Investigation Activities**

The Department of Education received this complaint on August 27, 2009. The Complaint Investigator was appointed on August 28, 2009 and issued a draft allegations report on September 14, 2009. The Complaint Investigator conducted a complaint investigation meeting on September 15, 2009 (rescheduled from the original date of September 9, 2009 at the Respondent's request), resulting in a stipulation and amended allegations. On September 21, 2009, the Complaint Investigator received a 4-page memorandum and 59 pages of documents from the Complainants along with a CD, followed by an additional memorandum of 4 pages on September 2, 2009 in response to the submission of the Cape Elizabeth School Department (the "District"), and received a 5-page memorandum and 295 pages of documents from the District on September 17, 2009 plus one additional page on September 18, 2009. Interviews were conducted with the following: Dominic DePatsy, director of instructional support; Angela Moore, instructional strategist; Tara Bucci, teacher; Tom Robinson, case manager; Alina Perez-Smith, Ph.D., psychologist; Candice Bray, Sc.D., learning disabilities specialist; Barbara Melnick, head of school; Kathy Condon, teacher; Aubrey Dugan, teacher; Peter Harris, department head; Sandi Nadeau, case manager; the Student's father; and the Student's mother.

### **III. Preliminary Statement**

The Student is xx years old and has been receiving special education under the eligibility criterion Specific Learning Disability. This complaint was filed by the Student's parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

### **IV. Allegations**

1. Failure to utilize the requisite criteria when determining that the Student no longer was eligible for special education in violation of MUSER §VII.3.A;
2. Determination to dismiss the Student from special education services despite evidence that she continued to have a disability that adversely affected her educational performance, that her achievement on IEP goals and data did not indicate adequate progress, and that her educational needs cannot be met through general education services in violation of MUSER §VII.3.A.

### **V. Stipulations**

1. At the June 9, 2009 IEP team meeting, when it was determined that the Student no longer was eligible to receive special education, the District also determined to continue to provide to the Student, through what the District terms a "personalized learning plan," one-on-one reading instruction, with the same instructor as in the prior year, again using the Orton-Gillingham reading program.

### **VI. Summary of Findings**

1. The Student lives in Cape Elizabeth with her parents and older sister, and is presently attending xx grade at Cape Elizabeth Middle School. During her xx grade school year, the Student attended Pond Cove Elementary School. She began receiving special education services in xx grade under the category Specific Learning Disability.
2. On January 9, 2008, the District completed a Learning Disability Evaluation Report for the Student. In the first section (Part A: Characteristics) of the report, the District indicated: 1) that the Student exhibited a disorder in one or more psychological processes, as demonstrated by a score of 75 on the Children's Memory Scale, a score 1.5 standard deviations below the mean, and a score one standard deviation below the mean on the Comprehensive Test of Phonological Processing ("CTOPP"); 2) that the Student was not achieving adequately for her age or was not meeting State-approved grade level standards based on a Developmental Reading Assessment ("DRA") score of 24 (her peers were at a 34), a Dynamic Indicators of Basic Early Literacy Skills ("DIBELS") score reflecting that the Student was at some risk, Wechsler Individual Achievement Test II ("WIAT II") scores in the average range except for word reading and spelling and decoding where the scores were in the second grade equivalent, and Northwestern Evaluation Association ("NWEA") scores at the 38th percentile in math and 58th percentile in reading; 3) that the Student exhibited a pattern of strengths and

weaknesses in performance, achievement, or both, relative to her intellectual development, that was relevant to the identification of a specific learning disability; and 4) that the Student's phonological processing negatively impacted her reading and math. In the second section (Part B: Conclusions) of the report, the District indicated that "[d]ue to rapid naming/attention deficit and phonological processing deficit, [the Student] has a Specific Learning Disability which is in reading," and determined that due to her learning disability, the Student required direct instruction in reading.

3. At an IEP team meeting held on March 28, 2008, the team determined that the Student would receive 3 hours per week of direct reading instruction, as well as 30 minutes per week of occupational therapy. The Student's IEP also provided for numerous accommodations on standardized tests, including: extended time; multiple breaks; small group setting; using a human reader (other than for reading passages); and verification of understanding following the reading of test directions.

4. On August 27, 2008, the Parents obtained a literacy assessment for the Student, conducted by Candice Bray, Sc.D. The results of this evaluation were as follows: Woodcock-Johnson III ("WJ III") – all subtests within average range; Test of Reading Word Efficiency – both sight word efficiency and phonemic decoding efficiency below average (standard scores 84 and 87, respectively); Rapid Automated Naming and Rapid Alternating Stimulus Tests – poor ratings (scores of 79, 8<sup>th</sup> percentile) for rapid naming of numbers and of numbers plus letters. On informal assessments of decoding, spelling and reading, Dr. Bray observed that the Student's performance was very poor with decoding of multi-syllable words, and that her spelling and reading speed were both very delayed. Dr. Bray concluded that the Student "exhibits processing issues that are impacting her development in the area of literacy including reading, spelling and written language." Dr. Bray recommended that the Student receive intensive remediation for her reading and spelling disability.

5. The Student's IEP team met on September 10, 2008 for an annual review of the Student's IEP and to review Dr. Bray's evaluation. The team determined that the Student would receive her direct reading instruction for 3 hours per week from tutor Julie Boesky utilizing the Orton-Gillingham reading program, and that the Student would also receive direct instruction in the resource room to address spelling and reading fluency for 30 minutes each day. The same accommodations on standardized tests were carried over from the previous IEP, and the team also determined to move up the Student's reevaluation and annual review date to May 2009.

6. The Orton-Gillingham methodology utilizes phonetics and emphasizes visual, auditory and kinesthetic learning styles. It is a specific way of teaching children with learning disabilities, and particularly for overcoming dyslexia. For the most part, Orton-Gillingham techniques are used only within special education classes and not as part of the public school reading curriculum. During the 2008-2009 school year, the Student completed most of level 4 of this program.

7. In May 2009, Angela Moore spoke with the Student's IEP team members, including the Student's mother, and the team determined that the Student would undergo an abbreviated assessment of her psycho-educational and achievement levels for her three-year reevaluation.

The team wished to be able to compare the Student's progress with achievement levels of the previous year and to review the diagnosis of a reading disability, but determined that a full evaluation was not necessary in order for the team to redetermine the Student's eligibility for special education.

8. On the assessments conducted by Ms. Moore, the Student obtained the following results: WIAT II - all scores (including word reading, pseudoword decoding and spelling) in the average range; WJ III – all three subtests (reading fluency, math fluency and writing fluency) in the average range; CTOPP, phonological awareness subtest - below average (score of 85). The District did not reevaluate the Student with regard to the Children's Memory Scale, upon which, in part, the District had determined that the Student was eligible for special education the prior year.

9. The Parents wished to enroll the Student in a 2009 summer program at the Landmark School in Manchester, Massachusetts, and the Landmark School therefore performed an admission screening assessment on May 22, 2009. The Student scored in the average range on the Lindamood Auditory Conceptualization Test-3 and on the Woodcock Reading Mastery Tests-Revised/NU ("WRMT"). On the Gray Oral Reading Test-4 ("GORT-4"), the Student scored in the average range for reading rate, but was below average for accuracy and fluency.

10. The Student's IEP team met on June 9, 2009, to conduct an annual review of the Student's IEP, to review the recent evaluations and to reevaluate the Student's eligibility for special education. In connection with the latter determination, the District again completed a Learning Disability Evaluation Report for the Student. In the first section (Part A: Characteristics) of the report, the District indicated: 1) that the Student did not exhibit a disorder in one or more psychological processes, noting that the Student scored 1.0 standard deviations below the mean on only one test (the CTOPP) in the recent assessments performed by the District; 2) that the Student was achieving adequately for her age or was meeting State-approved grade level standards based on: a DRA score of 40 (right at grade level); NWEA scores at the 70<sup>th</sup> percentile in reading and above grade level in math; WIAT II scores all in the average range; WCJ III scores all in the average range; a DIBELS score almost at grade level (although technically still in the "some risk" category); Maine Educational Assessment scores in the "Meets the Standard" category for both reading and math; and writing prompt and Everyday Math assessments in the average range; and 3) that the Student did not exhibit a pattern of strengths and weaknesses in performance, achievement, or both, relative to her age, State approved grade level standards or intellectual development, that was relevant to the identification of a specific learning disability. The District also noted that upon observations of the Student in the classroom, she appeared no different than her non-disabled peers. In the second section (Part B: Conclusions) of the report, the District indicated that, although the Student had a reading disability and a phonological processing disorder, she did not have a specific learning disability based on the fact that she was achieving adequately for her age or meeting State-approved grade level standards when provided with learning experiences and instruction appropriate for her age or State-approved grade-level standards.

11. After the IEP team made its determination that the Student was no longer eligible for special education, the Student's 504 team proceeded to consider whether the Student was eligible for an accommodation plan under Section 504 of the Rehabilitation Act, and found her not eligible. Next, the student study team considered what the Student's program would be the following year, when the Student would be in xx grade at the middle school. The team developed a Personalized Learning Plan ("PLP") for the Student, under which the Student would continue to receive direct instruction from Ms. Boesky, for 45 minutes 3 times per week, through the 5<sup>th</sup> and final level of the Orton-Gillingham reading program. The PLP also provided for: most of the same accommodations on assessments that had been found in the Student's previous IEP, such as extended time to complete assignments, oral reading by the tester (except for reading passages) and verifying understanding of directions; classroom accommodations such as extended time to complete assignments, previewing unfamiliar vocabulary and providing social studies text on tape; and monitoring of the Student's progress using the DIBELS and NWEA assessments at least 3 times yearly.

12. During an interview conducted by the Complaint Investigator with Angela Moore, Ms. Moore stated the following: She has been an Instructional Strategist/Teacher Leader at the Pond Cove School in the District since January 2007. In that capacity she oversees all instructional support programs for grades K - 4. She has not worked with the Student directly, but oversees all instructional support programs, including the Student's. She has also performed assessments of the Student.

When the Student came into xx grade, a DRA assessment was performed and the Parents were surprised by the extent of the Student's delays. The Parents had known that the Student was disabled, but not to that degree. The IEP team then decided to do extensive additional assessments to try to uncover the basis of the Student's disability. The Student's low score on the Children's Memory Scale provided insight to the nature of the Student's disability, and informed the District's decision to bring Ms. Boesky in to do the Orton-Gillingham program with the Student.

When the District again performed the DRA assessment of the Student in June 2009, the Student scored a 40, putting her squarely at the level of her same-age peers. The DRA measures overall reading ability, both fluency and comprehension. The DRA is a timed test, and the Student completed the test in the allotted time. The WCJ III (which is a timed test) also measures overall reading ability, allowing a student to choose to read either aloud or silently, and then asking questions to measure comprehension. A student could be missing words here or there but still have full comprehension of the text. On the WCJ III in June 2009, the Student's reading fluency score was 99, putting her at the 47<sup>th</sup> percentile. The DIBELS assessment, on the other hand, is based strictly on the number of words read aloud correctly per minute, without considering comprehension. Even on this assessment, however, the Student improved from a score of 61 (with 99 representing grade level) to 116 (with 118 representing grade level).

Initially, she had intended to also give the GORT-4 assessment, but then she discovered that it was going to be used as part of the Student's screening conducted by the Landmark School, and also that Dr. Perez-Smith had given the assessment in December 2007 and the Student's Oral Reading Quotient score had been in the average range. Therefore, as the staff was trying

to reduce the number of assessments being given in order to lessen the Student's anxiety, she discussed with the Student's mother via e-mail whether to do the GORT-4 again, and they both agreed it was not necessary. She was aware on June 9, 2009 that the scores obtained by the Landmark School showed the Student performing in the below average range on reading accuracy and fluency subtests, however, she never received a formal report from Landmark, so she didn't know the parameters of the testing. Also, a comprehension subtest of the GORT-4 must be given in order to obtain the composite Oral Reading Quotient. Landmark didn't record that they gave this subtest.

She also did not repeat the Children's Memory Scale assessment in June 2009. This was part of the overall decision to minimize the number of tests that would be administered, due to the fact that the Student had been pulled out so often for testing over the last 1 ½ years. The Student found the process of having to leave class and then be tested to be very distressing.

She is 100% confident that the Student is able to read material at her grade level silently to herself. The Student met all her IEP goals except spelling, where she still made satisfactory progress. With regard to the Student's writing, this was not raised as an area of concern by Ms. Bucci, Mr. Robinson or the Parents. According to the xx grade writing rubric, the Student was meeting or partially meeting grade level standards, and the Student's writing fluency score on the WCJII was in the average range (58<sup>th</sup> percentile). If one observed the Student during a writing lesson in her class, the Student would be keeping up with her class. Her work product would be slightly different in terms of the spelling, but it would be better than that of the other special education students in her grade. The Student's teachers will continue to make accommodations for the Student's spelling weakness as dictated by her PLP (although most teachers would do that anyway). The Student was also performing at grade level in math. The School's math curriculum is very language-based, and while she believes the Student is capable of independently solving math problems at her grade level, the Student was also encouraged to, and was able to, ask for help when she needed it.

She acknowledges that the Orton-Gillingham method is for instructional support students, and is not used with regular education students. As the Student was at the end of level 4 of Orton-Gillingham as she was leaving xx grade, and even though the Student didn't qualify for special education, the team decided that the Student should complete the program. It was not that the Student couldn't survive without completing level 5, but that it was in the best interest of the Student for her long-term success to finish what she had started. She believes it also sends the correct message to the Student, that the Student has mastered not some but all of those skills.

The District takes a seamless approach through regular education, response to intervention ("RTI") and special education. If a regular education student needs a little more support, or a literacy teacher decides she is not meeting all of a regular education student's needs, the District will create a PLP for the student to fill that gap. The primary purpose of the PLP is to generate and collect data so that the District can monitor the student's progress. It provides protection for the student and accountability for staff.

The Student is so smart, she worked so hard and, despite having a classic learning disability, she made astounding progress. This should be celebrated. She believes that the District went

above and beyond what was required for the Student – the Student was one of only three students getting one-on-one instruction. She further believes that the IEP team on June 9, 2009 had comprehensive information, applied the proper criteria and made a good decision with regard to eligibility. She believes as well that the Student acquired skills, and has demonstrated mastery of those skills, that will carry over as she continues through school.

13. During an interview conducted by the Complaint Investigator with Tom Robinson, Mr. Robinson stated the following: He is an instructional support teacher at Pond Cove School, working with the xx and xx grade. He worked with the Student and was her case manager when she was in xx grade and for a short time at the end of xx grade. Initially, he worked with the Student on reading fluency, using the Great Leaps program. After the Student's IEP team considered recommendations from Dr. Bray, the District decided to purchase the Spellography spelling program, and he worked with the Student on that as well. The Student worked very hard and did good work.

With regard to fluency, by the end of the year, the Student was reading fairly accurately and the mistakes she made generally didn't affect comprehension. The Student always had great comprehension. He monitored the Student's progress using the DIBELS oral reading fluency measure, which he gave at the beginning, middle and end of xx grade. DIBELS does not measure comprehension at all. The Student went from a score of 66 (where a score of 99 and above was "low risk," and less than 71 was "at risk") to a score of 116 (where a score of 118 and above was "low risk" and between 96 and 118 was "some risk"). The Student's score on the NWEA, which doesn't require students to read aloud and does assess comprehension, placed her at grade level in reading.

To measure the Student's progress in spelling, he tested her using an inventory of spelling words and then tested her using the same inventory at the end of the year. The Student did not see the inventory in between, so she couldn't study it. The Student's score improved from 9 of 34 words correct to 23 of 34 correct, with her total points score improving from 59 to 94 out of 116. He thinks that the Spellography work helped the Student, but also that her work with Ms. Boesky did as well. He doesn't believe that the Student's spelling problems affected her in the classroom.

With respect to the MEA assessments, even though the Student had various accommodations through her IEP, she generally didn't request them. On the reading section of the MEAs, the Student read the questions and answers to herself. On the math section, she occasionally asked for help with a word in the written problems. He believes that the Student completed the tests within the normally allotted time.

He feels good about the progress the Student made over the year and about the IEP team's determination to dismiss the Student from special education. He believes the student will go on to be successful.

14. During an interview conducted by the Complaint Investigator with Tara Bucci, Ms. Bucci stated the following: She is a xx grade classroom teacher at Pond Cove School, and is in her 13<sup>th</sup> year as a teacher. She is also a literacy specialist, with a M.Ed. in literacy. The Student

was in her classroom during the past year and she worked very closely with the Student, including meetings with her outside of school. She always expected the same amount of work from the Student as from any other student in the class. The Student improved greatly, both academically and socially, from the beginning to the end of the year. By year's end, using the criteria of a general education teacher, she found the Student to be on grade level academically. At that time, as she always does, she highlighted each of the students' accomplishments, and she gave the Student the "Most Improved Student" award.

The Student's ability to read, decode and comprehend greatly increased. At the beginning of xx grade, the Student scored a 28 on the DRA, where 30 is at grade level and most students are scoring in the 34-38 range. At the end of xx grade, the Student scored a 40, which is right at grade level. This assessment requires students to read a passage and then provide a summary and answer comprehension questions. The Student gave the summary and answers to questions in writing, not orally. Although the Student's IEP allows her to extend the time needed to complete the assessment, the Student completed it within the normally allotted time.

The only homework students received in her class was independent reading and some math problems. She does not agree that the Student doing her independent reading by asking her parents to read to her demonstrates that she wasn't reading at grade level. She asks all her xx graders to do 20 minutes of independent reading at home each night, and lets the students choose whether to read to themselves, listen to audio or have their parents read to them. The Student worked very hard at school and then had after-school tutoring in reading, as well as hockey, tap dancing and church activities. By the end of the day, the Student was exhausted. It made sense for her to choose to be read to. Also, the Student chose to participate in book club, an activity usually chosen by strong readers. Additionally, at least some of the books she was reading, Harry Potter for example, were written well above a xx grade level.

In math, she expects that students will ask for help with their homework. The average xx grader needs support for academic homework. The Student in class sometimes asked for help with math and for clarification of directions, but this was not unusual for students in general. The Student also was initially having difficulty with the content areas (science and social studies), and was reluctant to be called on in class. By the end of the year, however, the Student was raising her hand to answer questions and she gave a long report to the class on her social studies project. She also saw improvement in the Student's ability to complete assignments.

With regard to written expression, the Student was meeting xx grade standards on the writing rubric. Spelling was a weak area for the Student, but that is not the only criterion. The Student had some difficulty getting her words out in writing initially, but there were other students in the class with similar writing abilities. She worked with the Student on editing and improving the Student's first drafts, as she did with all the students. She is aware that the Parents tended to take control of the Student's writing assignments and correct all her mistakes, but she didn't think that was appropriate or necessary for a xx year-old child.



She believes the IEP team made the correct determination in dismissing the Student from special education. She is confident that the Student can be successful without specialized instruction as long as her teachers follow the classroom accommodations in the Student's PLP, which are things that any teacher should be doing for the Student anyway.

15. During an interview conducted by the Complaint Investigator with Dominic DePatsy, Mr. DePatsy stated the following: He has been the Director of Instructional Support for the District for the last four years. At the meeting of June 9, 2009, first the Student's IEP team made its determination that the Student was no longer eligible for special education, then a Section 504 team determined that the Student was not eligible under that statute, and then the Student's "student study team" developed a PLP for the Student. When a student transitions from special education, the District develops for that student a PLP, a term found in Chapter 127 of the Maine Department of Education regulations. The District also develops PLPs for regular education students that require testing accommodations to be successful. As the Student had already been receiving instruction using the Orton-Gillingham program, and had only one more level yet to be completed, the team decided that it was in her best interest to continue to receive that instruction. The District attempts to provide a seamless continuum of services, giving students what they need whether they are special education, regular education or section 504 students.

The Student's IEP team decided not to do a full battery of tests for her reevaluation because she had been tested so much within the last two years. Even if the Student's working memory had been tested and was found to again be 1.5 standard deviations below the mean, this would represent only a personal weakness of the Student, not a pattern of strengths and weaknesses as required by the Learning Disability Evaluation Report. The Student didn't exhibit marked discrepancies between reading and math, between different achievement test scores or between different report card scores. Ms. Bucci was very clear that the Student was on grade level in all areas and was, in fact, excelling.

The IEP team determined in January 2008 that the Student needed a different instructional methodology for reading. The Student's weakness in reading was in part the result of her not having been given explicit phonemic awareness through her early instruction. The Student's reading program had been whole-language based, emphasizing fluency, vocabulary and comprehension. This approach didn't work for the Student. The District hired Ms. Boesky to give the Student that phonemic awareness instruction that the Student was missing, and the Orton-Gillingham approach worked for the Student. The Student made remarkable progress in 1 ½ years. Dr. Bray had challenged the team, saying "You can get [the Student] on grade level," and the District did it.

16. During an interview conducted by the Complaint Investigator with Alina Perez-Smith, Ph.D., Dr. Perez-Smith stated the following: She is a clinical psychologist contracted by the District. She performed two psychological evaluations of the Student, in December 2007 and June 2009. The decision regarding which tests were to be administered in June 2009 was made in conjunction with the Parents. At that time, the Student's spirits were low, the Student was anxious and tearful and was specifically anxious about testing. They felt that another full battery of assessments would be too upsetting for the Student, and she was also concerned

that the Student might not be fully cooperative, so they decided to perform only a few key assessments. She did not represent to the Parents that eligibility would not be an issue at the upcoming evaluation meeting, as eligibility is always considered during such a meeting. When the IEP team made its determination, she wanted it on the record that she had not (as was decided between herself and the Parents) performed a full battery of assessments, and that she would be happy to do further testing if the Parents changed their mind about that. She does not, however, believe that further testing would have been in the Student's best interest, or that it would have changed the outcome. Regardless of the test scores, the Student would still have been achieving at her grade level.

Regarding the determination of non-eligibility on June 9, 2009, all the assessments showed solid average performance by the Student, and there were so many pieces of data showing good achievement. The DIBELS showed a definite upward trend. Although the GORT-4 results from Landmark School showed low scores on two subtests, only composite scores are considered meaningful for purposes of a student's classification as learning disabled, and the Student's GORT-4 composite score in December 2007 had been well into the average range. Compared to the last time the team had completed the Learning Disability Evaluation Report, the Student had demonstrated definite increases in her reading accuracy, rate and fluency. The Student was now reading at grade level. The Student didn't even strictly meet the DSM-IV-TR diagnostic criteria for a reading disability.

Her role at the IEP team meeting is to be an impartial advocate for the Student, and she didn't believe the Student needed special education at that time. If the team had not agreed that the Student should continue with the Orton-Gillingham program, she would have advocated for this. Not completing it would have left the Student with incomplete instruction. The Student needed to complete that program, even though her profile didn't qualify her for special education.

With regard to the Student's ability to read aloud, she believes there has been definite improvement. The Student's unwillingness to read aloud in class was more a function of nervousness in front of her peers. Spelling is also an area of challenge for the Student, as it is for all children with dyslexia, but the Learning Disability Evaluation Report doesn't include spelling as one of the areas of concern. The Student still fits the profile of a dyslexic child, and dyslexia is a condition that can't be fixed or cured. Nevertheless, she believes the Student has an excellent prognosis for success. For a student with this profile, the District develops a PLP with accommodations to be implemented by classroom teachers.

17. During an interview conducted by the Complaint Investigator with Candice Bray, Sc.D., Dr. Bray stated the following: She is a learning disabilities, literacy and educational specialist, and has been working with learning disabled children of all ages for 40 years. She performed an evaluation of the Student on August 27, 2008, and then did a follow-up assessment in January 2009 to look at the Student's progress. In January, the Student demonstrated some progress – the Student was somewhat better at decoding – but she still had concerns about the Student's lack of automaticity. Decoding and reading for the Student was still slow and very labor intensive.

Although she only tested the Student by having her read aloud, and most people read better silently, the only way to get at what children are doing when they read to themselves is to ask them to read aloud. A student's ability to read out loud is a huge predictor of that student's reading comprehension. There is no question that the Student can read for meaning, but the concern is whether she can complete assignments without significant help, accommodations and modifications. Based on the work she did with the Student in January, she doesn't believe the Student can do that with grade level material. She strongly believes that if you now gave the Student xx grade written materials and then asked her questions for which she had to generate an answer, especially if the answer had to be in writing, the Student couldn't do it.

The Student is bright, has a good knowledge base and has developed good strategies, but she doesn't believe the Student can actually read text, or write effectively, at her grade level. The Student often writes much less than would be expected because it is difficult for her to write, and much of this is due to her difficulty with spelling. The Student's written output is not commensurate with her knowledge.

In the classroom, the Student is very strategic. The Student listens to what others say, and has good listening comprehension. She attends carefully and gathers information. In the primary grade classroom, where much of the written material is read out loud and there are many class discussions, the Student is going to acquire a lot of information.

She does not believe that one must perform the comprehension subtest of the GORT-4 assessment for the results to be meaningful. In the comprehension portion, the student reads a passage out loud, and then the test administrator reads questions and multiple choice answers to the student. It is therefore possible for a student to answer correctly even without having understood the passage, simply by matching the question against the different possible answers. The most important subparts of the test are those that measure fluency.

With the MEA, the Student had to read passages on her own, but the test administrator could read the questions to her. With regard to the DRA, although the Student's score of 40 at the end of xx grade reflects definite progress, she believes it is still below grade level; she would expect a score of 42-44 as a student was entering xx grade. In order to better understand what the test results said about the Student's progress, she would like to know whether the Student had to answer orally or in writing, and whether the test was timed. The NWEA is an untimed test, so the Student's fluency rate doesn't affect the results, and answers are multiple choice, so the Student wouldn't have to formulate responses. The WIATT is a test that she uses in her practice. The results do demonstrate that the Student can read (it could have been either orally or silently), and the Student had to formulate responses. It can be timed, but it appears to her that the District didn't do that, and she wonders how long it took the Student to complete it.

Regardless of the above test scores, the Student is a slow and inaccurate reader, and she believes this compromises her ability to perform. She sincerely questions the Student's ability to perform at grade level.

18. During an interview conducted by the Complaint Investigator with Barbara Melnick, Ms. Melnick stated the following: She is head of school and the founder of the Aucocisco School and Learning Center. The Student received instruction at her school from January 2009 to June 2009. She met with the Student's mother, attended IEP team meetings, did some testing of the Student and oversaw the Student's reading program. She didn't attend the June 9, 2009 meeting because the Parents didn't expect that the Student was going to be dismissed from special education.

Fluency is the biggest issue for the Student. This has to be measured by the Student's reading aloud, because you can't measure silent fluency. The Student makes so many errors that it interferes with her comprehension, but the Student is great at faking it. She believes that the Student is unable to read informational text at her grade level, based on the fact that Ms. Condon had the Student bring in textbooks that she would be using in xx grade, and the Student couldn't read them aloud accurately. The Student hates to read aloud, and becomes tearful. When tested, the Student's independent reading level was at xx grade. Reading rate is also important, and it takes the Student a long time to get through text.

The Student looks good using some measures, but not others. Accuracy and phonological processing are big concerns. The Student is over-using her Orton-Gillingham skills; there isn't enough automaticity. In the next few years, the Student is going to encounter really difficult reading material. Efficiency becomes more important as the amount and level of instructional content increases. If the Student doesn't get the really basic words, doesn't remember what they look like, she will have lots of difficulty when she gets to more complex words. She believes the Student would benefit from the "Seeing Stars" program from Lindamood Bell, which works on the visual imagery skill.

She believes the Student needs a master teacher who can pull a lot of different components together. The Orton-Gillingham phonetic rules have to be a part of the Student's curriculum, and she commends the District for hiring Ms. Boesky to deliver that to the Student, but she believes the Student needs more than that. She believes that the Student is a right-brain learner, and that the sequential nature of the Orton-Gillingham program may be hard for the Student. Some children do better when they are taught different concepts at the same time. When Ms. Condon read with the Student, they worked on the meaning of the text first, and then went back and looked at the phonetics. Through her work at the Aucocisco School and Learning Center, the Student improved in her willingness to engage with reading. The Student really enjoys reading text that she can decode.

19. During an interview conducted by the Complaint Investigator with Kathy Condon, Ms. Condon stated the following: She is a teacher at the Aucocisco School and Learning Center. She worked with the Student from February until June 2009, twice a week for one hour per session. She worked on the Student's reading skills in a different way than the Orton-Gillingham method, which the Student seemed to find stressful. She used the LIPS program by Lindamood Bell, which involves listening to sounds and becoming aware of where sounds are produced in the mouth. In addition, she was trying to show the Student that reading could be enjoyable. The Student's stress levels around reading were very high, and she chose reading material for the Student that was at an easy reading level for the Student – xx to xx

grade levels. Even at this less challenging reading level, however, reading was still not easy for the Student.

When the Student read to her, she was careful to not correct every mistake, only those that affected meaning. This helped make the reading go more smoothly for the Student. The Student's mistakes generally involved word endings. The Student brought in some textbooks that her sister had from xx grade so they could work on study skills, and the Student couldn't even read the chapter titles and sub-headings. She asked the Student to read passages aloud and then try to orally answer the questions at the end of the chapter. This was really frustrating for the Student. She didn't ask the Student to bring in any of her xx grade material to work on. She didn't ask the Student to read material silently and then answer written questions about the material. Even though reading out loud may be a more difficult process, she doesn't believe that the Student can read to herself successfully, either. She may be less fluent when reading aloud, but if she doesn't understand a word aloud, then she doesn't understand it silently either. When she gave the Student a passage to read and then asked the Student to tell her about what she read, the Student would just shrug and say "I don't know." The Student should be able to show that she understands what she reads, and she can't do that. The Student has trouble using language to express herself.

By late May, the Student was shutting down with her reading with everyone. The Student said she didn't like going to her Orton-Gillingham instructor all the time. The Student told her that she needed lots of help to do her homework, and she was unhappy about that. The issue for the Student is not just whether or not the Student can do the work, but the amount of effort and time it takes, and what this costs her. The Student has a strong desire to do the work independently, but she isn't able to do that. One needs to consider more than just the numbers of the Student's test scores.

20. During an interview conducted by the Complaint Investigator with Julie Boesky, Ms. Boesky stated the following: She is certified as an Orton-Gillingham remediation tutor, and is contracted with the District as well as with other school districts to provide this service. She began working with the Student in January 2008, and has worked with her continuously since then with the exception of this past summer. When she began to work with the Student, she placed the Student at level 1 of the program. Orton-Gillingham is very structured and very sequential. There are concepts covered in level 1 that a student needs to understand before moving ahead through the other levels of the program. The Student got the level 1 concepts fairly quickly, and by June 2009 had come close to completing level 4.

The Student's primary area of weakness was phonemic awareness, and Orton-Gillingham targets this area. The Student has made wonderful progress in 1 ½ years, and she has seen definite improvement in the Student's confidence and in the Student's sense of herself as a reader and speller. The Student made tremendous gains in understanding how words work: in knowing what to do when she comes to a word which she doesn't recognize, and in understanding prefixes, suffixes and roots of words.

She would describe the Student's dyslexia as mild in terms of the extent to which it interferes with the Student's fluency. She works with other students for whom reading just one page is

a struggle, but the Student is not like that. That doesn't mean the Student gets through a page without making any mistakes, but those mistakes don't get in the way of the Student's understanding and enjoying what she is reading. If what one is looking for is word accuracy, a dyslexic student will always fall short. If, on the other hand, the measure is whether a student gets through the material with an understanding and appreciation of it, then the Student is able to be successful. Speed is actually a strength for the Student. If anything, she works to get the Student to slow down to reduce the chances for error. Reading is not a laborious, agonizing process for the Student.

Most of the reading she did with the Student was with fiction and not much with text books. The Student's comprehension and oral expression of the books they read were good. Most recently, the Student has been reading a book called "The Word Eater," which is targeted for grades 4-6. The Student really enjoys the humor and the change in perspective from one main character to the other.

Reading aloud is a different task than reading to oneself and telling someone about it, or answering questions about it. When reading aloud, the Student wants to read with expression, as if she were conversing, but words she doesn't recognize get in her way. When reading aloud, the Student is really careful to not delete or add a letter to a word. This makes her move more slowly through the material.

The Student is not as strong a speller as she is a reader. It is quite common for spelling to lag behind reading for a student such as the Student. Nevertheless, when she read things that the Student had written at the beginning of xx grade, she sometimes had difficulty following what the Student was saying; now, although the Student still makes spelling errors, she can understand what the Student is saying.

If she had been asked in January 2008 whether the Student could be in the regular education classroom without support and be successful, she would have said "No." The Student was then struggling to get through really basic early reading material. By June 2009, however, she agreed that the Student could be in the regular education classroom without support and be successful. If, however, the team had said at the June 9, 2009 meeting that they were going to discontinue her work with the Student, she would have felt differently about the team's determination. When she started to work with the Student, she explained to the IEP team that Orton-Gillingham was a 5-level program. Level 5 is not just the "icing on the cake." It is important and helpful for the Student to complete the program, and the team made a commitment to the Student that she would do that. The team said that many children in the District have PLPs, and that the Student's PLP would ensure that she completed the program.

The Student made wonderful progress in 1 ½ years. She is concerned that the Student be encouraged to feel that she can celebrate how far she has come.

21. During an interview conducted by the Complaint Investigator with Aubrey Dugan, Ms. Dugan stated the following: She is a science teacher and also provides tutorials at the Landmark School. During the past summer, the Student was in all of her morning classes: language arts (which focused on written expression), language structure (which focused on

oral language) and reading tutorial. In the afternoon, the Student engaged in extra-curricular activities, such as a ropes course. The Student was in a class with 5 other students with similar skills.

She administered informal diagnostic testing to the Student when the summer program began in order to assist with the Student's class placement. She performed fluency testing with the Student, and at a xx grade level, the Student read 93 words per minute with no errors. Tested for reading nonsense words phonetically correctly along with commonly-occurring words, the Student read 26 out of 26 words correctly in lower case and 25 out of 26 words correctly in upper case. Tested for identifying consonants, the Student correctly identified 19 of 20 initial consonants, 20 of 20 final consonants and 19 of 20 closed syllable consonants.

In class, the Student sometimes needed cueing in order to participate. The Student was reluctant to raise her hand and contribute to class discussion. When asked questions, the Student tended to give one-word answers, and had difficulty finding descriptive words and being precise in her choice of words. The Student's real strength was in comprehension. When she read text material to the class and then asked the class to talk about what she had read, the Student participated often and knew many specific details. For spelling, as an exercise, she would dictate 10 words to the class for them to spell. The Student took longer to finish these exercises, and often asked her to repeat words. The Student usually spelled about 8 of 10 words correctly, compared with from 6 to 10 words correct for the other students in the class. Another feature of the class was reading and sharing poetry - the students read poems to themselves and then to one another. The Student was very reluctant to participate in this activity. She didn't like standing up in front of the class and reading aloud, although she was better at this than the other students in the class.

The District had assigned to its students that they read two books over the summer, and the Student started that work while at Landmark. For the first book, she chose "Julia Gillian," which is written at reading level 5.2. The Student would first read a portion at home, and then she would read it with the student during the tutorial. The Student really liked the book, and understood the characters and the setting. With the next book the Student selected, the Student's mother reported that the Student was very frustrated and became tearful trying to read it. The language confused her and she didn't find the story interesting.

22. During an interview conducted by the Complaint Investigator with Peter Harris, Mr. Harris stated the following: He is department head for language arts and language structure for the summer program at the Landmark School. He was in Ms. Dugan's classroom to observe twice a week, and regularly met with Ms. Dugan to discuss her program. After the Student was accepted into the program and before the program began, the school sent her an assignment to complete to assist them in making a proper placement. The assignment involved a picture, and asked the Student to provide six nouns associated with the picture, to write three sentences about it and then to write a story about it. The Student's nouns showed a lack of specificity. The sentences were short (6 words, where 8-12 words were considered a good response), and the story was brief initially, but the Student's mother explained in a note that the Student started the story over again on another page. That second attempt was much

longer and more detailed. The Student's mother also stated that the Student was resentful of being tested because she had just gone through a triennial evaluation.

In language arts, the Student required cueing in order to write more sophisticated sentences; the Student had the words, but they weren't readily available. The Student's writing was under-elaborated and overly generic, and featured poor spelling and punctuation. He believes the Student was putting forth an earnest effort, but that written expression was difficult for her. In his opinion, the Student's written expression is below grade level.

In language structure class, students worked on skills that were critical to development of oral language and reading comprehension. The Student did a nice job in all areas of this class, including her poetry recital.

23. During an interview conducted by the Complaint Investigator with Sandi Nadeau, Ms. Nadeau stated the following: She is a case manager during the summer program at the Landmark School, and was the Student's case manager. She met frequently with Ms. Dugan, and observed the Student during her tutorials with Ms. Dugan. When she attempted to engage the Student in conversation, she received barely one or two words in response.

Looking at the Student's spelling skills, it was evident that the Student had difficulty spelling even some of the simple words. The Student's understanding of word patterns was still fairly simplistic, including some that she should have mastered by xx grade. The Student also had decoding issues, and the Student's program included work in this area, such as through use of the Lindamood-Bell word ending grid.

With regard to the Student's independent reading, the first book she selected, "Julian Gillian," has large print and not very sophisticated vocabulary or descriptive language. The second book the Student chose, "The Road to Paris," is at a 4.3 reading level, but has lots of descriptive language and fairly sophisticated vocabulary. Although the Student didn't demonstrate in class that she was having any difficulty with it, the Student's mother reported otherwise. The Student then switched to "The Borrowers," which is at level 5.3, but is British and has some idiomatic expressions. The Student's mother reported that this was too difficult for the Student as well. The Student finally selected "Sarah Plain and Tall," which is at reading level 3.4 with more simplistic language. The Student's mother reported that the Student was much more confident with it. She believes it is an issue of concern that the Student still relies on her mother to be her advocate, rather than advocating for herself.

Part of her job was also to review documentation of assessments. The Student was tested before entering the program and at the end of it. The Student's scores on the WRMT improved (word identification from 91 to 96; word attack from 101 to 112), while the Student's scores on the GORT-4 went down (rate from 8 to 6; accuracy from 6 to 5; and fluency from 6 to 5). She believes that the GORT-4 scores reflect the Student's attempt to slow her rate down in order to become more accurate. In terms of the Student's fluency, she believes these scores demonstrate that the Student is significantly impeded. She believes that the improved scores on the WRMT, which unlike the GORT-4 is not a timed test, reflect the



Student's application of the word decoding strategies she learned both in the Orton-Gillingham work at school and in the language structure class at Landmark.

24. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: The Student is not reading at the same level as her peers, and she is not functioning independently. When the Student comes home from school, the Student sometimes can't read her homework assignment sheet. Every day, she has to help the Student with some aspect of her homework. Sometimes the Student can't do it at all, sometimes she just needs some direction. She seems okay with math computation and concepts, but she asks for help with word problems or written directions. With other written assignments, she has had to edit the work and help the Student with her spelling. The school provides the Student with huge accommodations in order for her to be able to be successful: allowing extra time for tests and not counting spelling. On math tests, the teachers help the Student with understanding the problems. The Student's work that Ms. Bucci showed her from the classroom was clearly edited to make it look correct. In class, Ms. Bucci always makes sure that one of the students reads text aloud to the class, and the Student never has trouble understanding when she is read to. She wants desperately for the Student to master reading, writing and spelling skills.

She sees some improvement over the last 1 ½ years. For example, she can now understand what the Student is trying to write. Nevertheless, the Student's reading skills are not commensurate with her non-disabled peers. The District should continue to work on the Student's reading fluency (accuracy and rate) by continuing with the Orton-Gillingham tutorials and with the spelling and fluency work in the resource room. The Student needs lots of repetitions in these things in order to master them.

She agrees that the Student can read to herself and understand the material she reads; comprehension has never been a problem for the Student. The Student cannot, however, read her books and other material aloud without help. Listening to the Student read aloud highlights where the Student is having a problem. Hesitation and confusion slows the Student down to the point that she's reading at a xx to xx grade level. The Student has to reprocess every time she sees words that she doesn't know. The Student gets all this extra time to do her work and to do tests at school. She has to be able to read at a certain speed in order to be able to learn and grow.

When she met to discuss the testing that would be done for the Student's triennial evaluation, she understood that eligibility would be looked at, but she assumed that the staff would make sure they did the testing needed to make that determination. At the June 9, 2009 meeting, when the team started discussing eligibility, Dr. Perez-Smith said "But I didn't test to determine eligibility," and mentioned the Childhood Memory Scale. When she agreed that Ms. Moore didn't have to do the GORT-4 test again, she assumed that the IEP team was going to consider the scores that Landmark School obtained on the test. This is one of the few tests that targets the Student's specific problem area; the subtests that the Landmark School used focus on the very things that the Student is working to improve. At the June 9, 2009 meeting, however, Ms. Moore said she wouldn't consider the Landmark School results because she didn't administer the test herself. Dr. Perez-Smith did offer to do more testing,

but Mr. DePatsy said it wouldn't make any difference anyway, because the Student was making sufficient progress. She agrees that the Student made progress on her IEP goals, but she expected that there would be more IEP goals. There was nothing about improving her scores on the TOWRE assessment, for example, or improving decoding skills.

Mr. DePatsy says he wants the Student to continue with the Orton-Gillingham instruction, but if Mr. DePatsy leaves and the Student is not in special education, the District can decide to stop it. The Student has no legal protection. This is specialized instruction, not just an extra 5 minutes' help with reading. With the Student's PLP, it's as if the District is saying the Student still needs special education, yet they're dismissing her from special education.

25. During an interview conducted by the Complaint Investigator with the Student's father, the Student's father stated the following: He was present at the June 9, 2009 IEP team meeting. Mr. DePatsy came in and said "Is the Student eligible? Let's look at the learning disability evaluation report." Dr. Perez-Smith said "But I didn't test for eligibility," and he and the Student's mother also complained that necessary tests were not performed, but Mr. DePatsy said it didn't matter because the team didn't need the test results for the second prong of the evaluation report. He said the Student is getting so much support, and if it's taken away the Student is going to fail. Mr. DePatsy said the Student would continue to get the tutoring and accommodations, but he believes this must mean that she still needs those supports. Furthermore, he believes that one of those supports, the Orton-Gillingham instruction, is special and not general education. Only after the meeting did he realize that the staff hadn't even been asking the right questions, like whether adverse effect from the Student's disability was still being demonstrated.

He sees this adverse effect when the Student does her homework. The Student needed help reading her written math problems, although she could do the math computation without help. If the Parents didn't help the Student with understanding those problems, she would get really frustrated and break down crying. The Student never lost her composure in school, but she did at home. When the Student did spelling homework, she misplaced letters, and this made her very frustrated, too. She was so aware that she couldn't do the work correctly. When the Student had written material to read for social studies, she asked her parents for the meaning of words or of sentences. The Student's other homework involved reading for 20 minutes each night. The Student was allowed to choose to be read to, and school staff suggested to the Parents that, because the Student worked very hard at reading all day in school and in tutoring after school, it would be better if the Parents read to her. He did a lot of reading to the Student, but sometimes would have the Student read to him. The Student had a really hard time doing this, even though he tried not to ask her to read books written above her grade level.

## **VII. Conclusions**

**Allegation #1:** Failure to utilize the requisite criteria when determining that the Student no longer was eligible for special education in violation of MUSER §VII.3.A.

**VIOLATION FOUND**

The District appropriately began the Student’s IEP team meeting on June 9, 2009, comprising both the annual review of the Student’s IEP and review of the Student’s triennial reevaluation data, by reconsidering the Student’s eligibility for special education. As noted by the court in *Walton v. Liberty 53 School District*, 35 IDELR 63 (W.D. Mo. 2001), simply because a student may have been eligible for special education services in the past doesn’t mean the student will be eligible for them indefinitely in the future. As the court stated: “If a student receives services for a learning disability, it stands to reason that if the services are appropriately tailored and the student makes progress towards the goals in that area, the student should eventually no longer be in need of such services.” *Id.* See also *Yorkwood Community United School District 225*, 46 IDELR 235 (Ill. SEA 2006) (“One of the goals of IDEA is to move children away from special education classifications and to allow them to function fully in the general education classroom with appropriate supports,” citing 20 USC §1400(c)(5)(F)).

In reconsidering the Student’s eligibility, however, the District utilized the Maine Learning Disability Evaluation Report, a tool developed by the Maine Department of Education (based upon MUSER §VII.2.L) for purposes of making an initial determination of eligibility based upon the classification Specific Learning Disability. The applicable regulation for a change in eligibility is MUSER §VII.3.A, which states, in relevant part, as follows:

A child’s change in eligibility shall be made by the IFSP/IEP Team and shall be based on the recommendation of the members of the IFSP/IEP Team utilizing the following criteria:

- A. In school/preschool:
  - (1) Adverse effect is no longer demonstrated; and
  - (2) Measured achievement on IFSP/IEP goals and data indicate adequate progress;
  - (3) Needs can be met through identified general education services;
  - (4) A plan is in place for assessing that the student continues to make progress once the IEP is terminated, including a plan for what will be done if progress ceases after change in eligibility; and
  - (5) No pre-referral would be required if the child’s progress lessens during the same school year as a change in eligibility.

There is, of course, considerable overlap between the above criteria and The Learning Disability Evaluation Report. Several of the inquiries in the Report, however, which probe the existence of a disability (boxes 1 and 2, for example), would no longer apply, the disability having already been established.<sup>1</sup>

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<sup>1</sup> It must be noted that the District, in its completion of box 1 of the Learning Disability Evaluation Report, referenced only the Student’s CTOPP score, which was 1 standard deviation below the mean. The District, however, had decided not to re-administer the Children’s Memory Scale, which had been the basis for finding a disability on the Learning Disability Evaluation Report completed in January 2008, or any other assessment that would have measured this same psychological process. The decision not to re-administer the test may have been made for good reasons, but this meant that the Student’s score from the last Report was the most current available and should have been referenced.

Admittedly, the District worked through the entire Learning Disability Evaluation Report, rather than stopping at the first two questions, and therefore proceeded to consider fully the Student's academic progress, as required under MUSER §VII.3.A(2). When doing so, however, the District failed to explicitly consider the extent to which that progress was the result of the additional instruction and support the Student was receiving, both within and outside of school. The Student benefitted from not just the specialized instruction she was receiving, both in school and after school, but also from a long list of classroom and testing accommodations. The U.S. Office of Special Education Programs has advised that, in determining a child's current level of educational achievement for purposes of specific learning disability, it would generally be appropriate to consider that information. *See Letter to Lillie/Felton* (April 5, 1995).

In addition, the IEP team failed to explicitly consider whether the Student's needs could be met through identified general education services, as required under MUSER §VII.3.A(3). "Special education" (as distinct from general education) is defined as "specially designed instruction...to meet the unique needs of a child with a disability." MUSER §II.29. The definition of "specially designed instruction" found in MUSER §X.2.A(2) includes adapting "the content, methodology, or delivery of instruction to address the unique needs of the child that results from the child's disability." The fact that the Student's student study team determined that the Student should continue with specialized reading instruction and with all the same classroom and testing accommodations, while not being conclusive on the subject of whether the Student's needs could be met through general education services, at least rendered it a close case and necessitated consideration and discussion of whether that instruction in addition to those accommodations in fact constituted special education.

As one final consideration, the Parents clearly felt "blindsided" by the District's determination, and while they should have understood that eligibility would be under consideration at the meeting, they were so certain of the Student's eligibility that they weren't fully prepared to present their views. Under all the circumstances, the District's failure to utilize the proper criteria can be said to have "compromised [the Student's] right to an appropriate education," (*Roland M. and Miriam M v. The Concord School Committee*, 910 F. 2d 983, 994 (1<sup>st</sup> Cir. 1990)), and dictates that the District convene another IEP team meeting, at which at least one of the Student's xx grade teachers should be present to provide current information on the Student's classroom performance, and to which the Parents may elect to invite the participation of one or more of the educators who have worked recently with the Student outside of school. The IEP team will proceed, with guidance from the above conclusions regarding application of the proper criteria, to make its determination as to whether a change of eligibility for the Student is appropriate.

**Allegation #2:** Determination to dismiss the Student from special education services despite evidence that she continued to have a disability that adversely affected her educational performance, that her achievement on IEP goals and data did not indicate adequate progress, and that her educational needs cannot be met through general education services in violation of MUSER §VII.3.A.

**NOT REACHED**

As a violation has been found in regards to the process used to determine the Student's eligibility for special education, the allegation regarding the outcome of that process will not be considered.

**VIII. Corrective Action Plan**

The District shall promptly schedule a meeting of the Student's IEP team, which shall include at least one of the Student's xx grade teachers. The District will submit a copy of the advance written notice, written notice and any IEP or PLP which results from that meeting to the Due Process Office, the Parents and the Parents' attorney.