

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

April 26, 2011

11.047H— Parents v. Regional School Unit No. 16

REPRESENTING THE FAMILY: James Clifford, Esq.

REPRESENTING THE DISTRICT: Amy Tchao, 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 took place on February 15, March 2, 3, 4, and 21, 2011 at the Department of Health and Human Services in Lewiston, Maine. Those present for the entire proceeding were the Parents¹, Attorney Clifford, Susan Prince, Director of Special Education, Attorney Tchao, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Paula Starbuck	Teacher of the Visually Impaired
Pearl Radziszewski	Educational Technician
Susan Prince	Director of Special Education
Jodi Barber-Jordan	Special Education Teacher, Poland Community School
Kathryn Adams	Special Education Teacher, Minot STAR Program
Tara Paradie	Physical Therapist
Tiffany Witherell	Speech and Language Clinician

All testimony was taken under oath. The parties were given a full opportunity to examine and cross-examine witnesses, introduce documentary evidence and make oral argument.² The record closed upon receipt of the parties' closing arguments on April 11, 2011.

¹ The father was present during most of the hearing.

² Although the Parents' counsel notes in his closing argument "time constraints" on the last day of hearing, this was a choice he made. The Hearing Officer offered the parties the opportunity to continue the hearing to another day,

I. PROCEDURAL BACKGROUND:

On December 28, 2010, the Parents filed this hearing request on behalf of their daughter (“Student”). On January 31, 2011, Amy Tchao, Esq., counsel to Regional School Unit #16 (“District” or “RSU #16), sent James Clifford, Esq., counsel to the Parents and Student, a comprehensive document request, which documents were to be produced no later than the date of the prehearing conference, to comply with the five-day rule. On February 8, 2011, the prehearing conference was held at the Department of Health and Human Services (“DHHS”) in Lewiston, Maine. Participating in the conference were: the Parents; Attorney Clifford, Attorney Tchao, Susan Prince, Special Education Director, and Shari Broder, hearing officer.³ The District brought its documents and witness lists to the Prehearing Conference, but the Parents did not.⁴ Ultimately, the District agreed to waive the five-day rule for one day, and the Parents produced their documents on February 9, 2011. The Parents also contended that the District did not comply with their request for documents made on November 12, 2010. The District permitted the Mother to review the Student’s records in its possession at that time. Although the Parents expected the District to produce logs or therapy notes prepared and kept by the Student’s speech, occupational or physical therapists of the dates on which they provided services, such documents were not in the District’s possession and were therefore not produced. During the prehearing conference, the parties discussed production of these documents. The District believed these are

but they chose to complete it on March 21, 2011. This included a decision made by Attorney Clifford not to introduce rebuttal evidence.

³ Because the Mother and Student had a prior medical commitment out of state, the parties agreed to proceed with the prehearing conference with the Parents’ legal counsel, although the Mother did participate in part of it by telephone.

⁴ MUSER§XVI(9)(D) clearly states that the hearing officer “shall exclude evidence not disclosed to the other party at least five business days prior to the due process hearing.” The Parents failed to comply with this rule, nor did they come prepared to the prehearing conference with a list of witnesses or other items described in the Commissioner of Education’s January 3, 2011 letter.

sole possession notes within the exception to the Federal Educational Rights and Privacy Act (FERPA), but agreed to try to obtain the records and produce them in a way that would protect the confidentiality of other students. The District produced these documents for the limited nature of the proceeding, and maintains that they are not educational records. The Parents then objected to admission of these documents, but the hearing officer admitted them into evidence.⁵ The Parents submitted approximately 384 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1081 pages of exhibits (herein referenced as S-#).

On February 14, 2011, the District filed a Motion in Limine and/or Partial Motion to Dismiss asking the hearing officer to exclude certain documents from past school years earlier than December 2008, and to dismiss any claims by the Parents for Individuals with Disabilities in Education Act (IDEA) violations before that date, as these claims would not fall within the applicable statute of limitations. The hearing officer, with the agreement of the parties, agreed to address the statute of limitations issue in this decision.

As noted above, the hearing took place over the course of five days. Both parties requested to keep the hearing record open until April 8, 2011 to allow the parties to prepare and submit post-hearing memoranda. The Parents then requested an extension of this deadline to April 11, 2011, which the hearing officer granted without objection. The District submitted a 52-page closing memorandum and the Parent submitted a 53-page one. The record closed upon receipt of these documents on April 11, 2011. The parties further agreed that the hearing officer's decision would be due on April 26, 2011.

⁵ These records were admitted because the Parents requested them, and understood the District's position regarding their production. The District, responding to the request, undertook a considerable commitment of time and expense to obtain these documents and produce them in a way that did not violate the privacy rights of other patients of the therapists.

II. ISSUES:

1. Did the Student's IEPs and placements since December 2008 fail to provide the Student with a free appropriate public education (FAPE)?⁶ If so, is the Family entitled to an award of compensatory education relief or other remedy permitted under the IDEA?
2. Were the proposed IEPs developed in the fall/winter of 2010-2011 for implementation in the second half of that school year, including the proposed placement in the Minot STAR Program, reasonably calculated to provide FAPE to the Student in the least restrictive environment? If not, what remedy is appropriate?

III FINDINGS OF FACT

1. The Student is a xx year-old girl (DOB: xx/xx/xxxx), who lives with her mother and father, xx year-old brother and xx year-old sister in Poland, Maine. From the fall of 2006 until December 2010, the Student attended the Poland Community School ("PCS"), which is her neighborhood elementary school. She is in xx grade, and is currently being home schooled. The Mother is a physical therapist.
2. The Student is currently eligible for special education and related services under the category of Multiple Disabilities.
3. The Student has been diagnosed with level IV cerebral palsy secondary to cardiac arrest and anoxia, Noonan's Syndrome, traumatic brain injury, cardiopulmonary disease, seizure disorder, cortico-visual blindness (CVI) and significant cognitive delays. [S-268, 400-401] A psychological screening done on November 9, 2004 resulted in a diagnosis of mental retardation. [S-404] These conditions significantly impede the Student's ability to learn. She also has limited mobility, a limited ability to care for herself, and difficulty with communication. The Student is a happy child who loves people and social interactions, but can be easily distracted by others.

⁶ This issue also encompasses whether the Parents' claims beyond the statute of limitations are permissible.

4. The Student began receiving services through Child Development Services (CDS) before she was xx old. Her service coordinator there was Kathryn Adams, who now heads the Minot Specialized Teaching and Autism Resource (STAR) program in RSU #16. [Test. of K. Adams]
5. The Student transitioned to the District in the fall of 2006 for xx at PCS. Under the IEP, the Student received five hours per week of direct instruction for academic readiness skills, as well as speech/language, occupational (OT) and physical therapies (PT). [P-104] She also received one hour per week of vision therapy, and had a 1:1 educational technician (ed tech), Pearl Radziszewski. [*Id.*] The Student's transition to xx was successful. [Test. of Mother, J. Barber-Jordan]
6. At the April 4, 2007 IEP team meeting, Lynda Parker, the Student's xx teacher, remarked that the Student "had a great time" in xx, and the other students accepted her very well." Linda Leo, the Student's vision specialist, noted that the Student had made some nice gains in visual functioning. [P-86] Jodi Barber-Jordan⁷, the Student's special education teacher, reported limited progress on almost all of the Student's goals. Due to missing five weeks of school for heart surgery, the Student lost some of the gains she had made in school. [*Id.*] The Mother expressed her view that she would like to see the Student in the regular classroom as much as possible in the coming school year. Ms. Barber-Jordan did not believe the Student could get the instruction she needed in the regular classroom, due to her disabilities, and felt that the Student needed more pull-out time. [Test. of J. Barber-Jordan, P-88] The team discussed how xx grade was different than xx, and more independent skills are expected of the students, and that it might be more difficult for the Student without more pull-out time.

⁷ Ms. Barber-Jordan first met the Student when she was in xx. She voluntarily provided respite care for the Student and her family, took her on outings and so forth because she wanted to help the family. [Test. of J. Barber-Jordan]

[P-88] The IEP team agreed to the Parents' preference, and provided five hours per week of direct instruction, but also decided to retain the Student in xx for a second year, as the team thought this was more developmentally appropriate. [P-88] In addition, at that meeting, the Parents consented to evaluating the Student for speech/language, occupational and physical therapies, as well as a classroom observation. [S-384] Ms. Barber-Jordan noted in her classroom observation the following

[The Student] requires more staff support than other students to be able to access her education. Articulation issues make it difficult to understand what she says therefore it is difficult to know when she gives a correct answer when she chooses to. Academic and physical delays and communication issues impact her ability to fully benefit from the general education program. [S-376]

7. The IEP team drafted the Student's IEP at a June 14, 2007 team meeting. Like the previous year, this IEP called for five hours of direct special education instruction, and provided 2 ½ hours per week of direct speech/language therapy, 90 minutes of OT, 2 hours of PT, and 1 hour of vision therapy. [S-362] The team also agreed that the Student was eligible for Extended School Year services (ESY), which the Student would henceforth receive each summer.
8. The written notice dated June 9, 2008 states that the Student made functional language gains and social gains in the regular classroom. [S-350] The Mother said that she did not feel she could come to school as often as she would like because of the Student's behaviors when the Mother was present, and that communication with the school was not what she had hoped for. [S-350] The District noted that it had not received any reports from the Student's most recent intensive therapy, and that it would be good to have these to follow through at school.⁸ [S-350] The 2008-09 IEP for xx grade noted one of the Student's present levels of

⁸ Although it was unclear why, the Parents did not routinely share the reports from the Student's therapies, even when specifically asked by school personnel.

performance was using spontaneous utterances of three to four words in length with 50% accuracy. [S-341] Her delays made it difficult for her to participate independently in academics in all content areas of the general education curriculum. Again, the Parents emphasized that they wanted the Student to participate in the regular classroom as much as possible. [S-363, 386] Consequently, for the 2008-09 year, the IEP provided 5-10 hours of direct special education instruction, with a proviso that the Student could be pulled out of the classroom as necessary when classroom work would not benefit her. [S-348] The IEP also contained the same amounts of speech, physical, occupational and vision therapies as the previous year, and assistive technology consultation from ALLTech. [S-346] There were goals for speech/language, OT, PT, vision therapy and adaptive skills. [S-342-344] The Student's adaptive skills goals contained personal care skills as well as more academic skills, such as grouping objects by physical attribute and identifying objects needed for specific functions. [S-343] Although the Parents raised the issue of whether public school was the best place for the Student, or if it were better to have her in a conductive school, the team accepted the IEP without objection. [S-351]

9. Because her parents took her to New York and Florida to participate in intensive therapy, primarily focusing on improving her mobility skills, the Student missed approximately six weeks of school in xx grade. [P-130-135] First, she attended an intensive therapy focusing on physical therapy and stretching. [P-136] She and the Mother then attended a program in February and March 2009 by Pediatric Therapy Associates in Florida, which focused on physical and occupational therapy. [P-130] The report from this intensive therapy noted improvements in mobility and stated that the Parents' goal of having the Student walk with an assistive device was reasonable. [P-134-35] Each time the Student returned to school

following intensive therapy, however, not only had she missed her regular school instruction, it also took some time for her to readjust. [Test. of J. Barber-Jordan] Speech therapist Tiffany Witherell also noted regression in the Student's speech output after each of her trips. [Test. of T. Witherell, S-181] Sometimes it was difficult to modify the curriculum for the Student in the mainstream classroom. This and her long absences affected her ability to make progress in her educational program. Although the Student's progress in xx grade was limited, the IEP was implemented consistently. [Id.] Ms. Barber-Jordan felt that it was intended to provide the Student with meaningful educational benefit at the time of its inception. [Id.] The Student's service providers communicated with the Parents about the Student's school day almost daily through the use of a home-school notebook.⁹ [P-155-196]

- 10.** In March of 2009, the Parents requested that the District provide them with MaineCare documents for the Student's related services. The District provided the Parents with MaineCare logs for OT and speech therapies for that school year to date. The District did not possess PT logs, as those were kept by Tara Paradie, the Student's physical therapist, who was an independent contractor and not an employee of the District. [Test. of S. Prince]
- 11.** On June 8, 2009, the IEP team met to develop the Student's educational program for xx grade. The team developed essentially the same program as the Student had been receiving in xx grade, but reduced direct special education instruction to five hours weekly, rather than five to ten hours in the XX grade IEP. The team tried to accommodate the Mother's belief that if the Student was making limited progress in the resource room, she should spend more time in the mainstream with normally developing kids. [Test. of J. Barber-Jordan] Although Ms. Barber-Jordan was not sure she agreed with having so much mainstream classroom time,

⁹ This was true throughout xx, xx and xx grades.

the team adopted by consensus the Parents' preference in the xx grade IEP. The written notice stated that because the Student made minimal progress in xx grade in a pullout setting, she could do the same thing with her peers and at least be with other students. [S-334, Test. of J. Barber-Jordan] The IEP also added that on days when the Student was more disruptive in the regular classroom, she would be taken to the special education room. [S-314] Ms. Radziszewski explained that this worked well for the Student in xx grade, as certain classroom activities were not developmentally appropriate for the Student and could not be modified for her. [Test. of P. Radziszewski, S-256-257] It was agreed that the Student's objectives should be functional. [S-335] She had goals for speech/language, OT, PT, vision therapy and adaptive skills, the latter of which was a combination of functional life skills and more academic work like grouping objects and identifying their function. [S-328] During 2008-09, the Student's spontaneous speech declined, although Ms. Witherell saw gains in other speech/language areas. [S-334, 336] The Mother acknowledged that the Student made gains in speech that year, and seemed to be more cognitively appropriate. [*Id.*] The IEP team decided to make speech/language services a direct special education service rather than a related service for xx grade. The Mother expressed her dislike for co-treat therapies, and did not feel the Student's mobility goals were being addressed. [S-336] Because of the Student's limited progress in xx grade, many of her xx grade goals were repeated from her xx grade IEP. [S-323, 338] The IEP also added monthly meetings with the family in the 2009-10 school year. [S-331] These monthly meetings did not occur every month, however, and only occurred a handful of times during xx grade. [Test. of J. Barber-Jordan]

12. Tara Paradie noted on November of 2009 that the Student made great improvement with her school mobility and gait training. [S-303]

13. On March 8, 2010, the Parents gave the District consent to conduct a triennial evaluation of the Student, which included speech/language testing, classroom observation, academic development testing, occupational, physical and visual therapies evaluations, and the Gross Motor Function Classification System for assessing motor functioning in children with cerebral palsy. [S-291] The Student was administered the School Functional Assessment, which measured the Student's performance on functional communication, memory and understanding, and behavior regulation.¹⁰ [Test. of T. Paradie, S-279]
14. The evaluation results were discussed at a May 10, 2010 IEP team meeting. The team discussed whether it made sense to continue to provide the Student's program in the general education setting, and felt that the Student's needs were too individualized to be carried out there any longer. [S-251] Most of the Student's teachers and therapists felt that the Student would learn better in a quieter, less distracting setting. [S-251-252] The Mother acknowledged that the Student had definitely made progress in her educational program, but questioned the placement. [Test. of T. Paradie, S-253] Although the Mother had insisted that the Student spend as much time in the mainstream in the past, she said that if someone had told her this was not an appropriate setting for the Student, she would have listened to that. [S-252] She was concerned that the Student's goals were very general and included certain things the Student had already accomplished at home, thereby wondering whether the Student's present levels of performance were accurate. [Test. of Mother] It appeared at the meeting that everyone supported the change to a life skills model. [Test. of T. Paradie] The Father added that the Student was at a point in which academics did not really apply to her. [S-253] Tiffany Witherell (then Tiffany Miller), the speech/language therapist, noted that the

¹⁰ This was not a comprehensive norm-based cognitive test. As noted at Fact #14, Paula Starbuck recommended that the Student have a psychological evaluation conducted by one of the few people who is qualified to do this for a child with a visual impairment.

Student was making consistent progress with articulation and language in therapy, but was not carrying the progress over and not speaking in full sentences. [S-251] It was noted that the Student talked a lot when not in the presence of her classmates, but rarely spoke in a sentence when her peers were present.¹¹ [S-252] She was also distracted by her peers in the regular education classroom. At this meeting, Barbara Hasenfus, then special education director, said that the District did not have a life skills program for the Student's age group. [S-252] The IEP agreed upon increased direct instruction to 18.5 hours per week, and included direct speech/language services for 2.5 hours per week, with the other therapies being offered at essentially the same levels as before. [S-247-248, 250] The IEP team discussed the Student's goals and objectives, which were more in the nature of functional life-skills, including two speech/language goals, six OT goals, six PT goals, and a behavioral goal. [S-231-245, Test. of T. Paradie] The IEP team agreed upon this IEP by consensus and without objection.

15. Throughout her time at PCS, the Student received services for her visual impairment.

Initially, her visual impairment teacher was Linda Leo, but in the fall of 2009, Paula Starbuck became the Student's teacher. [Test. of P. Starbuck] Both were specially trained in working with people with CVI, which is caused by damage to the brain, not the eyes. [Id.] Ms. Starbuck was very impressed with how PCS was working with the Student's visual impairment. [Id.] The District sent Ms. Radziszewski and the Student's physical, occupational and speech/language therapists to a full-day training in Portland about working with the Student's visual impairment. Ms. Starbuck also worked with Ms. Radziszewski individually, and gave her ideas for working with the Student. [Id.] Ms. Starbuck observed

¹¹ This was a notable change from Ms. Witherell's experience with the Student the previous year, when the Student talked more around her regular education peers. [Test. of T. Witherell]

Ms. Radziszewski implementing these instructions very well, and was impressed with her ideas and ability to work with the Student. [*Id.*] In April 2010, Ms. Starbuck conducted a functional visual assessment of the Student, which stated that the Student's goal was to increase her visual attention to toys and objects and build stable and sustained looking. [*Id.*, S-10] Ms. Starbuck noted that the Student definitely made gains, resolving four of her CVI issues, and attributed the Student's progress to the efforts of the staff at PCS. [*Id.*, S-11] In her report, she gave the staff credit for this, and added that "Not only have they followed the suggestions, but have branched off and thought of more activities/tasks on their own. They are to be commended." [S-11] She noted that the nature of the Student's disability was such that she would be expected to progress slowly. In December 2010, the Mother spoke with Ms. Starbuck about the Student, and told Ms. Starbuck that things were not going well at PCS. [*Id.*] They discussed other possible placements for the Student, including the Morrison Center ("Morrison") in Scarborough, Maine. Ms. Starbuck works with students at Morrison, and thought that the students there were more challenged than the Student, and possibly much more challenged. She recommended that the Student have a psychological evaluation with someone trained in working with the visually impaired, such as Therese Pawletko. [*Id.*] Ms. Pawletko, who is located in New Hampshire, has a long waiting list for evaluations of possibly eight or nine months, and could not do this evaluation until the fall of 2011.

- 16.** On June 29, 2010, Barbara Hasenfus told the Mother that she had worked out an arrangement with SAD #75 for an aquatics program for the student at the Freeport YMCA. [P-42] On July 1, 2010, Susan Prince replaced Ms. Hasenfus as the District's special education director. [Test. of S. Prince] In an email correspondence between physical therapist Tara Paradie and the Mother, Ms. Paradie mentioned that Ms. Prince was open to an adaptive physical

education program for the Student, including an aquatics program. [P-45] She added she was submitting to Ms. Prince her total hours with the Student to determine whether any compensatory time was appropriate. [P-46] The Mother replied that she was hoping for compensation from the District to pay for more intensive therapy. [*Id.*] On September 1, 2010, Ms. Prince notified the Mother that she had made arrangements for an aquatics program closer to home through the Lewiston YWCA. The Mother replied that she wanted the Student to attend the Freeport program, unless there is a certified adaptive aquatics instructor at the YWCA. [P-42] In the same email, the Mother notified Ms. Prince that the Student would soon be attending a conductive education course, and inquired whether the District would pay for some of it. [*Id.*]

17. On September 9, 2010, the Mother sent Ms. Prince a list of what she believed were missed direct therapy sessions from the previous school year.¹² [P-35-36] The Student's IEP called for three 30-minute sessions of OT each week. The Mother could document thirteen missed OT sessions, or less than 10% of possible session. On two of these occasions, the Student was skiing with her school, two were early release days, and four the therapist was ill or at a medical appointment. These sessions were made up in any event. [S-36, Test. of P. Radziszewski] The Mother documented approximately twice as many missed speech therapy sessions. Although some of these were for early release days, snow days, or when the Student was skiing, most were due to Ms. Witherell attending to other professional obligations. [Test. of T. Witherell] Ms. Witherell also explained that she thought she made up most of the missed sessions, but did not keep records of the make-up sessions until the fall of 2010. [*Id.*]

Although the Mother did not produce documentation of missed PT sessions, Ms. Paradie

¹² Upon examining the MaineCare logs, the Mother suspected the District was engaging in MaineCare fraud. Although this hearing officer has no jurisdiction over such matters, the District provided credible testimony explaining the entries in the MaineCare logs, including those entries the Mother questioned.

missed several sessions in the fall of 2009 when she injured her finger and had amputation surgery. She also missed several days when she left the country to adopt a child. Ms. Paradie made up these sessions with the Student. [Test. of T. Paradie, P. Radziszewski, P-36] Ms. Prince asked the Mother how many PT hours the Student would miss at school while attending her conductive education program, and that she would consider paying for these. [P-37, Test. of S. Prince] The Mother did not respond to this request. Once Susan Prince became aware that the Mother wanted more information about precisely when the Student's in-school therapies were provided, she asked the therapists to begin keeping more detailed records of services provided to the Student. [Test. of T. Paradie] She also instructed her staff not to schedule IEP meetings that resulted in students missing their therapies. [Test. of S. Prince]

18. Shortly after the Student started her xx grade year, she left school to attend Ability Camp from September 6 through October 8, 2010 in Ontario, Canada. [P-115] This program focused on mobility, toileting and other self-care skills. [P-116] The Student made considerable progress with her mobility there. [Test. of Mother]
19. Upon returning from Canada, the Parents became increasingly frustrated with the District's programming for the Student. On October 15, 2010, the Mother sent an email to the IEP team asking what goals, if any, they would change for the Student. [P-18] Ms. Barber-Jordan replied that she had just met with Ann Butler, the OT, and Ms. Witherell, the speech therapist, and they agreed that the goals set in May were still appropriate. [*Id.*] Ms. Barber-Jordan further explained that they went through each of the goals at the May 2010 IEP meeting and the Mother approved each one because everyone wanted the goals to be functional. [Test. of J. Barber-Jordan] When the Student first returned to school after Ability

Camp, Ms. Barber-Jordan tried to set up a time for the Mother to come to school and show the staff who worked with the Student what the Student had learned.¹³ [Test. of J. Barber- Jordan, Mother] She also asked the Mother for permission to speak to the therapists at Ability Camp. [Id.] The Mother did not comply with either request. She began coming to PCS with increasing frequency for unannounced lengthy observations of the Student. [Test. of P. Radziszewski, J. Barber-Jordan] The Student was distracted by the Mother's presence, and would sometimes scream and cry, and make reference to her mother being there. [Id.] This was the only time the Student became upset like this while in school. One day, the Mother appeared at class and asked the adaptive physical education teacher, Chris Willer, about his credentials. [Test. of P. Radziszewski] Ms. Radziszewski felt uncomfortable because she thought the Mother was grilling Mr. Willer in an intimidating way, not only about his education and credentials, but about how Mr. Willer handled the Student. [Id.] Although she had had a good relationship with the Mother over the past several years, she felt that the Mother had become increasingly intimidating and inappropriate in the fall of 2010. [Id.] For example, one day, the Mother was in the classroom, where she picked up a hairbrush, and began combing the Student's hair, and exclaimed, "there, goal accomplished."¹⁴ [Test. of P. Radziszewski, J. Barber-Jordan] Although the Student was making consistent progress on her hair brushing objectives, she had not yet accomplished them at school. Ms. Barber-Jordan handled this well, and was kind to the Mother, asking what she wanted for a goal, to which the Mother replied, "I don't know, you're the teacher, you should be deciding this." [Test. of P. Radziszewski] Nonetheless, Ms. Barber-Jordan felt sufficiently uncomfortable with the

¹³ The Parents did not share the reports from Ability Camp with the District personnel either. Tara Paradie thought that having this information would have been helpful for the Student's programming. [Test. of T. Paradie]

¹⁴ Two of the Student's IEP objectives were "Given a hairbrush and verbal and tactile cues with hand over hand assistance, [the Student] will brush her hair in 8 out of 10 attempts" and "Given a hairbrush and hand over hand assistance, [the Student] will brush her hair in 8 out of 10 attempts." [S-233]

Mother's behavior in that setting that she called the school principal to come to the classroom. [Test. of J. Barber-Jordan] The staff was taken aback by the Mother's behavior, particularly some of the things she did and said in front of other students and staff. Mr. Willer thought the Mother's presence was negatively affecting the Student's learning environment. [S-123] Ms. Barber-Jordan found it increasingly difficult to do her job with the Mother present in school so often, as she had to spend more time supporting her ed techs, who were uncomfortable with the Mother present, thus preventing Ms. Barber-Jordan from accomplishing her other duties. [Test. of J. Barber-Jordan] Nonetheless, on many occasions, the Mother continued to come to school unannounced. [Test. of Mother, S-125, 127]

20. In X grade, the Student began her swimming program, which she enjoyed very much. [Test. of P. Radziszewski] Ms. Radziszewski continued to be the Student's 1:1 ed tech, and went into the pool with her. The Student's speech, occupational and physical therapists also attended the program with her and provided therapy at different stations in the water. [P-20, Test. of T. Paradie] Ms. Paradie also provided therapy in helping the Student on and off the bus, in the dressing rooms and shower. [Test. of T. Paradie]

21. Over the years of working with the Student, Ms. Radziszewski saw the Student making consistent progress, although it was often slow. [Test. of P. Radziszewski] When the Student first arrived at PCS, she was in a kid kart with head support. In xx grade, she was using a walker, and could get around the school quite well. [*Id.*] The Student's speech had come very far. With her peers, she previously did not look at anyone, but now she was very social, and asked to go places and see people. She used a computer now, and was doing a great job with it. [*Id.*] It was Ms. Radziszewski's observation that when the Student returned from her

absences for intensive therapy, sometimes the Student had made progress, and sometimes she had not.

22. At the Parents' request, the District scheduled an IEP meeting dated October 26, 2010. The Parents attended this meeting, and secretly taped it.¹⁵ [Test. of S. Prince] One purpose of this meeting was to discuss the Parents' concerns about the Student's goals, given her recent intensive therapy at Ability Camp. [Test. of Father, S-184] The Parents discussed the Student's considerable progress at Ability Camp, and their feeling that the Student's program at PCS was not being carried out appropriately. [S-184] The Mother told the IEP team that she felt they had not completed their discussion about the Student's goals, but she was happy with the goals they reviewed, and that they would discuss the remaining goals at the next meeting. [S-184, Test. of S. Prince] At this point, however, the Parents did not think it was necessary to give information to the District or otherwise participate constructively towards the new IEP, as they had already decided to home school the Student. [Test. of Mother, Father] The team also suggested that the Parents observe the Minot STAR program. The Parents responded that they did not have time, and did not want the Student to go there, as she would have the same therapists as at PCS.¹⁶ [S-181] The team discussed the Student's swimming program, and the Mother said she was not sure whether she wanted the Student to continue in it. [S-184] Ms. Prince offered to transport the Student to Minot for adaptive physical education (PE) instead of swimming, and was offering a whole program in Minot that included both adaptive PE and swimming. The Mother wanted to observe the swimming program. Ms. Prince responded that she would like 24 hours notice from the Mother before

¹⁵ Ms. Prince did not know the meeting was taped until this hearing. In her 27 years as a special education professional, parents have taped many meetings, but none had ever done so surreptitiously before, and she was shocked. [Test. of S. Prince]

¹⁶ The Mother testified that she did visit the program at some point, although no date was given. [Test. of Mother]

coming in to be with or observe the Student, and that the Parents could observe for 30 minutes at a time. [Test. of S. Prince, S-182] This request upset the Parents very much, and they adamantly refused to comply with it. [S-182] Ms. Prince also recommended that the Parents consider obtaining the assistance of an advocate. [Test. of S. Prince] There was no dispute throughout the Student's tenure at PCS that the Parents were regularly and appropriately informed of their due process rights.

23. The Parents were so upset about being asked to give notice before visiting the Student at school that they brought their concerns to the Superintendent of Schools, who said not to worry about it. [Test. of Father] In early December 2010, the Parents also brought their concerns before the School Board, of which the Mother's sister was a member. At the end of this meeting, the Superintendent said he was going to require the Parents to give 24 hours notice before visiting the Student in her program. [*Id.*] Meanwhile, the Mother continued to come to school unannounced to observe the Student's program while taking notes on her mobile device. [Test. of J. Barber-Jordan, R-123-124]

24. On October 27, 2010, the Mother sent an email to Ms. Barber-Jordan and Ms. Prince requesting all of the Student's "documentation this year for all of her therapies," and for an appointment to review her special education file. [P-17] She followed up by leaving a handwritten note to Ms. Prince on November 12 making the same request, and asking to see "daily therapy notes." [S-179] The Mother was not, however, asking for therapy calendars. [Test. of Mother] On or about that date, the Mother came in and was given access to all of the District's files regarding the Student's education.

25. Ms. Prince sent the Parents a draft IEP for discussion at the December 16, 2010 meeting. [S-79-115] She had previously sent the Mother a copy of the old IEP, and asked her to make

comments on it. The Mother did not respond to this, as she felt it was irrelevant, as she was planning to file for due process anyway. [Test. of Mother] The Parents told Ms. Prince to communicate through their attorney, so Ms. Prince sent their attorney a copy of the draft IEP the day before the meeting. [Test. of S. Prince] The draft IEP contained a 28 hours of direct instruction, 90 minutes of PT, 90 minutes of speech/language therapy, 60 minutes of OT, a swimming program, and 60 minutes per month of vision therapy consult. [S-112] The reduction in related services corresponded with increased functional life skills work in the Minot STAR program, which was where the District was proposing these services be delivered. [Test. of S. Prince] There were draft goals in academics, PT, OT, and speech/language. [S-83-100] Ms. Prince felt the STAR program would be a great placement for the Student, and her teacher could adapt it to give the Student more time in the mainstream when appropriate. [*Id.*] Although this program was originally developed for students with Autism, it has expanded to include students with other special needs, and currently only 40% of its students have Autism. [Test. of K. Adams] The program currently has 13 students and 12 ed techs of varying levels. There is an adaptive PE program run by Chris Willer, and speech, OT and PT. The Student's work with assistive technology and mobility devices, one student uses a walker and a few have mobility issues. A major goal of the program is to increase independence of the students. [*Id.*, S-56-58]

- 26.** Kathryn Adams is the head of the STAR program, and has been working in the special education field since 2000. She has provided services to children with significant cognitive deficits, and the more complex the child's needs, the more she enjoys the challenge. [Test. of K. Adams] She also has experience working with students with needs like this Student's: vision impairments, seizures, and mobility problems. Additionally, the Student has been

coming to Ms. Adams' ESY program for the past four summers, and the Father thought Ms. Adams had done an appropriate professional job. [Test. of Father] She is trained in and has experience with applied behavioral analysis (ABA) and CVI. [Test. of K. Adams] She thinks the Student is a very good fit for this program and the students in it. Ms. Adams observed the Student connecting very well with one of the students with a mobility problem, and her students have developed good friendships with one another. [Id.] The students in the group are similar to this Student developmentally. They work on academics, pre-academics, social skills, and adaptive skills. Some students spend the entire day in the program, and others spend some time in the mainstream. In developing the IEPs for students in the program, Ms. Adams uses the Assessment of Basic Learning Language Skills (ABLLS) and the Battelle Developmental Inventory to develop appropriate goals. [Id.]

27. Sometime in early December 2010, the Parents removed the Student from her program at PCS, and began home schooling her. Their attorney sent a letter to Ms. Prince and Superintendent Dennis Duquette detailing the Parents' views regarding, among other things, (1) the District's request that the Parents provide notice before observing the Student at school; (2) the lack of appropriateness of the IEP and the Student's placement; (3) IEP violations, such as a failure to hold monthly meetings; and (4) numerous other alleged violations of the IDEA. [S-116-118]

28. At the December 16, 2010 IEP team meeting, the Parents, who were accompanied by legal counsel, expressed their concerns that the Student was not making progress in her current placement, and did not agree with the Student's present levels of education performance, or the proposed goals. [S-78] The rest of the team felt the STAR program would benefit the Student. [Id.] The Parents said that they had visited the Morrison Center. The team

recommended STAR as the least restrictive environment for providing the Student with FAPE. [*Id.*] The IEP team also proposed a cognitive evaluation by Therese Pawletko, as recommended by Ms. Starbuck, and sent the Parents a consent to evaluate form. [S-76]

29. On December 28, 2010, the Due Process Office received the Parents' Due Process Hearing Request. The Parents then notified the District on January 3, 2011 of their intent to home school the Student. At that time, they withdrew permission from school personnel to obtain information about the Student, and rescinded all releases. [Test. of Mother] In response to the District's request for consent to evaluate, the Parents agreed to cognitive testing, but only with an evaluator recommended by Ms. Starbuck and preapproved by the Parents. [S-54]

30. The District, in an attempt to resolve the dispute with the Parents, made some slight changes to the proposed IEP from the December 16, 2010 meeting. On January 10, 2011, the District presented the Parents' counsel with an amended IEP proposal. [S-20] Both IEPs contained a similar service plan, but the January 2011 IEP contained some changes to the way in which the goals and objectives were worded, and how the goals were broken down. [Test. of K. Adams, S-44-48, S-108-11] The Parents did not respond to this proposed IEP.

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parents: The District committed numerous procedural errors which deprived the Student of educational benefit and impacted her parents' opportunity to participate in the IEP process. The District failed to evaluate the Student in all areas of suspected disability, and did not conduct academic, behavioral or cognitive assessments. It also committed grave procedural errors by failing to accurately state the Student's present level of performance or to develop academic goals for the Student. Additionally, the District did not provide reasonable access to the Student's records, and did not have necessary participants at

certain IEP meetings.

The District violated the Student's rights by failing to provide her with all of the related services to which she was entitled under her IEP. The Parents' claims for relief in this regard should not be limited by the Maine two-year statute of limitations because the District withheld information from the Parents that was required by law. It further violated the IEP by not conducting monthly meetings required beginning with the June 2009 IEP.

Lastly, the IEPs developed for the 2010-2011 school year were not reasonably calculated to provide the Student with FAPE. The December 2010 was procedurally deficient and contained a predetermined placement made without evaluations, and the hearing officer should not even consider the January 2011 IEP. As a remedy for these violations, the hearing officer should award compensatory education in the form of reimbursement for intensive therapies paid for by the Parent, ESY at the Perkins School for the summers of 2011 and 2012, missed therapies, an appropriate comprehensive cognitive evaluation and staff training.

B. Brief summary of the position of the District:

The District has attempted to provide programming that is both appropriate for the Student's high level of educational need and that accommodates the Parents' priority that the Student spend as much time as possible in the mainstream classroom.

First, there is no basis to apply an exception to the two-year statute of limitations. Second, the IEPs from December 2008 to present were reasonably calculated at their inception to provide the Student with FAPE. Her program was well coordinated among staff who each had appropriate qualifications to provide services to the Student. In determining whether the Student made meaningful progress, it is necessary to take into account her disability and limitations. The evidence shows that she made meaningful progress.

The Parents' arguments regarding missed therapies and other alleged implementation failures are also without merit, as they have failed to show more than a *de minimus* failure to implement all elements of the IEP. The evidence supports a conclusion that missed therapies were ultimately made up, and there was no regression or other harm resulting from incidental missed therapy sessions. Additionally, the evidence does not support a conclusion that there were no academic goals in the IEPs. Despite the Parents' allegations to the contrary, they were always given a meaningful opportunity to participate in the IEP process, and took full advantage of that opportunity.

Lastly, the proposed 2010-2011 IEPs and placement in the Minot STAR program are reasonably calculated to provide the Student with FAPE in the least restrictive environment. There was a wealth of evidence that this program can meet the Student's needs in a functional life skills setting. Therefore, no remedy is warranted.

I. Did the Student's IEPs and placements since December 2008 fail to provide the Student with a free appropriate public education (FAPE)? If so, is the Family entitled to an award of compensatory education relief or other remedy permitted under the IDEA?

In order to decide any of the issues in this case, it is first necessary to determine which party has the burden of proof. As the Supreme Court made clear in *Schaffer v. Weast*, "we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." 546 U.S. 49 (2005). The Court acknowledged that the rule applies with equal effect to school districts. Therefore, the Parents have the burden to prove each of their claims.

Regarding the evidence, the only testimony critical of the Student's program was from the Parents. The Mother gave her opinions about the inadequacy of the providers and program, but produced no corroborative testimony for those opinions. To the extent that she mentioned the

views of unidentified outside providers, this evidence is not sufficiently reliable to be the basis of findings of fact in a due process hearing.

A. Statute of Limitations: Under Maine law, the statute of limitations on IDEA claims is two years from the date the party knew or should have known about the alleged violations of the law or regulations. MUSER §XVI (5)(A)(2). According to 34 CFR 300.511(f), the only exceptions are when a parent is prevented from requesting a due process hearing due to: (a) specific misrepresentations by the District that it had resolved the problems forming the basis of the complaint, or (b) the district's withholding of information from the parent that the IDEA required it to provide. Here, there was no evidence of specific misrepresentations by the District, and the Parents essentially conceded this at the prehearing conference.

Additionally, although what comprises withholding of information is not defined in the law or regulations, the courts have given this a very narrow interpretation that it “refers solely to the withholding of information regarding the procedural safeguards available to a parent under that subchapter.” *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, 51 IDELR 157 (E.D. Pa. 2008). When a school department provides the parents with procedural safeguards, the statute of limitations for IDEA violations commences, regardless of whether the parents read them. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008). The Parents have cited no authority to the contrary. There is no dispute that the Parents were routinely told of their procedural safeguards. Therefore, I conclude that the two-year statute of limitations applies here.

B. Appropriateness of the IEPs

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique

needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The hearing officer must examine whether the Student's educational program contained in 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 two-part *Rowley* test for determining whether the school department has provided FAPE to the Student involves discerning whether (1) the IEP was developed in accordance with the extensive procedural requirements of the law; and (2) the IEP and placement were reasonably calculated to enable the child to receive educational benefit. 102 S. Ct 3034, 3047, 3051 (1982). 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). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward the 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 educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law does not

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.

998 F.2d 1083, 1086 (1st Cir. 1993). The determination of whether the IEP was "reasonably calculated" applies to the time the IEP is drafted and approved by the IEP team, not in hindsight.

See Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

The law is also clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. § 1412(a)(5); MUSER §X (2)(B). What is least restrictive depends upon an individual's needs. The goal is to educate the student, whenever possible, with nondisabled students, and as close as possible to the child's home. MUSER §X(2)(B). The regulations also state that the school must ensure that "the child is educated in the school that he or she would attend if nondisabled," unless the IEP necessitates a more restrictive placement. 34 CFR §300.116(c); MUSER §X.2.B. The U.S. District Court in Maine, in *Millay v. Surry*, recently cited the following standard,

The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995). "Mainstreaming may not be ignored, even to fulfill substantive educational criteria." *Roland M.*, 910 F.2d 983, 992-93 (1st Cir. 1990).

07-CV-178-B-W (Dec. 22, 2009), 109 LRP 79729. On the other hand, "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).

To determine whether a student has received meaningful educational benefit, one must look at the student's individual needs and her disability, which determines her capacity for educational benefit. Here, the Student's considerable disabilities and delays in almost every area of functioning must be considered in determining how much progress is reasonable under the IDEA standards.

There are many questions that complicate this inquiry in this case. Should it be expected that the Student will progress slowly in light of her level of disability? What was the effect of the Student missing considerably more school days than other students because of her medical needs

or the Parents' decision to take her out of school for intensive therapies? How much of her progress was attributable to the intensive therapies versus her school program? Was her rate of progress due to the IEP team's complicity with the Parents' preference for mainstreaming?

With respect to the Parents' preference for mainstreaming, the District's attempts to please the Parents by honoring their preference is admirable, and actually runs counter to the Parents' claim that they were not given an opportunity for meaningful participation in the IEP team process. The Parents were given, and took, every opportunity to be full participants in this process. Their claim to the contrary is completely devoid of any supporting evidence and is without merit¹⁷. On the other hand, it is still the District's ultimate responsibility to provide the Student with an appropriate education, and deference to a parent's preference does not automatically exonerate a school department from this responsibility when the parent's preference turns out not to work so well. Here, it made sense, particularly in the early grades, for the District to try to accommodate this preference and to see how things went. In xx, academics are minimal and the gap between the Student's level of functioning and that of her typically developing peers is as small as it will likely be. Because of the concerns of some team members following the Student's second year in XX, the IEP for xx and xx grades contained additional flexibility to provide more direct instruction in the resource room. After trying this for two years, however, the IEP team agreed that the Student's needs were too unique and considerable to continue this arrangement any longer.

The Parents also took issue with the statements of the Student's present level of educational performance in her IEP. The Mother testified how the Student was already doing certain things at home that were goals in her IEP. For example, the Student's IEP objectives

¹⁷ The Parents' argument regarding whether they were specifically deprived of the right to meaningfully participate in the December 2010 IEP meeting will be discussed elsewhere in this decision.

included brushing her teeth and hair without hand-over-hand assistance, or using a spoon to feed herself. Although there was no reason to doubt this, it is quite common for a student to perform distinct tasks in the quieter, familiar setting of her own home but to not do these same tasks while at school, and vice versa. What is important is that the Student's IEP reflects her level of performance at school.

1. XX grade: 2008-2009 IEP

The Student spent more time in the mainstream classroom than is usually the case for a child with her level and complexity of disability. Because some team members, particularly the Student's special education teacher, had concerns about the Student not receiving enough direct instruction in the resource room in 2007-08, the IEP team agreed to increase this time to five to ten hours per week in xx grade, with a proviso that the Student could be pulled out of the classroom as necessary when classroom work would not benefit her. This was intended to address the fact that the Student's progress in the mainstream classroom was limited, and to provide some flexibility when that was not working, while accommodating the Parents' preference for mainstreaming. [Fact #8] When it was drafted, the IEP appeared to provide the services the Student needed, took into account the expertise of all members of the IEP team, including the Parents, provided a reasonable probability of educational benefits. It was implemented consistently. The Mother acknowledged that the Student made gains in speech that year, and seemed to be more cognitively appropriate. [Fact #11] This was also the year that the Student's speech regressed due to her absence for intensive therapies, and this was not within the District's control. [Fact #9] Progress overall continued to be slow, but it was demonstrable and meaningful.

The fact that the Student's progress, even in some of her intensive therapy programs, was slow, leads to a conclusion that this is due largely to the extensiveness of her disabilities, and that she is not a student who can progress at a rapid rate. There was testimony from the Student's therapists, including Paula Starbuck and Tara Paradie, to support this. [Fact #15] There was no evidence in support of a contrary conclusion. The Student's absence from school, causing her to miss one-sixth of the school year, and the amount of mainstreaming, were undoubtedly factors in the rate of her progress in some areas. The District cannot be held responsible for the effects of the Parents' decision to remove the child from her educational program. Additionally, given the IDEA's preference for mainstreaming, it was reasonable for the IEP team to err on the side of trying the least restrictive setting. When considering the totality of the circumstances, I conclude that the Student's program was reasonably calculated to provide her with educational benefits, and that she received demonstrable benefits from it.

2. XX grade: 2009-2010 IEP

Despite the Student's slow progress in xx grade, the Parents continued to prefer keeping her in the mainstream classroom with her peers to spending more time in a pullout setting. Again, the IEP provided for the ability to take the Student to the special education classroom on more difficult days or when the classroom activities were not developmentally appropriate for her, and there was testimony that this worked well. On the other hand, there was evidence, at that point, that the Student was more verbal when surrounded by her mainstream classroom peers, so there was some merit in continuing to keep her there for most of the day¹⁸. Ms. Paradie described the great gains in school mobility the Student made during X grade. [Fact #12] The IEP team agreed

¹⁸ This changed over time, and she became less verbal when in the mainstream classroom.

that the Student's objectives should be functional, agreed to continue her current levels of related services, and agreed upon her goals and objectives.

Contrary to the Parents' argument, the Student did have what would be considered academic goals for her needs. In fact, the Parents acknowledged all along that the Student needed more functional goals, and that is largely what was in her IEP for xx grade. Work such as grouping objects and identifying their functions are considered academic for this Student's level of disability, even if they were not labeled specifically as such in the IEP. [Fact #8] Given the Student's needs in speech and language, the IEP team made these services a direct special education service rather than a related service in the X grade IEP, and this seemed to be an appropriate decision. Because of the Student's slow progress in xx grade, many of her xx grade goals were repeated from her xx grade IEP. This, too, was reasonable under the circumstances. The Mother acknowledged that the Student had definitely made progress in her educational program in X grade. [Fact #14] There was also evidence of consistent progress with the Student's vision therapy each year. [Fact #15]

One aspect of the IEP that the District did not follow was that it did not regularly have monthly meetings with the family in the 2009-10 school year. Because the school staff had excellent regular communication with the Parents, however, this deviation from the IEP was not substantial and did not result in a deprivation of FAPE to the Student.

The evidence supports a conclusion that this IEP, at the time of its inception, was reasonably calculated to provide the Student with an appropriate education. In xx grade, the Student still made demonstrable and meaningful gains in her educational program.

3. xx grade: 2010-2011 IEP

Although the Student spent less than two months in xx grade at PCS, this IEP may be the best of the three discussed herein in its ability to provide the Student with meaningful educational benefit. When developing the IEP, the team considered the Student's recent evaluations and the amount of time in the general education classroom, and felt that the Student would learn better in a quieter, less distracting setting. As the Student's progress was slower than her nondisabled peers, it would become more difficult for her to benefit from the regular classroom, where academics were becoming increasingly more complex. After trying to accommodate the Parents' preference and giving the mainstream model a try, and upon achieving modest results, the entire team supported the change to a life skills model. The IEP, adopted by consensus and without objection, increased direct instruction to 18.5 hours per week, and included direct speech/language services for 2.5 hours per week, with the other therapies being offered at essentially the same levels as before. The Student's program also included a weekly swim program. The testimony and other evidence at the hearing supported a conclusion that this IEP, at its inception, offered a reasonable probability of educational benefits to the Student.

When the Mother and Student returned from Ability Camp, the Mother began taking issue with the appropriateness of this IEP. She raised the question of whether the Student's present levels of performance were accurate during the so-called hairbrush incident in Fact #19. In response to the Mother's request, the District was willing to call an IEP team meeting to discuss whether the Student's goals and objectives needed revising, and the first of these meetings was held on October 26, 2010. As the Parents testified, however, by the time of this meeting, they had decided to stop cooperating with the District or otherwise participate

constructively towards the new IEP, as they had already decided to home school the Student. [Fact #22] It is well established that a family's claim for relief under the IDEA can be denied based upon their own refusal to participate meaningfully in the IEP process. *C.G. ex rel. A.S. v. Five Town CSD*, 513 F. 3d 279 (1st Cir. 2008) In other words, the Parents cannot claim that the IEP was inappropriate, then refuse to participate meaningfully in the IEP process.

The Mother testified that Ms. Barber-Jordan informed her that the Student was actually spending closer to 28 hours in pullout sessions, although the IEP called for 18.5 hours per week. Ms. Barber-Jordan denied making this statement. As Ms. Barber-Jordan was a credible witness, her first-hand testimony is the best evidence on this issue. Furthermore, there was no evidence regarding whether this happened one week, or was occurring regularly. Therefore, the evidence does not prove that it is more likely than not that a change of placement occurred that would trigger a Prior Written Notice.

C. Procedural and Implementation Issues

The Parents presented a lengthy list of alleged procedural violations, some of which have already been addressed above. Procedural violations in the IEP process may undermine the integrity of an IEP and thus be a violation of FAPE if there is "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) With respect to some of the procedural issues raised by the Parents, such as vague goals and objectives, the determination above that the IEPs were reasonably calculated to provide the Student with educational benefits, and that she made progress in her program make those issues moot.

1. Failure to evaluate in all suspected areas of disability: Pursuant to 34 CFR 300.301

(a), the School District must conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. This evaluation is the key to determining the existence of a student's disabilities. A procedural fault rises to the level of a denial of FAPE when a school fails to conduct proper assessments and consequently provides inadequate services. *Dracut Sch. Comm. v. Bureau of Special Education Appeals*, 110 LRP 50313 (D. MA. 2010) *citing N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008)(Failure to diagnose student with autism prevented IEP team from developing plan reasonably calculated to provide educational benefit).

Any alleged violations involving an initial evaluation are considerably beyond the statute of limitations, and therefore, I have no jurisdiction to review this issue. In any event, there is no dispute or allegation that the District failed to provide FAPE because of a problem with the Student's diagnoses, so this issue is irrelevant.

Reevaluations are just as important as initial evaluations under the IDEA, but the law does not require that every time a school does an evaluation of an eligible student, it must do a complete one in all areas of suspected disability. Schools commonly retest in specific areas when needed. MUSER §V(B)(2)(b). In March 2010, the Parents gave the District consent to conduct a triennial evaluation of the Student, which included speech/language testing, classroom observation, academic development testing, occupational, physical and visual therapies evaluations, and an assessment that measured the Student's performance on functional communication, memory, understanding and behavior regulation. [Fact # 12] The Parents allege a violation because the District did not conduct academic or cognitive testing, nor was there a behavioral assessment.

As I have determined above that the services provided to the Student were not inadequate, there is no violation of FAPE for failure to conduct comprehensive cognitive testing. The District's testing was adequate to allow it to develop an appropriate IEP for the Student. Furthermore, there is no dispute that the District has been very willing to arrange for comprehensive cognitive testing with the evaluator of the Parents' choice, but that this evaluator is not available until this fall. [Fact #28]

Regarding the lack of a behavioral evaluation, the IDEA requires the IEP team, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 USC §1414(d)(3)(B)(i). The regulations state that a school district must consider a student's need for a behavior intervention plan (BIP) under these circumstances. 34 CFR 300.324(a)(2)(i). There was no evidence that the Parents ever requested a behavioral assessment or that one was needed in this case. Although there was evidence that the Student was distractible in certain situations, there was no evidence that this was impeding the Student's learning, that the District staff was unable to deal with this, or that it was a particular problem for the Student. She did not have behavioral problems at school. Additionally, neither functional behavior assessments nor behavioral intervention plans are required components of IEPs, and are not required in this situation. As no behavioral assessment was required, and the Student received FAPE in any event, there is no violation.

2. Composition of the IEP team: The Maine Uniform Revised Special Education Regulations require the following people to be at the IEP team meeting: (1) the parents; (2) a regular education teacher; (3) a special education teacher; (4) a school administrator or representative of the school administrative unit who is able to commit school resources and is

knowledgeable about the special and general education curriculum; and (5) someone who can interpret evaluation results. The parents and school unit may also invite other individuals who have knowledge or expertise regarding the child. MUSER §VI (2)(B). Every IEP team meeting contained in the record was attended by the individuals required to be there under the MUSER, as well as by other service providers. The IDEA does not mandate that every person who provides services to the Student be in attendance at every IEP meeting.

The Parents take issue with the fact that some of the Student's therapists were not present for the entire meeting, and that Paula Starbuck, who usually attended IEP team meetings, was not present at one of them. As noted above, Ms. Starbuck is not mandated to attend these meetings by law. In any event, given Ms. Starbuck's testimony praising the Student's progress and the excellent work done by the PCS staff to support the Student's visual therapy goals, there is simply not one shred of evidence that Ms. Starbuck's absence from the IEP team meeting in any way compromised the Student's educational program or deprived her of benefits.

3. Predetermination of Placement: Predetermination is a procedural violation of the IDEA, and can deprive a child of a FAPE where the parents are effectively deprived of meaningful participation in the IEP process. *Deal v. Hamilton Co. Bd. Of Education*, 392 F.3d 840, 855 (6th Cir. 2004) Predetermination is not, however, synonymous with preparation or with stating an opinion. Federal law "prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N.L. ex rel. Mrs. C. v. Knox County Sch.*, 315 F.3d 688, 694 96th

Cir. 2003); see also 34 C.F.R. § 300, App. A, No. 32. Participation must be more than mere form, it must be *meaningful*." *Deal*, 392 F.3d at 858 (emphasis original).

It is no coincidence that parents appear first on the list of required IEP participants. Although they attended the October and December 2010 IEP meetings, the Parents patently admitted that once they decided to withdraw the Student from PCS, they stopped being cooperative participants in the IEP process at all. [Fact #22] This violates their obligation to participate in the process good faith. They were also under the mistaken impression that their obligation to participate in good faith ended when they requested due process. Hence, they chose not to attend the January 10, 2011 IEP team meeting. Ms. Prince sent the Parents a copy of a draft IEP before the December 2010 IEP meeting, and asked for their comments. [Fact #26] The draft IEP was not a predetermination. The Parents ignored this request. It is ironic that the Parents were claiming a procedural violation by the District in the formation of the December 2010 and January 2011 IEPs when they were refusing to participate meaningfully in the IEP process. Furthermore, as the District has a continuing obligation to provide FAPE to the Student, this obligation continues even when a family withdraws their child from school. Parents who choose not to be involved waive their right to claim that they did not have a meaningful opportunity to participate.

4. Missed Therapies: As noted above, there was credible evidence that although the Student initially missed certain therapies, these sessions were made up by her therapists. While the Mother's suspicion about the Student missing therapies was understandable, she was mistaken about this.¹⁹ Even if the Student did not get every single hour of therapy called for in

¹⁹ The Mother misinterpreted the MaineCare logs and assumed the worst without asking the District to explain how the logs were kept and what the notes meant. At the hearing, the District had a consistent and credible explanation of its recordkeeping. Additionally, the District did not bill MaineCare for any of the Student's services during the 2010-2011 school year, whether they were listed in the logs or not. [Test. of S. Prince]

her IEP each week, the Parents must show that the District's failure to implement this portion of the IEP was substantial or significant. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000). Missing a few sessions does not rise to the level of a substantial or significant failure to implement the IEP. *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 72 (D.D.C. 2007).

5. Access to educational records: As set forth in the evidence above, the Mother requested "documentation this year for all of [the Student's] therapies," and for an appointment to review her special education file. Ms. Prince made all of the Student's records in the District's possession available for the Mother's review. Although the Mother testified that she was not seeking therapy calendars, the Parents expected the District to produce logs or therapy notes prepared and kept by the Student's speech, occupational or physical therapists of the dates on which they provided services. As discussed in the procedural background above, such documents were not in the District's possession and are not normally produced in response to the type of records request made by the Parents. Consequently, there was no IDEA violation in the District's failure to make those records available.

6. Physical Education: The Parents raise for the first time in their closing argument the issue that the Student was not provided with physical education required under the IDEA. They never raised this issue at IEP team meetings, it was not an issue set forth in the Parents' complaint, nor was it raised in the issues set forth during at the prehearing conference. Consequently, there was no notice to the District that this was an issue in this hearing, and it is not appropriately raised now.

2. Were the proposed IEPs developed in the fall/winter of 2010-2011 for implementation in the second half of that school year, including the proposed placement in the Minot STAR Program, reasonably calculated to provide FAPE to the Student in the least restrictive environment? If not, what remedy is appropriate?

Based upon the standards discussed in the section above, it is not difficult to conclude that the IEPs developed in December 2010 and January 2011, to be delivered in the Minot STAR program, would be a placement reasonably calculated to provide the Student with FAPE in the least restrictive environment. There was a wealth of evidence demonstrating that this program would likely be an excellent placement for the Student, and no evidence to the contrary. Although the Parents have the burden of proving that this program was inappropriate, they presented very little evidence to support this allegation, and made no substantive argument to the contrary.²⁰ It was apparent that the mainstream model only went so far for the Student, and that she really needed more direct instruction in the special education setting to have a chance of progressing at a faster rate. Ms. Adams had impressive credentials and seemed to be very well suited to be the Student's teacher. In fact, the Parents had been pleased with her work in the Student's ESY program. Ms. Adams presented an impressive picture of what the STAR program was like and how the Student could benefit from it. [Fact #25 & 26] The Student would benefit from an integrated program, and would have both adaptive PE and a swimming program each week. The goals and objectives set for the Student in the proposed IEP are considerably more focused and detailed than previously written, thus addressing the Parents' concerns that the prior goals were too vague. Although this program would not be in the Student's neighborhood school, it would be in a public school within the District. This would be the least restrictive setting for the Student. As the Minot STAR program offers the Student FAPE in the least restrictive environment, there is no violation of the IDEA.

It has been difficult to comprehend, on the one hand, the Parents' insistence on keeping the Student in the mainstream classroom, while at the same time, considering placing her in the

²⁰ One of the Parents' main objections to this program was a statement made at the May 2010 IEP meeting by then-special education director Barbara Hasenfus that the District did not have a functional life skills program for the Student. The evidence produced at the hearing proved otherwise.

very restrictive placement of a conductive school. Without even giving the STAR program fair consideration, the Parents have chosen to place the Student in a very restrictive setting, and are looking for a more restrictive private placement. As noted above, even while considering those other possibilities, however, parents of children identified as eligible for services under the IDEA, and particularly those who are claiming a student has been denied services under this law, have a responsibility to participate in the IEP process and give fair consideration to programming offered by the school district.

V. ORDER

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

1. The District's IEPs and placements between December 2008 and December 2010 were reasonably calculated to provide the Student with a free, appropriate public education in the least restrictive environment, and did provide the Student with FAPE.
2. The District's proposed IEPs developed in the fall/winter of 2010-2011 for implementation in the second half of that school year, including the proposed placement in the Minot STAR Program, were reasonably calculated to provide FAPE to the Student in the least restrictive environment.

SHARI B. BRODER. ESQ.
Hearing Officer