

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

November 8, 2011

11.107H - Parents v. RSU #51

12.013H – RSU #51 v. Parents

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on August 16, and September 7, 9, 29, and 30, 2011, at the offices of Drummond Woodsum in Portland. Present for the entire proceeding were Eric Herlan, Esq., counsel for the school department; Richard O’Meara, Esq., counsel for the family; the student’s mother, the student’s father; and Ann Nunery, special education director for RSU #51. Observing a portion of the proceeding was Erin Feltes, Esq., with the law school’s law firm.

Testifying at the hearing under oath were:

Beth Fenwick, student’s xx grade reading teacher at Greely Middle School
Roberta Goodwin, school counselor at Greely Middle School
Marcia Hunter, Ph.D., student’s neuropsychological evaluator
Sarah Kaplan, student’s academic advisor at Eagle Hill School
Student’s grandmother
Student’s uncle
Student’s mother
Student’s father
Mark Phillips, student’s xx grade reaching teacher at Greely Middle School
Michelle Raber, student’s xx grade math and science teacher at Greely Middle School
Carol Robinson, student’s xx grade special education teacher at Greely Middle School
Peter Scott, social worker at Greely High School
Penelope Wheeler-Abbott, vice principal at Greely Middle School

I. PROCEDURAL BACKGROUND

The parents filed a request for a hearing on June 24, 2011. A prehearing conference was held on August 9, 2011. On the same date, the school district filed a due process hearing request, identified as 12.013H, and a motion that the hearing be joined with the proceeding in progress at 11.107H. The parents did not object to joinder and an order was issued consolidating the two cases.

A hearing day was held on August 16, 2011, for the limited purpose of submission of testimony related to the school department's affirmative defense that state and federal statutes of limitations limited the family's claim that the school district failed to refer, evaluate, and identify the student as eligible for services in a timely manner, which the parents allege began in the fall of 2007. The parties submitted written briefs and an order was issued on September 1 allowing the parents' claims.

The records includes 112 documents submitted by the parents, identified as pages P. 1 through P. 610, and 49 documents submitted by the school department, identified as pages S. 1 through S. 493. At the close of testimony, the parties jointly requested that the record remain open for the submission of written closing briefs. The record closed with the hearing officer's receipt of both parties' reply briefs on October 24, 2011.

II. ISSUES

The issues for hearing are:

1. Whether RSU #51 violated state or federal special education law by failing to refer, evaluate, and identify the student as eligible for special education services in a timely manner.
2. Whether RSU #51 violated state or federal special education laws by failing to provide the student with a free appropriate public education for the 2010-2011 school year.
3. Whether RSU #51 violated state or federal special education laws by failing to provide the student with an IEP that was reasonably calculated to provide the student with a free appropriate public education for the 2011-2012 school year.
4. If any violations occurred, what remedy is appropriate?

III. FINDINGS OF FACT

1. The student is 15. (S. 237)
2. The student attended xx grade (2005-2006) at Longfellow School within the Portland School District. The student was referred for special education in January 2006 due to difficulty completing independent academic work, difficulty following multiple step directions, inconsistent short-term memory, difficulty remaining seated, difficulty maintaining focus, and weak organizational skills. (P. 18.)
3. In March 2006, the parents hired Marcia Hunter, Ph.D., to evaluate the student. (S. 237.) Dr. Hunter concluded that the student was bright, with an IQ in the 86th percentile, but presented with an atypical interpersonal style and was introverted, withdrawn, and possibly anxious and depressed. (Testing of Hunter.) The student showed elevated results in terms of attention and anxiety. (Testing of Hunter.) In her report, Dr. Hunter noted that the student had been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) in 2003. (S. 237.) Dr. Hunter concluded that the student had advanced thinking abilities that required encouragement and support as well as serious impairments within the domains of executive mental functions and processing speed. (S. 250.) Dr. Hunter made a variety of recommendations related to the student’s education including creating stimulating and diverse learning opportunities to support the student’s deficits in mental speed and focus; using familiar materials and personal interests to increase the student’s focus with mundane tasks; utilizing divergent assessment procedures to provide him with positive feedback; and monitoring the student’s reliance on fantasy as a means to feed his intellectual hunger. (S. 252.) Dr. Hunter also recommended an occupational therapy evaluation as a means to address his fine motor weaknesses and his lack of automatic transcription skills, as well as direct instruction in keyboarding skills. (S. 252.)
4. At nearly the end of the school year, in May 2006, the referral and evaluation process culminated in the student being identified as eligible for special education services under the category of Other Health Impaired due to ADHD and executive functioning deficits. (P. 35-36.) The student took part in special education services for approximately the final six weeks of the school year. (Testimony of student’s mother.) His IEP included a series of classroom and homework accommodations as well as direct special education instruction for three-and-a-half hours per week, special education consultation with the student’s team, and occupational therapy. (P. 37-41.)
5. The student attended a private school, the Breakwater School, in Portland for his xx grade year (2006-2007). (Testimony of student’s mother.) The student had a family-funded tutor attend school with him for much of the day during xx grade. (Testimony of student’s mother.) The tutor met with the student before school and assisted him throughout the day. (Testimony of student’s mother.) The tutor spent a total of ten to twenty hours a week with the student. (Testimony of student’s mother.) The student did very well academically and gained self confidence. (S. 205-225). Despite the presence of a tutor, the student’s teachers reported that the student had difficulty following multi-step directions, could lose sight of the overall goal of an activity, needed extra assistance in planning and organizing assignments, was easily distracted and influenced by other students, got distracted with the details of projects which hindered his ability to finish on time, became distracted in class which interfered with his ability to learn the material presented, and had difficulty maintaining focus for entire class periods. (S. 212-225.)

XX grade (2007-2008)

6. The student enrolled in RSU #51 in the fall of 2007, following his family's move to North Yarmouth. (S. 197.) He attended xx grade (2007-2008), xx grade (2008-2009), and xx grade (2009-2010) at Greely Middle School. (Testimony of student's mother.)
7. Roberta Goodwin, school counselor at Greely Middle School, met with the student's mother in August 2007 to do general preparation for the student's transition to GMS. (Testimony of Goodwin.) The student's mother filled out a form indicating that the student had been diagnosed with ADHD, had a tutor for xx grade, and needed reminders to write down homework assignments, and the family had the student's prior IEP and his March 2006 evaluation. (P. 61.) Ms. Goodwin was assigned to be the student's school counselor for his three years of Greely Middle School. (Testimony of Goodwin.)
8. When meeting with Ms. Goodwin, the student's mother shared the student's school history, reiterated his diagnosis of ADHD, and indicated some struggles in the past but did not appear worried about his transition. (Testimony of Goodwin.) Ms. Goodwin subsequently received the student's prior school records, including his records from Breakwater School, his IEP from Longfellow School, and his March 2006 evaluation by Dr. Hunter. (S. 237-258; Testimony of Goodwin.) Ms. Goodwin forwarded the information to Carol Nale, a special education teacher at GMS. (Testimony of Goodwin.)
9. On September 18, 2007, Ms. Nale emailed the student's mother to inquire as to whether the student had a current IEP. (P. 64.) The student's mother responded that he did not, indicated that Breakwater did not offer such an "evaluation," and asked whether it would be appropriate to evaluate him again and how the family should move forward to obtain support for him at the school. (P. 64.)
10. Beginning in mid-September and continuing through October, the student's teachers observed that the student required a great deal of adult support to complete in-class assignments, he had difficulty following instructions and required frequent check-ins and prompts, he would benefit from the use of a math tutor, and he at times "shut down" when faced with difficult assignments, feeling that he would never be able to get it done. (P. 62-70.)
11. On September 25, Ms. Nale responded to the mother's query, indicating that because the student's IEP had expired and he had not received special education services at the private Breakwater School the prior year, the student was not receiving special education services at Greely Middle School. (P. 66.) Ms. Nale's email went on to state that the student's teachers were working with him to meet his needs and that the parent could choose to meet with his team by contacting his team leader, Carol Pappas, one of the student's regular education teachers. (P. 66.) The email concluded that if the parent sought a team meeting, the team could then talk about how to best meet the student's needs and the need to refer him for special education services. (P. 66.) Ms. Goodwin believed that Ms. Nale's email indicated that if the family sought special education for the student, the school district would need to make a re-referral of the student to special education and evaluate him because his IEP had expired. (Testimony of Goodwin.)

12. The student's mother was in regular communication with Ms. Pappas and on September 26 asked to meet with the student's teachers. (P. 65.) At that point in time, the student's mother thought that the student did not qualify for special education without further evaluation but was amenable to the suggestion that the student's teachers be utilized as support for him. (Testimony of student's mother.)
13. On October 30, while meeting with the student's mother, Ms. Goodwin emailed Penelope Wheeler-Abbott, the Assistant Principal at Greely Middle School and the facilitator of most of the Individualized Education Programs ("IEPs") for students attending school there. (P. 70-71; Testimony of Wheeler-Abbott.) In her email, Ms. Goodwin indicated that although Ms. Nale had understandably recommended reevaluating the student, she and the student's mother were concerned about the impact of testing on the student, identifying lost class time, invasive testing, and self-esteem issues as possible concerns. (P. 71.) Ms. Goodwin suggested a meeting to discuss providing the student with services under Section 504 without doing further testing. (P. 71.) Ms. Goodwin left the October 30 meeting with the student's mother with the feeling that the student's mother was hesitant to do a referral to special education because she did not want him removed from school for testing and she did not want him singled out for individual education. (Testimony of Goodwin.)
14. On October 31, Ms. Goodwin noted in an email that she had brought up the student at a "guidance/A-team meeting," and that the consensus was that there should be a team meeting to discuss him at more length. (S. 259.) Ms. Goodwin noted that the student's mother was "balking a little at a referral," but questioned whether bypassing a referral would result in the student not receiving all the services he needed. (S. 259.) Ms. Goodwin then asked to meet with Ms. Wheeler-Abbott and Ms. Nale to discuss the student. (S. 259.) Ms. Wheeler-Abbott perceived that because of the May 2007 expiration of the student's IEP, and his attendance at a private school the prior year, the student would need to be retested before he could be identified as in need of special education. (Testimony of Wheeler-Abbott.) Ms. Wheeler-Abbott expected that the process would consist of the parents consenting to an evaluation, the school conducting the evaluation within the 45-day timeframe, the student's IEP Team meeting to review the evaluation, a decision being reached as to whether the student was eligible for special education, and then creation of an IEP for the student if he were eligible. (Testimony of Wheeler-Abbott.)
15. On October 31, 2007, Ms. Goodwin emailed the student's mother to indicate that she and Ms. Wheeler-Abbott had decided that they could not determine whether the student should be referred to special education without having a meeting with his teachers. (P. 74.) Based on the information she had from Ms. Nale and Ms. Wheeler-Abbott, Ms. Goodwin assumed that more testing would be required to allow the school to determine if the student were eligible for special education and also that the purpose of the meeting was to determine if more testing would be pursued and whether the student should receive services through special education or pursuant to Section 504. (Testimony of Goodwin.)
16. From the school's perspective, the student arrived outside of eligibility for special education and needed to be considered as an initial referral for consideration if he was going to receive special education services. (Testimony of Wheeler-Abbott.) The school district did not discuss with the family the possibility of convening an IEP Team meeting

- for the student or of determining the student's eligibility based on prior testing and records. (Testimony of Wheeler-Abbott.)
17. On November 1, 2007, the student's father reported to Ms. Goodwin that the student seemed very upset about school and had a breakdown during which he reported that he liked the school but felt stupid, could not stay focused or keep up, and did not have enough support. (P. 72.)
 18. On November 9, 2007, the student's parents met with Ms. Wheeler-Abbott, Ms. Goodwin, Ms. Pappas, and two other regular education teachers. (S. 260.) In addition, Dr. Hunter attended the meeting at the invitation of the parents. (S. 260; P. 75.) No special educator from the school was present and the parents did not meet with anyone in the special education department during the fall of 2007. (Testimony of Wheeler-Abbott; student's mother; student's father.) The student's mother, when inviting Dr. Hunter, indicated that the student's team was meeting and that the parents' goal was to get him some support without going through another evaluation. (P. 75.) On November 9, the group discussed the student's performance at school, his anxieties, his difficulties, and his strengths and weaknesses at the "staffing" meeting. (S. 260.) Although the notes do not reflect this, Dr. Hunter had concerns that the student would resent being placed in special education and would think educators felt he was stupid. (Testimony of Hunter.) After the meeting, Dr. Hunter had no role with the student or school staff until the fall of 2009, during the student's xx grade year. (Testimony of Hunter.)
 19. School staff perceived that one of the purposes of the meeting was to determine whether the student should receive Section 504 services or special education. (Testimony of Goodwin; Wheeler-Abbott.) Ms. Wheeler-Abbott testified that the options on the table would generally have been informal support, a Section 504 plan, and a referral for a special education evaluation. (Testimony of Wheeler-Abbott.) Although her notes do not indicate that the group discussed the possibility of a special education referral, Ms. Wheeler-Abbott typically indicates that option to parents at similar meetings. (Testimony of Wheeler-Abbott.) Ms. Wheeler-Abbott does not recall whether she made such a statement at the meeting on November 9, and her meeting notes do not indicate whether she did or not. (Testimony of Wheeler-Abbott.) The student's mother did not recall any discussion of special education as an option. (Testimony of student's mother.) The parents did not recall any conversation that involved the school district providing services beyond accommodations under a Section 504 plan. (Testimony of student's father.) The parents' primary concern was that the student receive sufficient support to be successful in school. (Testimony of student's mother; student's father.) The parents continued to believe that the student was not eligible for special education services without further testing based on the school district's statements. (Testimony of student's mother; student's father.)
 20. Meeting notes taken by Ms. Goodwin, who was ultimately responsible for the student's Section 504 plan as his case manager, indicated a list of accommodations that Dr. Hunter proposed for the student. (S. 492-93.) School staff at the meeting concluded that all of Dr. Hunter's proposed accommodations could be implemented. (Testimony of Goodwin.) Ms. Goodwin and Ms. Wheeler-Abbott perceived that everyone at the meeting, including Dr. Hunter, felt that the necessary accommodations could be accomplished through a Section 504 plan for the student. (Testimony of Goodwin; Wheeler-Abbott.)

21. Meeting notes taken by Ms. Wheeler-Abbott indicate that the group was “[l]ooking more for the 504 route and to provide the emotional and mental breaks during the day.” (S. 261.) Ms. Wheeler-Abbott testified that this indicated that the group was looking at Section 504 rather than special education services as the appropriate vehicle for the student’s needs. (Testimony of Wheeler-Abbott.) The student’s mother believed that if the school provided services under Section 504, it would prevent the student from having to undergo additional testing. (Testimony of student’s mother.) The meeting notes indicate that the student was being treated for depression. (S. 260.) Throughout the student’s xx grade year, he struggled with academics, depression, and suicidal ideation. (Testimony of student’s mother; P. 76; P. 78; P. 82, P. 84, P. 101.)
22. The Section 504 plan created for the student called for, among other things, the student to be given emotional, mental, and physical breaks; the student’s teachers to implement a positive reinforcement program for focused attention; the student’s homework assignments to be modified; the student to be allowed to use his computer on assessments and assignments wherever possible; the student to be placed in selective pairing with students who would work well with him; and the student to be invited to a social skills group with the school counselor. (S. 193.)
23. Ms. Goodwin met with the student weekly for 30 minutes, mainly in a group with one other boy, throughout his time at Greely Middle School. (Testimony of Goodwin.) She worked with him on social skill building. (Testimony of Goodwin.) She did not take notes or prepare reports on her sessions but shared information from her sessions with the student with the student’s mother. (Testimony of Goodwin.)
24. In March 2008, MEA testing showed the student partially meeting standards in reading and not meeting standards in math. (P. 80-81.) Also in March, Ms. Pappas reported to the student’s parents that the student continued “to be off task in all of his content classes, distracting himself and others, and really not interested in school work. He is more concerned with objects and creating inventions out of classroom and cafeteria materials. This is interfering with working in class and completing assignments.” (P. 82.)
25. In May 2008, three of the student’s xx grade teachers filled out assessment forms at the request of the student’s pediatrician. (P. 85, P. 88 & P. 91.) Each of the teachers independently reported that the student very often (the highest rating) failed to give attention to details or made careless mistakes in schoolwork, had difficulty sustaining attention to tasks or activities, did not seem to listen when spoken to directly, did not follow through when given directions to finish activities, had difficulty organizing tasks and activities, avoided, disliked, or was reluctant to engage in tasks that required sustained mental effort, lost things necessary for tasks or activities, was easily distracted by extraneous stimuli, was forgetful in daily activities, fidgeted with his hands or feet or squirmed in his seat, left his seat in the classroom or in other situations in which remained seated was expected, and actively defied or refused to comply with adult’s requests or rules. (P. 85, P. 88 & P. 91.) The teachers also reported that the student’s performance was somewhat of a problem or problematic (the highest two ratings) in reading, math and written expression. (P. 86, P. 89 & P. 92.) Carol Pappas, the student’s language arts and math teacher, commented that she was “very concerned about [the student]. He is unfocused and unwilling to do work during class. He is ‘in his own world’ most of the time during class. It is as if he is listening to a tape in his mind. He

- does not seem happy.” (P. 92.) Nancy Lane, the student’s science teacher, reported that the student “does not seem to like school. He fixates on two students and wants to be their friend. He is often in another place in his mind. He gets distracted, this precludes him from getting his thoughts on paper, on the computer or verbalized. He will get distracted and it is very difficult to get him to refocus. Breaks, rewards and threatening to not allow him to ‘hang’ with his friends during mastery works sometimes (not frequently).” (P. 89.) All three of the teachers gave the student a six (labeled a “very severe impairment” on a scale of one to seven) in the following domains of function: the student’s symptoms impaired his ability to comply to school rules, adult commands or general behavioral expectations; the student’s symptoms impaired his ability to form and maintain positive relationships; the student’s symptoms impaired his ability to express or control emotions; and the student’s symptom impaired his ability to perform daily school tasks and responsibilities. (P. 87, P. 90 & P. 93.) Ms. Goodwin, who did not see these evaluations, testified that although the student had work completion issues, his Section 504 plan was supporting him sufficiently, the student was progressing academically, and the quality of the student’s work was fine if it was completed. (Testimony of Goodwin.)
26. The student’s May 2008 NWEA testing scores showed a reduction from 74th percentile in the fall to the 34th percentile in the spring in reading and a smaller decrease in his math scores from the 44th to the 40th percentile. (P. 103.)
27. In late May, the student’s mother informed his teachers that he was under intense supervision at home due to symptoms of severe depression. (P. 84.)
28. The parents did not feel that the Section 504 accommodation plan helped the student succeed academically but did reduce his work level which reduced his stress level. (Testimony of student’s father.) The student continued to struggle with homework. (Testimony of student’s father.) On his final report card of his xx grade year, the student received many rankings indicating he was meeting expectations, as well as many partially meets expectations grades, and four rankings in the does not meet expectations category. (P. 101.) His work habits were graded as “needs improvement” in nearly all classes for each trimester and his conduct was graded as “needs improvement” in several classes each trimester. (P. 101.)
29. After the student’s xx grade year, the family hired Carol Pappas, his xx grade language arts and math teacher, to tutor him throughout the summer and into the fall. (Testimony of student’s father.) In October 2008, Ms. Pappas reported that she did not have the time to continue as the student’s tutor. (Testimony of student’s father.)

XX grade (2008-2009)

30. In the fall of 2008, the student entered xx grade at Greely Middle School and his team met in October 2008 to review his Section 504 plan. (Testimony of Goodwin.) There were no substantive changes to the student’s Section 504 plan for his xx grade year. (S. 187.) At the 504 plan meeting, the student’s father informed school staff that the student felt very overwhelmed and like a failure. (S. 262.) The student continued to struggle with homework completion and his emotional state at home worsened. (Testimony of student’s father.) The student expressed to his family that he felt like a failure, which the family reported to school staff. (Testimony of student’s father.) The student’s father felt that his relationship with the student was greatly stressed due to the father trying to get

the student to accomplish homework and still has not fully recovered. (Testimony of student's father.)

31. During the student's xx grade year, his parents offered to buy him a new computer if he achieved certain grades. (Testimony of student's father.) This resulted in a short-lived improvement in the student's homework completion but it ultimately backfired because the student felt significant pressure. (Testimony of student's father.) Four of the student's seven grades rose in the second trimester, while five of his seven grades dropped in the third trimester. (P. 117.) The student's third trimester grades included two grades in the A range, eleven grades in the B range, seven grades in the C range, and one grade in the D range. (P. 117.)
32. School staff believed there was less communication from the student's parents that year, indicating fewer concerns on their part. (Testimony of Wheeler-Abbott; Goodwin.) In September and October, the parents worked directly with the student's Spanish and language arts teachers to help him complete his homework because he was frequently not turning it in. (P. 578-84.) In October, the parents also asked school staff to provide the student additional support and keep an eye on him since he was showing a lot of sadness and depression at home. (P. 584-86.) In November, the student's Spanish teacher informed the parents that although his homework completion was improved, she was concerned about his comprehension and his ability to follow classroom instruction. (P. 588.) In January 2011, his math/science and humanities teachers reported that the student was dragging his feet, was having trouble completing work unless given individual attention, and was struggling to complete homework. (P. 591.) The parents reported that they believed the student was completing his homework based on his own report. (P. 591.) The student's mother requested that she be informed of the homework assignments for the student directly so she could work with him on them. (P. 593.) In February, the student's math/science instructor continued to express concern that the student was not understanding the material and was giving up easily. (P. 594.) By the end of February, the student's humanities teacher reported to the parents that the student had been working hard on his writing and his motivation had improved. (P. 595.) The student's mother continued contact with the student's teachers. (P. 599-604.) By May, teachers were reporting that the student's confidence and self-direction had slipped and he had reverted to not knowing what to do or how to get started. (P. 605.) Although Ms. Goodwin was the student's case manager and believed that teachers regularly informed her of information about the student, she was not copied on most of the emails between teachers and the parents. (P. 578-605.)
33. Michelle Raber, the student's xx grade math and science teacher found that the student was not as motivated as other students. (Testimony of Raber.) The student received grades ranging from B to D+ and Ms. Raber noted that the student's work habits fluctuated during the course of the year. (Testimony of Raber; S. 189.) She noted that the student's work habits improved in the second trimester, but declined in the third trimester after he obtained a new laptop that had been designated a reward by his parents. (S. 189.) Ms. Raber helped the student organize his notebook and found that if she held his feet to the fire, the student could complete his work. (Testimony of Rebar.)
34. Beth Fenwick, the student's xx grade reading, English, and social studies teacher, taught the student for nearly two hours every day. (Testimony of Fenwick.) The student responded well to individual attention from Ms. Fenwick and became dependent upon

help from her to get work completed. (Testimony of Fenwick.) She observed that the student needed instructions to be broken into steps. (Testimony of Fenwick.)

XX grade (2009-2010)

35. Shortly into his xx grade year in the fall of 2009, the student was showing defiance and was unable to engage even when redirected by a teacher. (Testimony of Goodwin.) Although some of the student's teachers believed the student had a negative attitude, Ms. Goodwin believed that the student's negativity was a coping mechanism. (Testimony of Goodwin.) The student's language arts and reading teacher, Mark Phillips, offered to meet with the student twice a week after school which worked for a while but ended when scheduling difficulties arose. (Testimony of Phillips.) The parents believed that xx grade was much worse for the student. (Testimony of student's father.) The student's maturity level increased and he began to suspect that others felt he was stupid. (Testimony of student's father.) The family contracted with a tutor to work on the student's social skills. (Testimony of student's father.)
36. Shortly after his xx grade year began, the student took the NECAP testing, on which he scored "partially proficient" in reading and "substantially below proficient" in math. (P. 122.)
37. In the fall of the student's xx grade year, the student joined the cross country team. (Testimony of student's mother.) In early October, the student became ineligible to compete during the season because he was not handing in work in his language arts class. (Testimony of student's mother.) The student's parents and Ms. Goodwin intervened and asked that he be allowed to stay on the team. (Testimony of student's mother; S. 264-65.) Ms. Goodwin suggested to other school staff that the student's "aspbergery qualities" made it surprising he had joined a team at all and argued that because he was "lost a lot" and as a result he missed a lot of homework, he shouldn't be penalized by being removed from the team. (S. 264-65.) Ms. Goodwin informed school staff that the student was "extremely spacey and floaty, and then when you confront him about this, he does get a little edgy and attitudeish" as his way of coping because all his life he has been told he was "out of it." (S. 265.) One teacher noted that although he had informed the student that he was likely to become ineligible if he did not complete assignments, the student seemed to have completely forgotten the conversation the following week. (S. 265.) The student was allowed to continue participation. (Testimony of Goodwin.)
38. On October 14, 2009, the student's 504 Team met and made no significant changes to the student's Section 504 plan. (S. 181.)
39. In October and again in early November, the student was disciplined at school for computer-related offenses in which he attempted to hack into school security systems. (S. 265; S. 298; P. 164.)
40. On November 1, 2009, the student received his interim first trimester grades, which increased the parents' concern because he received three failing grades in reading, language arts, and music. (S. 311; Testimony of student's mother; student's father.) The student's mother informed school staff that the student was reporting that he was bored and could not complete assignments. (S. 311.) The student's father indicated that the parents were frustrated and did not know where to turn for help for the student's feelings

- of being lost and loss of self-confidence. (S. 314.) The student's father questioned school staff as to whether the student should repeat xx grade or be placed in special education services and suggested a possible strategy of getting the student's teachers to understand that when they spoke the student only heard a portion of what was said due to his lack of attentional skills. (S. 314.)
41. On November 2, the parent's mother sought the advice of Dr. Hunter. (P. 158.) Dr. Hunter advised the parents that the student needed increased support. (Testimony of Hunter.) On November 4, Ms. Goodwin reported to school staff that the student was going into "overwhelmed mode" causing his ADHD to intensify and resulting in him grasping "very little of his education." (S. 319.) On November 9, the family contracted with tutor Biz Houghton to work with the student once a week on the skills involved in executive functioning, processing, and organizing. (Testimony of student's mother; P. 345.) On November 9, Ms. Goodwin arranged for an educational technician to work with the student two periods a week during study halls. (S. 323; S. 342-43; P. 169.) The student's family requested additional support for the student at school and formally sought a referral to special education on November 10. (Testimony of student's mother; P. 162; S. 175.)
 42. At the initial IEP Team meeting of December 2, the student's team discussed his academic progress and determined his testing needs. (S. 175-76.) The parents gave consent for testing, although specific testing was not identified pending an evaluation with Dr. Hunter that the parents had arranged to pay for. (S. 169; S. 171-72.) The family also agreed to continue to pay for Biz Houghton to tutor the student in organizational skills. (S. 169.)
 43. Following the school holiday break, Ms. Goodwin observed that the student was more defiant and choosing not to engage. (S. 348; Testimony of Goodwin.) Ms. Goodwin and Dr. Hunter were concerned that the student was at risk for substance abuse. (Testimony of Goodwin; S.375.)
 44. On February 11, the student's mother spoke with Ms. Goodwin, who subsequently relayed to other school staff that the student disclosed to his mother that he felt that his teachers were telling him he was failing, that he did not understand much of the subject matter in his classes, and that he was not getting enough help. (S. 387.) The parents also informed Ms. Goodwin that the student was significantly detached at home and never smiled anymore and they were very concerned about his well-being. (S. 393.) The student's physical education teacher reported that he was very worried about the student based on his non-participation in class, noting that no matter what game was being played, the student put his hands in his pockets, stood still, and refused to engage with the physical education teacher. (S. 390.) The student's social studies teacher reported that he was concerned about the student and had been unable to connect with him. (S. 391.) He noted that the student was disengaged, the work he produced was of low quality, and even hands-on activities did not energize him. (S. 391.) The student's math/science teacher reported that he had the student sit next to him and checked in on him often but even so the student only conducted work when he was prompted and only then for a minute or two at a time. (S. 395.)
 45. In February 2010, school psychologist Peggy Bickford submitted her evaluation of the student. (S. 133.) She noted that the student reported being bored at school, not caring

- about his grades, and not feeling he was learning anything. (S. 134.) Ms. Bickford observed the student in several classes and noted that he was disengaged, that his contributions were minimal, that he arrived to classes unprepared, and that his work product was significantly less than other students. (S. 135.) In evaluations submitted to Ms. Bickford, the student's teachers rated him as demonstrating at-risk behaviors and adjustment challenges in the areas of attention, learning problems, social skills, study skills, and communication skills. (S. 137.) They also noted that he was minimally engaged. (S. 134.) Ms. Bickford concluded that it was unclear why the student had not internalized a work ethic and did not have a desire to engage positively in the learning process. (S. 138.) She observed that over time there had been inconsistencies in holding the student accountable for producing work and for demonstrating proactive learning strategies. (S. 138.) She opined that he was consciously choosing not to engage with few consequences. (S. 138.) Ms. Bickford concluded that the student was at great risk for failure at the high school level without behavioral supports in place and that until he was held accountable for his behavior, there would be little change. (S. 138.) She observed that the student's school adjustment did not appear to be remediated by the Section 504 accommodations. (S. 138.)
46. Ms. Bickford recommended that the student receive direct instruction in organization, have tasks broken into steps, and receive support in starting and completing classwork. (S. 138.) She also recommended a behavioral plan to be implemented with parent support that held the student accountable and had relevant consequences. (S. 138.) She suggested that the student be taught note-taking skills and be held accountable for taking notes during class. (S. 138.) Ms. Bickford suggested that the student's IEP Team consider whether his math computation skills required mediation and potentially develop a positive support plan, to be reinforced by his parents and teachers, for the completion of work. (S. 138.) She also recommended that a decision be made about the xx grade school year soon so that plans could be put in place to support the student's transition to high school demands. (S. 139.) She concluded that the student should be required to demonstrate some commitment and effort before his parents invested in a costly private school placement. (S. 139.)
47. An academic achievement summary report was also produced for the student's IEP Team by Carol Robinson. (S. 140.) Based on achievement testing, she found that the student's math, calculation, and writing fluency skills were low but all other skills were average or above average. (S. 141.) During her formal observation of the student, she found that he was sitting in the back corner of the room with his back to the teacher; that he was exempted from taking a quiz because he had not completed his work; and that an educational technician was working with him. (S. 145.) She concluded that the student was somewhat disengaged from the classroom and that his physical location in the back of the room made it easy for him to disengage. (S. 145.) She observed that his lack of preparedness resulted in him doing something separate from the rest of the class. (S. 145.) Ms. Robinson did not make any recommendations in the report. (S. 144.)
48. In March 2010, Dr. Hunter issued a report of her reevaluation of the student. (S. 146.) Dr. Hunter observed that the student was disengaged and not available for academic instruction. (Testimony of Hunter.) Dr. Hunter found that the student's symptoms included a communication disorder, a significant degree of disengagement, significant obsessive interests, highly inflexible behaviors and traits, decline during periods of transition, dysregulation of mood, blunted affect, and anxiety. (Testimony of Hunter.)

- Dr. Hunter found that the student harbored revenge fantasies and imaginings based on anger but did not understand what the outcomes would be if he took those actions. (Testimony of Hunter.)
49. Dr. Hunter's testing of the student suggested that his memory skills were highly erratic, his intellectual potential within language domains was excellent, his executive mental functions showed significant weaknesses, and his pragmatic language and fluent conversational skills showed mild impairment. (S. 156-57.) Dr. Hunter's testing found that the student was at the 1st percentile in math fluency. (S. 154.)
 50. Dr. Hunter concluded that the student had a puzzling diagnostic profile that was not easily captured in a discrete category and that he was best understood as being on the autism spectrum and having Asperger's disorder. (S. 157.) She concluded that the student met the diagnostic criteria as related to communication deficits, impairments of social perception, special interests, and problems of adaptive functioning, with impacts evident across academic, behavioral, emotional, motoric, and interpersonal realms. (S. 157.)
 51. Dr. Hunter opined that the student's learning needs included a motivational environment, accommodation of core weaknesses of working memory and processing speed, and remediation of a learning disability in mathematics. (S. 159.) Dr. Hunter suggested modifying the student's environment, creating opportunities for him to shift perspective, and crisis intervention. (S. 159-66; Testimony of Hunter.) She also provided a series of detailed recommendations with regard to the student's educational planning. (S. 161-66.)
 52. Dr. Hunter did not agree that the approach advocated by Dr. Bickford of holding the student accountable would be successful given that Dr. Hunter believed that the student did not have the skills needed to be accountable. (Testimony of Hunter.) Dr. Hunter advocated building a plan that identified the student's skill deficits as well as his psychological needs. (Testimony of Hunter.)
 53. At the next IEP Team meeting of March 5, 2010, the student was identified in March 2010 as eligible for special education under the category of multiple disabilities, listed as autism, other health impairment, and a specific learning disability. (S. 56.) Dr. Hunter advocated for brain-based interventions with the hope of changing the student's behavior so that he would become more engaged in learning. (S. 277.)
 54. The student's IEP called for specially designed instruction for nine blocks of forty-five minutes each week as well as social work services for one hour per month. (S. 118-21.) The IEP identified goals related to organization and work completion, basic math skills in multiplication and division, and social worker consultations with staff. (S. 188-20.) The IEP indicated that a behavioral plan was not needed but did call for his homework assignments to be written down for his parents to see and for classroom expectations to be modified. (S. 116 & 122.) The written notice from the meeting also included continued weekly counseling sessions with Ms. Goodwin and the continuation of all the accommodations that were included in the student's Section 504 plan. (S. 107.)
 55. Dr. Hunter did not think that the IEP developed for the student was appropriate. (Testimony of Hunter.) She opined that the instructional goals were not sufficiently specialized for the student and did not build upon his interests. (Testimony of Hunter.)

- She concluded that the IEP did not reflect the complexity of the student's needs. (Testimony of Hunter.)
56. Also in March, the parents contracted with a private speech-language pathologist to provide the student with social cognition therapy. (P. 237). The pathologist met with the student three times but the service was discontinued due to the student's lack of engagement. (P. 237.)
 57. In mid-April, Ms. Houghton reported that the student was not very engaging and had "not caught on to the modeling of a system," likely due to his overall disinterest in school. (P. 247.) Because the tutoring was not successful, the family stopped the service. (Testimony of student's mother.)
 58. The student's IEP was modified in May, and the modification forwarded to the parents in June, to include a transition plan due to the student's age and a change in the student's case manager from Carol Robinson at the middle school to Cynthia Lasher at the high school. (S. 90.)
 59. Carol Robinson, assigned to the student as his special education teacher, worked with the student for an hour and a half after he was identified as a special education student in March 2010 until the end of his xx grade school year. (Testimony of Robinson.) She focused on math with him during their sessions and also helped him to organize assignments. (Testimony of Robinson.) She did not undertake individualized lesson plans to teach the student organizational and executive functioning skills. (Testimony of Robinson.) Ms. Goodwin perceived that after the student began working with Ms. Robinson, his work refusal was reduced and his work production improved. (Testimony of Goodwin.)
 60. As of June 2010, Ms. Robinson graded the student as partially meeting his annual goal of learning his multiple facts and single and multi-digit division terms. (P. 322.) She also graded him as partially meeting the annual goal of completing homework and classwork assignments and obtaining grades of C or better. (P. 323.)
 61. During the spring of 2010, the family explored alternative placements for the student's xx grade year, including Casco Bay High School, Hebron Academy, and Waynefleete Academy, as well as several out-of-state residential options (Testimony of student's father; student's mother.) The family also sought information about a program at Greely High School called the Small Learning Community. (Testimony of student's mother.) The Small Learning Community was a group of 60 students who were taught by three teachers in a team teaching model. (Testimony of Wheeler-Abbott.) The family received feedback from Ms. Goodwin that she did not have a clear understanding of how to get the student selected for this small program. (Testimony of student's mother; P. 278.) Ms. Wheeler-Abbott agreed that the Small Learning Community would be good for the student. (Testimony of Wheeler-Abbott.)
 62. By the start of June 2011, the student had either been rejected by or did not seem a good fit for all of the high school options that had been explored by the family except for Franklin Academy in Connecticut. (Testimony of student's mother.) On June 4, the student's mother requested information about the transition to Greely High School, when the IEP Team would get together to work on his transition, and whether the high school

- staff would be part of the transition plan. (S. 432.) When school district staff sought to schedule an IEP team meeting in September, the student's mother requested that it be held earlier. (S. 435; P. 291-92.) Because many school staff were unavailable due to end of the school year activities, an IEP Team meeting was not scheduled but the student's mother met with a few staff members. (Testimony of student's mother; Goodwin.) The district would have held a transitional meeting for the student in the fall once they knew who the student's case manager and guidance counselor would be, decisions that would be made right before or as school was starting in the fall. (Testimony of Goodwin.)
63. The student's third trimester grades for xx grade included one B and five grades in the C range. (P. 324.)
64. The student's xx grade language arts and reading teacher, Mark Phillips, found that the student was very quiet, tended not to contribute to class conversation, and was reading at grade level. (Testimony of Phillips.) Mr. Phillips observed that the student sometimes struggled to get started when asked to write. (Testimony of Phillips.) Mr. Phillips found that when he did meet with the student individually, his presence alone helped the student to accomplish writing tasks. (Testimony of Phillips.) Mr. Phillips observed an improvement in the student's work product once he was identified as special education and Ms. Robinson began to help him with work completion. (Testimony of Phillips.)
65. Just prior to the June 15 staffing meeting, the family submitted an application for the student to attend Eagle Hill School, a residential school in Heartwood, Massachusetts. (Testimony of student's mother.) In attendance at the staffing meeting were the student's mother, Ms. Goodwin, Cindy Lasher (the anticipated special education teacher/case manager for the student at the high school), and Ms. Robinson. (Testimony of student's mother; Goodwin.) The school staff members were not able to answer the mother's questions as to whether the student would be placed in the Small Learning Community program, who would be his social worker, and who would be his special education teacher. (Testimony of student's mother.) The school staff members were not ready to answer the family's questions because they were not yet prepared for the student's transition meeting, which would have happened in the late summer or early fall. (Testimony of Goodwin.) Ms. Goodwin reported to Ms. Wheeler-Abbott that the meeting was disorganized and that Ms. Lasher did not have a clear plan on how she was going to support the student. (S. 86.)
66. At Greely High School, the student's social worker would have been Peter Scott and his behavioral strategist would have been Nancy Dwyer. (Testimony of Nunery; Scott.) Although Carol Robinson learned at some point near the end of the school year that she would be transferring to the high school the following year, meaning she would likely remain the student's special education teacher, it is not clear when this information was conveyed to the student's family. (Testimony of student's mother; Robinson.)
67. On June 17, RSU #51 sent an IEP to the family that had been amended to include the list of accommodations that the Team had designed for the student at its March meeting and contained a secondary transition plan. (S. 99; S. 101-04.) The family found the IEP to not be sufficiently individualized to address the student's needs. (Testimony of student's father.) The parents were concerned that the student was not learning to learn. (Testimony of student's father.) The parents were also concerned that the student was going to be pulled out of regular education settings for 40% of the time even though he

- learned best in a small collaborative environment. (Testimony of student's father.) The parents felt that the IEP did not tap into the student's motivations. (Testimony of student's father.) They were concerned that although the student did not resist being placed in special education, he would resist being singled out and pulled out of classes. (Testimony of student's father.) Dr. Hunter believed that to succeed in high school the student needed to get grounded in his sense of himself as a student, be engaged at the level of shared ideas or concepts, be educated in a smaller setting where educators would know the student well, understand the complexity of his profile, and have the resources and ability to work through his multi-level needs. (Testimony of Hunter.)
68. The last day of the 2009-2010 school year was June 21, 2010.¹
69. By letter dated June 23, 2010, Eagle Hill School informed the family that the student had been accepted for admission. (P. 239.) On June 25, 2010, the family forwarded a check in the amount of \$36,181 to Eagle Hill School representing \$7,500 for a deposit; \$24,811 for one-half of the total tuition due for the 2010-2011 school year; and \$3,800 for a student account. (P. 334.) The letter that accompanied the check indicated that enrollment forms for the student would be faxed the following Monday. (P. 334.)
70. By letter dated August 13, the parents informed the school district that they were placing the student at Eagle Hill School for his xx grade year. (P. 345.) The parents stated their belief that the student required special education long before he was identified as eligible in March and that the IEP for the student to be implemented at Greely High School was not appropriate to address his special academic and functional needs. (P. 345.)
71. In late August, several school staff members met to devise a behavioral plan for the student. (Testimony of Wheeler-Abbott; Scott.) The revised IEP included a draft behavioral plan that utilized "xx Money" rewards to incentivize the student. (S. 47.) The plan was developed without the student although school staff anticipated that it would be revised once the student's input was obtained. (Testimony of Wheeler-Abbott; Robinson.) This behavioral plan was added to the student's IEP along with a behavioral goal, the student's social work goal was revised, and the IEP was forwarded to the family on August 27, 2010. (S. 83.) The student's father did not believe that the xx Money reward system in the student's draft behavioral plan would work because it was too juvenile and did not play to the student's interests. (Testimony of student's father.)
72. On September 16, although the student was not returning to RSU #51, an IEP Team meeting was held and changes were made to the student's IEP. (S. 49; Testimony of Wheeler-Abbott.) At the Team meeting, the parents expressed concern that school staff had not taken the time to get to know the student and understand his interests, that the student would not buy into the behavioral plan as developed, and that the transition to Greely High School was not sufficiently supportive. (S. 50.) The parents agreed that if the student returned to RSU #51, he would participate in the modification of the behavioral plan. (S. 50.) The revised IEP, sent to the family on September 22, 2010, reflected the longer blocks in the high school class schedule and the social work and behavioral goals were modified. (S. 56-81.)²

¹ Although this fact does not appear in the record, it is represented as such in both parties' briefs.

² Because the IEP that was sent to the family on August 27, 2010, is not in the record, which changes occurred in that draft and which occurred in the final draft that was sent on September 22, 2010, are

XX grade (2010-2011)

73. The parents placed the student at Eagle Hill School, a residential school in Heartwood, Massachusetts, for xx grade. (Testimony of student's mother.) All of the students at Eagle Hill School have been diagnosed with a learning disability, including executive functioning disorders and ADHD. (Testimony of Kaplan.) The student's day at Eagle Hill School was structured, beginning at 6:45 and ending at 8:00. (Testimony of Kaplan.) Academic classes at Eagle Hill School have a maximum of 8 students, allowing the instructors to work individually with students. (Testimony of Kaplan.) Residentially, each dorm floor has a dorm counselor and during study halls, dorm counselors and teachers are present on the dorm floors. (Testimony of Kaplan.) The staff at Eagle Hill School seek to form bonds with the students, take into consideration their strengths and weaknesses, and encourage productivity. (Testimony of Kaplan.) The student's cc grade academic advisor at Eagle Hill School was Sara Kaplan. (Testimony of Kaplan.) Her role was to devise the student's academic schedule, provide academic and personal support, and maintain contact with the student's parents. (Testimony of Kaplan.)
74. At Eagle Hill School, the school year is divided into nine terms of 21 days each. (Testimony of Kaplan.) The student was required to take core classes but was able to select various electives. (Testimony of Kaplan.) Ms. Kaplan drafted the student's IEP based on his prior educational record. (Testimony of Kaplan.) The IEP was designed to give teachers ideas to draw upon. (Testimony of Kaplan.) Eagle Hill School incorporates a set of accommodations into expectations for all students. (Testimony of Kaplan.)
75. The student quickly earned the privilege of self-study, meaning he did not need to have a proctor check off that his homework was completed, because Ms. Kaplan gauged that he was able to do his work independently on a consistent basis. (Testimony of Kaplan.) Shortly after his arrival at Eagle Hill School, the student took a TerraNova test that showed high mastery in reading objectives and moderate mastery in all language and mathematics objectives. (P. 391.)
76. The student seemed happy at Eagle Hill School until March 2011, when he became melancholy after a close friend left the school. (Testimony of student's father.) When the student came home in March, he reported that he had been punched in the leg by another student. (Testimony of student's father.) When the family reported to Eagle Hill School staff that the student had been bullied, the student became a source of additional conflict when school staff intervened. (Testimony of student's father.) Eagle Hill School staff looked into the concern of bullying and found that conflict was occurring between the student and another student. (Testimony of Kaplan.) The dorm counselor was asked to keep an eye on the situation, the assistant headmaster conducted an investigation, and a social worker met with the student. (Testimony of Kaplan.) The student returned home for several days. (Testimony of student's father.) Ms. Kaplan remained in contact with the student while he was home to assure him that his return would be handled well. (Testimony of Kaplan.) Also while he was home, Dr. Hunter had a session with the

difficult for the hearing officer to ascertain, although the cover letter that accompanied the August 27 version identifies the elements that were changed that time. (S. 83.)

student and concluded that he was suffering situational depression due to his conflict with the other student at Eagle Hill School. (Testimony of Hunter.)

After the student's return to Eagle Hill School, Ms. Kaplan checked in with him regularly and concluded that he was doing well, seemed happy, and was participating in his classes for the rest of the school year. (Testimony of Kaplan.) At the end of the year, the student was nominated for the English department award for writing. (Testimony of Kaplan.) Ms. Kaplan was impressed with the student's trajectory over the year and believed that the tight structure helped him to maintain a sense of routine and that the academic and social support was critical to his success. (Testimony of Kaplan.) The student earned all As and Bs during his year at Eagle Hill School and was on the honor roll in the final three terms of the year. (P473; Testimony of Kaplan.) The student's mother believed that he experienced amazing growth during his year at Eagle Hill School and came to believe in himself in a way that he did not while at Greely Middle School. (Testimony of student's mother.) Dr. Hunter felt that the placement met the student's needs because it offered a smaller class size, the program was driven by relationships, and staff had specialized knowledge of teenagers and Asperger's syndrome. (Testimony of Hunter.)

77. The parents spent \$66,111.92 in tuition and related expenses for the student to attend Eagle Hill School for the 2010-2011 school year. (P. 475.) The tuition was \$57,262; student fee account was \$3,800; counseling was \$570; school uniform was \$996.70; travel expenses, with mileage computed at the IRS rate, was \$1,226.75; educational consultant cost was \$382.50; psychological testing and session fees were \$600; and lodging expenses were \$1,273.97. (Testimony of student's father; P. 475.)
78. On August 8, 2011, the student wrote a letter explaining that he felt his xx grade teachers were angry that he was not performing at the level of other students and wondered why he could not perform adequately. (P. 476.) He noted that in xx grade his family sought assistance and support, but that he felt he had received only a lightened workload and occasional bi-daily assistance with his classes. (P. 476.) He indicated that he felt xx grade consisted of a back and forth fight to gain help for him, that he found little meaning in what was being taught, and that he had just about given up in his classes. (P. 476.) The student wrote that at Eagle Hill School, things changed for him, he gained perspective on academics, he learned that he had a talent for writing, and he did well in his classes. (P. 476.) He concluded that he felt he had learned exactly what he needed to succeed as a learner with his given disabilities. (P. 476.)

XX Grade (2011-2012)

79. Dr. Hunter had a session with the student during September 2011. (Testimony of Hunter.) The student appeared more attentive to his grooming, pulled together, and articulate about his experiences at Eagle Hill School. (Testimony of Hunter.) The student also began to engage in therapy services more than in the past. (Testimony of Hunter.)
80. The IEP that the school district proposed for the 2011-2012 school year, the student's xx grade year, included annual goals in organization, time management, and study skills; basic math skills; interpersonal skills with peers and adults; behavior, related to preparedness for class, participation in class, and completion of assignments; and social work, including attending and participating in appointments, improving his understanding

of others, improving his self-awareness, and increasing his comfort with a range of emotions. (S. 10-14.) The IEP called for specially designed academic instruction six times per four-day rotation for 55 minutes each; specially designed behavioral instruction weekly for 55 minutes; social work services weekly for 55 minutes; consultation by the special education teacher and social worker 45 minutes each month; coaching 15 minutes before and 15 minutes after school each day; and tutorial services as needed. (S. 16.) The IEP also included a series of accommodations for the student, including writing down his assignments, modifying classroom expectations, providing the student with visual and tactile opportunities to demonstrate his understanding, preferential setting, and frequent check-ins. (S. 17.)

81. Dr. Hunter did not believe that the final IEP offered to the student for his xx grade year was appropriate. (Testimony of Hunter.) She believed that the behavioral plan would not have been effective because the student does not have a typical understanding of cause and effect, the standard motivations did not engage the student, and it required the student to take initiative. (Testimony of Hunter.) She opined that the student's behavioral plan needed to compensate for the fact that he did not initiate or sustain actions. (Testimony of Hunter.) She concluded that the student's behavioral plan was not sufficiently individualized to meet the student's needs. (Testimony of Hunter.)
82. The student's uncle observed that the student seemed to grow increasingly distant and less apt to smile during his three years at Greely Middle School. (Testimony of student's uncle.) The student's uncle observed that during the student's year at Eagle Hill School he became more animated, made more eye contact, and seemed like his old self. (Testimony of student's uncle.) The student reported to his uncle that he liked school and had fun at Eagle Hill School. (Testimony of student's uncle.) The student's grandmother observed that the student withdrew gradually and became more difficult to communicate with during his three years in middle school. (Testimony of student's grandmother.) The student's grandmother also observed that the student seemed in slightly more positive spirits when he returned home from Eagle Hill School during breaks was more engaging in the summer after his xx grade year. (Testimony of student's grandmother.)
83. The student is attending Brewster Academy in New Hampshire as a residential student for his xx grade year. (Testimony of student's father.)

IV. DISCUSSION AND CONCLUSIONS

A. Burden of proof.

Although the Individuals with Disabilities Education Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. Schaffer v. Weast, 126 S.Ct. 528, 537 (2005). As such, the family bears the burden of persuasion on the first two issues, which were

raised in their hearing request, and the school district bears the burden on the third issue, raised in its joined hearing request.

B. Whether RSU #51 violated state or federal special education law by failing to refer, evaluate, and identify the student as eligible for services in a timely manner.

Each school district must have a plan to identify, locate, and evaluate at public expense students residing within the district who may be eligible for special education services. 34 C.F.R. § 300.111(a)(i) & (ii); 34 C.F.R. § 300.111(c)(1) & (2); *MUSER* § IV.2.A. These obligations must be met within the first 30 days of the school year for returning students and within 30 days of enrollment for transferring students. *MUSER* § IV.2.A. If a child find process indicates that a student may need special education and related services in order to benefit from regular education, the student should be referred to an IEP Team. *MUSER* § IV.2.D. A school district's child find process must include "obtaining data on each child, through multiple measures, direct assessment, and parent information, regarding the child's academic and functional performance, gross and fine motor skills, receptive and expressive language skills, vision, hearing and cognitive skills." *MUSER* § IV.2.C. Final identification of such students is to occur after evaluation of the student and an IEP Team meeting. *MUSER* § IV.2.A. A school district must develop and implement a service plan for each IDEA-eligible student that describes the specific special education and related services that the school district will provide. *MUSER* § IX.3.A.1.d.

This responsibility extends to students in private schools; school districts are responsible for children with disabilities who are placed in private schools by their parents to the extent that a school district must locate, identify, and evaluate all such children. *MUSER* § IV.4.G.1.b. Nevertheless, the IDEA and Maine regulations do not specify how long a determination of eligibility lasts and whether it transfers from one school district to another within the state when a student transfers and the IEP has expired, the circumstances here. Special education provisions require a reevaluation to occur not more frequently than once a year, unless the parents and the

school district agree otherwise, but at least every three years. 20 U.S.C. §§ 1414(a)(2)(B); *MUSER* § V.1.B.2.

Case law provides additional insight. In *L.G. v. Wissahickon School District*, 2011 U.S. Dist. LEXIS 476 (E.D. Pa. 2011), a district court held that when a student was offered an IEP in April 2004, the parents rejected the IEP offer and enrolled the student in a private school for the 2004-2005 school year, but the student returned to the school district for the 2005-2006 school year, the school district was obligated to consider the student eligible and develop a new IEP for the student. *Id.* at *36. The district court noted that

because IDEA requires that a public school district make a FAPE available to all disabled students residing within the district, school districts ‘must be prepared to develop an IEP and to provide FAPE to a private school child if the child’s parents re-enroll the child in public school.’

Id. (quoting 64 Fed. Reg. 12406, 12601 (1999)).

Parents’ Argument:

The parents argue that the student’s May 2006 identification as a special education student in the Portland school district remained in effect and as such the District was not permitted to treat him as an ineligible or unidentified student under the IDEA. The family contends that by failing to provide the student with an IEP upon his enrollment, the school district automatically violated the IDEA.

The parents maintain that the failure of the school district to provide the student with an IEP until late in his x grade year was disastrous. With regard to xx grade, the parents cite evidence of teachers’ observations of the student’s inability to remain on task, distractibility, lack of interest in school work, and very severe impairments in many domains. Regarding xx grade, the family argues that any success the student found was due to the family’s hiring of a private tutor over the summer before the school year and the first two months of the school year, the family’s incentivization of the student with a computer reward, and the parents’ investment of significant time helping the student complete homework. Even then, the family asserts, the

student's academic performance was marginal, pointing out a D-plus math grade in the final trimester. With regard to xx grade, which the family contends was the least successful of the student's three years at Greely Middle School, the family points to the student's poor grades in the first trimester, poor work habits, chronic failure to turn in assignments, and his complete shutdown part way through the year.

School District's Argument:

The school district argues that it did not have a duty to consider the student a special education student after his IEP expired while in a private parental placement prior to his transfer into the district. The district maintains that it offered the family the option of evaluating and identifying the student upon his entry into the district but that the family chose not to do so in part because they did not want him evaluated and in part because they believed he would be uncomfortable in special education. The district contends that the family and the evaluator hired by the family, Dr. Hunter, were satisfied that the Section 504 plan created in the fall of the student's xx grade year would sufficiently serve him. The district argues that it did not violate its child find obligations by failing to continue the student as a special education student in these circumstances.

Once the student was provided a Section 504 plan, the district maintains that he benefitted from his educational program with the supports that were provided and without the need for specialized instruction until his referral to special education in the fall of his xx grade year.

Analysis:

The statute of limitations order issued on September 1 addresses this issue in part in concluding that the parents have the ability to pursue their claims that the school district violated its child find obligations back to the fall of 2007.

As shown in Wissahickon School District, a student can retain eligibility in public school after returning from a year of attendance at a private school. Further, as the 1996 OSEP Letter to Anonymous shows, a student does retain eligibility after transferring in from another public school where he had been identified as eligible for special education even if the prior IEP was not available or if the new school feels that the prior IEP was inappropriate. Letter to Anonymous, 25 IDELR 525 (Office of Special Educ. Programs 1996).

The facts of the present case lead to a conclusion that the school district failed in its obligation to identify the student as in need of a referral to special education in the fall of 2007 and that the violation continued into the student's xx grade year. The student's evaluation, leading to the special education designation at his prior public school district, had occurred in March 2006, thus not requiring a reevaluation until March 2009, and the student's IEP resulting from his initial identification did not expire until May 2007, just three months prior to his enrollment in RSU #51. In addition, RSU #51 was aware that during the interim school year, the student had received significant tutoring.

Even if the student was not considered eligible immediately upon enrollment in RSU #51, by two months into the school year, school staff had accumulated a significant body of evidence indicating that the student was experiencing profound struggles to maintain attention in class, to understand grade level instruction, and to complete grade level work in class and at home. In particular, by the end of October, school staff observed that the student required a great deal of adult support to complete in-class assignments, had difficulty following instructions, required frequent check-ins and prompts, needed a math tutor, and felt overwhelmed by difficult assignments. In conjunction, the parents were seeking additional help for the student due to his struggles. Finally, Ms. Goodwin had questioned other school staff as to whether bypassing a referral would result in the student not receiving needed services.

Pursuant to *MUSER* § IV.2.D, the school district should then have convened an IEP

Team meeting to determine the student's eligibility. The school district did convene a "staffing" meeting, but failed to include mandatory IEP Team members or to follow IEP protocol for convening a Team meeting. And even though school staff indicated at hearing that one of the purposes of the meeting was to determine whether the student was eligible for IDEA services, the evidence indicates that this question was not discussed at the meeting because the parents had already been informed that without additional testing the student would not be considered eligible. The determination that additional testing was required to determine his eligibility, made by a special education teacher and the school's vice principal, was usurped from the student's IEP team. Under these circumstances, the school district violated its child find obligation by not referring the student to an IEP Team meeting for further discussion of eligibility. The school district further violated special education law by not following IEP Team protocol when it convened the staffing meeting to essentially make an eligibility determination and by not following IDEA protocol related to IEP Team meetings.

The school district continued to violate its child find obligations until the child was ultimately referred for special education two years later. Near the end of the student's xx grade year, six months after his Section 504 plan was put into place, his teachers filled out assessments that showed the incredible magnitude of the student's difficulties engaging in work, sustaining attention, and meeting expectations. Teachers consistently gave him the highest or second highest ratings when scoring how problematic his attentional and organizational deficits were in the core subjects of math, reading, and written expression.

In cc grade, the student's teachers continued to observe that he was not comprehending instruction, could not keep up, and had trouble completing assignments and homework. This feedback to parents from teachers, who often did not include Ms. Goodwin as the student's Section 504 case manager, continued throughout the year. By the end of the year, teachers reported that the student had lost any gains he had made in self-confidence and self-direction.

Even into the fall of his cc grade year, school staff were sharing information about the student's extreme disengagement without making a referral to special education. It is difficult to imagine circumstances in which a school district could have observed more evidence of the need to refer a student for a determination of special education eligibility.

Although the student was served by a Section 504 plan with accommodations from the fall of his xx grade year and to have regular half-hour sessions with school counselor Ms. Goodwin, the student was not referred to special education until his parents made a referral in the fall of his xx grade year. I find that the student did not have access to the specially designed instruction and related services to which he was entitled from the fall of his xx grade year through the spring of his xx grade year, when his IEP became effective. The impact of the school district's failure to timely identify the student is discussed in the final section of the decision regarding remedies.

C. Whether the IEPs proposed by the school department would have provided the student with a free, appropriate public education during the 2010-2011 and 2011-2012 school years.

A student who has been identified as eligible for special education is entitled to a free appropriate public education ("FAPE") provided by the school district in which he resides. 20 U.S.C. § 1412(a)(1)(A); 20 M.R.S.A. § 7201. A FAPE includes special education as well as related services. 20 U.S.C. § 1401(9); *MUSER* § II.14.

An IEP is reviewed first for consideration of whether it was developed in accordance with procedural requirements and, second, whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). An IEP must be designed to provide a student with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Id. at 203. In addition, an IEP must include the student's present levels of performance, measurable annual goals, methods by which progress

towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward his goals, make progress in the general education curriculum, participate in nonacademic activities, and be educated with other children with disabilities as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); *MUSER* § IX.3.A.

As the First Circuit Court of Appeals has explained, the IDEA “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.” *Leno v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). The IEP must be evaluated as of the time it was created, not in hindsight. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). In addition, the IEP must be evaluated as a whole, not piecemeal; even if one portion of the IEP is not as strong as it could be, the IEP will still pass muster if the overall program is reasonably calculated to provide educational benefits. *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 30 (1st Cir. 2008).

Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student’s individual potential. *Rowley*, 458 U.S. at 203. A student’s program must be geared toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs.” *Town of Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), aff’d, 471 U.S. 359 (1985); see also *Sanford Sch. Dep’t*, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student’s specific area of need). Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” each situation requires a “student-by-student analysis that carefully considers the student’s individual abilities.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 248 (3^d Cir. 1999) (holding

that the “meaningful benefit” standard requires ““significant learning”” (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3^d Cir. 1988)).

Further, the IDEA requires that students be educated with non-disabled peers “to the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); *MUSER* § X.2.B. As such, a public school may remove a child with disabilities from the regular educational environment only when “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); *MUSER* § X.2.B. The educational benefit and least restrictive environment requirements “operate in tandem to create a continuum of educational possibilities.” Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990). As such, schools must make a continuum of placement options available. 34 C.F.R. § 300.115; *MUSER* § X.2.B.

The IEP as written is the appropriate document for consideration. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768-70 (6th Cir. 2001). Information about what services could have been provided but not included in the IEP should not be considered. Id.

2010-2011 School Year

Parents’ Argument:

The parents argue that the school district did not provide the student with an appropriate IEP for the 2010-2011 school year. The parents also maintain that the critical determinant is whether the IEP as it was written at the time it was offered would have provided a FAPE and it is not relevant what the school district might have provided had the FAPE been implemented. The parents contend that therefore the IEP amendments sent to the family by the school district in September 2010 are not relevant to the analysis.

The parents argue that the IEP offered to the student in March 2010, which was amended in June 2010, failed to address the student’s wide range of educational needs appropriately. The

family argues that the IEP failed to acknowledge the central fact that the student regularly engaged in behaviors that impeded his engagement in learning throughout middle school and these behaviors escalated to a critical level in xx grade. The family criticizes the IEP's initial indication that positive behavioral interventions, supports, and strategies were not needed for the student despite his long history of issues with work completion, work avoidance, and general disengagement in the learning process. The family also asserts that the IEP was inappropriate because it contained only three goals, which did not reflect the wide-ranging issues identified in the student's evaluations; did not implement the type of programming recommended by Dr. Hunter in planning for the student to receive some resource room time during his school day to work with an educational technician on basic math skills and to have adult monitoring of his homework completion; and offered services that were designed to simply allow the student to pass his classes without addressing the core skill deficits he was facing. In addition, the family critiques the IEP's designation of 45 minute blocks of time since the high school schedule utilized 55 minute blocks. Finally, the family contends that it was clear at the June 15, 2010, meeting that the high school staff did not have sufficient supports in place for the student since the family's most basic questions went unanswered.

School District's Argument:

The school district argues that it offered the student a number of IEPs for the spring of 2010 and for the 2010-2011 school year, each of which was appropriate. The school district maintains that the IEP that was created in March 2010 was appropriate for the student and provided him demonstrable educational benefit through the end of the 2009-2010 school year. The school district contends that the benefits of the IEP were demonstrated by reports of teachers that he turned in more assignments, improvement in his grades for the third trimester of the xx grade year, and a Terra Nova test administered to the student at Eagle Hill School in September 2010, which showed high mastery in reading and partial mastery in language usage and math.

The school district argues that the IEP would have continued to provide the student with educational benefits into the 2010-2011 school year as well. The school district notes that the IEP was revised in August 2010 and again in September 2010 after an IEP Team meeting.

The school district argues that the IEP issued in September should not be discounted because it was issued after the family informed the school district of its decision to place the student unilaterally. The school district argues that the ten-day notice requirement for reimbursement claims was intended to provide schools with time to address family concerns after notice and before the student is withdrawn. The school district argues that by making their decision in late June when it accepted the student's admission offer at Eagle Hill School but not notifying the school district until mid-August of their decision, the parents left the school district little time to make additional efforts to address their concerns.

The school district argues that the academic, behavioral, and social work goals, two of which were expanded from the March 2010 IEP, were student-specific and were not challenged by the family. The school district maintains that the behavior plan was consistent with Dr. Hunter's recommendation for an incentive-based plan and was merely a starting point, open to family and student input prior to utilization. The school district contends that there is no meaningful evidence to prove, or even suggest, that the IEP would not have been successful if implemented. Nor, the district argues, was there any evidence to suggest that it could not have implemented the IEP as written.

Analysis:

The parents argue that the amendments to the student's IEP in August and September 2011, namely the addition of a behavioral plan and goal and modification of social work goals, cannot be considered in evaluating the program that the student was offered for the 2010-2011 school year. The parents cite A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007), in which the Fourth Circuit Court of Appeals held that the evaluation of an IEP should be limited to

the IEP itself and should not rely upon comments made at IEP Team meetings. Id. at 682. The parents also cite County Sch. Bd. of Henrico v. Z.P., 399 F.3d 298 (4th Cir. 2005), in which the same Circuit Court of Appeals held that a hearing officer's assessment of an IEP was appropriately based on what was contained in the IEP, not the provision of an aide after the IEP was written. Id. at 306 n.5. The parents also cite Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 (D. Vt. 1996), in which a United States District Court held that the review of an IEP consists of whether it complies with the IDEA, not whether it could subsequently be modified to provide a FAPE. Id. at 1256.

All of the cases cited by the parents emphasize the importance of the written IEP document, but none indicate that a hearing officer should not review all versions of an IEP. Here, the behavioral plan was added, the student's social work time was increased, and related goals for both behavior and social work were generated in August and presented to the family before the school year started. All of these components would have been implemented for the entirety of the student's xx grade year. The final version of the IEP, issued in mid-September, was substantially similar to the prior versions and it was offered very shortly after the school year started. A school district is required to have an IEP ready for each eligible student when the school year begins, which the school district did in this instance. 34 C.F.R. § 300.323(a); *MUSER* § IX.3.B.1.

The IEP designed for the student in March 2010 included specially designed instruction for nine blocks of 45 minutes each week as well as social work services for one hour per month; identified goals related to organization and work completion, basic math skills in multiplication and division, and social worker consultations with staff; and called for classroom expectations to be modified. During the last few months of his xx grade year when the IEP was being implemented, the student received the specially designed instruction from Mr. Robinson, focusing on math and organization of his assignments from other courses.

Under that IEP, the student made progress toward, and partially met, his annual goal of learning his multiple facts and single and multi-digit division terms; he made progress towards, and partially met, the annual goal of completing homework and classwork assignments; and he met the goal of obtaining earning a grade of C or better in all of his classes.

That IEP would have continued into the 2010-2011 school year with the modifications developed in mid-June, August, and September. It is clear that the staffing meeting held in June was unsettling to both the parents and Greely Middle School staff in terms of the transition plan for the student to enter high school. Nevertheless, the final details of the student's support team would have been resolved and ultimately Ms. Robinson would have continued as the student's special education teacher, providing the student consistency and support during the period of transition, and the student would have received behavioral support from Ms. Dwyer and social work services from Mr. Scott.

Further, the substance of the IEP contained the essential elements of personalized instruction, support services, present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, and an explanation of to what extent the student would participate with non-disabled students. In addition, the special education and support services were designed to enable the student to benefit educationally. This is so regardless of whether the IEP is reviewed in its June, August, or September format, although it was improved somewhat with each revision.

Although the parents expressed concern that the behavioral plan was not well designed to meet the student's interests, the behavioral plan was a draft version to be shared with the student and his family for revision and input. In the end, if the student had not responded to the reward concepts utilized, school staff was prepared to implement a different system with which the student agreed. The student's social work goals were also intended to be draft only, to be

modified once the social worker at the high school had had the opportunity to work with the student and obtain his input into the social work goals.

As such, the IEP offered by RSU #51 for the student's xx grade year, the 2010-2011 academic year, was reasonably calculated to provide the student with educational benefit.

2011-2012 School Year

Parents' Argument:

The family contends that the IEP offered to the student for the 2011-2012 school year was inappropriate because it maintained too much segregation for the student, at nearly one-third of his instructional time, some of the specially designed services would have been provided by the school social worker, who maintains a caseload of up to one hundred and twenty students, and the nature of the tutorial and coaching services was unclear. The parents critique the 2011-2012 IEP proposal as being a grouping of services without any central integration and lack of focus on the key characteristics necessary to build a successful educational program for the student, specifically, relationship-based teaching, small class sizes, support services integrated into the classroom setting, and instruction that drew on high interest areas for the student and encourages him to develop his areas of academic strength. The family also argues that the behavioral plan, and its utilization of the xx Money reward system, were virtually certain to fail. The family concludes that the proposed IEP lacked the essential features of the successful Eagle Hill School program.

School District's Argument:

The school district notes that the IEP for the 2011-2012 school year included updated goals related to organization and work completion, math, behavior, and social work. The school district maintains that the services were varied to reflect information provided by the family at the IEP Team meeting and continued the core service levels from the previous IEP, with specially designed instruction in math, organizational skills, and work completion. The school district

maintains that the continued and generalized critique of the concept of “xx Money” found in the draft behavior plan is without merit since the Team had agreed that the student would have significant input into the behavioral plan before it was implemented. The school district concludes that the evidence that the student progressed during the 2010-2011 school year at Eagle Hill School makes it even clearer that he would have been able to benefit from the IEP drafted by the district.

Analysis:

The IEP proposed by the school district for the 2011-2012 school year was much the same as that proposed for the prior year, during which the student was not enrolled in the school district. The IEP included annual goals in organizational, time management, and study skills; basic math skills; interpersonal skills with peers and adults; behavior, related to preparedness for class, participation in class, and completion of assignments; and social work. The IEP called for five-and-a-half hours of specially designed academic instruction every four days; as well as approximately one hour of behavioral instruction and social work services per week, before and after school coaching, and tutorial services as needed. The IEP also included a series of accommodations for the student, including writing down his assignments, modifying classroom expectations, providing the student with visual and tactile opportunities to demonstrate his understanding, preferential seating and frequent check-ins.

The student’s needs are reflected in the five-and-a-half hours of specially designed instruction included in the IEP for every four-day rotation, which does not appear to unnecessarily segregate the student and is consistent with the six and three-quarters hours of specially designed instruction that the student received weekly during the last few months of the 2009-2010 school year and which he was scheduled to receive during the 2010-2011 school year.

The other critique presented by the parents, that the nature of the tutorial and coaching services were vague, is a fair assessment but reflective of the fact that the student had not been in

the school district for the prior year. As with the behavioral plan, school staff needed to work with the student in order to fine tune some aspects of the IEP.

As such, the IEP offered by RSU #51 for the student's xx grade year, the 2011-2012 school year, was reasonably calculated to provide the student with educational benefit.

D. What remedy is appropriate?

Because the school district violated its child find obligations and the student was thus denied a FAPE from the start of his xx grade year in September 2007 until his identification in March 2010, the family is entitled to a remedy.

When a student is deprived of a FAPE, he is entitled to "such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Compensatory educational services are one form of remedy, the nature and extent of which vary depending on the facts of each particular situation. Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184 (1st Cir. 1993). Not appropriate for purely procedural violations, compensatory education is a remedy designed to compensate a student for educational opportunities missed as a result of substantive IDEA violations. MSAD No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 19 (1st Cir. 2003); see also Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993).

Although an IEP need only provide some benefit, "compensatory awards must do more – they must compensate." Reid, 401 F.3d at 525. An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005); see also MSAD #22, 43 IDELR 268 (Me. SEA 2005) (stating that the typical compensatory education award is an award of "services in an amount sufficient to make up for the past educational deficiencies"). Compensatory education need not be an hour-for-hour replacement of lost time or opportunity; instead, a compensatory education award should be designed to "ensure that the student is appropriately educated within the meaning of the IDEA." Parents of Student

W. v. Puyallup Sch. Dist. #3, 31 F.3d 1489, 1497 (9th Cir. 1994); see also Reid, 401 F.3d at 523 (rejecting a “cookie-cutter approach” that “runs counter to both the ‘broad discretion’ afforded by IDEA’s remedial provision and the substantive FAPE standard that provision is meant to enforce”). An award of compensatory education should be fact-specific, depending on the child’s needs. Reid, 401 F.3d 516 at 524; Pihl, 9 F.3d at 188 n.8. Finally, a student’s right to compensatory education accrues when the school district “knew or should have known that the student [was] receiving an inappropriate education.” Ridgewood, 172 F.3d at 250.

Parents’ Argument:

The parents seek compensatory relief for the school district’s failure to provide a FAPE to the student from September 2007 until March 2010. The parents seek a compensatory award in the form of reimbursement for the costs incurred in obtaining compensatory services unilaterally by placing the student at Eagle Hill School as well as future educational services as deemed appropriate to complete the compensation the student is owed for the school district’s failure to provide FAPE for over two years, although they do not suggest any particular additional service. The parents contend that their decision to enroll the student outside the district was correct and entitles them to the equitable recovery of reimbursement since they acted with proper statutory notice in an attempt to properly compensate the student for past violations of IDEA rights. The parents argue that they placed the student at Eagle Hill School for his xx grade year in part as a compensatory remedy for the past denial of FAPE by the school district, noting that in their letter of August 13, 2010, to the school district, they stated that the student had required specialized instruction long before he was identified as eligible for special education in March 2010.

The parents argue that such an award is appropriate on the facts of this case, contending that it does not matter that the parents first purchased the services and then sought reimbursement rather than pursuing a hearing to seek future compensatory educational services. The parents

counter the school district's argument that tuition reimbursement is not available as a compensatory education remedy by pointing out that the language of the IDEA references remedies for past failures to provide FAPE in a timely manner as well as current failures to offer FAPE. The parents argue that the IDEA does not prohibit a hearing officer from awarding reimbursement for a unilateral placement designed to address, at least in part, a school district's failure to provide FAPE to a student. The family argues that the student's year at Eagle Hill School changed a lot for him, teaching him what he needs from an educational program in order to be able to learn successfully despite his disability, helping lift him from the despair and desperation that characterized his middle school experience, restoring him to a position of being able to benefit from his education, and igniting a passion for creative writing and artistic expression.³

With regard to the question of whether the family provided the school district sufficient notice of its intention to withdraw the student from RSU #51 and enroll him at Eagle Hill School, the family maintains that it made the decision to withdraw the student during summer break and notified the school district during that summer recess, meeting the statutory and regulatory requirement, citing a federal district court decision as well as a Maine administrative decision that address similar situations.

Finally, the parents argue that the student's placement at Eagle Hill School was proper under the IDEA. The parents note that it is a special purpose school focusing exclusively on the needs of students with substantial learning differences and which maintains a highly structured program, a low student-teacher ratio, a schedule of terms that allows student wide latitude to pursue interests while meeting core requirements, and utilizes a level system for the earning of

³ The parents offer an alternative ground on which reimbursement should be awarded, as a direct remedy for an appropriate unilateral placement capable of providing the student with an appropriate education for the 2010-2011 school year. The school district responds with argument as to why such a remedy could not be applied. Because the decision has already concluded that the student was offered a FAPE for the 2010-2011 school year by the school district, the parties' arguments on this point are not addressed.

privileges and freedoms. The parents emphasize that the student found positive results there which demonstrates the conclusion that the program was appropriate.

School District's Argument:

The school district argues that based on First Circuit precedent the family cannot obtain reimbursement as a form of compensatory education and an order of compensatory education should instead require a type of educational service in the future for the benefit of the child.

In addition, the school district argues that the parents are not entitled to a compensatory educational award because its failure to identify the student as eligible for special education in the fall of his xx grade year was a procedural violation, the student received a Section 504 plan with a host of accommodations during xx, xx, and xx grades, and the Section 504 plan was agreed to by the parents and the student's evaluator. The school district argues that the student's grades generally trended upward during xx grade, the general consensus was that xx grade was even better than x grade with average grades that trended upward, and he was described as growing emotionally during his years at Greely Middle School. As such, the school district argues, it would be impossible to conclude that the student received "no real educational benefit" from the time he entered Greely Middle School until his identification as a special education student in the spring of his xx grade year.

Next, the school district maintains that the family did not meet its notice obligation and thus its claim for reimbursement for the 2010-2011 school year must fail. The school district contends that the student was removed from Greely Middle School the last day of school of June 21, 2010, and that the family signed a contract for the student to attend Eagle Hill School the following year on June 25, 2010. The school district argues that by that point, the student was not expected to come back to the school district. The school district insists that by delaying notifying the school until their letter dated August 13, the parents were not in compliance with the requirement that notification occur ten days before withdrawal. The school district argues that

the notification obligation should be fully applied to this family and result in denial of their reimbursement claim.

Finally, the school district maintains that the student's placement at Eagle Hill School was not appropriate and thus bars the family's reimbursement claim. The school district argues that there was no evidence to support the conclusion that the student required a residential setting, the least restrictive environment of all under the IDEA. The school district maintains that in addition the student endured significant harassment or hazing and as such the placement cannot possibly be deemed proper. Finally, the school district maintains that the placement was not appropriate because it failed to contain any of the components of specialized instruction that the student required. The school district notes that the student did not receive instruction in executive functions, counseling, or social skills instruction.

Analysis:

The school district first argues that its failure to identify the student as eligible for special education services was a procedural violation and as such not subject to a compensatory educational remedy, although it does not cite any case that has classified a failure to identify as a procedural violation. The failure to identify the student here was a substantive IDEA violation which had significant substantive ramifications. The differences between the student's Section 504 plan of xx and xx grades and the IEP he was eventually provided in the spring of his xx grade year are major. During the time that the student was educated under the Section 504 plan, he was provided accommodations as to classroom and homework expectations and the only direct service he received was a half-hour of weekly counseling. As the school psychological evaluator noted, the Section 504 remediations were not sufficient to meet the student's needs.

In contrast, under the IEP of xx grade, the student received six-and -three-quarters hours per week of specially designed instruction as well as social work services. As noted above, the IEP also contained personalized goals, a transition plan, and accommodations to be provided the

student. The student's ability to access his education improved with his transition to the IEP. All of these factors lead to a conclusion that the school district's failure to identify the student in xx grade was not merely a procedural violation.

Next, the school district argues that the family cannot be awarded tuition reimbursement as a form of compensatory education. The school district is correct that the First Circuit has drawn a distinction between tuition reimbursement awards as a form of compensatory education and tuition reimbursement awards as a prospective remedy for a school district's failure to provide FAPE in a timely manner. See, e.g., Mr. and Mrs. I. v. MSAD No. 55, 480 F.3d 1, 25-26 (1st Cir. 2007) (upholding the denial of tuition reimbursement as a direct remedy for failure to provide FAPE in a given year but remanding the question of whether tuition reimbursement was appropriate as a form of compensatory education). As the court noted in Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 (1st Cir. 2006), "reimbursement" suggests tuition reimbursement as a backwards-looking form of remedial relief. Id. at 32. The court noted that monetary awards are limited to those for reimbursement for services privately obtained by a family because a school district failed to provide services to which a student was entitled and that reimbursement was a "matter of equitable relief, committed to the sound discretion of the district court." Id. (citing Roland M. v. Concord Sch. Comm., 910 F.2d 983, 999 (1st Cir. 1990)); see also Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124-25 (1st Cir. 1993). The court also noted that when "fashioning appropriate relief, courts have generally interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of 'related services.'" Id. (citing 20 U.S.C. § 1401(26)). Upholding the award of compensatory education in the form of reimbursement for private school tuition and related expenses when a school district failed to offer a student a FAPE, the court did not suggest that tuition reimbursement was not an appropriate form of compensatory education but cautioned that "reimbursement" by definition referred to actual and retrospective costs. Id. (noting that this reasoning was the substance of the

distinction between “tuition reimbursement” and “compensatory education”).

The other case primarily relied upon by the school district in its argument, Ms. M. v. Portland Sch. Comm., 360 F.3d 267 (1st Cir. 2004), also does not prohibit an award of tuition reimbursement as compensatory education. There, the First Circuit held that when a parent made a unilateral placement of her child at a private school but failed to give adequate notice to the school district, she was not eligible for tuition reimbursement as a direct remedy for the school district’s failure to offer FAPE to the child for that school year. Id. at 273. The court construed the parent’s effort to claim tuition reimbursement as an attempt to avoid the notice requirement, and denied her claim for tuition reimbursement since she did not provide notice and did not meet any exceptions to the notice requirement. Id. Although the court did not award the remedy of tuition reimbursement in that case, it did not prohibit such an award in cases where appropriate notice had been provided and held that because tuition reimbursement was not available to the parent in that particular case, the court did not need to determine when such claims would otherwise be cognizable. Id.

None of the cases cited by the school district bar tuition reimbursement as a form of compensatory education. Further, as the Eleventh Circuit Court of Appeals has observed, tuition reimbursement can in fact be an appropriate form of compensatory education, stating that the IDEA does not require “compensatory awards of prospective education to be [considered] inferior to awards of reimbursement.” Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1785-86 (11th Cir. 2008). In addition, the costs of related expenses may be included in a tuition reimbursement remedy. See, e.g., Deal v. Hamilton County Dep’t of Educ., 2006 U.S. Dist. LEXIS 76324, *14 (E.D. Tenn. 2006) (holding that reimbursement for travel and lodging may be reimburseable if related to the provision of education or related services); B.P. v. Charlotte-Mecklenburg Bd. of Educ., 2010 U.S. Dist. LEXIS 45555, *4-*5 (W.D. N.C. 2010) (noting that mileage should be reimbursed at the rate in effect at the time of travel). Finally, courts and hearing officers have

awarded reimbursement for unilateral placements as compensatory education remedies in a variety of cases. See, e.g., New Paltz Central Sch. Dist. V. St. Pierre, 307 F. Supp.2d 394, 395-96 (N.D.N.Y. 2007); Sanford Sch. Dep't., 47 IDELR ¶ 176 (MSEA 2006); School Admin. Dist. No. 22, 43 IDELR 268 (MSEA 2005).

Third, the school district argues that the family did not meet the statutory notice requirement and as such is not entitled to tuition reimbursement.⁴ When parents make a unilateral placement of a child, they are required to provide the school district with formal notification of their rejection of an IEP either at the most recent IEP meeting or at least ten business days prior to the removal of the student. 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 30.148(d); *MUSER* § IV.4.G.3.d.i.II. In the event that a family does not meet the notice requirement, the cost of reimbursement may be denied or reduced. 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 30.148(d); *MUSER* § IV.4.G.3.d.i.II.

The sequence of events in this case indicate that the family met the notice requirement. The 2009-2010 school year ended on June 21, 2010. On June 25, 2010, the family forwarded a check for half the annual tuition, plus a deposit and student fee, and signed an enrollment contract for the student to attend Eagle Hill School. By letter dated August 13, the family informed RSU #51 that the student was being withdrawn, more than ten days before the start of the school year.

The cases cited by the parents indicate that when parents notify a school district over the summer in advance of the start of the school year, they meet the statutory requirements. In Sarah M. v. Weast, 111 F. Supp.2d 695 (D. Md. 2000), a district court held that the enrollment of a

⁴ It is not entirely clear that the notice and appropriateness provisions apply to the remedy of tuition reimbursement as compensatory education as it appears in statute and regulation in sections related to unilateral placements as a measure to address a current denial of FAPE. 20 U.S.C. § 1415(i)(2)(C). In this case, tuition reimbursement is being granted as a compensatory educational remedy for a past failure to provide FAPE. The school district did in fact offer the student FAPE for the 2010-2011 school year, so the timing of the parents' notice of withdrawal for that year is somewhat irrelevant to this analysis. Nevertheless, the analysis proceeds assuming that all the requirements that apply to direct reimbursements for unilateral placements apply when tuition reimbursement is being awarded as a compensatory educational remedy.

child in private school does not necessarily equate with her removal from public school. Id. at 700-01. There, the court held that when a student was enrolled by her parents at a private school in May 1998, to begin classes in the fall of 1998, the parents provided sufficient notice of her removal from public school by notifying the school district in July. Id. In Sanford School District, a hearing officer adopted the reasoning of Sarah M. in awarding a family reimbursement of private school tuition as a compensatory educational remedy when the family enrolled the student in the private school on July 1, 2005, and notified the school district of the student's withdrawal on August 9, 2005. Sanford School District, 47 IDELR 176 (MSEA 2006).

As such, the parents' decision to withdraw the student and subsequent notice of removal to the school district occurred within a timeframe sufficient to meet the notice obligations in statute and regulation in this case.

Finally, the student's placement at Eagle Hill School was appropriate. Parental placements do not need to conform with all IDEA requirements but do need to be appropriate in the sense that the program must be reasonably calculated to provide the student with educational benefit. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993). Eagle Hill School is a special purpose school in which all students have learning disabilities, each student receives an IEP, the student's school days were well structured, the student's classes had a low student-teacher ratio, the schedule of terms allowed the student the opportunity to pursue interests while meeting core requirements, the program utilized a system for the earning of privileges and freedoms, and the entire program was designed to accommodate for Eagle Hill School students' learning disabilities. Although social work services were not a consistent part of the student's program, they were made available during the period of crisis in the spring. The student's placement at Eagle Hill School was successful and allowed the student to gain mastery of skills he lacked, become engaged in his education and work products, and advance academically. The student's conflict with another student in the spring of his year at Eagle Hill was handled

effectively by school staff and does not render the placement inappropriate. In conclusion, the program was appropriate and provided the student with educational benefit.

Furthermore, the student's program at Eagle Hill School appropriately compensated for the failure of the school district to refer, evaluate, and identify the student for the period in question between 2007 and 2010.

V. ORDER

1. RSU #51 violated state or federal special education law by failing to refer, evaluate, and identify the student as eligible for special education services in a timely manner beginning in September 2007.
2. RSU #51 did not violate state or federal special education laws by failing to provide the student with a free appropriate public education for the 2010-2011 school year.
3. RSU #51 did not violate state or federal special education laws by failing to provide the student with a free appropriate public education for the 2011-2012 school year.
4. The school district is ordered to reimburse the family \$66,111.92 for tuition and related expenses that the family expended for the student to attend Eagle Hill School for the 2010-2011 school year as compensatory education for its child find violations.

Rebekah J. Smith, Esq.
Hearing Officer