

State of Maine
SPECIAL EDUCATION DUE PROCESS HEARING
12.075H — Parents v. Portland Public Schools
September 7, 2012

Representing the Parents: Richard O’Meara, Esq.

Representing the District: Eric Herlan, Esq.

Hearing Officer: Sheila Mayberry, 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 May 25, June 4, 5, 11, 18, and July 3, 2012 in Portland, Maine. Present for the entire proceeding were: Eric Herlan, Esq., counsel for the Portland Public Schools (“School”); Bonnie Violette, Lead Special Education Coordinator for the School; Richard O’Meara, Esq., Counsel for the Parents; and the Student’s parents, father and mother (“Parents”).

Testifying at the hearing were:

- Student’s Father
- Student’s Mother
- Marcia Hunter, Ph.D., Neuropsychological Evaluator
- Barbara Melnick, Director of Aucocisco School
- Karen Neidlinger, Aucocisco School Faculty
- Jane Mack, Speech Language Therapist
- Steve Carroll, Special Education Teacher
- Hiram Sibley, Assistant Principal, King Middle School
- Lisa Hatch, General Education Teacher
- Jen Lindsay, Special Education Teacher
- Bonnie Violette, Lead Special Education Coordinator

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On March 28, 2012, the Parents requested a due process hearing regarding their son, the student. The School submitted a Partial Motion to Dismiss based upon the statute of limitations. On April 30, 2012, a prehearing conference was held in Portland, Maine. Participating in the conference were: the Parents; Mr. O'Meara; Ms. Violette; and Mr. Herlan, Esq. Documents and witness lists were exchanged in a timely manner. Both parties submitted additional documents after the five-day deadline without objections. The Parents submitted 85 documents (347 pages, herein referenced as P. #) The School submitted 85 documents (572 pages, herein referenced as S. #). The Parties agreed that the first day of hearing would be dedicated to presenting witnesses on the School's Partial Motion to Dismiss.

On June 1, 2012, the Hearing Officer granted the School's Partial Motion to Dismiss claims alleged to have occurred during the 2008-2009 and 2009-2010 (up through March 27, 2010) school years based upon the statute of limitations of the Individuals with Disabilities Education Improvement Act ("IDEA") and the Maine Unified Special Education Regulations ("MUSER"). (See administrative record for Order Granting Partial Motion to Dismiss.)

At the close of the testimony on July 3, 2012, both parties requested to keep the hearing record open until August 15, 2012 for the submission of closing memoranda. The District submitted a 34-page closing argument and the Parents submitted a 58-page closing argument. The record closed upon receipt of these documents, on August 15, 2012. The parties and the Hearing Officer further agreed that the decision would be due on September 7, 2012.

II. THE ISSUES

- 1. Did the Student's IEP and placement from March 28, 2010 through the end of the 2010-2011 (xx grade) school year fail to provide the student with a FAPE?**
- 2. Was the Student's IEP and placement for 2011-2012 (xxth grade) school year reasonably calculated to provide him with a FAPE?**
- 3. If not, is the family entitled to reimbursement of their costs for the student's unilateral placement at the Aucocisco School during school year 2011-2012?**
- 4. Is the student's proposed IEP and placement for school year 2012-2013 (xx grade) reasonably calculated to provide him at FAPE?**

5. **If not, is the student entitled to continue his placement at the Aucocisco School at the District's expense, or is he entitled to any other form of compensatory education or remedies?**

III. PRELIMINARY LEGAL ISSUE

The Parents request that the Hearing Officer address the argument raised in their response to the School's Partial Motion to Dismiss that was not addressed in the Order granting the School's motion. The Parents argued that Maine's statute of limitations for filing due process hearing requests was not legally changed by the Maine's legislature, but that it was "illicitly" changed by the Department of Education when the new regulations were released in January 2010. Specifically, they argue that, while the "look back" period in MUSER XVI.5.A.2 went through the proper emergency rule-making procedures and changed from four year to two years, no emergency rule was proposed to change the language of MUSER XVI.13.E, which allows a four-year filing deadline. The Parents argue that someone at the Department must have "illicitly" changed the language of MUSER XVI.13.E at the time of printing. The Parents argue that the change in MUSER XVI.13.E has no legal effect, and therefore, that the limitations period does not apply to this case because the IDEA recognizes time limitations permitted under state law, citing 20 U.S.C. § 1415(f)(C).

While the Parents' argument is intriguing and perhaps not without merit, I am without jurisdiction to change the regulations as they are written. A hearing officer has jurisdiction under 20 U.S.C. § 1415(f). The authority of a hearing officer is limited to determinations relating to the identification, evaluation or educational placement of a child with a disability or the provision of a free appropriate public education ("FAPE") to the child. Thus, the IDEA clearly limits the authority of a hearing officer to decide matters involving whether or not the child was deprived of a FAPE. I decline to go beyond this authority and make conclusions regarding propriety of the Department's rule making process or the legality of the regulations themselves. The Parents could seek a determination on the legality of the conduct of an agency within the executive branch of the Maine State government, which is clearly outside of my jurisdiction.

IV. FINDINGS OF FACT

1. The father and mother ("Parents") filed their due process hearing request ("Hearing Request") on March 28, 2012. (Hearing Request)

2. The Student is xx years old. He was born on xx/xx/xxxx. (Hearing Request) He lives with his parents and sister in Portland, Maine.
3. At age xx, Cumberland Child Development Services evaluated the student and found him eligible for services due to “developmental delay.” (P. 9) Intervention services included Speech/language and occupational therapies. (P. 5)
4. A neurological evaluation by Dr. Steven Rioux in 2003 indicated that the student had a mild coordination disorder. (P. 12)
5. An Individualized Family Service Plan (“IFSP”) meeting was convened on December 3, 2003. (P. 17) The exceptionality was noted as Speech/Language Impairment. The IFSP developed included speech/language services, as well as occupational therapy. (P. 17)
6. The student entered xx in 2003 at the Hall Elementary School in Portland, Maine (“School”). An Individual Education Plan (“IEP”) was developed for him under the exceptionality of Speech/Language Impairment. (P. 13) He received speech/language and occupational therapy (“OT”) one hour each per week. (P. 13)
7. The father reported that during xx grade (2004-2005), the student began having issues keeping an appropriate distance from his peers and had difficulty making friends. Writing and organization issues became apparent as well. He and the mother were becoming concerned. (Father’s testimony)
8. In an IEP meeting on November 10, 2004, the Team discussed the student’s behavior at school. It was reported that he had a short attention span in the classroom, was not connecting with other students socially, and was approaching them inappropriately. The mother reported that the student continued to believe that other students did not like him. There was follow-up appointment with Dr. Rioux. Social worker services were added to his IEP as well as sensory breaks in the resource room three times daily, and he was placed in a literacy group four times per week. (P. 19)
9. An IEP meeting was convened on January 7, 2005 for the student’s annual review. (P. 23) The IEP team reported that the student continued to exhibit functional weaknesses but his fine and gross motor skills were improving. The IEP determined that he would continue his speech/language and OT therapies at the same frequency, continue with a literacy group, start Reading Recovery services, continue sensory breaks, social work services for pragmatics and social skills, as needed, and be provided an option for quiet lunch. (P. 26)
10. The student entered xx grade in the fall of 2005. Both Parents were worried about his temperament and apparently pervasive unhappiness. The student told his parents that he did not have any friends and that other students were mean to him. He frequently cried at night. He felt that his peers did not like him. The Parents saw that the student felt he could not fit in with his peers and that he could not focus on his work. (Parents’ testimony)

11. An IEP meeting was convened on October 17, 2005. (P. 34) The team discussed how the student had made “great strides” in reading and comprehension, expressing himself in the classroom, and essentially correcting his lisp. However, all the deficits in the student’s functional skills discussed in January 2005 still persisted. He was not self-directed, did not pay attention to instructions, and struggled with his personal space, which created negative social issues. The team agreed that he should be reinstated into a social group and reevaluated, since it did not appear that his eligibility under speech/language impairment was accurate. (P. 38) Direct speech/language therapy was discontinued. (P. 38)
12. In December 2005, the School’s psychologist, Sally Serunian, performed a psychological evaluation, which indicated that teacher and parent rating scales showed clinically significant indicators for hyperactivity, anxiety, depression, and withdrawal. (P. 41, 46) The IEP team reviewed her report on February 16, 2006, as part of the student’s annual review. (P. 60) The team, which also included Dr. Christopher Kaufman, the School’s lead psychologist, was informed that the student had performed within the average ranges on the testing instruments (WISC-IV, Bender Visual-Motor Gestalt.) However, his math scores indicated significant deficits. In addition, the parents’ and teachers’ ratings scales for hyperactivity, depression, withdrawal, and attention problems were significantly high. The Parents reported that they had taken him to be evaluated by Dr. Jack Mann and that he had given an Attention Deficit Hyperactivity Disorder (“ADHD”) diagnosis. The IEP team agreed that student’s eligibility category should be changed to Other Health Impairment (“OHI”). The IEP agreed that the student would receive six hours of direct instruction per week; social work services on an informal basis for pragmatic and social skills; OT for .5 hours per week; an option to be in the quiet lunchroom; and sensory breaks built into his school day. (P. 61) His IEP goals remained the same, including math and hand writing skills. (P. 66-68)
13. The father testified that the student continued to be upset at night, crying and telling his Parents that kids were mean to him. (The father’s testimony)
14. The student began xx grade in the fall of 2006. An IEP meeting was convened on October 11, 2006. (P. 92) The discussion was focused on the student’s emotional, psychological, and social issues that had become apparent. The team reported that the student was anxious at school, moved around a lot, cried, at times inconsolably, worried about not being in the right place, and was overwhelmed. His social skills were weak and he had few friends. His misperception of social interactions led to inappropriate behaviors toward other students who were becoming less tolerant of him. (P. 97) While he was making progress academically, the team discussed whether he was in the right placement. (P. 97) Dr. Kaufman, who was present at the IEP meeting on October 11, 2006, asked the IEP team if the student fit the Asperger’s profile. The team agreed that an Asperger’s “checklist” would be completed to rule out Asperger’s Syndrome. (P. 97) Social coaching was also added to his IEP at that time.
15. In a memorandum to Cheri Drago, the School’s learning strategist, dated October 10, 2006, Karen Hunter, one of the School’s social workers, stated her impression of the student. (S. 407) She stated that, “My concern is that student seems totally overwhelmed this year, although I’ve only met with

him a few times. He still complains about having ‘no friends’, and he states he just walks around on the playground alone. He seems preoccupied with odd things at times - grass, last year the cardboard cutout. He has a very low frustration tolerance and has a great deal of anxiety when attempting new things or activities he does not enjoy. He is so sweet and kind but his anxiety can literally sicken him and take away his appetite. I see him as very emotionally fragile at times and not comfortable in his own skin.” (S. 407)

16. Dr. Kaufman testified that he has no recollection of what happened after the IEP team agreed to submit the Asperger’s checklist. He does not recall producing a report or speaking to the School or the Parents about a checklist. He stated that it would be unusual for him not to do so, but he had no recollection of discussing the issue further with anyone. (Kaufman testimony) No checklists or evaluations of checklists were submitted into the record.
17. The Parents privately engaged Barbara Baum Freethy, M.Ed. for a social cognitive therapy evaluation of the student. Her evaluation took place between October 13, 2006 and March 15, 2007. (S. 284-291) In a summary report, Ms. Freethy stated that the student’s Sensory Profile indicated difficulties in executive function, language processing, emotional regulation, cognitive flexibility, and social skills. She recommended that the student continue his social thinking groups, include activities for increasing problem solving/reasoning skills in his social group, and incorporate the Collaborative Problem Solving approach into his school day to reduce his frustration and anxiety in the academic setting. (S. 288-290)
18. The Parents testified that during xx grade, the student continued to cry at night. He was feeling bad about himself. Ms. Freethy suggested that they see Dr. Marcia Hunter, Ph.D., to try to find out why he was so anxious and unhappy. (The father’s testimony)
19. The Parents engaged Dr. Hunter to perform a neuropsychological evaluation, which was conducted on December 19-20, 2006, and January 17, 2007. (S. 261-283) She noted that the student was in a high state of distress at the time he was referred. (S. 274) In summary, her diagnostic impressions stated that the student presented a complicated profile of emotional, educational, and social difficulties. She stated that his ADHD diagnosis could not explain his overall profile, and that his range of symptoms raised the possibility of a developmental disorder and/or an Autism Spectrum disorder, such as Asperger’s Syndrome. However, since his emotional sensitivity was so diffuse and intense, she declined to diagnose a more specific syndrome, such as Asperger’s. Instead, a more conservative diagnosis was appropriate in her view. She therefore assigned the diagnoses of Generalized Anxiety Disorder Not Otherwise Specified (“NOS”) and ADHD. (S. 271-272)
20. Dr. Hunter provided general, academic, social, and therapeutic recommendations, including amending his IEP to shift him out of ‘crisis’ mode, providing a shortened school day, and arranging for a short-term restricted environment to reduce environmental stress. Many of Dr.

Hunter's general recommendations focused on attending to the student's anxiety disorder.¹ (S. 274-280)

21. On March 19, 2007, the IEP team reviewed Dr. Hunter's report, as well as Ms. Freethy's report, of the student's progress in her small social group. (P. 121) At the suggestions of both providers, the IEP team included strategies into the student's Goals and Objectives. (P. 123) The Parents reported that it was during this period that the student was prescribed Zoloft. The eligibility category remained OHI. (P. 121)
22. The IEP developed from the meeting on March 19, 2007 included two Annual Goals: 1) raising his writing level by one year's growth; and 2) increasing his appropriate behavioral and social skills by one year's growth. (P. 128-130) The IEP included direct instruction in small groups in a special education setting four times a week for one hour. He was to receive OT two times per week for 30 minutes. (P. 127)
23. The IEP also included Short Term Objectives for three of the four goals specifically addressing functional behavioral issues. (P. 130)
24. The student began xx grade in the fall of 2007. He was placed in an integrated xx-xx grade classroom setting. The Parents felt that it was a better fit for the student due to the reduction in transition from one teacher to another, and the same set of students was included over the course of the grades. (The father's testimony)
25. The October 27, 2007 IEP noted that the student still had a poor ability to stay focused and attend to his work, to be organized approaching tasks, cope with changes in routines, and understand others' personal space. (P. 140) His parents were still concerned about his self-esteem and social skills. (P. 140) Academically, he was on grade level in reading and math. (P. 142) Writing was still a struggle for him; independently, he produced below grade level. (P. 142)
26. The IEP included the following goals: 1) improve his organizational skills by one year's growth; 2) raise his writing level by one year's growth; 3) increase his appropriate behavioral skills and his social skills by one year's growth; 4) independently demonstrate spatial awareness within the OT session 3 out of 4 times in the following areas: a) personal space and objects by positioning himself and/or items in a safe non-invasive manner to perform the task or activity required; and b) relation of letters on the keyboard by performing games using the keyboard patterns as measured by notes recording observation of performance. (P. 143-149)

¹ They included allowing a slower pace; reduced stimulation; incremental learning strategies that reduce his experience of failure; offering to switch to a preferred interest before he escalates; time to rehearse new behaviors and anticipate times of transition or novelty; explicit scripts to learn as a means of organizing his problem-solving; and engagement in cognition, e.g. counting backwards, to help him to decrease emotionality and reestablish his equilibrium.

27. IEP progress reports made during the 2007-2008 school year indicated that the student was making progress in his OT and writing goals, as well as his organizational skills. (P. 160-170) With respect to his behavioral and social goals, the student's behavior had improved; he still faced challenges under some circumstances, but had come "a long way." (P. 169)
28. By the end of xx grade, the Parents reported that the student was somewhat stable. They felt that perhaps the medications were working, but that there was no improvement, and perhaps deterioration, in his social interactions or self-esteem. He still expressed negative thoughts at night, but his anxiety level was "in check." (The father's testimony)
29. The student started xx grade in the fall of 2008. The father reported that, while the school year started out well, higher expectations in school seemed to increase the student's anxiety levels. During the second semester, he started crying consistently every night. He told his parents that no one liked him, and that he wished he could have his tear ducts removed so that he could stop crying. His Parents were trying to find a "magic bullet" that would be effective. He had continued his Zoloft medication. (The father's testimony)
30. The student's scores on the Northwest Evaluation Association ("NWEA") assessment for the fall of 2008 indicated that he was in the "Low" range for mathematics and in the "High" to "High Average" range in reading, except for "Informational in Persuasive" reading, which was in the "Low Average." (P. 172) No testing scores were produced for Language Usage.
31. An IEP team meeting was convened on November 21, 2008 to review the student's program. (P. 175) No changes were made to his IEP, but it was noted that he had been more flexible than in the past. (P. 175)
32. The Parents had privately engaged Daniel Bates, DO, to treat the student for ADHD and anxiety. On March 4, 2009, Dr. Bates reported a visit with the student for a medication recheck. (P. 178) He stated that while the student's "triggerable" hypersensitivity tended to be what was getting him "in trouble," "improving his focus and reducing his impulsivity would help him out both academically and socially." (P. 178) His assessment was ADHD, mixed type, with generalized anxiety. His plan was to raise the dosage for Zoloft and continue with Strattera. (P. 178)
33. The third quarter comment section indicated the following: "The student has certainly come a long way since he entered room 20 as a xx grader. Now that he is a xx grader, it is important that he accepts that our expectations of him are much higher. Sometimes that is difficult for him. We are concerned that the student's progress is not in line with what we had hoped for at this point. At times he is resistant to what is required to be a part of a community of learners, doing his best and treating others with respect." (P. 184)
34. IEP progress reports for March 2009 indicated that the student had been using supports more effectively to develop his organizational skills; was more willing to take direction; still struggled with his writing; and did well in math but only with one-on-one support. (P. 179-182) Progress Report behavioral goals stated, "Lately the student has shown some improvement in this area,

however it is very up and down with him. He will have a good day and then have a bad day. It is not always predictable.” (P. 181)

35. An IEP team meeting was convened on March 18, 2009 for the annual review of the student’s IEP. (S. 251) While no changes were made to his IEP, the Written Notice indicated the student struggled with transitions, perspective taking, handling frustration and reciprocal conversations. The Notice stated that, “It takes a lot of energy for the student to handle the school day.” His handwriting and math were challenging. (S. 251) The Notice indicated that, while he had made “great strides” academically and socially, “He still is sort of on his own in the classroom.” While he is more accepting of feedback, he would not tolerate it, was defensive to comments, argumentative and produced no more than the minimum amount of work. He was not on grade level in reading and math, needed one-on-one support to get started, and easily got off task. (S. 252) He was working on social pragmatics and perspective taking in social work sessions, attended a daily sensory diet group, and had daily coaching which had been effective, “but not to a great degree.” (S. 252)
36. An IEP team meeting was convened on April 3, 2009. (P. 205, S. 187-189) The purpose of the meeting was to discuss the student’s transition into middle school. (P. 207)
37. An IEP was developed from the April 3, 2009 meeting. It had an effective date of April 3, 2009 to March 18, 2010. The exceptionality was noted as OHI (P. 188) The IEP summarized that the student was on grade level in reading and math, while writing was a challenge for him. (P. 192) He remained significantly below grade level with respect to organizational, writing, social, and behavioral skills. “He has difficulty staying in his own space and is frequently very ‘silly’ with his peers, often to the point of annoyance. When corrected about situations, the student often becomes very defensive and has difficulty listening to others’ opinions. He has been coached for these issues for the past three years and has made some progress, however, is still not able to change his behavior without constant reminders of the appropriate actions.” (P. 192) “He becomes extremely anxious in difficult situations and may become belligerent.” (P. 192)
38. The goals from the IEP dated April 3, 2009 included the following: 1) improve organizational skills by one year’s growth; 2) raise writing level by one year’s growth; 3) increase appropriate behavioral skills and social skills by one year’s growth. “He will keep to his personal space by keeping his hands and feet to himself. He will avoid making silly and annoying comments and noises to his peers. The student will become more aware of times he might need a break because of fatigue and he will appropriately remove himself from the setting and relax for a few minutes before coming back to work; ” 4) given sensory strategies and breaks as needed, the student will participate in class activities and transitions, responding to increased demands or disappointments while maintaining control of his emotions 5 out of 5 school days. (P. 193-199, S.197-203) Detailed short-term goals were added.² Also an array of accommodations, modifications, and behavioral

² Special education services included direct instruction in a small group setting, specially designed in the SPED setting and in the regular classroom (P. 200) His short-term goals for these functional annual goals included the same short-term goals from his prior IEP. They included the following: developing coping skills to calm down;

supports were included.³ Special education and related services included direct instruction in a special education setting for four one-hour sessions per week; specially-designed instruction in the regular education setting for five 24-minute sessions per week; and specially-designed instruction in the special education setting for one hour per week. (P. 200).

39. IEP progress reports for June 2009 indicated that for his Instructional goals he made “satisfactory progress” for writing, and had “achieved” his goal for improving his organizational skills goal. (S-198, 200). The student made “limited progress” in his Behavioral goal. The June 8, 2009 narrative stated, “The student has made some improvement in this area with a lot of support. However, this is very sporadic and inappropriate behavior can be set off quite quickly, subject to the student’s perception of an experience.” (S. 202) The student’s OT goal progress indicated that he had made “satisfactory” progress. (S-197).
40. In April, June, August, and October of 2009, and January and April of 2010, the student was seen by Dr. Bates or Dr. O’Hanlon, his associate from Integrated Behavioral Health. (P. 208, 209, 210, 217-219) In reports of the visits, Dr. Bates or his associate assessed the student’s profile as ADHD, Asperger’s, and anxiety or “possible Asperger’s.” *Id.*
41. The student’s father testified that he did not see any of the notes from Integrated Behavioral Healthcare until they were produced in preparation for the due process hearing. (The father’s testimony) He stated that if he or the student’s mother had been aware of the notes from Dr. Bates, they would have provided them to the IEP team. (The father’s testimony)
42. The student began xx grade at King Middle School in the fall of 2009. His regular education teacher was Lisa Hatch and his special education teacher was Steve Carroll. Ms. Hatch’s class had approximately 20 students and had an educational technician available as support staff. (Hatch, Carroll Testimony) Ms. Hatch stated that she developed a good relationship with the student and could talk to him about perspective taking and boundary issues, constantly talking to him and coaching him during structured and unstructured times (hallways, breaks) about understanding his own personal space. (Hatch testimony)

engaging in social-accepted behavior by staying in his own personal space, having no incidences of inappropriate intrusion on others 4 out of 5 days a week; participating in reciprocal conversation with adults and peers by not only sharing his own thoughts but also listening to others' thoughts and asking questions or making comments about those thoughts, 2 out of 5 times the situation presents itself; accepting constructive criticism from teachers and peers without becoming anxious (crying, becoming rigid, displaying an exaggerated, tense facial expression) 5 out of 5 times. (P. 198)

³ These accommodations and modifications included the following: elimination of cursive expectation; access to a computer; long term assignments broken into smaller parts, steps; homework changes (reduction in math problems, limitation on amount of time spent on homework); inclusion of French as a foreign language; extra time to complete math tests; options to take tests in another setting if needed; academic support within the classroom for 100 minutes weekly; preferential seating; continuation of the OT consult for 30 minutes weekly; breaks as needed. (P. 206)

43. The student's father stated that expectations for homework and classwork in middle school were higher. It became immediately apparent to the Parents that things were not going well for the student. They were getting reports of high anxiety and difficulty with transitions going from class to class, and completing homework at night was difficult. He frequently cried at home. (The father's testimony)
44. While the student's triennial evaluation and IEP review were due in December 2009, there is no record that they were performed at that time. Dr. Kaufman did not have any memory of why they did not occur. (Kaufman testimony)
45. Dr. Bates saw the student on October 26, 2009 and January 11, 2010. His notes indicated that the student had "proudly" showed his report card, and that the student's mother reported that she had seen a "vast mood improvement." (P. 219) He indicated that improvement had been made regarding depression, anxiety, sleep, and concentration. While homework was overwhelming at first, the student had become "more efficient at it." (P. 219) The student's father reported that the student's comfort level "comes and goes," that academics were "going pretty well," that the student was "responsive," but that there were "some periods" of some school behaviors. (P. 218) Dr. Bates noted that a reduction of certain medications would be considered for the summer. (P. 218) However, by April 5, 2010, Dr. Bates reported indicated that the student "regresses routinely as defense." (P. 217)
46. Progress reports on the student's IEP goals were reported in March 2010. (P. 212) While no descriptive narrative was included, the reports indicated that he made satisfactory progress (designated as a "2") on all goals, including organization, behavioral, and writing skills. (P. 212)
47. The student's IEP expired on March 18, 2010. (P. 201) No evidence was submitted into the record that there had been any agreement to extend it. Mr. Carroll, who had been the student's special education teacher in xx grade and case manager in xx grade, testified that he did not know why the IEP team meeting had not been convened sooner. (Carroll testimony)
48. Between January and April 2010, the student participated in the Social Thinking Group for 30 minutes per week. This activity was not included in his IEP, but was something that the Parents had been requesting. (The father's testimony, S. 148) The skills are developed by way of theater activity, using games to help middle school students improve their social behavior and communication across all settings. (S. 148) The group focused on understanding paralanguage (nonverbal) elements of communication; inhibiting behaviors (thinking before acting); group interaction; understanding body language; planning and organizing; cognitive flexibility; and self-monitoring (S. 148)
49. In his April 2010 report, Rohan Henry, the Social Thinking Group's staff leader, wrote the following third trimester report on the student's participation in the theater group:

One of the student's biggest challenges is his inability to consistently decipher unstated expectations or "reading the between the lines." This occasionally leads

to problems regulating social interactions. When his peers are quietly listening for the teacher's next instruction, the student is sometimes the last one to pick up on the nonverbal cue. During activities where the student is required to focus and give his undivided attention, the student sometimes will fidget, slouch in his chair or gaze around the classroom. The student is also working hard on self-monitoring. He has become increasingly aware that he needs to check himself more often in relation to others in the group. The student is able to organize and manage a 2-3 step plan of action. However, when asked to shift or revise his plan in the face of obstacles, when given new information, or when he made a mistake, the student becomes stuck at times. The student is an important member of the group. He interacts with his peers with humor and great sensitivity. The student approaches each activity with a thirst for learning and enthusiasm. Many of the areas covered in the Social Thinking Group are addressed in the Maine Learning Standards. A copy of those standards are attached and scored where appropriate. (S. 148-149)

50. The father testified that between January and April 2010, the student began having a very difficult time at school and at home. He stated that the student had become more argumentative and had difficulty completing assignments and homework. It was very stressful trying to get the student to finish his homework at night. The father felt that the student's anxiety about school was clouding how he felt about school and that he was overwhelmed. He stated that he and the student's mother had been trying to get the student into a social skills group of some sort for a long time, but it only happened in January 2010. He did not know why it was never part of his IEP. He felt that the student's ability to socialize within his peer group and with teachers colored his entire educational experience and inhibited his ability to learn. felt that finally, someone understood how to work with the student. (Father's testimony)
51. On April 6, 2010, the School administered an Academic Achievement Assessment using the WIAT II assessment tool. (S. 167) Mr. Carroll, the student's special education teacher, administered the assessment. The report indicated that the student was receiving special education as a student with a "specific learning" disability. (S. 167) the student's composite reading scores fell in the "average" range and his reading comprehension scores fell in the "high average" range. (S. 168) His composite math scores fell in the "low average" range. (S. 169) His written language composite score fell into the "average" range. (S. 169)
52. On April 27, 2010, Mr. O'Hanlon, a colleague of Dr. Bates, noted a visit from the student and his mother. (P. 215) He stated that the student's mother needed to discuss the student's stress responses and coping skills. He noted that the student was not responding well to teachers' rules. He was tearful, angry, intrusive, demanding, and avoidant. (P. 215)
53. On April 28, 2010, William J. Ferreira, the School's psychologist, performed a psychological evaluation as part of the student's triennial review. (S. 151-156) Mr. Ferreira's diagnostic impressions indicated that the student demonstrated average to above average range of conceptual reasoning, but had increasing difficulty processing visual, spatial, and symbolic information, which placed him in the lower average range. "His relative increasing weaknesses in processing more complex visual symbolic information may be reflective of nonverbal processing difficulties." (S.

155) Mr. Ferreira also indicated that the student continued to exhibit high levels of emotional and behavioral disinhibition, along with attentional, executive function, and social competence weaknesses. He stated further that, “While weaknesses in attention and executive dysregulation support an ongoing diagnosis of attention deficit hyperactivity disorder, the level of emotionality liability mood irritability, and social interactive difficulties that the student is rated as experiencing indicates that he likely experiences a broader range of difficulties than AD/HD alone. Diagnostically, the question as to whether the student experiences functioning reflective of Asperger Disorder or mood disorder still remains open, but needs to be addressed.” (S. 155) “The student is viewed as in need of continued assessment to further rule out whether his functioning represents Asperger disorder and/or additional impact from mood disorder.” (S. 155) His triennial testing used the WIAT II Grade equivalent and the WISC IV. The WIAT II indicated that the student was performing below grade level on subtests.⁴ His full-scale WIAT IV score was “average.”⁵ (S. 152)

54. Mr. Ferreira reported teacher and parent ratings. He stated that their ratings were largely consistent. The student showed “very significant problems with his emotional controls” and he was “highly prone to overreact to events and to experience excessive periods of emotional upset.” (S. 155). His very high levels of disinhibition were experienced more at school than at home. In addition, Mr. Ferreira stated that in school the student had “significant difficulty restraining his impulses and showing a strong tendency to interrupt and disrupt group activities. ” His findings also indicated that the student showed a variety of significant metacognition problems affecting his schoolwork performance. The student had difficulty getting started on tasks, remembering the steps to follow to complete a task, organizing his materials efficiently, and checking over the quality of his work. Mr. Ferreira stated that, in conjunction with his difficulties in executive function, the student also showed a high level of attentional weaknesses both at home and at school. Finally, he found that “Along with his proneness to distractibility, impulsivity and restless/overreactive behaviors, the

⁴ Scale	Score	Grade Equivalent
Word reading	97	5.8
Reading comprehension:	117	11
Numerical Operations:	80	4.4
Math reasoning:	100	6.8
Spelling	93	4.3
Written Expression	86	3.7
Listening Comprehension	78	2.8

⁵ Scale	Composite Score	Percentile Rank	Qualitative Description
Verbal Comprehension	106	66	Average
Perceptual Reasoning	100	50	Average
Working Memory	86	18	Low Average
Processing speed	85	16	Low Average
Full Scale	94	37	Average

student was also rated as experiencing high levels of social interactive difficulties and proneness to irritability." (S.155)

55. An IEP team meeting was convened on May 3, 2010 to discuss evaluation results. (S. 141) It should be noted that no regular education teacher was present at this IEP meeting. (S. 142, Hatch testimony) The team agreed with Mr. Ferreira's recommendation to assess the student in order to rule out Asperger's Syndrome. The team further agreed that until such testing was completed and reviewed in the fall of 2010, teachers would lessen the student's workload to help manage his anxiety. The Written Notice did not indicate any agreement to extend the expired IEP or create a new one. No social skills goals or related services were discussed. (S. 142) The Written Notice indicated that the student was having "difficulties within the social pragmatics areas. This is impacting his daily ability to navigate within the mainstream curriculum and social arenas. More information is needed so testing has been suggested." (S. 143) No assessment had been completed by the end of the school year.
56. The student's mother testified that in May and June 2010 the student's anxiety and argumentative behavior did not change. He continued to be very "emotionally uptight" at night about what happened during the school day. (The mother's testimony)
57. The student's father reported that by the end of xx grade, the student had not improved his social skills. His anxiety was high and he had not progressed academically. He was very disorganized. Mr. Ferreira's initial report made the Parents wonder if something different should be done since he had only been treated for anxiety and ADHD. (The father's testimony)
58. During the summer of 2010, the student attended an overnight boys camp, the same one he attended the year before without incident. However, interpersonal issues arose with other campers and he was reported to have killed and dissected a frog. The student's parents took him home after two days. (The father's testimony)
59. The student returned to School for his xx grade year in September 2010. There was no IEP in effect at that time. His regular education teacher was Ms. Hatch again, since it was a "looping" year for her class. Mr. Carroll had been assigned as his case manager and special education teacher. (Hatch and Carroll testimony)
60. The father testified that they began to receive phone calls right after school started about the student's behavior. He was argumentative toward teachers. He was anxious and emotional at home. (The father's testimony)
61. Between mid-September 2010 and mid-October 2010 the student's teachers reported to his Parents that the student had transitioned reasonably well to xx grade. There were no reports of any serious behavior issues. (S. 351-367) However, on September 15, 2010, the student was disciplined for slapping another student who had collided with him in the hallway, spent the last part of the day in a time out room, and warned of further consequences. (S. 447)

62. Between September 13 and 27, 2010, Dr. Bernard J. Gordon, M.D., performed a private psychiatric evaluation at the Parents' request. Dr. Gordon's diagnosis included a developmental coordination disorder, ADHD-combined type, anxiety disorder-NOS, and "perhaps" a Mood disorder/Depression-NOS. Dr. Gordon did not see "clear-cut" evidence of Asperger's Syndrome. (P. 224) He discussed with the Parents how the student may benefit from a small classroom environment such as provided at the Aucocisco School in Cape Elizabeth, Maine, and questioned whether current medications had been effective. He recommended terminating the Strattera medication and increasing the dosage of Sertraline. (P. 221-224)
63. Standardized testing in the fall of 2010, using the NECAP testing tool, indicated that the student scored in the "partially proficient" range in both reading and math. (S. 443)
64. In mid-October 2010, the student attended a 3-day class camp experience at Camp Kieve. Ms. Hatch also attended the camp. She stated that the trip was successful for the student, with no difficulties reported, despite the variable situations he experienced during that time (bunk sleeping, many activities, classes, adult interactions) (S-353, Hatch testimony)
65. On or about October 27, 2010, the student's teachers began reporting that the student had seemed unusually tired in class and at times had fallen asleep in class. (S-349, 343).
66. The IEP team was convened on October 28, 2010. Ms. Hatch indicated that the student "appears more relaxed in class and there have been fewer behavioral push backs or defiance," and had shown more effort in his writing. Math teacher, Paula Murphy, reported that the student had a good start, and his participation and group work had improved. While the student did "very well" at Camp Kieve, Mr. Sibley, the School's Vice Principal, discussed some of the difficulties the student had in gym class around boundary issues and not always picking up social cues from peers. (S. 129, P. 240) The team agreed that, while OT screening may be beneficial, the parents declined it due to their concerns that OT services would mean more time out of the classroom, as well as their experience with the student's prior unhappiness attending OT in elementary school. (S. 129, P. 240)
67. By the October 28, 2010 IEP meeting Mr. Ferreira had not yet completed the Asperger's Syndrome assessment that had been ordered in May 2010. At the October 28, 2010 meeting he provided rating scales to be completed by parents and teachers in order for him to complete his evaluation. Until the IEP Team could review Mr. Ferreira's results, Mr. Sibley stated that he would explore the possibility of social counseling through the guidance office; the special education teacher would provide parents with typing websites and explore the possibility of using voice recognition software. Services were to be continued to give the student support in the mainstream curriculum. (P. 239) Mr. Sibley reported that the Social Thinking Group was no longer available (S. 129, P. 240)
68. Mr. Carroll testified that Mr. Ferreira's Asperger's Syndrome assessment order in May 2010 had not been completed due to a lost consent form during the summer/fall. (Carroll testimony) Mr. Carroll then explained that there had been a problem locating the consent form for testing that the

parents had signed on the last day of school in June 2010. He thought that they needed to sign another one because the timeframe for performing the evaluation had run out. (Carroll testimony)

69. The IEP developed from the October 28, 2010 meeting included three goals for the student: 1) earn grades of “B” or better and turn in 8 out of 10 assignments in a timely manner; 2) earn grades of “B” or better in his xx grade math class and raise his NWRA RIT score to the 220-225 range; and 3) improve his writing ability using the skills and strategies of the writing process, and improve his organization of his ideas, elaborating, and editing. (P. 232-234) No functional or adaptive goals were included in the IEP. Special education services included specially designed instruction with a special education teacher in the regular education setting two times per week for one hour, and with a special educator in a special education setting, two times per week for one hour. While functional deficits were described, no related services or positive behavioral interventions were included. (P. 235)
70. Mr. Carroll acknowledged that he should have included social goals and included supplementary aids regarding behaviors when he wrote the IEP. However, he stated that this did not mean that services were not being provided. The IEP team understood that the student needed to work on his social skills. He worked with the student’s regular education teacher, Ms. Hatch, on a regular basis to help the student’s progress. For example, social coaching and perspective taking was an ongoing activity; the student would be pulled aside after an incident and they would discuss the issues with him. Mr. Carroll stated that he would ‘preload’ the student when a new activity or outing was planned to get him ready for it. (Carroll testimony)
71. The student’s father stated that he and the student’s mother were very disappointed that the Social Thinking Group that had been offered as a non-IEP service in the third trimester of xx grade was not being offered to the student at all. It was his sense that Mr. Henry understood the student’s difficulties more than other staff members (The father’s testimony)
72. In an email to the mother dated November 2, 2010, Jeffery Gahn, the School’s guidance counselor, introduced himself and stated that he had been informed about “some concerns” she may have had specifically dealing with physical education. He stated that he spoke to the student about it and it appeared that it was not the first time someone had raised concerns with him. Mr. Gahn stated that he wanted to help out any way he could to make sure things went smoothly for the student. “If you guys have any specific concerns or idea on ways that I can do that, let me know. He seems like a great kid.” (S. 348) Mr. Carroll stated that the service provided by Mr. Gahn was not an IEP service, but was part of the student’s social coaching. (Carroll testimony)
73. In an email to the student’s mother dated November 3, 2010, Mr. Carroll reported that he was following up on the IEP team’s agreement to provide typing programs and voice recognition software for the student’s writing. The typing software would be downloaded onto the student’s computer and the voice recognition software was available, but he needed to get the details on it. (S. 345) However, Mr. Carroll testified that the voice recognition program, called “Dragon” was not available at that time, had been ordered, but did not arrive until sometime in the spring of 2011.

He stated that it would not have been appropriate for the student to use in any event. (Carroll testimony)

74. On November 12, 2010, teachers were reporting that the student had become more impulsive and had been engaging in inappropriate behaviors with other students (pinching and poking). (S. 342)
75. On December 6, 2010, Mr. Ferreira completed the psychological assessment of the student to determine whether he was experiencing Asperger's Syndrome. (S. 107-110) In summary, he concluded that:

Based on the presence of significant patterns of social rigidity, difficulty with reciprocal communication and social awareness, strong, but obsessive areas of intellectual interest, and notable motor control awkwardness, the student is viewed as demonstrating Asperger's Syndrome. His recommendations included: 1) Changing his special education exceptionality to Autism; 2) Placing increased emphasis on social/communicative developmental challenges; 3) Social problem solving skill development; 4) Ongoing support to assist him in coping with changes and transitions; 5) Support to cope with new academic demands and tasks, particularly in the areas of writing.
76. On December 7, 2010, the student received a 30 minute detention as discipline for disrupting his class by making "silly noises," bothering other students, and shaking his finger at a girl. (S. 447)
77. IEP progress reports on the student's goals were submitted on December 15, 2010. (S. 111-115) He made "satisfactory" progress on his writing and "limited" progress in math. He made "satisfactory" progress in his goal to earn Bs in all academic classes and turn in 8 out of 10 assignments on time. The comments stated, "While the student did not earn Bs in all his cases he did show increased attention to organization and assignment completion." (S. 111-115) the student's academic report card for the first trimester indicated the following grades: Personal fitness-89; Language Arts-87; Social Studies-87; Spanish-79; Math-79; Science-92; Art-74. (S. 442)
78. An IEP was convened on January 7, 2011 to review Mr. Ferreira's evaluation. The IEP team decided not to change the student's exceptionality to Autism until the Parents had the evaluation reviewed by the student's physician. (S. 454) However, the IEP team agreed that social skills groups at the middle school would be explored. (S. 454) No changes to his IEP were made at that time.
79. Ms. Hatch testified that after January 2011, the student's progress declined and he experienced many difficulties at school. By May 2011, he was off task many more times and his work initiative was difficult. While she was not at either of the IEP meetings in June 2011, she testified that the Learning Center option was a positive step. (Hatch testimony)
80. On January 20, 2010, the student was reported to be argumentative with his special education case manager over an assignment. (S. 330) On January 26, 2011, the student disrupted the debate team by getting into an argument with the staff leader about a disagreement he had with another student. He was asked to leave the team for the balance of the week (P. 244-245) When the student's mother discussed the matter with Mr. Carroll, he also told her the student was found "Googling"

the phrase “how to get revenge” in computer class, and that his Internet privileges had been suspended for a week. (P. 244, S. 328)

81. In emails dated January 31, 2011, Mr. Carroll acknowledged to the student’s father that the student was “slipping” in his classes, stating that Ds in two subjects were due to missing assignments. (P. 246) He believed that the student needed more help with organizing and planning his days and assignments, and should come in twice a week in the morning for help with this. He stated that the student would be required to attend “Back on Track,” and after school make-up time to do work. (P. 246) In a follow-up email, dated February 1, 2011, Mr. Carroll also suggested that the student set aside time to see him for supervised study at the end of the day, every other day, for planning, organizing and skill building. (P. 248)
82. On March 3, 2011, the student was in an altercation with another student in the hallway and struck the other boy in the face, saying, "I hate you." The student received a timeout for the rest of the day and was warned that he would be suspended from school if he engaged in further misconduct. He acknowledged that he should have walked away without hitting the boy. (S. 446) On that same day, the student threw two boys' binders and folders into the trash during the "Back on Track" session. He told his teacher that he was playing a game with the boys, however they disagreed. He received another timeout for his misconduct. (S. 446) On March 8, 2011, the student arrived to class late and without his work. He became angry with his teacher when he was told he could not go find his work at that time. The student drew a picture of his teacher with two knives sticking into her head and labeled the picture "Ms. muFery" and "jerk." The student received a 60-minute office detention for his misconduct. On March 9, 2011, the student slapped a xx-grade boy in the back of the head in drama practice. The boy told the student that he was leading a line in the wrong direction, to which the student got angry and hit the boy. The student received an out-of-school suspension for his misconduct for two and a half days. He was allowed to return the following Monday morning with the requirement that his parents have a re-entry meeting. (S. 445)
83. On March 9, 2011, the student’s father wrote to Barbara Melnick, Director of the Aucocisco School, seeking information about the admissions process. (S. 493) He stated that he had been speaking with her about the student previously, and that he had just been suspended, and was having significant issues at school, both behaviorally and academically. Ms. Melnick stated that she was out for the week, but would be back in touch with him. (S. 493)
84. In an email to the student’s father dated March 16, 2011, Mr. Carroll reported that teachers were concerned about the student. (P. 250) He related that there had been an “escalation” in the student’s behaviors, which led up to the two suspensions he received. He stated that there were new instances when the student had appeared to have trouble regulating his behavior around his peers. He was ribbing and bumping kids in the hallway, overtly stealing pencils and pens, and had slapped in a boy in the face when he called the student “gay.” “While the student does have a pattern of ‘young’ behavior the frequency and degree has increased lately.” (P. 250) Mr. Carroll suggested that 1) the School’s social worker attempt to identify triggers or antecedents causing the behaviors; 2) have the student check-in with Mr. Gahn when he feels stress or anxiety or the need to talk; and 3) do a daily check-in at the end of each day with Justin Pease, an intern working with

Mr. Carroll. (P. 250) On March 30, 2011, the student was reported to have been sticking objects into a electrical socket on two occasions during drama practice, and disrespected stage crew when asked to be quiet and still during stage practice. (P. 252)

85. In an email to the student's Parents, dated March 31, 2011, Mr. Sibley reported that he saw the student writing, "The student rules!" on the side of the building in lipstick. (S. 104) said to him, "So...detention, suspension, or expulsion?" He also reported that the student was talking to other peers in his class about picking on other kids the way he had been picked on. He also reported that the student had been editing the Wikipedia website, making entries about bombs. He expressed his concern about the student's apparent attention-seeking and asked the Parents to impress upon the student that the word "bomb" was off-limits in school, and that if he started searching for bomb-related topics on the Internet, he would lose his computer privileges. (S. 104)
86. An IEP meeting was convened on March 31, 2011. (S. 457) The IEP team agreed that based upon teacher reports and observations, a Functional Behavioral Assessment ("FBA") completed for the student would provide more information for determining the appropriate programming for him. (S. 457) No changes were made to the IEP at that time.
87. On April 7, 2011, Mr. Carroll reported that the student had a difficult day and seemed stressed, very anxious, and overwhelmed; he wondered if this might have been due to the play. (S. 99) In an email to the student's father, dated April 12, 2011, Mr. Carroll reported that the student had been resistant to academic support and was argumentative about whether he had completed assignments. He had asked the student several times to lower his voice and not behave rudely. "My observation that this is quite typical of the behavior that Sarah, Justin and I experience, a lot of arguing and rudeness when we attempt to assist him in class or in academic support." (S. 87)
88. The student's father testified that by April 2011, he and the student's mother felt as if the student was in a crisis. His academic progress was declining, he was lonely, and other students did not like him. At night, he was miserable, saying again that he wished he had never been born. (The student's father's testimony)
89. An IEP meeting was convened on April 15, 2011 for the student's annual review. (S. 92) At this meeting, The parents expressed great concern over the student's progress. They presented a "Statement of Parent Concerns" that outlined their specific set of concerns about the student's progress in academic and functional areas. (S. 404) These concerns included the student's daily struggles to "handle his school day emotionally, socially and academically." (S. 404) The list included concerns about Writing, Math, Executive Functioning, Social Thinking, Assistive Technology, and Behavior Intervention issues. (S. 404-405) They believed that the student was not progressing, and that his behavioral and emotional needs/issues impacted his academic progress.⁶

⁶ At the April 15, 2011 IEP meeting Mr. Carroll stated that the student's special education programming was focused on academics. (S. 94) The student was receiving academic support every other day to review and work on class content. He was also meeting with a college student intern during supervised its study time to work on planning and organizing school assignments. Also noted was the student's 2010 spring NWEA score of 203 (18th percentile) and spring 2011 NWEA scores of 210 (27th percentile) the student's language Arts teacher reported

It was also noted that Theresa Puckett, one of the School's social workers, was working on an FBA that would be completed in May 2011. Mr. Carroll reported that the student's negative behaviors occurred during non-classroom time and tended to emerge around boundary issues with peers. (S. 94) The IEP team concluded that until the FBA was completed, additional services would be provided, including: 1) 30 minutes of social pragmatic skills work weekly; 2) identification of strategies/interventions to try helping the student with unstructured times of the day (the results of which should be reported back to the IEP Team); 3) having the student meet with Mr. Gahn and Ms. Puckett for lunch once a week; having the student meet with Jane Mack, the School's speech pathologist, once a week to work on social communication skills; and have an informal OT observation and consultation with teachers. (S. 94) However, no changes were made to the IEP. (S. 53-65)

90. On May 2, 2011, Ms. Puckett completed an FBA. (S. 68) The targeted behaviors included inappropriate boundaries of personal space, including people and materials, and off-task physical behaviors during class. (S. 68-69) Based upon the student's history and diagnosis, she recommended that the student's exceptionality be changed to Autism. (S. 71-72) Her recommendations included the following:

1. The student needs an integrated, comprehensive plan to address his difficulties across the curriculum.
2. In developing goals for the student, a plan that includes positive reinforcements should be implemented.
3. "Front-load" the days with daily check-ins.
4. Provide IEP services to address weak verbal and non-verbal communication skills.
5. Provide the student's doctor the most recent reports in order to best inform the doctor of school concerns and in order to obtain optimal results from medications.
6. An OT screening will determine the need for a full evaluation and services.
7. Small group or individual lunches to give the student a chance to decompress and an opportunity to build social skills if his lunch included one or two other students.
8. Recommendations provided by Marcia Hunter, PhD stand as appropriate to his needs in his current school experience. (S. 72)

91. On May 3, 2011, the student received an in-school suspension for fighting. He kicked a boy in the groin after the boy provoked him. (S. 445) On May 5, 2011, Mr. Carroll reported to the student's father that the student had had a difficult morning and that he seemed overwhelmed, while during the afternoon he seemed better. (S. 49)

the student struggled with working with peers. Most of the student's teachers reported that he needed frequent intervention and redirection.

92. A Supplemental Speech/Language Therapy report was completed on May 5, 2011 by Ms. Mack. (S. 66-67) Based upon her assessment of the student significant functional deficits, Ms. Mack recommended speech/language services at a minimum of 40 minutes per week in a group to focus on social communication skills. She cited Michelle Garcia Winner's "Social Thinking" curriculum to work on understanding paralanguage (nonverbal) communication skills, such as facial cues, body language, and reading social situations (reading between the lines) correctly. She also suggested that group interactions, planning and organizing, revising plans, and self-monitoring behaviors should also be addressed. (S. 66)
93. On May 9, 2011, the student participated in a fieldwork outing at Fall Brook to identify invasive plants. (S. 49) the student did well with reminder and redirection. (S. 49)
94. The IEP team met on May 10, 2011 to review the FBA and Speech Pathologist reports. (S. 50) While the IEP team acknowledged the recommendations made by Ms. Puckett, it rejected the idea of moving the student to a smaller more structured educational setting in the school, but agreed that a behavioral goal and positive behavior support plan should be developed to address unstructured times and boundary issues, including being escorted between classes to redirect and remind the student of appropriate behaviors. (S. 51) The Parents felt that moving the student to a more structured classroom outside the mainstream would be interpreted as a failure of the student's, but wanted him to have the plans and support in place to assist him with his social and behavioral needs. (S. 52) The Parents also informed the IEP team that they were having Dr. Hunter reevaluate the student in the spring. (S. 51-52) Other concerns raised in the IEP meeting included the xx grade work load in the fall, and the possibility of moving the student to a reading class due to his low NWEA score in reading (17th percentile). (S. 51) The final determinations made at the IEP meeting were to increase speech/language services to two forty-minute sessions weekly, focusing on social communication; one hour behavior coaching support daily in the regular education setting; and a behavior plan to address non-instructional times of the day. (S. 50)
95. The IEP created from the IEP meeting on May 10, 2011 indicated that the student did not need the use of positive behavioral interventions and support. (S. 56) (While Mr. Carroll told the parents that this would be corrected in an amended IEP, it was not included until June 16, 2012.) (S. 44) An additional speech/language goal was added to the IEP. Progress would be reported on June 8, 2012, November 15, 2011, and April 14, 2012. (S. 59) speech/language therapy was included as an additional special education service at the frequency of 40 minutes once a week. (S. 63) No other related services were included.
96. In May of 2011, the student was involved in several incidents. He received a detention for making an anti-Semitic remark to another student when he became angry with the boy. (S. 46) Mr. Sibley stated that he had spoken to the student about the difficulties students have in xx grade, but that for the student, there were pieces in place to help him to improve his weaknesses. (S. 46) On May 24, 2011, the student was in an altercation with another boy and threatened to stick a knife in his ear. (S. 40-43) Mr. Sibley and the student's mother discussed the situation via email and both agreed that the student was extremely agitated that day. The student cried, expressed regret about the

incident in front of the boy in Mr. Sibley's office, and told his mother in the car ride home how upset he was with himself. He told his mother that he felt constantly watched and had no privacy.

97. The student's father stated that he and the student's mother were very concerned for the student's welfare after the knife incident, wondering whether there would be retaliation against the student. They felt that the student's trust in adults was dwindling, especially due to the hall escort he was receiving, which the student felt impinged upon his freedom after telling his parents that he felt like he was being watched all the time. (The student's father's testimony)
98. An IEP meeting was convened on June 7 and 16, 2011, to discuss the student's progress over the three prior weeks since his behavior plan went into effect, and to decide on his xx grade placement. (P. 254) Teachers reported while the student's behavior was "generally good," he was not independent with his class work, group work continued to be "difficult," and he needed to be redirected in order to not antagonize his peers. (S. 255) Mr. Gahn reported that the student was feeling resentment and that he did not trust many people at the middle school. Ms. Puckett reported that the student had been discussing the "difficulties" of establishing friendships and that he expressed some "sadness." (S. 255) Mr. Carroll reported that the student was being escorted to class to help him avoid boundary issues with his peers and that, since mid-May, he had good transition days on 9 out of 12 occasions. Phil Dyer, the xx grade special education teacher, stated that he had observed the student in class and found that he had difficulty sitting still and saw more behavioral issues during group work, such as pinching peers and taking their possessions. (S. 255) Mr. Sibley discussed the option of placing the student in the Learning Center, a self-contained room that is a highly structured setting with more opportunities for coaching. (S. 255) The Parents stated that they wanted to see the room and visit the teacher. They were concerned that this placement would create a sense of failure in the student. (S. 255-256)
99. On June 13, 2011, the student shoved another boy in the hallway as he came up behind him. (S. 445) When he went to Mr. Sibley's office, he kicked the walls and knocked over an electric air cleaner. Mr. Sibley viewed the incident as a bullying tactic by the student and gave him a "time out." He was taken home by his mother to calm down. (S. 445)
100. The IEP team reconvened on June 16, 2011 after an OT evaluation had been completed and the Parents had visited the Learning Center. (P. 30) The OT evaluation indicated that the student scored in the "low" average range for visual perceptual performance and "below" average for visual motor integration. (P. 30) Julie Waterman, the School's occupational therapist, recommended that the student receive OT services twice a week for 30 minutes. The student's mother reported that she visited the Learning Center and spoke to Jen Lindsey, who would be the student's teacher in xx grade. Both parents expressed concerns that the student would see the Learning Center as a setback, but said they agreed with the School's judgment that it was the best placement for him. (S. 30) Therefore, the IEP team agreed that the student would start xx grade in the Learning Center and attend regular education classes for science, physical education, and reading. (S. 30)

101. The IEP created from the team meeting on June 16, 2011 included the need for positive behavioral interventions and assistive technology. (S. 13) The IEP summarized the student's present level of performance, citing NWEA scores, and progress on academic goals. With respect to behavioral issues, the IEP stated, "Observation and data prior to this meeting to assess the student's struggles with social interactions. It was found that during unstructured times the student is prone to engage in inappropriate boundary intrusions. This takes the form of grabbing, hitting, fake hitting, intentional colliding, and taking peers (sic) belongings." "In the class room setting during instruction, the student engages in off task physical behaviors. This is seat bouncing, rocking in his seat, exaggerated breath holding, random vocalizations and singing." (S. 14)
102. In addition to the speech/language goal that was added to the IEP in May 2011, OT and two behavioral goals were added. The OT goal stated, "Given education and practice with occupational therapy skills, the student will demonstrate self awareness regarding his self regulation and develop strategies that he can use in the classroom to improve his ability to attend to classroom learning activities, for 4 of 6 trials by 4/13/12, as measured by therapist or teacher observation and documentation." (S. 17) The behavioral goal stated, "The student will demonstrate 90% appropriate behavior in the special education setting and regular education setting by his annual 2012. The student will focus on increasing on task behaviors, implementing learned strategies to improve social communication with peers and adults, and maintaining appropriate boundaries between himself and his peers." (S. 21) The second behavioral goal stated, "Given unstructured times of the day (transitions, breaks) the student will improve his ability to maintain appropriate boundaries with peers and need redirection for 2 or fewer incidents four out of five days as measured staff charting on his behavior plan by June 7, 2011." (S. 22) In addition to the related services already included in the IEP, speech/language therapy was increased by one hour from the prior IEP; specially designed behavior support five times per week for one hour was added, as was specially designed instruction in math, social studies, and English five times a week for 150 minutes. Related services included OT pull-out instruction and in-class support two times per month for 30 minutes, and social work services one time per week for 30 minutes. (S. 23) Supplementary aide and services included the new positive behavior support plan and hallway escort to address his behavior goals. (S. 24) The IEP indicated that the student would be with non-disabled peers 40% of the time. (S. 25) The Positive Reinforcement and Support Plan ("PRSP") was attached to the IEP. (26)
103. Mr. Carroll testified that despite the constellation of services for the student during the 2011 spring, it was not enough. He was supportive of the idea of having the student move into the Learning Center for xx grade. He stated that the student would get coaching and feedback built into his day, and be able to be in the mainstream for science, reading, and PE. The Learning Center teacher was experienced with students on the autism spectrum and she had a calm, levelheaded approach to her classroom. The student could also be part of the drama club if he chose to. (Carroll testimony)
104. The PRSP was developed by Mr. Carroll, Ms. Mack, Mr. Sibley and Ms. Puckett. (S. 451) It included summary of targeted behaviors, preventions strategies, teaching elements, how the plan

would be monitored, reinforcement procedures, consequences or safety procedures, and a rating system. (S. 448-452)

105. The student's third trimester Report Card indicated the following: Language Arts-80; Math-78; Social Studies-91; Science-82, Spanish 6- 54, Computer 83; Personal Fitness-94; and Chorus-98. (S. 453)
106. In a letter dated June 28, 2011 to Ms. Violette, the student's mother requested that the Written Notice be amended to indicate that the Parents did not agree that the Learning Center was an appropriate placement for the student. (S. 7) The student's mother explained that, while they rely on the professional judgment of the School staff, they continued to doubt that the "proposed" plan for the student was appropriate and were "very concerned" about the placement. (S. 7) In email exchanges between Mr. Sibley and the student's father, dated June 29, 2011 and July 1, 2011, Mr. Sibley stated his confusion on what the student's parents agreed to at the IEP meeting and attempted to get clarification from them. The student's father replied that they were "at a loss on choosing an appropriate placement in general, and more concerns about the Learning Center environment." He agreed that the better way to express their concerns was how Mr. Sibley stated it, in that they were "going along with the decision to place the student in the Learning Center program because the rest of the team recommended it, but want it noted that (they) had concerns about the placement." (S. 4)
107. IEP progress reports for the third trimester of the student's xx grade, submitted on June 8, 2011, indicated that he had made "satisfactory" progress on all his IEP goals. (S. 32-34) No comments were included for his speech/language goal.
108. The student's father testified that they were at a loss about the student's placement for the following year. The Learning Center did not appear to be what the student needed after the student's mother visited the classroom and met with the teacher. From his perspective, since his children had attended the middle school, that particular classroom had always been known as the location for problem students, those with behavior issues. He felt that the student's issues were more complex than the ordinary behavior problems of some students. Since June had gone so poorly, they went along with the placement, but were still very concerned. (The father's testimony)
109. During the summer of 2011, the student attended the Backstage program at Aucocisco School. (S. 553) Ms. Puckett brought the program to the attention of the Parents. (The father's testimony) The program was run by Rohan Henry, the same teacher who had overseen the Social Thinking Group in which the student participated during the third trimester of xx grade. The Program focuses on skill building for students with behavioral difficulties. Using improvisational theater games, board games, and outdoor games to help improve skills in social behavior and communication, social emotions, and problem solving.
110. A report of the student's progress in the Backstage program indicated that he participated well during the two-week session; did better in group conversations after being given more time to process information; initiated interactions and had conversations with several peers. Areas of

improvement included group interaction, inhibiting behaviors, taking turns, sitting with the group, and facing the group. Areas that he needed to work on included being on topic; perspective taking; understanding paralinguistic; eye contact; flexible thinking; coping with stress; and emotional regulation. (S. 561)

111. The student's father testified that their experience with the Back Stage Program had been positive for the student and decided to unilaterally place the student at Aucocisco for the fall 2011. (The father's testimony) The student's mother stated that it was a difficult conversation they had with the student on whether to move him from the School. The student did not automatically agree with the idea because he had friends he would be leaving. Ultimately, they persuaded the student that he should try Aucocisco. Promising him a laptop was clearly helpful, in their view. (The parents' testimony) On August 2, 2011, the student's mother contacted Barbara Melnick expressing their "soul searching" over whether to apply to Aucocisco School, and stating that they would like submit an application for the student to attend there in the fall. (S. 487)
112. On August 11, 2011, the Parents applied for the student to attend Aucocisco School in the fall of 2011. (P. 302) On August 12, 2011, the student received a welcoming letter to Aucocisco. (S. 551) In a letter to Ms. Violette dated August 22, 2011, the mother notified the School that they were unilaterally placing the student in a private setting at the Aucocisco School in Cape Elizabeth, Maine. (S. 2-3)
113. The Aucocisco School is a certified special purpose day school for students with learning disabilities. Students who attend have a broad range of disorders including anxiety, those on the autism spectrum, and traumatic brain injuries. (Melnick testimony) Most of the teachers have attended seminars in how to implement the Michelle Garcia Winner teaching methodology and regular in-service training is performed. There are 13 certified special education teachers and three educational technicians. There are approximately 38 students attending. (Melnick testimony) Several students have IEPs; some have been placed by public school districts; and others have been placed privately by parents.
114. In late October 2011, Dr. Hunter completed a neuropsychological evaluation requested by the student's parents, who were seeking diagnostic clarification and treatment recommendations. (S. 377-403)⁷
115. Dr. Hunter determined that:
 - The student presented with a complex neurological, behavioral, and mental health profile. His range of symptoms impacted his self-control, mood, sensory integration, learning,

⁷ Over a period of four months, Dr. Hunter administered assessment tools. The NEPSY-II Woodcock Johnson III Normative Update Tests of cognitive Abilities and Achievement ("WJ III NU"); Rey Osterrieth Complex Figure Design; Children's Color Trail Tests; Achenbach Child Behavior Check List ("CBCL"); Million Adolescent Personality Inventory ("MAPI"); Social Responsiveness Scale ("SRS"); Developmental Questionnaire Update; Incomplete Sentence Stems; Clinical and Parent Interviews; Collateral Contacts; Classroom Observation, teacher and case manager interviews; and Record review. She noted that she had evaluated the student in January 2007.

and social confidence, suggesting a broad-reaching condition with significant impact across several domains of function. (S. 391)

- She concluded that a diagnosis of an autism spectrum disorder was appropriate, specifically Pervasive Developmental Disorder, Not Otherwise Specified (“PDD/NOS”).
- She also concluded that the student continued to meet the diagnostic criteria for Attention Deficit Hyperactivity Disorder, Combined Type (“ADHD/C”), clarifying that ADHD was presumed under the category of PDD/NOS.
- In addition, she concluded that a diagnosis of Dysgraphia was warranted. She stated that Mathematics Disorder and Disorder of Written Language could not be ruled out.
- Dr. Hunter also stated that the student endorsed symptoms of depression, anxiety, and deep social insecurities, and he acknowledged times of suicidal ideation and hopelessness. He has minimal tolerance for distress, is hyper-reactive to perceived rejection, and harbors paranoid attitudes and long-standing grudges. Her results from personality testing suggested severe weaknesses of psychological structure that may reflect an emerging personality disorder of a borderline or histrionic type. She stated that given his variable and intense mood fluctuations, consideration of Mood Disorder NOS is warranted.

116. Dr. Hunter discussed academic considerations in approaching the student’s educational programming. She stated that the student needs the most intensive and sophisticated kind of programming available. (Dr. Hunter testimony) He needs to “undo” stereotypical behavior (i.e. repetitive motor movement, noise making, twitching.) (Dr. Hunter testimony) He requires direct instruction in metacognitive strategies, daily executive skills coaching, and instruction by teachers who are trained in executive issues of children on the autism spectrum. (S. 393) Academic strategies should take into consideration his processing speed, poor integration of details, weak memory functions, limited metacognition skills, and global deficits in executive mental functions, including dysgraphia. (S. 396-397) She stated that it is imperative that adequate attention be given to growing a sense of self. (S. 393) She stated that the gap between what the student can conceptualize and what he can produce seems to serve as a source of chronic frustration. She stated that he may require a “fresh start” that includes a peer group that models positive behaviors, but also identifies with the student’s areas of exceptionality. He needs to feel part of a community and thus placement within a single room within the larger school setting is apt to be problematic. (S. 393)

117. Dr. Hunter recommended several strategies to address the student’s functional development, specifically his social competence, including psychosocial treatment. (S. 298, 394-395) She stated that, “The student is demonstrating increasingly deficient social behaviors, with significant negative impact on his academic and psychological functioning,” citing sensory issues, his cognitive profile, mental rigidity, poor self-monitoring and self-control, problems with social cognition of rules, expected behaviors, emotional reactivity, and trust issues. Based upon this profile, Dr. Hunter recommended specialized social skills curriculum using individual and group instruction addressing social awareness, social cognition, social communication, social motivation, and autistic mannerisms, citing the work of Michelle Garcia Winner. (S. 398) She also made recommendations for individualized mental health therapy that targets his underlying fragile personality structure to address his frustration tolerance, reaction to perceived criticism, brittle mood, tenuous hold on his sense of self, and anxiety. (S. 398-399) She believed that he needed

monitoring due to his depressed mood (his sense of hopelessness, self-denigration, and suicidal ideation). (S. 399)

118. The student entered Aucocisco in the fall of 2011. His first quarter comments were by Karen Neidlinger, his language arts teacher, a certified special educator.⁸ (Neidlinger testimony) Her written comments indicated that the student had “greatly” improved his ability to focus in class, but occasionally needed cues not to interrupt the teaching. While he also continued to have challenges keeping his physical and verbal boundaries with other students, he was able to “get the job done” given clear and concrete expectations, and frequent teaching proximity. (S. 569) Also, his writing was improving despite his fine motor difficulty. He earned grades of 89 in language arts, 97 in social studies, and 94 in science. In the second quarter, he earned grades of 90 in social studies, 81 in language arts, and 97 in science. In the third quarter he earned grades of 90 in social studies and 94 in science. (S. 564, 570, 572) In the fourth quarter, he earned a grade of 94 for science (S. 572) No grades were submitted for social studies or language arts. His hand writing fluency improved over four quarters. (S. 565-568)
119. Ms. Neidlinger testified that the student was in a classroom of three to five students, and that she met with them three days a week for about an hour. She also saw him during unstructured times, morning break, and in the hallways. She stated that over time he became more relaxed and less timid at school. His behaviors could usually be redirected by saying his name and using eye contact. She kept data earlier in the year on his behaviors, but he improved over the year to the point that it was no longer necessary. She would speak to him privately when there were behavior concerns and gradually developed eye cues that he understood. She believed that he became more aware of how people were reacting around him. If she showed his progress on paper, he appeared to understand and comply. She felt that his confidence was higher and that he became more accepted by his peers. His handwriting improved from where he had difficulty writing 2 to 3 sentences to where he was typing “cliff hanger” paragraphs by the end of the year. He became more of a leader on the playgroup and on field trips, and was better at self-advocacy. She believed that consistently approaching his program with a non-confrontational approach has been effective. Collaborative problem solving allows him to accept the outcome of a situation better. She uses social thinking skills used in the Marcia Garcia Winner methodology. However, she felt that he was not ready to reenter a different setting because his trust level around adults had just been established, and to readjust too soon would not be productive. She believes that a “systematic” transition is needed. (Neidlinger testimony)
120. Dr. Hunter testified that she observed the student at Aucocisco in the spring of 2012 and reviewed teachers’ rating scales. She noted that concerns raised by the rating scales, such as social, attention, and thinking problems, still indicated that he was symptomatic. (Dr. Hunter testimony, S. 332-337) From her observations, she concluded that the self-contained classroom in a community setting

⁸ Ms. Neidlinger has been teaching for 20 years. She was trained at Cornell University in therapeutic crisis intervention, is a certified special educator, and has worked in several Maine school districts. She has been a behavior consultant and a special education teacher. She performed functional behavior assessments and testing. Her strength is in teaching literacy skills. (Neidlinger testimony)

was appropriate. The building was “cozy” and there were few corridors. Modified instruction was appropriate, noting that positive, direct corrective feedback occurred immediately. The formal social skills curriculum, which focused on social competence, was also appropriate, including hands-on supervision and guidance, and a great deal of staff support. (Dr. Hunter testimony) She observed the student’s math class and found that he was off task about 25% of the time. He engaged in some maladaptive behaviors with other students, but was quickly redirected by the teacher, who immediately discussed what effect his behavior had on other students. While the teacher reported to her that his negative behaviors were a big problem, there had been improvement. (Dr. Hunter testimony, P. 340) Ms. Melnick reported to Dr. Hunter that the student had made gains, but remained significantly challenged in his daily functioning. He needed constant hands-on coaching and attention from adults. As a general observation, Dr. Hunter reported that the student was strikingly more self-regulated than he was when she saw him in the spring and summer of 2011. He was no longer physically touching other students, infrequently made inappropriate comments, and had a more pronounced sense of being engaged. (P. 341)

121. Dr. Hunter hesitated to give her opinion on the proposed IEP for the 2012-2013 school year without being given more detail. She was not present at the IEP meeting. However, she stated that a specialized transition plan was needed when he returns to the public education setting. Attention to the adult relationships is important, as is having a very well-thought out process to manage anxiety by anticipating what was going to happen, including rehearsing coping strategies with the student. (Dr. Hunter testimony)
122. Dr. Hunter testified she had visited the proposed setting at the Learning Center at the School in May 2012. She stated that she was impressed with the teacher and saw that those students were well controlled; there were positive reinforcements, which included social coaching. (Dr. Hunter testimony, P. 333-334) However, she believed that the student was too disabled to succeed in that program. She saw that the students in that program were far more self-regulated and self-directed in their work, and that an aide became involved only occasionally while the teacher was in the front of the classroom. She believed that the student needed a “far more intensive approach, with a curriculum designed for students on the autism spectrum that could target significant OT issues, sensory problems, self-regulation, social competence and anxiety. (Dr. Hunter testimony, P. 342-343)
123. Ms. Melnick testified that she had seen a gradual, but dramatic, change in the student by the end of the first quarter in the fall of 2011. He had entered Aucocisco anxious and wound up, and often lashed out at others in response to a variety of circumstances. He was able to process situations immediately with adults, and was able to increase his ability to self-monitor and reduce disparaging language, while starting to apologize when he did. She noted that he received social services for 30 minutes a week in one-on-one counseling and speech therapy. (Melnick testimony)
124. Several fourth quarter and year-end reports for the 2011-2012 school year were submitted into the record. In a Year End Social Work Summary, dated June 6, 2012, David Chatabash, LCSW, Aucocisco’s consulting social worker, reported that the student had responded very positively to his placement. He was significantly less anxious about his academic performance. He had shown

no incidents of severe emotional reactivity since October 2011. He sought adult help for peer difficulties and continued to work on pragmatic social skills so that he could be more self-reliant. In Mr. Chatalbach's opinion, the gains the student had made during the 2011-2012 were "significant." (S. 462-463) A fourth quarter update on the student's social language skills showed progress in several areas. Continued therapy was suggested. (S. 51-52) Lexia Reading Test levels indicated that he successfully completed all the skills at "Level A-Real Word v2, Non-Word v1." (S. 519-523) He needed more work on higher levels. (S. 524-526) Additional reading and oral reading tests were also submitted indicating his level of progress (S. 527-549)

125. The student's father testified that, while the first part of the year at Aucocisco was rough for the student in terms of his lack of trust in the adults, within a few months they were seeing less anxiety at home and nighttime was calmer. The student became more comfortable in his "own skin." There appeared to be academic stabilization from the downturn they had seen in the spring. The student appeared to have made ongoing friendships. He was beginning to recognize when he behaved inappropriately and started apologizing, which had never happened before. The emotional overflow and crying at night waned during the year. He was no longer miserable. (The father's testimony)
126. For the 2011-2012 school year, the student's family expended a total of \$37,296.27, as detailed on the summary of expenses they have prepared and submitted. (P. 338)
127. The IEP Team met on April 27, 2012 for the student's annual review and determined his placement for the 2012-2013 school year. The Team agreed to change his exceptionality from OHI to Autism. Team members agreed that King Middle School continued to be an appropriate placement for the balance of the 2011-2012 school year and then Portland High School for 2012-2013. There was agreement that 90 minutes per day of specialized direct instruction to address his goals was appropriate. His classes would either be co-taught or have assigned support in the classroom. He would receive speech/language therapy in a specialized setting for 90 minutes a week (two 45 minute sessions). A positive behavior plan would be in place and he would receive social work services for 30 minutes a week. (P. 324) His current level of performance, as reported by Aucocisco staff, indicated that the student was on grade level in reading; at the 3/4 grade level according to the New England Common Assessment Program ("NECAP") writing rubric for narrative writing and a 2/3 grade level for report writing as recorded by the teacher. His math skills were at late xx/ early xx grade level and he was ready for pre-algebra. He was meeting level 3 (intermittent teacher prompting, support and reinforcement) for expectations in organization, time management and problem solving 75-89% of the time per trimester. Aucocisco staff were continued to be concerned about the student's body awareness, impulse control, inattention, and executive skills, but he responded to social coaching and teacher cues. Eileen Gluade, the student's assigned xx grade team leader, observed the student at Aucocisco and reported that the student seemed to have limited opportunities for social interactions with typical peers and observed him talking with one other student during snack time. Ms. Mack also observed the student during recess at Aucocisco and it appeared that he was having appropriate interactions with other students at the time. The Team agreed that there should be a transition back. However, the Parents expressed their concerns for transitioning the student back to the Portland schools, (P. 327-330)

128. The new IEP created for the student was dated April 12, 2012. (S. 417-436) The exceptionality was changed to Autism. The IEP described the student as academically requiring specialized instruction in executive function strategies and skills, social pragmatics, written expression, and math skills. Developmentally, he benefited from guidance and close supervision during social situations, particularly during unstructured times. Functionally, he benefitted from motor breaks, monitoring during transition between classes, check-ins periodically during the day, and a positive behavior support plan. The IEP presented weaknesses in social thinking skills, visual perception, visual motor integration, and fine motor skills. He was two standard deviations below in the areas of auditory visual, movement, and behavior on a sensory profile. He was below grade level in reading and math. His executive functional skills were at the 50 percentile on the skill rubric, had difficulty maintaining physical boundaries with peers, and struggled with making and maintaining relationships. The IEP noted his deficits in attention, working memory, and processing, as well as his anxiety, impulsivity, and social communication skills. (S. 417-421)
129. The IEP included two speech/language goals and two OT goals focused on self-regulation and fine motor skills. The two instructional goals focused on math and writing ability. Two behavioral goals addressed executive functioning and social boundaries. A social work goal also addressed the maintenance of physical boundaries, as well as appropriate communication with peers in order to improve positive peer relationships. (S. 430)
130. Specially-designed instruction for the 2012-2013 school year included co-taught math and English in a regulation education setting five times a week for 90 minutes, and specially-designed instruction in a special education setting five times a week for 90 minutes. Related services included OT, both pull-out and in-class, two times a month for 30 minutes; social work services once a week for 30 minutes; and speech/language services twice a week for 45 minutes. (S. 431) Several supplementary aids and services were also included, such as a positive behavior support plan and supplemental special education support. (S. 432)
131. The IEP statement for the student's placement indicated that he would be in the mainstream setting for social studies, math, language arts, and science. He would have his speech/language and OT in a special education setting for 90 minutes out of the day. (S. 433)
132. The IEP included a detailed Positive Reinforcement and Supports Plan. It included two specific targeted behaviors (physical boundaries/aggressive touching and off task during class), interventions, positive incentives, the method for data collection, and a plan for evaluation. (S. 434-435)
133. Ms. Violette, the School's Lead Special Education Coordinator, has over 20 years of experience working with children and students with disabilities. She has several degrees and certifications in special education and communication disorders. (Violette testimony). It was her opinion that the Learning Center would have been an appropriate placement for the student from April 15 to June 16, 2011. He would have had academic support and executive and social skills coaching. The smaller class size would have allowed him to receive immediate feedback. She explained that the

success of the Learning Center was phenomenal, in that most of the students were mainstreamed after their time there. (Violette testimony)

134. Ms. Violette also stated that the IEP for 2012-2013 was appropriate for the student. She emphasized the benefits of the co-teaching methodology for his mainstream classes in order to integrate him with his peers. The students in the co-taught classes are all within the average intelligences level. In addition, for 90 minutes a day, he would be in the special education setting for social coaching and scripting. For other classes, such as art, education technical support would be available if he needed it. She stated that the benefit of having the student in co-taught mainstream classes would be to have him with typical peers where he needs to use the skills he is learning within the general population. She stated that, while this was a new methodology for inclusion, she believed it would benefit the student. (Violette testimony)
135. Jennifer Lindsay testified about her experience as the lead teacher of the School's Learning Center. She has a Bachelor of Arts degree in Art and received her teaching certification and special education certification. She has been a special education teacher for nine years. She did not have Michelle Garcia Winner training or a Masters degree. She described the Learning Center's function as being for students with learning and behavior difficulties. There are up to 8 students in the class, which varies depending on their programming. She co-teaches with another Education Technician III. She engages the students by coaching on better communication methods, stops the class when an issue comes up to talk them through it in the moment, and has students take perspective of their actions/words. There is a point ("star") system and a weekly goal system. Students with Asperger's Syndrome attend the Learning Center. The teaching model has worked for most of her students who have gone back to the mainstream setting. She stated that after observing the student in class, and attending an IEP meeting in the spring of 2011, she believed that the student was a good fit for the Learning Center for the rest of the 2010-2011 school year. (Lindsay testimony)

V. BRIEF SUMMARY OF PARTIES' POSITIONS

1. Parents

The Parents argue that the School's failure to have an IEP in place for the student after April 2, 2010 is per se violation of the IDEA. *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (failure to provide IEP constitutes per se denial of FAPE); *Justin G. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576 (D. Md.2001) ("[T]he complete failure to develop an IEP for a disabled child prior to the beginning of the school year constitutes a serious violation of the IDEA."); *Parents v. Gorham Sch. Dept., No. 07-20H* at 18 (Maine Dept. of Educ. Jan. 5, 2007)

In the alternative, the Parents argue that the School did nothing to amend the student's programming or enhance the services it was providing him from April 2010 until over a year later. They assert that during that entire period, his programming consisted of low-level

academic services: two hours per week of pull-out instruction and two hours per week of shared in-class support. In addition, the goals and objectives of his IEP targeted only three skill areas: math, organizational, and written language. Nothing in the IEP was designed or implemented to provide the student with the social thinking instruction he so desperately required.

The Parents aver that Portland compounded its programming failures with its failure to complete the student's evaluation in a timely manner. The Parents cite the IDEA, whose regulations provide that each school district must ensure that "[t]he child is assessed in all areas of suspected disability" 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); MUSER V.2.C.4. If a school district fails to assess a student in all areas of suspected disability, this can constitute a procedural defect in the development of the IEP sufficient to result in denial of the student's right to a free appropriate education. See, e.g., *W.H. v. Clovis Unified School Dist.*, 2009 WL 1605356, at *14 (E.D. Ca. June 8, 2009). "...when a school fails to conduct proper assessments and then provides inadequate services." *Dracut Sch. Comm. v. Bureau of Spec. Ed. Appeals*, 2010 WL 3504012, at *9 (D. Mass. Sept. 3, 2010) (student's right to FAPE violated when school failed to conduct appropriate transition assessments to gather necessary information about the student's needs, thereby resulting in an IEP that lacked appropriate transition goals).

The Parents further argue that the IEP developed after the meeting on October 28, 2010 was inappropriate because it contained the exact array of services as the IEP from April 2009. They claim that despite Mr. Ferreira's evaluation, which was reported in January 2010, the IEP still failed to address the student's social-behavioral deficits. They argue that while some changes (an additional 30 minutes of speech/language therapy and some social work services) were made to the IEP in May 2011, they were only minor. The Parents assert that by the end of the school year, the student was being escorted to class, hated being at school, and had lost all trust in adults at school. His academic progress declined as well.

The Parents request reimbursement for their private placement at Aucocisco School as a form of compensatory education for the School's alleged failure to provide the student with an IEP from April 2010 to November 2010, its simultaneous failure to evaluate him in a thorough and timely manner, and its failure to address his need for social and pragmatic language instruction and appropriate behavioral interventions.

The Parents also request a reimbursement award because they believe that the School's IEP and placement for the 2011-2012 school year failed to adequately address the student's wide range of educational needs. They cite Dr. Hunter's conclusion that students in the Learning Center were far less disabled than the student and therefore it would not be an appropriate setting.

The Parents portray the Aucocisco School as an appropriate alternative for the student, citing case law for standards used to weight the reasonableness of a private placement. They stated that the student received meaningful benefit at Aucocisco and gained new skills there, both academically and functionally.

The Parents also assert that the IEP and placement designed for the student for the 2012-2013 school year is not appropriate. They aver that since the program is new and pull-out services would be reduced to only 90 minutes per day, it fails to provide social thinking curriculum and continues to ignore the effect that different learning environments have on his ability to progress. In addition, the IEP is geared toward mainstreaming the student in the high school, rather than having him placed in a smaller, self-contained setting, as recommended by Dr. Hunter.

2. School

The School argues that the student's programming through the end of the 2009-2010 school year continued to be reasonably calculated to provide him with meaningful educational benefits. This is despite any technically faulty IEP processes that may have occurred during the tail end of the year. The IEP developed for the school year was comprehensive and included IEP goals for organizational and behavioral skills, writing, and social skills. Many classroom accommodations were also included. Four hours of specially designed instruction were included for both regular and special educational settings. The student's report card reflected passing grades, his effort at least met expectations, and his conduct was at least satisfactory. In addition, the School offered the student the Social Skills Group theater activity, which went over and above what was called for in the IEP. Therefore, the School argues that the student's program continued to be calculated to provide him meaningful educational benefit between March 18, 2010 and the end of the school year.

The School argues that it met its duty to provide reasonably calculated educational benefits during the 2010-2011 school year. Since Mr. Carroll had worked with the student during the xx grade, he had a good understanding of his profile and worked with the student more than the two-hour period allotted to him in his IEP. He would "preload" the student with information to support easier transitions and met with him at the start of each day and during home room. The fall went well, including his week at Camp Keive, and during extra curricular activities. The School avers that virtually no problems arose during the first half of the year. While it acknowledges that the second half of the year did not go as well, the School asserts that it responded to the increase in the student's inappropriate behaviors. The School cites the Back on Track program, additional study hall with Mr. Carroll, increased guidance counselor availability, an FBA, adult monitoring during unstructured times, speech/language therapy, and social work services. The School states that by May 2011, Mr. Carroll reported to the IEP Team that the

interventions were working well, but that a placement in the Learning Center was probably a better fit for the student at that time. Based upon the student's actual needs at the time, the School argues that it took measures reasonably calculated to address them.

The School urges that any alleged procedural violations that may have occurred during this time period are outside the parameters of the issues raised in the Due Process hearing request. However, if the procedural issues are considered, the School states that they are not significant because they did not cause the student any educational harm. With respect to an untimely diagnosis of Autism, the School states that the student's demonstrated needs over time drove his programming, not a technical diagnosis. The School stated that with respect to the expired IEP from 2009, the family agreed to an extension into xx grade. The School argues that even if there was no clear agreement, the expiration of the IEP posed no harm to the student, since he was progressing well in the first half of xx grade. In addition, the School states that the lack of a social behavior goal and a behavior plan in the student's IEP did not adversely impact the student in xx grade.

The School asserts that the IEP designed for the 2011-2012 (xx grade) school year was reasonably calculated to provide the student with meaningful educational benefit. The School cites Dr. Hunter's approval of the Learning Center, since it was the type of placement she had recommended: small class size, well-controlled; active teacher presence; multi-age; individualized math content; and access to social and executive skills coaching. The School also cites Ms. Violette's positive opinion of the Learning Center and Ms. Lindsay's experience with the students in that setting. Based upon these recommendations for the student, the School believes that it offered the student a reasonably calculated educational program for the 2011-2012 school year.

The School further argues that in the same vein, the IEP designed for the student's 2012-2013 (xx grade) school year is reasonably calculated to provide him with meaningful educational benefits. The School stated that the student was even more prepared for xx grade, since he was a year older and he had made progress, according to Ms. Melnick.

The School asserts that if a remedy is ordered, it should not be for tuition reimbursement because: 1) the family is not entitled to financial reimbursement as a form of compensatory education; 2) Aucocisco was not an appropriate unilateral setting; and 3) the Parents were untimely in providing statutory notice to the School.

VI. LEGAL STANDARDS

1. Burden of Proof

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

2. Free Appropriate Public Education (“FAPE”)

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The hearing officer must examine whether the Student’s educational program contained in his IEP was “reasonably calculated to enable the student to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The First Circuit elaborated that the student’s educational program must guarantee “a reasonable probability of educational benefits with sufficient supportive services at public expense.” See *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The IDEA sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential. 998 F.2d 1083, 1086 (1st Cir. 1993). In *Roland M. v. Concord School Comm* the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990). As the First Circuit explained:

The issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate education" as defined in federal and state law . . . For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C, Question 38. *Id.*

“Education” has a broad meaning under the IDEA, and is not limited to academic progress, as the IDEA requires the IEP team to consider the “academic, development, and functional needs of the child.” 20 U.S.C. §1414(d)(3)(9)(A). Accordingly, the IEP must be designed as a package to target “all of a child’s special needs . . . whether they be academic, physical, emotional, or social.” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993). The law is also clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. § 1412(a)(5); Maine Unified Special Education Regulations (MUSER) §X(2)(B). What is least restrictive depends upon an individual’s needs. The goal is to educate the Student, whenever possible, with nondisabled students, and as close as possible to the child’s home. MUSER §X(2)(B). An out-of-district placement is only appropriate when the District is unable to provide the Student with FAPE. “Parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child.” *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993).

VII. CONCLUSIONS

1. **Did the Student’s IEP and placement from March 28, 2010 through the end of the 2010-2011 (xx grade) school year fail to provide the student with a FAPE?**

a. From March 27, 2010 through the end of the 2009-2010 (xx grade) school year

At the time in issue, the student was provided special education and related services under the exceptionality of OHI. This had been changed from ADHD in February 2006, based upon Mr. Ferreira’s evaluation.

The IEP spanning April 3, 2009 - March 18, 2010 clearly reflected the student’s academic and functional needs, as discussed by the IEP Team in March 2009. It included goals to address his weaknesses in math, writing, and particularly his functional needs. The IEP specifically addressed organizational skills, writing skills, behavior and social skills and sensory strategies. While it was difficult to pinpoint the cause of his disability, whether it was OHI or something else, the IEP team attempted to address how it was impacting the student within the school community. While the student made gains with respect to his instructional goals in math and organization, he clearly did not make progress on his behavioral goals, as noted in the IEP progress reports from June 8, 2009. Any improvement was “very sporadic” and “inappropriate behavior can be set off quite quickly, subject to the student’s perception of an experience.”

When the student entered xx grade in the fall of 2009, he seemed to adjust fairly well to the higher level of workload and expectations. Dr. Bates noted that the student appeared to be

happier and his mother reported a “vast mood improvement.” (P. 219) His IEP progress reports were not consistently reported at that time. By December 2009, it is unclear how he was progressing in his OT goal, since no progress was reported. (S. 197) He apparently made satisfactory progress on his instructional goals in writing. (S. 198) However, his organizational goal was mixed. While he apparently made satisfactory progress overall, his only short-term goal indicated that he made only “limited progress.” (S. 200-201) He made “satisfactory” progress in his behavioral goal by December 5, 2009. The narrative stated, “the student has transitioned well to middle school. He at times has difficulty with changes in routine and unexpected events. He has been able to adjust when he can discuss the situation with a teacher.” (S. 202) The student’s IEP progress reports up until March 3, 2010 indicate that he made satisfactory progress in all his goals. The only behavior-related service included in his IEP was a 15-minute sensory diet session in the special education setting. (P. 201)

On March 17, 2010, the student’s IEP expired. While the School argues that the Parents agreed to extend the IEP, there is no evidence in the record that they did so.

There is scant evidence of the student’s progress during January and February 2010. The Parents report that the student was becoming emotional at night and having a very difficult time completing his homework assignments. There is very little evidence in the record to indicate how the student was behaving in school, other than the Parents’ recollection that he was being argumentative with teachers and having negative peer interactions, which were also reflected in Dr. Bates’ office notes. The only documented school record is the report by Rohan Henry about the student’s participation in the Social Skills Group between January and April 2009. That report indicated that the student was working on self-regulation issues, perspective taking, and picking up on non-verbal cues (“reading between the lines”) regarding his interactions with peers. If not for this non-IEP activity, the student would not have had any supplementary social skills services.

By late April, a more accurate picture of the student was emerging. Mr. Ferreira’s report, dated April 28, 2010, noted the student’s continued functional disabilities and raised the possibility of a diagnosis of Asperger’s Syndrome. Both in school and at home, he found that the student had significant functional deficits, including difficulty restraining his impulses and a strong tendency to interrupt and disrupt group activities. He was having difficulty with initiating tasks, remembering steps to follow, organizing his materials, and checking his work. He was prone to distractibility, impulsivity, and restless over-reactive behaviors. He experienced “high levels” of social interactive difficulties and irritability. (S. 155) The IEP team acknowledged at that point that it had serious concerns about his difficulties with social pragmatic skills, which were “impacting his daily ability to navigate within the mainstream curriculum and social arenas.” (S. 143) However, rather than creating a new IEP or extending the IEP of April 2009 - March 2010, the IEP Team chose to “manage” his anxiety by reducing his work load and

continue providing special education and related services as described in the expired IEP, while waiting until the fall of 2010 for results from additional testing. Given the information known to the IEP Team, the history of the student's disability in prior years, and the fact that he no longer had a current IEP, it is reasonable to conclude that after March 18, 2010 the student's programming was not reasonably calculated to provide him with meaningful benefit. He was not receiving a FAPE during from March until the end of the 2009-2010 school year.

b. The 2010-2011 (xx grade) school year

The student started the 2010-2011 school year without an IEP. The IEP from April 2009 had expired on March 18, 2010. The IEP Team did not meet until October 28, 2010, more than two months into the school year. While this is a procedural violation that was not raised as an issue at the hearing, it is important in determining whether the School provided the student special education and related services that were reasonably calculated to provide him with educational benefits.

While the student started out the year fairly smoothly, within a few weeks his behavior began to seriously impede his educational performance. In late October 2010, he began falling asleep in class. By November 3, 2010, teachers were reporting impulsive, inappropriate behaviors during class time, including poking and pinching other students.

Despite having met on October 28, 2010 and explicitly discussing the student's functional needs, the resulting IEP, dated November 1, 2010, was devoid of any goals to address them. The only goals written into the IEP were focused on math, reading, and writing. No related services or supplemental services were included to address his social and behavioral needs. The student's case manager, Steve Carroll, stated that he wrote the IEP, and admitted that he should have included functional goals.

The student became more anxious and his nighttime routines were stressful and tearful. Sometime after December 2010, reports about the student's behavior became more frequent. He began to get into altercations with students in the hallway during transition times, resulting in detentions and in-school suspensions for his behavior.

The IEP team met again in January 2011 to review Mr. Ferreira's psychological report, in which he concluded that the student's symptoms and profile warranted a diagnosis of Asperger's Syndrome. His recommendations included: 1) Changing his special education exceptionality to Autism; 2) Placing increased emphasis on social/communicative developmental challenges; 3) Developing skills in social problem solving; 4) Providing ongoing support to assist him in coping with changes and transitions; and 5) Supporting his efforts to cope with new academic demands and tasks, particularly in the areas of writing.

Despite these recommendations and the student's persistent needs, the IEP team took no action. Instead, the IEP Team chose to allow the Parents to review the report before any action would be taken. There were neither goals nor were individually designed instructions added to his IEP to address the student's functional deficits.

The student continued to languish during early 2011. By end of March, Mr. Carroll acknowledged to the student's parents that his teachers were concerned about the "escalation" of the student's problematic behaviors. He had been asked to leave the debate team temporarily and was suspended for physical altercations. He argued with teachers and drew threatening pictures of them. He reportedly stuck objects into electrical outlets. He edited the Wikipedia website on bomb making. He barely made passing grades in his academic classes. He was getting D's because of his lack of work completion.

Clearly, the IEP's specially-designed instruction for math, writing, and organization, and his daily 15-minute sensory diet, were not working, as acknowledged by Mr. Carroll at the hearing. Apparently, his lunches with the School's social worker and Speech and Language pathologist were also not effective. The IEP Team struggled to figure out what to do.

At the IEP meeting on March 31, 2011, the IEP Team decided that an FBA was in order based upon the student's decline in school. However, it did not add even temporary services to his IEP. (S. 457-458) By April 2011, the student's parents felt that the student was in crisis. His suicidal remarks at home compelled them to think about their options.

The IEP Team met on April 15, 2011 for what they referred to as the first of a two-part meeting. The FBA had still not been completed. While they waited, the IEP Team decided to manage the student's situation by adding 30 additional minutes a week of social pragmatic services (lunch with the social worker) and informal OT consultations. (S. 94) However, none of these services was actually added to the student's IEP.

The student continued to exhibit negative behaviors that impeded his educational performance after the meeting on April 15, 2011. Ms. Puckett's FBA was completed on May 2, 2011. In it, she stated that the student needed a "comprehensive plan" to address his "difficulties." She included detailed recommendations and referenced recommendations in Dr. Hunter's evaluation from 2007.

The IEP Team did not meet again until May 10, 2011 to review the FBA. It was only at that point that the IEP Team modified the student's IEP to address at least some of his functional needs and to establish a behavioral goal for him. The Team agreed to add the following: 1) two forty-minutes sessions per week of speech/language services in order to work on his social

communications skills; 2) daily one-hour behavioral coaching in the regular class room; 3) a 30-minute social work session once a week; and 4) a behavioral plan. While the Team discussed placing the student in the Learning Center at that time, it was agreed that, based upon the Parents' input, pulling the student out of the mainstream setting into a self-contained placement was not a good idea at that point, because they felt that the student, who was already miserable, could potentially see it as a failure on his part.

The IEP created from the April 15 and May 10, 2011 IEP meetings, effective from April 15, 2011 to April 14, 2012, was sent to the Parents on May 16, 2011. It included a speech/language goal, along with just one 40-minute session of speech/language services per week. However, the IEP was not complete. The IEP Team had agreed to two sessions per week of speech/language services, not one. In addition, none of the other related services agreed upon was added to the IEP (30-minutes per week of social work services, one hour of daily coaching support, and a behavioral plan). It was not until the entire IEP was amended on June 16, 2011 that these items were eventually included.

Despite having lunch with the guidance counselor and speech pathologist, and 30 minutes of social work a week, several behavioral incidents occurred in May and June 2011. One included the student threatening a boy with a knife. To redirect his behavior in the hallways School staff began to escort the student to class. Mr. Gahn reported that he believed the student no longer trusted the adults at School. Ms. Puckett reported that friendships were very difficult for the student. His Parents reported that the student was highly emotional at night and cried a lot.

The IEP Team met again on June 16, 2011 to discuss the student's xx grade placement and also to check on his progress since the last IEP Team meeting on May 10, 2011. The Written Notice clearly stated Mr. Sibley's view of the student: "At this point the student is much more dramatic and hostile. He seems very upset by the recent escort behavior plan." The present level of performance, as stated in the Amended IEP established after the meeting on June 16, 2011, indicated that the student was still struggling with his handwriting and organizing his ideas, but that he had improved his work production and completion rate. With respect to his current behavior, the IEP stated that the student was "prone to engage in inappropriate boundary intrusions. This takes the form of grabbing, hitting, fake hitting, intentionally colliding, and taking peers (sic) belongings. In the class room he engages in off-task physical behaviors such as seat bouncing, rocking in his seat, exaggerated breath holding, random vocalizations and singing." (S. 14)

It was not until after the IEP meeting on June 16, 2011 that the student's IEP was populated with two behavior goals, related services, and a behavior plan. As Mr. Carroll stated at the hearing, the School staff was merely reacting to the student's behaviors, and managing them

as best they could until the IEP Team had clear direction for the FBA and other indicia in order to create a more comprehensive plan. All the while, the evidence shows that the student's overall educational progress, specifically his functional development, was languishing.

In summary, it is evident that the School was unable to address the student's significant functional performance needs during the entire 2010-2011 school year. It is important to note that, to be appropriate, an IEP must address all of a child's needs, whether they are academic, physical, emotional or social. MUSER defines educational performance to include functional performance. MUSER § II.11, 16. In *Mr. and Mrs. I v. MSAD 55*, 480 F.3d 1 (1st Cir. 2007), citing *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), the Court points out that the State of Maine has chosen to define educational performance more broadly than the federal scheme does, expanding the definition to include non-academic areas that fit under the rubric of physical, emotional, or social needs, as well as more traditional academic areas. The School failed to provide the student the social and behavioral instruction and services he needed to access his education, and therefore did not provide a FAPE during the 2010-2011 school year. First, the School committed a violation of the IDEA when it allowed the student to return to school without an IEP. MUSER § IX.3.B(1); 34 C.F.R. § 300.323(a). In addition, the IEP dated October 28, 2010, was devoid of any instruction in the social and behavioral skills that the student needed. The School's failure to provide a FAPE was compounded after the IEP Team failed to implement any needed changes to the student IEP when he was diagnosed with Asperger's Syndrome in January 2011. The IEP dated April 15, 2011 added only social services that included eating lunch with School staff twice a week. By May 2011, not only was he floundering in his social and behavioral progress, he was earning D's in two classes and his academic testing continued to put him below grade level, despite his low-average to average cognitive abilities. It became necessary for him to attend a non-IEP program for academic help after school in order to improve his grades. Finally, only after the student was in crisis in the spring of 2011 did the IEP Team conclude on May 10, 2011 that he needed a more comprehensive IEP to address his longstanding needs, including an option to change his placement to a self-contained setting, which the Team declined. The amended IEP was finalized on June 16, 2011, too late to have any impact on the student so late in the year. According to Mr. Sibley, the student had become more hostile and impulsive. It is notable that Mr. Carroll, the student's xx grade case manager, testified that the student needed a more comprehensive program than the one the School had attempted to implement during the 2010-2011 school year. Based upon the above, I find that the School failed to offer the student a FAPE during the 2010-2011 school year.

2. Was the student's IEP and placement for 2011-2012 (xx grade) school year reasonably calculated to provide him with a FAPE?

By June 2011, the IEP finalized the student's IEP for the upcoming 2011-2012 (xx grade) school year. While the IEP is dated April 15, 2012, it continued to be amended until it was finalized on June 16, 2011. In addition to the three instructional goals to address his difficulties with assignment completion, math, and writing, the IEP also contained a speech/language goal to address his communication skills in social situations, an OT goal focused on his self regulation issues, and two behavioral goals to address social communication, boundary issues, and on-task behaviors. An array of specially-designed instruction and related services was included, as well as supplementary aids, such as a positive behavior support plan and hall escort. The IEP Team ultimately agreed that the Learning Center was the most appropriate placement given the level of support he needed in xx grade and the recommendations of Dr. Hunter and others. He would be with his typical peers for science, reading, and physical education. Dr. Hunter had recommended that the student have a small class size with access to immediate social coaching and feedback. Ms. Lindsay and Ms. Violette described the Learning Center as just such a placement, with a record of positive success. The Learning Center included supplementary staff support in the form of an Educational Technician III. Both Ms. Violette and Ms. Lindsay noted the success Learning Center students have had in returning to the regular education setting, including those on the Autism spectrum.

I find that this IEP was reasonably calculated to provide meaning educational benefits for the student. It was directly targeted to meet his behavioral and social functional deficits, increasing the likelihood that he could be successful at school. The IEP was comprehensive in scope and design, unlike the prior IEP. Clearly, the School had turned a corner in its assessment of the student's needs and appreciated what it needed to do in order for him to access his education.

3. Is the student's proposed IEP and placement for school year 2012-2013 (xx grade) reasonably calculated to provide him at FAPE?

Determining whether the IEP prepared for the student s xx grade school year was reasonably calculated to provide him with educational benefits requires a slightly different analysis than whether the prior IEPs provided a FAPE ex post. *Mr. and Mrs. C. v. Maine School Adm. Dist. No. 6*, 49 IDELR 36 (D. Me 2007), citing *Ross ex rel. Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 17 (D. Mass. 1999), aff'd 229 F.3d 1133 (1st Cir. 2000) (“[A] claim about implementation is necessarily distinct from a claim that an IEP was not appropriate at the time it was adopted (that is, from the ‘ex ante’ perspective.)”). As stated earlier, the IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The IDEA sets modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. The IDEA also requires a preference for mainstreaming. *Lenn*, supra

In this regard, it is apparent that the IEP Team has created an IEP for the student that is reasonably calculated to provide meaningful educational benefits in the least restrictive environment. It allows for mainstreaming of his core academic courses with behavioral supports co-taught within a classroom. Other classes, such as art, would include special educational support as needed. The IEP included 90 minutes per day of behavioral and social coaching within the special education setting. In addition to academic goals, the IEP included OT, behavioral, and social work goals addressing his functional and behavioral deficits. A detailed Positive Reinforcement and Behavior plan was included. This IEP is calculated to address the student's needs and at the same time allows him to be mainstreamed into the regular education setting. While the faculty at Aucocisco believes that the student would still be too fragile to join the regular education setting, he has clearly made progress, as noted by Dr. Hunter and School staff who observed him in the spring of 2012. Also, Aucocisco documents show that while he still has difficulties with classroom behavioral issues, he has made progress.

While it is difficult to predict whether or not the student will be successful at Portland High School, it is the view of this Hearing Officer that the School has worked hard at creating an individualized program that has a greater likelihood of success than his prior programming. Therefore, I find that the IEP dated April 14, 2012 is reasonably calculated to provide the student meaningful educational benefit in the least restrictive environment.

4. Remedy for the failure to provide a FAPE between March 28, 2010 and during the 2010-2011 (xx grade) school year.

The family is entitled to a remedy for the School's failure to provide a FAPE from March 28, 2010 through the 2010-2011 (xx grade) school year. This remedy must be in the form of equitable relief. *Phil v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993). The Parents request that the remedy be in the form of reimbursement for tuition and other expenses incurred as a result of their unilateral placement of the student at the Aucocisco School.

A private placement is an appropriate self-help remedy when a public school system has failed in its obligations under the IDEA, if the education provided by the private school is reasonably calculated to enable the student to receive educational benefits. *Rafferty v. Cranston Pub Sch. Comm.*, 315 F.3d 21, citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11, citing *Rowley*, 458 U.S. 176. However, parents make a private placement at their own financial risk. *Florence*, 510 U.S. at 15 (1993), quoting *Burlington*, 471 U.S. at 373-74 (1985). As a remedy, a private placement need provide only some element of special education services missing from the public alternative in order to qualify as reasonably calculated to enable the

child to receive educational benefit. *Mr. and Mrs. I. v. MSAD No. 55*, 480 F.3d 1, 25, citing *Berger v. Medina City Sch. Dist.*, 348 F.3 513, 523 (6th Cir. 2003). The private placement does not have to meet every special education need. *Id.*, citing *Frank G. v. Bd. Of Educ. Of Hyde Park*, 459 F.3d 356, 365 (2nd Cir. 2006), *cert. denied*, 552 U.S. 985 (2007).

Reimbursement for an appropriate private placement may be awarded as a form of compensatory relief when parents have acted unilaterally and with proper statutory notice. *Ms. M. v. Portland Sch. Comm.* 360 F.3d 267 (1st Cir. 2004).

In this case, the programming provided to the student at Aucocisco was directly targeted to meet the student's academic and functional educational needs. He was provided the type of placement recommended by Dr. Hunter. Her observation of him in the spring of 2012 indicated that the self-contained classroom in a community setting was appropriate. The modified instruction that emphasized positive, direct, and immediate corrective feedback was also appropriate. She noted that he was strikingly more self-regulated than when she had seen him in the spring and summer of 2011. He was no longer physically touching other students, he made inappropriate remarks only infrequently, and he had a more pronounced sense of engagement. Ms. Glaude and Ms. Mack also observed appropriate behaviors on the site visit to Aucocisco to observe the student. The Aucocisco progress reports and narrative summaries of the student's 2011-2012 school year showed progress as well. It is worth noting that although Ms. Melnick had difficulty locating records that were subpoenaed for the hearing and a substitute teacher was charged with social coaching from March 2012 to the end of the school year, this does not completely discount the benefits that the student gained over the entire year at Aucocisco. While Aucocisco may not have produced perfect results, there is no dispute that the student benefitted from the programming. That is all that is required. Therefore, I find that the private placement at Aucocisco was appropriate.

With respect to whether the Parents gave reasonable notice to the School regarding their unilateral placement, the cost of reimbursement may be reduced if, at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency that they were rejecting the placement and intended to privately place the student. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); MUSER IV.4G(3)(d)(i)(II). The School argues that the parents knew they were going to withdraw the student on or about August 12, 2011, the day the student was accepted to Aucocisco. However, they did not give the School notice of their intent to withdraw him until August 22, 2011. The School argues that the Parents should have notified the School on August 1 or 2, 2011 in order for the notice to be timely.

In *Sarah M. v. Weast*, 111 F. Supp. 2d 695 (D. Md. 2000), the District Court held that the enrollment of a 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). In *Parents v. RSU #51 & RSU #51 v. Parents* (MSEA 2011)(on appeal), the hearing officer also found that parents gave sufficient notice when they submitted their notice on August 13, 2010, ten days before school started, despite having sent a deposit to the private school on June 25, 2010. *Id.* Citing *Sarah M.* and *Sanford*.

Similarly in this case, the student was accepted to Aucocisco on August 12, 2011 and the Parents sent their notice of removal on August 22, 2011, more than 10 days before the start of the School's calendar year, which started on September 7, 2011. Therefore, the notice in this case satisfied the statutory notice requirement.

In determining a reasonable remedy in this case, I take into consideration the timing of the School's failure to provide the student a FAPE. Since he was denied a FAPE for the later portion of the 2009-2010 school year and then again for the entire 2010-2011 school year, and to adjust for any educational benefits he did receive at the School during that period, it is not unreasonable to provide a remedy that includes compensatory education for the entire 2011-2012 school year, but not more. Therefore, a remedy of compensatory education in the form of reimbursement to the Parents for the costs of the 2011-2012 tuition and expenses at Aucocisco is reasonable.


In addition, the IEP Team must be convened in order to design an appropriate transition plan for the student's reentry into the public school setting.

ORDER

1. The School shall reimburse the Parents in the amount \$37,296.27.

2. The IEP Team shall meet to design an appropriate transition plan for the student's reentry into the public school setting for the 2012-2013 school year. Such meeting shall take place within 30 days of the entry of this order.

It is so ORDERED on this 7th day of September 2012.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Esq.

Portland, Maine