

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

October 16, 2012

12.105H – Parents v. Wells Ogunquit Community School District

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on September 10, 2012, at the offices of Drummond Woodsum in Portland, and September 13, 2012, at the offices of the Department of Health and Human Services in Sanford. Present for the entire proceeding were the student’s mother; the student’s father; Richard O’Meara, Esq., counsel for the family; Ryan Fairchild, director of special services for Wells Ogunquit Community School District; and Eric Herlan, Esq., counsel for the school department.

Testifying at the hearing under oath were:

Student’s mother
Student’s father
Scott Hoch, Ph.D., psychological evaluator
Beth Hutchins, student’s xx and xx grade special education teacher
Michelle Lazzara, student’s xx grade general education teacher
Victoria Papageorge, academic evaluator, Hyperion Learning Services
Karen Ropes, former director of special services, Wells Ogunquit Community School District

I. PROCEDURAL BACKGROUND

The parents filed a request for a hearing on June 28, 2012. A prehearing conference was held on August 10, 2012. The hearing was held on September 10 and 13, 2012.

The record includes 22 documents submitted by the parents, identified as pages P. 1 through P. 242, and 64 documents submitted by the school district, identified as pages S. 1 through S. 255.¹ All documents were admitted without objection. At the close of testimony, the parties jointly requested that the record remain open for the submission of written closing briefs. The record closed with the hearing officer's receipt of both parties' closing briefs on October 1, 2012.

II. ISSUES

The issues for hearing are:

1. Whether the school district failed to provide the student with programming that provided her a free, appropriate public education during the 2010-2011 school year and the 2011-2012 school year until February 17, 2012, when the student's Individualized Education Program ("IEP") services ceased.
2. Whether the school district violated the student's right to a free, appropriate public education when it terminated her eligibility for special education and related services on January 23, 2012.
3. If the family is entitled to a remedy, what remedy is appropriate?

III. FINDINGS OF FACT

1. The student was born on xx/xx/xxxx. (S. 7.) From xx through xx grade, the student attended Wells Elementary School. (S. 1, S. 153, S. 237; S. 247.) For xx grade, the current school year, the student attends Wells Junior High School. (Testimony of Father.)

xx grade (Fall 2008 – Spring 2009)

¹ The parents' submission of a document identified as P. 243 on the last day of hearing was not accepted into the record due to lack of foundation.

2. The parents made a referral of the student for special education in June 2009, toward the end of the student's xx grade year, stating that the student had had difficulty with her speech for several years and had begun to exhibit frustration with her progress in reading and writing. (S. 234-236.) At the initial Team meeting on June 16, 2009, the parents informed the school department that the student was on the wait list for services in Lindamood Phoneme Processing System ("LiPS") programming there. (S. 227.)
3. The student received LiPS program tutoring at the Center for Communication beginning in August 2009, just before the start of her xx grade year. (P. 1.) The primary goal for the student was to improve her reading skills to an age appropriate level by addressing her phonological awareness deficits and phonological memory deficits. (P. 1.) The school district was aware that the student was receiving private tutoring utilizing the LiPS program. (S. 55; Testimony of Ropes).

xx grade (Fall 2009 - Spring 2010)

4. The student was identified as eligible for special education and related services in October 2009, shortly after entering the xx grade, in the category of specific learning disability. (S. 159.) At that time, the Team reviewed two speech-language evaluation reports, a psychoeducational evaluation, and an educational evaluation. (S. 172-173.) The student's IEP called for specially designed instruction in reading to be provided by a special education teacher in the resource classroom one hour per day. (S. 166.) The student's IEP goal was to improve her reading skills from a level 10 informal reading inventory to reflect 6 to 12 months growth in increased skills in decoding, word identification, passage comprehension, and fluency meeting instructional level benchmarks by her next annual review in November 2010. (S. 164.)
5. In a progress note of March 2010, the student's Center for Communication tutor noted that, in tutoring, the student was working on goals of improving reading skills to an age appropriate level, increasing fluency of single syllable and bi-syllable word identification to an age appropriate level, and manipulating single sounds within words with 80% accuracy in the processes of substitution, addition, deletion, repetition, and shift, using the LiPS program. (S. 150.)

xx grade (Fall 2010 - Spring 2011)

6. On October 28, 2010, the student's IEP Team met and created her IEP for the period of November 2010 to November 2011. (S. 106.) The Team noted that the student continued to struggle with fluency although she was able to comprehend material equivalent to her grade level peers. (S. 109.) The student was reported to be performing at a DRA reading level 34, mid-xx grade level, with 97% accuracy at 71 words per minute, while meeting the benchmark for

- comprehension. (S. 111.) The Team noted that the student struggled with omission of ending sounds of multi-syllabic words and articulation of words containing the letter “r.” (S. 111.) It was noted that the student’s spelling skills were impacted by her challenges in articulation. (S. 111.) The IEP identified one annual goal: that the student, given specially designed instruction in fluency, would increase her accuracy and decrease omission of endings of multi-syllabic words to meet grade level benchmarks for accuracy and words per minute with 90% accuracy or greater by November 2011. (S. 112.) The student’s IEP Team added an additional 45 minutes per day of specially designed instruction in writing and spelling with the special education teacher in the resource classroom to the student’s one hour of specially designed instruction in reading each day. (S. 135.) The purpose of this additional time, which was intended to be temporary, was to boost the student’s skills so that she could return to reading and writing instruction in the general education curriculum. (S. 145; Testimony of Mother.) The parents were not comfortable with this plan but went along, feeling that they were not sure what to request for the student. (Testimony of Mother.)
7. On December 1, 2010, the student’s progress on her IEP goal of improving her reading skills was graded as “satisfactory,” among choices of “limited progress,” “satisfactory progress,” and “achieved.” (S. 125.) Beth Hutchins, the student’s special education instructor, was employing the “Predict” and phonics strategies and story maps to record the important elements of a story with the student. (S. 125.) Ms. Hutchins reported that the student was making excellent progress toward using these strategies independently. (S. 125.) The student was also graded as making “satisfactory progress” on spelling, capitalization and punctuation skills. (S. 126.) Ms. Hutchins reported that the student had done very well restating questions into a response and including key vocabulary and was writing with capital letters, punctuation, and complete sentences 95% of the time without support, but continued to struggle with spelling. (S. 126.)
 8. The student’s fall of 2010 NECAP test result in reading was a scaled score of 345, placing her in the proficient category. (S. 101.) The student’s subtest scores in reading were: 15 in word identification/vocabulary as compared to a state average of 14.7; 10 in literary text compared to a state average of 9.2; 8 in informational text compared to a state average of 8.1; 12 in initial understanding level of comprehension compared to a state average of 10.6; and 6 in analysis and interpretation compared to a state average of 6.8. (S. 101.)
 9. In the fall of 2010, the student received a score of 200 in reading on the NWEA, placing her in the 75th percentile. (S. 4.)²

² A version of the student’s scores in the parents’ documents, generated in November 2010, places the student’s score of 200 at the 73rd percentile, while the school district’s version, generated in July 2012, shows the student’s score of 200 at the 75th percentile. (P. 9; S. 4.)

10. The student's first trimester report card in grade three indicated that all of the enumerated reading and writing skills were not applicable. (S. 153.)
11. The student's IEP Team met in February 2011 to review the student's mid-year progress. (S. 117.) Based on the student's daily performance on benchmark assessments, the student was performing at grade level at that time and the Team felt she would benefit from the opportunity to participate in the general education setting for instruction in reading, writing, and spelling. (S. 119.) The Team decided to decrease the student's time in the special education setting to 15 minutes a day, during which she would receive specially designed instruction in fluency to target accuracy and decrease omission of ending sounds. (S. 113; S. 117.) The student's special education instructor felt that the student had exhibited a steep increase in performance, her confidence and ability to take risks had increased significantly, and she would benefit from having more time in the general education classroom to increase her confidence there. (Testimony of Hutchins.) The parents noted pleasure with the student's progress and observed her increased ability to self-correct. (S. 119.)
12. On March 1, 2011, the student's progress on her IEP goal of increasing her accuracy and decreasing her omission of endings of multi-syllabic words was graded to be "satisfactory." (S. 124.)
13. The student's second trimester grades in reading and writing goals in grade three were as follows (on a grading scale that ranged from "needs improvement" to "secure plus"):
 - Defines and uses new words: Developing
 - Responds to literature orally: Developing Plus
 - Responds to literature in writing: Developing Plus
 - Reads fluently with expression: Developing
 - Uses a variety of reading strategies: Developing
 - Expresses ideas clearly in writing: Developing Plus
 - Organizes ideas appropriate to topic: Developing
 - Applies correct writing mechanics (punctuations, capitalization, grammar):
Developing Minus
 - Applies spelling patterns and rules in writing: Beginning Plus(S. 153.)
14. The student's NWEA reading score in the spring of 2011 was a 206, placing her in the 68th percentile. (P. 32; S. 4.)
15. When the student began her tutoring at the Center for Communication, her insurance covered the service but the parents were required to submit a co-pay; in April 2011, however, the parents became responsible for the entire cost of the hourly sessions. (P. 15-19; Testimony of Father.) As a result, the parents brought the student to Hyperion Learning Services in April 2011 for a consultation,

- having been informed that the student could receive the same services at a lower cost there. (Testimony of Father.) Victoria Papageorge, M.Ed., M.S., a certified special education consultant for approximately 22 years, began Hyperion Learning Services in 2002. (Testimony of Papageorge.)
16. Ms. Papageorge conducted a reading evaluation of the student on April 20, 2011. (S. 102.) Ms. Papageorge administered the Woodcock Reading Mastery Tests Revised-NU (“WRMT-R-NU”); Gray Oral Reading Tests-4 (“GORT-4”); Test of Word Reading Efficiency (“TOWRE”); and the Test of Orthographic Competence (“TOC”). (S. 102.) The student’s composite scores were all in the average range, although she had borderline or below average scores on the subtest for phonemic decoding on the TOWRE and borderline average scores in the letter choice and sight spelling subtests on the TOC. (S. 103: Testimony of Papageorge; Testimony of Hoch.) Ms. Papageorge concluded that the student required increased focus on development of phonological processing and symbol imagery skills. (Testimony of Papageorge.) Ms. Papageorge believed that the student’s deficits in phonological memory could be improved with the right methodology but remediating her phonological awareness deficits would be a slower process that required specially designed instruction and reinforcement. (Testimony of Papageorge.) Ms. Papageorge recommended sight word vocabulary reinforcement; phonics skill development focusing on accuracy in a timed situation; and use of the LiPS and Seeing Stars programs for sight word and phonetically-based word spelling. (S. 105.)
 17. At Hyperion Learning Services, the student began tutoring with Robin Vaughn, who was trained in the LiPS and Seeing Stars programs. (Testimony of Papageorge.) The student’s tutoring services have since been delivered one-on-one by Ms. Vaughn, with Ms. Papageorge consulting on the student’s program, observing the lessons, and meeting with Ms. Vaughn regularly. (Testimony of Papageorge.) Although Ms. Papageorge has consistently recommended two hours of instruction weekly for the student, the student has attended only one hour per week of tutoring during school years due to the other time demands on the family. (Testimony of Papageorge; Testimony of Father; Testimony of Mother.) The family informed the school department that Ms. Papageorge was recommending two hours per week of tutoring but the student was attending only one. (S. 90; Testimony of Father.)
 18. On May 16, 2011, Ms. Papageorge provided the parents with a progress report noting that ongoing areas of concern for the student were difficulty blending vowels and consonant blends in single syllable words; difficulty blending individual phonemes in one syllable words; and distortion of consonant sounds when talking and reading. (P. 67.) Ms. Papageorge noted student progress in the student’s mastery of all the vowel combinations in the 15 sounds of the “vowel circle” and improved fluency. (P. 67.)

19. Beth Hutchins, the student's special education teacher for xx and xx grade, felt that in xx grade the student was demonstrating skill levels above her xx grade peers. (Testimony of Hutchins.) Ms. Hutchins felt that the student would benefit from having more time in the general education classroom. (Testimony of Hutchins.) After the student's time in specially designed instruction was reduced to 15 minutes per day, the student worked with Ms. Hutchins at the start of each day to review multi-syllable words she would be encountering. (Testimony of Hutchins.) Ms. Hutchins felt that the student thought that she was succeeding only because of Ms. Hutchins's help, although Ms. Hutchins did not feel that was the case, and Ms. Hutchins felt the student was skilled enough to be entirely in the generalized education setting and that her social-emotional growth would benefit from that as well. (Testimony of Hutchins.) Ms. Hutchins believed that the student would have performed adequately going into xx grade even without any special education services. (Testimony of Hutchins.)
20. In June 2011, the student was reported to be making satisfactory progress toward her IEP goal of increasing her accuracy and decreasing omission of endings of multi-syllabic words to be able to meet grade level benchmarks for accuracy and words per minute with 90% accuracy or greater by her annual review. (S. 87.) Ms. Hutchins noted that the student was reading fluently although she still struggled with the oral motor skills of multi-syllabic words. (S. 87.)
21. The student's final trimester grades of xx grade in subjects of reading and writing were as follows:
 Defines and uses new words: Developing
 Responds to literature orally: Secure
 Responds to literature in writing: Secure Minus
 Reads fluently with expression: Developing
 Uses a variety of reading strategies: Developing Plus
 Expresses ideas clearly in writing: Developing Plus
 Organizes ideas appropriate to topic: Developing
 Applies correct writing mechanics (punctuations, capitalization, grammar):
 Developing Minus
 Applies spelling patterns and rules in writing: Developing Minus
 (S. 153.)
- xx Grade (Fall 2011 – Spring 2012)
22. The student's NWEA reading score in the fall of her xx grade year was 211, placing her in the 78th percentile. (P.32.) The student was rated as "high" in performance on literary texts and "high average" on word identification, information texts, and comprehension strategies. (P. 32.)
23. The student's NECAP scaled score for the fall of her xx grade year was 452, placing her in the proficient category. (S. 100.) The student's subtest scores in

- reading exceed state averages in all categories at: 14 in word identification/vocabulary as compared to a state average of 11.6; 12 in literary text compared to a state average of 10.9; 14 in informational text compared to a state average of 11.0; 16 in initial understanding level of comprehension compared to a state average of 13.6; and 10 in analysis and interpretation compared to a state average of 8.2. (S. 100.)
24. On October 21, 2011, Ms. Papageorge conducted an educational evaluation of the student utilizing the Test of Orthographic Competence. (S. 94.) The student received composite scores in the average range in conventions and in spelling speed and well below average in spelling accuracy. (S. 95.) Her overall orthographic ability score was in the below average range. (S. 95; S. 97.) The student's sight spelling subtest score had dropped from 100, in the 50th percentile (average range) in April 2011 to 94, in the 2nd percentile. (S. 95; S. 103.) Ms. Papageorge concluded that the student's true score was somewhere in between and that the low score in October 2011 showed that some of the student's sight words had not gone into her long-term memory. (Testimony of Papageorge.) Dr. Hoch found all of the student's subtest scores on Ms. Papageorge's testing to be "solid" with the exception of the sight spelling subtest, which he concluded was due to the student not memorizing some of her sight spelling words. (Testimony of Hoch.)
25. On October 26, 2011, the student's IEP Team met to conduct the student's annual review. (S. 82.) The student's parents expressed concerns about the student's reading and writing skills and how the student would handle the workload in the coming xxxx year. (S. 83.) The parents expressed confusion about the student's ability to perform well on tests and to read and write adequately in class because she struggled with such tasks at home. (S. 83.) The parents noted the student's ability to read silently as a strength and reported that she appeared to have good comprehension of her silent reading material. (S. 83.) Ms. Papageorge did not attend the meeting and neither the documents nor the testimony indicate that her most recent report was discussed. (S. 90; S. 91.)
26. The IEP Team reviewed the student's initial 2009 evaluation, as well as an "informal writing sample" that the student had produced that fall, presented by her general education teacher, Michelle Lazzara. The assignment had been to copy parts of an essay off the blackboard while filling in several blank words and sentences within the essay. (Testimony of Lazzara.) The student produced a rough draft and a final version of the essay, although only the final version was presented at the IEP Team meeting. (P. 24-25; P. 29-31; Testimony of Lazzara.)
27. The IEP determined that the student's fluency was below average for her grade level and that she had difficulty manipulating the sounds to decode many multi-syllable words. (S. 84.) The Team determined that the student had a specific learning disability in the area of reading; that her challenges with working

memory and phonological processing impacted her fluency; and that she was able to access the general curriculum but needed daily practice to make progress to become an accurate, fluent oral reader. (S. 85.)

28. The student's IEP defined one annual goal: that given specially designed instruction and consultation, the student would increase her reading fluency from 88 correct words per minute to 110 correct words per minute on the initial read of grade level passages and that she would achieve that level of speed and accuracy on 8 out of 10 trials. (S. 85.) The student's IEP called for her to receive 10 minutes of 5 sessions per week of specially designed instruction in English/language arts and for the special educator to provide consultation in the regular education setting for 10 minutes once a month. (S. 86.) Ms. Hutchins supported the continuation of special education services into the xxxx primarily to ensure that the student made a successful transition to a new general education teacher and she wanted the student to be confident that the special education staff was still available to her if needed. (Testimony of Hutchins.) Ms. Hutchins found that the student felt insecure when she compared herself to her twin sister, a very skilled reader. (Testimony of Hutchins.) Linda Logan, who provided the student's special education services in xx grade, was familiar with the LiPS program and was utilizing similar decoding strategies with the student during her daily specially designed instruction. (S. 89; Testimony of Ropes.)

29. The Written Notice following the IEP Team meeting indicated that the school district had considered moving up the student's reevaluation date from the fall of 2012 to the fall of 2011 but ultimately decided not to do so. (S. 89.) The Written Notice explained that the Team decided to reduce the amount of services provided to the student because she was making progress in all subjects at the general education level and performing at grade level. (S. 89.) The Team found that the student's fall NWEA reading score showed growth from the spring; her reading fluency and decoding of multi-syllable words were improving but were still areas of concern; these skills were addressed in the classroom reading program and were the focus of the student's specially designed instruction; and the special education teacher was familiar with the methods used in the student's tutoring sessions and was able to use similar decoding strategies. (S. 89.) The Team noted that spelling was not the student's strongest academic area; that she needed to learn encoding skills; and that these special skills were identified in assessments and would be included in her classroom spelling instruction. (S. 89.) At the meeting, the father agreed with the change. (S. 89.) The parents decided to hold back on their request for updated evaluations because of fear that the student's eligibility would be discontinued if her test results were too good, which had been suggested by vice principal Ken Spinney, who moderated the meeting. (S. 89; Testimony of Father.)

30. The Written Notice indicated that the Team had significant discussion of the parents' concerns and sharing of language arts performance at home but decided

- on the reduced level of IEP services with the understanding that the student's progress would be monitored carefully and a parent meeting would be held in December 2011. (S. 89.) It was also noted that the student's Team would meet to discuss next steps if she did not continue to make progress in reading, writing, and spelling. (S. 89.)
31. On November 1, 2011, Ms. Papageorge conducted another educational evaluation of the student utilizing different tests, this time the Comprehensive Test of Phonological Processing ("C-TOPP") and the Test of Written Language-4 ("TOWL-4") spontaneous writing composite. (P. 33.) The student's scores were in the low average range for phonological awareness and the low average or borderline range for phonological memory. (P. 33; Testimony of Papageorge.) In the TOWL-4 subtests related to spontaneous writing, the student received an overall spontaneous writing score of 78, low or below average. (P. 35; Testimony of Papageorge.) Ms. Papageorge did not do all the subtests in the TOWL-4 so was unable to provide its composite scores. (Testimony of Papageorge; Testimony of Hoch.) Ms. Papageorge testified that it was unlikely that she had the report ready for the November 3, 2011, meeting with school staff but it was more likely that she presented it for the first time at the January 2012 IEP Team meeting. (Testimony of Papageorge.)
32. On November 3, 2011, the student's parents met with Mr. Spinney and the director of special education, Karen Ropes, to discuss their concerns that the student's written product had been misrepresented at the IEP Team meeting as an independent project and with the reduction in time for the student's specially designed instruction. (P. 239; Testimony of Ropes; Testimony of Father.) This was the first time that Ms. Ropes was directly involved with the family or the student's IEP. (Testimony of Ropes.) Ms. Ropes had been the director of special education at the school district for four years, prior to which she had spent 18 years as a special or general education teacher and an additional 13 years in building or district administration. (Testimony of Ropes.)
33. Ms. Papageorge attended the meeting, which was not an official IEP Team meeting, but only for the initial several minutes because the subject of the meeting turned to the parents' concern about the perceived misrepresentation of the student's written work. (Testimony of Ropes.) Ms. Ropes felt it was a personnel issue and therefore not appropriate to discuss with Ms. Papageorge present. (Testimony of Papageorge; Testimony of Ropes.) The parents and the school district agreed at that time to complete a reevaluation of the student. (P. 239; Testimony of Ropes.)
34. The student's first trimester grades of xx grade in reading and writing skills were as follows:
Word Study/Vocabulary: Developing Plus
Uses a variety of reading strategies: Developing Plus

Reads fluently with expression: Secure Minus
Responds to literature orally and in writing: Developing Plus
Expresses ideas clearly in writing: Developing Plus
Demonstrates skills in prewriting, drafting, revising, and editing: Developing
Applies correct writing mechanics: Developing Plus
Applies spelling patterns and rules in writing: Developing
Writes legibly: Secure
(S. 1.)

35. On December 1, 2011, a report on the student's progress toward annual IEP goals indicated that she was making "adequate progress" toward her goal of increasing her reading fluency from 88 correct words per minute to 110 correct words per minute on the initial read of grade level passages and achieving this level of speed and accuracy on 8 out of 10 trials by her next annual review. (S. 74.)
36. On December 14, 2011, Scott Hoch, Ph.D., completed a psychological evaluation of the student. (S. 25-30.) Dr. Hoch has been a licensed psychologist in Maine since 1980 and is certified as a school psychological services provider. (Testimony of Hoch.) His practice currently consists of performing contracted psychological evaluations for school districts. (Testimony of Hoch.) Among other assessment procedures, Dr. Hoch utilized the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV"), the Rey-Osterrieth Complex Figure Drawing Test, the GORT-4, and the C-TOPP. (S. 25.) Dr. Hoch also interviewed the student, reviewed records, and conducted a phone consultation with the student's parents, among other assessment procedures. (S. 25.) Dr. Hoch concluded that all of the student's skills were within the average range, although she had a relative area of weakness in her fluency skills and that she had a perception that she read slower than other students. (Testimony of Hoch.)
37. On the testing utilized by Dr. Hoch, the student's scores on the WISC-IV were all in the average range, including on verbal comprehension and working memory indexes, while she displayed a relative area of strength in her visual/spatial and non-verbal reasoning abilities, in the superior range of ability, but her processing speed subtest score was one point below the average range of ability. (S. 26; Testimony of Hoch.) On the GORT-4, the student's rate, accuracy, and fluency all fell within the average range of ability and her reading comprehension skills were approximately several years above her grade level. (S. 27.) The student's scores on the C-TOPP showed that her phonological memory skills were an area of weakness and underscored that her reading comprehension skills were in the above average to superior range while her fluency skills were in the upper end of the low average to average range. (S. 28.) Dr. Hoch recommended that the IEP Team integrate the results of his evaluation into the student's educational program in the least restrictive environment; continue to encourage the student to read independently; consider structured work to develop the student's phonological memory skills which could improve her reading fluency even though her overall

- accuracy was within the average range; and allow the student extra time to undertake written and standardized tests. (S. 30.) Dr. Hoch did not believe that the student required special education and testified that his recommendations would have looked very different if he had. (Testimony of Hoch.)
38. After reviewing all available test results and reports, Dr. Hoch concluded that the majority of the data indicated that the student was performing adequately and that all of the student's scores were within the adequate to average range even though spelling was a relative weakness. (Testimony of Hoch.) He concluded that even in math, where she was in the highest grouping, she was able to succeed in a strongly language-based program. (Testimony of Hoch.) Dr. Hoch opined that the student was not being held back by her areas of deficit. (Testimony of Hoch.)
39. On January 4, 2012, Ms. Ropes observed the student during a technology lesson in her computer lab as part of her reevaluation. (S. 55.) Ms. Ropes observed that the student's difficulty with spelling the password required her to seek assistance but that she exhibited ease and confidence when navigating the web-based blog once she was able to access it. (S. 56.)
40. Also on January 4, 2012, Summer Massaro Roy, M.A., CCC-SLP, conducted a speech-language evaluation of the student. (S. 67.) Ms. Roy observed that the student's speech and language skills were comparable to those of her same-age peers as evidenced by her score on the Clinical Evaluation of Language Fundamentals-4. (S. 68.) Ms. Roy found that the student was demonstrating average receptive and expressive language skills and average speech sound production skills. (S. 72.) Ms. Roy noted that the student continued to exhibit an inconsistent neutralized production of vocalic /r/ in conversational speech and had some difficulty producing new or unfamiliar multi-syllabic words. (S. 72.) She observed that the student's errors did not impact overall intelligibility or communicative effectiveness and did not constitute an articulation impairment, but rather an area of weakness within the student's overall speech and language skills. (S. 72.) Ms. Roy noted that although the student's receptive vocabulary skills were average and her expressive vocabulary skills were above average, she exhibited a clinically significant strength in the area of expressive vocabulary relative to receptive vocabulary, which could cause her to appear to understand new vocabulary and concepts better than she really does. (S. 72.) Ms. Roy recommended that the student's IEP Team: 1. consider whether the student qualified for and would benefit from speech-language intervention; 2. recognize that the student's strength in expressive vocabulary relative to receptive vocabulary indicated that she could appear to understand new vocabulary and concepts better than she actually did; 3. provide the student occasional reminders about appropriate tongue placement and/or natural reminders or consequences from her communication partners, such as asking her to repeat because her message was not clear; and 4. provide the student with an adult model and prior practice of appropriate production before spontaneous or on-command use of such

words is expected or anticipated given her difficulty producing some new or unfamiliar multi-syllabic words. (S. 72-73.)

41. On January 5, 2012, Elizabeth Goodwin, M.S.Ed., conducted an academic evaluation of the student. (S. 58.) The student received a score of 106 on the WIAT III Total Achievement test, administered by Ms. Goodwin, in the average range of achievement. (S. 62.) All of the student's subtest and composite scores were in the average range, with mathematics, math fluency, and oral language appearing as relative strengths and word recognition, decoding, and spelling appearing as relative weaknesses. (S. 62.) Based on the student's relative weaknesses in word recognition, decoding, and spelling, Ms. Goodwin observed that the difference between the rate at which the student read the fluency passages and her accuracy suggests that she may have been reading faster than her ability to decode all the words and that the spelling errors that occurred in spontaneous and contrived writing tasks indicated that the student had difficulty with accurate letter-sound combinations. (S. 62.) As a result, Ms. Goodwin recommended that the student could benefit from increased exposures to content vocabulary and grade level word lists in order to develop greater automaticity of word recognition and increase reading fluency. (S. 62.) Ms. Goodwin also observed that the student could be a more effective writer if given access to a word processor with editing tools, instruction in using an on-line spell check program, and additional instruction in the writing process including brainstorming, word choice, and topic development. (S. 62.)
42. On January 9, 2012, Kayla Hinkley, MS, OTR/L, completed an occupational therapy evaluation of the student. (S. 31.) The student scored in the average or above average range in all subtests of the Test of Visual Perception Skills (non-motor) 3rd edition. (S. 33-34.) On the Visual Screening Appraisal, the student's scores indicated that remediation was not required but monitoring of visual scanning was recommended. (S. 35.) Ms. Hinkley recommended providing the student with extended time on reading assignments, providing the student with practice and visual remedial activities with an exercise program for visual scanning, and the use of visual best practices for reading tasks. (S. 36.)
43. At the student's January 23, 2012, IEP Team meeting, the Team completed its review of the student's reevaluation. (S. 13.) The Team, by consensus, concluded that the student displayed a phonological memory deficit of 1.5 standard deviations below the mean as displayed by her C-TOPP test results. (S. 13; S. 20; Testimony of Ropes.) The Team also determined, over the objection of the parents and Ms. Papageorge, that the student did not present with a specific learning disability, as concluded through the completion of the Learning Disability Evaluation Report, because she did not present with adverse impacts to her academic performance on achievement testing, NWEA testing, and NECAP testing. (S. 13.) The Team concluded that the student achieved adequately for her age or by meeting state-approved grade level standards in all areas listed (oral

- expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving) when provided with learning experiences and instruction appropriate to her age or state-approved grade level standards. (S. 21.)
44. Ms. Papageorge's November 1, 2011, testing report was provided at the IEP Team meeting. (Testimony of Papageorge; Testimony of Mother; Testimony of Ropes.) Ms. Ropes indicated that she would review it after the meeting. (Testimony of Mother.)³ Ms. Ropes, however, did not have the report in her file when she left the meeting and she did not request a copy thereafter from the parents or Ms. Papageorge. (Testimony of Ropes.) In addition, Ms. Papageorge's October 21, 2011, was identified and outlined in the meeting notes. (S. 15.)
45. The Team, over the objection of the parents and Ms. Papageorge, determined that the student did not require special education services and should be dismissed from services with an exit plan to general education. (S. 13.) The parents and Ms. Papageorge did not agree with this determination. (S. 13; S. 23.)⁴ The parents and Ms. Papageorge expressed concern regarding the student's ongoing struggles with language, specifically in word pronunciation, decoding, sight words, word retrieval, and spelling. (S. 15.)
46. The Team recommended that the student's exit plan from special education include: a meeting to discuss the plan by February 17, 2012; continuation of IEP services through February 17, 2012; commencement of a full general education program on February 23, 2012; implementation of an exit plan through December 15, 2012; monthly consultation between a special education teacher or highly qualified English and language arts teacher and the student's general education teacher; reteaching and support services in spelling, decoding, reading fluency, content vocabulary, and structured work to address development of the student's phonological memory skills for 30 minutes twice a week; classroom and assessment accommodations of extra time on tests, visual supports to encourage accurate spelling for non-language arts classes; and a review of the plan to be conducted by December 2012. (S. 16.) The parents and Ms. Papageorge left the meeting before the exit plan was developed. (S. 14.)
47. On February 17, 2012, Ms. Ropes reported to the parents that she had completed the first phase of the student's exit plan by meeting with the student's special education consulting teacher, her classroom teacher, and her special education teacher to determine the specific components of the student's exit plan. (S. 6.)

³ Although at the IEP Team meeting Dr. Hoch indicated that he had received and reviewed Ms. Papageorge's testing, he was referencing her October 21, 2011, evaluation, not her November 1, 2011, evaluation. (Testimony of Hoch.)

⁴ The student's father and Ms. Papageorge signed that they disagreed with the Team's conclusion on the Learning Disability Evaluation Report. (S. 23.) The student's mother had to leave the meeting early and therefore did not sign the report, although it was clear that she disagreed with the determination as well. (Testimony of Father; Testimony of Mother.)

- Ms. Ropes informed the parents that after February vacation, the student's exit plan would be fully implemented. (S. 6.) The student's exit plan was defined to be: 30 minute sessions twice per week of instruction from the special education consulting teacher focused on reading and content vocabulary, spelling patterns, and decoding multi-syllable words. (S. 6.) This service was to be delivered in small group settings. (Testimony of Ropes.) The special education consulting teacher was also to consult with the student's regular education teacher for 30 minutes on a monthly basis. (S. 6.) The exit plan was noted to be in effect into the student's xxxx year through December 2012. (S. 6.) The student was expected to be monitored by both the classroom teacher and the special education consulting teacher so that if she showed signs of faltering, an IEP Team meeting would be called immediately. (Testimony of Ropes.)
48. In the second half of the student's xx grade year, in the spring of 2012, the student received a score of 219 in reading on the NWEA test, placing her in the 81st percentile and showing student growth of 13 compared to typical growth of 8. (S. 4.) The student's scores in word identification and comprehension strategies were high and in literary texts and informational texts was high average. (S. 4.)
49. The student's second trimester grades in xx grade in reading and writing were as follows:
Word Study/Vocabulary: Developing Plus
Uses a variety of reading strategies: Secure Minus
Reads fluently with expression: Secure Minus
Responds to literature orally and in writing: Secure Minus
Expresses ideas clearly in writing: Developing Plus
Demonstrates skills in prewriting, drafting, revising, and editing: Developing Plus
Applies correct writing mechanics: Developing Plus
Applies spelling patterns and rules in writing: Developing Plus
Writes legibly: Secure
(S. 1.)
50. Ms. Lazzara, the student's general education xx grade teacher, reported that the student progressed in her ability and confidence in reading out loud throughout the year and that she was reading between a xx and xx grade level. (Testimony of Lazzara.) She reported that the student did not have any more difficulty reading than any other student in class. (Testimony of Lazzara.) Ms. Lazzara noted the student's difficulty with spelling and legibility of her own writing. (Testimony of Lazzara.) Ms. Lazzara felt that the student achieved adequately in reading and written language overall during her xx grade year. (Testimony of Lazzara.)
51. The student's final trimester grades in xx grade in reading and writing were as follows:
Word Study/Vocabulary: Secure
Uses a variety of reading strategies: Secure

Reads fluently with expression: Secure
Responds to literature orally and in writing: Secure
Expresses ideas clearly in writing: Secure
Demonstrates skills in prewriting, drafting, revising, and editing: Secure
Applies correct writing mechanics: Secure Minus
Applies spelling patterns and rules in writing: Secure Minus
Writes legibly: Secure
(S. 1.)

52. Ms. Ropes believes that the student will achieve sufficiently without special education. (Testimony of Ropes.) She notes that the student's services over the 11 months prior to the termination of her eligibility were minimal and were not likely to be responsible for the student's success. (Testimony of Ropes.) Ms. Ropes also believes that the student would achieve adequately without the weekly hour of tutoring with Hyperion Learning Services, which she classified as minimal support. (Testimony of Ropes.) The family is concerned that the student will fail without specially designed instruction and that she will be unable to keep up with the increased work demands of xxxx grade. (Testimony of Mother.)

IV. DISCUSSION AND CONCLUSIONS

A. Burden of proof.

Although the Individuals with Disabilities Education Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. Schaffer v. Weast, 126 S.Ct. 528, 537 (2005). Further, in an eligibility dispute, the parents challenging the IEP Team's decision have the burden of persuasion. See R.C. & E.P. v. York Sch. Dept., 5 IDELR 68 at 22 (D. Me. 2008) (magistrate recommended decision), aff'd by R.C. & E.P. v. York Sch. Dept., 51 IDELR 217 (D. Me. 2008).

B. Whether the school district failed to provide the student with programming that provided her a free, appropriate public education

during the 2010-2011 school year and the 2011-2012 school year until February 17, 2012, when the student's IEP services ceased.

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

Parents' Argument:

The parents maintain that throughout her xx and xx grade years until the cessation of her special education services, the student was denied a FAPE because of the school district's refusal to provide her with the specially designed instructional services that she required to remediate her disability, specifically the one-on-one LiPS and Seeing Stars programs. The parents argue that the school district denied the student a FAPE while expecting her family to provide the specialized services necessary to remediate her ability and keep her progressing in school. The parents contend that both the Center for Communication and Hyperion Learning Services, the two outside evaluators and service providers, concurred on her diagnosis and the necessity for remediation to be provided through the LiPS program, later supplemented by the Seeing Stars program.

The parents maintain that the school district's provision of generic special education services was reduced to just 15 minutes of preteaching per day in February 2011 was insufficient and would not have allowed her to make meaningful academic progress but for the outside tutoring. As a result, the parents conclude, the student's IEPs failed to be reasonably calculated to address her specific language-based deficits, thereby denying her a FAPE.

School District's Argument:

The school district argues that the student was provided a FAPE during her xx and xx grade years up to the termination of her eligibility and that the Team's programming decisions were reasoned, carefully considered, and well explained. The school district maintains that the student's grades, her IEP progress reports, her group test results, and her individualized test results all showed meaningful progress over the time period in question. The school district concludes that the student's IEPs over the time period in question were reasonably calculated to provide her with meaningful benefit and that she did in fact receive such benefit.

Analysis:

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

As the First Circuit Court of Appeals has explained, the IDEA "does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.

Appropriateness and adequacy are terms of moderation.” Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993). In addition, the IEP must be evaluated as a whole, not piecemeal; even if one portion of the IEP is not as strong as it could be, the IEP will still pass muster if the overall program is reasonably calculated to provide educational benefits. Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 30 (1st Cir. 2008).

Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student’s individual potential. Rowley, 458 U.S. at 203. A student’s program must be geared toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs.” Town of Burlington v. Dep’t of Educ., 736 F.2d 773, 788 (1st Cir. 1984), aff’d, 471 U.S. 359 (1985); see also Sanford Sch. Dep’t, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student’s specific area of need). Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” each situation requires a “student-by-student analysis that carefully considers the student’s individual abilities.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3^d Cir. 1999) (holding that the “meaningful benefit” standard requires ““significant learning”” (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3^d Cir. 1988)).

Finally, the IDEA requires that students be educated with non-disabled peers “to the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); MUSER § X.2.B. A public school may remove a child with disabilities from the regular educational environment only when “the nature or severity of the disability of a child is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); MUSER § X.2.B. The educational benefit and least restrictive environment requirements “operate in tandem to create a continuum of educational possibilities.” Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990). As such, schools must make a continuum of placement options available. 34 C.F.R. § 300.115; MUSER § X.2.B.

Applying the standards set forth in statute, regulation, and case law, I hold that the student was provided a FAPE from the fall of her xx grade year to the conclusion of her special education services in February 2012. The student began xx grade receiving specially designed instruction in reading from a special education teacher in the resource classroom one hour per day. (S. 166.) In November 2010, the student’s IEP Team added an additional 45 minutes per day of specially designed instruction in writing and spelling with the special education teacher in the resource classroom, intending to give her enough of a boost to allow her return to the general education setting for her reading, writing, and spelling instruction. (S. 135.) Then in the spring of 2011, in recognition of the student’s grade level performance and the Team’s belief that the student was ready to return to general education instruction for the majority of her reading, writing, and spelling, the Team decreased the student’s special education services to 15 minutes a day, with a focus on fluency, and returned her to the least restrictive environment for as much time as possible. (S. 113.) The amount of special education instruction was decreased to 10 minutes per day of fluency instruction in the fall of 2011. (S. 86.) Although the parents argue that the school district refused to utilize the LiPS and Seeing Stars programs, the

record indicates that Ms. Logan, during the student's xx grade year, utilized comparable decoding methods to the LiPS program. (S. 89; Testimony of Ropes.)

During xx and xx grade until the cessation of IEP services, the student made satisfactory progress on her IEP goals. In December 2010, in March 2011, and in June 2011, the student was graded to be making "satisfactory progress" toward her decoding, fluency, and spelling goals and in December 2011, on a form that did not have a box for "satisfactory progress," she was graded as making "adequate progress" toward her IEP goal in fluency. (S. 74; S. 87; S. 124-126.)

The student also showed appropriate grade level achievement on her report cards for all trimesters of xx grade and her xx grade report card grades prior to termination of her IEP. In xx grade, the student showed proficiency in NECAP testing and scores in the 68th and 75th percentiles on NWEA testing. (S. 4; S. 101.) In the fall of xx grade, the student increased her NWEA score to the 78th percentile and again received a proficient score on the NECAP. (S. 4.) Furthermore, her special education teacher for xx grade, Ms. Hutchins, found that the student progressed in utilizing reading strategies independently and gained confidence in her own skills over that time. (S. 125; Testimony of Hutchins.) Ms. Hutchins also felt that the student resolved many of her challenges in xx grade, her increased confidence was evident, and she was enthusiastic to take part in the general education setting with her peers. (Testimony of Hutchins.) The student's xx grade teacher, Ms. Lazzara, also found the student to be progressing adequately and on par with her same-aged peers. (Testimony of Lazzara.) Further, the student's IEP Team met twice a year during her xx and xx grade years. (S. 12; S. 88; S. 117; S. 143.)

As such, I conclude that the student received a FAPE through IEPs that were reasonably calculated to enable her to receive educational benefits during her xx grade year and her xx grade year until the point of termination of her special education services.

The parents also assert that the student would not have achieved meaningful progress but for her private tutoring in the LiPS and Seeing Stars programs, during xx and xx grades until the termination of her eligibility. It is impossible to isolate the one hour of private tutoring services, in which the student did make progress, from the student's overall success, such that the school district would be deemed to have denied her a FAPE.

C. Whether the school district violated the student's right to a free, appropriate public education when it terminated her eligibility for special education and related services on January 23, 2012.

A school district must reevaluate a student who has been identified as eligible for special education at least every three years but is not allowed to do so more than once a year unless the parents and school district agree otherwise. 300 C.F.R. § 303(b). In conducting an evaluation, a school district must “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent,” to determine whether a student has a disability. 34 C.F.R. § 300.304(b)(1). Moreover, a school district should “[n]ot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.” 34 CFR 200.304(b)(2).

The process for determining whether a student has a specific learning disability includes an evaluation to determine if data from general education intervention, if

appropriate, indicates that the response to general education intervention is not adequate. MUSER § VII.2.L(2)(a)(i). In addition, the student must exhibit scores of 1.5 or more standard deviations below the mean for the child's age on tests in one or more area of psychological processing or one or more standard deviations below the norm in two or more areas of psychological processing. MUSER § VII.2.L(2)(a)(ii). For students in grades 4 to 12, a student must also have obtained a composite standardized score that is no lower than 1.5 standard deviations below the mean on at least one index or scale of cognitive functioning from a standardized measure of general cognitive ability. MUSER § VII.2.L(2)(a)(iii).

Further, a Team must also determine that the student “does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards”: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving. MUSER § VII.2.L(2)(c)(i)(I); 34 C.F.R. § 309(a)(1). And finally, the Team must conclude that the student does not make sufficient progress to meet age or state-approved grade level standards in one or more of the identified areas when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using

appropriate assessments consistent with the regulations. MUSER § VII.2.L(2)(c)(i)(II); 34 C.F.R. § 309(a)(2).

A student with a disability is eligible if the student has been determined to have a disability which “requires special education and related services.” MUSER § VII.2; 34 C.F.R. § 300.8(b)(2); see also MUSER § V.2.F(2) (stating that if a determination is made that a child has a disability and “needs special education and related services,” an IEP must be developed) & 20 U.S.C. § 1401(3)(A)(ii).

Further, a change in a student’s eligibility by an IEP Team must be based on measured achievement on IEP goals and data indicating adequate progress and a conclusion that the student’s needs could be addressed through the general education curriculum. MUSER § VII.4.A. In addition, a Team must create a plan for assessing that the student continues to make progress once an IEP is terminated, including a plan for what will be done if progress ceases after eligibility. MUSER § VII.4.A.

Parents’ Argument:

The parents contend that the school district inappropriately terminated the student’s eligibility for special education services in January 2012.⁵

First, the parents argue that the school district erred in exclusively relying on the fact that the student was proceeding adequately with the support of special education services as a measure of her eligibility. The parents also contend that the school district erred by utilizing only the MDOE’s Learning Disability Evaluation Report without

⁵ In their closing brief, the parents term the school district’s asserted errors in terminating the student’s eligibility as procedural and the school district objects, maintaining that the family has not raised any issues as stand alone procedural issues and any such issues should not be considered. The parents respond that their arguments fall squarely within the substantive issues identified for hearing and fully developed by the parties at hearing. The parents’ arguments are addressed because they relate to the issues established for

examining the student's ability to achieve adequately in the general education setting without any special education services. The parents argue that the school district violated MUSER § VII.4.A, specifying that districts seeking to terminate a student's eligibility must identify how the student's needs will be adequately addressed exclusively through general education services. The parents also rely on a 2009 Maine Department of Education complaint investigation report in which the complaint investigator determined that a school district was incorrect in determining that a student who was progressing adequately at school while receiving special education was no longer eligible, citing Parents v. Cape Elizabeth School Department, No. 10.019C (Nov. 2, 2009).

Second, the parents contend that the school department erred by not considering the remedial effect of the substantial private tutoring services that the family provided the student. The parents cite a 1995 OSEP letter, Letter to Little/Felton, 23 IDLR 714 (OSEP April 5, 1995), and a 2006 Maine complaint investigation report, N and S v. Cape Elizabeth School Department, No. 05.128C (March 28, 2006), to argue that the Team should have considered the student's outside tutoring because the student's educational attainment reflected the service augmentation, not what she would have been achieving without the additional support. The parents argue that all of the student's achievements in school were heavily supported by her participation in weekly tutorials in the LiPS or Seeing Stars programs. The parents contend that it was not possible for the student's IEP Team to conclude that the student's eligibility should be terminated without explicitly considering the effects of this remediation and academic support on her academic performance.

hearing.

Third, the parents contend that in addition to the school district's errors in the process of terminating the student's eligibility, the evidence established that the student struggled academically despite the provision of special education services. The parents conclude that the student exhibited less than proficient performance in at least three areas of examination for a specific learning disability – basic reading, reading fluency, and written expression – even with the provision of specialized services.

Specifically with regard to written expression, the parents point to the student's performance on the spontaneous writing portion of the TOWL-4 administered in November 2011 by Ms. Papageorge. The parents fault the school district's special education director for not obtaining the low TOWL-4 subtest results that were discussed at the January 2012 meeting and for not referencing the test results on the Learning Disability Evaluation Report. The parents complain that the school district had only a single measure of the student's written language skills, derived from the WIAT-III and that a single measure was insufficient to determine eligibility. With regard to reading fluency, the parents point to Ms. Papageorge's assessment that the student's reading fluency remained in the "some risk" category as of August 2012.

School District's Argument:

The school district argues that the student's IEP Team correctly concluded that the student no longer met the IDEA eligibility standards for a specific learning disability. The district maintains that the student participated in mainstream courses and did well on state assessments measuring proficiency in reading and math. The school district maintains that the Team correctly concluded that the student was "achieving adequately" in the eight identified areas and that case law makes clear that isolated low subtest scores

are insufficient to conclude that a student has failed to achieve adequately but instead that overall test scores, grades, classroom participation, testimony from teachers, and other factors should be broadly considered, citing Scot S v. State of Hawaii, Department of Education, 2012 WL 78384, *1, *7 (D. Hi. 2012); Hartford County Pub. Schs., 109 LRP 34467 (Md. SEA Feb. 13, 2009); Carlynton Sch. Dist., 109 LRP 21673 (PA SEA Jan. 6, 2008). The school district maintains that a student's test scores cannot be the sole criterion to determine whether a student has a specific learning disability and that other measures must also be considered.

The school district maintains that in the areas of dispute – written expression, basic reading, and reading fluency skills – there were many measures of the student's performance with virtually all of them indicating performance within the broad range of average. The school district contends that the entire constellation of data yields only three or four outlier subtests indicating below average performance in the subcategories of the overall concepts under consideration. The school district maintains that isolated subtest scores are insufficient to establish inadequate performance in the broad areas of concern, particularly when the student's school-based performance was strong.

In response to Ms. Papageorge's testing, the school district notes that Ms. Papageorge did not administer the other subtests within the Test of Written Language in November 2011, which prevented her from reporting composite results in the areas of contrived writing and overall writing. The school district argues that the four low subtest scores found by Ms. Papageorge would be more relevant if they were not outlier scores or if the student was performing poorly in broader, school-based measures of performance.

Turning to the “need for special education” standard, the school district argues that the student was able to progress effectively in the regular education program. The district contends that it did all it could to make a reasonable determination that the student could in fact progress effectively in the regular education program and did not require special education services.

The school district maintains that its process should be a model for eligibility decision making – by gradually decreasing services over a year to a virtually non-existent level, undertaking a host of various measures to ensure that the student continued to benefit from her general education program, and then implementing an exit plan that would permit further assessment of the student’s performance without an IEP. The school district notes that it made clear that if the student were unable to receive reasonable benefits in the general education curriculum, a return to special education services would be relatively easy given the existence of a processing disorder.

With regard to the family’s argument that the student’s ability to achieve adequately was in fact due to her outside services, the school district maintains that the one hour of weekly tutoring was neither extensive nor highly skilled. The school district asserts that the amount of out of school service was simply too low a level, without evidence of high sophistication, to have any meaningful impact on the school district’s eligibility determination. The school district argues that the Team’s conclusion that the student could continue to benefit without any such services, whether in school or out of school, was reasonable.

Analysis:

I hold that the school district did not violate the student's right to FAPE when it found her no longer eligible for special education in January 2012.

First, the school district appropriately considered whether the student's needs could be met in the general educational setting. In Parents v. Cape Elizabeth, a Maine complaint investigation report cited by the parents, the complaint investigator remarked on the district's failure to consider whether the student's needs could be met through general education services, as required by MUSER § VII.3.A(3). The complaint investigator found that the student's Team erred in using the Maine Learning Disability Evaluation Report exclusively when considering whether the student remained eligible for special education, since it was a tool developed by the Maine Department of Education for purposes of making an initial determination of eligibility in the classification of specific learning disability. Id. at 19.

The parents also cite N and S v. Cape Elizabeth School Department (05.128C) (March 28, 2006), in which a complaint investigator found that the xx grade student involved spent two to three hours an evening doing homework, had a nanny who worked with her on homework, and had a tutor that she worked with two hours a week. Id. at 5. When the student's services were reduced and eventually ended as a result of the Team's determination that the student was no longer eligible for special education, the complaint investigator found that the student's motivation and perseverance coupled with open-ended and expanded homework time as accommodations and outside assistance to master the curriculum and earn good grades counteracted the lack of special education services. Id. at 7-10 & 14. The complaint investigator found that the Team erred in not considering the private tutoring and instruction, homework accommodations, and

assistance provided by the student's parents and nanny to be meaningful factors and that the student was not achieving commensurate with her age and ability levels. Id. at 14.

In guidance on the same theme from the Office of Special Education Programs ("OSEP"), in Letter to Little-Felton, an OSEP letter of April 1995, OSEP responded to the question of whether, when determining a student's current level of educational achievement for purposes of specific learning disability identification, satisfactory grades could be discounted because the student received them as a result of extraordinary parental or tutoring assistance received outside the school day or compensatory help received at school. Letter to Little-Felton (OSEP April 5, 1995). OSEP responded that it would "generally be appropriate to consider information about outside or extra learning support provided to the child when determining whether a child who receives satisfactory grades is nevertheless not achieving at age-level" since "such information may indicate that a child's current educational achievement reflects the service augmentation, not which the child's achievement would be without such help." Id.

All three of these pieces of guidance suggest that school districts need to consider not just IEP services but also outside support when reviewing an identified student's eligibility for continued services. Here, the school district was aware of the weekly tutoring throughout the student's period of identification and at the time of her subsequent termination from services. Although the school district was not as diligent as it should have been in ensuring that Ms. Papageorge's educational evaluations were included in the student's IEP Team record, Ms. Papageorge did attend the meeting at which the student was deidentified, as well as a prior meeting, and was given the opportunity to share her reports and recommendations. (S. 15; Testimony of

Papageorge.) In contrast with the student here, who was receiving one hour of outside tutoring each week, the student in N and S was receiving significant outside services as well as daily accommodations and substantial homework assistance. Furthermore, the school district here fully evaluated the student's progress in the general education curriculum and her ability to have her needs met there. The school district further buttressed its analysis by providing the student a nearly year-long exit plan, consistent with MUSER § VII.4.A(3), and there was no indication by the end of grade four that the student was faltering.

In addition, the school district did not err in finding that the student was achieving adequately for her age or meeting State-approved grade level standards in the areas of oral expression, written expression, and basic reading skill. In Hartford County Public Schools, 109 LRP 34467 (Md. SEA Feb. 13, 2009), a student's eligibility as a student with a specific learning disability was terminated on the basis that the student's disability no longer impacted his classroom performance and he was performing at an academic level above his classmates. Id. at 3. The hearing officer concluded that despite the fact that the educational assessment data indicated that the student was performing below grade level, there was other evaluative data from teachers and formal and informal assessments that indicated that the student was performing at an academic level consistent with his same-aged peers. Id. at 6.

And in Carlynton School District, 109 LRP 21673 (PA SEA Jan. 6, 2008), a hearing officer found that a student's eligibility was appropriately terminated even though multiple school psychologists found that the student's testing showed a relative weakness in reading, specifically word decoding, but there was no sign of a discrepancy

between intelligence and achievement and the student's scores were often commensurate with or better than her ability would indicate. Id. at 10. The hearing officer concluded that although the student exhibited some reading weakness, it did not rise to the level or yield the requisite adverse effect to qualify her for continued special education services. Id.

The Team here readily identified the student's areas of weakness, as evidenced by her low subtest scores on several measures, and agreed that the student exhibited a processing disorder. The next question, however, was whether the student was nevertheless achieving adequately in the areas of concern. The student's record as a whole here - including much of the testing performed by Ms. Papageorge, Dr. Hoch, and Ms. Goodwin, as well as her graded IEP goals and report cards, and teacher testimony - indicated that she was indeed achieving adequately in the areas of concern. Here, as in Hartford, the student's low subtest scores suggested the existence of a language-based processing difficulty, but the weight of the evidence regarding the student's performance did not establish that she was not achieving adequately.⁶ As such, the student's achievements in written expression, basic reading, and reading comprehension were adequate as evidenced by her record as a whole and the school district did not err in so concluding.

D. What remedy is appropriate?

Because no violation has been found, the parties' arguments as to an appropriate remedy are not reiterated here.

⁶ Although the parents were frustrated with the consideration of the student's final draft of a prescriptive writing assignment as an "informal writing sample," the student's Team had sufficient alternative information about the student's writing progress to make its assessment that she was achieving adequately.

V. ORDER

Wells Ogunquit Community School District provided the student with IEPs designed to provide her with a FAPE during the 2010-2011 and 2011-2012 school year until the point that she was determined ineligible for continued services. Wells Ogunquit Community School District did not violate the student's right to FAPE by terminating her eligibility in January 2012. Therefore, no remedial order need be issued.

Rebekah J. Smith, Esq.
Hearing Officer