

State of Maine
SPECIAL EDUCATION DUE PROCESS HEARING

13.005H — xx v. RSU # 73

March 7, 2013

Representing the Parents: Sara S. Hellstedt, Esq. and Nicole L. Bradick, Esq.

Representing the District: Daniel C. Stockford, 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 pre-hearing was held on September 17, 2012 in Farmington, Maine. The hearing was held on 10/17/12, 11/9/12, 12/3/12, 1/14/13, and 1/23/13 in Farmington, Maine.¹

Testifying at the hearing were the following:

- The Parent
- Glenn Davis, Ph.D., Neuropsychological Evaluator
- Elizabeth (Lisa) Kinney, Wayne Regional Autism Program
- Lisa Marie Pennabere, Wayne Regional Autism Program
- Susan Wiles, Special Education Teacher
- Robert Kahler, Principal, Livermore Elementary School
- Jeanie Rackliff, Special Education Teacher
- Tina Collins, Special Education Director
- Nicholas Rehagen, Ph.D., School Psychology Consultant
- Cheryl Thorpe, the Student's Community Case Manager

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On August 8, 2012, the Parents requested a due process hearing regarding their son, xx, ("Student"). On September 17, 2012, a prehearing conference was held in Farmington, Maine.

¹ There were several postponements to the hearing schedule due to the death of the Hearing Officer's father, two days of settlement discussions, two snowstorms, and the early delivery of Parents' counsel's baby.

Participating in the conference were the following: the Parent, Ms. Hellstedt, Mr. Stockford, Ms. Collins, and Ms. Moreau. 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 35 documents (276 pages, herein referenced as P. #). The School submitted 104 documents (552 pages, herein referenced as S. #).

At the close of the testimony on January 23, 2013, both parties requested to keep the hearing record open until February 11, 2013, for the submission of closing memoranda. An extension was granted to February 13, 2013. The School submitted a 34-page closing argument and the Parents submitted a 58-page closing argument. The record closed upon receipt of these documents on February 13, 2013. The Parties and the Hearing Officer further agreed that the decision would be due on March 7, 2013.

II. ISSUES

- 1. Did the IEP and placement provided to the Student by the School and implemented during his xx grade (2010-2011) fail to provide him with a free appropriate public education (“FAPE”). If so, what remedy is appropriate?**
- 2. Did the IEP and placement provided to the Student by the School and implemented during his xx grade (2011-2012) fail to provide him with a FAPE. If so, what remedy is appropriate?**
- 3. Are the IEP and placement for the 2012-2013 school year reasonably calculated to provide the Student with a FAPE in the least restrictive environment? If not, is the Student entitled to a publicly funded placement in the Wayne Regional Autism Program (“WRAP”) at Wayne Elementary School (or an equivalent out-of-district Applied Behavior Analysis (“ABA”) program for students with autism) or any other appropriate remedy?**

III FINDINGS OF FACT

1. The Student is xx years old, born on xx/xx/xxxx. (S. 1). He lives with his parents and two younger brothers in Livermore Falls, Maine; one brother is diagnosed with autism. (Parent testimony). The Student attends Livermore Elementary School (“LES”) located in

Regional School Unit (“RSU”) 73 (“School”), his neighborhood elementary school. He has been eligible for special education and related services under the category of autism. (S. 125).

2. At the age of xx, the Student was diagnosed with Oppositional Defiance Disorder (S. 6), with delayed communication skills. (S. 13, P. 6). He received Individual Developmental Therapy, including Speech and Language (“S/L”) therapy, during the 2007-2008 school year through Child Developmental Services. (S. 15-18).
3. On May 8, 2008, an Individualized Education Program (“IEP”) Team meeting was convened to discuss the Student’s transition to xx. (S. 21). The Team agreed that specialized instruction and services were required due to the Student’s speech and language impairment, and his need for adult supervision due to his history of behavioral difficulties (i.e., low tolerance for frustration, aggression, “meltdowns,” throwing objects). The following services, in addition to subsequent evaluations, were proposed: direct instruction for one to two hours per day in a special education setting; rehabilitative assistance supports in all settings; S/L therapy; and a modified school day (from 9:00 am to 12:00 pm). (S. 21- 23).
4. The IEP developed from the IEP meeting on May 8, 2008 identified the Student’s disability as that of Speech or Language Impairment. (S. 24). The IEP indicated that his level of performance required assistance with fine motor control; his language concepts were difficult and he was not “conversational”; he used aggressive behaviors to express frustration or displeasure; and he had difficulty with transitions. (S. 29). The need for positive behavioral interventions and supports were indicated, as was the need for a behavioral consultant to aid in planning the Student’s program (S. 28). Three goals were included in his IEP: mastery of xx standards for literacy and math by May 2009, and a goal in expressive and receptive language skills to “a level commensurate with his developmental ability.” (S. 30-31, 33).

5. End-of-year progress reports by the developmental therapist for the 2007-2008 school year indicated that the Student made progress in all subject areas. It was noted that the Student had “challenging” and “aggressive” behaviors (i.e., biting and striking others) and had to be physically put in a "Rifton" chair on at least two occasions. (S. 39). It was noted that, “In the ABA setting, (the Student) has not been physically aggressive with his classmates, only his teachers.” (S. 39).
6. In June 2008, Farhana Shah, Ph.D., diagnosed the Student with Autistic Disorder and recommended continued developmental therapy, special education, access to an autism specialist for all of his teachers, a positive support plan, and access to home and community resources. (S. 46).
7. In the fall of 2008, the Student began xx at the Mallett School in RSU 9, located in Farmington, Maine. (S. 24).
8. An IEP Team meeting was convened on October 1, 2008 to discuss changes to the Student’s IEP. (S. 51). There was consensus that the Student would transition to a full school day; that S/L would be reduced to 40 minutes per week; and that rehabilitative assistance would be changed to 30 minutes a week. (S. 51). In addition, because the Student’s behaviors often necessitated adult assistance for his own safety, an observation would be performed to aid in programming decisions. (S. 52).
9. A Progress Report, dated November 25, 2008, indicated that the Student attended xx in the regular classroom for the majority of the day. (S. 57). It noted that he required a quiet learning space or small group for his academic learning; benefited from the classroom routines; had difficulty with letter names, numbers and quantity, but could count up to 5; was improving on writing his name; had learned about community helpers; and practiced safe community behavior and life skills on field trips. (S. 57).
10. By January 2009, the Student’s behavior had become extreme at times, resulting in the Student being restrained or removed from the classroom. (S. 60). It was reported that

upon being removed, he was often carried, kicking and screaming, and trying to bite the adults assisting him to the Rifton chair, which was located in the special needs room at the far end of the school. (S. 60).

11. In January 2009, the Student was referred to Steven R. Brod, LCSW, BCS, the RSU 9 social worker, for a Functional Behavior Analysis. (S. 60). His evaluation focused on the Student's extreme behavior and suggested that the current use of restraint and removal practice was contraindicated, based upon his escalating behavior during these events. He stated that while these events had decreased to one every two weeks, he suggested that another chair be placed in the Student's classroom to avoid the restraint and removal procedure. (S. 60-62).
12. In an Occupational Therapy Initial Evaluation, dated January 8, 2009, Christine Libby, MOTR/L, LSW, reported that the Student presented with "significant deficits in the areas of sensory processing/emotional regulation, fine motor, and visual perceptual skills." (S. 63-65).
13. In a Progress Report dated March 16, 2009, the Student's special education teacher, Mardi Porter, reported that he was attending the regular xx classroom for the majority of his day; required a quiet learning space or small group for academic learning; and was provided with individualized instruction for academic work. Ms. Porter noted that group settings were difficult for him, but that he had progressed with working in a small group; and that he was provided with a quiet space under the teacher's desk and a "safe chair" with a tray. She noted that his behavior continued to improve with the use of positive behavioral supports and that he understood "natural" consequences. (S. 66).
14. The IEP Team met on March 26, 2009 to discuss changes to his IEP. (S. 67-69). Based upon updated information, the Student's disability category was changed to autism. (S. 67). In addition, based upon the Student's behavioral issues, the Team assigned educational technician ("Ed. Tech.") support in non-special education settings, and a high level of adult support in special education settings. (S. 67). The Team concluded that the

Student needed a full-day behavioral management plan to be developed, implemented and monitored by the School's social worker. (S. 67, 69). It was noted that the Team discussed the need for behavioral goals for maintaining physical boundaries, and accepting and complying with teacher and staff directives. (S. 68). The Parents reported that they believed the Student's progress was attributed to the ability of the Student to stay in the regular classroom setting with 1:1 support. (S. 69). They request that 1:1 support be continued in all settings. (S. 67).

15. The IEP Team also developed the Student's educational plan for the 2009-2010 school year. There was no consensus on the level of inclusion in the regular education setting. Mr. Ferreria, the RSU 9 administrator, determined it that two hours of special education direct instruction and four hours of instruction in the regular education setting would be appropriate. Also, the Team disagreed on the value of having one familiar Ed. Tech. with the Student throughout the day, including in the special education setting. Mr. Ferreria explained that the Student's needs would be met by staff in the special education setting, but that he would have 1:1 support in the regular education setting. (S. 68-69).
16. The Student's IEP, dated May 5, 2009, indicated that a positive behavioral plan was being developed. (S. 71). Goals and objectives included making progress in literacy and math skills; expressive and receptive language skills; behavioral skills (self-regulation, reducing the number of "incidents" and following direction); and occupational/executive functional skills. (S. 73-77). Specially designed instruction in the special education setting was set at one hour per day, five times per week for the balance of the 2008-2009 school year. This was increased to two hours a day, five times a week for the 2009-2010 school year. Related services included occupational therapy ("OT"), rehabilitative assistance, S/L services, and special transportation.
17. In a consultation report, dated March 30, 2009, Mr. Brod, the School's social worker, determined that, while staff and the Student's mother felt that a consistent 1:1 Ed. Tech. would be optimal, it appeared that the Student's xx teacher had success during the year

with a positive behavioral plan. He stated that he did not believe that a revision in the Student's plan was needed at that point. (S. 80).

18. The IEP Team met in June 2009 to amend the Student's IEP. (S. 84). His progress was reported to have been satisfactory in all objectives. (S. 96, 101, 108, 110, 114). The primary concern for the Parents continued to be that of having one consistent Ed. Tech. with the Student at all times during the school day. (S. 85, 88). Based upon the Team's concerns and Mr. Brod's recommendations, the IEP was amended to increase his specially designed instruction to three hours per day, five days a week during the 2009-2010 school year. (S. 105). Consensus was reached that the Student would be placed in placement the "Elementary Transition Program" ("ETP") at the Mallett School in RSU 9 for three hours a day for literacy, math, and behavioral strategies. (S. 84-85). The ETP is a special education setting designed to address students' behavioral needs. (Parent Testimony). The Student would continue to receive 1:1 Ed. Tech. support in the regular classroom and a "high level of adult support" in the special education setting (special education teacher and/or Ed. Tech. support). (S. 106). The IEP noted the following with respect to his least restrictive environment: "Due to this student's diagnosis and learning needs. (sic) The student will attend the regular classroom for activities in which he can experience success and work on readiness skills. He will receive the majority of direct instruction in the special education setting (approximately 2 hours). He will be able to participate with students in his regular class for the remainder of his day, with accommodations for his learning and behavior management." (S. 107). The IEP also indicated that the Student needed a full-day comprehensive management plan. (S. 89).
19. A special education mediation was held on July 13, 2009. The agreement reached at the meeting included having 1:1 support from the same Ed. Tech. throughout the day, from the time the bus arrived at school to the time the bus returns the Student home. This support would be assessed at the IEP meeting in December 2009. (S. 488).
20. The IEP team met on December 16, 2009 to review the Student's xx grade programming. (S. 120). It was reported by the regular education teacher that the Student was not in the

regular classroom much of the time due to his disruptive behaviors, struggled with large group settings, and was not safe in the room. His special education teacher reported that while he had made progress, he was still working at the xx level. The Team determined that the Student would participate with his regular education class for all specials (music, art), morning sign-in, snack, lunch and recess. (S. 120). The Parent believed that the Student would benefit more if he could be in the regular classroom more often. (S. 120a).

21. In January 2010, the Student was referred to the Pediatric Behavioral Medicine Clinic for recommendations on medication, programming, and management strategies for behavioral issues. (S. 122). A comprehensive interdisciplinary evaluation was performed. It included a team summary of reports on the Student's medical history, family assessment, psychological assessment, and recommendations. (P. 8-9).
22. Dr. Michael Nurick, Ph.D., summarized the interdisciplinary reports for the Parents in the "Parent Conference" report. (S. 122). He reported that the Student appeared to be in a stable family environment, and had difficulty transitioning to different activities as exemplified in temper tantrums, hitting, biting, and kicking. He had been known to grab knives and scissors out of drawers as well. He occasionally required restraints. It was noted that academically the Student was not at grade level, his memory and ability to generalize information were of concern; and his behavioral problems occurred during school. Dr. Nurick reported that intellectual testing showed that the Student fell within the mild mental retardation range; his perceptual reasoning was more developed than his verbal comprehension abilities; his adaptive behavior scores fell in the moderately low range; and he was found to be functioning on the border of non-autistic and mildly autistic on the Childhood Autism Rating Scale, and in the severe range, "although not to levels that were indicative of autism" on the Autism Behavior Checklist scale. Dr. Nurick made a diagnosis of Autistic Disorder and Borderline Intellectual Functioning (S. 123).
23. Dr. Nurick also summarized recommendations made by the interdisciplinary team regarding his educational programming and behavioral management. (S. 123-124, P. 9-11). It was agreed that the Student was in an appropriate educational setting and that

visual prompts were helpful to obtain new information, to aid his nonverbal reasoning abilities and during transitions times. It was suggested that daily rewards and a point system may be helpful to reinforce positive behaviors. It was also suggested that since the Student understood and followed rules, pointing out that he had not followed rules would help as a reinforcement tool to avoid unacceptable behaviors. (S. 123-124, P. 9-11).

24. The Student was reported to have made progress on all IEP goals by March 2010, with the exception of math in which he made limited progress. (S. 129, 132, 138, 143, 149). Progress in his OT goals was noted by Christine Libby MOTR/L. LSW in her March 24, 2010 report. (S. 180). She recommended continuing services for 60 minutes per week due to his deficits in fine motor, visual motor, visual perception, and social skills/sensory processing skills. (S. 181).
25. The IEP Team met on March 24, 2010. (S. 182). The Team discussed his progress in all areas. However, there was some discussion on whether he should be retained at the xx grade level since behaviors, while improved, continued to interfere with his academic progress for much of the year. (S. 183). It was noted that the Student was “happier” than the previous year and that fewer restraints were needed (i.e. use of the Rifton chair). It was also noted that it was important to have consistency in how he was being aided. The Team agreed to maintain his programming and services at the current level and added extended school year services for three hours, twice a week. (S. 183-184).
26. The School and Parent agreed in April 2010 that it would benefit the Student to remain in xx grade for the 2010-2011 school year in order to reinforce the current skills he had developed. (S. 186).
27. Prior to the fall of 2010, the Student’s family moved to Livermore Falls, Maine, located in RSU 36. (Parent testimony). An IEP Team meeting was convened with RSU 36 staff on August 31, 2010 to discuss the transition of the Student from RSU 9 to the RSU 36. The Team reviewed the IEP from the Mallett School (RSU 9) and the Parent’s information about the Student’s behaviors and what strategies had worked. (S. 193).

Based upon its review, the IEP Team agreed to continue with the Student's goals in the areas of S/L and OT therapies. S/L services were reduced from 50 to 40 minutes weekly and OT continued at the rate of 60 minutes weekly. The Team changed 1:1 adult support to "academic consultation" services, with adult supervision throughout most of the school day. Classroom accommodations included break time, and a timeout space. The Picture Exchange Communication System ("PECS") would be provided throughout the school day. (S. 192-193).

28. The amended IEP, dated August 31, 2010, included the need for positive behavioral interventions, noting that there were behavioral goals. (S. 196). His level of academic and functional performance at that time remained the same as noted in his IEP from May 2010. (S. 198). Goals and objectives were indicated for S/L, OT, behavior, reading, writing, and math. (S. 202-214). In addition, specially designed instruction in the form of consultation services for ten minutes per day was also included. (S. 199). The Student's least restrictive environment was not indicated. (S. 201).

29. The IEP Team reconvened on October 14, 2010 to discuss the Student's behaviors at school. (S. 219). It was reported that while he did well in "morning meeting" and in areas of literacy, he had a "difficult time" participating in "center time." He did not like to share the "listening center and had his own tape recorder and headphones. He had a space away from his peers but could still see what was going on in the classroom. Math assignments were fast paced but he could complete them with support. His behavior had been inappropriate at lunch, noting that he hit a student in the lunch line. It was observed that the cafeteria setting was overwhelming, and that alternative lunch settings needed to be available for him. The Parent stated her concern at the meeting that she did not think the Student was ready to be without 1:1 adult supervision at that point. The Team determined that the Student required adult supervision throughout the school day with the exception of lunch. He required headphones to block out noises and sensory breaks would be regularly scheduled. He would have a designated area in the classroom for breaks when needed. In addition, academic consultation services at the rate of 15 minutes per week would occur between the special education department and the classroom

teacher. (S. 199-220). The Parent testified that she believed the Student was not progressing because he did not have consistent 1:1 adult support or a behavioral plan. (Parent's testimony).

30. The IEP Team reconvened on December 16, 2010. (S. 228). The Team discussed that he was avoiding math and was not on grade level in that subject. It was agreed that providing math instruction in the special education setting would benefit him more than having it in the regular classroom. The Parent reported that a new evaluation by a Dr. Silvado indicated that the Student was overwhelmed by being in the regular classroom. The Parent stated that she believed the Student's transitions would be easier with 1:1 educational support. She also reported that his behaviors were "spiking" at home. (S. 229).
31. The Parent testified that up to three non-IEP meetings took place sometime in January and February 2011 to discuss the Student's progress. (Parent testimony). While no changes to his program were made at these meetings, the School's staff discussed strategies to use with the Student. (Parent Testimony).
32. By March 2011, the Student showed "limited" progress on his IEP goals in writing and math. (P. 43-46). While progress on his reading goal was not indicated in the IEP, some progress in his reading objectives were noted. (P. 42). He was progressing in his goals in S/L. (P. 35). No progress report was indicated for OT. (S. 37). The IEP indicated that he made "satisfactory" progress on his behavior goal, but with no measure of how progress was measured. (P. 39).
33. In April 2011, an achievement assessment was conducted using the Woodcock-Johnson Test of Achievement-III. (S. 237). The Student scored in the xx range on all reading and writing skills assessments, as well as two of the three subtests involving written language. (S. 237). The narrative report indicated that the Student's academic knowledge was within the average range of others at this grade level, but that his academic skills were very low. (S. 238). It was recommended that the Student receive clear directions and

expectations; specific and direct instruction in math, reading, and writing; and that all assessments needed careful consideration in determining the Student's educational planning. (S. 238).

34. Wendy Moreau, the RSU 36 special education director, performed a classroom observation. (S. 240). She observed the Student during a library activity for 35 minutes. She noted in her report that, compared to other peers in the setting, the Student required Ed. Tech. support, but not at all times, and that he did not interfere with other students. She also stated that, "The Ed. Tech. support that (the Student) requires is a very restrictive program and without the support (the Student) would not be able to access the general curriculum." (S. 240).

35. The IEP Team met on May 26, 2011 for the Student's IEP annual review. (S. 248). The Team determined that the Student's educational needs would best be met in the District's Developmental Disabilities Program ("DDP"). (S. 249). As justification for this change in placement, the Written Notice stated that, while the Student started out in the regular classroom full-time, with Ed. Tech. support, "Over the course of the school year, however, it became apparent that (the Student) required more special educational support in the special education classroom. The demands of the xx grade curriculum and the over stimulation (sic) of the regular classroom required more support from the special education setting." (S. 250). With respect to his progress in S/L, it was reported that the Student's vocabulary skills fell in the low average to average range of performance, and his receptive language scores varied from mild delay to average. It was noted that the Student scored in the "severe delay" range on the Listening Comprehension of one of the assessments. The Student also presented a delay in his expressive language skills. (S. 247, 250). The occupational therapist reported on the Student's OT evaluations. She stated that he scored below average for the visual perceptions skills standards. He had the most difficulty with visual memory and visual sequential memory. The Student also performed below average and continued to have difficulty with sensory processing. He scored below average on visual motor skills. Based on the assessments, the occupational therapist recommended continuing with OT services for 60 minutes weekly to address

visual perception, fine motor skills, visual motor skills, coordination of new tasks and sensory processing. (S. 250).

36. The Student's special education teacher reported on the academic achievement evaluation that was administered. She indicated that his scores, while not at grade level, showed significant gains in the area of literacy. (S. 250). She stated that in the fall he did not know his letters and sounds, but had progressed to knowing his letters, sounds and 14 sight words. With respect to his "readiness" to learn, she stated in the fall the Student would color rather than participating in the whole class discussions or in small group instruction. In contrast, he had progressed to being able to focus his literacy and had progressed to reading level "A", but still had difficulty comprehending reading content. In the area of math, the Student could do simple word problems with manipulatives and with support. (S. 251).
37. The Written Notice indicated that the Student interacted well with older peers from xx grade and demonstrated "significant growth" in his ability to express when he was upset. It was noted that, "The school had not seen any display of behavior meltdowns that involved violence." (S. 251).
38. At the IEP Team meeting on May 28, 2011, placing the Student in the DDP was discussed as an option for placement for the 2011-2012 school year. (S. 251). Mrs. Jeannie Rackliff, the special education teacher of the DDP, described the program to the Team. Ms. Rackliff has training in the use of ABA methodology, as well as continuing education in the areas of autism spectrum disorder, and behavioral safety techniques, (e.g. "Safety-Care"). (S. 493-500). She stated that she had received ongoing consultation from a certified ABA consultant for 11 years. (S. 251). She explained that the DDP would incorporate ABA/discrete trial format for skills as appropriate and allow for group instruction as appropriate based upon the student's needs. She stated that since there would be two teachers in the program, there would be a good balance of these types of instructional opportunities. There would also be a "team" of Ed. Techs to provide support. She stated that the DDP program incorporated sensory activities, functional life

skills, academics, social skills, and behavioral regulation. She stated that the program was individualized for each student and it was possible that the Student could be in the mainstream setting for key aspects of the day and then go to the DDP for his special education program. (S. 251). The Parents were invited to observe the DDP. (S. 251).

39. The Written Notice indicated that the Parents felt that the WRAP was the best placement for the student rather than the DDP. They felt that the School's program was probably good but that they wanted the Student to have his behaviors improve at WRAP and then send him to back to attend the School. (S. 251). They felt that that the School's program would be going through some transitions, such as relocating to another building, unfamiliar staff, and staff not trained in ABA methodologies, and they did not want the Student to be part of that transition. Mrs. Morel, the RSU 36 Special Education Director, noted that there were no "significant behavioral concerns" during the year; and that the proposed DDP, which contained ABA discrete trial components, was an appropriate placement for the Student. (S. 251). The District also proposed to provide Extended School Year ("ESY") services from July 12 to August 4, 2011, however the Parents stated that the ESY services were not adequate and requested that they be provided at WRAP.
40. After visiting the DDP setting, having further conversations with Ms. Rackliff, Ms. Collins, the special education direction of the School; and Ms. Moreau, assistant special educator director, the Parents ultimately rejected the proposal to place the student in the DDP for the 2011-2012 school year. (S. 259, Parent Testimony.)
41. The WRAP program is located in RSU 38 in the neighboring town of Wayne, Maine. (Parent Testimony). The students in the WRAP program have unlimited access to mainstream peers, and mainstream students are often brought into the wrap program for "reverse mainstreaming." (Kinney Testimony). The program is specifically designed for students with autism and is overseen by a Board Certified Behavioral Analyst and a talented group of ABA-certified teachers and educational technicians. (Kinney Testimony.)

42. On June 17, 2011, an Advanced Written Notice of an IEP meeting was sent to the Parents, which indicates that several attempts were made to reach the parents by telephone on June 9, 2011. It noted that, "Parents stated they did not want an IEP meeting," On June 14, 2011 the parents stated that the Student's last day would be on June 15, 2011, "as the family would be leaving for vacation." (S. 257).
43. An IEP meeting was held on June 24, 2011. (S. 258). The Written Notice indicated that the Parents had visited the DDP and met with the School staff to address any questions they had. It was noted that the Parent and Cheryl Thorpe, the Student's community case manager, had attended an informal meeting with School staff and proposed a meeting date to finalize the IEP before the beginning of the 2011-2012 school year. However, the Parents declined the meeting and indicated that they were pursuing due process. The Written Notice indicated that because the Student's IEP was due to expire over summer vacation, the School was required to meet. (S. 259).
44. The Written Notice indicated that while they understood that the Parents had requested WRAP for the Student's out-of-district placement request, the School denied the request indicating that it was not warranted given that the Student was being offered an appropriate program within the School that met his needs and was less restrictive than the out-of-district placement. (S. 260).
45. The IEP Team determined that the Student would receive specially-designed instruction for 18 hours per week in the DDP and participate, with adult support as needed, in the regular education setting with non-disabled peers for all specials, lunch/recess, and for 75 minutes per week for socialization within the xx grade classroom setting. It was also noted that the student was performing at a xx academic level and therefore it was appropriate to have his academic program provided within the special education setting. While in the special education setting, four hours per day would be allocated to specially designed instruction, and 60 minutes per week each for S/L and OT. The Written Notice

indicated that new IEP goals drafted at the previous IEP meeting were finalized and incorporated into the new IEP. (S. 258-259).

46. The IEP for the 2011-2012 school year included 12.5 hours per week of specially designed instruction, 60 minutes per week of speech language services, and 60 minutes per week of occupational therapy services. (S. 265, 267). The IEP did not include the need for positive behavioral interventions, behavioral goal(s), or provisions for behavioral consultation services. (S. 263). Ed. Tech. support in the regular classroom was on an “as needed” basis. (S. 271). The IEP stated that 50% of the Student’s day would be with mainstream peers. (S. 272).
47. The IEP described the Student’s level of academic and functional performance as follows: “(The Student) is currently reading independently at a level A, and instructionally at a B. (The Student) can read 15 sight words. He knows all of his letters and sounds. He can do addition problems with manipulatives up to 20. (This Student) has a hard time transitioning from one activity to another.” (S. 264).
48. With respect to how the Student’s disability impacts his involvement and progress in the general curriculum, the IEP states, “Due to deficits in the areas of math, reading, writing, speech and occupational needs inclusion in the regular classroom is precluded.” (S.264).
49. The IEP for the 2011-2012 school year included the following five goals:
 - Reading (read a book at Level D-beginning xx grade level by May 2012)
 - Writing (writing at a xx grade level by May 2012)
 - Math (performing at a beginning xx grade level by May 2012)
 - Language skills (become more effective communicator as measured by tallies, informal assessment and parent/teacher input by June 7, 2012)
 - Occupational Therapy (improve visual perception, fine motor skills, visual motor skills coordination of new task sensory processing to be measured by OT and staff).(S. 266-270).
50. While 60 minutes per week of S/L therapy was agreed upon at the IEP Team meeting (S. 259), it was not included as related service in the amended IEP, dated June 24, 2011. (S. 271).

51. On July 1, 2011, a planned merger between RSU 36 and RSU 73 took place, and RSU 36 became part of RSU 73. (Collins Testimony).
52. The Parents filed a Hearing Request Form on July 21, 2011, requesting an out-of-district placement at WRAP rather than in the DDP. (S. 274). The School sent the Parents a letter responding to the complaint, explaining the reasons for its placement of the Student in the DDP, noting that it was more restrictive than his previous placement, but less restrictive than the WRAP program. (S. 278).
53. Settlement discussions between the Parents and the District occurred prior to the start of the 2011-2012 school year. The Parent testified that the hearing request was withdrawn after an agreement was reached; she was to have the Student try the DDP as long as a 1:1 Ed Tech would be provided. (Parent Testimony).
54. The Student attended extended school year services during the summer of 2011. (S. 281). During that period, Elizabeth Kinney, M.S. and a Board Certified Behavior Analyst (“BCBA”), was engaged by the School to consult with School staff regarding the Student’s programming. She conducted observations during the Student’s ESY services on July 14, 21, and 28, and on August 4, 2011. (S. 282). Her summary and recommendations were submitted in August 2011. Ms. Kinney noted that it was difficult to analyze whether the Student’s learning strategies could be primarily ascribed to his challenges with handwriting or if, in addition, he was significantly challenged in other areas. She stated that his handwriting skills would need to be addressed and remediated to completely understand any challenges in other areas. (S. 283, Kinney Testimony). She recommended that a consistent approach to writing numerals and letters, using explicit instructions across the day, as well as scheduling brief handwriting instructional sessions using discrete trial instruction, should be implemented. She recommended that the Student participate in trial sessions using the “Headsprout Early Reading-Working with Autism” program to observe his reading ability and determine if it would help him progress on his IEP goals and objectives. She recommended that his access to computer

time or other motivating activities and enforcers should be dependent on his participation in instruction, as well as on the accuracy of his performance. She also recommended that a data collection system be developed for the Student's IEP goals and objectives, including lesson plans. She stated that once a system was developed and agreed upon by the team, the staff should be trained in the teaching methodologies, and that a draft weekly data sheet should be included in the lesson plan. (S. 283). Several goals were included in her recommendations. (S. 284-301).

55. Ms. Kinney was engaged to consult with the School for the 2011-2012 school year in designing a program for the Student. (Kinney, Collins testimony). She stated that a review of his program did not indicate that a behavioral plan was in place. She also noted that there was no IEP goal for behavior in the IEP for the 2011-2012 school year. She stated that she designed data collection sheets to track the Student's behavior and progress. The goal was to draft a positive behavioral intervention plan for the staff to use. She also had planned on meeting with the School staff once a month for consultation. (Kinney Testimony).
56. The Student began the 2011-2012 school year in the DDP. The DDP special education teacher, Jeanie Rackliff, testified that the Student had a "difficult" time transitioning into her program on the first day of school. (Rackliff testimony). She stated that he was in an "emotional state" and that he "escalated during the day." (Rackliff testimony). He asked for his teacher from the prior year, Susan Wiles, as well as his peers. (Rackliff testimony). She stated that he "left" the room, went to another teacher's room, returned and, by the end of the day, was permitted to stay in the resource room with Mrs. Wiles. (Rackliff testimony). She stated that prior to going to be with Mrs. Wiles, he was "emotionally distraught." (Rackliff Testimony).
57. Based upon the Student's reaction to the first day of school, the IEP Team met to discuss options for an alternative placement at an "emergency" IEP meeting on August 31, 2011. (Collins testimony). There was consensus that the Student be placed back into the resource room setting with Mrs. Wiles. (S. 305-308). The Written Notice stated,

The IEP team had anticipated (the Student's) participation in the developmental program at LES and had drafted changes to the IEP to further refine that level of programming. Given the current discussion, however, the Team considered whether changing back to a less restrictive setting within the resource room was warranted. The team considered (that Student's) comfort level with known staff and peers in addition to the level of academic programming he requires. Mrs. Wiles suggested that if the team felt it was appropriate, she would absolutely welcome the opportunity to have (that Student) come to her setting. The team considered the academic areas for specially designed instruction and noted that he would need that for his reading, writing, and math instruction. (S. 307).

58. The Parent testified that Ms. Rackliff specifically told the IEP Team that the DDP was not socially acceptable for the Student based upon his behaviors, and that is why she agreed to take him out of the DDP and have him placed back in the resource room setting. (Parent Testimony).
59. The IEP determined that, rather than access his education in the DDP, the Student would receive his special education program in reading, math, and written language within the resource room setting for three hours per day. The team believed that the Student had the social skills necessary to be in a resource room setting, and that he had already established positive working relationships with the teacher, Susan Wiles, and many of the peers in that setting. (S. 305, 314).
60. The IEP team determined that he would receive one hour per week of OT and S/L therapy. The IEP continued the adult support "as needed" in the mainstream classroom. (S. 307).
61. Between September 12 and 28, 2011 there were ten School reports to the Parents of the Student's behaviors, including bolting from the class room, property destruction, sitting under tables, poking students, and sleeping and refusal of math assignments. (P.192-203). Charting of targeted behaviors confirmed these reports. (S. 456.)

62. On September 20, 2011, therapeutic restraints were used to manage the Student. (P. 55). It was noted in the Documentation of Therapeutic Restraint (“DTR”) that the Student refused to do his math work, dumped everything on a shelf onto the floor, ran out of the room, and ran down the hall, at which point the school’s principal, Mr. Kahler, stopped him. (P. 55).
63. On September 23, 2011, two DTRs were filed at different times, both stating that the Student refused to do his math work, ran out of the room, was stopped by a teacher (whom he tried to bite), and then was brought into the break room with the help of Mr. Kahler. It was noted that the Student was biting, hitting, and kicking. (P. 56-57).
64. On October 11, 2011, the Student’s mother referred him to Dr. Michael Nurick, Ph.D., for a Psychological Evaluation. (P. 58). In his report, Dr. Nurick stated that, based upon his consultation with the Student’s mother and his assessment using standardized tools, the Student showed “significant weaknesses in all areas of adaptive functioning including receptive, expressive, written and reading communication, completing self-care responsibilities, tasks within the home, as well as socializing with peers, family members and in the community.” (P. 59). He further concluded that, given the reports of significant behavioral issues at school, including bolting, aggression, defiance, and frequent calls to his mother to pick him up, it was clear that the School was not able to appropriately handle his behavior. Dr. Merck recommended that School staff receive consistent behavioral management consultation with Ms. Kinney to set up and establish a behavioral plan; this plan would include an applied behavioral analysis appropriately implement by school staff. He suggested that if School personnel were not able to appropriately implement the program, then the student should attend a school that could provide for his educational needs without the necessity of calling the mother when his behavioral outbursts occurred. He also suggested that the mother receive her own parent-focused behavioral management counseling, with an applied behavioral analysis format to assist with the Student’s aggressive, defiant, and inappropriate behavior in the home setting. He suggested that this could include consultation with Ms. Kinney to coordinate the efforts between home and School. (P. 60).

65. Between October 3 and 31, 2011, charting of targeted behaviors indicated that between 5 and 52 incidents per week of aggression, biting and biting attempts, bolding and property destruction occurred. (S. 456). Home-school reports also informed the Parents of some of the Student's behaviors during October (S. 173-190). Work completion rates for this same period were less than 50%, with the exception of a 90% completion rate for in the third week of October 2011. (S. 459).
66. An IEP Team meeting was convened on October 26, 2011 at the request of the Parent to review the Student's progress. (S. 309-310). The Parent expressed to the Team that the Student's aggressive behaviors had increased since the 2011-2012 school year started, but noted that it appeared to have stabilized. (S. 312). She stated that she was worried that his academic goals were not being met, and that the Student could only learn by using ABA methodologies. She noted that his IEP goals had not changed for three years and pointed out that he could not spell his name with magnetic letters. She also was concerned about the lack of documentation regarding when restraints were being used. (S. 312).
67. Ms. Kinney was present at this meeting of the IEP Team. She reported that she agreed with the change in placement from the DDP to the resource room, given the Student's gravitation to the room and Mrs. Wiles. (S. 310). She shared the data collected up to that point and stated that the behaviors targeted for improvement included property destruction, bolting, transitions during the day, and academics. (S. 310). She stated that the focus of her consultation to that point had been on the Student's behaviors. She stated that she had seen a marked improvement during October 2011 and that his behaviors had stabilized. (S. 310). His behaviors during transitions were "better," and he was "much more cooperative with instruction." (S. 310). It was her view that it was time to start focusing on his academics. She stated that, although his program had been adjusted during the fall, it was now working for the Student. (S. 310).
68. Ms. Kinney also testified that during the fall of the 2011-2012 school year, the Student refused to go to his non-academic "specials," including music and recess. She stated that

this was of concern, since these were his mainstreaming opportunities, an important part of his program. (Kinney testimony). She noted that the Student often chose to use the iPad as an activity during academic games or breaks, and that transitioning from the iPad was difficult for him. (Kinney Testimony).

69. Ms. Wiles also reported improvement in the Student's behaviors and academics. (S. 311). She noted that he was at a Daily Reading Assessment ("DRA") level 2, an improvement from the same time in the prior year. (S. 311). It was noted that a combination of reading programs, including a computer-based program and the Wilson Foundation program, were being used. She noted that math was still a problem area, and that it was being addressed by trying different techniques, with the consultation of Mrs. Kinney. (S. 311).
70. It was also noted that the Student worked best in small groups of three students. (S. 311). This included eating lunch in small group settings because the cafeteria setting was over-stimulating for him. (S. 311).
71. His regular education teacher stated that the Student had improved his behaviors since the beginning of the year. She noted that adult support was provided at all times in the regular education setting and at specials; that he was getting along with his peers; and that he was expressing his wants and needs rather than "acting out." (S. 310). The speech language therapist, Laura Conner, reported that she had been working on social skills planning and how to work in small groups. She recommended that visual rather than oral prompting be used, since he responded well to that technique. (S. 310). The occupational therapist, Melissa Plourde, noted that she had introduced the "ALERT Program" for helping the Student manage and improve his self-regulation, and was using Handwriting Without Tears to target his handwriting skills. (S. 310-311).
72. The Team noted that the use of a break room needed to be clarified, since it had become a tool used by the Student to avoid his academic work. (S. 312). It was agreed that since he considered it a safe space to go it was seen as a good alternative for getting work done or having lunch. (S. 312).

73. The use of restraints was also discussed. The Parent stated that she was concerned about the School's use of restraints and a lack of documentation of when restraints were used. (S. 312).
74. The amended IEP, dated October 26, 2011 included the following goals with objectives: writing (xx grade level by 5/2012); reading (at level D-beginning xx grade by 5/2012); math (xx grade level by 5/2012); S/L goals to reflect visual prompts versus oral prompts; and OT goals, (S. 321-330). Specially designed instruction included 15 hours per week in the special education setting; consultation services to regular education staff for 10 minutes per week; 60 minutes per week of S/L; 60 minutes per week of OT; Adult support in the regular education setting was provided as needed. The IEP stated that 48% of the Student's day would be in the mainstream setting. (S. 331-332).
75. The amended IEP continued to exclude the need for positive behavioral interventions and supports or other strategies to address interfering behaviors. (S. 317). Ms. Collins testified that a behavioral plan was not included in the IEP because the School was starting to collect data in order to develop one, and at the beginning of the 2011-2012 school year the IEP Team had not identified significant behavioral issues the previous year. (Collins Testimony).
76. On November 1, 2011, therapeutic restraints were used to manage the Student. (P. 68). It was noted in the DTR that the Student bolted upstairs from the break room. He was in an unsafe area and was thereafter carried to the elevator, and then back to the break room. He had been in the teacher's copier room with unsafe equipment and began banging on the copier. The DTR indicated that waiting for the conduct to stop was not an option due to the nature of the environment and the inability to remove items out of the room. (P. 68).
77. Progress reports, dated November 4, 2012, indicated that the Student did not meet objectives in writing or math, and only partially met objectives for writing and OT. (P.

69-71, 96, S. 322, 325, 327, 328, 329). No progress reports were noted for S/L goals. (S. 320).

78. Between November 7 and 28, 2011, charting of targeted behaviors indicated a decline from a high 22 incidents per week to almost zero during the last week of November. (S. 457.) Home-school reports also informed the Parents of some of these Student's behaviors during November (S. 157-172). Work completion rates for this same period were less than 60%, with the exception of a 70% completion rate during the last week of November 2011. (S. 460.)
79. Dr. Nurick performed a psychoeducational evaluation on December 13, 2011, upon a referral from the Student's Parents. (P. 92, S. 338). His summary report stated that while the Student was relatively cooperative, he was very distracted and needed frequent props to focus on the tasks, which may have decreased the scores to some degree, but not significantly. (P. 94, S. 340). He stated that the Student's performance on the Cognitive Assessment System generated a Planning score of 68, 1.6 percentile; Simultaneous score of 85, 16th percentile; Attention score of 71, 3rd percentile; Successive score of 66, 1.2 percentile. The Student had a Full Scale IQ score of 61, .5 percentile, which Dr. Nurick determined fell in the range of mild mental retardation. (P. 94, S. 340). He stated that the Student had "very significant weaknesses in all areas of academic functioning" on the Wechsler Individual Achievement Test-Third Edition ("WIAT-III"), which was either commensurate with or lower than his Full Scale IQ. (P. 94, S. 340).
80. Dr. Nurick also stated that the above findings should be taken into consideration in receiving special educational assistance. He stated that the Student would require a "great deal of academic Resource Room assistance given both autism and his mild range of mental retardation." (S. 340). He stated that as part of his programming, the Student should always be asked to summarize instructions before beginning a task, in order to ensure accurate understanding. He stated that the Student would need "very slow, methodical one-step directions to increase the likelihood that he would understand." (S. 340). Dr. Nurick also suggested that the Parent contact the Pediatric Center for a

stimulant medication consultation, due to the Student's high degree of distractibility and problems in focusing. (S. 340).

81. Between December 5 and 19, 2011, charting of targeted behaviors indicated an increase from a low of almost zero incidents per week to about 14 per week during by the third week of December. (S. 457). Work completion rates for this same period declined to about 45% during this same period. (S. 460).
82. On January 9, 2012, therapeutic restraints were used to manage the Student. (P. 95). It was noted in the DTR that the Student began throwing things at the other students at his table when he was asked to complete math problems. (P. 95). After helping, prompting, and waiting strategies were attempted, he was then escorted to the break room. (P. 95). The incident was also reported in the homeschool notebook. (P. 95).
83. Between January 2 and 30, 2012, charting of targeted behaviors indicated an increase from a low of about 5 incidents per week to approximately 23 per week, with the exception of the week of January 16, 2012 where less than five incidents occurred. (S. 457). Home-school reports also informed the Parents of some of these Student's behaviors during January 2012. (S. 127-141). Work completion rates for this same period fell to near 10% during the first week, then rose to 75 and 80% the second to weeks, then fell to about 58% the last week of January 2012. (S. 460).
84. An IEP Team meeting was convened on February 9, 2012. (S. 341). The Team reported that, "[t]hings were currently working in the Student's best interests" and that the Team would reconvene if his behaviors started to escalate. The Team noted that the Student did not respond well to change and that changes in staff "affected his behavior." (S. 342). The Parent reported that she was concerned about the Student because his behaviors had started to escalate at home. (S. 342).
85. An Incident Form was filed on February 15, 2012. (P. 97). It stated that the Student had kicked over a plastic filing cabinet, which landed on another student, causing a bruise to

her elbow. (P. 97). Two weeks of charting targeted behaviors was done in February 2012. While the first week indicated over twenty incidents occurring, the second week showed decrease down to ten. (S. 457). Some of the serious incidents were reported to the Parents, notably on February 3, 2012 the Student kicked, scratched, pulled Ms. Wiles' hair, and attempted to bite her. (S. 118, 121, 123, 125, 126).

86. In a letter dated March 7, 2012, Dr. Linda Glass, from Pediatric Associates, recommended that the Student be placed at WRAP for more intense behavioral management based upon his early onset of puberty. (P. 106). She stated that when children on the autism spectrum enter puberty, they develop into taller and heavier adults with hormone fluctuations that increase the unpredictability of their behavior, making behavioral management more challenging. (P. 106).
87. A DTR was filed on March 12, 2012. (P. 107). The report stated that the Student refused to go to PE and started pacing. He then sat in the corner and put "stuff" around him, blocking himself in. "He then started ripping papers and throwing them, along with markers, stapler, hole punch and anything within reach." He stood on a chair and ripped things off the wall, and then threw the chair at Mrs. Wiles. (P. 107). Mrs. Wiles and the school principal, Mr. Kahler, escorted him to the break room. No other strategies were successful. (P. 107).
88. An IEP Team meeting was conveyed on March 14, 2012 to discuss the Student's increased aggressive behavior at home and incidents that occurred at school. (S. 344, 345). The Team members acknowledged the data showing 22 instances per week of bolting, biting, and kicking, and noted that the Student "generally turned things around in a short amount of time." (S. 346). It was also reported that the Student's "work completion" had been above 80% every week except for two. The Written Notice stated, "Mrs. Kinney noted that the plans implemented during fall are still working. While he was using his words more to communicate his needs, communication goals remained a target. The data indicated that (the Student's) behavior dipped whenever the small group dynamics changed, so this is monitored carefully by staff." (S. 346). The data suggested

that two weeks in particular, one in January and one in March, appeared to be more difficult than others.

89. The Team agreed to implement a protocol for occasions when the Student refused to get on the bus. It was agreed that unless the Student's behavior (e.g., being physically aggressive) made it unsafe for him to ride the bus, the staff would physically put him onto the bus, a staff member would ride with him, and the Parents would be notified. (S. 347). In addition, a token economy plan was offered by Ms. Kinney and accepted by the Team. (Kinney Testimony).
90. The Team also discussed the Parents' concern that the Student was not socializing with peers and could not identify any friends at school. The Team explained that he is in small groups of three other students, and that he has structured social periods for lunch and recess. It was noted that "lately he has not really wanted to go outside for recess." (S. 346). It was also acknowledged that he tended to seek out his resource room teacher, Mrs. Wiles, and did not always attend "specials," such as music class. (S. 346).
91. Ms. Kinney testified that by March 2012, she had not delivered a behavioral plan that had been requested, due to scheduling conflicts that interfered with her consultation schedule with the School. She stated that during the entire 2011-2012 school year, she had met with Mrs. Wiles eight times, with each meeting lasting between five and thirty minutes. At no time did any Staff member contact her for advice or consultation. She did not know whether Mrs. Wiles was consulting with other Ed Techs regarding the information the two of them discussed. She acknowledged that it should have only taken about one month to design a behavioral plan, but she did not submit one to the School until July 2012. (Kinney Testimony).
92. Two DTRs were filed on March 20, 2012. (P. 108, 109). The first report stated that the Student refused to "get off the computer when his special was up. He lay on the floor and began kicking chairs. A xx class was coming into the computer room. He was moved 5 feet to the hallway." (P. 108). The second DTR was reported about 20 minutes later. The

Student threw things, bolted outside, pulled a fire alarm, pulled the fire extinguisher off the wall, kicked Mrs. Wiles, and pulled her hair. Mrs. Wiles and Mr. Kahler escorted him to the break room. (P.109).

93. Between March 5 and April 2, 2012, charting of targeted behaviors indicated that between 20 and 22 incidents per week occurred during the first two weeks, then decreased to below 10 per week for the last two weeks of March 2012. (S. 458). Work completion rates for this same period remained at 50% for the first three weeks and then rose to 70% during that last week of March 2012. (S. 461).
94. Ms. Kinney also testified that in March 2012, based upon the information she had received for the 2011-2012 school year up to that point, she believed that the Student needed significant supports to access the mainstream classroom, which she believed should be an important part of the Student's program. (Kinney testimony). She stated that the data indicated that the Student's behaviors spiked when he entered a small group setting from a 1:1 setting. She stated that this was one reason why a more restrictive setting may be more appropriate. At the same time, the Student needed to become more comfortable with other staff members, rather than being dependent upon the resource room teacher, Mrs. Wiles. Ms. Kinney stated that she felt that the program either at WRAP or in the DDP would be appropriate for the Student because they both had developed a systematic approach to comprehensive academic instruction and used data collection as a tool to measure progress. (Kinney Testimony).
95. An IEP meeting was conveyed on April 5, 2012. (S. 350, 352). The Written Notice stated that, "Based upon the data collected by the IEP Team, (the Student) continues to demonstrate academic and behavioral progress within his current program. Despite that, the family continues to feels strongly that (the Student) requires ABA programming in order to demonstrate even greater gains. The School has offered a change in programming with instructional time within the developmental disabilities program at Livermore Elementary School, which would include opportunities for ABA programming." (S. 353). The Written Notice reported that the Parent believed the Student

had not made any academic or behavioral gains in the last three school years, that his program was not being provided in the least restrictive environment, and that he needed more socialization with non-disabled peers. (S. 354). The Parent believed that the Student needed more than consultation services with the behavioral analyst, and continued to request an out-of-district placement at WRAP. In addition, academic testing was agreed upon. The Written Notice stated that the Parents and Mrs. Kinney were invited to visit the DDP before any decisions were made. (S. 351).

96. A Student Incident Report (“SIR”) was filed on April 6, 2012, reporting that the Student refused to get on the bus to go home and lay down on the floor. (P. 208). Pursuant to the protocol agreed upon by IEP Team, he was physically carried onto the bus. (P. 208).
97. Progress reports for the third and fourth quarters of 2012 ending April 4, 2012 and June 26, 2012 indicated that the Student partially met his goals in writing, math, OT, and S/L, and that he met his goal in reading. (P. 210-219, 234-256).
98. On April 12, 2012, Dr. Nicholas J. Rehagen conducted a Special Education Evaluation. (S. 356). Standardized assessment tools were used, including the Test of Nonverbal Intelligence (“TONI”), Adaptive Behavior Assessment System (“ABAS-II”), and the Vineland Adaptive Behavior Scales (“Vineland-II”). In addition, a clinical interview, along with staff and parent consultations, were performed. (S. 356-357).
99. In his summary report, Dr. Rehagen stated that the Student’s TONI score was 86 (17th percentile). He stated that this score placed him within the “low-average” range, which was “substantially higher than the Full Scale score reported in Dr. Nurick’s report of 2011.” (S. 359). Dr. Rehagen stated that it was important to note that the TONI was a non-verbal test of intelligence, and “when tasks have a substantial verbal component, (the Student’s) scores are significantly lower.” (S. 359). Dr. Rehagen also reported that the composite score on the ABAS-II was 63 and the composite score on the Vineland-II was 73. He stated that this profile “was relatively flat with scores consistent with the most recent Full Scale cognitive assessment score, with the exception of his functioning in the

practical domain, which was moderately higher.” Dr. Rehagen stated that the data from these assessments was designed to supplement previous assessments, and provide additional non-verbal cognitive measures. He found that the previous diagnoses given appeared to be “well reasoned.” (S. 360).

100. Dr. Rehagen’s recommendations included “continued structured educational setting with predictable routines, a positive behavioral plan, and an array of supports at this important time in his elementary school experience. This type of programming is available in his current setting in (the School) and it is important to note that (the Student) has established very positive relationships with his teachers and his peers. In a review of the record, it appears that he is making gains and is responsive to the programming and accommodations provided.” (S. 360).

101. In an email to the District’s staff, dated April 23, 2012, Ms. Kinney reported on her observation of the DDP. It was her opinion that it would be an appropriate placement for the Student. She stated,

Staff are well trained in data collection systems for both skill acquisition and for behavior reduction. General education curricula can be presented for reading and math; interventions that break down the curricula into component parts can be presented in small group or individualized sessions to ensure mastery of the academic skill. Mrs. Rackliff utilizes HWOT for writing, which has been an effective intervention in increasing (the Student’s) writing skills. Small group instruction with peers with somewhat similar profiles would be possible. Current inclusion opportunities could be maintained. Ms. Rackliff’s classroom has easy access to individual or small group instruction rooms, which (the Student) could access when overwhelmed. Mrs. Rackliff has worked with students who benefit from cartooning for social skills, which seems to be an effective strategy for (the Student’s) emotional processing. Staff is trained in Safety-Care. Staff currently transition from one student to the next, which is recommended for (the Student), to support generalization across instructors. (S. 469).

Ms. Kinney stated that the Student would likely protest the transition from Ms. Wiles’ classroom to Ms. Rackliff’s classroom. This would have to be thoughtfully planned out to minimize (the Student’s) emotional responses that resulted in him returning to Ms. Wile's classroom last fall. (S. 469). Ms. Rackliff also informed the Student’s mother that she

thought the DDP would be a “good match” for the Student, explaining the above reasons to her. (S. 469).

102. Between April 2 and April 30, 2012, charting of targeted behaviors indicated that fewer than 10 incidents occurred during the first week of the month, and thereafter zero incidents for the rest of the month. (S. 458). Work completion rates for this same period rose to 70% the first week, with a decrease in the second week to 60% then to 85% and 90% for the last two weeks of April. (S. 461).
103. The Parents referred the Student to Dr. Glen Davis for a Psychological Evaluation, which occurred on May 14, 2012. (S. 374). Standardized assessment tools were used for the evaluation that included the Wechsler Intelligence Scale for Children - 4th Edition (“WISC-IV”), Achenbach Child Behavior Checklist (“ACBC”), and Achenbach Teacher Report Form (ATRF”), in addition to interviews with the Parent and the Student’s case manager, Cheryl Thorpe, and an interview with the Student within the office setting. (S. 474). With respect to information about the Student’s educational programming, Dr. Davis reported that, apart from the Student’s IEP, no information was furnished by the School regarding his program, such as a positive behavioral support plan, data measuring success with behavioral or learning goals, or information about teaching methods and specific objectives. (S. 375, Davis Testimony).
104. Based upon his assessment, Dr. Davis concluded that test results supported previous testing indicating moderately delayed cognitive skills, consistent with mild intellectual disability, and that the Student exhibited problematic externalizing behavioral problems such as temper outburst defiance, and aggression dating back at least two years.
105. Dr. Davis recommended the following: a) a well-defined, coherent teaching plan for developing functional skills fitted to the Student’s current developmental level; b) direct teaching making use of effective teaching practices, such as direct instruction and modeling, discrete trial training, guided practice, rehearsal to mastery, reinforcement, and distributed rehearsal after skills have been mastered; c) services to be delivered at a high

rate of frequency throughout the day, and as feasible, conducted across multiple settings; d) “objective monitoring” of the Student’s success through data collection in order to modify content, specific educational objectives, and teaching methods based on progress data; e) staff attention to the “ecological validity” of skills being taught (“real-world usefulness and developmental appropriateness for the Student”), including maintaining and generalizing functional daily routines in natural settings with multiple people. (S. 377).

106. Dr. Davis also recommended that the student receive “intensive treatment services” designed to promote “social responsiveness and social relating,” receptive comprehension instructions, problem solving, academic skills, and promotion of self-care skills. (S. 377). Due to the Student’s disruptive behavior in mainstream classroom, he recommended intensive instruction and support in a self-contained program to effectively reduce behavioral problems and promote the Student’s educational progress. Once this is achieved, he recommended the next intermediate goal to be introducing the Student into mainstream classroom activities in such a way as to promote his successful participation in learning activities and prevent or reduce the likelihood of disruptive behavior reemerging in this setting. (S. 377).

107. Dr. Davis also “strongly recommended” that the student's educational program incorporate direct instruction, coaching and rehearsal of social skills, and reinforcement of the Student’s social interaction with others, to include receiving and acknowledging peers and staff, saying goodbye, making requests, initiating interaction, negotiating play activities and conflict, reciprocity in conversation, and so forth. (S. 377-378). He recommended that strategies to reduce the duration of transportation to and from the School to no more than 30 minutes each way should be discussed. (S. 378). He also recommended incorporating instruction in self-care skills using a picture schedule depicting the steps involved in various self-care activities. (S. 378).

108. Dr. Davis also recommended the following accommodations and supports:

- “Careful piecing” of instruction and frequent opportunities for “distributed rehearsal” of learning skills;

- Ensuring that the Student is at attention when giving instructions;
- Providing brief instructions using simple language tailored to his vocabulary;
- Directly teaching the specific vocabulary used in directions;
- Breaking down multi-step directions into smaller increments and providing a visual reminder (such as a picture of the current step);
- Either paraphrasing or allowing the Student to paraphrase or model directions to assess his understanding of the task;
- Repeating instructions accompanied by modeling if he does not understand the nature of the task;
- Frequently checking in to ensure understanding of expectations and praising his cooperation with the activity;
- Providing extra time between giving instructions and beginning a task;
- Using multimodal sensory activities as part of his learning tasks;
- Frequently praising and reinforcing participation during his learning tasks;
- Providing visual information such as demonstration, models, use of pictures, illustrations, and simple diagrams, etc.;
- Using instructions that assess prior knowledge before teaching new information, and pre-teaching vocabulary;
- Sequencing information presented from easy to more difficult;
- Linking new information to something he already knows, and helping him to learn from relationships with other information;
- Organizing what he is learning;
- Providing frequent review and repetition of information. (S. 378).

109. An IEP Team meeting was convened on May 21, 2012 to review evaluations performed by Dr. Rehagen and Dr. Davis, and the Student's educational performance, in order to consider placement and programming. (S. 381). The Team considered behavioral data, academic data, and progress on IEP goals. It was noted that the Parent "continues to feel that (the Student) requires a more restricted program despite his academic and behavioral growth over the course of the school year. Given the family's strong contention that (the Student) requires ABA programming and a more restrictive setting, the school proposed placement with the developmental program located within Livermore elementary school. Presently, (the Student) is participating in the resource room setting with Livermore elementary school. While he has demonstrated behavioral and academic gains, the school is willing to move toward more restrictive programming. (The Student's) new IEP will reflect placement within the developmental program at Livermore elementary school starting in the fall of 2012. The team reviewed the results of the additional evaluation ordered at the previous IEP meeting and considered all evaluation data and progress in determining (the Student's) placement and programming needs in order to continue with the annual review process." (S. 383). The Written Notice indicated that consensus was not reached regarding the placement decisions because the Parent did not wish to agree to

any of the determinations until she had a chance to talk with the Student's father. (S. 383).

110. Mrs. Kinney was present at the IEP team meeting on May 21, 2012. She shared the results of behavioral data graphs that were compiled during the spring of 2012. She indicated that the behavioral data demonstrated progress, as evidenced by reductions in targeted behaviors for aggression, biting, bolting, and property destruction to below five incidents per week. She stated that the Student had responded "extremely well" after the implementation of the token system for bus use, recess, to and from specials, with the exception of one day getting on the bus. She reported that the Student was requesting fewer breaks and when he took them he was returning to the activity without issue. She reported that the student was now completing his work nearly 100% of the time, and that his work refusal was at 0%. (S. 384).
111. The Written Notice indicated that while the team considered the Parent's request for an outside placement at WRAP, it did not support this request, stating: "An outside placement is not in keeping with least restrictive environment, as it is far more restrictive than programming within (the Student's) home based school. The district notes that the Student is demonstrating academic and behavioral progress, and that the district has not exhausted all of its resources as it offers a developmental program that can provide additional/more intensive services than those currently in place within the IEP within the resource room setting." (S. 385).
112. The Written Notice indicated that the Parent stated that the DDP had already been tried in the past, and that it didn't work in another school system. She felt that it would not be successful in the District-run program. The Written Notice quoted the Parent as saying, "Will he be able to make progress in this program? Yes, he may. But will it catch him up to his grade level?" (S. 385). Mrs. Collins stated that, at this time, there was a need to get at the underlying adaptive skills and emotional regulation so that the Student could be ready and able to learn academics. She felt that getting the Student "caught up" to his grade level peers for academics may not be a realistic target at this point. She stated that

given his cognitive functioning, the focus needed to be on behavioral and academic targets that were “functional” in nature, and that the Student had showed progress with those targets during the school year. She stated that, “A move to the developmental program is something the team can consider in order to further his current gains in academic/behavioral regulation already observed this school year.” (S. 385).

113. The Written Notice summarized the team’s discussion regarding how the Student’s progress would be measured if he were to be in the DDP. Ms. Rackliff, the DDP special education teacher, explained that the program would be implemented based on the Student’s needs. It would include individual programming in combination with small group, whole group, and mainstream time as appropriate, and that data collection and charting would be conducted in order to measure progress relative to the Student’s baseline data. She stated that participation with nondisabled peers could be a part of the Student’s recess, specials, morning meeting, and special activities in the regular classroom, and that S/L and OT services would be included, as well as monthly consultation services. (S. 385-386).

114. The IEP developed from the May 21, 2012 meeting included the decision to place the Student in the DDP at the LES. With respect to the “Needs” of the Student, the IEP stated the following:

(The Student) has demonstrated steady gains in his behavioral functioning this year. When (the Student) first started at LES in the fall of 2010, (the Student) was not engaged and this impacted his readiness to learn. (The Student) just wanted to color and would not participate in whole class discussions or participate in small group instruction. In contrast to that, throughout the year this changed and by the spring of 2011 he was focused on his literacy work and was demonstrating progress and growth. Transitioning from preferred activities of his choice was difficult at times, but he made growth in this area during the course of the school year. Targeted data collection has assisted the team in reducing unwanted behaviors and increasing functional behaviors. As of May 2012, (the Student) is performing academically at an overall mid xx grade level in the area of reading, written language and at a beginning xx grade level in the area of math. The Student requires specially designed instruction in the small group setting in the areas of reading, written language and math. Functionally, the Student requires a predictable,

structured setting and responds well to consistent routines. He uses a visual schedule and requires instruction in small chunks and frequent sensory breaks. The Student is provided with adult support when in the regular education classroom for task modification and prompting as needed. (S. 390).

115. This IEP indicated that it was necessary to have positive behavioral interventions, supports, and other strategies to address “behavioral goals located within the IEP,” with charting to monitor progress. (S. 391). The IEP included the following goals, each of which included specific objectives to meet:

- S/L – improve overall language skills by completing the following skills during session activities having 70% accuracy by May 2013: i) using complete sentences with appropriate grammar; ii) answering WH questions; iii) correctly sequenced picture to retell an event or story; iv) correctly choosing associations and/or state categories titles; v) use two or more attributes when requesting an item or giving simple directions to peers; iv) continue with "Superflex" social program and/or cartooning/social stories as needed;
- OT – Improve visual perception, fine motor skills, visual motor skills, coordination of new tasks, and sensory processing for increased independence in the school-based environment, as measured by motive and staff;
- Writing – demonstrate six months growth in his written language skills from a mid-xx grade level to ending xx grade level and writing by May 2013;
- Reading – demonstrate at least six months growth in his reading skills from a mid-xx grade level to a beginning xx grade level by May 2013;
- Math – demonstrate six months growth in his math skills from a mid-xx grade level to a beginning xx grade level by May 2013.

(S. 394-403).

116. The IEP indicated that the Student would be spending 48% of his school time with nondisabled students. The Student would also receive consultation services once per month for 15 minutes. Extended school year services were also included for the summer of 2012. Direct S/L and OT services were included, each at two times per week for 30 minutes. (S. 404).

117. Supplementary aids, services and modifications included the following, as needed: use of a visual schedule; modified curriculum expectations for grade-level assignments; access to sensory breaks; access to a quiet space in the regular classroom setting for work completion; use of a picture schedule to assist in transitions; adult support within the regular education setting; alternative location for lunch. (S. 405).

118. Mrs. Kinney, with the aide of her assistant, Lisa Pennabere, submitted consultation notes from an observation on May 29, 2012. (S. 471-474). She included several recommendations for improvement in prompting the Student during transitions. She noted that the Student did not have the same good rapport with the Ed Techs as he had with Ms. Wiles. (S. 472-473).
119. Between April 30 and May 28, 2012, the Student had zero incidents of targeted behaviors and between a 60% and 85% work completion rate. (S. 458, 461).
120. Progress reports for the Student's goals were submitted for the fourth quarter of the 2011-2012 school year in June 2012. (S. 440-452). The reports indicated that the Student partially met goals ("3") in math, writing, S/L, and OT. (S. 440-442, 445-452). He also met his objectives in reading. (S. 443).
121. A Positive Behavior Support Plan ("PBSP") was submitted by Ms. Kinney on July 12, 2012, based upon the data that had been collected during the 2011-2012 school year. (S. 412, Kinney Testimony). The document explained the rationale of the PBSP as follows:
- The goals are to teach (the Student) how to interact within the school environment in safe and appropriate manners, how to safely interact with others when encountering instructional demands, transitions, waiting, changes or novelties, or a social interaction he does not have the skills to navigate (e.g., how to converse on topics of mutual interest to him and others). The function of (the Student's) behaviors targeted for reduction has not been determined by completion of a Functional Behavior Assessment, and interventions thus far reveal that these behaviors are motivated by attention from adults, escape from instructional demands in social interactions, access to tangibles (e.g., stuffed animals, iPad apps), and automatic (e.g., hand flapping, visual tracking). (S. 412).
- The PBSP specific included preventive measures, descriptions of behaviors targeted for increased intervention, and descriptions of those targeted for reduced intervention. It also described how data collection would be performed to determine progress. (S. 413-416).
122. It was the opinion of Ms. Kinney that if the PBSP was implemented in the DDP, the Student's program had a possibility of working for him. While she noted that the DDP

teacher, Ms. Rackliff, is not a certified behavioral analyst, she had been consulting with Ms. Kinney, and consults with her when needed. (Kinney Testimony).

123. The Student attended four out of 12 ESY programming days during the summer of 2012. (S. 417). He worked in a 1:1 setting for academics with a staff person from WRAP and made “satisfactory progress” while attending. He participated in social and functional skills during calendar, “read alouds,” recess, and snack times. During recess time, he actively engaged with up to four peers. (S. 417). His academic work included guided reading, math, and writing activities. (S. 417).
124. The Student's IEP was “corrected” on September 6, 2012. (S. 418).² The change within the IEP included the addition of two behavioral goals. (S. 434-435). The first goal stated, [g]iven behavioral supports, (the Student) will make progress with behaviors targeted for increase from baseline weekly averages: IEP work completion from 86% to 91%, requesting breaks from .20 to .60, and transitions to and from scheduled activities from 85% to 90% as measured by teacher maintained data collection.” (S. 434). This second goal stated, “given behavioral supports, (the Student) will decrease behaviors targeted for reduction from weekly averages: aggression from 10.6 to 5.3 occurrences, bite and bite attempts from 3.2 to 1.6 occurrences, bolts from 1.0 to .5 occurrences, property destruction from 6.2 to 3.1 occurrences, and request break room from .4 to .2, as measured by data collection with progress reported on a quarterly basis. (S. 435).
125. Dr. Davis testified that he believed the WRAP program would be an appropriate placement for the Student. However, he did not observe the DDP and had no opinion about it. He believed that the WRAP was a sophisticated program incorporating hierarchical development of learning objectives, reinforcement strategies, and environmental management to deal with behaviors. He stated that because it would be helpful to make sure that the Student had opportunities to interact with typically developing children, WRAP had access to mainstream classrooms. He stated that the ultimate goal is to have the Student’s learning environment modified in the least possible way, relative to typically developing peers. (Davis Testimony).

² The term “corrected” was handwritten on the document.

126. Dr. Davis stated that the use of ABA was an appropriate teaching methodology for the Student because it incorporated a systematic hierarchy of learning objectives; clearly defined teaching strategies; a plan to provide reinforcement of skills that have been mastered and to expand on them in a variety of settings; and the use of data collection, which would provide information on the level of success of the teaching strategy. He stated that the National Task Force has recommended the use of ABA for students with similar disabilities as the Student. He stated that it was important that teachers involved in implementing ABA strategies have a background in behavioral studies or specific training in ABA methodology. He stated that it is not uncommon for schools to use ABA-like strategies, such as a data collection protocol, for use in analyzing and planning for students with behavioral issues. He stated, however, that it was most often done in the context of a functional behavioral analysis and a positive behavioral support plan. (Davis Testimony).
127. Ms. Kinney testified about the WRAP program, stating that she was asked to develop it in 2009. She explained that it uses an ABA program designed to measure data-based behavioral information in order to plan a student's behavioral plan. The behavioral plan guides the school staff on how to interact with a student. The data is used to attempt to understand the causes of the underlying behaviors and defining those antecedents. From this information, PBSPs are developed. Data is generated to indicate what strategies of the plan are working and which ones need adjustment. The PBSPs must be consistent since students with autism frequently cannot tolerate inconsistent strategies. (Kinney Testimony).
128. Ms. Kinney stated that she began to consult with the School during the ESY program in the summer of 2011. She stated that the School had not developed a behavioral plan at that time. She stated that she was asked to design a plan for the 2011-2012 school year based upon data collected, but that she had been unable to do it in a timely manner given her infrequent visits to the School for consultations. (Kinney Testimony).

IV. POSITIONS OF THE PARTIES

The Parents' Position

a. 2010-2011 School Year

The Parents argue that the School failed to provide a FAPE to the Student during the 2010-2011 school year because of the lack of a behavioral plan to address his inappropriate behaviors documented by RSU 9 prior to transferring into the School.

The Parents argue that Dr. Rogers and Dr. Shah had both recommended behavioral plans prior to the Student entering the School. The Parents cite the Student's IEP from RSU 9, which explained that his behaviors prevented him from participating in the regular curriculum and that "extreme refusals" could be dangerous. The Parents also cite Dr. Nurick's recommendations from January 2010 to implement a behavioral plan.

The Parents note that while the IEP implemented by RSU 9 had a behavioral goal, no behavioral plan was provided to guide staff on how to reach the goal. The Parents state that the behavioral goal was measured by "teacher record keeping," but that no data on his behavior was taken during 2010-2011.

The Parents cite incidents occurring during 2010-2011 to bolster their argument that the School failed to implement an appropriate program during that school year. They cite documentation of inappropriate behaviors, including hitting a student in the lunch line, having a difficult time in center time, and refusing to share the listening center. The Parents point to the IEP Team meeting in October 2010 that reported on the Student's "inappropriate behavior." They also noted that the IEP Team reported in December 2010 that the Student was avoiding math instruction and was allowed to draw and do other things to manage behavioral outbursts.

The Parents argue that the Student's behaviors became so severe that the IEP Team recommended that he be placed in the more restrictive DDP setting for the 2011-2012 school year. They cite the justification for recommending the DDP in the Written Notice of April 2011, which stated, "The demands of the xx grade curriculum were over stimulating." The Parents state

the recommended placement is clear evidence that the Student's programming had not been effective during the 2010-2011 school year.

The Parents argue that the Student's IEP academic goals for 2010-2011 were inappropriate. The Parents point out that the goals and objectives developed by the IEP Team from RSU 9 were adopted without serious review by the School. The Parents argue that, given the fact the Student was repeating xx grade, the IEP Team should have carefully reviewed the goals and objectives to determine whether they were appropriate. The Parents continue to assert that, based upon their view that the Student did not progress during the school year, it should have been apparent that the goals and objectives were not being meaningfully met. The Parents compare IEPs from 2009-2010 and 2010-2011, stating that they had essentially the same goals and objectives, and that the Student continued to be working at a xx level during his second attempt to complete xx grade at the School. The Parents cite math as a concern, stating that the School acknowledged that he was not doing any of the xx grade reading or math, and that by April, he was still scoring in the xx age range on all subtests related to reading and math, and two out of three subtests relating to writing. Based upon this lack of progress, the Parents suggest that the Student's IEP should have been revised in order to make meaningful progress during the 2010-2011 school year.

b. 2011-2012 School Year

The Parents argue that the Student was not provided a FAPE during the 2011-2012 school year. They explain that the Student entered the 2011-2012 school year without a behavioral goal, noting that there had been one in the Student's IEP the prior year. They also state that the IEP did not reference a behavioral plan or consultation services. The IEP indicated that the School would provide Ed Tech support as needed, rather than assign a consistent Ed Tech on a 1:1 basis throughout the day. The Parents assert that, without a behavioral plan or appropriate support, the Student floundered. As evidence, the Parents point to the numerous restraint reports submitted into the record. The Parents assert that, while a break room was assigned as one of the accommodations provided by the School as a place where the Student could take a break, the purpose of it was confusing. Not only was it used for break, it was also used as a punishment – the place he was physically taken if his behavior became unmanageable.

The Parents cite an incident when the Student's mother was called to pick up the Student after a behavioral incident, finding that a rope had been used to keep the break room door shut.

The Parents acknowledge that Ms. Kinney had been engaged to provide consultation to the School staff and develop a behavioral plan. However, they doubt the value of such services due to the infrequency of her consultation visits and the failure to develop a PBSP until the summer of 2012. They point to Ms. Kinney's testimony that a PBSP could have been designed and implemented within 30 days, and her admission that her scheduling conflicts delayed the development of the plan.

The Parents argue that the Student had no one he could name as a friend at School, claiming that his mainstreaming opportunities were rare. They believe that he was unable to function in the resource room setting for any meaningful period of time, citing numerous behavioral incidents wherein the Student refused work, bolted out the resource room, and engaged in kicking, biting, and hair pulling. The Parents assert that evidence of the Student's failure to make progress in the resource room setting without proper supports was the ultimate reason why the IEP Team recommended he be placed in the DDP for the 2012-2013 school year.

The Parents argue that the academic goals from the IEP from 2011-2012 were scaled back from IEPs in the previous two years. For those years, the reading goal was level E by the end of the school year, but in 2011-2012, the reading goal was only level D. They state that the writing goal from prior years had been to reach 90% accuracy, but in 2011-2012, the accuracy target was reduced to 80%. The Parents also state that similar reductions in targeted math goals were made in the IEP for 2011-2012, such as adding and subtracting numbers up to 10 instead of 20, despite the fact that the goals had remained the same in prior years.

The Parents argue that, based upon the lack of progress made during the 2011-2012 school year, and upon the Student's unchecked behavior, that it was clear that the IEP was inappropriate and failed to offer the Student a FAPE.

c. 2012-2013 IEP

The Parents argue that the IEP developed for the 2012-2013 school year is inappropriate for the Student. They cite the Student's history of placement within a DDP earlier, when he was in RSU 9. The Student was unhappy in the program and failed to make progress in educational performance. The Parents also cite that the Student was unhappy with the DDP's ESY program during the summer of 2011, and did not want to attend. They also point to the unsuccessful attempt to place him in the DDP during the 2011-2012 school year, noting that he only had one day in the room before he was moved to the resource room setting.

The Parents also state that the DDP does not use ABA programming, the preferred educational methodology that is known to be successful for students with autism. Rather, the DDP uses only some aspects of ABA methodology and is not overseen by a BCBA. In the view of the Parents, this is an unacceptable alternative to the program at WRAP. The Parents also assert that the DDP will not allow the Student to have one consistent Ed Tech to support him during the day. Rather, the DDP has up to eight different Ed Techs. The Parents argue that having a consistent 1:1 support model was what eventually worked in RSU 9.

The Parents suggest that the WRAP would be the most appropriate placement for the Student. The use of ABA methodologies and discrete trials, overseen by a BCBA, could provide him with an appropriate program that would allow him to make meaningful progress. The Parents explain that the WRAP would provide many opportunities for mainstreaming with non-disabled peers.

The Parents assert that the DDP is more restrictive than the WRAP because, in their view, it does not allow for adequate mainstreaming opportunities for the Student. It argues that the touchstone of "least restrictive environment" is meaningful access to mainstream peers, not school location. The Parents cite behaviors that they believe illustrate the School's difficulty in providing the Student with mainstreaming opportunities: being overwhelmed in the cafeteria, his persistent refusal to participate in his music special, and disruptive and unsafe behaviors in the classroom. They believe that his experience would be no different if he were placed in the DDP. They aver that he would be spending the vast majority of his time with significantly impaired

students, including those who are nonverbal or barely verbal. They suggest that WRAP would interweave mainstreaming opportunities for the Student within his programming.

Based upon the above, the Parents argue that the IEP from 2012-2013 is inappropriate and will not provide the Student with a FAPE.

The School's Position

a. 2010-2011 School Year

The School argues that when the Student transferred into the School, the IEP Team took into account the previous IEP from RSU 9, as well as the Parents' preference to have the Student in the regular education setting as much as possible in order to model after his non-disabled peers. Based upon these considerations, the School asserts that its decision to place him in the regular classroom was objectively reasonable.

The School argues that it monitored the Student's progress frequently and convened IEP meetings when necessary. It cites the IEP meeting in October 2010, when the Team made adjustments to increase his Ed Tech support in the classroom, provided headphones to the Student to reduce noise distraction, included scheduled sensory breaks, and implemented a home/school communication system. The School notes that additional changes were made in December 2010, when the IEP Team agreed to place the Student in the special education resource room setting for math instruction in a small group. The School avers that the Student did well with these adjustments and that he was participating more in the classroom, getting along with his peers, and joining group activities. In addition, the School states that the Student's progress in math improved over the remainder of the year.

The School argues that during the 2010-2011 school year, the Student achieved "significant growth in behaviors" with no evidence of aggression. The School notes that by the end of the school year, he had achieved "satisfactory" progress on his behavioral goal.

The School argues that the Student made meaningful progress on his academic goals. In reading, the School states that by June 2011, the Student had made progress on knowing letters and sounds and had attained reading level "A." He made satisfactory progress on three of four objectives and limited progress on the fourth objective. In math, the School states that, after he started receiving direct instruction, he was able to complete his math assignments and made limited progress on his math goal.

The School concludes that, based upon the adjustments to the Student's IEP that were made during the year, and the progress that the Student made based upon these changes, the Student received a FAPE during the 2010-2011 school year.

b. 2011-2012 School Year

The School argues that it provided a FAPE for the Student during the 2011-2012 school year. It states that in considering changes to the Student's IEP in the spring of 2011, it took into account the Parents' preference to continue the Student's placement in the resource room, rather than its proposed placement in the DDP.

The School asserts that, once it became apparent at the beginning of the 2011-2012 school year that the Student gravitated to the resource room, the IEP agreed to change the Student's placement to the resource room setting and monitored his progress during the year. The School avers that this was an objectively reasonable decision given the circumstances, and resolved a due process complaint that had been filed by the Parents.

The School states that it had engaged Ms. Kinney to help the School develop a behavioral plan over the course of the school year for the Student. The behavioral plan included differential reinforcements, which simultaneously reinforced good behaviors while withholding reinforcement of negative behaviors, such as unsafe conduct and work avoidance. It included a token system, access to a break room, and frequent breaks between lessons. The School also began charting the Student's behaviors so that Ms. Kinney could develop a PBSP. The School states that, while the Parents wanted ABA methodologies to be used, it was not a requirement

that the School do so; it also avers that there was no requirement to put the behavioral plan in writing or include it in the Student's IEP.

The School claims that charting the Student's behaviors indicated that he made "tremendous progress" during the year. By the end of the year, his work completion was at 100%. While there were some spikes in behavioral issues, they were stabilized with additional supports.

The School argues that the Student made meaningful academic progress during the 2011-2012 school year, partially meeting his writing goals in January, April, and June 2012. By April and June, he met all of his writing objectives except one. The School states that in reading, the Student partially met his goals in November and January, and met his goals in April and June 2012. In math, the School reports that the Student partially met objectives in the fall of 2011 and the spring of 2012, and met three of his four math objectives by June 2012. Based upon this progress, the School argues that the Student receive a FAPE for the 2011-2012 school year.

c. 2012-2013 IEP

The School argues that the IEP Team's decision to place the Student in the DDP for the 2012-2013 school year was reasonably calculated to provide him a FAPE within the least restrictive environment. It explains that the DDP served students with autism by providing them with instruction and services comparable to those provided to the Student in previous years. The DPP is staffed by a special education teacher with experience and training in behavioral education, and is experienced in the use of ABA methodologies and discrete trial and data collection. The DDP is also staffed with up to eight Ed Techs. Finally, the IEP proposed for the 2012-2013 school year included consultation services, which have been provided by Ms. Kinney, a certified behavioral analyst. The School states that the Student's program in the DDP will allow for "significant" opportunity for mainstreaming, including participation in specials, such as music, physical education, field trips, celebrations, lunch, and library activities with non-disabled peers. His academic instruction can take place in small groups that target skills deficits and student interests. S/L, OT, and PT services are imbedded into the program and provided once a week in groups and individually. Finally, consultation services are provided to the staff.

The School states that there has been evidence of success in mainstreaming prior students with autism who have gone through the DDP. It also notes that the DDP was approved by Ms. Kinney and has all the components recommended by Dr. Davis, with the only exception that it was not supervised by a board certified behavioral analyst.

The School states that the Parents' preferred placement at WRAP is no different with respect to the type of students in DDP, noting that one or two students are at similar intellectual levels to the student and would be a match for the Student's small group instruction. It also suggests that WRAP would provide no greater mainstreaming opportunities than DDP. Therefore, since the DDP is within the School, it is the least restrictive alternative, and therefore the most appropriate placement for the Student.

V. LEGAL STANDARDS

1. Burden of Proof

It is first necessary to determine which party has the burden of proof. The Individuals with Disabilities Education Improvement Act ("IDEA") provides no guidance on the allocation of the burden of proof in administrative hearings. The Supreme Court held in *Schaffer v. Weast* that the burden of persuasion "lies where it usually falls, upon the party seeking relief." 126 S. Ct. 528, 537 (2005). The Court acknowledged that this 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).

An IEP is reviewed first for consideration of whether it was developed in accordance with procedural requirements and, second, whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). An IEP must be designed to

provide a student with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203. In addition, an IEP must include the student’s present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward his goals, make progress in the general education curriculum, participate in nonacademic activities, and be educated with other children with disabilities, as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); MUSER § IX.3.A.

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.” *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 minimis* in nature. However, the IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Lenn v. Portland School Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). It sets more modest goals: it emphasizes an appropriate, rather than ideal, education and it requires an adequate, rather than optimal, IEP. *Id.* Appropriateness and adequacy are terms of moderation. *Id.* It follows that, although an IEP must afford some educational benefit to the disabled student, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential. *Id.* In *Roland M. v. Concord School Comm.*, 910 F.2d 983, 991 (1st Cir. 1990), the First Circuit explained that the goal is to provide the student with “demonstrable” benefits, stating:

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.

“Education” has a broad meaning under the IDEA, and is not limited to academic progress. 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, supra* 998 F.2d. at 1089. Where the behavior of a student is interfering with learning, a behavioral plan may become a necessary tool for this purpose. The IDEA requires at least the consideration of positive behavioral interventions and supports to address interfering behavioral issues. 20 U.S.C. 1414(d)(3)(B)(i); 34 C.F.R. 300.324(a)(2)(i) and (b). See also *Letter to Anonymous*, Office of Special Education and Rehabilitative Services, 57 IDELR 49 (2010). A failure to address adverse behaviors in developing and implementing a student’s IEP may constitute a denial of FAPE. 34. C.F.R. Part 300, Appendix A, Q. 38, 64 Fed. Reg. 12479 (March 12, 1999.) See *Lauren P. v. Wissahickon Sch. Dist.*, 310 Fed. Appx. 552, 554-55 (3d Cir. 2009) (school’s failure to address the student’s behavior in a systematic and consistent way was a denial of FAPE.); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1002, 1029 (8th Cir. 2003) (Failure to address behavioral problems constituted denial of FAPE.); *Penn Trafford Sch. Dist. v. C.F.* (2006 WL 840334, at 8 W.D. Pa 2006) (lack of behavioral management plan was a serious omission.)

The law is also clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. §1412(a)(5); (MUSER) § X.2.B. What is least restrictive depends upon an individual’s needs. The goal is to educate the Student, whenever possible, with nondisabled students, and as close as possible to the child’s home. 34 C.F.R. § 300.116; MUSER § X.2.B. An out-of-district placement is only appropriate when the District is unable to provide the Student with FAPE. As such, a public school may remove a child with disabilities from the regular educational environment only when “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); MUSER § X.2.B. Parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan or placement for a disabled student. *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993).

The educational benefit and least restrictive environment requirements “operate in tandem to create a continuum of educational possibilities.” *Roland M., supra* 910 F.2d at 993. As such, schools must make a continuum of placement options available. 34 C.F.R. § 300.115; MUSER § X.2.B.

VI. CONCLUSIONS

1. **Did the IEP and placement provided to the Student by the School and implemented during his xx grade (2010-2011) fail to provide him with a free appropriate public education (“FAPE”)? If so, what remedy is appropriate?**

a. IEP

The Student’s IEP from the 2010-2011 school year was developed by the IEP Team at RSU 9 prior to his transfer to the School in the summer of 2010. When he arrived at the School, the IEP Team met and discussed what portions of the IEP from RSU 9 to keep and what to change. The information in the IEP was substantial with respect to the level of support he needed to address his behavioral issues due to his diagnosis of autism. The Team reviewed the report in the IEP, dated May 7, 2011, indicating that the Student’s behavior prevented him from participating in the regular curriculum and that, “During extreme refusals his behavior can be dangerous to others as well as to property.” (S. 158). The Parents provided input regarding the success he experienced having consistent 1:1 support had been assigned to him in RSU 9. The Parents also specifically informed the Team that the Student was known to kick and bite. The Team reviewed the level of S/L and OT services he was getting to address his communication deficits and motor control, which also impacted his behavior in the classroom. It reviewed the prior evaluations about his behavioral history. Despite this information, the IEP Team placed the Student in the regular classroom with adult supervision as needed. It reduced S/L services from 50 to 40 minutes “due to the demands of xx grade.” No PBSP was put in place, despite the inclusion of a behavioral goal in the IEP and the prior determination in RSU 9 to develop a plan. The only provisions to address behavioral issues were S/L and OT services, a quiet space, and sensory breaks.

I find that the record is replete with evidence that, in fact, as the year progressed, the Student’s challenges became evident. By October 2010, he was having a difficult time

socializing in the classroom. He did not participate well in morning meeting or center time. He did not share in the listening center. He was then placed away from other students in the classroom. He hit a student in the lunch line and appeared to have been overwhelmed by the noise in the cafeteria. He was removed to the “time-out” room or the resource room when he became unmanageable in the classroom. His teacher informed the Parents that she was worried about his behavior in the classroom. By December 2010, his behavior continued to interfere with his learning ability. Notably, he became extremely frustrated during his math instruction, and would bolt out of the classroom or was taken out of the room to another location for small group instruction. At that point, the IEP Team agreed that the resource room setting would be more appropriate, at least for his math instruction. During January and February 2011, informal meetings were held to discuss various strategies, but no changes were made to the Student’s IEP. By March 2011 the Student showed only “limited” progress on his IEP goals in writing, and math, and some progress in his reading goal. The IEP indicated that he made “satisfactory” progress on his behavior goal despite the number of documented incidents of maladaptive behaviors. By April 2011, the School’s academic assessments documented that the Student remained at the xx level in reading, math, and writing. By May 2011, the IEP Team acknowledged these facts and the need to develop an IEP more appropriate to the Student’s needs. It recommended that for the 2011-2012 school year, the Student be placed in the DDP, a more restrictive setting for students with a higher level of need for direct instruction and support. The rationale for this was stated in the Written Notice dated May 25, 2011: “Over the course of the school year, however, it became apparent that (the Student) required more special educational support in the special education classroom. The demands of the xx grade curriculum and the over stimulation (sic) of the regular classroom required more support from the special education setting.” By the end of the 2010-2011 school year, the Student was participating in the mainstream setting for only morning circle, calendar time, specials such as art, gym, music (but inconsistently), and recess. He was not receiving any of his academic instruction in the regular classroom setting.

The Parents argue that the Student’s IEP goals and objectives for the 2010-2011 school year were inappropriate. While there is sufficient evidence to show that the Student failed to make meaningful progress during the 2010-2012 school year, I find that this was due to the

interference of his behavioral challenges. There is insufficient evidence show that the adoption of the goals from the IEP from RSU 9 was not objectively reasonable based upon the information it had in August 2010. Therefore, I find that the academic goals and objectives IEP in the 2010-2011 school year were appropriate.

Based upon the above, I find that the IEP for the 2010-2011 school year was inappropriate and did not provide the Student with a FAPE. It is evident that the School ignored the information at its disposal about the Student's significant behavioral challenges when he transferred from RSU 9. The Student's educational record unequivocally indicated that a more substantive individualized program was needed, one that addressed his behavioral challenges, for him to be able to make meaningful progress in his educational program.

b. Placement

Placing the Student in the regular classroom setting upon arrival into the School was inappropriate when it was evident that he needed more support in the special education setting based upon the IEP developed in RSU 9, and the Student's documented history of behavioral needs. The School argues that it chose to place the Student in the regular classroom setting because the Parents expressed their desire to have the Student in the mainstream setting. In reviewing the record, there is no objective basis for the School to have placed the Student in the regular classroom upon arrival. The Team knew, or should have known, that the Student needed a closely supervised program. The Student's documented history from RSU 9 should have adequately informed the School that placement in the regular classroom without 1:1 support was unsafe to him and others, not to mention disruptive to other students. The IEP, dated May 7, 2011, explicitly stated, "(T)he Student has not demonstrated the ability to gain/learn the content of the instruction presented in a large group setting. He requires individually designed instruction present with individual support for his academic learning. He needs direct instruction in Literacy and Math. (The Student) requires behavioral support in order to be successful in all settings." (S. 158).

While the IDEA requires that students be placed in the least restrictive environment to the maximum extent possible, there are circumstances that require a more restrictive placement. As

it became readily apparent over the course of the year, the School managed the Student's behavior and learning by migrating him to the resource room setting. By the end of the year, he was receiving all of his instruction in the resource room, aside from the specials he attended with his non-disabled peers. It was only at that point that the School acknowledged that the regular class room setting was unsafe and disruptive to himself and others, and that the Student needed a more restrictive placement. Based upon the above, I find that the regular classroom placement for the 2010-2011 school year was inappropriate.

2. Did the IEP and placement provided to the Student by the School and implemented during his xx grade (2011-2012) fail to provide him with a free appropriate public education ("FAPE"). If so, what remedy is appropriate?

a. IEP

The School's acknowledgement that changes were needed in the Student's programming for the 2011-2012 school year was documented in the Written Notice dated May 26, 2011. It was at that time that the School recommended that the Student be placed in the DDP, a more restrictive setting within the School. The placement was agreed to by the Parents after the School agreed to the concession to have a consistent 1:1 support in the DDP for the Student. However, at the IEP Team's emergency meeting on August 31, 2011, after the first day of school, the Team changed his placement to the resource room setting. This was the informal placement to which the School migrated the Student during the 2010-2011 school year, although there was never a change to the IEP for the placement. While the School suggests that the resource room placement was to appease the Parents' during due process settlement discussions, the facts do not bear this out. The placement was made by the IEP Team due to the Student's inappropriate behaviors on the first day of school in the DDP. The DDP special education teacher, Ms. Rackliff, clearly stated this in her testimony. In effect, the Student was so disruptive that the IEP Team chose to place him in the more comfortable setting with familiar staff and peers to which he had become accustomed during the prior year.

The effective date of the amended IEP was October 26, 2011. It included 15 hours per week of specially-designed instruction in the special education setting; consultation services to regular education staff for 10 minutes per week; 60 minutes per week of S/L; 60 minutes per

week of OT; and other supplementary aids and services, including adult support in the regular education setting as needed. The IEP stated that 48% of the Student's day would be in the mainstream setting. He had goals in reading, writing, math, S/L, and OT.

I find that the amended IEP, dated October 26, 2011, had several glaring omissions, including positive behavioral interventions and supports, a behavioral plan or any reference to a behavioral plan, or even a statement about his functional needs with respect to his behavior. (It should be noted that the IEP for the 2010-2011 school year included references to these items.) In light of the Student's prior behavior during the 2010-2011 school year, documentation of restraints used from September 2011 through March 2012 in response to the Student's uncontrolled behaviors, as well as numerous reports of bolting, kicking, biting, crawling, and property damage, it is remarkable that no positive behavioral interventions or behavioral goals were called for in the amended IEP. An IEP must address all of a child's needs, whether they are academic, physical, emotional, or social. MUSER § II.11, 16. See also *Mr. and Mrs. I. v MSAD 55*, 480 F.3d 1 (1st Cir. 2007).

It is notable that the School engaged the services of Ms. Kinney, BCBA after the beginning of the 2011-2012 school year to implement non-IEP learning strategies for the Student. Her consultation services were noted in the IEP as "consultation services" under "Considerations" in developing the amended IEP, however those services were never written into the amended IEP as a formal special education-related service, and the frequency of the service was not indicated. She worked with Ms. Rackliff, the DDP special education teacher, to provide input on effective academic strategies for the Student's ESY program during the summer of 2011. She provided an assessment to the IEP Team in the fall of 2011 that helped to guide Ms. Wiles during the year. Over the course of the 2011-2012 school year, Ms. Kinney consulted with Ms. Wiles up to eight times to review the Student's progress and develop strategies for managing the Student's maladaptive behaviors so he could access instruction. She created a charting system to track his behavior and planned to develop a PBSP. She recommended the use of "differential reinforcement" (reinforcing good behavior while withholding reinforcement of the unacceptable behaviors.) She also recommended that the Student's assignments be provided in small segments interspersed with frequent breaks. In March 2012, the IEP Team adopted a token

system for getting the Student onto the bus and transitioning to other mainstream activities throughout the day.

While the School attempted to implement these strategies during the course of the year, the Student's behavior continued to be unstable. He bolted from the resource room, crawled in the hallway, threw items at students, knocked over bookshelves, bit, kicked, and pulled his teacher's hair. The use of restraints was implemented, including carrying the Student from the resource room to the break room. His refusal to work on math was persistent, as was his refusal to participate in mainstream activities, such as music class, recess, and lunch.

By November, the Student made limited to no progress on his IEP goals. Charting of his behavior and work completion, which began sometime in mid-to-late September, indicated that his work completion rate through December 2011 was consistently below 60%, although it had increased to 80% for one week in October and one week in December, before declining again. The incidents of bolting, physical aggression (kicking, biting, hair pulling), and property destruction within the resource room setting made him unsafe to himself and others. It is noteworthy that a PBSP still had not been developed, nor had a behavioral goal been added to his IEP. Up until mid-March 2012, the success of intervention strategies in force at the time was inconsistent, at best.

It was not until after mid-March 2012 that steady improvement in the Student's frequency of targeted behaviors, break requests, and rate of work completion became evident. The Student's work completion rate was over 60% with a high of 90% for one week in April 2012. His rate of targeted behaviors, while they spiked in early March 2012, diminished to almost zero from mid-April to the end of the school year. This appears to be correlated to the implementation of the token system for positive reinforcement of his good behaviors. Between April 30 and May 28, 2012, the Student had no targeted behavioral incidents and a work completion rate of between 60% and 85%.

I find that the Student was not provided a FAPE during the first three quarters of the 2011-2012 school year. While the Student showed slow progress starting in mid-March 2012, the

amended IEP for 2011-2012 lacked the terms necessary for the Student to make meaningful progress. Despite documented instances of severe behavioral challenges, the amended IEP failed to contain any reference to positive behavioral interventions when the record from the 2011-2012 school year made it clear that he needed them. The exclusion of a behavioral goal in his IEP, when one had always been included, highlights the School's failure to substantively address the Student's functional needs. While the School attempted to use non-IEP behavioral interventions³ recommended by Ms. Kinney, such as a break room, segmenting tasks, and "differential reinforcements," there is little evidence to suggest that the Student started to make meaningful progress until after mid-March 2012. Ms. Kinney acknowledged that her failure to develop a PBSP was due to scheduling conflicts and her infrequent consultation visits. Despite numerous recommendations by various evaluators for over two years, the School failed to implement any of them to address the Student's functional challenges. The extensive list of supports and recommendations made by Dr. Davis in late-May 2012, for example, should have been implemented long before the last few months of the 2011-2012 school year. (*supra* at paragraph 107).

The Parents argue that the Student's academic goals and objectives in the IEP for the 2011-2012 school year were inappropriate. While I find that his behavioral challenges interfered with his overall educational progress, I do not find the academic goals and objectives to be inappropriate. The IEP Team attempted to adjust his academic programming based upon this lack of progress the year before. They lowered the level of expectations and implemented learning strategies, such as segmenting lessons into smaller units, recommended by Ms. Kinney. This was an attempt to have the Student achieve some success in his academic goals. Based upon the School's objectively reasonable decisions regarding his academic programming, I do not find the IEP's academic goals and objectives to be inappropriate. However, as stated earlier, his maladaptive behavior clearly interfered with the progress he could have made in his educational program.

³ The IEP for the 2011-2012 school year did not include behavioral interventions and supports or a behavioral plan.

b. Placement

I find that the resource room setting placement during the 2011-2012 school year was inappropriate for the Student. While it was less restrictive than the DDP placement in which the IEP Team originally placed him for that year, he continued to need more direct instruction and support than was available in the resource room setting. His behaviors caused disruptions in the room and he was unsafe around other students at times. There was insufficient adult support when needed and he was restrained numerous times. The School recognized the deficiencies of the resource room setting by April 2012, when it recommended that the Student be placed back into the DDP with a higher level of support for the 2012-2013 school year. It is evident that the School was unable to provide an appropriate placement for the Student at the School during the 2011-2012 school year.

3. Are the IEP and placement for the 2012-2013 school year reasonably calculated to provide the Student with a FAPE in the least restrictive environment? If not, is the Student entitled to a publicly funded placement in the Wayne Regional Autism Program (“WRAP”) at Wayne Elementary School (or an equivalent out-of-district ABA program for students with autism) or any other appropriate remedy?

a. IEP

Determining whether the IEP proposed for the 2012-2013 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 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, and 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 created an IEP that was reasonably calculated to provide meaningful educational benefits in the least restrictive environment. It is based upon objective considerations by several evaluators, the autism consultant, Lisa Kinney, and data gathered during the 2011-2012 school

year. The DDP special education teacher is an experienced educator with training in behavioral education, including teaching students on the autism spectrum. She will also have access to consultants, including BCPAs, such as Ms. Kinney. Ms. Kinney's PBSP provides in-depth and detailed behavioral guidance on how to help the Student with his functional needs. The use of the PBSP will be essential for the Student's success in the DDP and for future mainstreaming opportunities. It therefore must be part of his IEP. The IEP's academic goals are objectively reasonable. Based upon the challenges that the Student had during the 2011-2012 school year, the IEP Team set his academic goals back six months from what they had been the prior year. Under the circumstances, these are appropriate goals for the Student.

b. Placement

While the DDP is more restrictive than the resource room setting, the IEP Team believed that it was the most appropriate setting for the Student because it offered a highly specialized program for the Student in his home school. The IEP ensures that the Student will have mainstreaming opportunities for up to 48% of his school day. There is little evidence in the record that WRAP would offer more than that. There is a preference to have students remain in their home school despite the existence of other viable options. 34 CFR 300.116. It must be appropriate and offer a moderate level of educational benefit. Therefore, I find that the DDP is an appropriate placement given the needs of the Student and the opportunity he will have for mainstream activities.

While it is difficult to predict whether or not the Student will be successful in the DDP, it is the view of this Hearing Officer that the School has worked hard in creating an individualized program for the 2012-2013 school year that has a greater likelihood of success than his prior programming. Therefore, I find that the IEP dated September 6, 2012 is reasonably calculated to provide the Student meaningful educational benefit in the least restrictive environment.

VII. REMEDY

Remedy for the failure to provide a FAPE during the 2010-2011 and 2011-2012 school years

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

Although an IEP need only provide some benefit, "compensatory awards must do more -- they must compensate." *Reid*, 401 F.3d at 525. An award of compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005); *see also MSAD #22*, 43 IDELR 268 (Me. SEA 2005) (stating that the typical compensatory education award is an award of "services in an amount sufficient to make up for the past educational deficiencies"). Compensatory education need not be an hour-for-hour replacement of lost time or opportunity; instead, a compensatory education award should be designed to "ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist. #3*, 31 F.3d 1489, 1497 (9th Cir. 1994); *see also Reid*, 401 F.3d at 523 (rejecting a "cookie-cutter approach" that "runs counter to both the 'broad discretion' afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce"). An award of compensatory education should be fact-specific, depending on the child's needs. *Reid*, 401 F.3d 516 at 524; *Pihl*, 9 F.3d at 188 n.8. Finally, a student's right to compensatory education accrues when the school district "knew or should have known that the student [was] receiving an inappropriate education." *Ridgewood*, 172 F.3d at 250.

The Student is entitled to a remedy for the School's failure to provide a FAPE for the 2010-2011 and 2011-2012 school years. The Parents request that the remedy be in the form of an

out-of-district placement at the Wayne Regional Autism Program. WRAP is located in the Wayne Elementary School, a public school in RSU 38, located in Wayne, Maine, within driving distance of the family's home. As stated above, WRAP provides individualized specialized instruction and services for students with disabilities, particularly those who are in the autism spectrum. It is known to use research-based methodologies, such as ABA, to enable students to access their educational programming. It is the program which Lisa Kinney, BCBA, initially helped to implement. The School's consistent objection to placement at WRAP has been that the program is not provided in the least restrictive environment for the Student. However, during the 2010-2011 and 2011-2012 school years, it was one that could have been accessed to provide programming for the Student. In fact, other students from the School have been assigned to WRAP for their individualized special education programming, including the Student's brother.

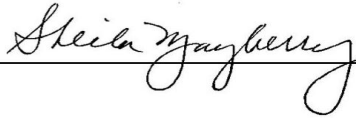
Based upon the above, the School is directed to provide the Student with an out-of-district placement at WRAP, at no expense to the Parents, for two school years in order to compensate for its failure to provide a FAPE to the Student during the 2010-2011 and 2011-2012 school years. Thereafter, the IEP Team must convene and design a transition plan and an appropriate IEP for the Student's return to the School.

ORDER

1. The School shall provide the Student with compensatory education, at no cost to the Parents, including transportation, at the Wayne Regional Autism Program for a period of two school years, commencing in the fall of 2013.

2. The IEP Team shall meet in the spring of 2015 to design an appropriate transition plan for the Student's reentry into the School setting. As part of the transition plan, the IEP Team shall review the PBSP, adjust it as necessary, and append it to the IEP. The School shall train all educators and support staff on how to implement the PBSP prior to the Student's re-entry into the School.

It is so ORDERED.



Sheila Mayberry, Hearing Officer

Portland, Maine
March 7, 2013