

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

**February 15, 2013**

**13.015H      Parents v. Yarmouth School Department**

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

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This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S. § 1415 et seq., and accompanying regulations. The hearing was held on November 26, November 29, December 7, and December 18, 2012, and January 3 and January 13, 2013, at the offices of Drummond Woodsum in Portland. Present for the entire proceeding were parents of the student; Richard O'Meara, Esq., counsel for the family; Jodi McGuire, Director of Instructional Support for the school department; and Eric Herlan, Esq., counsel for the school department.

Testifying at the hearing under oath were:

Student's Maternal Grandmother

Julie Bogdanski, Director, Lindamood Bell Center, Arlington, Massachusetts (by phone)

Lisa Clark, Lindamood Bell Instructor, Aucocisco School

Christopher Kaufman, Ph.D., Psychologist, Yarmouth School Department

Marcia Hunter, Ph.D., Psychologist

Suzanne Jones, Ph.D., Psychologist, Yarmouth School Department

Jodi McGuire, Director of Instructional Support, Yarmouth School Department

Student's Mother

Student's Father

Student's Paternal Grandmother

Annie Ouimet, Instructional Strategist, Yarmouth School Department

Karen Rusinek, Special Education Teacher, Yarmouth School Department

## **I. PROCEDURAL BACKGROUND**

The parents filed a request for a hearing on September 6, 2012. A prehearing conference was held on October 15, 2012.

The record includes pages P. 1 through P. 714 submitted by the parents and pages S. 1 through S. 1156 submitted by the school department. The parent's exhibit numbered P.715, a DVD of recordings of Individualized Education Program ("IEP") Team meetings and a recording of the student, was admitted only for the IEP Team meeting recordings. The school department's objection to the parents' exhibits at P. 498 to P. 542, articles on non-verbal learning disabilities, was overruled. All other documents were admitted without objection. At the close of testimony, the parties jointly requested that the record remain open for the submission of written closing briefs. The record closed with the hearing officer's receipt of both parties' briefs on January 31, 2013.

## **II. ISSUES**

The issues for hearing are:

1. Whether the school district failed to provide the student a free appropriate public education during the 2010-2011 school year by failing to refer her for special education prior to December 2010 or failing to find her eligible until September 2011.
2. Whether the school district failed to provide the student with a free appropriate public education from September 2011 to August 2012.
3. Whether the IEP offered to the student for the 2012-2013 school year was reasonably calculated to provide her with a free appropriate public education.
4. If the family is entitled to a remedy, what remedy is appropriate?

### **III. FINDINGS OF FACT**

1. The student is xx years old. (S. 3.) She is in the xx grade at xx Middle School (S. 34.)
2. The student has attended schools within the Yarmouth School Department since xx. (Testimony of student's mother.)

#### **xx (2007-2008)**

3. Prior to the student beginning xx, the student's mother expressed concern to school screening staff that the student did not understand the difference between letters and numbers. (Testimony of student's mother.) In xx the student was identified as having difficulty with numbers and letters and a Personalized Learning Plan ("PLP") was devised for her in March 2008, although the family was not informed that the student had a PLP until early in her xx grade year. (S. 415-419; Testimony of student's mother.)
4. The school department uses a philosophy of blurring the boundaries of instructional supports so that special education is not the first line of services that a student may receive. (Testimony of McGuire.) The school department tries to meet each student's needs with the resources available, regardless of whether or not the student is identified as eligible for special education services. (Testimony of Ms. McGuire.) The PLP is utilized as an internal document to identify the services and time frames of such services provided to students. (Testimony of McGuire.)
5. The student's mother, who was then the school's volunteer coordinator, had a meeting with the school department superintendent in May 2008, in which she felt he raised his voice and yelled at her when she raised concerns about teacher absences. (Testimony of student's mother.) The student's mother wrote to the superintendent in August 2008 regarding the same concerns. (P. 6.) This led to a response from the superintendent which was copied to the school board, in which the student's parents felt that the superintendent violated the student's confidentiality by referencing the student's particular needs, encouraging the parents to maintain contact with the school counselor and the student's teacher to monitor the student's progress. (P. 34.)

#### **XX grade (2008-2009)**

6. Shortly after the student entered xx grade, her parents received a request from her regular education teacher for a parent-teacher conference to discuss the teacher's concerns that the student did not have the foundational skills to succeed in xx grade, specifically that she did not know her letters and her numbers. (Testimony of student's mother.) For most of xx grade, under the auspices of a PLP, the student received four hours per week of literacy and math instruction in the

- Learning Center, the school's classroom for the delivery of special education services. (S. 418.)
7. In January 2009, a referral to an IEP Team was made by the student's parents, her regular education teacher, and the school's instructional strategist. (S. 384-386.) In March 2009, during the spring of the student's xx grade year, the PLP services increased to four hours per week of literacy. (S. 418.)
  8. In March 2009, an IEP Team meeting was held to review a series of evaluations that had been conducted. (S. 354.) The Team reviewed a psychoeducational evaluation conducted by Lisa Millwood, M.Ed., NCSP, who was the school's psychologist at the time. (S. 363-368.) Ms. Millwood administered a series of tests including the Wechsler Intelligence Scale for Children–Fourth Edition (“WISC-4”) and the Comprehensive Test of Biological Processing (“C-TOPP”). (S. 363.) Ms. Millwood found that the student's IQ fell within the high average range and there was no significant difference between the student's general ability to process language, which fell within the high average range, and her general ability to process visual information, which fell within the middle average range. (S. 368.) Ms. Millwood concluded that the student's working memory and visual processing speed were estimated to be within the average range, probably slightly higher. (S. 368.) Finally, Ms. Millwood found that the student's phonological processing, strongly linked to reading, writing, and oral language, was solidly within the average range as was her performance on the memory and learning tasks that assess short-term visual and auditory memory. (S. 368.) Ms. Millwood observed that the student exhibited distractibility and impulsivity that might have interfered with some of the subtests; Ms. Millwood opined that her distractibility could have been negatively impacting her learning. (S. 368.) Ms. Millwood recommended the following: that the student be seated in an area of the classroom that limited auditory and visual distractions; that the student would benefit from small movement breaks during long periods of seatwork; that the student have directions or instructions be restated to her to ensure her understanding; that the student be encouraged to check for answers for mistakes; that graph paper be used in math to keep the student's information more organized; that the student be given one direction at a time; and that the student be provided a “wiggle” seat or “fidget” object. (S. 368.)
  9. The Team also reviewed an academic evaluation, conducted by Valle Gooch, MS, the school's instructional strategist, in February 2009. (S. 377-383.) Ms. Gooch conducted a classroom assessment and applied several informal assessments, as well as the Wechsler Individual Achievement Test-II (“WIAT-II”). Ms. Gooch concluded that the student had acquired good beginning skills in all academic areas. (S. 381.) She reported that testing results, however, indicated that when the student was required to put various skills together to read and spell words, complete math calculations, or conduct any task requiring pencil and paper as well as sequencing information, the student was not consistently successful. (S.

- 381.) Ms. Gooch found that the student had many isolated skills but few of the integrated skills necessary to complete reading and spelling tasks. (S. 381.) She concluded that the student demonstrated “significantly weaker academic skills when compared to her xx-grade classmates.” (S. 382.) Ms. Gooch made multiple recommendations regarding the student’s instruction in reading, writing, and math. (S. 383.)
10. The Team noted that the psychoeducational evaluation did not identify a processing disorder and as such, no learning disability. (S. 355.) The Team noted that Ms. Millwood concluded that there was no significant difference between the student’s general ability to process language and her general ability to process visual information, noting her observation at the meeting that “testing results of cognition for young children . . . has been shown to be unstable and should not be used to predict future achievement.” (S. 355.) The Team concluded that the student did not require special education services because she did not have an identified disability. (S. 355.) The parents did not disagree with the conclusion of the Team at that time. (S. 361.) Although the student was not identified as eligible for special education, she continued to receive individualized services through her PLP. (S. 355.) The Team increased the student’s literacy support from 2 to 4 hours per week, noting that the student was significantly below grade level in reading and writing. (S. 355.) The Team noted that the Child Study Team from Rowe School and Yarmouth Elementary School would meet in the spring to discuss the student’s needs as she transitioned into xx grade at Yarmouth Elementary School the following year. (S. 355.)
  11. In May 2009, the student received an occupational therapy screen from Todd Metcalf, MS, OTR/L, as a result of a referral from the school’s Child Study Team due to concerns regarding visual processing based on her limited reading ability. (S. 348-349.) Mr. Metcalf concluded that the student showed good precision in her visual motor shapes but that she ran into difficulty when required to combine shapes, which involved being able to understand visual information and then manipulate it. (S. 348-349.) He concluded that visual processing was a “significant issue” for the student “in all aspects.” (S. 349.) Mr. Metcalf recommended that the student be further evaluated to determine how extensive her visual processing challenge was. (S. 349.)
  12. Also in May 2009, the parents discussed with the student’s pediatrician her testing results and provided evaluation scales for school staff to fill out for evaluation of potential Attention Deficit Hyperactivity Disorder. (P. 77.) The student’s pediatrician concluded that the questionnaires were not clear enough to justify considering medication, which school staff had suggested. (P. 78.)
  13. During xx grade, the student became frustrated because other children were reading and writing while she could not. (Testimony of student’s mother.) She began to feel badly about not being able to take part with friends who were

reading and writing books together. (Testimony of student's mother.) The student, throughout her education, has been very motivated to read and progress at the same rate as her peers. (Testimony of student's mother.)

**XX grade (2009-2010)**

14. The student attended xx grade at Yarmouth Elementary School. (S. 397.) Pursuant to her PLP, the student received small group support in math 3 to 4 days a week for 30 minutes with the instructional support staff as well as small group support five days a week for 45 minutes with the instructional support staff. (S. 415-S.416.) Karen Rusinek, a special education teacher who provided the student's PLP services, observed that the student was very easily distracted. (Testimony of Rusinek.) In November 2009, partway through her xx grade year, the student's literacy services increased to three hours and 20 minutes a week with instructional support staff. (S. 416.)
15. In xx grade, Ms. Rusinek utilized the Wilson Reading System as the main phonics program with the student and supplemented that program with phonemic awareness drills, Lindamood Bell sight words, the Lexia computer program, and fluency instruction. (Testimony of Rusinek.)
16. In November 2009, Julie Fraser, the school's psychological services provider, conducted an observation pursuant to a re-referral of the student to special education. (P. 85-88.) Ms. Fraser indicated that the student appeared to benefit from small group, targeted skill instruction focusing on phonics and phonemic skills, sight word development, and reading fluency. (P. 88.) She also recommended continuing the student's writing skills development through classroom-based instruction and explicit phonics-based instruction to build automaticity in spelling. (P. 88.) Ms. Fraser also provided specific teaching strategies in this regard. (P. 88.) Finally, she recommended supporting the student and maintaining attention by encouraging her to sit near the focus on instruction and away from potentially distracting stimuli; monitoring her understanding of instructions by asking her to restate directions in her own words; teaching self-monitoring and active listening strategies to support her sustained attention and understanding. (P. 88.)
17. The IEP Team met following the observation by Ms. Fraser. (S. 329-333.) The student's xx grade regular education teacher, Laura Skowronski, reported that the student was making "good gains" in writing and math although she required a lot of math instruction to be read to her and she needed additional support in writing. (S. 330.) The student's special educator, Karen Rusinek, who was providing services in the Learning Center pursuant to the student's PLP, reported that the student was reading at a level 4 in the Developmental Reading Assessment ("DRA") and that although her fluency was still weak, she was able to read much more than previously. (S. 330.) Jodi McGuire, the school department's Director of Instructional Support, considered Ms. Rusinek to be the best literacy teacher in

the school department and a valuable resource for all students needing literacy support regardless of special education eligibility. (Testimony of McGuire.)

18. At the meeting, Ms. Rusinek observed that the student had some anxiety about reading. (S. 330). Ms. Fraser reported her opinion that overall the student was benefiting from her current programming and advocated continuing the same level of support. (S. 330). The student's regular education teacher reported that the literacy teacher was working with the student in a group on letter/sound connections and that although the student was making regular and steady progress she would sometimes get upset that she could not read what she had written. (S. 330.) The Team again agreed that the student did not require specially designed instruction as a student with a learning disability although the Team endorsed support of three hours and twenty minutes in literacy instruction each week and two hours of instruction in math pursuant to a PLP. (S. 332.) The Team filled out another Learning Disability Evaluation Report, noting that the student did not have a disorder of a basic psychological process that would qualify her as learning disabled. (S. 323.) The student's mother testified that the parents agreed with this conclusion because they trusted that the school was doing what it needed to do to figure out what the student's needs were. (Testimony of mother.)

**XX grade (2010-2011)**

19. The student remained at Yarmouth Elementary School for xx grade. (S. 393.) Ms. Skowronski remained the student's regular education teacher and Ms. Rusinek remained her service provider for PLP services. (Testimony of student's mother.) In the fall, the student took the standardized NECAP and NWEA tests. (P. 92 & P. 94.) On the NECAP, the student scored in the 1<sup>st</sup> percentile in reading, substantially below proficient, and in the 11<sup>th</sup> percentile in math, partially proficient. (P. 92.) On the NWEA, the student scored in the 14<sup>th</sup> percentile in math and the 1<sup>st</sup> percentile in reading. (P. 94.) The parents received these results from the school in October 2010 and immediately requested a meeting with Ms. Rusinek and Ms. Skowronski. (Testimony of student's mother.) At the October 29, 2010, meeting, Ms. Rusinek reported that the student was not progressing as quickly as she had hoped. (Testimony of student's mother.) When the parents asked what else could be done, Ms. Rusinek reported that the school had done all the testing it was allowed to do and that a long enough period of time had not elapsed since prior testing to do more. (Testimony of student's mother.) Ms. Rusinek suggested that the parents speak to their pediatrician, citing examples of the student's inability to focus, and suggesting medication might help. (Testimony of student's mother.)
20. The student's parents spoke to their pediatrician, who suggested a full neuropsychological evaluation and gave them names of recommended service providers. (Testimony of student's mother.) The family researched options and settled on Dr. Marcia Hunter as an evaluator. (Testimony of student's mother.)

On December 3, 2010, the student's parents provided Dr. Hunter with a nonrefundable retainer. (P. 123.)

21. On December 17, 2010, the student's IEP Team met. (S. 309.) According to the referral form of the same date, the student's classroom teacher and her parents referred her for evaluation for special education services at that time. (S. 316.) The referral form indicated that there were social and emotional concerns as well as academic concerns for the student in the areas of reading, written language, spelling, and mathematics. (S. 316.)
22. At the IEP Team meeting, the parents expressed concern that the student could be required to stay back as well as frustration that their own concerns about the student's academic skills when she entered school were dismissed by school staff. (S. 310.) The parents expressed confusion as to why the school had no answer as to the reason for the student's inability to learn at the same rate as her peers. (S. 310.) They also noted that the student was not happy. (S. 310.) The parents were observing the student withdraw from her peers and express anxiety about having to perform in any capacity, including sports. (Testimony of student's mother.)
23. At the meeting, Ms. Skowronski indicated that the student was very social and enjoyed being with her friends in the classroom. (S. 310.) The parents, the student's regular education teacher, and the student's special education teacher all noted an increase in the student's anxiety level. (S. 310.) The student's mother noted that, at home, the student was always on the move, which made it difficult for her to complete tasks. (S. 310.) Ms. Rusinek reported on the student's progress in reading in the Learning Center, noting that the student was working on sight words, phonemic skills, and her reading level. (S. 310.) Specifically, she noted that in September 2010, the student could read 124 of 150 sight words and by December 2010 she was able to read 163 out of 175 sight words. (S. 310.) With regard to phonemic skills, in September 2009, the student had obtained 5 out of 10 phonemic skills needed to improve overall reading; in September 2010, the student had obtained 8 out of 10 such skills; and in December 2010, she remained at the 8 out of 10 skill level. (S. 310-311.) With regard to her reading level, Ms. Rusinek reported that in September 2009, the student was reading at a xx reading level; in September 2010, she was at a mid-xx grade reading level; and in December 2010, she was at an end of xx grade reading level. (S. 311.) Ms. Rusinek expressed concerns that the student had lost reading skills over the summer and that it was taking her longer than others to pick those skills back up. (S. 311.) Mr. Rusinek also noted that when a new skill was introduced, the student often regressed with prior skills. (S. 311.) The parents expressed concern that the student continued to mix up letters and had difficulty sequencing sounds. (S. 311.) Both the student's mother and Ms. Rusinek agreed that the student was using coping mechanisms rather than learning how to read correctly. (S. 311.)



24. The Team also reviewed the special education referral process and began to discuss the necessary evaluations. (S. 311.) The student's mother indicated that the student's pediatrician suggested a neuropsychological evaluation and reported that the family was on the waiting list for Dr. Marcia Hunter to complete an evaluation in January. (S. 311.) The student's mother requested that Dr. Hunter and school staff have a collaborative process. (S. 311.) Ms. Fraser noted that school district might want to provide supplemental information to the neuropsychological evaluation. (S. 311.) Annie Ouimet, Instructional Strategist for the school department, reported that because the student was assessed only one-and-a-half to two years ago, the district could not have reevaluated her sooner. (S. 311.) She also noted that even if the student had been identified as eligible for special education during the prior referral process, her programming might not have looked any different than what she had received in the Learning Center. (S. 311.)
25. Also at the meeting, Ms. Rusinek reported that she had met with the student's team (apparently the team overseeing the student's PLP) to increase reading time for the student to 8 hours 30 minutes of literacy support per week. (S. 311.)
26. On January 27, 2011, the parents agreed to school testing as approved in advance so that it would not interfere with the testing already paid for to Dr. Hunter. (S. 313.) As such, at that time, the parents consented only to classroom observation. (S. 313 & S. 315.)
27. On January 26 and February 11, 2011, the student was evaluated by Dr. Hunter. (S. 3.) The parents had a meeting with Dr. Hunter on March 24, 2011, to obtain her initial feedback although Dr. Hunter's report was not completed. (P. 645.) Dr. Hunter reported to the parents that the student was clinically very unusual in that the right hemisphere of her brain was not operating and the left hemisphere of her brain dominated. (Testimony of student's mother.) Dr. Hunter diagnosed the student with a non-verbal learning disability, but noted that most children with such a disability compensate by reading. (Testimony of student's mother.) Dr. Hunter also diagnosed the student with dyslexia, which inhibited her ability to cope with her non-verbal learning disability. (Testimony of student's mother.) Finally, Dr. Hunter diagnosed the student with ADHD. (Testimony of student's mother.) Dr. Hunter provided the parents with reading materials and recommended that the student would be best suited in the regular classroom and gifted and talented programming, rather than remedial programming, because the student would model the behavior she observed in other students. (Testimony of student's mother.)
28. At some point in the spring of 2011, the student took the NWEA and scored in the 35<sup>th</sup> percentile in math and the 4<sup>th</sup> percentile in reading, (P. 204.) In reading, the student showed growth of 16 compared to typical growth of 17. (P. 204.)

29. On April 8, 2011, the student's IEP Team met again because even though Dr. Hunter's report was not yet available, school staff wanted to meet its 45 day legal obligations. (S. 292; Testimony of McGuire.) The IEP team agreed that the parents would contact the school when Dr. Hunter's report was ready. (S. 294.) The parents emailed and called Dr. Hunter seeking her written report before it was provided in mid-May. (Testimony of student's father.)
30. In her evaluation, Dr. Hunter utilized a clinical interview and a record review and also conducted multiple tests, including the WISC-IV Integrated; the Woodcock-Johnson III-Normative Update Tests of Achievement; Rey Osterreith Complex Figure Design; Hooper Test of Visual Organization; Incomplete Sentences; Children's Color Trails Test; Rapidly Recurring Target Figures Test; Millon Pre-Adolescent Clinical Inventory; Achenbach Child Behavior Checklist; Behavior Reading Inventory of Executive Function; and Social Responsiveness Scale. (S. 3.) The student's parents and teachers reported puzzlement over the student's mix of skills and deficits. (S. 4.) Her parents noted early signs of advanced language skills as well as problems of hyperactivity and distractibility. (S. 4.) The student was reported to be good-natured as well as anxious, friendly and outgoing, and very social, although her teacher reported increasing anxiety that compromised her classroom focus. (S. 6.) In particular, the student was perceived to exhibit a painful awareness that her learning was different from that of her peers and that her difficulties were apparent to her classmates. (S. 6.)
31. Of particular note to Dr. Hunter was a 1<sup>st</sup> percentile score in perceptual reasoning on IQ testing as compared to an 82<sup>nd</sup> percentile score in verbal comprehension in IQ testing. (S. 10; Testimony of Hunter.) When the parents asked about the 1<sup>st</sup> percentile score, Dr. Hunter reported that it was probably not reliable because it was so low compared to other scores and indicators and that the student would likely obtain a different score if the test were repeated in a month. (P. 164: Testimony of Hunter.) Dr. Hunter found that although the number was not necessarily valid, the information it generated was important. (Testimony of Hunter.) With regard to why the student's perceptual reasoning had been in the average range when the student was evaluated by Ms. Millwood at age xx, Dr. Hunter opined that the same test became more sophisticated as the student got older and began to measure more about perceptual reasoning. (Testimony of Hunter.) At hearing, Dr. Hunter acknowledged that the student's perceptual reasoning scores could have been impacted by attentional issues, but noted that she had considered it in her evaluation and concluded that lack of attention could have contributed to the low score but was not the entire cause of it. (Testimony of Hunter.) She was aware that the school department had suggested that the parents meet with her and Dr. Kaufman, in particular to discuss this score, but that the family did not give her permission to do that. (Testimony of Hunter.)
32. Dr. Hunter observed that the student had a distracted air and was inattentive during the initial interview but was easily redirected. (S. 7-8.) Dr. Hunter found

- that the student gave a good effort across tasks of the evaluation and considered the results to be a valid reflection of her current functioning. (S. 8.)
33. Dr. Hunter found that the student's neurocognitive profile was highly defined and characterized by significant skew between cognitive domains. (S. 14.) She reported that the student's intellectual profile was evident in strong verbal skills, as reflected in a verbal IQ score in the 82<sup>nd</sup> percentile, but her ability to actualize this capability was compromised by weakness of higher level, integrative functions that were critical to the mobilizing of cognitive resources. (S. 14.) Dr. Hunter found that the neurocognitive data suggested a dominance of left hemisphere brain functions with significant weakness maximal to frontal and right hemisphere regions. (S. 14.) She reported that the functional impact was evident as poor visual-spatial analysis, variable self-regulation, weak working memory, erratic processing speed, distractibility, and problems with fluent processing of complex inputs, including social/emotional information. (S. 14.)
34. Dr. Hunter reported on a variety of neurocognitive skills. With regard to memory, Dr. Hunter found that the student's skills were variable, with marked inconsistency in recall. (S. 14.) Dr. Hunter also found that the student showed weakness with tasks calling for perceptual analysis and spatial organization. (S. 14.) She concluded that the student's sensorimotor skills were atypical. (S. 14.) With regard to language, Dr. Hunter concluded that the student's receptive and expressive language abilities were well-developed, that she had an excellent vocabulary, and that she was interested in language. (S. 14.) She noted, however, that the student exhibited some problems with comprehension and her interpretation of speech could be overly literal and concrete. (S. 15.) Here, given that the student's academic achievement and language had been consistently below grade level and her strong verbal IQ, among other factors, Dr. Hunter diagnosed the student with a learning disability in reading and written language. (S. 15.) Dr. Hunter observed that the student showed variable reasoning abilities. (S. 15.) Finally, Dr. Hunter concluded that the student's areas of weakness included significant vulnerability within the domains of executive mental functions including variable attention and problems of self-regulation, difficulties which impacted her memory, processing speed, self-monitoring, and emotional modulation. (S. 15.)
35. Dr. Hunter noted that the student had several areas of challenge that required specialized teaching knowledge, instruction, and support. (S. 16.) She recommended: intensification of remedial instruction, a systematic program of instruction, differentiation of methodology to address areas of neurocognitive weakness, attention to the role of environment, specialty training of instructors, attention to motor issues, and attention to social/emotional vulnerabilities. (S. 16.) Dr. Hunter recommended interventions with regard to neurocognitive needs, learning disabilities, mental health, and social competence. (S. 19.) She recommended a comprehensive treatment team to include a medical provider,

- psychologist, education specialist, occupational therapist, and speech language support. (S. 19.) Finally, Dr. Hunter made a series of recommendations with regard to areas of support, learning style, academic needs, executive mental functioning, attention issues, and mental health. (S. 19-25.)
36. Among her general recommendations, after listing the student's diagnoses, Dr. Hunter stated in her report, "[m]edication that targets self-regulation, anxiety, and distractibility may be most helpful." (S. 19.) At hearing, Dr. Hunter clarified that that language in the report was intended to indicate to the student's medical providers that if medication was under consideration at all, medication targeting self-regulation, anxiety, and distractibility would likely be the most helpful. (Testimony of Dr. Hunter.) The student's mother shared Dr. Hunter's report with the family pediatrician shortly after she received it. (Testimony of student's mother.) The pediatrician did not recommend medication, concluding that it was not necessary at that time but that it could be considered again in the future. (Testimony of student's mother.) The student's mother has twice since revisited the question of whether medication would be useful for the student, but the pediatrician has not recommended it. (Testimony of student's mother.)
37. On May 11, 2011, the parents met with Ms. McGuire to discuss how the Hunter report would be shared. (P. 180.) The parents remained concerned that the report would not be kept confidential and that some of the student's lowest scores or her suicidality would be shared in the community. (P. 180; testimony of student's mother.) After the meeting, the student's mother emailed Ms. McGuire and Ms. Jones to report that she would drop off the evaluation later that day, requesting that only Ms. McGuire and Ms. Jones review it. (P. 180.) The student's mother requested that the evaluation not be part of the student's permanent file, but instead a note be included in the file indicating that the evaluation would be made available upon request. (P. 180.) The student's mother also requested that the report be returned to her following the IEP Team meeting that was to occur on May 13. (P. 180.) The student's mother specifically requested that Ms. Jones have the chance to review the evaluation and present appropriate items to the IEP Team later that week so that the Team could begin to discuss support strategies for the student. (P. 180.) The student's mother also noted that Dr. Hunter was available for any questions from Ms. Jones, but that she would not attend the IEP Team meeting on May 13. (P. 180.) Ms. Jones never contacted Dr. Hunter with any questions. (Testimony of Jones.) Ms. McGuire never contacted Dr. Hunter with any questions although she had concerns about the validity of the 1<sup>st</sup> percentile perceptual reasoning score. (Testimony of McGuire.)
38. Prior to Dr. Hunter's evaluation, there had been no indication of a systemic evaluation of the student's attention or executive capacities. (Testimony of Kaufman.) Ms. McGuire did not necessarily agree with Dr. Hunter that the student had a non-verbal learning disability, testifying at hearing that she noted that Dr. Hunter often reached such a diagnosis in her evaluations and that she still

- did not know if the student had a non-verbal learning disability. (Testimony of McGuire.) Dr. Kaufman found the discrepancies in perceptual reasoning scores between the Millwood and Hunter evaluations to be extremely unusual statistically and clinically. (Testimony of Dr. Kaufman.) He opined that the more likely explanation for the drop in the student's scores between the two evaluations was anxiety and distractibility in the testing by Dr. Hunter. (Testimony of Dr. Kaufman.) He also took "substantial exception" to Dr. Hunter's diagnosis of non-verbal leaning disability. (Testimony of Dr. Kaufman.)
39. On May 12, 2011, the student's mother met with Ms. McGuire and Ms. Jones for over two hours to review Dr. Hunter's report. (Testimony of student's mother; testimony of Jones.) During the meeting, Ms. McGuire and Ms. Jones took notes on the report; Ms. Jones noted that the report would qualify the student for special education and now the effort would be on putting together a program. (Testimony of student's mother; testimony of Jones; testimony of McGuire.) Ms. Jones took down her general impressions from the report but not particular scores. (Testimony of Jones.)
40. On May 13, 2011, the student's IEP Team met again. (S. 285.) The Team reviewed several pages that had been excerpted by the family from Dr. Hunter's report, outlining the student's learning style, referencing her diagnoses, and making recommendations. (S. 286; S. 1448-1456.) The Team also discussed the possibility of administering further assessments. (S. 286.) Ms. Rusinek reported that the student was reading at a mid-xx grade reading level. (S. 286.) She noted that although the student's fluency skills were lower, she was able to use strategies independently in reading and her decoding and comprehension skills were improving. (S. 286.) Ms. Jones shared the information that she had obtained from Dr. Hunter's report, including the diagnosis of a reading disability, consistent with the school staffs' perception, as well as a non-verbal learning disability. (S. 286.) The Team reviewed Dr. Hunter's educational recommendations. (S. 286.) The student's regular education teacher, Ms. Skowronski, reported that the student appeared uncomfortable being supported in the regular education classroom. (S. 286.) The Team also discussed the need for further assessments to determine the student's eligibility for special education services. (S. 286.) The Team concluded that the student required the following assessments: Key Math Assessment, Gray Oral Reading Test ("GORT-4"), C-TOPP, and an occupational therapy evaluation. (S. 286.) On May 13, 2011, the parents consented to the additional testing. (P. 184.)
41. Ms. Ouimet administered the C-TOPP and the Key Math Diagnostic Assessment to the student on May 31, June 1, and June 3, 2011. (S. 268.) The student performed in the average range on all subtests and her standard score in the Key Math assessment. (S. 270-271.) On the C-TOPP, the student scored in the average range in all areas of phonological awareness, phonological memory, and rapid naming. (S. 268-270.) Ms. Ouimet recommended that in the area of

- phonological processing skills, the student would benefit from direct instruction in auditory manipulating words by dropping the beginning, medial, and ending sound in the word. (S. 272.) She also recommended that the student would benefit from continued support in computation including creating and solving addition and subtraction problems that require regrouping and renaming as well as multiplication and division problems. (S. 272.)
42. Tim Reidman, MOT, OTR/L, performed an occupational therapy evaluation of the student in late May 2011. (S. 275-280.) He concluded that her visual perceptual, visual, and fine motor skills were in the average range. (S. 280.) Nevertheless, the student's scores showed some problems in the balance scale, typically demonstrating multiple difficulties with movement and balance as well as postural control. (S. 279.) In addition, the student scored in the "definite dysfunction range" in planning, indicating that she may show inconsistently poor performance in many activities that require motor skill and flexible problem-solving; and she may resist unfamiliar tasks, preferring repetitive play to novel activities. (S. 279.) Mr. Reidman provided several recommendations to improve the student's motor planning and organization. (S. 280.)
43. Dr. Christopher Kaufman became involved with the student's case via contract with the school department at some point in approximately May of 2011 to provide consultation regarding the student's reading instruction. (Testimony of McGuire.)
44. On June 10, 2011, the student's IEP Team met again. (S. 260-265.) Ms. Ouimet introduced the purpose of the meeting as to review the Learning Disability Evaluation Report to look at what information would be needed to fill it out. (P. 715 (recording of June 10, 2011, IEP Team meeting)). The Team reviewed the evaluations of Ms. Ouimet and Mr. Reidman, with both evaluators explaining their results. (S. 261.) In addition, Ms. Rusinek reviewed the results of her administration of the GORT-4, explaining that the student scored in the very poor range in her reading rate, in the below average range for accuracy, in the poor range for fluency, and in the average range for comprehension. (S. 261; S. 273.) Ms. Rusinek reported that the student had improved in her sight word knowledge from 189 out of 200 in April 2011 to 342 out of 350 in June 2011. (S. 262.)
45. The meeting minutes indicate that the Team considered completing a Learning Disability Evaluation Report, but rejected this option at the request of the student's parents. (S. 264.) The parents also sought additional outside evaluations. (S. 262.) The parents asked that the student's services remain the same at that time. (S. 262.) The parents expressed a desire for optimal programming to be provided to the student. (S. 263.) Ms. Jones reviewed the Learning Disability Evaluation Report with the Team, stating to the parents that it would be important for Dr. Hunter to identify the key processing areas that were impacting the student's difficulties with reading. (S. 263.) Ms. McGuire suggested that the parents might want to meet with Dr. Hunter and provided them

- with a blank Learning Disability Evaluation Report, noting that Dr. Hunter's input was required for them to complete Part A of the document. (S. 263.)<sup>1</sup> The meeting notes indicate that the meeting concluded with the understanding that the parents were pursuing further outside assessments and would contact the school when they were ready to move forward with the determination of eligibility for special education services for the student. (S. 264.)
46. At hearing, Ms. McGuire testified that the indication in the record that the document was not filled out at the parents' request was a reference to the parents not being willing to provide the entirety of Dr. Hunter's report for the student's file. (Testimony of McGuire.) The parents, however, deny that they were hesitant for her to be identified and expressed confusion, in the record, as to why the student was not identified at the June 2011 meeting. (Testimony of student's mother; P. 227.)
47. Dr. Hunter recommended Victoria Papageorge as a resource to help develop the student's educational plan. (Testimony of student's mother.) Dr. Hunter felt that the student was within a subset of children requiring the most comprehensive assessment and that the collection of as many data points as possible would be useful. (Testimony of Hunter.) The parents arranged with Ms. Papageorge to conduct further assessments of the student. (Testimony of student's mother.)
48. On July 6, 2011, Ms. Papageorge conducted an educational evaluation of the student. (S. 231-258.) Ms. Papageorge had observed the student in several classes before the school year ended and also conducted several assessments, including the Woodcock Reading Mastery Test Revised-NU, Test of Word Reading Efficiency, Test of Written Language-4 (spontaneous writing composite), Test of Orthographic Competence, Test of Reading Comprehension-4, and the Comprehensive Mathematical Abilities Test. (S. 231-240.) Ms. Papageorge concluded that the student had above average verbal abilities - both receptive and expressive - while she experienced weaknesses with visual spatial analysis, working memory, uneven processing speed, distractibility, and fluid processing of complex information. (S. 252.) She also found that in terms of executive functioning, the student exhibited weaknesses in attention and self-regulation directly impacting her memory, processing speed, self-monitoring, and emotional response. (S. 252.) Ms. Papageorge opined that the student demonstrated significant impairment in the non-verbal realm, which directly impacted her academic performance. (S. 252.) Ms. Papageorge noted that the student showed below average performance in the area of elision, sight word recognition and word attack skills, indicating that the student was not stable with fluent processing of phonemes which in turn impacted her ability to decode accurately. (S. 252.) She also noted that when a timed component was added, the student's performance dropped dramatically. (S. 252.)

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<sup>1</sup> Although Ms. McGuire testified that the family provided score sheets from Dr. Hunter's report at the June meeting, the record suggests that occurred at the September meeting.

49. Ms. Papageorge expressed concern that the student had been receiving instruction for two years in the Wilson Reading System but had not progressed even one third of the way through the program, even though it was a 12 step program designed to be completed within three years. (S. 252.) Ms. Papageorge also provided recommendations for academic instruction of the student. (S. 254-256.) With regard to reading instruction, she suggested several Lindamood Bell programs, including the LIPS program, the Seeing Stars program, and the Visualizing and Verbalizing for Language Comprehension program. (S. 254-255.) Ms. Papageorge suggested the Every Day Math program as well as the problem-solving program Math Message Notebooks during direct remedial instruction 2 to 3 times a week for 30 minutes each session to learn, practice, reinforce, and master basic calculation skills for whole numbers, fractions, and decimals. (S. 258.)
50. Ms. Papageorge did not support continued programming for reading and encoding through the public school setting because the student had not made expected gains through the Wilson Reading System or the LLI intervention program due to their inappropriateness for her individual learning profile. (S. 256.) Ms. McGuire attributed the student's slow progress in the Wilson Reading System to inattentiveness and anxiety. (Testimony of McGuire.) Ms. Rusinek saw no need to alter the student's primary program from Wilson to Lindamood Bell. (Testimony of Rusinek.) She believed that the student was making sufficient progress with Wilson. (Testimony of Rusinek.)
51. The Lindamood Bell Seeing Stars program develops phonemic awareness and sensory cognitive function of symbolic imagery; the Visualizing and Verbalizing program develops cognitive processing of contextual imagery. (Testimony of Bogdanski.)
52. On July 20, 2011, the student's mother wrote to the school district indicating that the family was declining the school department's offer of Extended School Year programming and instead seeking private tutorial services, for which they would seek reimbursement. (P. 226.) At that time, the student's mother also noted disagreements with the Written Notice from the Team meeting on June 10, 2011; specifically, she stated that the Learning Disability Evaluation Report had not been completed at the meeting because the parents were seeing the document for the first time and it was unreasonable to expect them to complete all of the items necessary. (P. 226.) The parent reported her belief that the school department should have found the student eligible for special education services many months previous. (P. 227.) She stated that the family was confused as to why the student remained ineligible. (P. 227.)
53. On July 26, 2011, Ms. McGuire responded that the school department had no information to suggest that the student's current programming was not meeting her needs. (P. 225.) Ms. McGuire also reiterated the school district's offer of Extended School Year services. (P. 225.) Ms. McGuire indicated that "we do not



- disagree on special education eligibility” but that special education regulations dictated that IEP Team members document a learning disability with specific psycho-metric data and because the necessary data from Dr. Hunter’s evaluation had not provided to the Team, it was not possible for them to complete Learning Disability Evaluation Report. (P. 225.) Finally, Ms. McGuire stated that it was the Team’s understanding that it would meet prior to the beginning of the upcoming school year to review the testing results the family had indicated would be completed during the summer and to complete the Learning Disability Evaluation Report at that time. (P. 225.)
54. On July 28, 2011, the student underwent a diagnostic evaluation at the Lindamood Bell Center in Arlington, Massachusetts. (P. 256.) The testing summary indicated that the student scored significantly below grade level on a series of assessments, including the Woodcock Reading Mastery Test-RU, the Slosson Oral Reading Test-R3, the Wide Range Achievement Test-4, GORT-4, and the Lindamood Auditory Conceptualization Test. (P. 256-258.) The student showed weakness primarily with symbolic imagery and secondarily with word retrieval. (Testimony of Bogdanski.) Julie Bogdanski, the Center Director and the student’s evaluator, recommended use of the Seeing Stars program and the Visualizing and Verbalizing for Language Comprehension and Thinking program in daily instruction of four hours a day for five days a week for an initial period of 200 to 240 hours (10 to 12 weeks). (S. 259.) The family did not wish for the student to leave public school, so researched local options for accelerating her progress in literacy skills so that she could participate meaningfully in a public school education. (Testimony of student’s mother; testimony of student’s father.) The parents researched options in Maine, but concluded that the only option was for the student to attend a concentrated program at the Lindamood Bell Center in Arlington. (P. 242; testimony of student’s mother.)
55. On August 22, 2011, the parents informed the school department that they intended to provide programming for the student at the Lindamood Bell Center and seek reimbursement for all costs associated with the placement. (P. 255.) The parents requested that the school department provide the student with appropriate classroom instruction upon her return and that her teacher be educated in teaching methods that would be appropriate given her diagnosis and disability profile. (P. 255.) At that time, the parents also provided the school department with copies of the Lindamood Bell Center testing and the Papageorge evaluation. (P. 255; testimony of student’s mother.)
56. By September 1, 2011, the parents were still asking the school department to specify what data was required to make a determination of eligibility for the student. (P. 283.) The parents reiterated that Ms. Jones had taken notes on the Hunter report in May and that the parents had assured the school department that all required data would be available to the Team and that they still did not understand what was needed of them. (P. 283.)

57. In September 2011, Ms. Rusinek prepared a report of the student's progress during xx grade. (S. 581.) In September 2010, the student was able to identify 124 out of 150 sight words; in June 2011, she was able to identify 342 out of 350 sight words. (S. 581.) She had mastered 8 out of 10 phonemic skills in September 2010 and 10 out of 12 in June 2011. (S. 581.) The student began xx grade reading Book 2 in the Wilson Reading System and ended the year reading in Book 4.2. (S. 581.) In September 2010, she was reading at a mid-xx grade level in the Developmental Reading Assessment and at a mid-xx grade level in May 2011. (S. 581.)

**xx grade (2011-2012)**

58. The student began programming at the Lindamood Bell Center in Arlington in September 2011. (Testimony of student's mother.) Although the program is usually delivered in four hour per day blocks, the Center developed a six hour per day program to allow the student to abbreviate the time spent in Massachusetts. (Testimony of Bogdanski.) The student was provided one-on-one instruction in the Seeing Stars program. (Testimony of Bogdanski.) The family commuted many days but also stayed with friends in the area a night or two each week during the eight week program. (Testimony of student's mother.)
59. The student's IEP Team met again on September 16, 2011. (S. 203.) The Written Notice from the meeting indicates that the student's mother shared the scoring sheet from Dr. Hunter's evaluation, which the Team found was sufficient to complete the Learning Disability Evaluation Report. (S. 204.) The Team found the student eligible for special education services as a student with a specific learning disability. (S. 199-203.) The Team did not, however, list a non-verbal learning disability or the 1<sup>st</sup> percentile perceptual reasoning score that the student received in Dr. Hunter's testing as bases for its conclusions. (S. 202: Testimony of McGuire.) On the Learning Disability Evaluation Report, the Team found that the student had a disorder in one or more of the basic psychological processes as demonstrated by a score one standard deviation below the mean in two or more areas. (S. 199.) The Team referenced data from Dr. Hunter's evaluation, Ms. Papageorge's evaluation, and the school district's previous and current evaluations and observations. (S. 204.) The Team concluded that the student's psychoeducational profile revealed a pattern of strengths and weaknesses in performance, achievement, and intellectual functioning that was consistent with the identification of a specific learning disability. (S. 202.)
60. At the Team meeting, the family expressed interest in being allowed time to draft goals at the same time that the school staff was doing so with the parties agreeing to share the goals so that a draft IEP could be discussed at the IEP Team meeting in October 2011. (S. 204.) At the meeting, the family expressed concern that the student had not been identified as having a learning disability sooner. (S. 205.) They requested compensatory educational services, which Ms. McGuire denied.

(S. 205.) The parent's advocate, Joan Kelly, requested that Ms. Rusinek obtain training in Lindamood Bell programming, because she was to resume the student's special education instruction when she returned to school and she had received initial Lindamood Bell training several years earlier. (S. 205; testimony of Rusinek.) On September 22, 2011, Ms. McGuire wrote to the parents, denying their request for reimbursement for the cost of the student's attendance at the Lindamood Bell Center. (S. 198.)

61. On October 19, 2011, the student's IEP Team met again to draft the IEP and prepare for the student's return to school on November 7, 2011. (S. 179.) The Team proposed goals in the areas of reading and spelling as well as consultation between the student's special education teacher and her Lindamood Bell instructor to support her transition back to school. (S. 179-180.) It was agreed that the student's special educator would observe at least one lesson via video as well as consult with Ms. Bogdanski at the Lindamood Bell Center and that consultation between the two could continue as needed. (S. 180; Testimony of Julie Bogdanski.) The Team agreed that additional data from the Lindamood Bell program regarding the student's progress was necessary to inform the draft goals. (S. 180.) Ms. Bogdanski agreed to provide final assessment data upon the student's completion of the Lindamood Bell program. (S. 180.) The Team agreed not to add math and writing goals to the IEP because supports for math and writing were addressed within the section of the IEP dedicated to supplemental aids and services, modifications, and supports. (S. 180.) Ms. McGuire reported that although Ms. Rusinek would be utilizing the Seeing Stars program with the student, specific program names would not be included in the goals; Dr. Kaufman added that the school department's refusal to include a particular methodology was based on its concern that it would limit the special educator's ability to utilize multiple programs. (S. 181.) The Team agreed that during the first three weeks of the student's return to school her services would specifically be in the area of reading fluency. (S. 181.) Ms. McGuire indicated, in response to the student's mother's concerns, that Ms. Rusinek, who had originally received her Lindamood Bell training in 2004, would receive additional training in the Seeing Stars program prior to her beginning of instruction of the student in reading fluency. (S. 182.) Judy Shank, the school department's Title I reading teacher, also attended the training. (Testimony of Ms. McGuire.) The student's mother also questioned whether the student needed to go to the Learning Center for reading instruction because the student did not wish to attend the Learning Center and that she did not feel part of her regular education classroom last year due to her frequent trips to the Learning Center. (S. 182.) Because the Team did not complete drafting of the IEP, it was scheduled to reconvene on November 9, 2011. (S. 179.) The parents felt they were being asked to sign off on a program that had not been fully fleshed out yet, including details such as whether delivery of the specially designed instruction would all be during the school day, and if so during what portions of the day. (Testimony of student's mother.)

62. Lindamood Bell Center staff did not find the student to be anxious during instruction; on the contrary, she appeared very happy with the instruction, was very motivated, and responded positively to the reward system. (Testimony of Bogdanski.) The only times Center staff observed anxiety were during timed reading tests. (Testimony of Bogdanski.) Ms. Rusinek observed one of the student's lessons via video conference, after which Ms. Bogdanski met with Ms. Rusinek to discuss programming goals and format of instruction. (Testimony of Bogdanski.)
63. At the conclusion of the student's 234 hours of Seeing Stars programming at the Lindamood Bell Center, testing showed that her score on the GORT-4 had increased from the 2<sup>nd</sup> to the 5<sup>th</sup> percentile and from the 1.0 to the 2.2 grade level in contextual reading rate. (P. 324; S. 171.) In reading accuracy, the student's scores increased from the 1<sup>st</sup> to the 2<sup>nd</sup> percentile, or from a below 1.0 to a 1.2 grade level. (P. 324.) In reading fluency, the student's score also increased from the 1<sup>st</sup> to the 2<sup>nd</sup> percentile, going from below 1.0 to a 1.7 grade level. (P. 324.) In comprehension, the student's scores increased from the 16<sup>th</sup> to the 37<sup>th</sup> percentile, increasing from the 2.2 to the 4.0 grade level. (P. 324.) Ms. Bogdanski recommended that the student return for 60 to 100 hours of additional instruction in the Seeing Stars program. (S. 174.)
64. The student greatly enjoyed her time at the Lindamood Bell Center, during which she worked hard and regained some self-confidence. (Testimony of student's mother.) At night, the student would read to her family and was very excited about her progress. (Testimony of student's mother; testimony of student's maternal grandmother.) The family felt that the student made significant progress in a short period of time at the Center, noting the student's now grade level comprehension score and her excitement about being able to read. (Testimony of student's mother; testimony of student's maternal grandmother.)
65. The student returned to school at the conclusion of her Lindamood Bell Center program in early November, but the parents chose not to have the student access special education services until Ms. Rusinek attended Lindamood Bell training later that month. (Testimony of student's mother.) As a result, the student attended only regular education classes for nearly a month upon her return, during which time the student appeared to be back to her happy disposition and was excited about going to school, seeing her friends, and being able to read. (Testimony of student's mother.) She had friends over to visit and was able to read with them, which was a new experience for her. (Testimony of student's mother.)
66. Prior to the November 9, 2011, IEP Team meeting, the parents shared a statement of parental concerns. (S. 163-164.) The parents expressed concern that the Written Notice following the October 2011 Team meeting did not accurately

- represent the Team determinations; that Ms. Rusinek was not the appropriate special education teacher for the student given that she had failed to refer the student to special education in the past, that the student was not making progress with the program that was delivered by Ms. Rusinek, and that Ms. Rusinek was not investing in the one-on-one individualized Lindamood Bell programming that had proven successful for the student; and that the school district intended to deliver a particular methodology without identifying that methodology in the student's IEP. (S. 163.) The parents requested that the student's specialized reading instruction occur before the start of the school day, allowing the student to remain in the mainstream during the day, which the parent found to be essential to her sense of well-being and anxiety level; that the school include in the student's weekly communication the pre-teaching and post-teaching to be integrated at home; and that the student's IEP include monitoring time for Ms. Papageorge to conduct an ongoing review of service delivery and lesson plans. (S. 164.)
67. The student's IEP Team met again on November 9, 2011. (S. 165-170.) The student's IEP was developed and a draft was sent home for the parents to review. (S. 168.) The Team revised the goal areas to include fluency, spelling, and overall reading. (S. 165.) The Team concluded that the student's instruction would include: Star Word Tasks and words within the student's reading-sight word development for 5 to 10 minutes per day; fluency work for 20 minutes a day, divided between the Great Leaps program and the Read Live program; text reading using books from her classroom reading instruction including pre-teaching vocabulary, word attack skills, symbol imagery, and practice oral reading for 20 minutes per day; and spelling through use of the Seeing Stars program and the Rebecca Sitton Spelling Program for 10 minutes per day. (S. 167.) The parents expressed concern that the student would not reach grade level scores in reading if her IEP expectations were not set higher, that being in the Learning Center had not been a positive experience for the student in past years, and that, in the past, the student had come home every day with physical and psychological issues due to the Learning Center environment. (S. 168.) The parents and Ms. Kelly requested that the student services be delivered in a space other than the Learning Center and that the services be delivered before the school day by staff from the department's middle school, although the Team did not agree to those requests. (S. 168-169.) Ms. McGuire noted that teachers were not contracted to work beyond the confines of the school day. (S. 169.)
68. Following the meeting, the student's mother contacted Dr. Kaufman, to offer him full access to Dr. Hunter's report since he mentioned that he had not seen it previously. (P. 342.) The student's mother noted in her email that she had told school staff that the full report was available upon request. (P. 342.) The student's mother subsequently provided Dr. Kaufman with a full copy of the report. (Testimony of Kaufman.)

69. On November 11, 2011, Ms. Papageorge conducted a second educational evaluation of the student. (S. 148-153.) She administered the Woodcock Reading Mastery Tests Revised-NU and the Test of Orthographic Competence. (S. 149.) Ms. Papageorge reported that the student's cognitive weaknesses in the non-verbal realm continued to directly impact her academic performance in the areas of basic reading skills. (S. 152.) She recommended that the student continue to receive Seeing Stars programming to address her continued significant deficits in phonological and orthographic processing. (S. 153.)
70. The student's IEP team met again on November 18, 2011, to finalize the student's IEP. (S. 136-A-137.) The parents submitted another statement of parental concerns prior to the November 18 meeting, in which they expressed horror at the hostility displayed at the prior meeting, which they noted was a far cry from prior meetings. (S. 145.) The parents indicated that they did not feel they were treated as respected members of the Team at the November 9 meeting. (S. 145.) The parents also recommended modifications to the student's goals. (S. 145.) They reiterated the student's dislike of pull-out services and the Learning Center, reporting that putting her in the Learning Center impacted her emotionally and increased her anxiety. (S. 145.) The parents expressed confusion about why the school department would not allow for services to occur outside the Learning Center or outside of the school day. (S. 146.)
71. The student returned to school on approximately November 7, 2011. (Testimony of student's mother.) The student's special education services did not begin until December 2, 2011, because Ms. Rusinek had not yet attended the Lindamood Bell training. (Testimony of student's mother.) Once the student's pull-out services in the Learning Center began, however, the student began to fall apart. (Testimony of student's mother.) Within the first week of the provision of special education services in the Learning Center, the student reported being upset to her parents because the Lindamood Bell programming was not being done in the manner it had been in Arlington. (Testimony of student's mother.)
72. On November 18, 2011, the student's IEP Team met again. (S. 136-A-140.) The Team finalized the student's IEP. (S. 136-A-140.) The Team discussed but rejected the possibility of including math and writing goals because the student's current level of performance indicated she would benefit from math and writing support within the classroom. (S. 137.) Instead, support in math and writing was included as a supplementary need for the student in her IEP. (S. 137.) The family rejected school staff's suggestion that the student work with the school counselor during the school day. (S. 138.) The Team reviewed the parents' statement of concerns and rejected the parents' request that special education services be provided outside the school day and outside of the Learning Center as well as their request that the specific reading instruction methodology be identified within the student's IEP. (S. 138.) The Team also rejected the parents' request that Ms. Papageorge be allowed to monitor her instruction delivered by Ms. Rusinek; Ms.

McGuire stated that this was an internal school department responsibility. (S. 139.) The student's mother reported that the student had a breakdown the prior week when she learned that she might need to access special education support outside of the classroom. (S. 139.) The student's father expressed concern that the student would regress emotionally if she was required to receive special education services outside of her classroom during the school day. (S. 139.)

73. The student's IEP, to begin December 2, 2011 and end on November 17, 2012, called for specially designed instruction from a special education teacher 60 minutes per day. (S. 132.) The three annual goals for the student were in the areas of spelling, reading fluency, and reading level. (S. 129-130.) With regard to spelling, the student's goal was that given systematic, multi-step teaching procedures, direct instruction, visualization strategies, and opportunities to practice, the student would improve her spelling skills by obtaining a spelling speed standard score of 85 and a spelling accuracy standard score of 90 as measured by common spelling monitoring tools and the Test of Orthographic Competency by November 17, 2012. (S. 129.) With regard to reading fluency, the student's goal was that given sequence levels of text, direct instruction, opportunities to practice, and immediate feedback, the student would increase by one year her rate (to a 3.2 grade level), accuracy (to a 2.2 grade level), and fluency skills (to a 2.2 grade level) as measured by progress monitoring tools and the GORT by November 17, 2012. (S. 129.) Finally, with regard to reading level, the student's goal was that given sequenced levels of text, direct instruction, opportunities to practice, and immediate feedback, the student would increase her standard score levels to a standard score of 85 as measured by the progress monitoring tools and the GORT by November 17, 2012. (S. 130.) The student's IEP also called for many supplementary aids, services, modifications, and supports, including, among others, the ability to take dictation when needing help to get her ideas down; writing support in the classroom; use of graphic organizers, webs, outlines, or checklists; extra time or reduced length of assignments; use of modeling, demonstration, and opportunities for repetition; simple, step-by-step directions; frequent check-ins to ensure that the student understood class expectations; preferential seating; opportunities for movement breaks; and consultation between her classroom teacher and her special education teacher for 30 minutes per month. (S. 133-134.)
74. Ms. Rusinek attended Lindamood Bell training in Arlington on November 28 and 29, 2011. (S. 113.) Once the student's special education services resumed, Ms. Rusinek structured the student's daily hour of specialized instruction into the following blocks: 10 minutes of sight words, using some of the Seeing Stars sight word list and some she identified on her own; 10 minutes of the Great Leaps program; 20 minutes of reading texts; 10 minutes of spelling using the Seeing Stars program; and 10 minutes of the Read Live computer program. (Testimony of Rusinek.) The mother attended the same training. (Testimony of student's mother.) The conversation between the mother and Ms. Rusinek was strained; the

student's mother felt that Ms. Rusinek ignored her. (Testimony of Rusinek; student's mother.)

75. On December 8, 2011, the student's parents reported to Ms. McGuire that the student was exhibiting stress related to the pull-out services in the Learning Center and that the student felt that the Lindamood Bell program was not being administered as it had been in Arlington. (P. 377.) Ms. McGuire responded that she did not share concerns about the implementation of the Lindamood Bell Seeing Stars program but suggested a meeting time to discuss the concern further on December 12. (P. 377.) In continued email communications, Ms. McGuire suggested that the student access school social worker support and expressed confidence that Ms. Rusinek was implementing the Seeing Stars program appropriately. (P. 478.) The parents responded that they were concerned that additional pull-out services would only increase the student's stress level and also that a school guidance counselor would not be the appropriate person to provide support to the student. (P. 478.) The parents also noted particular aspects in which they had concerns about the implementation of the Lindamood Bell programming by Ms. Rusinek as well as other aspects of Ms. Rusinek's provision of programming. (P. 478.) Ms. McGuire, who was not trained in Lindamood Bell programming, never consulted with anyone other than Ms. Rusinek about the implementation of the student's Seeing Stars programming. (Testimony of McGuire.)
76. On December 20, 2011, the student's parents met with Ms. McGuire. (S. 113; P. 391; testimony of student's mother.) In particular, the parents were concerned that the student had been questioned by Ms. Rusinek as to whether the Lindamood Bell program was being implemented correctly, which greatly increased the student's anxiety level. (P. 391.) When the parents reiterated their request that the student be taught by someone other than Ms. Rusinek outside the Learning Center outside the school day, Ms. McGuire responded that they were essentially asking that the student be removed from special education entirely. (P. 391.)
77. The student was in tears every day during the Christmas break, and the family felt she was in crisis. (Testimony of student's mother.) On January 1, 2012, Ms. McGuire emailed the family as a follow-up to their December 20, 2011 meeting. (S. 113.) She reported that Ms. Rusinek shared the parents' concerns about the student's progress during the 11 days she had received special education that year, between December 2 and December 20. (S. 113.) Ms. Rusinek had reported to Ms. McGuire that the student was exhibiting behaviors that interfered with her learning similar to those she exhibited in xx grade. (S. 113.) Ms. McGuire also noted that the student's anxious presentation and weak executive functioning were the basis of the school's continued recommendation of school counseling services. (S. 113.) She responded that the parents' statements that Ms. Rusinek was using inappropriate strategies, was using incorrect materials, and was not applying the Lindamood Bell program with fidelity were unfounded; Ms.



McGuire requested that the parents avoid making assertions against Ms. Rusinek's attitude and character. (S. 114.)

78. On January 3, 2012, the student's mother requested an emergency meeting of the student's IEP Team that week so that the Team could consider changes to the student's programming in an attempt to meet her needs appropriately. (S. 112.) On January 9, 2012, the student's mother reported to Ms. McGuire that the student was resistant to coming to school that day and had experienced a meltdown after school. (P. 405.)
79. On January 10, 2012, the student's IEP Team held an emergency meeting. (S. 108.) The Team rejected the parents' request to provide services in a room with no other students present and by a special educator other than Ms. Rusinek, determining that issues of staff and space were not IEP Team decisions. (S. 109.) The Team discussed possible reasons for the frustration and anxiety about school that the student was expressing at home. (S. 109.) The parents explained that the student was experiencing a lot of difficulty, particularly crying and stomachaches, each morning and evening at home and that since she had begun to work with Ms. Rusinek, she did not want to come to school. (S. 109.) Ms. Rusinek stated that Lindamood Bell Center staff had observed the student to be anxious while there, although Ms. Bogdanski denied that. (S. 109; testimony of Bogdanski.) Dr. Kaufman opined that the student's diagnosis of ADHD was the primary factor impacting her acquisition of reading skills, particularly speed, and reiterated that it was important for the student to begin developing an understanding of her disability. (S. 109.) School staff and the parents' advocate disagreed about whether one-on-one instruction, as provided in the student's IEP, required an environment with no other student in the space. (S. 109.)
80. On January 18, 2012, the student's mother emailed Ms. McGuire to report that the student had been in tears and experiencing a stomachache since the end of school that day and had been screaming "I hate Mrs. Rusinek, I hate school, I don't want to go there anymore, hide me forever." (P. 418.) The student's mother noted that the student felt exactly the opposite about her time in the regular education classroom. (P. 418.) The student's mother also reported that she consulted with the family's pediatrician, who opined that it was a school-related problem that needed to be fixed. (P. 418; Testimony of student's mother.)
81. Throughout January and into February, the parents reported to the school that the student continued exhibiting extreme anxiety and was upset about her instruction in the Learning Center. (S.464-471.) Ms. McGuire responded that the student was not exhibiting the same level of distress at school but again offered the support of a school counselor to work with the student to explore the stressors and emotionality that she was experiencing at home as it related to school. (S. 468-469.) The parents responded that they were receiving guidance from the student's pediatrician, to which Ms. McGuire responded that school staff would be willing

- to hold a confidential consultation with any out of school providers with the parents' permission. (S. 468.)
82. Dr. Hunter met with the student and her mother on February 1, 2012. (P. 424; Testimony of mother.) Dr. Hunter expressed concern about the student's level of anxiety and noted that a hallmark of learning disabilities is issues related to mood and suggested that school staff should take the student's stress level into account by significantly reducing homework to allow time for playdates to build her social competence and confidence. (P. 424.)
83. Just prior to the student's February 2012 vacation week, the parents chose to have the student reevaluated at the Lindamood Bell Center because of her anxiety, lack of desire to read, and frequent upset. (Testimony of student's mother.) The student's testing summary on February 13, 2012, from Lindamood Bell showed regression in some areas. (P. 425.) In particular, the student's scores on the Peabody Picture Vocabulary Test, the Detroit Tests of Learning Aptitude, the Woodcock Reading Mastery Test-NU, informal tests of writing, and symbol imagery tests showed a decrease. (P. 425-427.) The family took a two week February break to help calm the student, taking her to Florida to visit with her grandparents. (Testimony of student's mother.)
84. At this time, the student's regular education teacher also expressed concern that the student was not able to keep up with her peers anymore and was experiencing regression. (Testimony of student's mother.) The student was also becoming increasingly frustrated with her family because they were not able to fix what she felt was not working about the program. (Testimony of student's mother.)
85. Between the February and April school breaks, the student continued to exhibit headaches and stomachaches every day; she told her parents the program offered in the Learning Center was confusing, was not working for her, and was upsetting because it required to leave her regular education classroom. (Testimony of student's mother.) The students' parents continue to communicate with the school department about the student's distress level. (Testimony of student's mother.)
86. Following the vacation week in April 2012, the student began having meltdowns on weekends as well as weekdays. (Testimony of student's mother.) Often on Saturday mornings, she did not get out of bed. (Testimony of student's mother.) She began to withdraw from activities and refused play dates with friends. (Testimony of student's mother.) The student obsessed all day on Sunday about going to school the following day. (Testimony of student's mother.)
87. In early May, Ms. McGuire reiterated an offer to include school social work services in the student's IEP. (P. 444; testimony of student's mother.) The family declined the offer of social work services because they were concerned that a

- social worker was not appropriate to help the student and because Dr. Kaufman had indicated that Dr. Hunter would be an appropriate support in this regard; the family also declined the service because Ms. McGuire indicated that it could occur only during the school day, which would have meant more pull-out time for the student. (Testimony of student's mother.)
88. On May 15, 2012, the student had a visit with Dr. Hunter. (P. 616.) Dr. Hunter summarized the visit in a treatment note, indicating that the student continued to exhibit increasing anxiety, cognitive rigidity, low self-esteem, and negativity toward school. (P. 446.) Dr. Hunter opined that because the student had a "lagging skill" regarding mental flexibility and shifting of perspective, it was important for adults involved in a situation to be flexible. (P. 446.) She encouraged the IEP Team not to adopt a polarized position regarding any aspect of the student's program, but instead to think outside the box to accommodate the student's need for a change regarding her remedial reading instruction. (P. 446.) Dr. Hunter noted that the main objective of such flexibility would be to help the student sustain a positive association to school, remain open and motivated regarding her specialized learning needs, and reduce anxiety that interfered with her concentration and obtaining a positive state of mind. (P. 446.) Dr. Hunter suggested that the student could be masking much of her distress at school because she was invested in pleasing others and being a good student. (P. 446-447.)
89. Also on May 15, 2012, Ms. Rusinek measured the student's progress toward her annual goals, the only time that the student's 2011-2012 IEP was graded. (S. 98.) She graded the student as "in progress" on all three of her IEP goals. (S. 98.)
90. The student began to talk about not wanting to live, stating that she had nothing to live for; she did not want to left alone in a room while at home. (Testimony of student's mother; testimony of student's father.)
91. On May 18, 2012, the student's IEP Team convened to discuss IEP goals, present levels of performance, parental concerns regarding the student's ability to keep up with her classmates during reading in the classroom, Extended School Year services, and the student's upcoming transition to the middle school. (S. 85.) The parents shared Dr. Hunter's most recent treatment note. (S. 85.) The Team declined the parents' request that special education services be provided outside of the school day and by a different special educator. (S. 85.) Goals and services to support the student's social-emotional needs were proposed but rejected by the parents. (S. 85.) Ms. Rusinek presented the student's most recent progress; in the Seeing Stars program, the student read 57 out of 70 words, in the Reading Fluency program, the student was at a xx grade reading level, and in the Independent Guided Reading, the student was reading at a xx grade level. (S. 85.)

92. Toward the end of the meeting, the tone of the conversation became hostile. (P. 715 (recording of 5/18/12 IEP Team meeting).) Dr. Kaufman provided his opinion that there was no clinical reason to provide services to the student outside the school day; that the Learning Center was a fine and appropriate setting; and that the student needed to understand her disability and the help that she would need to overcome it. (P. 715.) The student's mother became upset, reiterated her frustration that the school department would not agree to any of their requests regarding how and by whom services would be provided, and reported that the student felt bullied and threatened by Ms. Rusinek. (P. 715.) In response, Ms. Rusinek expressed resentment that she was being accused of bullying and she noted that although the parents reported student meltdowns, she did not observe any concerning behavior, other than anxiety that presented as increased questions, and that she had asked the school principal to "confront" the student to see what her concerns really were. (P. 715.) The student's father stood and raised his voice. (Testimony of McGuire.) Although the student's father's voice was the loudest in the recording of the meeting, multiple parties at the meeting were engaged in emotional and unproductive conversation, amidst mutual accusations of bullying between the parents and Ms. Rusinek. (P. 715.) Ms. McGuire ended the meeting before any determinations were made due to her concern that the student's father was engaging in aggressive discourse and personal attacks. (S. 85.) Following that meeting, Ms. McGuire reiterated the offer of social work services, although Ms. McGuire continued to maintain that there was no "clinical substantiation to provide . . . services for [the student] beyond the school day." (S. 83.)
93. On May 22, 2012, Dr. Hunter received an emergency call from the parents reporting that the student was in crisis. (P. 653; testimony of Dr. Hunter.) Dr. Hunter suggested to the student's mother that adults see this as a crisis time when the student's routine needed to be adjusted, noting that the student had lagging skills and would not change overnight. (P. 653; testimony of Dr. Hunter.) She suggested that the adults involved reduce the stress on the student and increase interventions including how to read teacher cues. (P. 653; testimony of Dr. Hunter.) Dr. Hunter noted that the student had consistently reported that her time in the Learning Center was a specific stressor and Dr. Hunter's primary recommendation was to stop her attendance there. (Testimony of Dr. Hunter.)
94. Ms. Rusinek did not contact Ms. Bogdanski with any questions about administering the Lindamood Bell program, because she didn't have any questions. (Testimony of Rusinek.) In May 2012, Ms. Rusinek provided a literacy update regarding the student indicating that in December 2011 she had correctly spelled 34 out of 49 Seeing Stars words and in May 2012 she had correctly spelled 57 out of 70. (S. 89.) She reported that the student was reading 66 correct words per minute in December 2011 and 85 correct words per minute in May 2012. (S. 89.) Ms. Rusinek also reported that the student had gone from a

mid-xx grade reading level in December 2011 to an ending xx grade reading level in May 2012. (S. 89.)

95. Around this time, the student's parents met with the school department superintendent. (Testimony of student's mother.) On May 23, 2012, Ms. McGuire informed the parents that the school department would offer the student an hour a day of reading instruction four days a week from Judy Shank, the school district's lead literacy teacher, who was trained in the Lindamood Bell Seeing Stars program. (S. 80.) The parents responded that they would attempt services with the new teacher because they were trying to find a solution that would work for the student's disabilities, noting they were in a crisis situation. (S. 81.) The student came home after her first day of instruction with the new teacher, locked herself in a closet for two and half hours, screamed uncontrollably, and would not eat. (S. 80; testimony of student's mother.) The student's mother sent an emergency page to Dr. Hunter, who recommended crisis management of which changing the student's instructor was the first step, which had already been taken; she also recommended therapy services outside the school; finally, she suggested rethinking how the student's needs were met as a long-term plan. (P. 654; testimony of Hunter.) The student's mother found that Jill Coplan, recommended by Dr. Hunter as a therapist, was not taking new patients and the counselors suggested by Ms. Coplan were also full. (Testimony of student's mother.)
96. On May 31, 2012 the student's mother informed the school department that the student had experienced a major breakdown the prior evening as a result of the start of the new program. (P. 460.) The student's mother reported that the student was extremely fragile and that the change had been more than she could handle. (P. 460.) The student's parents could not imagine returning her to the program for a second day after she had gone into crisis the night before. (Testimony of student's father.) Ms. McGuire found that the student did not display any such distress at school, noting at hearing that when students are not happy about receiving specialized instruction, they try to avoid it, they do not leave spontaneously to attend when it is time to go, and they do not engage once they get there. (Testimony of McGuire.) Ms. McGuire observed that the student was accessing her reading instruction, was engaged in it, and was making progress. (Testimony of McGuire.) Ms. Rusinek also testified that she had never had a student present as fine at school but in crisis at home and she could not understand the discrepancy between what the parents observed and what she observed. (Testimony of Rusinek.) Ms. Ouimet testified that she believed that it was inevitable that if the student were as upset at home as the parents reported, then she would display frustration or unhappiness at school. (Testimony of Ouimet.) She testified that she had never seen a child who did not show frustration at school who was upset at home; she could not reconcile in her mind an understanding of the vast difference between what she observed in the student at school and what the parents reported they were seeing at home. (Testimony of Ouimet.) Dr. Kaufman opined at hearing that if the student were experiencing

- anxiety about her transitions into the Learning Center during the school day, she would likely exhibit transitional stress, she would look upset, or her ears would turn red, although none of those symptoms appeared evident to school staff. (Testimony of Kaufman.)
97. After the student was removed from special education services, the student stopped having meltdowns. (Testimony of student's mother.) By the end of the school year, the student was interested in having play dates with friends again and began to talk about things she wanted to do in the summer. (Testimony of student's mother.)
98. On June 6, 2012 the student's IEP Team met again. (S. 74.) Ms. McGuire did not invite elementary school staff to attend, but instead invited the Yarmouth Middle School Instructional Strategist, in hopes of mending the school department's relationship with the parents. (Testimony of McGuire.) The student's IEP was amended to reflect an offer of 48 hours of Extended School Year services. (S. 67 & 74.) The goal for ESY services was that the student, given systematic, multi-step, multi-sensory teacher procedures, opportunities to practice, and appropriate materials, would maintain IEP-rated level skills in September 2012. (S. 64.) The parents expressed concern that the student would not be mentally able to access the summer services and it was resolved that the parents would contact the school department if they decided to access the services. (S. 75.) The parents again expressed concern over the student's progress. (S. 75.) The school department offered a meeting between the parents, Dr. Kaufman, and Dr. Hunter to review and interpret current and historical evaluation data. (S. 75.) The school department rejected the parents request that the school department pay for the student to attend Lindamood Bell instruction over the summer. (S. 76.)
99. The Team began to discuss the student's transition to xx-grade and what the provision of special education services would look like at the Yarmouth Middle School. (S. 76.) The parents request that the student's specialized instruction occur in a room with only herself and the instructor was rejected; school department staff stated that the instruction would occur in a Learning Center by staff trained in Lindamood Bells Seeing program. (S. 76.)
100. The parents chose not to access the Extended School Year services offered by the school district for the summer of 2012. (Testimony of student's mother.) On July 17, 2012, the student's parents informed the school department that they were enrolling the student in programming at the Lindamood Bell Center for the weeks of August 6 and August 13 for 30 hours of instruction each week. (S. 54.) The parents explained that they viewed this program as compensatory educational services to remedy the inappropriate programming and lack of meaningful progress that the student had shown in her development of literacy skills. (S. 54.) Ms. McGuire denied the parents request for reimbursement of the summer

services. (S. 54.) The parents requested an IEP team meeting following the student's attendance at the Lindamood Bell Center summer program. (P. 488.)

101. During the student's two weeks of Seeing Stars programming at the Lindamood Bell Center that summer, Center staff found the student to be engaged and happy although they had to work harder to keep her attention since the Center was busier in the summer than it had been the previous fall. (Testimony of Bogdanski.) At the conclusion of the student's two weeks of programming at the Lindamood Bell Center, the student was retested. (P. 468.) From her February 2012 testing, she had increased scores on the Detroit Test of Learning Aptitude, the Woodcock Reading Mastery Test, the Slosson Oral Reading Tests, informal tests of writing, and symbol imagery tests. (S. 468-470.) She had decreased scores, however, on the Peabody Picture Vocabulary Tests, the Wide Range Achievement Test, the GORT, and the Lindamood Auditory Conceptualization Test. (P. 468-470.) After finishing the program at the Lindamood Bell center, the student was excited about returning to school, seemed like her old self, and was participating in play dates and sports activities. (Testimony of student's mother.)

**xx Grade**

102. The parents requested that the student not receive special education services until the IEP Team had met. (P. 486.) Prior to a September 5, 2012, IEP Team meeting, the parents shared some of the recommendations from Julie Bogdanski, the Director of the Lindamood Bell Center in Arlington. (P. 486.) Ms. Bogdanski noted that the student had finished the 1000 sight words list for reading and would need to capture new say words to expand her vocabulary. (P. 486.) The parents requested they be able to preview all instruction materials to capture new practice words. (P. 486.) Ms. Bogdanski recommended that the student continue with reading practice one-on-one for three hours a week utilizing xx-grade level reading with support. (P. 486.) Ms. Bogdanski also recommended that the student not be encouraged to read for speed because it would not be accurate and encouraged the student's habit of scanning material for comprehension rather than going slowly and reading each word. (P. 486.) Finally, the parents noted that stress impacted the student's ability to learn and process, requesting that the student's environment not be distracting or noisy. (P. 486.)
103. On August 28, 2012, Dr. Hunter wrote the parents a letter, opining that the student had become polarized with her special education teacher which was unfortunate in part because relationships were especially critical for a child with the student's profile. (P. 612.) Dr. Hunter observed that cognitive rigidity made it difficult for the student to shift, which combined with her high sensitivity to the environment, left her particularly attuned to non-verbal communication while her disability left her at great risk to misinterpret those inputs. (P. 612.) Dr. Hunter suggested that in such a situation the adults needed to shift while keeping in mind that the student needed continued support and maturation to build more flexibility into her interpretation of the interpersonal world. (P. 612.) Dr. Hunter suggested the

- possibility of reducing the student's time in the Learning Center while increasing small group instruction in the classroom to be supplemented by outside tutorials. (P. 612.) Dr. Hunter noted that the student presented as anxious and discouraged about school, a core vulnerability of children with learning disabilities because their anxiety and low self-esteem increase as the world becomes more complex. (P. 612.)
104. On August 31, 2012, Dr. Hunter provided a summary of her opinions regarding the student's educational plan for the coming academic year, which was shared with the school department. (P. 490.) Dr. Hunter noted the student's anxiety, cognitive rigidity, low self-esteem, and negativity towards school during the prior semester. (P. 490.) Dr. Hunter observed that the functional impact of these symptoms was evident as the student's perseveration on her dislike of the Learning Center, her belief that her special education instructor did not like her, and her reliance upon the style and methodology of instruction that have been most amenable to her, namely the Lindamood Bell program. (P. 490.) Dr. Hunter opined that it was imperative that the student have a fresh start in the fall, characterized by flexibility in programming to simultaneously meet her instructional needs and address her emotional distress. (P. 490.) She suggested that "out of the box" solutions, such as afterschool possibilities, should be considered as well as direct support to develop "lagging skills" with regard to self-soothing strategies, perspective taking, and being a flexible problem solver. (P. 490.) Dr. Hunter reported that the main objective of such flexibility was to help the student sustain a positive association to school, remain open and motivated regarding her specialized learning needs, and reduce anxiety that interfered with concentration and an overall positive state of mind. (P. 490.) Dr. Hunter emphasized that the student's identified disabilities greatly increased her risk for negative mental health outcomes and that without appropriate interventions and supports she could become increasingly impaired by anxiety and maladaptive coping solutions. (P. 490.)
105. Dr. Hunter felt that the best way to predict the student's success was to review her prior experience having significant services be delivered in a pullout model, which had not worked. (Testimony of Hunter.) She suggested strategies such as having the student meet her new teacher from the Learning Center over the summer, spending time in the Learning Center, bringing her puppy in, and fully acclimating to that environment and that teacher, to promote a positive outcome. (Testimony of Hunter.) Dr. Hunter opined at hearing that students need to accept interventions, but that the student's disability included a distortion of other people's intentions and of herself and difficulty shifting mental states. (Testimony of Hunter.) She concluded that Dr. Kaufman's observations that the student would benefit from acclimating to the need for services to be delivered during the school day as a component of her disability would be more appropriate when the student was older, but at this point in the student's education, the



flexibility needed to come from adults because the student was not able to be flexible. (Testimony of Hunter.)

106. Dr. Kaufman took a more involved role with the student's IEP Team during her xx grade year, having started a contract to provide services to the school department one day a week. (Testimony of Kaufman.) Dr. Kaufman has reviewed the student's file but has never met or had any clinical contact with the student. (Testimony of Kaufman.)
107. Dr. Kaufman believes that untreated attentional issues related to processing have caused the student's academic problems; he recommends medication to turn on the student's ability to self regulate and to focus portions of her brain. (Testimony of Kaufman.) Dr. Kaufman also recommends that the student have a therapeutic relationship to build healthy coping and social skills. (Testimony of Kaufman.) Dr. Kaufman opined at hearing that a processing disorder, namely ADHD, was evident at the time of Ms. Millwood's evaluation, although because the referral to did not list attentional issues, she was not required to evaluate for it. (Testimony of Kaufman.)
108. The student's IEP team met on September 5, 2012, at which point the student had entered xx grade at the Yarmouth Middle School. (S. 30-33.) The Team met to discuss the student's IEP programming and to review data from her Lindamood Bell Center programming. (S. 31.) The school department continued to offer consultation between Dr. Kaufman, Dr. Hunter, and the parents to clarify the Team's understanding of various historical and current testing results. (S. 31.) The Team determined that social work would be added to the student's IEP as an accommodation to be accessed only with parental notification and also increased the consultation time between regular and special education teachers from monthly to weekly. (S. 30-31.) The parents reported that the student exhibited anxiety and significant emotional distress as a result of having to leave the general education setting to receive special education instruction in the Learning Center. (S. 31.) The parents declined the opportunity for a consultation between Dr. Hunter and Dr. Kaufman because they felt that the tenor of their relationship with school staff had deteriorated. (Testimony of student's mother.) The parents did not feel they had a choice to put the student in pull-out programming at school and felt that the Lindamood Bell services provided after school by Lisa Clark would be a good fit for her. (Testimony of student's father.) They did not attempt Learning Center services in xx grade with a new teacher because the school department was not listening to any of their suggestions, they were not sure how well trained in Lindamood Bell the xx grade special education teacher would be, and they felt they could not afford another failed program for the student. (Testimony of student's father.)
109. The parents again requested that the school department provide after school

- tutoring for the student three hours per week instead of daytime IEP services, but the Team rejected this request because the school department felt that due to the student's learning profile, cognitive fatigue, and attentional weaknesses, an extended day was not recommended. (S. 32.) The parents informed the school department that the student would not access the portion of the IEP providing specially designed instruction outside of the general education classroom, rejecting a suggestion that the program be run as indicated in the IEP for a trial designated period of time given that it was a new setting for the student at the middle school. (S. 32.) Finally, the parents reported that they would be providing the student with reading services after school and would seek monetary reimbursement for such services based on their belief that the school department was denying the student her right to an education by refusing to consider after school options. (S. 33.)
110. At the September 5, 2012, IEP Team meeting, the student's IEP was amended by the addition of social work service from a school social worker for 30 minutes a week, with a goal that the student would decrease her anxiety and episodes of distress to the level that enables her to access special education services within the Learning Center. (S. 39 & 43.) The student has not accessed this service or the specially designed instruction described in her IEP. (Testimony of student's mother.)
111. The parents arranged for Lisa Clark, a teacher at the Aucocisco School in Cape Elizabeth, to provide the student afterschool Lindamood Bell programming an hour-and-a-half two days a week. (Testimony of student's mother.) Ms. Clark is providing Seeing Stars programming, focusing on decoding and imaging three-syllable words with the goal of helping the student recognize and read multisyllable words in context to increase her fluency. (Testimony of Clark.) Ms. Clark finds the student to be engaged in the lessons and able to work for a full hour-and-a-half with a five minute break. (Testimony of Clark.) In combination with the student's work at home, Ms. Clark finds that three hours a week is sufficient to allow the student to gain skills and acquire new sight words, resulting in increased fluency. (Testimony of Clark.)
112. The student is having a positive experience in her regular education classroom in xx grade at the Yarmouth Middle School; she is enjoying school and is comfortable there. (Testimony of student's mother.) The student's regular education teacher is supportive and the student's mother is able to provide significant pre-teaching of classroom concepts. (Testimony of student's mother.) The student's mother also provides the student with Lindamood Bell programming at home every day. (Testimony of student's mother.) The student was brought to the Learning Center on one occasion when she finished a test early, which was upsetting to her. (Testimony of student's mother.) The parents intend to continue with the Lindamood Bell Programming at Aucocisco School after school. (Testimony of student's mother.) The student's parents believe that

- the Lindamood Bell programming is the only methodology that has been successful for the student and that it should continue being delivered one-on-one in a quiet, non-distracting location, not during the student's school day. (Testimony of student's mother.) The student is able to complete a full day of school followed by tutoring and still remain enthusiastic about doing homework because she is excited about producing results and keeping up with her classmates. (Testimony of student's mother.)
113. Dr. Hunter recognized that it would be useful to find out if the student's xx grade program would work, although she did not think it was acceptable to employ a try-until-we-fail strategy. (Testimony of Dr. Hunter.) Dr. Hunter suggested putting in place steps to set the student up to succeed in proceeding cautiously due to her significant deterioration the prior spring. (Testimony of Dr. Hunter.)
114. The student's mother provided the school with a full version of the Dr. Hunter report in October 2012 for the student's file. (Testimony of student's mother.)
115. The student took the NWEA test again in the fall of 2012. (P. 495.) She obtained a score of 204, the 27<sup>th</sup> percentile, in math and 188, the 9<sup>th</sup> percentile, in reading. (P. 495) With regard to math goals performance, she was rated as low in geometry and measurement as well as in statistics and probability; low average and functions in algebra; and average in numbers and operations. (P. 495.) With regard to reading goals, the student was rated as low in all areas: word identification, literary texts, informational text, and comprehension strategies. (P. 495.)
116. The student's parents report that the student now has good friends, is engaged in extracurricular activities, and socially seems like a normal xx-year-old girl. (Testimony of student's mother.)
117. The parents expended the following for the student's Lindamood Bell evaluation and programming:
- \$645 to Lindamood Bell Center for July 2011 evaluation
  - \$19,492.20 to Lindamood Bell Center for program fee for 10 weeks in September to November 2011
  - \$5,643 to Lindamood Bell Center for program fee for 2 weeks in August 2012
  - \$273 in tolls traveling to and from Lindamood Bell Center during the above three time periods
  - \$3,893.13 in mileage, incurred at IRS reimbursable rate, traveling to and from Lindamood Bell Center during the above three time periods
- (P. 655-656.)

#### **IV. DISCUSSION AND CONCLUSIONS**

**A. Burden of proof.**

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

**B. Whether the school district failed to provide the student a free appropriate public education during the 2010-2011 school year by failing to refer her for special education prior to December 2010 or failing to find her eligible until September 2011.**

Each school district must have a plan to identify, locate, and evaluate at public expense students residing within the district who may be eligible for special education services. 34 C.F.R. § 300.111(a)(i) & (ii); 34 C.F.R. § 300.111(c)(1) & (2); *MUSER* § IV.2.A. A school district’s child find process must include “obtaining data on each child, through multiple measures, direct assessment, and parent information, regarding the child's academic and functional performance, gross and fine motor skills, receptive and expressive language skills, vision, hearing and cognitive skills.” 34 C.F.R. § 300.532; *MUSER* § IV.2.C.

A student’s Team must assess a student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3); *MUSER* § V.2.C.4. Final identification of a student is to occur after evaluation of the student and an IEP Team meeting. 20 U.S.C. §1414(b)(4)(A); *MUSER* § IV.2.A. A school district must develop and implement a service plan for each IDEA-eligible student that describes the specific special education and related services that the school district will provide. *MUSER* § IX.3.A.1.d.

**Parents' Argument:**

The parents seek a compensatory remedy for the denial of a free appropriate public education ("FAPE") during the student's xx grade year, arguing that the events that occurred during the student's xx and xx grade years are relevant to assessing the violations of FAPE within the limitations period, which begins in September 2010 in this case.

The parents contend that the school district's repeated exclusion of the student from special education eligibility based on the fact that no processing disorder was identified was a function of the school department's poor evaluation practices and failure to evaluate the student in all areas of suspected disability. The parents point out that from the time of the student's initial evaluation in early 2009, it was noted that the student was distractible, demonstrated poor attention and focus, and struggled on a test that involved visually scanning symbols, arguing that there was at that point ample evidence that the student had potential deficits in the areas of attention, executive mental functions, and orthographics. The parents fault the school department for never seeking an answer to the question of why the student, lacking a processing disorder, would be struggling so significantly in obtaining basic literacy skills and for offering specially designed instruction appropriate for a student with a phonological processing disorder while finding her ineligible for special education. The parents further contend that events subsequent to the initial eligibility determination in 2009 added to the evidence suggesting the need for a broader evaluation of the student's learning difficulties.

The parents contend that the student suffered harm from not being found eligible for an IEP by the start of her xx grade year in the form of low scores in district-wide

academic testing, a high level of anxiousness and distractibility, and a lack of progress during her xx grade year. The parents critique Ms. Rusinek's data regarding progress as not finding their sources in standardized, non-referenced instruments and as being contradicted by evaluations done by Ms. Papageorge and the Lindamood Bell Center.

**School Department's Argument:**

The school department argues that it did not commit child find violations as of September 2010 because by that time the student had been referred to special education in January 2009, with a decision of ineligibility made in March 2009, and had been referred again in November 2009, with a second finding of ineligibility. The school department notes that the family did not contest the eligibility determinations of March 2009 or November 2009, arguing that the statute of limitations on any claims regarding those decisions has now expired and they are irrelevant to the issues for hearing.

The school department argues that there is no dispute about the student's eligibility status as she entered xx grade, and that by November 15, 2010, the school department had scheduled an IEP team meeting to begin the referral process. With regard to the timeline of the execution of that referral, the school department argues that any delay in determining eligibility, which ultimately occurred on September 16, 2011, was due to the family's decisions, not to the school department's actions. The school department points out that it offered to do a full evaluation in December 2010 and the family refused that offer.

With regard to the miscommunication between the school department and the family as to whether Dr. Hunter's full report had to be provided to the full IEP team before eligibility could be determined, the school department argues that it explained to

the family that they needed the full report to be available for the full team to make a determination of eligibility. The school department argues that by relying on just the test results of Dr. Hunter, rather than her full report, in September 2011 to determine eligibility, it acted inconsistently with its practice in order to move the process forward.

**Analysis and Holdings:**

The family's claim that the school department violated the student's right to FAPE may extend back only until two years prior to the date of their due process hearing request of September 6, 2012. Beginning in xx, the student was noted to be falling behind her peers in acquisition of literacy skills and to have problems of distractibility and focus. (Testimony of student's mother.) Her academic deficits led to a PLP that included math and reading instruction. (S. 415-419.) In xx grade, her classroom teacher sounded the alarm early in the year that the student was well behind her peers in the development of literacy skills. (Testimony of student's mother.) In Ms. Gooch's February 2009 academic evaluation, the student was noted to be acquiring reading skills at "slow and laborious rates," slower than her peers and at below grade level expectations. (S. 377.) The student was noted to be unable to make more than minimal academic progress. (S. 379.)

In the student's March 2009 psychoeducational assessment, Ms. Millwood did not evaluate the student for ADHD, but observed that the student exhibited distractibility and impulsivity during the testing and opined that those characteristics could impact her test scores as well as her general learning. (S. 368.) Ms. Millwood recommended several accommodations to address the student's difficulty with focus and attention. (S. 368.) Dr. Kaufman testified that he believed that untreated attentional problems were the

primary source of the student's academic difficulties. (Testimony of Kaufman.) He also opined that her attentional issues were evident at the time of the Millwood evaluation.

(Testimony of Kaufman.)

The student was observed to have stronger auditory processing skills than visual processing skills in both Ms. Gooch's evaluation and Mr. Metcalf's May 2009 occupational therapy evaluation, which found visual processing to be a "significant issue" for the student "in all aspects." (S. 249 & S. 377.) In Ms. Fraser's November 2009 classroom observation, the classroom teacher noted that the student was off task at times attending to what other students were doing, in addition to acquiring reading skills at a slow rate. (P. 88.) Ms. Rusinek testified that in xx grade the student was very easily distracted. (Testimony of Rusinek.) Ms. McGuire testified that she believed the student made limited progress in the Wilson Reading System in xx and xx grade due to inattentiveness and anxiety. (Testimony of McGuire.)

As such, and as Dr. Kaufman noted, there was significant evidence of executive functioning and attention deficits that merited independent analysis that would have led to a determination that the student qualified for special education as of September 2010.<sup>2</sup>

As of September 2010, therefore, the school department was in violation of its obligation to locate, identify, and provide a FAPE to the student as a student with a disability. By not assessing the student in all areas of suspected disability, which adversely affected the determination of her IDEA eligibility, the school department committed a procedural denial of FAPE. 20 U.S.C. 1414(b)(3); *MUSER* § V.2.c.4; see also *W.H. v. Clovis United Sch. Dist.*, 52 IDELR 258 at \*16-\*17 (E.D. Cal. 2009)

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<sup>2</sup> The parents also raise arguments that the Maine regulatory requirement that a processing disorder be



(holding that a district's failure to assess in all areas of suspected disability was a procedural denial of FAPE). Although the court in W.H. characterized the failure to conduct appropriate assessments and evaluate all areas of disability to be a possible procedural violation, when a school district's failure to identify an eligible student, it can become a substantive violation of the IDEA. See RSU No. 51 v. Doe, 2012 U.S. Dist. LEXIS 185359 (D. Me. 2012) (upholding a hearing officer decision that a school district's failure to identify a student was a substantive IDEA violation), aff'd, 113 LRP 4299 (D. Me. 2013). Even if the school district's violation here is characterized as exclusively procedural, it impeded the student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, and caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); *MUSER* § XVI.15.A.2.

When the parents requested a meeting with school staff after the student obtained alarmingly low standardized test scores in October 2010, Ms. Rusinek indicated even though the student was not progressing as she had hoped, the school had done all the testing it could do (Testimony of student's mother); instead of rereferring the student for a determination of special education eligibility, Ms. Rusinek referred the parents to their pediatrician, suggesting that medication might help the student focus. (Testimony of student's mother.) Even then, the formal referral form was not filled out until December 17, 2010. (S. 309.) At the IEP Team meeting of the same date, Ms. Ouimet repeated the assertion that the school department could not have reevaluated the student any sooner because they had done so only one-and-a-half to two years earlier. (S. 311.) This was

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found conflicts with federal law, which need not be addressed here.

inconsistent with special education regulations allowing reevaluation annually if the parents and school district agree. 20 U.S.C. § 1414(a)(2)(B); *MUSER* § V.I.B.2. By the time the school district offered an evaluation in December 2010, the family had already provided Dr. Hunter with a down payment towards a private evaluation.

Once the third referral process for the student formally began in December 2010, the delays in the student's identification were caused by both by the delay in the completion of Dr. Hunter's report and by the miscommunication between the parents and school staff about its use by the Team.<sup>3</sup> Once Dr. Hunter's report was completed in May 2011, until September 2011, the communication between the school department and the family as to what information was required for the Team to make a determination was understood differently by both parties. Although the school department maintains that it was clear as to what the parents needed to provide, the parents expressed confusion, both through testimony at hearing and in contemporaneous documentation, as to why the student continued to remain unidentified. The parents repeatedly reminded school staff that the Hunter report was available upon request and provided Ms. Jones and Ms. McGuire the opportunity to review the report in full, while asking them to share the portions of the report with the Team that it would need.

The discussion at the June 2011 meeting in particular is perplexing; Ms. Ouimet opened the meeting by stating that the Team would review the Learning Disability Evaluation Report and what information would be required to fill it out. (P. 715.) The

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<sup>3</sup> Although the parties disagree over the appropriate diagnosis for the student, specifically whether she has a non-verbal leaning disability, the dispute need not be addressed here since by the time the student was identified, the Team agreed that she had the disabilities of Attention Deficit Hyperactivity Disorder and processing disorders related to working memory, attention, and adjustment, qualifying her for special education as a student with Specific Learning Disabilities. (S. 126 & S. 199-202.)

meeting notes indicate that the family did not want the student identified at that time but instead wished to obtain additional evaluations, while the family's response to the written notice from the meeting was confusion as to why the student had not yet been identified and at hearing, the student's mother testified that the parents felt overwhelmed and confused by the school Department handing them the Learning Disability Evaluation Report. (S.264; testimony of student's mother.) Ms. McGuire testified that the language "at the parents' request" essentially meant that the Learning Disability Evaluation Report because the parents had not provided sufficient information from Dr. Hunter's report. (Testimony of McGuire.) Ms. McGuire testified that the student was not identified at that meeting because the family had not turned over the full Hunter report for the student's file. (Testimony of McGuire.)

Ultimately, it was the school department's responsibility to identify and provide services for the student as a student with qualifying disabilities. The school department did not meet its responsibility because it did not facilitate the Team's ability to make a determination by not furnishing the information that Ms. Jones and Ms. McGuire had obtained and not explaining clearly to the family what specific information from Dr. Hunter's report needed to be provided to the whole Team, while also assuring them that the report provided sufficient information to identify the student as eligible for special education.

Although the school district contends that because throughout xx grade the student received services under a PLP, no harm was done, the fact that an eligible student did not have an IEP is in itself a denial of FAPE. A PLP is markedly different from an

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IEP. There are myriad legal requirements surrounding the makeup of the Team creating an IEP, the terms and provisions of an IEP, and a family's right to legal documents and notice regarding IEP Team decisions. Of particular note is the fact that the parents were not initially informed that the student was receiving PLP services and the lack of formal parent involvement in the development of the PLP. Moreover, the student's PLP services were delivered in a group setting and her PLP did not contain, among other IEP requirements, annual goals, assessment measures, supportive services, or accommodations. (S. 415-419.)<sup>4</sup>

Finally, although the school district maintains that the student made progress during xx grade, and as such no remedy is required, the student was still markedly delayed in her acquisition of literacy skills, which is contrasted with the rapid progress the student made while in Lindamood Bell programming. In Mr. Rusinek's administration of the GORT-4 in June 2010 , the student scored in the very poor range in her reading rate, in the below average range for accuracy, in the poor range for fluency, and in the average range for comprehension. (S. 261 & S. 273.) Although the student had increased her sight word recognition over the last few months of the year, testing by Ms. Papageorge in July 2011 showed that the student scored below average on sight word recognition and word attack skills, recognizing sight words two years below her grade level placement. (S. 252.) Ms. Papageorge found the student was at Step 2 of the Wilson Reading System after two years of instruction in it, even though it was a twelve-step program ideally completed in three years of intensive instruction. (S. 252.) At the

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<sup>4</sup> Although the school department's objective to meet all students' needs, regardless of special education eligibility, is laudable, the decision making and services provided to the student in the PLP were not a valid substitute for a determination of special education eligibility and development of an IEP.

Lindamood Bell Center, also in July 2011, the student scored significantly below grade level on a series of assessments. (S. 256-258.)

As such, I hold that the school district failed to provide the student a FAPE during the 2010-2011 school year by failing to refer her for special education prior to December 2010 and failing to find her eligible until September 2011.

**C. Whether the school district failed to provide the student with a free appropriate public education from September 2011 to August 2012.**

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

An IEP is reviewed first for consideration of whether it was developed in accordance with procedural requirements and, second, whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). An IEP must be designed to provide a student with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Id. at 203. In addition, an IEP must include the student’s present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward his goals, make progress in the general education curriculum,

participate in nonacademic activities, and be educated with other children with disabilities as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); *MUSER* § IX.3.A.

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

Appropriateness and adequacy are terms of moderation.” Leno v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993). Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student’s individual potential.

Rowley, 458 U.S. at 203. A student’s program must be geared toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs.” Town of Burlington v. Dep’t of Educ., 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), aff’d, 471 U.S. 359 (1985); see also Sanford Sch. Dep’t, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student’s specific area of need).

Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” each situation requires a “student-by-student analysis that carefully considers the student’s individual abilities.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3<sup>d</sup> Cir. 1999) (holding that the “meaningful benefit” standard requires ““significant learning”” (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3<sup>d</sup> Cir. 1988)).

Further, the IDEA requires that students be educated with non-disabled peers “to the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); *MUSER* § X.2.B. As such, a public school may remove a child with

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

**Parents’ Argument:**

The parents argue that the school department refused to include in the design of the student’s IEP certain critical facets of educational programming necessary to address her individualized needs. The parents contend that the evidence was overwhelming that between December 2011 and May 2012, the student experienced severe stress and emotional dysregulation related to her special education program. Despite the family’s best efforts, the family maintains that the student remained in significant distress regarding being pulled out of her regular education classroom to work on literacy skills in the Learning Center with Ms. Rusinek.

The parents point out that they made multiple requests during this period for changes to the student’s program to schedule literacy instruction delivery before or after school, change the location of services, and alter who provided the services. The parents complain that the school department refused all of their requests regarding the student’s xx grade program, regardless of the fact that such decisions were impacting the student’s receipt of a FAPE. The family argues that this decision-making caused the student to

become increasingly emotionally compromised, ignoring the central tenet of special education – that services for a child with a disability must be tailored to meet the child’s individualized needs. The parents argue that the school department instead focused on what would be most convenient to it for the delivery of services. The parents fault the school department for disregarding Dr. Hunter’s advice that because of the student’s anxiety, cognitive rigidity, maladaptive coping strategies, and risk for negative mental health outcomes, it was important for the adults involved to maintain flexibility. They maintain that the school department’s refusal to alter any component of the student’s program led them to act unilaterally to place the student at the Lindamood Bell Center in Massachusetts in the fall of 2011.

**School Department’s Argument:**

The school department argues that to prevail on this issue the family must prove that the school department denied the student a FAPE, and yet the family does not dispute the IEP, its contents, or the methodology used to educate the student. Nor, the school department contends, did the family assert that the IEP was not followed or provide knowledgeable testimony to rebut the skill set of Ms. Rusinek. With regard to the family’s requests to change the location and instructor for the provision of such IEP services, the school department responds that the IDEA is very clear that families do not have a right to choose the staff who will serve students with disabilities. Further, the school department points to the testimony of school witnesses that it maintains firmly established that the student was not demonstrating distress at school but instead was engaged and participating in her programming, both in the mainstream and in the Learning Center. The school department argues that it is well established that school



districts are not required to address out-of-school behavior if such behavior does not impact the student's educational performance.

Furthermore, the school department contends that it is not possible to draw conclusions about the efficacy of the student's programming based on only half a year of attendance. The school department also points to the Lindamood Bell test results, which it asserts essentially present a picture of consistency and standard scores over the period of time in which the student took part in special education services.

Finally, the school department argues that it made multiple offers to assist with the student's emotional issues through school-based counseling, all of which were rejected by the family, and therefore the school department should not be deemed to have failed to provide a FAPE to the student.

**Analysis and Holdings:**

The student's IEP for the period of September 2011 to August 2012 contained the essential elements of an IEP and identified a set of services and accommodations that was reasonably calculated to provide her with meaningful benefit. It defined three annual goals in spelling, reading fluency, and reading level. (S. 129-130.) It called for 60 minutes for day of specially designed instruction and a set of auxiliary aids and accommodations. (S. 132.)

The implementation of the student's plan, in terms of its impact on her ability to access her learning, however, merits further analysis. The student did not begin accessing the services until early December of 2011 because of her attendance at the Lindamood Bell Center during the fall. (Testimony of student's mother.) She accessed only regular education for several weeks, during which time she showed no emotional

distress. (Testimony of student's mother.) Once she began to access Learning Center services with Ms. Rusinek on December 2, 2011, however, her distress quickly became apparent. On December 8, the parents began to report the student's distress to school staff. (P. 377.) This resulted in many conversations and meetings between school staff and the parents, including an emergency IEP Team meeting on January 10, 2012. (P. 478, S. 112, S. 113, P. 391, P. 405 & P. 478.) At that meeting, the parents began to request a special educator other than Ms. Rusinek, a request that Ms. McGuire rejected. (S. 109.) The parents also requested presentation of services in a room with no other students present due to distractibility, which Ms. McGuire also rejected, despite Dr. Kaufman's opinion that the student's ADHD was the primary factor impacting her difficulty acquiring literacy skills. (S. 109.) School staff attempted to probe the student's distress as school with the student, although this further exacerbated the parents' frustration when the probing upset the student. (Testimony of student's mother.)

The parents consulted with their pediatrician, who felt that the school needed to redefine its provision of services to the student to alleviate her distress. (P. 446.) In a visit note of May 15, 2012, which was shared with school staff at the May 2012 Team meeting, Dr. Hunter encouraged flexibility in the provision of services to the student given the student's "lagging skill" regarding mental flexibility and shifting of perspective. (P. 446.) Dr. Hunter also provided insight into the student's desire to mask her distress at school in order to please others and be identified as a good student. (P. 446-447.) When the family requested that services be provided after or before school, the school department responded variously that staff members were not contracted to work before or after school and that special education services were always delivered during

the school day (S. 169); that data at the time did not indicate the need for an extended school day (S. 85 & S. 86); that extended school day services were not appropriate for the student because of attentional and anxiety issues (testimony of McGuire); and it was therapeutically important that the student take part in school day services to begin to understand what services she would need in order to overcome her disabilities (testimony of Kaufman). At hearing, Ms. McGuire testified that these decisions were not IEP Team decisions but were exclusively hers as the Director of Instructional Services and that, with regard to staffing, she considered Ms. Rusinek to be the best reading teacher in the district. (Testimony of McGuire.)

Permeating throughout the school district's response to the student's increasing distress and eventual crisis, however, are indications that school staff members were not entirely convinced by the parents' recitation of the student's expressions of distress at home. At the Team meeting on May 18, 2012, Ms. Rusinek stated that because the parents kept "saying she is having these meltdowns and everything else," she had asked the building principal to "confront" the student as to the cause of her distress. (P. 715 (recording of May 18, 2012 IEP Team meeting).) Multiple staff members testified at hearing that they found it implausible that a student could exhibit such distress at home about a school-related issue while not displaying signs of distress at school. (Testimony of McGuire; testimony of Ouimet; testimony of Kaufman.)

It was not until the parents met with the school department superintendent that the school department agreed to make any changes to the student's program. Unfortunately, after one day receiving services from a new teacher, the student's despair reached an all-time low, at which point Dr. Hunter suggested they remove the student from the Learning

Center programming, since she had consistently identified it as the significant stressor for her, and the parents became unable to fathom returning her to a situation that caused her so much distress.<sup>5</sup> (P. 460; testimony of student’s father.) Prior to this escalation in the student’s discomfort with her pull-out services, it was noted in various evaluations that the student was social, enjoyed being with her peers, tried to mask her learning difficulties, and was uncomfortable receiving support in the regular education classroom. (S. 6, S. 169, S. 286 & S. 310.)

Courts have routinely held that parents do not have the right under the IDEA to select which providers will deliver instruction to special education students. See, e.g., Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp.2d 880, 884-85 (D. Minn. 2003). On the other hand, courts have indicated that an IEP Team should consider issues of location and schedule relevant to the implementation of an IEP. In Carrie I. v. Department of Education, 869 F. Supp.2d 1225 (D. Haw. 2012), the court explained that the location in which services are delivered is an element of placement, appropriate for Team deliberation for consideration of any potential harmful effects. Id. (citing R.B. v. Mastery Charter Sch., 762 F. Supp.2d 745, 762-63 (E.D. Pa. 2010).) Furthermore, in Sanford School Committee v. Mr. and Mrs. L., 34 IDELR 262 (D. Me. 2001), the court held that when a student’s placement was based on administrative convenience rather than the child’s needs, it violated the intent of an IEP to serve the child in the least restrictive environment and as such an IEP Team “must give meaningful consideration to whether proposed IEP and placement suit the unique needs of the child.” Id.

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<sup>5</sup> At that time, Dr. Hunter reiterated the recommendation that the student attend weekly therapy. It is not clear whether accessing such services, particularly during the school day as the school department proposed, would have slowed the student’s emotional deterioration over that period or would have

In this case, the student's extreme distress over her placement warranted consideration of a change by the student's IEP Team, particularly in light of the fact that her evaluator, Dr. Hunter, explained that the student's desire to please others might be masking her discomfort and advocated for creative thinking in designing her service delivery. She also later advised that it was appropriate to maintain flexibility to help the student maintain a position association with school, remain motivated to address her specialized learning needs, and reduce anxiety that interfered with learning. Dr. Kaufman's opinion that it was not clinically sound to accommodate the student's desire not to be removed from the regular education setting would hold more merit if he had established a clinical relationship with the student or had the school department staff fully accepted the parents' recitation of the student's downward emotional trajectory from December 2011 to May 2012.

The school district cites cases in which courts held that school departments were not required to address out-of-school behaviors that did not impact the student's educational performance. In R.C. and E.P. v. York School Department, 2008 U.S. Dist. LEXIS 75538, for example, a student's difficult out-of-school behaviors did not lead to special education eligibility when they could be classified exclusively as "social problems at home." As the court noted in that case, "[e]ducational benefit is indeed the touchstone in determining the extent of governmental obligations under the IDEA." Id. (quoting Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 352-53 (1<sup>st</sup> Cir. 2001)). In Gonzalez, however, the court went on to note that "as a practical matter, in cases such as this one, where all agree that the student's activities need to be highly structured both

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exacerbated it since it involved more separation from her regular education classroom.

during and after school in order for him to receive an appropriate education, clear lines can rarely be drawn between the student's educational needs and his social problems at home." Gonzalez, 254 F.3d at 352. The court continued, "[t]hus, typically an IEP in cases whether the student's disability is this serious (and requires such a degree of structure) must address such problems in some fashion, even if they do not warrant residential placement." Id. at 352-53.

In the present case, the entirety of the student's out-of-school distress was directly related to her in school programming, contrary to the facts in A.S. v. Madison Metropolitan County Sch. Dist., 477 F. Supp.2d 969 (W.D. Wis. 2007), where when a family failed to show that behavioral problems at home were educationally related, the school was not required to address them. When a disability impacts a student in school, including in areas of non-academic educational performance, it is relevant to the evaluation of her eligibility for special education. Mr. and Mrs. I. v. MSAD No. 55, 2005 U.S. Dist. LEXIS 11401, at \*53-\*54 (D. Me. 2005). In Parent v. Gorham School Department, Case No. 07.020H, a hearing officer held that when a student's behaviors at home derived from his experiences at school and significantly contributed to his inability to access his potential, the student's IEP did not adequately meet his needs because it did not address those behaviors. Id. The fact that the ultimately extreme result of the student's distress in the present case was an inability to take part in her programming confirms that her distress, even though only released at home, had a direct impact on her education. As Dr. Hunter reported, although the student tried to do as expected of her at

school, her emotional and physical distress at home, which was tied directly to her school day, warranted consideration by the student's IEP Team.<sup>6</sup>

The student's disabilities and resulting mental health needs required changes to her program that the school department refused to entertain. By refusing to entertain any changes to the student's program that might mitigate that deterioration, at least with regard to location and timing, the school department failed to provide the student with a FAPE from the point at which the parents began to inform the school department of the student's distress in early December 2010 until the end of that school year.<sup>7</sup>

Finally, the school department points to data that Ms. Rusinek compiled to indicate that the student continued to make meaningful gains during the time she was in services in xx grade. Of note, Ms. Rusinek reported shortly after the services began that the student was exhibiting regressive behaviors that interfered with her learning. (Testimony of Rusinek.) Further, as the parents note, Ms. Rusinek's data was not means-tested. Moreover, the student's mid-February 2012 testing at the Lindamood Bell Center showed that the student had fallen behind in the Test of Word Opposites and the Symbol Imagery Test, a critical component of literacy skills acquisition. Moreover, the student's emotional deterioration, which culminated in her inability to even take part in the services, underscore that her program was not adequately addressing her needs. Finally, the student's subsequent ability to successfully engage in after school direct instruction proved that she was capable of an extended day.

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<sup>6</sup> Although the school department challenges the ability of the parents' testimony alone to meet the family's burden of proof about the student's mental health, the parents' testimony was sufficient to establish the factual bases for the student's distress and the cause thereof, and Dr. Hunter's expert testimony buttress the parents' testimony.

<sup>7</sup> The parents do not put forth any argument that the ESY services offered for the student in the summer of

As such, I hold that the school district failed to provide the student with a free appropriate public education from December 2011 to June 2012.

**D. Whether the IEP offered to the student for the 2012-2013 school year was reasonably calculated to provide her with a free appropriate public education.**

The legal standards regarding provision of FAPE are outlined in the prior section of this decision.

**Parents' Argument:**

The parents argue that, as Dr. Hunter opined, there was nothing in the student's history to suggest that she would succeed in a pullout, Learning Center-based literacy program in xx grade and that as a result the school department's program offer for that year was not reasonably calculated to provide the student with meaningful educational benefit, but instead was likely to cause her renewed distress.

**School Department's Argument:**

The school department argues that the IEP that the student's Team devised for the 2012-2013 school year was reasonably calculated to provide her with FAPE. The school department argues that there was no expert testimony provided against the content of the IEP. With regard to placement, the school department contends that there was no testimony that the student's emotional distress about the Learning Center at Yarmouth Elementary School was similarly directed at the Learning Center in her new school, Harrison Middle School, or her new special education teacher, Kristina Walsh.

**Analysis and Holdings:**

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2012 were inadequate; therefore, the analysis of this claim ends with the conclusion of the 2011-2012 school year.



The student's xx grade IEP was never accessed by the family. The parents' hesitancy given the student's negative reaction to her xx grade program was understandable. The parents testified that they did not access the xx grade Learning Center services because the school department was not listening to their suggestions, they were not sure how well trained the xx grade instructor would be, and they felt they could not afford for the student to fail again. (Testimony of student's father.) Although the parents argue that even attempting this model would have set the student up for failure, Dr. Hunter suggested several gradual measures to acclimate the student to the new program that would have aided an attempt to access the new program. The fact that the parties appear never to have reached any discussion of potential gradual introductory measures to test the student's ability to access the services reflects both on the parents' decision to reject the services and the complete breakdown in communication between the parties. Nevertheless, without any attempt to determine the student's reaction to a new teacher and a new setting, it is impossible to determine that the IEP devised for the student would not have provided her with a FAPE had it been implemented.

As such, I hold that the IEP offered to the student for the 2012-2013 school year was reasonably calculated to provide her with a free appropriate public education.

**E. If the family is entitled to a remedy, what remedy is appropriate?**

When a student is deprived of a FAPE, he is entitled to "such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Compensatory educational services are one form of remedy, the nature and extent of which vary depending on the facts of each particular situation. Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184 (1<sup>st</sup> Cir. 1993). Although an IEP need only provide some benefit, "compensatory awards

must do more – they must compensate.” Reid v. District of Columbia, 401 F.3d 516, 525 (D.C. Cir. 2005). 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, 401 F.3d at 518; 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 (9<sup>th</sup> 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.

An award of compensatory education may reimburse a family for services obtained during the period of deprivation of FAPE, Draper v. Atlanta Independent School System, 518 F.3d 1275, 1285-86 (11<sup>th</sup> Cir. 2006), and also may require services at a future time to compensate for what was lost, Pihl v. Mass. Dept. of Educ., 9 F.3d 184, 189 (1<sup>st</sup> Cir. 1993). Further, a compensatory education award “is very dependent on the particular facts and circumstances of the case.” Millay v. Surry Sch. Dept., 2011 WL 1122132, \*9 (D. Me. March 24, 2011), aff’d by 2011 WL 1989923 (D. Me. May 23, 2011).

Parents are entitled to reimbursement for a private school placement only if the

public placement violated the IDEA and the private school placement was proper under the IDEA. 20 U.S.C. § 1414(a)(10)(C); see also Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-15 (1993). Tuition reimbursement may be awarded as compensatory education. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also RSU No. 51, 2012 U.S. Dist. LEXIS 185359 at \*106.

**Parents' Argument:**

The parents argue that compensatory educational services are the appropriate remedy for the school department's failure to provide the student with a FAPE for xx and xx grades. The parents seek reimbursement for the costs incurred in evaluating the student at the Lindamood Bell Center in July 2011 and subsequently obtaining literacy services from the Lindamood Bell Center in the fall of 2011, which was specifically recommended by Ms. Papageorge following her evaluation of the student in the summer of 2011; for the mother's attendance at the two day Lindamood Bell training in November 2011; for the costs associated with a reevaluation of the student at the Lindamood Bell Center in February 2012; and for the final two weeks of instructional program at the Lindamood Bell Center in August 2012. The parents do not request reimbursement for the Hunter or Papageorge evaluations.

The parents assert that reimbursement of Lindamood Bell Center services is appropriate because they made a unilateral decision to take this step and reject the IEP while enrolling the student elsewhere, a correct decision that compensated the student for past violations of IDEA rights. The parents also contend that the student's placement at the Lindamood Bell Center had a substantial compensatory effect because the methodology used was highly appropriate to kickstart her reading development; they

argue that it was focused on the type of processing disorder she experienced, was intensive, and had the effect of improving the student's anxiety and self-confidence in her ability to read. They contend that they waited patiently for the school department to address the student's issues throughout xx and xx grade and eventually realized that they needed to act independently in late October 2010 when they were told that no further testing could be completed.

The parents also seek reimbursement for a private after school services provided to the student by Lisa Clark at the Aucocisco School since September 2012.

**School Department's Argument:**

The school department argues that even if violations occurred before and after the student began receiving special education services, no remedy is appropriate because the student received specialized instruction throughout and benefited from the instruction. The school district points to the student services received during xx grade, which it argues employed a reading methodology that was plainly appropriate for the student and as a result of which the student showed gains in all areas. The school department also suggests that for xx grade, when the student was receiving special education, the student did well during the relatively short period in which she accessed services and consequently no remedial order is appropriate. In addition, the school department argues that an award should be denied because of the families' delay in the overall processing of the student's eligibility determination and rejection of the services that were proposed.

**Analysis and Holdings:**

The parents are entitled to a remedy for the school department's failure to identify

and find the student eligible for special education as of September 2010 until her identification in September 2011 and for the school department's failure to provide the student with a FAPE from December 2011 to June 2012.

An appropriate remedy for the denial of FAPE during the student's xx grade year is reimbursement for all costs associated with the Lindamood Bell Center initial evaluation in July 2011 and subsequent 234 hour program from September to November 2011. This is an appropriate remedy for the student's deprivation of FAPE during xx grade because the program significantly advanced the student's literacy skills and moved her closer to the position she would have occupied had she received special education services during xx grade.<sup>8</sup> The programming directly addressed the student's processing order deficits and was successful in boosting not only her concrete skills but also her confidence and decreasing her anxiety.

With regard to the denial of FAPE for the portion of the student's xx grade year during which she was in attendance, the family is entitled to reimbursement for the costs associated with the student's reevaluation at the Lindamood Bell Center in February 2012 (this is limited to tolls and mileage because within in the parents' recitation of costs there is no fee associated with this evaluation). The family is also reimbursed for the cost of the additional 60 hours of Lindamood Bell Center programming the student undertook in August 2012. These remedies are directly tailored to the student's academic deficits and learning style and resulted in significant gains.

If, at any point during the pendency of the student's IEP, the family decides to

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<sup>8</sup> The delay in the identification process caused by the length of time it took Dr. Hunter to complete her report beyond the 45 days that the school department would have been allocated has been taken into account in fashioning this remedy.

access the specially designed instruction and or social work services identified in the student's IEP, the student's IEP Team should meet to determine options for gradual introduction of the services to the student as well as options for alternative locations and timing of the delivery of such services.

As such, I hold that the school department must reimburse the family \$29,946.33, representative of the following amounts:

- \$645 to Lindamood Bell Center for July 2011 evaluation
- \$19,492.20 to Lindamood Bell Center for program fee for 10 weeks in September to November 2011
- \$5,643 to Lindamood Bell Center for program fee for 2 weeks in August 2012
- \$273 in tolls traveling to and from Lindamood Bell Center during the above three time periods
- \$3,893.13 in mileage, incurred at IRS reimbursable rate, incurred traveling to and from Lindamood Bell Center during the above three time periods<sup>9</sup>

(P. 655-656.)

## **V. ORDER**

1. Yarmouth School Department violated special education law by failing to provide the student a free appropriate public education during the 2010-2011 school year by failing to refer her for special education services prior to December 2010 and failing to find her eligible until September 2011.
2. Yarmouth School Department violated special education law by failing to provide the student with a free appropriate public education from December 2011 to June 2012.
3. Yarmouth School Department offered the student an IEP for the 2012-2013 school year that was reasonably calculated to provide her with a free appropriate public education.
4. Yarmouth School Department is ordered to reimburse the family \$29,946.33 for the costs of services that served as compensatory education, outlined above.

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<sup>9</sup> The parents seek reimbursement for food and lodging costs as well, but because testimony indicated that the parents stayed with friends and did not incur lodging costs, these costs are not awarded; they are also not awarded the costs for a pool fee they incurred while in Massachusetts.

5. If, at any point during the 2012-2013 school year, the family decides to access the specially designed instruction and or social work services identified in the student's IEP, the student's IEP Team should meet to determine options for graduation introduction of the services to the student as well as options for alternative locations and timing of the delivery of such services.

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Rebekah J. Smith, Esq.  
Hearing Officer