

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

January 22, 2013

13.025H— Parent v. Portland School Department

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

REPRESENTING THE DISTRICT: Eric Herlan, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on December 5, 11, 12 and 14, 2012 at the offices of the Drummond Woodsum in Portland, ME. Those present for the entire proceeding were the Mother, Attorney O’Meara, Sharon Pray, Director of Special Education, Attorney Herlan, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
Ruth Roy	Friend of the Family
Jayne Boulos	School Psychological Services Provider
Christopher Kaufman, Ph.D.	Psychological Evaluator
Barbara Melnick	Director of Aucocisco School
Karen Neidlinger	Faculty at Aucocisco School
Sharon Pray	Director of Special Education
Deb Mullis	Special Education team leader
Maryanne Scally	Wilson Reading instructor
Suellyn Santiago	Assistant Principal, Lincoln xx School
David Turner	Assistant Principal, Riverton School
Cynthia Johnson	Special Education teacher, grades xx to xx
Kathryn Mercier	xx Grade teacher
Jo-Ann Galli	System 44 instructor

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On October 15, 2012, the Mother filed this hearing request on behalf of her son (“Student”). On November 27, 2012, a prehearing conference was held at the offices of Drummond Woodsum in Portland, Maine. Participating in the conference were: the Mother; Richard O’Meara, Esq., counsel to the Mother and Student; Eric Herlan, Esq., counsel to the Portland School Department (“District” or “Portland”) and Penny Wheeler-Abbott, consultant at Drummond Woodsum; Sharon Pray, special education director; and Shari Broder, hearing officer. Documents and witness lists were exchanged in a timely manner. The Mother submitted approximately 749 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1606 pages of exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of four days. Both parties requested to keep the hearing record open until January 7, 2013 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 40-page memorandum and the Mother submitted a 67-page final argument. The record closed upon receipt of these documents on January 8, 2013. The parties further agreed that the hearing officer’s decision would be due on January 22, 2013.

II. ISSUES:

1. Did Portland violate state or federal special education law by failing to provide the Student with a free, appropriate public education for the 2010-2011 school year?
2. Did Portland violate state or federal special education law by failing to provide the Student with a free, appropriate public education for the 2011-2012 school year?
3. Was Portland’s IEP developed for the 2012-2013 school year reasonably calculated to provide the Student with a free, appropriate public education?
4. If Portland failed to provide FAPE during any of these years, what remedies are appropriate under the Individuals with Disabilities in Education Act?

These issues are addressed below.

III FINDINGS OF FACT

1. The Student is xx years old (DOB: xx/xx/xxxx), and lives with his mother (“Mother”) in Portland, Maine. He is currently eligible for special education and related services under the category of Specific Learning Disability.
2. When the Student was around xx years old, his mother noticed that he was having difficulty pronouncing words. She had him evaluated by Child Development Services, which began providing speech and language services to the Student. He was receiving one hour of speech-language therapy per week. [P-6]
3. The Student began xx at Riverton School in the fall of 2005. The Mother thought he had a great teacher with whom he worked well, and the Student had help with different ways to read and write. [P-408] His November 2005 progress report said that the Student was not associating sounds with letters. [P-13] At this point, the Mother concluded that the Student was “wired” the same as her father, nephew and brother, and that he learned by doing, not just by having a teacher lecture him. [Testimony of Mother, P-408] The Student began receiving Title I assistance and was making some strides with this.
4. When the Student had his xx grade screening, the Mother expressed her surprise to his teacher, Ms. Stinson, that he had lost much of what he had learned in xx. [Testimony of Mother, P-20] The Mother thought Ms. Stinson was also a great teacher. Because the Student’s articulation skills were appropriate, he was dismissed from speech therapy with the Mother’s consent. [Testimony of Mother, P-21] The Student began receiving Reading Recovery. [P-24] He “definitely made progress” during xx grade. [Testimony of Mother, P-25, S-435]
5. The Student had the same teacher for xx grade as he had for xx grade, and continued to receive reading support in school. Two months into the school year, his teacher, Mrs.

Stinson, recommended testing the Student. [Testimony of Mother] The Mother signed a consent for evaluation on January 22, 2008, which provided that the IEP Team would meet to consider the evaluation on March 21, 2008. [S-459] Because the Mother wanted the results sooner, she decided to have the testing done on her own, and took the Student to Sharon Etzweiler, Ph.D.¹ [Testimony of Mother] Due to anxiety, the Student began receiving counseling in October 2007.² [S-438]

6. Dr. Etzweiler conducted a psychological evaluation on February 19, 2008, and issued her report on March 25, 2008. [S-434] The Student was doing well in math. [S-435] On the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Student obtained a full-scale IQ score of 108, which was in the 70th percentile. [S-440] He demonstrated average verbal conceptualization and reasoning skills, and visual processing speed, and superior nonverbal reasoning/visual-spatial skills, but scored in the low average range in auditory attention/working memory. On the Wechsler Individual Achievement Test-2nd Edition (WIAT-II), his reading skills were in the low average to borderline range, and showed borderline skills on basic reading of single words and phonetic decoding. [S-443] Based upon the social-emotional evaluation, Dr. Etzweiler concluded that the Student was experiencing at least moderate levels of anxiety and worry. She diagnosed him with Axis I Reading Disorder, Disorder of Written Expression, and Anxiety Disorder NOS. [S-450] To address the reading issues, Dr. Etzweiler recommended a “structured and systematic multi-modal reading approach that focuses on phonics” such as Orton-Gillingham or the Wilson Reading Program (“Wilson”).

¹ Dr. Etzweiler’s report said he was referred for evaluation by his therapist and parents. Additionally, Dr. Etzweiler’s report was not available until March 25, 2012, which was actually later than when the District would have had its evaluation completed had the Mother allowed the District to evaluate the Student.

² The Student also received counseling services for about a year when he was xx years old to address problems with anxiety and behavior. [S-437]

7. Within a week of receiving Dr. Etzweiler’s test results, the School held an IEP team meeting. The Student was found eligible for special education services under the category of Specific Learning Disability. [S-424] His present level of academic performance noted that he was reading at a beginning transitional level of Rigby Literacy 15. [P-40] Rigby Literacy is a comprehensive research-based literacy program that helps teachers provide effective reading instruction and measure progress. The IEP team agreed to provide the Student with five hours per week of direct instruction in reading and writing, and extended school year (ESY) services as well.
8. The Student began receiving Wilson reading instruction from Cynthia Johnson at the end of xx grade and into xx grade. [Testimony of Mother, P-46] Ms. Johnson was a certified special education teacher who had a year of training in Wilson and Level 1 Wilson certification, which meant she was certified to teach to level 4.2. [Testimony of C. Johnson] She reported that she was working on word patterns with the Student up to Wilson level 4.1 but that he needed a review of the basics of Step 1. [S-364]
9. During the summer, the Student received one-on-one (1:1) ESY reading services with Jackie Harkin, and the Mother was very pleased with the Student’s progress. [Testimony of Mother, S-360] Ms. Harkin worked with the Student up to Wilson level 1.5. [S-360-407]
10. For xx grade (2008-2009), the Student was placed in a class of 27 or 28 students at Riverton School with Ms. Linneman as his teacher. He continued to receive his special education reading and writing services from Ms. Johnson in a 1:1 or 1:2 setting. [Testimony of Mother, C. Johnson] Ms. Johnson worked with the Student on Wilson reading, especially phonics, and what was called “meaningful” reading and writing. “Meaningful reading” used Rigby level books. He did well with comprehension, but was increasingly challenged by decoding. Ms. Johnson loved working with the Student, who worked very hard, but he struggled with

attention, and his progress was slow. [Testimony of C. Johnson] Over time, Ms. Johnson learned how to keep the Student's attention. She knew he loved mysteries and used those stories when possible. That year, Riverton also hired Ms. Harkin to work with the Student twice a week. The Mother thought the Student bonded well with Ms. Harkin and that his work with Ms. Johnson was also positive. [Testimony of Mother]

- 11.** By May of xx grade, the Student was reading at a Rigby level 19, which was a mid-xx grade level. [S-350] The Written Notice issued following the Student's annual review at that time said that the Student needed a multisensory reading approach and writing support with mechanics and spelling. [S-350] He had strong reading comprehension and was a good math student.
- 12.** During the summer between xx and xx grades, the Student again had ESY services for a multisensory reading program for four hours each week with Ms. Harkin. This went well, as reported by both his mother and Ms. Harkin. [Testimony of Mother, S-333] The Student began working at Wilson level 4.1 and they worked on concepts through level. 4.3. [S-333]
- 13.** For xx grade (2009-2010), the Student was again in a regular education class of 28 students with Ms. Linneman. The year started out fine, except that the Student began feeling that he was stupid and that everyone else in class could read better than he could. [Testimony of Mother] His NWEA scores from October 2009 showed that he was in the 1st percentile in reading, and his growth in reading was much less than what a typical student would accomplish. [P-70] His MEA assessment that year also placed the Student in the 1st percentile for reading. [P-74] The Student also had problems with a girl who pushed him down on the way home from school. [Testimony of Mother]
- 14.** At the Student's annual review in May of 2010, when he was finishing xx grade, he was reading at a Rigby level 23, which was a beginning of xx grade level. [S-324] The IEP team

continued to provide the Student with a multisensory reading program for five hours each week. [S-323-324] Although the Mother agreed with the IEP, she was not happy about the Student's level of progress and was not sure what to do. She thought Ms. Johnson was a very caring teacher in her work with the Student. [Testimony of Mother]

15. Towards the end of xx grade, the Mother consulted with Ms. Johnson about who would be the best xx grade teacher for the Student. Ms. Johnson recommended Mrs. Mercier as a good fit for the Student, which was consistent with what other parents told the Mother. [P-78, P-89] The Student's progress report for xx grade showed that he was making progress towards his writing and reading goals, but had not met any of his targets. [P-79] His narrative progress reports stated that he was making specific improvements, but was reading books at the end of xx grade that were on a xx grade level. [P-82]

16. Just before the start of xx grade (2010-2011), Ms. Johnson informed the Mother that she would not be working with the Student that year, and that Kate Fisher would be his special education teacher. [Testimony of Mother] Ms. Fisher had the same Wilson training as Ms. Johnson. Ms. Fisher emailed the Mother about larger caseloads for special educators due to the removal of learning strategists and reduction in resource room teachers, so she would not be teaching the Student on a 1:1 basis³. [S-1532] The Student came home from school reporting that his Wilson reading group now had five or six students. He added that he was reading on his own a lot. [Testimony of Mother] The Mother was not happy about this, and expressed her concerns to the teachers and assistant principal David Turner. [Testimony of Mother, P-95] Ms. Fisher did not know how to help the Mother be on board with her

³ The Student's IEP did not specifically call for 1: 1 reading instruction. It said his instruction was to be in a small group. [S-312]

programming, and found the Mother to be very adversarial about what Ms. Fisher was trying to do with the Student in class. [Testimony of C. Johnson]

17. In response to the Mother's concerns, an IEP team meeting was held on October 14, 2010.

The Written Notice was issued on October 21, 2010. [S-293-295] The IEP team discussed the need to provide the Student with more individualized instruction in a smaller group with no more than a 1:2 ratio. [S-295] The Mother expressed her concern about the increase in the Student's anxiety during xx grade, and that this interfered with his ability to use his reading strategies. She also expressed her concern about the Student's lack of progress over the past few years and that his current programming would not help his reading improve. [Testimony of Mother, S-295]

18. In late September, the Mother met with Barbara Melnick, Director of the Aucocisco School ("Aucocisco"), a certified special purpose school in Cape Elizabeth, Maine that serves special needs students. The Mother wanted to learn more about Aucocisco as a possible placement for the Student. [Testimony of Mother, P-644] Aucocisco has 35 students, 16 of whom are in the xx school. The Student had the kind of profile that this school served. [Testimony of B. Melnick]

19. The Student's regular education teacher was Kathy Mercier, who had a class of 18 students. [Testimony of K. Mercier] Ms. Mercier had ten years of experience teaching special education working with students with learning disabilities.

20. The IEP team met again on November 2, 2010 and discussed the way the Student's Wilson reading program had been administered. [P-626-635] Although the Wilson reading program required 100% accuracy on a level to move up, sometimes Ms. Johnson allowed the Student to progress if he received 90% accuracy on a sub-step three times in a row. She modified the program in a way that she thought would be best for the Student to keep him motivated,

which was consistent with her training. [Testimony of C. Johnson, P-629] The Mother was unaware of this approach until this meeting, and had not agreed to it. Nonetheless, she agreed to change the Student's Wilson reading teacher back to Ms. Johnson because Ms. Johnson cared about the Student and worked well with him, and the Mother had faith in her ability. [Testimony of Mother] The Mother asked that the Wilson program proceed step by step, without skipping any steps, to which Ms. Johnson agreed. [P-631] Ms. Johnson became the Student's "go-to" person if he was upset or needed help. The written notice following this meeting said that the team would reconvene on February 1, 2011 with the school psychological services provider to evaluate the Student's progress and discuss the need for further testing for the Student's triennial review. [S-283] This written notice stated that the Student was approximately two grade levels below his peers in reading and writing skills, and has significant deficits in memory requiring him to have an intensive small group program of multi-sensory phonological instruction for five hours per week. [S-284] It also stated the Mother's emphasis on the importance of the Student receiving complete instruction in Wilson reading by trained professionals in a group of no more than two students. [Testimony of Mother, S-284]

- 21.** The Student began having difficulty with two students in his class, student A and student K, and the Mother thought he was being bullied. The Mother contacted Assistant Principal David Turner about it, then emailed him and Ms. Johnson. [P-118-119] At that time, the Mother expressed her concerns about whether Ms. Mercier "gets it" regarding the Student and his learning disability. Ms. Mercier saw the Student as basically happy in class, and felt that his conflicts with some of the students were outside the classroom. [Testimony of K. Mercier] Ms. Johnson agreed that the Student's affect in school was usually happy, but believed it would be helpful to work with the Student on strategies for dealing with the

problem with his classmates. [Testimony of C. Johnson] Mr. Turner addressed the peer conflicts, but did not think it was a good idea to change the Student's classroom. [Testimony of Mother] He tried to help the Student deal with how to respond to peers when they teased him. [Testimony of D. Turner] Whenever there was such an incident, it was difficult to discern which student was telling the truth, as each child blamed the other. Mr. Turner thought there were times when the Student overreacted to these situations, and did not think the Student was targeted more than other students at Riverton, but thought he didn't have the "stamina to deal with it as well as some other kids." [Testimony of D. Turner] Ms. Johnson thought the Student was a very sensitive child and that things upset him that might not upset other students. [Testimony of C. Johnson] Mr. Turner acknowledged that bullying was a constant problem in the schools. [Testimony of D. Turner]

- 22.** In an effort to help the Student, Ms. Johnson invited a Portland school psychologist, Jayne Boulos, to attend a meeting about the Student because the Mother was concerned about the Student's evaluations. [Testimony of J. Boulos] Ms. Boulos told the Mother about the possibility of the Student receiving free reading instruction at the Masonic Center. Because there was a waiting list at the Masonic Center, the team discussed having Ms. Boulos conduct the Student's triennial testing earlier than it would otherwise have been done, as testing results were used to determine eligibility for the program. [Testimony of J. Boulos] Although the Student was 18th on Ms. Boulos's list of students to be tested, she offered to move the Student to the top of her testing list and get his testing done right away, even though it involved working outside school hours. The District also told the Mother about a process for getting certain textbooks online through a program called Learning through Listening. This was helpful for the Student and reduced his stress. [Testimony of Mother]

- 23.** Thereafter, Ms. Johnson worked with the Student on a one-to-one basis for 30 minutes daily on reading, spelling and writing, then an educational technician III (who was not Wilson certified) worked with him for an additional 30 minutes under Ms. Johnson's supervision. [Testimony of C. Johnson, S-294] Ms. Johnson's progress notes show that on November 17, 2010, the Student had almost completed the criteria for mastering level 4.2 of the Wilson reading program. [S-303, Testimony of C. Johnson] Following these changes, things got somewhat better for the Student. His anxiety started to go down, but he still had problems with bullying and taunting from some classmates, particularly Students A and K. [Testimony of Mother]
- 24.** Ms. Boulos conducted her testing on November 8 and 19, 2010. [P-125] She observed the Student in a small reading group in which he was working one-to-one with Ms. Johnson. It was a very supportive environment. [Testimony of J. Boulos] The Student's WISC-IV scores were in the solidly average range, and his perceptual reasoning was high average. [P-127, 134] Memory testing, however, revealed some definite weaknesses, some in the borderline range. [Testimony of J. Boulos, C. Kaufman] Ms. Boulos noted that short-term and working memory were needed for decoding, and the Student had a complex working memory profile. [Testimony of C. Kaufman] Various aspects of the Student's learning were affected by his memory problems. [P-134] On his achievement testing (WIAT-III), the Student's oral language (listening comprehension and oral expression) were in the average range, but total reading was below average, and reading comprehension and fluency were in the low range. [P-131] Written expression and mathematics achievement scores fell in the average range. [P-132] Ms. Boulos concluded that the Student's mixed dyslexia would continue to require high levels of reading support, and recommended that he continue his multisensory reading instruction in a quiet place to reduce distractions. [Testimony of J. Boulos, S-257] She also

noticed that the Student's worksheets were on a xx or xx grade level without much reading on them, and that this did not seem appropriate for a fifth grader of average intelligence. Ms. Boulos said the Student should be getting work that was appropriate for him with accommodations for his reading needs. She presented the results of her evaluation at a January 13, 2011 IEP team meeting. [S-236-237] The behavior scales showed no problems at that time. [Testimony of J. Boulos] The Mother and IEP team agreed with Ms. Boulos's recommendations, and the team was prepared to do what she recommended. [Testimony of J. Boulos, S-237]

- 25.** In the Student's regular class, he was in a reading group with two students who taunted him. To remedy the situation, Ms. Mercier and Ms. Johnson arranged to have the Student join a different reading group, one that was using a computer-based program. [P-158]
- 26.** On April 8, 2011, Ms. Johnson emailed the Mother to report the Student's progress in completing Wilson Book 6 and that they would begin working on Book 7 the following school day. She also reported that the Student passed level 24 in the Rigby books with a 92%. [Testimony of C. Johnson, P-174] This is a mid-transitional level equivalent to mid-xx grade. Communication between the Mother and Ms. Johnson was very good and regular.
- 27.** The Student continued to have problems with some of his classmates calling him names, and writing swear words directed at him. [P-194]
- 28.** On June 2, 2011, the IEP team met to review the Student's program. Deb Mullis, who would be the Student's case manager in xx school, attended. [Testimony of Mother, D. Mullis] Ms. Johnson explained that the Student was working on Step 7 of the Wilson program, and that he was doing quite well. [Testimony of J. Boulos, S-227] Ms. Boulos felt the Student had a solid reading program in place for xx school, and agreed with the actions taken on the written notice, which were: (1) to provide 5 sessions per week at 50 minutes per session for

individual multisensory instruction in reading/language and writing/spelling; (2) three sessions per week of 50 minutes per session of special education support to help the Student complete classroom assignments; and (3) ESY services for reading with a frequency of six hours per week for five weeks. [S-226] She was hopeful that the Student would do well with this program. Ms. Boulos had discussed the differences between the three Portland xx schools with the Mother to help her decide which school she preferred to have the Student attend. [Testimony of J. Boulos] The Mother was optimistic as well, and sent an email to the assistant principal thanking him for “all your closed door meetings, handling my meltdowns, and all your hard work!! It means the world to me.” [P-208] She added that the transition IEP meeting was the best ever, and that she felt great about what the team put together for the Student for xx grade. [Testimony of Mother, P-208] On the other hand, the Mother thought xx grade was hard for the Student, as it was the first time he had a teacher who the Mother felt did not understand her child. [Testimony of Mother]

29. The Student’s spring 2011 NWEA tests continued to place him in the first percentile for reading, and showed growth of 5 points, compared to typical growth of 13. [P-171] At the end of xx grade, he was writing at about a xx grade level. Spelling was the Student’s biggest challenge. [Testimony of C. Johnson] The Student’s AIMSweb⁴ report for xx grade showed that he made progress in reading and exceeded his targets.⁵ [S-206] He went from a Rigby level 22 to 25 during the course of xx grade. Although level 25 is an ending xx grade level, the Student made one year of growth according to this measure. In Wilson, the Student ended xx grade at level 4.2 and ended xx grade at level 7.

⁴ AIMSweb is an online method of recording benchmarks for students, setting goals and monitoring their progress.

⁵ The Student did not quite reach his targets in reading comprehension. [S-205]

- 30.** During the summer, the Student again received 1:1 Wilson reading instruction from Jackie Harkins, in accordance with his IEP. [P-207] This went very well. [P-235]
- 31.** The Mother had a choice of xx schools and selected Lincoln xx School (“Lincoln”) because she thought it would be the best fit for the Student. [Testimony of Mother] [Testimony of Mother, P-221] The Student’s new Wilson reading instructor, Maryanne Scally, thought it was “miraculous” that the Student had a one-on-one Wilson program every day because this was difficult to achieve in light of how the xx school schedule was set up. [Testimony of M. Scally] By having Wilson reading scheduled every day, however, the Student was unable to also take band, which he enjoyed very much. Peg Lane, the Student’s guidance counselor, attempted to find a way to allow the Student to partake in both band and daily Wilson reading. [P-221] Because this was unworkable at the time and band was very important to the Student, the Mother chose to have him participate in band, and to reevaluate his progress in four to six weeks. [P-223, S-1178, testimony of Mother] This reduced his special reading instruction time by half.
- 32.** The Student began attending Lincoln for xx grade in September of 2011. On October 6, 2011, Mr. Turner emailed the Mother to ask how summer programming went and whether xx school was going well. [P-235] The Mother reported that the Student’s transition to Lincoln had gone very smoothly and that the Student liked school again. [Testimony of D. Turner, P-235] The Student began receiving Wilson reading and support in the regular education classroom from Ms. Scally, a certified Wilson instructor. [Testimony of M. Scally] The Mother wanted the Student’s special education reading instruction to be Wilson and nothing else. She did not want this time to be used for the Student to get caught up on homework. The Mother told Ms. Scally that the Student was on level 7. [Testimony of M. Scally] When Ms. Scally went through the Student’s files and did some Wilson testing, she found “holes in

his knowledge” that caused her to return the Student to level 2 to ensure that his learning was solid. [Testimony of M. Scally, S-111] Consequently, Ms. Scally began working with the Student on level 2.1, initially on a half-time basis because of band. The Student reported this to the Mother. [Testimony of Mother] After a meeting with the Student’s teacher’s on October 25, however, the Mother decided to have the Student drop band and take private music lessons to allow him to devote more time to his studies. [Testimony of Mother, M. Scally, P-246] At that point, he began receiving his reading instruction four days per week, as there was a conflict one day each week with the Student’s math class.

33. In October, the mother attended an open house at Aucocisco School.

34. On November 4, Robin Lea, the Student’s science teacher, reported to the Mother that the Student felt that he was the recipient of bullying. [Testimony of Mother, P-251] On November 8, the Mother emailed Suellyn Santiago, the assistant principal, to ask to speak with her, as the Student had “blown up twice” in science class. [P-254] They had a meeting on November 9 and made a plan for how the Student would report bullying. [Testimony of S. Santiago, S-198] Ms. Santiago offered the possibility of the Student receiving services from the school social worker, but the Mother did not access this. There was also an incident in which student A, the same classmate the Student had a problem with at Riverton, pushed the Student’s books on the floor. [P-255] Another student who had been a problem for the Student at Riverton, student M, wrote on the Student’s paper or told him that that his writing was bad. [S-198] Around this time, the Mother told Ms. Santiago that the Student was angry because his father was moving to South Carolina. [S-199] About a month later, the Student and student A had another altercation in math class. The teacher, Ms. Mueller, reported that student A called the Student a weirdo, which prompted the Student to take student A’s binder, and their confrontation escalated. [S-183] Student M grabbed the Student in the

lunchroom one day, while student K (also a problem at Riverton) called him names. The Student called student K “fatty,” and the two began pushing one another. [S-181] Another student, student O, was also bothering the Student by poking him. [P-268-269] Some classmates called the Student a particular name that he did not like,⁶ and others called him other names at times, usually during recess. [Testimony of Mother, S-194-199] The Student was very sensitive to being bullied, and sometimes responded explosively. [Testimony of S. Santiago, S-200, S-184] Ms. Santiago always spoke to the parents following disciplinary issues, but often could not figure out who was at fault because it was one child’s word against another’s and the parents believed their children. [Testimony of S. Santiago] In response to these incidents, the school tried to increase supervision and keep the students away from one another.

- 35.** In early January, the Mother asked for a meeting with the Student’s case manager, Patty Coombs, and his reading teacher, Ms. Scally, to discuss his progress. The Mother thought that Ms. Coombs had a true understanding of the Student. [Testimony of Mother] The meeting took place on January 10, 2012, and Ms. Scally discussed why she had begun teaching the Student Wilson reading at level 2. [Testimony of Mother] Ms. Scally said she was not concerned about the Student’s reading progress, and the Mother did not express any concerns that she had. [Testimony of M. Scally]
- 36.** On January 26, 2012, the Student was punched in the face at school by student Z, and had to go to the emergency room for treatment. [P-272] There were conflicting stories about who started the altercation, but the Mother believed the Student did not provoke it. [Testimony of

⁶ To protect the Student’s privacy, this name cannot be included in the decision because it would reveal the Student’s first name. The Student’s first name is also the name of a geographic location. An example of what the classmates were doing is this: if the Student’s first name were Higgins, the classmates would have called him Higgins Beach.

Mother, P-273] The Mother decided that the Student “was fine” to return to school the next day, and felt that the school was responsive to her concerns about bullying. [Testimony of Mother, P-273]

37. When the Student returned to school the following day, student M told him that he was glad student Z hit him. [Testimony of Mother, P-274] The Student started acting aggressively towards student M, threatening to beat him up. Ms. Lea intervened and tried to calm the Student down. The Student then began yelling at a mild mannered student and threatening to hit him. [P-178] The Mother did not know about this latter incident, but was very frustrated about the Student’s situation, and the Student was concerned about his safety in school. After that, the Mother decided to keep the Student out of school until she could be assured by the school administration that he would be safe. [Testimony of Mother, P-278]

38. The Mother met with Ms. Santiago and Steve Nolan, the principal, for about one and one-half hours to discuss the punching incident and the problem of the Student being bullied at school. [Testimony of S. Santiago] The Mother wanted to develop a plan to keep the Student safe while at school. Student M seemed to be a ringleader in science and math classes. They discussed increased supervision during the times when these problems were most likely to occur, separating the Student from those with whom he was having problems, and identifying staff members the Student could turn to if he had problems. [Testimony of S. Santiago] They also made some scheduling changes to separate the students who had been the biggest problem recently, specifically students M and O. [S-1580] Ms. Santiago informed the staff of the problems and how they would be addressed. [S-1580]

39. On January 31, 2012, the Mother took the Student to see John Millhouse, Ed.D., a psychologist, for an assessment. She was concerned about the Student’s “blow ups” in the classroom and sought a recommendation. [Testimony of Mother] The Student described his

mood as angry and frustrated, and he was also sad about his father's impending move. [P-289] Dr. Millhouse diagnosed the Student with Axis I: 309.28 (adjustment disorder with mixed anxiety and depressed mood), and rule out 296.21 (major depression).

- 40.** The Student missed three days of school and thought that he was expelled because his friends told him so and he had heard that this was what happened to student Z. [P-301, testimony of Mother] No amount of effort on the Mother's part could convince him otherwise. On the day he returned, student Z pushed him. [P-293] Because the Mother was concerned about the Student falling behind, she decided to have Ms. Scally work with him on getting caught up on missed work until February vacation, rather than on Wilson reading. [Testimony of S. Santiago] Ms. Scally was confused about this because the Mother had been so clear that she only wanted Ms. Scally to work on Wilson with the Student. [Testimony of M. Scally] One day, the Student became very upset with Ms. Scally and was screaming and accusing her of witnessing bullying but doing nothing about it. Ms. Scally had no idea what the Student was talking about but brought him to see Ms. Coombs. In early March, the Mother asked that the Student be removed from his classes in which Ms. Scally worked with him and also from social studies, as she did not like the social studies teacher. [Testimony of M. Scally]
- 41.** On February 6, 2012, the Student's English Language Arts (ELA) teacher, Ms. Hood, emailed the Mother about her perceptions of the Student's return to school. [P-296] Ms. Hood saw changes in the Student's behavior, specifically lots of fidgeting, refusing to open the book from which they were reading, being unfocused and making loud comments while the teacher was talking. That day, the Student's father and stepmother met with Ms. Santiago to discuss the Student's situation. [S-1581] The following day, the Father emailed Ms. Santiago to thank her for meeting with him. He said he was encouraged by how well the school worked with the students and knew the Student was in good hands there. [S-1581]

42. During the Student's therapy sessions, he said he felt like he was being blamed for any problems in school. [P-311] Therapy notes also say that around this time, the Student learned that his father had spent five years in prison for rape. The Student had developed a closer relationship with his father over the past two years, and was upset that he was moving, feeling like the Father's new family was more important than he was. [Testimony of Mother, P-311]
43. On February 16, 2012, the Mother was at Lincoln meeting with Ms. Santiago. While she was there, Ms. Boulos,⁷ while in the hallway waiting for another student, heard Ms. Hood yelling at a student because he did not have a paper. [Testimony of J. Boulos] The teacher then slammed the door. Ms. Boulos observed that it was the Student who had been the subject of this interaction, and he was clearly upset. Ms. Boulos spoke with Ms. Coombs to find out what they could do to help the Student with this teacher. [Testimony of J. Boulos, P-316] Ms. Coombs spoke with the Student about the incident. The Mother was very upset about it and asked Ms. Santiago to speak with Ms. Boulos and Ms. Coombs about it, then "get Ms. Hood off my kid's back. Her behavior and lack of understanding is unacceptable." [P-313] She added that she did not think Ms. Hood was capable of being the Student's homeroom teacher, and wanted the Student removed from this class. [Testimony of Mother] The Mother no longer trusted Ms. Scally either because the Student overheard her talking to Ms. Hood about him.⁸ [Testimony of S. Santiago] Ms. Santiago agreed to bring Ms. Boulos into meetings regarding certain teachers who were not teaching the way the Student needed to learn. [P-316] She attended multiple meetings with the teaching team to be sure teachers

⁷ Ms. Boulos was assigned to cover Lincoln this year.

⁸ There was no evidence about the content of the conversation the Student reported overhearing.

understood the Student's needs and shared the Mother's concerns with them. [Testimony of S. Santiago]

44. The following day, the Student was not in school because his father was moving to South Carolina, and the Student traveled there with him. Ms. Hood sent an email to Ms. Coombs, Ms. Lane, Mr. Nolan and Ms. Santiago⁹ sharing her observations of the Student during the past week. [S-1583] She noted that he had refused to follow most directions in class and was uncooperative. When Ms. Hood took him aside to explain why she was redirecting him, he said that she was picking on him. [S-1583] On numerous occasions, she heard him calling other students "hobo," and explained to him that name-calling was not OK. Her view was that the Student's impatience, frustration and unwillingness to try were increasing, and that this was a shift in the Student's attitude since the first trimester. [S-1583] That same day, Ms. Mullis, the Student's case manager, emailed Ms. Santiago asking whether the Student's accommodations were being made. She added that Ms. Scally was doing Wilson reading with him and he was showing some progress, but that he continued to read and write well below grade level despite his average cognitive abilities. [S-1584]
45. Over winter vacation, Ms. Santiago, Ms. Mullis and Ms. Coombs conferred about how to address the Student's growing difficulties, and tried to set up a meeting with the Student's teachers. [S-1586-89] His difficulties in class, particularly acting out and thinking he was being singled out, continued to escalate. On February 29, he was disrespectful to Ms. Scally, and Ms. Lea reported inappropriate behaviors. [S-1588, 2590] Principal Nolan told Ms. Coombs to have Ms. Scally take a break from working with the Student the following week so that those involved with the Student's programming could figure out what the problem was and how to address it. [S-1589] Ms. Scally only really worked with the Student on

⁹ Ms. Boulos was not copied on this email. [Testimony of J. Boulos]

Wilson reading from September through late January, as she had been instructed to help the Student with other academic work after that time. The Student was at level 2.5 when their work ended. [S-111]

- 46.** The Mother was very upset and concerned about the decline in the Student's behaviors at school, which Ms. Boulos also found alarming. [Testimony of Mother, J. Boulos] On March 6, the Mother met with Ms. Santiago, Principal Nolan, Ms. Mullis, and Ms. Boulos to discuss the Student's difficulties in school. The meeting was very tense. The Mother was very upset and felt that nothing the school was doing was working. [Testimony of S. Santiago] She said she might need to withdraw the Student from school, as the school was not meeting his learning style, and she did not think Ms. Hood or Ms. Chard, the Student's social studies teacher, were capable of teaching him. [Testimony of Mother, S-186] The only other Wilson teacher available was Frankie Crush, but the Mother would not consider her because she did not have complete certification. Ms. Scally had told Ms. Boulos that she had a difficult time working with the Student, that he wasn't very engaged with her and was unable to make much progress. [Testimony of J. Boulos] Lincoln had not been offering Wilson reading as much as previously, but was using System 44 and Read 180. System 44 was a highly structured, evidence-based remedial reading program developed by two educational scientists for students with the greatest reading challenges. It used computers to help students learn phonics and sight words, among other reading skills. [Testimony of C. Kaufman, J. Galli] The school had seen students make a lot of gains in these programs.¹⁰ [Testimony of S. Santiago] It seemed like a good choice for the Student, as it was similar to Wilson in all ways except being multi-sensory. The Student had said his primary area of interest was technology

¹⁰ Dr. Kaufman also testified that in his experience, System 44 benefitted many students. [Testimony of C. Kaufman]

and computers and had expressed a preference for such approaches. [Testimony of C. Kaufman, P-98] The attendees at this meeting thought these programs might work for the Student. System 44 was normally taught in a group setting with Ms. Galli, a teacher highly qualified in language arts and social studies who was teaching literacy. The Mother did not like the idea, and would only agree to it if it were taught on a 1:1 basis, which was not how it designed to be taught. [Testimony of J. Galli, S. Santiago] She preferred that the Student be taught Wilson reading, but agreed to try System 44 with her proviso. It was difficult for the school to set up System 44 according to the Mother's requirement that it be taught 1:1, as this required a qualified staff person, flexibility in the schedule, access to the technology and an available room. [Testimony of S. Santiago] The class also had to be offered during block 4, and required rearranging staff schedules and equipment so that the Student could have an individual workstation. [Testimony of D. Mullis] It was necessary to change the Student's schedule so he would not be attending mainstream ELA with Ms. Hood, and he was placed in System 44 instead of social studies. His "team time" was changed to Ms. Mueller's room. Ms. Mueller was the Student's math teacher. The Student was doing well in math and there were no issues with Ms. Mueller.

- 47.** The Mother reported that the Student continued to be involved in name-calling incidents, as classmates were calling him "big ears" and asking him what was wrong with his ears, and again calling him the name that was related to the geographical location that bore his name. [S-174-175, testimony of Mother, S. Santiago] There was also an incident instigated by the Student in which he taunted a classmate about how slowly she walked and laughed at her. [S-176]
- 48.** On very short notice, Ms. Santiago scheduled another meeting for March 12 with the Student's teachers plus Ms. Crush, Ms. Lane, and social worker Kathy Randall. Because

Ms. Santiago's mother, who was diagnosed with terminal cancer, was admitted to the hospital the previous day, Ms. Santiago was unable to attend the meeting. [Testimony of S. Santiago] Ms. Santiago sent the Mother an email the day of the meeting letting her know she was unable to attend due to her mother's illness. [P-337] Principal Nolan also emailed the Mother explaining that he could not be there because he needed a little lead-time to "make my calendar work." [P-337] The Mother chose not to attend either, but was confident that Ms. Boulos could convey her concerns. [S-187, S-1594, testimony of S. Santiago] Ms. Boulos led the meeting. The Mother wanted them to know that the Student did not usually have behavior problems but he was very frustrated and the bullying had had a big impact upon him. [Testimony of J. Boulos] Ms. Chard asked what the big deal was of kids calling him the name that was related to the geographical location, saying that kids did things like that all the time. Ms. Boulos did not think it was appropriate and shared this comment with Ms. Santiago, who took bullying very seriously. [Testimony of J. Boulos] The day after the meeting, the Mother wrote to Principal Nolan, "How do I advocate for my son and get you or Suellyn (Ms. Santiago) at these critical meetings? The teachers need to hear from you or Suellyn that their attitudes and ways of teachings [sic] is not acceptable. My feeling is that if Suellyn cannot be there, than [sic] you need to be in the meeting." [P-337]

- 49.** The Student's disciplinary and bullying problems increased between November and March, but the last incidents of either were in early March. [Testimony of S. Santiago] Ms. Santiago thought the Student had a good relationship with his guidance counselor, Ms. Lane, but Ms. Lane thought the Student was creating a lot of his problem situations. The Mother took great offense at this and did not want to work with Ms. Lane any more. This surprised Ms. Lane, who thought things were going OK. [Testimony of S. Santiago]

- 50.** Jayne Boulos made considerable efforts on the Student's behalf to make his educational program work. She observed him in class and met with his teachers and case manager. [Testimony of J. Boulos] She arranged to get him a pass so that he could go to an established safe place if he were feeling overwhelmed or bullied. [P-355, 364] Ms. Boulos observed the Student in Ms. Coombs's room where she was working with the Student and a classmate. Ms. Coombs was concerned that the Student was not as engaged in small group instruction as well as she thought he would be and was engaged in off-task behavior. She introduced the Student to Kathy Randall, the school social worker. Ms. Coombs tried to inform all of the Student's teachers about the change in the Student's program. [Testimony of J. Boulos]
- 51.** At Dr. Millhouse's recommendation, the Student had a psychiatric evaluation on March 21, 2012 because Dr. Millhouse thought the Student would benefit from medication. [P-369-371, testimony of Mother] Daniel Bates, D.O., noted that the Student had a fairly easy time perceiving and understanding the complexities of the world around him, but a very hard time articulating them in expressed speech. The Student was overwhelmed by the difficulties of reading and writing, and had pulled away. [P-369] The Student was also quite angry about his father's impending move. While he appreciated his mother's attempts to help him with school issues, he thought she was trying to micromanage his academic experience. The third issue was bullying, which the Student reported took a long time for the school to address, but the situation had improved markedly. Dr. Bates wrote that the Student "spends much of his day with the specters of impending bullying and his father's impending departure hovering over him, and this is quite distracting to him." [P-369] Dr. Bates diagnosed him with Anxiety Disorder, NOS, Rule Out Central Auditory Processing Disorder versus Language, Writing and Reading Learning Disabilities. He noted severe stress with the Father's impending relocation and peer environment. Dr. Bates recommended continuing therapy with Dr.

Millhouse, and a low dose of Zoloft. [P-371] The Student's therapy notes with Dr. Millhouse on March 26 and April 10 indicated that the school was doing a good job dealing with the bullying issue, and that he no longer needed to keep his guard up when at school. [P-394] Dr. Millhouse's notes stated that the Student stopped attending therapy at that point because he felt that therapy was a form of punishment, and that he was leaving it up to the Student to decide whether to resume therapy. [P-394]

- 52.** Once the logistics could be arranged, the Student began System 44 on March 26. [S-805] The Mother "wasn't thrilled with the environment." [Testimony of Mother] The Mother introduced herself to the teacher, Ms. Krasowski ("Ms. K"). The Student had problems with the computer system and reported that Ms. K. became angry with him. The Mother then asked the principal whether Ms. K. was the right person for this task. [Testimony of Mother]
- 53.** On April 4, 2012, when Ms. Boulos checked with the Mother about how the Student was doing in school, she told Ms. Boulos that the Student had told her that school was going well, including System 44. The Student reported that he was learning again. [P-388] That same day, Ms. Coombs told the Mother that the Student did a good job in school that day, and she complimented him on his good behavior and helpfulness. [P-391] The Mother checked with teachers via email to see how the Student was doing, and the reports were good. [P-398-404]
- 54.** By April 12, the Mother decided that System 44 was a waste of time and was not working, and reported this to Ms. Boulos. [Testimony of Mother, P-396] "Either the computer doesn't work, the teacher is out sick, the library door is locked, and on and on . . . Patty Coombs is doing a great job but she's only one person and can only do so much."
- 55.** The Mother wanted someone outside the school department to look at Ms. Boulos's and Dr. Etzweiler's assessments and advise her about the Student's education. On April 30, 2012, she contacted Christopher Kaufman, Ph.D., a licensed psychologist and certified school

psychologist who had been the lead school psychologist for Portland for 12 years, and had left there in February of 2011. [Testimony of C. Kaufman] Dr. Kaufman only had peripheral involvement with the Student while working for Portland. The Mother expressed her frustrations with the Student's learning challenges and wanted Dr. Kaufman's opinion regarding whether the District was adequately addressing them. [Testimony of C. Kaufman] The Mother shared the Student's previous psychological testing with Dr. Kaufman. Dr. Kaufman performed an initial consultation and diagnostic interview, reviewed the Student's previous testing, and attended IEP meetings on May 16 and May 30, 2012. [Testimony of C. Kaufman, P-587] Dr. Kaufman noted that the Student had difficulty holding onto the progress he had made, and assumed the Student's problems with working memory or long-term memory were the cause. [Testimony of C. Kaufman] He thought it was very unusual for a student to really be on Wilson level 7 and drop back to Wilson level 2.5, and assumed this was due to the Student's memory problems. He did not attribute this to a failure of the IEP or to the way Ms. Johnson had delivered the instruction.

56. On May 16, 2012, there was an IEP team meeting to review the Student's program. [P-437] The team discussed fact that the Student had not needed to use his pass to leave the classroom and had not had peer incidences since early March, as well as his good progress in math class. [P-438] Dr. Kaufman reviewed the Student's weakness in working memory, visual memory and processing. Based upon these deficits and the Student's mixed dyslexia, Dr. Kaufman recommended three things: (1) a multisensory systematic reading program, such as Orton-Gillingham, Wilson or Lindamood Phoneme Sequencing Program (LiPS); (2) regular intensive sight word drills, such as the Fry word list, Dolch word list or Rebecca Sitton list, the last of which he thought was the best choice; and (3) daily guided oral reading practice to improve fluency, such as Great Leaps or Read Live. He recommended later

adding highly structured comprehension instruction, but did not want to give him too much at this point. [P-438, testimony of C. Kaufman] The IEP team unanimously decided to continue the System 44 program with 1:1 support and to continue the program with trained literacy personnel, including as part of the Student's ESY. [P-437, P-738] Dr. Kaufman thought the determinations of the team were reasonable based upon the information they had at the time. [Testimony of C. Kaufman] Because the Student became frustrated with Wilson, Dr. Kaufman thought it was reasonable to shift him away from it to System 44.¹¹

57. At the May 30, 2012 IEP team meeting, the team did an annual review of the Student's program and drafted his IEP for the coming year. [S-84] The Mother said that the Student's System 44 1:1 arrangement with Ms. K did not work, and had consequently agreed to place the Student in Ms. Galli's small group System 44 class until the end of the school year. [S-86] The services provided to the Student for xx grade would include specially designed instruction as follows: (1) for academic support for 50 minutes every other day; (2) for ELA in the special education setting for 50 minutes daily; and (3) support in science 5 days a week for 50 minutes. There would also be 30 minutes of consultation with a literacy teacher each month. [S-85] The team changed the Student's writing goal to explicitly include the Houghton-Mifflin Reading/Writing Sourcebook, and added having the Portland Writing Rubric as the measurement device, and the System 44 progress monitoring system would be used to measure the reading elements. [P-739] Ms. Galli had been working well with the Student, and her schedule for the coming year was designed around providing direct instruction for him during xx grade. [Testimony of J. Galli] The IEP contained measurable

¹¹ Although Dr. Kaufman thought Wilson was a reasonable program to offer the Student, he testified at the hearing that he would like to look further into why the Student was not progressing with it and would have recommended progress monitoring for this purpose.

goals for spelling, writing, reading. The Mother concurred with the proposed IEP, which was mailed to her on June 29, 2012. [S-73] The IEP also included ESY services four times per week for 90 minutes a day. [S-21]

58. The Student started System 44 with Ms. Galli at series 4 sometime in May.¹² [Testimony of J. Galli] She tested him, then provided direct instruction in areas of need. [Testimony of J. Galli, S-47] The Student had test anxiety, and tested as a beginning reader. He seemed excited about the work, and was anxious to participate. He became a leader in the class, and had no behavioral difficulties. [S-11] In an email to the Mother on June 6, 2012, Ms. Galli reported that the Student had made some admirable gains in the program since he began in March, advancing from a Scholastic Phonics Inventory (SPI) fluency score of 13, which was “developing decoder,” to a SPI fluency score of 24, “advancing decoder.” [Testimony of J. Galli, S-54, S-98] The Student’s grades for xx grade ranged from an 86 in science and 88 in ELA to 98 in math and 100 in technology despite missing 16 days of school that year. [S-201]

59. For the Student’s summer programming, the Student had System 44 instruction with Deb Mullis, a trained System 44 teacher. The Student was supposed to have 12 sessions of 90 minutes in length during August 2012. [S-41] The Student participated in 10 sessions because the Mother canceled one and he did not attend another for unknown reasons. [S-41] The Mother did not think Ms. Mullis was delivering the program appropriately. [Testimony of D. Mullis, Mother]

60. The Mother drafted a letter to the District dated August 21, 2012 notifying the District that she was enrolling the Student at Aucocisco and intended to seek reimbursement for the costs associated with this placement. [P-500, testimony of Mother] The letter said that the Student

¹² It was unclear from the evidence precisely when in May the Student began working with Ms. Galli.

was several years behind his peers in literacy skills due to the highly inappropriate educational services he received over the past two years. [P-500] The Mother hand-delivered this letter to the Superintendent's office that day. The following day, the Mother emailed the Student's application to attend Aucocisco to its director, Barbara Melnick. The Student was accepted for admission on August 24, 2012 and began attending school there on September 5, 2012. [P-640] The Mother paid \$29,900 for the Student's tuition, and drove him a total of 24 miles each day between school and home. [Testimony of Mother]

61. The Student's schedule at Aucocisco includes language arts, science, and math four days each week, a reading tutorial with Ms. Neidlinger four days a week in which he receives the Lindamood-Bell Seeing Stars reading program, and a corrective reading small group four days each week. [Testimony of B. Melnick, P-646] Ms. Neidlinger has training in Lindamood-Bell LiPS and Seeing Stars programs, and introductory training in Wilson reading. There are eight boys in the Student's ELA class, and no girls. [Testimony of K. Neidlinger] She provides direct instruction for half an hour, and then the Student follows up with Mr. Collette in the computer lab. The Student also has coaching four days a week, in which he learns organization, planning, homework priorities and social thinking. [Testimony of B. Melnick] One day each week, the Student has gym for two hours, and Transitions, in which he learns about basic learning style preferences and career planning. Halfway through the year, the Student will have social studies, but the school felt the Student needed the extra reading instruction initially. The Student has been happy at Aucocisco. His anxiety level has decreased. He is friendly and works hard, although he remains frustrated by reading and writing challenges. [Testimony of B. Melnick] Ms. Neidlinger has seen the Student improving, primarily in anxiety levels and confidence. [Testimony of K. Neidlinger]

62. In the second half of September 2012, Dr. Kaufman conducted a psychoeducational evaluation of the Student focusing primarily on his literacy skills, and the scope and severity of his writing and reading challenges. [Testimony of C. Kaufman, P-592-604] Although the Student was not uncooperative, he struggled to remain engaged. His scores showed that he was substantially and pervasively delayed in his reading skills, and had a lack of growth related to age norms. [Testimony of C. Kaufman, P-598] His Gray Diagnostic Reading Test scores (GORT) were in the poor to very poor range, except that reading comprehension was below average. [P-599] Dr. Kaufman administered achievement testing (WIAT-III). [P-131] He found that, when he compared the WIAT scores from his testing with the scores the Student received when Ms. Boulos tested him two years earlier, the Student's scores in reading comprehension, word reading, sentence composition, pseudoword decoding, oral expression, spelling and essay composition had all declined. His oral reading fluency score dropped by only one point, and his math scores stayed about the same. Although the Student did increase his skills, these scores indicated a lack of much growth. Dr. Kaufman explained the Student as someone with generally average intelligence but with neurocognitive processing challenges, primarily in phonological awareness and memory, visual memory, delayed recall, and visual-motor integration, that have significantly impacted his acquisition of literacy skills. [P-602, testimony of C. Kaufman] He noted Dr. Etzweiler's report, which underscored the nature of the Student's anxiety and how this had an exacerbating effect on his ability to engage effectively in academics. [P-602] Consequently, the Student developed literacy-related anxiety over the years and an avoidance-based coping strategy with literacy tasks, which Dr. Kaufman described as avoiding the work completely or getting it over with as fast as possible. As part of his evaluation, Dr. Kaufman observed the Student in school at Aucocisco. There, he saw an engaged, productive Student whose decoding and fluency skills

were improving. [Testimony of C. Kaufman] Dr. Kaufman was impressed in his two observations sessions, and thought it reflected the Student's apparent "buy-in" to his Corrective Reading and Seeing Stars methodologies. [P-602] He observed the Student exhibit better skills informally in the classroom, compared to when he was tested.¹³ Dr. Kaufman also observed the Student in a corrective reading program with two other students. Although these classmates were off-task and disruptive, the Student stayed engaged. [Testimony of C. Kaufman] The Student tried to rush when reading out loud, but his teacher did a nice job of not letting him gloss over difficult words. The Student was learning to read with the Seeing Stars program, but Dr. Kaufman could not categorically attribute the Student's reading success to this program. Because the Student was making progress and doing better, Dr. Kaufman thought his maladaptive coping strategies would also be broken down, so he did not recommend removing him from this setting. [Testimony of C. Kaufman] On the other hand, Dr. Kaufman could not say that Portland had fallen short on its programming and thought the Student could get the programming he needed in a public school setting. This could be done by implementing a reading program with a high degree of consistency and putting individualized support for reading as a clear priority over the Student's other subjects, with data collection being done on a biweekly basis to make certain that the people providing his program were doing their job. [Testimony of C. Kaufman] Dr. Kaufman did note that Aucocisco's very small class size and "strong teacher: student ratios would make it better positioned at this point than most resource-level public school settings to help address the academic anxiety and related avoidance-based coping strategies" the Student developed in response to his years of academic struggles. [P-603] Regardless of placement, Dr. Kaufman strongly recommended that the Student's specialized instruction in

¹³ Ms. Neidlinger also noted the Student had very high anxiety when she tested him.

the coming years center heavily on highly structured, evidence-based methodologies like those he is currently receiving to help him develop literacy skills, and that these should be a priority over regular curriculum coursework. [P-603]

- 63.** The Mother called Jayne Boulos in the fall of 2012 to observe the Student at Aucocisco. Ms. Boulos agreed to do this as a favor, and therefore did not charge for her services. [Testimony of J. Boulos] She observed the Student on November 20, 2012. [P-736] Ms. Boulos watched the Student and a classmate play educational card games with the teacher. Although the Student was engaged in the games, he had notable difficulty pronouncing the words on the cards during the Memory game, which required him to match two cards with the same sounds in the words. When he switched to the Go Fish game, he continued to have difficulty reading short vowel sounds, and often mispronounced them. His behavior, however, was more like his xx grade than xx, when he had been more engaged in his learning. [P-736, testimony of J. Boulos] He seemed to feel successful in this setting.
- 64.** At the resolution session held on October 30, the District offered the Mother another opportunity to choose from the three xx schools in Portland if she were unhappy with the Student's peers at Lincoln. [S-4, testimony of S. Pray] The District also offered an amended IEP that included additional services of social work once per week for 30 minutes and social skills training once a week for 30 minutes, along with goals for these services. [S-19, S-21, testimony of S. Pray] The Mother rejected this proposed IEP in favor of keeping the Student at Aucocisco.

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Mother:

The 2010-2011 IEP, as developed and implemented, failed to provide the Student with FAPE. The Student's Wilson reading program was compromised, first by placing him in a class with a new instructor and a 1:6 teacher to student ratio, then by having half his program delivered by an educational technician who was not Wilson-certified, and the other half by a teacher who omitted significant elements of the program. Consequently, the Student failed to make meaningful progress. He began xx grade as a first percentile reader and ended xx grade as one. Despite the Student's lack of progress, Portland neither made changes to the design of the program nor considered other methods to instruct him. The Student also became the target of a group of students who taunted him throughout the year. His stress and frustration from this began to interfere with his desire to be in school and engage in learning.

Although the Mother had high hopes that the Student's transition to xx school would improve his educational experience, the Student's xx grade year, 2011-2012, proved to be even worse. The IEP called for five reading lessons per week, yet the Student received only two sessions in September and early October, and then four sessions per week due to other scheduling problems. Again, he failed to make meaningful progress in learning to read and remained in the first percentile. His learning experience was made worse by an increase in taunting and bullying that had started in Riverton School. This raised his anxiety and stress levels and made it difficult for him to learn. Dr. Kaufman's testing showed that the Student's literacy-related achievement scores dropped in all areas. This cannot possibly be considered meaningful benefit under any definition of the term.

The appropriate remedy for a FAPE deprivation is compensatory relief designed to restore the affected student to the levels of skill and function he would have attained if proper

services had been delivered in a timely fashion. The appropriate remedy here should take the form of reimbursing the Mother for the costs she has incurred and will continue to incur in obtaining appropriate compensatory services unilaterally through the Aucocisco School, and by awarding such future educational services as may be appropriate to complete any compensation owed to the Student.

A reimbursement remedy is plainly available in a case like this one. Under the IDEA, it does not matter whether a parent first purchases the necessary services for the student, then seeks reimbursement, or commences a due process hearing seeking future compensatory services for the student. Both situations are functionally equivalent under the law. The federal regulations provide that a hearing officer may require the school department to reimburse parents for the cost of private school enrollment if the hearing officer finds that the school did not make FAPE available to the child in a timely manner prior to enrolling the student in private school.

Lastly, the Mother is entitled to reimbursement when a hearing officer determines that the IEP offered by the school would fail to provide the student with an appropriate education, and the private placement chosen by the parent is proper under the IDEA. The IEP offered for xx grade was essentially the same as the xx grade IEP. The plan was to remove the Student's literacy services and provide them in a small group System 44 class taught by Ms. Galli, who was not a certified special educator. System 44 is not a multisensory program.

To qualify for reimbursement, the parent must only show that the unilateral placement was capable of conferring educational benefit. The parent need not show that the placement is the only one or the least restrictive. Aucocisco easily satisfies the liberal test set forth in the IDEA. As the Student is making progress there, it is appropriate as compensatory education.

B. Brief summary of the position of the District:

The burden of proof in this case rests with the parent. That means that the Mother must

prove that the past programming failed to meet IDEA standards, that the proposed IEP for xx grade failed to meet IDEA standards, and that the relief she is seeking is appropriate.

When determining whether an IEP and placement is appropriate, decisions of the IEP team must not be viewed in hindsight, but in terms of what was reasonable at the time the IEP was promulgated. Furthermore, the IEP must be judged as a unitary whole. A program is not inappropriate simply because at the end of the day it did not achieve the level of progress expected.

The Student's xx grade program met all IDEA standards. The Student's report card, which constituted 84% of his program, shows what must be considered meaningful success. Portland provided specialized literacy programs at all times, and used the methods that everyone agreed were appropriate. The Student's movement from level 4.2 to level 7 with a 90% success rate, even if not strictly adhering to the Wilson 100% standard, still shows real progress. Although the Mother will argue that Ms. Johnson did not implement the program properly, there was no evidence to support a contention that the method she used to deliver the Wilson program, which she used to keep the Student motivated, was a failure to implement the program. While the Mother's witness, Dr. Kaufman, could not explain why the Student would move back to Wilson level 2 in xx grade, he noted it might reflect the Student's poor working memory, but did not attribute it to Ms. Johnson's method of delivery or to any deficits in the Student's IEP.

The IEP team did extensive preparation work in planning for the Student's transition to xx school, and the Mother was very happy about this. The Student had IEP goals in reading and writing, individualized Wilson instruction in a 1:1 setting, which was very important to the Mother, and support in the regular education classroom. It appears undisputed that the Student's program for this year was reasonably calculated to provide him with educational benefits.

Although the year did not go as planned, the school worked hard and successfully resolved the

Student's peer issues. In trying to accommodate the Mother's wishes, however, the Student's program was thrown into a state of upheaval. Nonetheless, despite these decisions, the Student made progress in his Wilson reading and System 44, and he benefitted from his regular education program, earning grades ranging from 86-100. [S-201] To the extent that the gains varied or were not as hoped, this was not because of school failures but because of decisions made by the Mother to upend the program over the course of the year. There is a long line of court precedent establishing that a school should not be found liable for a failure to provide FAPE when any such failure is the result of choices made by the family.

Although student harassment can on occasion be the basis for ruling against a school district in an IDEA proceeding, there was no evidence that the Student was bullied to such an extent that rendered him unable to benefit from his educational programming. Dr. Kaufman would not testify that this occurred. Lincoln dealt effectively with the Student's peer interactions. These problems were not the only source of the Student's anxiety issues, which were equally caused by issues related to his father.

The Student's proposed IEP for xx grade continued to have appropriate goals for reading, spelling and writing, and was structured to address identified needs. If the Mother had simply given the program a chance, there is no reason to think it would not have been effective. The hearing officer should uphold this IEP as being reasonably calculated to provide the Student benefits in the least restrictive environment. If placement in a less restrictive setting can provide an appropriate education, placement in a more restrictive one would violate the IDEA's mainstreaming requirements.

The District does not believe there were FAPE violations, so no remedy is needed. If the hearing officer finds otherwise, the First Circuit has twice distinguished between a parent's reimbursement claim and a parent's claim for compensatory education. If an IEP offered is

appropriate for a given year, then it would be wrong to order reimbursement for placement costs incurred that year as a type of compensatory education for an earlier year. This is because the family failed to meet the reimbursement standard for the current year, and the law therefore requires denial of the claim for that year. An out of district placement is inappropriate if the IEP offered by the public school is appropriate.

C. Discussion of Issues:

As a preliminary matter, the U.S. Supreme Court has held that in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005). Therefore, the Mother must prove that the evidence supports her position on the issues before the hearing officer.

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The IEP must be developed in accordance with the procedural requirements of the IDEA and designed to provide an eligible student with an educational program that is "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In this case, there was no issue of procedural violations, so the focus will be on the Student's programming. In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP." 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law sets a fairly modest goals of an appropriate, rather than an ideal, education, and that these are

terms of moderation. The IDEA does not require that the benefit conferred must reach the highest attainable level or the level needed to maximize the child's potential. 998 F.2d 1083, 1086 (1st Cir. 1993). The *Lenn* court also stated that the IEP must be designed to target, "all of a child's special needs, whether they be academic, physical, emotional, or social." 998 F.2d 1083, 1096.

In considering whether an IEP is reasonably calculated to provide educational benefits, the hearing officer must look at the student's individual potential. *Rowley*, 458 U.S. at 203. Because there is no "bright-line rule on the amount of benefit required of an appropriate IEP," each situation requires a "student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 248 (3^d Cir. 1999) (holding that the "meaningful benefit" standard requires "significant learning" (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3^d Cir. 1988))).

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

1. Did Portland violate state or federal special education law by failing to provide the Student with a free, appropriate public education for the 2010-2011 school year?

There was no dispute that the Student's IEP for xx grade contained the essential elements of personalized instruction in the areas of need, support services, present levels of performance, measurable annual goals, methods by which progress towards those goals will be measured, and an explanation of the extent to which the Student would participate with non-disabled students. There was no objection to the IEP at its conception, and the evidence shows that the special education and support services were designed to enable the Student to benefit educationally.

The Mother's complaint is not with how the IEP was drafted, but with how the Student's Wilson reading program was delivered, and she disputes whether the Student really made the progress reported. This was due, in part, to the fact that the Student's xx grade Wilson instructor found "holes in his learning" and began working with him at Wilson level 2. She also thought the Student had a bad year because the Mother did not like the Student's regular education teacher and thought this teacher did not understand her son, and because of the problems he encountered with a few of his classmates.

There was no dispute among the various experts and evaluators, including Dr. Kaufman, Dr. Etzweiler and Ms. Boulos, that Wilson was an appropriate reading program for the Student's needs. For several years, the Student had made rather slow but steady progress receiving individualized Wilson instruction for five hours each week with a Wilson certified instructor and educational technician support. By the end of xx grade, he was reading at Wilson level 4.2, and during the summer, he worked on Wilson levels 4.1 through 4.3 with another instructor. The Mother was very pleased with this instruction. The Student consistently remained about 1 ½ to 2 grade levels below his peers in reading and writing and was consistently in the first percentile as a reader. There was no evidence that this was due to a failure of the Student's programming, but

was due to his complex learning needs. He has mixed dyslexia, which makes learning difficult enough, but his learning needs are more challenging because of his mixed, complex working memory problems. Consequently, despite his average intellect, not only was it difficult for him to learn reading, writing and spelling, but it was difficult for him to retain what he learned. This pattern of difficulty retaining literacy instruction first became apparent when the Student entered xx grade. It is therefore no surprise that he had difficulty making greater progress than he made. The fact that he steadily progressed in the same manner through xx grade showed that he was receiving meaningful educational benefit. There were a number of measures discussed in the facts above that showed that he was making the level of progress appropriate for him, including the Rigby measure, progression through the Wilson levels, AIMSweb and his grades. Dr. Kaufman recommended using AIMSweb prompts for measuring progress regularly to demonstrate efficacy. [Testimony of C. Kaufman]

The District tried hard to be responsive to the Mother's concerns. When the Mother objected early in the school year to the Student having a new Wilson teacher in a group of five or six students, the District responded with the challenging task of arranging to have Ms. Johnson become the Student's teacher in a 1:1 setting. Ms. Boulos observed Ms. Johnson working with the Student and did not report seeing anything wrong with her teaching methods. To the contrary, she thought Ms. Johnson provided a supportive environment. Dr. Kaufman acknowledged that the Student had difficulty holding onto the progress he made. Although Dr. Kaufman thought it was very unusual for a student to really be at Wilson level 7, then return to level 2, he did not know what to attribute this to, other than the Student's working memory and long-term memory problems. There was no evidence that Ms. Johnson's approach to delivering the Student's program amounted to a deprivation of FAPE. To the contrary, she used her judgment to keep the Student motivated and enhance his success.

The assistant principal and other school officials dealt with the Student's problems interacting with a few of his peers, and the Mother enthusiastically thanked Mr. Turner for his work. The Student's peer problems did not appear to interfere with his learning.

For these reasons, the IEP offered and implemented for the Student's 2010-2011 school year was reasonably calculated to provide the Student with educational benefit and did provide educational benefit.

2. Did Portland violate state or federal special education law by failing to provide the Student with a free, appropriate public education for the 2011-2012 school year?

Essentially the same analysis is applied to the Student's xx grade year, although the facts are quite a bit different.

As with the xx grade IEP, there did not seem to be any issue that the IEP contained the essential elements required by law. The Student's IEP contained programming similar to what he had received in the past, providing Wilson instruction daily with a certified instructor. Ms. Boulos thought the reading program for xx school was "solid." As noted above, all of the Student's evaluators agreed that Wilson was an appropriate program for the Student. The Mother did not contest the IEP, and in fact felt great about the program the IEP team put together. As with the 2011-2012 school year, the Mother's challenge to this IEP was primarily with its implementation.

By Ms. Scally's own admission, the Student did not work very well with her for various reasons and made little progress, but he did make measurable progress working with Ms. Galli in System 44. The evidence supports a conclusion that the Student made only minimal progress in reading during xx grade. This conclusion is not based on the fact that he ended xx grade on Wilson level 7 and Ms. Scally began working with him in xx grade on Wilson level 2. Even the Mother's witnesses did not conclude that this was the fault of his programming in school. During

the summer between xx and xx grade, the Student worked with Ms. Harkins on level 4, so it was reasonable to conclude that he was performing at that level and above with Ms. Johnson in x grade and there were other indications that he was making progress with her. Although there were various theories put forth attempting to explain why he returned to level 2, and certainly the Student's poor memory was a contributing factor, these were only theories and there was no solid evidence to explain this.

There were other issues with the implementation of the IEP, some of which were attributable to the District and others to decisions made by the Mother. As the District points out, there are cases in which schools have not been found liable for the failure to provide FAPE when such a failure is the result of choices made by the family. *E.g., Loren F. v. Atlanta Independent School System*, 349 F. 3d 1309 (11th Cir. 2003) (Even where FAPE is not provided, courts can deny reimbursement if a parent's own actions frustrated the school's efforts to provide FAPE.)

The evidence shows that the Mother is a caring and zealous advocate for her son, which is very important and admirable. On the other hand, it shows that she was very demanding, blaming, and insistent upon doing things her way when it came to the Student's education. The evidence demonstrates that the District once again tried its best to please the Mother and address her concerns. Some of the Mother's requests and demands, however, actually obstructed delivery of services under the IEP. For example, she chose to have the Student receive half of the Wilson instruction called for in his IEP rather than drop band, and she had his Wilson instruction stopped in late January 2012, choosing instead to have Ms. Scally work with the Student on missed school work. She insisted on 1:1 instruction for Wilson and System 44, even though this delayed the Student from being in and benefitting from the System 44 program. She pulled him out of many classes because she did not like his teachers, and refused to deal with guidance counselor Peg Lane after Ms. Lane expressed her view that the Student was responsible for some

of his problems with peers. These decisions hindered the delivery of reading instruction and mainstream instruction to the Student, and were certainly a significant factor in his lack of progress during the months of September, October, February and March. After giving the System 44 program about two weeks, during which time the Student told Ms. Boulos that the program was going well and that he was learning again, the Mother decided it was a waste of time¹⁴, but she would not allow him to receive the program in the way it was meant to be delivered. Even the Student was upset that his mother was “micromanaging his education.”

On the other hand, the District gave no viable explanation for why it could not deliver Wilson reading to the Student for the amount of time required in the IEP. The Student never received Wilson five days a week, even after he dropped band. This was certainly a factor in his slow progress and was the solely District’s responsibility.

Another complicating factor was the Student’s anxiety experienced in zz grade, which was noted to be primarily the result of a combination of being bullied in school, his father’s move to South Carolina, and learning about his father’s criminal history. Lincoln was responsible for dealing with the first of these, and did an admirable job. The administration at Lincoln was very responsive and proactive to the bullying problems, and the actions it took resolved them. While no student should be subjected to bullying, it remains a problem in schools, and the important thing is how the school addresses it.

Setting aside the problems brought about by the District’s attempts to make the changes the Mother wanted, the District nonetheless failed to implement an important part of the Student’s IEP by not providing the Student with his reading instruction five times a week, as required in his IEP. This was a factor in his minimal progress that year. As learning to read was

¹⁴ There were initially problems with System 44 that the Mother points out in her April 12, 2012 email [P-396], but these problems did not exist when the Student had System 44 delivered in the group with Ms. Galli, which was the way the program would have been delivered, had the Mother not insisted it be done her way.

the most important part of his program, failure to provide the level of services required in the IEP amounts to a deprivation of FAPE.

3. Was Portland's IEP developed for the 2012-2013 school year reasonably calculated to provide the Student with a free, appropriate public education?

The evidence supports a conclusion that the Student could get the programming needed to provide him with FAPE in a public school setting. Dr. Kaufman's testimony and other evidence support a conclusion that the 2012-2013 IEP was reasonably calculated to provide the Student with FAPE. The Mother did not dissent to any portion of this IEP while she was part of the team drafting it.

Dr. Kaufman testified that he could not conclude that Portland had fallen short on its programming and thought the Student could get the programming he needed in a public school setting. As discussed in Fact #44, this could be done by implementing an evidence-based, highly structured reading program with a high degree of consistency and putting individualized support for reading as a clear priority over the Student's other subjects, which the xx grade IEP provides. It improves upon the xx grade IEP by making available specially designed instruction in ELA daily, daily support in science and other academic support, plus consultation with a literacy specialist. Dr. Kaufman thought System 44 was a very good program, with his caution being that computer-based reading programs are problematic for distractible¹⁵ students because they may not have the discipline to stay focused in the same way that a teacher can. The Student was doing very well with System 44, however, and was making good progress in his short time using that program with Ms. Galli. Under the 2012-2013 IEP, the Student would have continued to work with Ms. Galli on reading. The 2012-2013 IEP also offered enhanced writing goals and programming with provisions for measuring progress in both reading and writing.

¹⁵ Although there was evidence of the Student's distractibility, there was no determination by any of the professionals who evaluated him that he had attention deficit disorder.

Although the Student's anxiety abated towards the end of xx grade, Dr. Kaufman's September 2012 evaluation discussed the Student's anxiety and how this had an "exacerbating impact on his ability to engage effectively in academics." He did not state that this prevented the Student from receiving FAPE. The addition of social work services offered at the resolution session in October would help the Student deal with any anxiety as well as any literacy-related anxiety and avoidance-based coping strategy with literacy tasks identified by Dr. Kaufman.

Dr. Kaufman did note that because of Aucocisco's very small class size and strong teacher to student ratios, it was probably in a better position than most public school special education programs to address these anxieties. It is clear from the evidence that the Student is thriving at Aucocisco, but he continues to struggle with reading, and it will probably remain a challenge for him in the foreseeable future. There was no measurable evidence of how much progress in reading the Student was making there, and Ms. Neidlinger noted that most of his progress was in reducing anxiety and gaining confidence. [Fact #61]

As discussed above, the IDEA does not guarantee the best possible option for a student. It merely promises appropriate, rather than ideal education, and an adequate, rather than optimal, IEP. Because Portland offered the Student an IEP for xx grade that was reasonably calculated to provide him with FAPE in the least restrictive setting, specifically at one of its public xx schools, that is the appropriate placement for the Student.

4. If Portland failed to provide FAPE during any of these years, what remedies are appropriate under the Individuals with Disabilities in Education Act?

Because the District denied the Student FAPE during 2011-2012, he is entitled to a remedy. When a student is deprived of 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 possible remedy.

The First Circuit case of *Pihl v. Mass Dep't of Education* is recognized authority in this Circuit that, “a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time.” 9 F.3d 184, 198 (1st Cir.1993). The First Circuit explained, “[t]he nature and extent of compensatory education services which federal courts have recognized varies according to the facts and circumstances of a given case.” *Pihl*, 9 F.3d at 188, n. 8. For a student who has been denied appropriate services in the past, an award of compensatory educational services is designed to place him in the same position he would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). Although an IEP need only provide some benefit, “compensatory awards must do more – they must compensate.” *Id* at 525. 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.”) 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.

The District argues that compensatory education cannot, as a matter of law, take the form of tuition reimbursement. Courts and hearing officers have awarded reimbursement for unilateral placements as compensatory education remedies in a variety of cases in Maine and elsewhere, most recently in the Maine case of *Regional School Unit No. 51 v. John Doe, et al.*, No 2:12-cv-29-DBH (Nov. 29, 2012) (“*RSU No. 51*”) See also *New Paltz Central Sch. Dist. V. St. Pierre*, 307 F. Supp.2d 394, 395-96 (N.D.N.Y. 2007); *Sanford Sch. Dep't.*, 47 IDELR ¶ 176 (MSEA 2006); *School Admin. Dist. No. 22*, 43 IDELR 268 (MSEA 2005). In *RSU No. 51*, the Federal Magistrate rejected the same argument the District makes here. Magistrate Rich wrote

It is true, as the District points out . . . that “when [the First Circuit] has used the term ‘compensatory education,’ it has usually assumed that the remedies available involve prospective injunctive relief, which would not encompass tuition reimbursement . . . Yet,

in none of the three First Circuit cases relied on by the District, *Ms. M., Diaz-Fonseca*, and *Mr. I* – did the First Circuit ever hold that tuition reimbursement is unavailable as a matter of law as compensatory education.

RSU No. 51 at 61-62. Magistrate Rich goes on to point out that IDEA statutory and regulatory provisions do not bar an award of tuition reimbursement as compensatory education, and that the broad equitable power afforded to hearing officers and courts to remedy IDEA violations counsels against a narrow view of compensatory education. *Id.* In *RSU No. 51*, the Magistrate upheld the hearing officer’s award of tuition reimbursement for a future year as compensation for the denial of FAPE in earlier years.

A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the local school department. Under the holding of *Florence County*, parents must demonstrate that the public school did not provide a free, appropriate public education, *and* that the private school placement is proper, which means, “education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Florence County*, 510 U.S. at 11. The First Circuit Court of Appeals cited the *Florence County* decision as holding that this issue is viewed more favorably to the parents than the question of whether a residential placement is required in order to provide FAPE. *Mrs. B. v. Rome Sch. Comm.*, 247 F.3d 29, 34 n.5 (1st Cir. 2001). It is not necessary that this unilateral placement be in the least restrictive setting. The Third Circuit Court of Appeals noted that imposition of the least restrictive environment requirement on such a placement “would vitiate the parental right of unilateral withdrawal,” and that “the test for the parents’ placement is that it is appropriate, and not that it is perfect.” *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 84 (3d Cir. 1999). Furthermore, the placement need not “meet every last one of the child’s special education needs.” *RSU No. 51* at 68.

In crafting an appropriate remedy, it is important to consider the extent of the District's role in the Student's failure to receive FAPE. As discussed above, Portland's failure was not offering the Student a schedule in which he could have Wilson reading five days each week, as set forth in the IEP. Much of his lack of progress was due to the Mother's decisions, and it does not seem fair to penalize Portland for its many efforts to try to appease the Mother by changing the Student's program at her request in ways that prevented the Student from receiving reading instruction. Therefore, the Student is entitled to reasonable compensation for his educational losses during that part of the 2011-2012 school year when the reading program in his IEP was not fully implemented due to the fault of Portland. This shall consist of the following: (1) payment for six weeks of attendance at the Aucocisco School academic intensive summer program for three hours each day, or an equivalent program of the Mother's choosing¹⁶; (2) two additional weeks of tutoring in literacy for two hours a day at a maximum rate of \$50 per hour; and (3) transportation to this program, either provided in the form of mileage reimbursement or transportation provided by the District. As noted above, Aucocisco is a special purpose school for students with learning disabilities where each student receives individualized education programming in a highly structured environment, and it provides students with a wide range of academic support. As Dr. Kaufman testified, the program at Aucocisco is providing the Student with intensive reading instruction to help him make progress in decoding and fluency skills, and his skills in these areas were improving. Attendance at this or an equivalent summer program will help the Student make additional gains and prevent him from losing newly acquired skills.

The District is ordered to take remedial action set forth in section V below.

¹⁶ If the Mother chooses an equivalent program, the cost may not exceed the Aucocisco program cost.

V. ORDER

1. Portland did not violate state or federal special education laws by failing to provide the Student with a free appropriate public education for the 2010-2011 school year.
2. During the 2011-2012 school year, Portland violated state or federal special education law by failing to provide the Student with a free, appropriate public education when it did not completely implement that portion of the Student's IEP requiring it to provide him with reading instruction five times a week.
3. Portland is ordered to pay for the cost of attendance for six weeks at the Aucocisco summer academic intensive program for three hours each day or an equivalent program, plus the cost of two hours per day of literacy tutoring for two weeks at a rate not to exceed \$50 per hour, plus mileage reimbursement or transportation provided to these services as compensatory educational services for the failure to provide FAPE for the 2011-2012 school year. The Mother shall provide bills for these services to Portland so that Portland may pay for these services directly, unless the parties mutually agree to a different payment arrangement.
4. Portland did not violate state or federal special education laws by failing to provide the student with a free appropriate public education for the 2012-2013 school year.

SHARI B. BRODER. ESQ.
Hearing Officer