

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

**August 15, 2013**

**13.068H— Parents v. Regional School Unit #38**

**REPRESENTING THE FAMILY:           Richard O’Meara, Esq.**

**REPRESENTING THE DISTRICT:       Eric Herlan, Esq. and Hannah King, Esq.**

**HEARING OFFICER:                   Shari Broder, Esq.**

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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 June 12 & 14, and July 2, 3, and 8, 2013, one day of which was at the offices of Drummond Woodsum in Portland, ME, and the remaining were in Augusta, ME. Those present for the entire proceeding were the Mother, the Father, Attorney O’Meara, Ryan Meserve, Director of Special Education, Attorneys Herlan and King, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Grandmother	Student’s Grandmother
Marcia Hunter, Ph.D.	Psychologist, Evaluator
Barbara Melnick	Director of Aucocisco School
David Chatalbash, LCSW	Social Worker at Aucocisco School
Susan Holinger	School Psychologist
Jannifer McNaughton	Special Education Teacher
Lew Collins	Former Director of Special Education, RSU #38
Sonja Morrison	Educational Technician
Hope Lord	Special Education Teacher
Kelly Brooks	Educational Technician
Victoria Gabrion	School Nurse
Catherine Jacobs	Principal, Maranacook Middle School
Dru Johnston, LCSW	Social Worker, Maranacook Schools
Elisabeth “Lisa” Kinney	Board Certified Behavior Analyst
Ryan Meserve	Director of Special Education

All testimony was taken under oath.

**I. PROCEDURAL BACKGROUND:**

On April 24, 2013, the Mother and Father (“Parents”) filed this hearing request on behalf of their son (“Student”). On May 29, 2013, a prehearing conference was held at the Department of Education in Augusta, Maine. Participating in the conference were: the Mother; Richard O’Meara, Esq., counsel to the Parents and Student; Eric Herlan, Esq., and Hannah King, Esq., counsel to RSU #38 (“District” or “RSU”); Ryan Meserve, special education director; and Shari Broder, hearing officer. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 1277 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1199 pages of exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of five days. Both parties requested to keep the hearing record open until July 31, 2013 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 38-page memorandum and the Parents submitted a 70-page memorandum. The parties further agreed that the hearing officer’s decision would be due on August 15, 2013.

**II. ISSUES:**

1. Was the Student’s IEP and programming implemented by the District from April 2011 through June 2012 reasonably calculated to provide him with a free, appropriate public education (“FAPE”) in the least restrictive environment?
2. Was the IEP and program for the 2012-2013 school year, as designed and implemented by the District, sufficient to offer the Student a free, appropriate public education in the least restrictive environment?
3. Has the District failed to offer the Student an IEP that is reasonably calculated to provide him with a free, appropriate public education for the 2013-2014 school year?

4. Does the hearing officer have jurisdiction over the Parents' retaliation claim against the District? If so, did the District retaliate against the Parents by restricting the Mother's access to the school building and staff?

5. If the hearing officer determines, in her conclusions about the issues listed above, that the District violated the IDEA, what remedy is appropriate? This includes whether the Student is entitled to payment for the costs of his placement at the Aucocisco School, or any other form of compensatory education

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") and younger twin sisters in Readfield, Maine. He is currently eligible for special education and related services as a student with Other Health Impairments (OHI).
2. Although the Student began xx in Massachusetts, the Student and his family moved to Mapleton, Maine part way through the school year.
3. In xx grade, the Student experienced difficulty with reading. He initially received Title I reading and math assistance. [Testimony of Mother] Because his math skills were good, those Title I services ceased, but the Student continued to receive assistance with reading. The Student liked school because he enjoyed learning new things. [S-419]
4. The Student was unhappy in xx grade, the 2006-2007 school year. His teacher requested that the Student be evaluated, as he could only read four sight words. Although there was no finding that the Student had a processing disorder, his teacher provided numerous classroom accommodations, including reading and scribing. [Testimony of Mother] In May of 2007, the Student took the TerraNova achievement test, earning a total nonverbal score of 92 and a total verbal score of 50. [P-1]
5. Because the Student was smart but had difficulty with reading and writing, his parents took him for a full neuropsychological evaluation with Christine Fink, Ph.D., in December of

2007, during xx grade. Dr. Fink concluded that the Student had a complex information processing, learning and emotional profile, with concerns dating to when he was cc years old.

[S-892]<sup>1</sup> Dr. Fink’s cognitive testing, the WISC-IV, had the following results:

Verbal Comprehension Index	106
Perceptual Reasoning Index	117
Working Memory Index	104
Processing Speed Index	91
General Ability Index	113

On the WIAT-2 achievement test, the Student’s scores were a math composite of 120, with a high of 131 on math reasoning, a reading composite of 92, and a written language composite of 90. [S-896] Dr. Fink considered the Student’s low average scores in sight word recognition, phonemic decoding, reading fluency and spelling in conjunction with his borderline impaired performance on a measure of phonological processing, and weaknesses in visual scanning, rapid symbol recognition and memory for abstract visual stimuli, and concluded that this data supported both a Reading Learning Disorder and Written Expression Learning Disorder. Maternal family history was significant for anxiety, Attention Deficit Disorder, bipolar disorder, alcohol abuse and reading difficulties, while the paternal side had a history of anxiety with features of obsessive-compulsive disorder, depression, attentional difficulties, substances abuse and other unspecified mental health issues. [S-895] In addition to the learning disabilities, she diagnosed the Student with Attention Deficit Hyperactivity Disorder (“ADHD”), combined type, Developmental Coordination Disorder, Generalized Anxiety Disorder and Depressive Disorder, NOS. [S-892, 896] She did not think the data supported any disorder on the Autism spectrum.

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<sup>1</sup> Dr. Fink’s 2009 evaluation states that in 2007, the Student was receiving special education services under the exceptionality of Other Health Impairment, due to his ADHD diagnosis. [S-894] There was no other evidence to support this, and other evidence indicated that he was not identified until after Dr. Fink’s evaluation.

6. During xx grade, the Student was found eligible for special education services under the category of Other Health Impairment (OHI). He received pullout time for reading and writing with a special education teacher whom the Mother did not like. [Testimony of Mother] The teacher reported that the Student would not cooperate or do his work.
7. In xx grade (2008-2009), the Student's teacher read to him. This teacher noted the Student's strong math skills, advanced vocabulary and ability to get his point across on tests and comprehension questions. [S-894] Additionally, the Student was very preoccupied with daily routine. When he did not get his way, he would argue and try to make deals with the teacher in an attempt to get his way, or shut down and choose not to participate or interact. [S-894] Although the Student received pullout services for reading, the Mother did not think he was making gains. The Student said that reading and writing were painful for him. [Testimony of Mother] At some point, the Parents withdrew the Student from special education services because they did not like his teacher. [Testimony of Mother]
8. In June 2009, Jolayne Mathers, a speech clinician, observed the Student during literacy in the regular education classroom. Ms. Mathers concluded that the Student had difficulty remaining on task for adequate periods, and required frequent redirection and prompting. [S-854, 894] He spent much of his independent time off task, and at the conclusion of the activity, most of his classmates were at least a step and half ahead of him. He had more decoding errors and word recognition difficulties during oral reading than the majority of his classmates, and his writing was simplistic with several misspellings. [S-854, 894]
9. On August 3, 2009, just before the Student entered xx grade, Dr. Fink again evaluated him. She found that the Student no longer exhibited symptoms of depression, and with positive supports, was making gains in self-esteem, stress tolerance and academic risk-taking. [S-906]

She did point out, however, that he had significant features of tension, physiological reactivity, somatic complaints, worry and nervousness that continued to support a diagnosis of Generalized Anxiety Disorder. This condition likely contributed to his difficulties with transitions, departures from routine and his propensity to withdraw or shut down when things did not go as he had planned. Dr. Fink noted that the Student excelled in classes that did not require a lot of reading and writing, and found it much easier to concentrate and attend during those subjects. He was more off task and distractible when engaging in challenging subjects like reading and writing. [S-893] Dr. Fink pointed out that while medication has helped, the Student continued to have difficulties with sustained attention, easy distractibility and independent work completion. He did better with one-on-one (“1:1”) instruction with his more challenging subjects, and could become overwhelmed and frustrated when performing more challenging academic tasks. [S-893] Dr. Fink administered a number of assessments and reviewed the Student’s records. On the WISC-IV test of intellectual abilities, the Student scored as follows:

Verbal Comprehension Index	104
Perceptual Reasoning Index	123
Working Memory Index	102
Processing Speed Index	91
General Ability Index	116

The Student’s achievement test scores placed him at a xx grade level for math, in the 93<sup>rd</sup> percentile, but his spelling and written expression were only at a second grade level, and his composite score for written language was only the third percentile. His reading composite score was a 93, in the 32<sup>nd</sup> percentile, and he was below grade level in word reading and pseudoword decoding. [S-902] Dr. Fink concluded that the Student’s overall abilities were in the high average range, his nonverbal, visual-perceptual abilities in the superior range, and

verbal comprehension and working memory in the average range, but his processing speed, particularly with tasks requiring rapid visual-motor skills, were on the lower end of the average range. [S-904] She noted that reading, spelling and written expression were “nonautomatic and quite effortful” for the Student, and felt that he needed direct instruction in these areas. His assessment data and academic achievement scores supported a reading learning disorder and written expression learning disorder. [S-905] She made a number of recommendations, including that a literacy specialist oversee the Student’s reading and writing programs, that he needed intensive practice to commit sight words and irregular words to memory, and that fluency training be a daily component in his specialized reading instruction. The Student functioned best in a low stimulation environment with a structured, predictable routine. [S-908]

10. At an IEP team meeting on September 3, 2009, the team determined that the Student was eligible for special education under the category of Specific Learning Disability (“LD”). [S-888-891]
11. During the fall of the Student’s xx grade year, Deb Dimmick conducted an assistive technology assessment, recommending: (1) access to a quiet place to compose writing; (2) a computer with Dragon Naturally Speaking (“Dragon”) voice recognition software; and (3) Kurzweil text-to-speech software. [S-870-877]
12. That fall, Phyllis Fischer, Ph.D., conducted an assessment of the Student’s reading skills for the Mapleton school department. She recommended that the Student begin with 45 minutes each day of direct instruction, and that he needed to write as much as possible. [S-881]
13. Candace Bray, a learning disabilities and literacy education specialist, evaluated the Student on December 18, 2009. Dr. Bray found the Student to be very articulate and engaging, with

keen observation skills, a strong vocabulary and good communications skills. [S-854]

Although he was a motivated learner, he was also easily distracted and needed redirection.

Dr. Bray made numerous recommendations for helping the Student with spelling and writing, including using Lexia software, reading books at his level and interest on a regular basis, and providing him with books on tape to allow him to engage in rich dialogue around books. [S-859]

**14.** Following these evaluations, the IEP team in Mapleton amended the Student's IEP in January of 2010. The IEP included 1.5 hours of direct instruction in reading, writing and spelling in the special education setting four days per week, and 30 minutes one day per week. The IEP also called for three 45-minute occupational therapy sessions per month to assist the Student with fine motor coordination and sensory processing. [P-8, 11] There were also many accommodations to help the Student with reading and writing issues, organization and attention, including "scribing/oral responses," not being penalized for "spelling/grammar/organization," use of a laptop with Kurzweil and Dragon software, and positive reinforcement. [P-11-12] The Student did very well in school under this IEP, but also because he connected well with his teacher. He received straight As and was "really learning." [Testimony of Mother]

**15.** In August of 2010, the Mother abruptly left the Father, telling her three children that they were taking a late summer vacation, and moved with the children to Readfield, Maine. [Testimony of Mother] Because this move was done quickly and suddenly, there was only a short time to prepare the Student for school. She enrolled the Student in Maranacook Middle School ("Maranacook") without the Father's knowledge. [S-690]



- 16.** Because the Student was to attend Maranacook for xx grade, the Mother made an appointment to speak with school principal Cathy Jacobs. The Mother brought the Student's evaluations with her, and explained that the family was going through a very difficult time because of the divorce, and this was very hard for the Student. [Testimony of Mother] Ms. Jacobs assured the Mother that it was not a problem and that the school had a perfect team for the Student.
- 17.** Due to his parents' separation and subsequent divorce, the Student lived in four different locations during the first six months in school, and this resulted in adjustment challenges for him. [S-420, Testimony of Mother]
- 18.** At the time of the Student's transfer to Maranacook, Lew Collins was the director of special education. It was Mr. Collins' practice to review new student files, try to get an idea of who the student is, and see whether the evaluations match the IEP. Mr. Collins reviewed the Student's IEP, and saw several accommodations that did not seem appropriate in light of the evaluations and his age. Mr. Collins wanted to do some additional testing, with parental permission. Mr. Collins, Principal Jacobs, and school psychologist Sue Holinger questioned whether the Student needed the reading instruction and many accommodations in his IEP, and questioned whether the Student's evaluations supported his LD designation. There was no dispute about the Student's eligibility as OHI. [Testimony of L. Collins]
- 19.** The first day of school on September 1, 2010 was difficult for the Student. He wanted to leave his class because his math teacher asked him copy something from the board, and he did not want to do this. [Testimony of Mother] He asked to go to the Wellness Center ("Wellness"), an office that included school nurse Vicki Gabrion, guidance counselor Gwen Mohlar, a "cot room," bathroom, and an administrative staff person. [Testimony of V.

Gabrion] It was a very busy place where Ms. Gabrion tried to make students feel welcome. The Student met with her and talked about his move from the Presque Isle area, and how hard it was to leave his school and friends there. [S-503] The Student returned to Wellness several times that day to see Ms. Gabrion, and seemed more comfortable with each visit. Ms. Gabrion thought they hit it off right away, and the Student enjoyed their conversations, laughing at times. [Testimony of V. Gabrion, S-503] He was also tearful on occasion, and said he had a lot of worries and wanted to speak with the guidance counselor. He expressed concern that his mother would not want him to share some information with the school, so Ms. Gabrion encouraged him to ask his mother before doing so. [Testimony of V. Gabrion, S-503]

**20.** On the second day of class, the Student wanted to go to Wellness because he thought he was unable to do what the teacher asked of him, but his teacher, Wendy Shaw, would not allow him to leave the classroom. [Testimony of V. Gabrion] To get out of class, the Student rubbed the skin on the back of his hand raw by scraping it with the metal part of his pencil eraser. He was then permitted to go to Wellness and saw Ms. Gabrion. [Testimony of V. Gabrion] The Student's skin looked raw, but not too bad, so Ms. Gabrion put some Bacitracin and a Band-Aid on it. The Student reported that his mother gave him permission to discuss whatever he wanted, and he shared with Ms. Gabrion how difficult it was to live in his aunt's camp, about financial hardships and other problems arising from his parents' impending divorce. [S-503] Ms. Gabrion arranged for the Student to speak with Ms. Mohlar, the guidance counselor, and the Student visited with her at length.

**21.** On September 7, 2010, Ms. Shaw sent a memorandum to the remainder of the Student's teaching team, as well as Ms. Gabrion, Principal Jacobs, and Dru Johnston, the school social

worker. [S-848] She expressed the difficulty she had interpreting the Student's existing IEP from Mapleton, noting contradictions within the document, questions about it, and that there was no indication of progress on the objectives. She wrote that the Student was clearly under a tremendous amount of stress, and that she would like to see Mr. Johnston start working with him. It was her opinion that academics were secondary to the Student's emotional well-being and self-image. She also acknowledged that it was her class that was causing the Student anxiety. [S-848] Mr. Johnston agreed that the Student's emotional needs outweighed his academic support needs.

- 22.** On September 16, 2010, the Student's IEP team met and discussed the Student's program. Although the Mother was concerned about the District's request to do cognitive testing, as she thought this was intended to disqualify him for services, she signed consent for occupational therapy ("OT") and cognitive testing, and a classroom observation. [S-832, 829, Testimony of Mother] Some of the school employees, however, were concerned about the Student being found eligible under the category of LD based solely upon one subtest, and Ms. Holinger had been trained never to use a single subtest to determine eligibility. [Testimony of S. Holinger] The team essentially kept the same program of direct instruction and supportive services in place as the Student had in Mapleton, but reduced his total direct instruction by 15 minutes per week, from 6.5 to 6.25 hours, eliminated 30 minutes of in-class special education consultation per week, and added 30 minutes of social worker services per week. [S-832, 826] Hope Lord provided direct instruction in reading, writing and organization, and all of the Student's English Language Arts ("ELA") was in the special education setting. Dru Johnston provided social work services. [Testimony of Mother] The Student's annual goals were the same as the Mapleton IEP, except that the fluency goal was

removed. The team also reviewed the Student's classroom accommodations, and agreed to remove a number of them that the team felt were no longer age appropriate. They eliminated things like the Student's fidget object and disco seat, private work area, positive/concrete reinforcement, assignment notebook, visual schedule, all materials read aloud, audio text for content areas, and Kurzweil software. [S-832] The Mother agreed with the change in accommodations, except for the elimination of the Kurzweil, which she felt the Student still needed. The rest of the team, however, felt that given his reading on the DRA was at 95% accuracy for xx grade, and that his academic scores for reading were average except for reading multi-syllabic words, Kurzweil was no longer appropriate, and could possibly result in the Student regressing in his reading skills if he chose to use the Kurzweil instead of reading things himself. [Testimony of L. Collins, H. Lord, S-806] The team added accommodations including: allowing the Student to complete work in the resource room as needed, using a clipboard and chosen postural position for writing, having a teacher sign the Student's planner after each class, teacher verification of accuracy of answers orally as needed, and materials would be read aloud at the Student or teacher's request. The Student continued to have use of Dragon software. The team also agreed to meet in 45 days to review the evaluation results.

**23.** The following day, Hope Lord sent all the Student's teachers and the school principal the minutes of the IEP team meeting because she wanted to be sure all of the teachers were aware of what was discussed. [Testimony of H. Lord] Because Ms. Lord's special education classroom was divided, she could work with students on one side, and there was a small room with a glass door for working separately. She met with the Student in that room for his direct instruction. [Testimony of H. Lord] Although she originally started working with the

Student in a group with two other students, this was too distracting, so she worked with him one-to-one. The Student arrived with some books from his prior school, so Ms. Lord started with those. The Student did not like to write or use his writing program. [Testimony of H. Lord] He had Dragon and initially asked to use Kurzweil as well, but he did not want Ms. Lord in the room while he was using it. Ms. Lord allowed him to use Kurzweil at the beginning of the year to help him transition, but then he stopped asking to use it. [Testimony of H. Lord] The two of them seemed to work well, but the Student refused to do his fluency and writing. As soon as Ms. Lord tried to step things up to help the Student meet his goals, he would seek to go to Wellness or see the school social worker. Unlike in his other classes, the Student did not ask to leave and go to Wellness often, although these requests became more frequent as the year went on. [Testimony of H. Lord]

- 24.** The Student continued to visit the nurse often, as he found comfort in his relationship with her. Sometimes, his teachers did not permit this, as they were concerned that he was not really sick and was missing too much class time. For example, on September 23, 2010, Ms. Shaw would not allow him to go to Wellness, and instructed him to do his lesson. The Student persisted in asking Ms. Shaw and arguing with her. [S-795] Ultimately, she gave him the choice of leaving without permission or doing his work. The Student left and went to Wellness, but was sent back to class within five minutes. [S-794-795]
- 25.** The Student often complained of stomach aches, and although Ms. Gabrion noted these complaints in her log, she did not believe he always had the symptoms he complained of. [Testimony of V. Gabrion, S-503] She knew from experience that physical complaints were often a manifestation of something else, and thought this was the case with the Student, and that he was also using physical complaints to get out of class and get what he wanted. Ms.

Gabrion found the Student to be bright, interesting, articulate and good at conversing with adults. He worried a lot, however, both about school and home, and did not want to join in activities with other children. [Testimony of V. Gabrion] The Student trusted Ms. Gabrion, and she tried to be a bridge between him and the teachers, whom he did not trust.

**26.** Ms. Gabrion did serve as a bridge between the Student and his teachers, checking up on concerns he had and finding some of them were unfounded. [S-504] She also learned that although the Student's teachers offered him accommodations in his IEP, he often refused them, possibly because he was embarrassed to have other students know that he needed them. [S-504] Teachers and Mr. Johnston were concerned that the Student was missing too much class to go to Wellness, and that by waiting for Ms. Gabrion in the Wellness waiting area, the Student was overhearing confidential information about other students. [Testimony of V. Gabrion, D. Johnston, S-504] While the faculty wanted to place limits upon the Student's Wellness visits, the Mother asserted that he should be permitted to leave class immediately if he looked distressed or ill. On the other hand, she complained that the Student was missing too much class time. Ms. Gabrion was becoming less comfortable with the Student's use of Wellness, and felt he was taking advantage of her. [Testimony of V. Gabrion]

**27.** On October 25, 2010, the Student began psychotherapy with Neil B. Colan, a psychologist. Dr. Colan noted that the Student had "significant and longstanding" challenges that included "difficulties in the areas of learning, behavior, mood, family and social interactions." [P-696] During the Student's 18 months of therapy, he worked with Dr. Colan on reducing his negative mood, increasing use of positive coping skills, and increasing the Student's positive connection with his father. [P697]

**28.** Sue Holinger, a masters level certified school psychologist, was asked to evaluate the Student. Before conducting the evaluation, she contacted Dr. Phyllis Fischer, stating the Student has a “complicated IEP that seems a bit like ‘over-kill’ given what appears to be a marginal LD.” [S-841] Ms. Holinger asked for Dr. Fischer’s insights, adding, “He seems to have some legitimate weaknesses,” but his problem at the time was that he was refusing to do work and feigning “psychosomatic complaints to avoid work, mostly writing.” [S-841] Dr. Fischer agreed about the “overkill,” adding that she thought that the Mother had serious mental health issues, was very aggressive and negative about the Student’s abilities. [S-1009] Dr. Fischer recalled things like when she complimented the Student, the Mother downgraded his skills and abilities, even if the compliment was about something nonacademic. [S-1009] Dr. Fischer’s own experience working with the Student was that he was “pleasant, interesting, positive and willing to try anything I asked, though he expressed some anxiety about whether his writing and spelling would be adequate. I found him just delightful when Mom wasn’t there. He’s intelligent, verbal, and very knowledgeable.” [S-1009] She saw evidence that the Mother influenced the Student’s thinking about his own abilities in a negative way. Dr. Fischer explained to Ms. Holinger that although the Student struggled, he was not as disabled as his mother thought he was, but in her opinion, the previous school department thought it was easier to provide services than fight with the Mother. [Testimony of S. Holinger]

**29.** Ms. Holinger administered to the Student selected subtests of the WISC-IV and the Woodcock Johnston tests of cognitive ability, and the Comprehensive Test of Phonological Processing (“CTOPP”). She then prepared a report dated October 29, 2010. [S-744] The results of the WISC-IV subtests were average scores in most areas, high average scores in

matrix reasoning and picture concepts, above average scores in similarities, and a superior score of 130 in block design. The Student scored a low average score of 88 on the CTOPP rapid naming test, and below average of 75 on the WISC-IV coding test. His reading scores were clustered around the xx to xx grade level, with his comprehension above grade level and his spelling and decoding below average. [Testimony of S. Holinger] Ms. Hollinger concluded that the Student did not meet the criteria necessary for the exceptionality of learning disability. [S-749] It was her opinion that the Student had a performance deficit rather than a skill deficit.

**30.** The IEP team met on November 18, 2010 to review Ms. Holinger's testing. At that time, the Director of Special Education determined that the Student did not meet the legal eligibility criteria for special education as a student with a learning disability, but was eligible under OHI. [S-708] This was because only one of the Student's subtest scores on the tests was below average. [S-747] The Mother and her advocates disagreed, so there was no consensus on this issue. The Mother was concerned that the Student had dyslexia and dysgraphia, and that he would not get the right services if viewed as a student with attentional issues. [Testimony of Mother] Despite the change in exceptionality, no change was made to the Student's programming. The team decided to keep all of the services in place while they got to know the Student better. [Testimony of S. Holinger] All of the goals of the Mapleton IEP were carrier over as well, except the fluency goal.

**31.** Social worker Dru Johnston worked with the Student to transition, get to know people, and tried to be available when the Student needed him. Initially, the Student needed support with problem solving, as he had difficulties interacting with the staff and complying. [Testimony of D. Johnston] Mr. Johnston and the Student got along very well, and the Student regularly



met with him outside of their weekly appointments, although this was often to avoid going to the next scheduled activity rather than for support. [Testimony of D. Johnston] Sometimes, Mr. Johnston met with the Student during his visits to Wellness. Mr. Johnston felt that the Student's family life would be a stressor for any student, with the multiple moves, starting school in a new district and his parents' separation. This was on top of the stress that typical middle school students experience. [Testimony of D. Johnston] The Student talked with Mr. Johnston about his dissatisfaction with his math teacher, Ms. Shaw, who the Student reported was not teaching enough math, and made him read things and answer on paper, which the Student felt was a violation of his accommodations. [S-688] Mr. Johnston found the Student very animated and enjoyed spending time with him, but the Student avoided conversation on topics of substance. Although the two got along exceptionally well at first, as school became increasingly more problematic for the Student, he became more suspicious of Mr. Johnston when he asked the Student personal questions, so Mr. Johnston did not push those subjects. [Testimony of D. Johnston] Mr. Johnston spoke with the Student's father, who was concerned about the Student's emotional state. Over time, Mr. Johnston concluded that the Student was having emotional responses out of emotional needs, rather than emotional responses out of educational needs.

**32.** On December 14, 2010, the Student received his first report card and earned straights As. [P-38] His progress report from this period noted that the Student only used his typing software once. He was encouraged to learn to type because he did not want to write. [S-638] Also, he was unwilling to do timed readings, although he did one fluency reading at the end of the trimester and read 103 words in 1 minute with 97% accuracy. [S-640] He met three of his reading goals and his regular ed assignment work completion goal. Additionally, the Student

made adequate progress on four of his other instructional goals while making inadequate progress on four of them. [S-638-651] His lack of adequate progress was largely due to his refusal to write in front of his classmates, as he was embarrassed to do so.

**33.** The Mother requested an IEP team meeting to review the Student's program, which was held on January 13, 2011. [S-693] The Mother was concerned that the Student was reading less and did not like school. She wanted the Student's special education eligibility to be based upon multiple disabilities. [Testimony of Mother] The Mother was concerned that the Student was going to Wellness a lot and not learning. She requested a meeting with the social worker to discuss her concerns, and wanted the Student's teachers to write notes in the Student's planner about his assignments, explaining any work that needed completion so the Mother would know what the Student needed to do to complete his assignments. [S-695] The IEP team made no changes to the Student's IEP.

**34.** On January 26, 2011, the Father emailed school principal Cathy Jacobs, and copied Mr. Johnston and Ms. Hayden, explaining that he and the Mother were going through a very difficult divorce, and that his lack of involvement in the Student's education was due to the divorce, not to a lack of interest. [Testimony of Father, S-690]

**35.** On March 3, 2011, the Student visited Ms. Gabrion and told her that he was very stressed about something he could not talk about, but wanted to because he thought it would help him get what he wanted. He added that he had to be careful with his therapist because they can trick you into telling them things. [S-504-505] He was also very suspicious of anything his teachers suggested. Ms. Gabrion felt the Student was set on sabotaging his education at any cost, although she could not discern why. [Testimony of V. Gabrion] Mr. Johnston tried to impress upon the Student that the school nurse's purpose was to provide first aid to people, to

which the Student responded that he would do anything to see the nurse, including make himself sick or bleed. [S-680]

- 36.** The Student continued to miss a great deal of time from class and refused to do work that was challenging for him. On March 25, 2011, with the Mother's permission, Ms. Gabrion spoke with Dr. Colan and shared the difficulties the Student was having in school. Dr. Colan asked to meet with members of the staff to discuss this. [S-681] Dr. Colan thought the Student needed to follow basic protocols like other students in the school, and have disciplinary consequences for walking out of class without permission. [Testimony of D. Johnston] To try to provide the Student with the support he needed while maximizing the amount of time he spent in class, Dr. Colan devised a plan for the Student, with input from Ms. Gabrion and Mr. Johnston. [P-41, testimony of V. Gabrion, D. Johnston] It provided ways for the Student to calm himself, including use of the small room in Ms. Lord's classroom. There was also a protocol for dealing with the Student's work refusal. This involved being sent to Dean Gardner in the behavioral room, contacting the Mother if the Student refused to go, but letting Mr. Gardner manage and assess the situation if the Student complied. The plan also placed limits on the Student's ability to go to Wellness, and he was given two tickets per week to see Ms. Gabrion to use at his discretion, although he could always go to Wellness if he were actually ill or injured. [P-41, Testimony of D. Johnston] The Student was not permitted to go to Wellness if Ms. Gabrion was unavailable, and the visits were time limited. The Mother agreed with this plan for the most part. [Testimony of H. Lord, Mother] There was a definite reduction in the Student's problem behaviors immediately after implementation of this plan. [Testimony of D. Johnston, S. Holinger]

- 37.** In April of 2011, the Student began treating at Kennebec Behavioral Health for medication management. [P-722, testimony of Mother] His treating psychiatrist was Teresa Hermida. The Student was taking Concerta for ADHD, and continued this with Dr. Hermida. The Student was refusing to visit with the Father. [P-741] Around this time, Toby Hollander was assigned to be *guardian ad litem* for the Student and his siblings during the Parents' divorce.
- 38.** The Student's second trimester grades declined, although he was not taking all of the same classes as he did during the first trimester. His math grade dropped from A- to C+, and he had two new classes, Modern History Through Music, in which he earned a C+, and Cells, where he earned a B. His teacher, Cathy Hayden, wrote that he did fine. [P-40] The Student earned an A in geography.
- 39.** The Mother requested another IEP team meeting, which was held on May 12, 2011. [S-666] At this meeting, the Mother stated that she did not think the Student's needs were being met at school, that his behavior plan was not adequate, and that he needed more incentives and structure. She asked that the Student be found eligible for special education under the category of multiple disabilities. At this meeting, Ms. Hayden and Ms. Lord discussed how the Student often refused to engage in instruction and would either try to go to Wellness or claim he could not do a task in which he has already demonstrated proficiency. [S-667] The District proposed developing a behavior plan to address the Student's work refusal and other compliance issues. The team agreed to do this within 30 days with input from Dr. Colan, the Student's private therapist. [S-667, Testimony of L. Collins] Ultimately, however, this plan was not prepared.
- 40.** On June 6, 2011, the Father corresponded with math teacher Karen Laverty and Mr. Johnston, telling them that he had virtually no contact with the Student, although he was

fighting that in the divorce court, and that Toby Hollander was appointed by the court to determine what was in the Student's best interest and might contact school personnel. [S-661]

- 41.** At the end of the school year, Mr. Johnston reported that initially he met with the Student two or three times a week at the Student's urging, and helped him transition away from going to Wellness to avoid classes. This transition had gone well. [S-652, Testimony of D. Johnston] Mr. Johnston reported that the Student was very interactive and engaged during their meeting times, and that he was doing very well on his IEP social work goal. The Student's progress on other IEP goals was mixed. He met his regular education assignment completion goal in three out of five classes, but did not make adequate progress on his writing goals and some of his remaining reading goals due to work refusal or going to Wellness. [S-639-651] The Student's work improved a lot at the end of the year, which Mr. Johnston attributed to the Mother setting specific expectations for the Student following their last IEP team meeting. [Testimony of D. Johnston, S-617] The Student's grades were mostly Cs with two Bs. [P-44] Math teacher Ms. Lavery noted that the Student was making a better effort towards the end of the year, and Ms. Hayden remarked that the Student did well when he worked on his assignments. Mr. Collins observed that, given the Student's cognitive profile, he hoped he would do better, but he did fine under the circumstances. [Testimony of L. Collins] Data collected by the school showed a notable decrease in the Student's work refusal. [S-592]
- 42.** When the Student began xx grade on September 1, 2011, he had many of the same teachers, except that Jannifer McNaughton was his special education teacher. Ms. McNaughton, a certified special education teacher, had experience working with students with behavior

challenges, having worked at Spurwink and she started the behavior program at Wiscasset Middle School. [Testimony of J. McNaughton] She prepared for working with the Student by meeting with Mr. Collins, reviewing the Student's file, all reports and the IEP, and meeting with Hope Lord to learn what worked. Mr. Johnston emailed Ms. McNaughton with ideas for motivating the Student. [S-617] She wanted to track the Student's work completion and other challenging areas, and she contacted board-certified behavior specialist Lisa Kinney, who set up a form for monitoring behaviors. [Testimony of J. McNaughton] Ms. McNaughton also attempted to set up a meeting with the Student before school started to ease him in, given his anxieties the previous year. Ms. McNaughton called the Mother and arranged a time to meet with the Student, but the Student and Mother did not show up. [Testimony of J. McNaughton, Mother] She also set up the Student's annual IEP team meeting.

- 43.** This year, the school schedule was such that the Student had twice as much ELA time, which meant he had reading and writing daily, broken up into two classes, one of which was in the regular education classroom. The Student immediately refused to attend these classes. [Testimony of J. McNaughton] Ms. McNaughton assured the Student he would do his own writing assignments, not what the other students had to do, but the Student did not feel comfortable with this, and refused to go to class. Ms. McNaughton tried to persuade him to attend the class until his IEP team meeting on September 13, and assured him he would do the same work as if he were in the resource room. Nonetheless, he refused to go to class. His Mother supported this and would not allow him to attend school as long as his schedule required him to attend a mainstream ELA class. [Testimony of J. McNaughton, Mother, P-47]

44. On the morning of the September 13, 2011 IEP team meeting, Mr. Johnston spoke on the telephone to *guardian ad litem* Toby Hollander, who also attended the IEP meeting. Mr. Hollander explained that the Mother obtained a lot of accommodations for the Student from his previous school because she was “a bully, persistent and over protective.” [S-596, Testimony of D. Johnston] Mr. Hollander thought the Student had “way too much power” in the home, and that the Mother drilled the Student about what he should say to the school staff. [Testimony of D. Johnston] He reported that Dr. Hermida, the Student’s psychiatrist, was concerned that the Student had an “emerging disorder.” [Testimony of D. Johnston, S-596] It was Mr. Hollander’s opinion that the Mother needed help with boundaries, and that the Student would be better off outside of his family environment, suggesting a placement such as the Maine School of Science and Mathematics in Limestone, as the Student was “a genius, real genius with puzzles.” [S-596] Mr. Hollander also thought a psychological evaluation of the Student was a good idea.
45. At the September 13, 2011 IEP team meeting, the participants agreed to increase the Student’s service time so that he would not have ELA in the mainstream classroom. His IEP called for writing, reading comprehension and fluency 5 times a week for 60 minutes and organization 5 times a week for 60 minutes with Ms. McNaughton. [S-588] Ms. McNaughton provided 1:1 instruction, and used Spellography and Megawords, a phonics-based program, as well as the Lexia online reading program which works on fluency, comprehension and vocabulary<sup>2</sup>. [Testimony of J. McNaughton] Under the new IEP, the Student would continue to receive OT services once a month for 30 minutes and social work services weekly for 30 minutes. [S-588] He had OT goals involving learning keyboarding skills so he could do

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<sup>2</sup> Ms. McNaughton also testified that she tried using the SPIRE program with the student, which works on phonological awareness, fluency, vocabulary, handwriting and comprehension. [Testimony of J. McNaughton]

writing assignments without having to hand write them, goals for organization and assignment completion, writing sentences and paragraphs properly, improving his reading and fluency, plus a behavioral goal to increase his awareness and ability to verbally discuss personal levels of emotional discomfort. [S-578-587] The Mother stated that she felt the Student would work better if he had a positive incentive plan. Mr. Collins thought it would be very helpful to have Tim Rogers, Ph.D., a preeminent Maine child psychologist, do an evaluation of the Student to help craft a behavior plan, and that this could fill out the missing piece in completing a behavior plan that would work for the Student. [Testimony of L. Collins] The Mother was hesitant to sign the consent form, as she was concerned that Dr. Rogers was “the school’s doctor.” Mr. Collins asked the Father to sign the form, noting that he only needed one parent’s signature. The Mother then signed a consent to evaluate form, thinking that she had to do so in exchange for the additional direct instruction in the Student’s IEP. [Testimony of Mother, S-599]

- 46.** Shortly after the IEP team meeting, the Mother then sent an email to Mr. Collins saying that she felt his tactics for getting her to sign the evaluation consent form were “highly unprofessional and nothing short of sneaky and manipulating.” [S-553] Mr. Collins was very surprised that the Mother was so resistant to having the Student evaluated by someone who he believed could provide insight into the Student’s work refusals and other behavioral issues. [Testimony of L. Collins] Dr. Rogers had offered to see the Student very soon and get a report done by October. The Mother would not agree to Dr. Rogers until after she had the opportunity to ask the Student’s psychiatrist and case manager about Dr. Rogers, so Mr. Collins provided her with Dr. Rogers’ contact information. [S-553, Testimony of Mother, L. Collins] As of October 3, 2011, Mr. Collins had not heard back from the Mother. [S-565] Mr.



Collins proposed going to mediation to “get all of our mutual issues and concerns on the table and seek some resolution to them.” [S-546] The Mother and Father agreed. At the Father’s suggestion, Mr. Collins invited Toby Hollander to attend. [S-536, 543] Mr. Hollander was interested in attending, and wrote to Mr. Collins asking for his patience in working with the Parents while they were entrenched in their “high conflict, high stakes” divorce litigation. [S-548] Mr. Hollander also suggested that the District consider using Dr. Ross Greene’s collaborative problem solving (“CPS”) approach with the Student. Some of the staff had been using this approach in school, and Mr. Hollander suggested looking at the Student through the CPS lens. He mentioned that he had received the Mother’s email to Mr. Collins, which Mr. Hollander characterized as a “blast” back, adding that he had communicated with the Mother regarding her use of inflammatory language and how it was not helpful to her cause. The Mother periodically berated school personnel and spoke to them in a disrespectful manner, sometimes swearing at them. [Testimony of J. McNaughton, S-521, P-96]

47. In the Student’s reading class, Ms. McNaughton paired the Student with another student who had similar IEP goals. This worked well for several weeks, until one day, the Student told Ms. McNaughton, “I’m not doing this anymore. You can’t trick me into reading these words.” [Testimony of J. McNaughton] Ms. McNaughton tried other strategies, some of which were more successful than others. Whenever the Student refused work, Ms. McNaughton offered him a different option, but often, the Student would continue to refuse. Sometimes, he would be disruptive with verbal outbursts, and sometimes with physical actions. At times like these, the Student would usually remove himself from Ms. McNaughton’s classroom and go to Dean Gardner’s room. Mr. Gardner ran a behavior

program, and had a quiet place for the Student to sit and have some “chill down time.”

[Testimony of J. McNaughton] Sometimes, the Student would call the Mother, and on occasion, the Mother would yell at Ms. McNaughton, berate her and swear at her. If the Student did not want to do something, he tried to engage Ms. McNaughton in what she described as a never-ending circular banter. The Student also had the option of using a “Vicki pass.” The Student had Dragon on his computer and could either use it in a quiet corner of the classroom or go into a small room to use it. The Student elected to use it only three or four times in the small room, and would not use it in the main classroom because he did not want to look different. [Testimony of J. McNaughton]

- 48.** On October 12, 2011, the Student was taking the NECAP test. He wanted to start the math section first because he was good at math. Kelly Brooks, who was proctoring the test for him, acknowledged to the Student that he was very good at math, but explained that he needed to do the tests in order, and could not skip around. The Student argued with her, then did the reading section, but refused to do the math because he had to do the reading section first. He wanted to leave the room, and told Ms. Brooks, “I can and will do anything I want to and I know it.” [Testimony of J. McNaughton, S-557] Ms. Brooks told the Student he needed to stay, as he could not go into the hallway and disrupt the other students. He nonetheless left the classroom through the teacher’s room, went to Mr. Gardner’s room, and called his mother. [Testimony of J. McNaughton] The Student declared to the Mother that he left his test, and did not know why, but was not testing with Ms. Brooks. [S-439, testimony of J. McNaughton] The Mother asked whether Ms. Brooks was making the Student feel bad about himself, to which he replied, “yes.” The Mother then asked to speak with Ms. McNaughton, and said the Student was not refusing to take the test, that they were not listening to him, and

that he would take the test, but not with Ms. Brooks. [S-439] Although the test needed to be proctored, the Mother wanted the Student to be in a room alone when he took the test. Ms. McNaughton explained that the Student had refused to take the tests with her the previous day, even with all of his IEP assessment accommodations.

**49.** When the Student and the Mother saw Dr. Hermida on October 18, 2011, the doctor's notes state that the Mother was still opposed to the Student having a psychological evaluation because, "given current issues, [the Student] won't do his best on that testing." [P-833] The doctor's notes also say that the Student was refusing work every day at school.

**50.** On October 20, 2011, Mr. Johnston emailed Mr. Hollander to express his concerns about changes in his relationship with the Student. The Student was resisting personal emotional discussion over any issue of consequence. Mr. Johnston was not asking about family relationships, but about the Student's education, peer relationships, preferences, frustrations, and the like. [Testimony of D. Johnston, S-530] He was concerned that the Student was moving away from reality and discussion of emotional issues, and that his resistance was becoming more sophisticated and entrenched. Mr. Johnston felt that the Student's learning disability issues had taken a significant back seat to his clinical emotion and mental health disabilities. It was Mr. Johnston's impression that the Student needed significant support with his mental health, and that it was not simply a school-based anxiety. [S-530]

**51.** After agreeing that they needed to work together on the Student's behalf, the Parents sent an email to the *guardian ad litem* on October 25, 2011, asking him not to make recommendations regarding what he thinks the schools should be doing or playing an active role in developing the curriculum or behavior plan for the Student. [S-519]

- 52.** Around this time, the Mother sent an email to Mr. Johnston and others stating that she was receiving calls from the Student daily within the first hour of school, and that things had gotten completely out of hand. [S-522] That same week, the Father sent an email to Principal Jacobs saying “things have completely broken down at this point and virtually no one at school contacts [the Mother] when issues with [the Student] arise. [S-510] The Father also expressed his concerns about the Student’s mental health. Mr. Johnston spoke with both Mr. Hollander and the Father on October 26. They asked for his perspective on how to approach the Student’s resistance. [S-516] Mr. Johnston was concerned and frustrated by the Mother’s “alienating behaviors” and her lack of accountability for her actions. He felt that he had to use his clinical judgment, regardless of the Mother’s wishes, and Mr. Hollander and the Father were receptive to his explanation of recent events. [Testimony of D. Johnston, S-516]
- 53.** The Parents met with the principal on November 2, 2011 to discuss the Student. [S-497] During the meeting, Principal Jacobs suggested that the Student no longer attend regular education classes because of his distracting behavior, and spend his regular education time in Mr. Gardner’s room. The Parents rejected this, and said that the school staff needed to be more sympathetic and supportive of the Student’s emotional needs. [Testimony of Mother] The Mother added that there was no need for a psychological evaluation, as they had all the information they needed. She also alleged that Mr. Hollander was not in support of an evaluation. [S-497, Testimony of L. Collins]
- 54.** On November 6, Mr. Collins wrote to the Father that because it did not appear that either parent was willing to pursue a psychological evaluation at District cost to examine the Student’s school refusals and inability to engage in the general curriculum, he hoped that either parent would permit the District to conduct a Functional Behavioral Analysis (FBA),

and explained what this was. The District had an excellent person on staff, Lisa Kinney. [S-495, Testimony of L. Collins] He asked the Father to let him know whether he was willing to pursue either of these assessments. The Father responded that he agreed it could be a valuable tool, but the Parents had concerns. Mr. Collins did not think the Parents were interested in obtaining this additional information. [Testimony of L. Collins]

**55.** Although the mediation session requested by Mr. Collins was originally scheduled for November 9, 2011, conflicts in his schedule resulted in it being postponed, it could not be rescheduled until November 29, 2011. At mediation, the parties agreed to the psychological evaluation, and the District offered three psychologists from whom the parents could choose. The Parents chose Dr. Rogers. The parties also agreed that Dr. Colan would consult with the District to figure out the best approach to the Student's work refusals, and that the Student's outside agency case manager could observe him in the classroom. [Testimony of L. Collins, P-48] Following the psychological evaluation, the IEP team would revisit the Student's language arts instruction. The District also ensured that the Student's accommodations would be followed. [P-48] Particularly, the Parents were concerned that they were not aware of the Student's homework assignments, so an accommodation was revised to require that "teachers will ensure that assignments are accurately documented in planner."

**56.** The District contacted Dr. Colan shortly after the mediation to use his consultation services in the hopes of improving the Student's educational experience. Dr. Colan met with Mr. Johnston and Ms. Holinger, and they agreed that he should observe the Student in class and meet with the teaching team. [S-451]<sup>3</sup> Dr. Colan's opinion was that the Student was a belligerent child, and that it was "hard for people to put up with his crap." They discussed the

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<sup>3</sup> Although this document was dated February 5, 2011 and 1/6/12, Mr. Johnston testified that the January 2012 date was correct. See also S-687.

need for a plan when the Student refused to do as instructed. Dr. Colan said the Student was oppositional, defiant and disruptive, impulsive with some learning problems. He felt the Student was “a true product of his family dynamics and home life.” [S-451, Testimony of D. Johnston] Dr. Colan and the Student used the word “beligefiant” to describe the Student’s behavior. He also observed that the Student was persistent in pushing people’s buttons, and that he and the Mother were “two peas in a pod.” Dr. Colan also discussed maintaining compassion for the Student. Ultimately, Dr. Colan thought the Student manipulated the Mother to intervene on his behalf and empower him to not be accountable for his conduct. [S-451, Testimony of D. Johnston] Dr. Colan’s consultation dated January 24, 2012 was based upon his discussions with staff at Maranacook, a classroom observation of the Student, a review of the previous behavior plan and his clinical knowledge of the Student and his family. [S-449]

- 57.** On December 1, 2011, Sonja Morrison, an educational technician, was working with the Student in his map skills class. She asked him to get out his paper and open his laptop, but he did neither. [S-485] Ms. Morrison moved the students away from him so that they could work without distraction, but the Student tried to engage them anyway. Ms. Morrison then explained that she asked the Student to get his paper and laptop out, but that he was not being asked to write or type. [S-485] The Student asked to go to Mr. Gardner’s room, and Ms. Morrison would not let him go there. He kept leaning over his desk and asking to go to Mr. Gardner’s or Wellness, or seeking a reason why he could not go, and said, “Ignoring me is not going to help.” Ms. Morrison would not give him a reason, and asked him to sit down, but the Student continued to ask her until he finally left the classroom without permission. [S-485] Ms. Morrison had been told previously not to tell the Student to use his scribing

program in front of other students, which is why she simply asked him to take out his laptop. Ms. Morrison did nothing to embarrass or humiliate the Student. [Testimony of S. Morrison]

The Student then spoke with Mr. Gardner, Ms. McNaughton and Mr. Johnston. He was given the option to return to class, but refused. The Mother was then called, and came to school to meet with Ms. Jacobs and Mr. Gardner.

**58.** The Mother's boss did not like her having to take calls at work from the school and having to leave work to pick up the Student. She was fired from her job on December 16, 2011.

[Testimony of Mother]

**59.** Mr. Collins and his staff made several attempts to obtain from the Parents the signed consent form for Dr. Rogers' evaluation agreed upon at mediation. [Testimony of L. Collins, S-463, 467, 474, 472] The Mother signed it on January 6, 2012. [Testimony of Mother, S-453-456]

**60.** The Student's progress reports from the first trimester showed inadequate progress on all of his goals [P-75-83] The Student's grades were all Ds, except that he failed Map Skills because he did not do his work. His poor grades were the result of refusing to do his work. His math teacher, Ms. Hayden, noted that the Student did well when he passed in his work. [P-51]

**61.** Some time in January 2012, the Student became upset after seeing his name on a piece of scrap paper used for class. The teacher had been told not to use scrap paper with any student names on it. The piece of paper did not reveal any special education information about the Student. [Testimony of Mother, C. Jacobs]

**62.** On January 9, 2012, the Student was refusing to complete any work in the resource room, even with teacher assistance. Because Wellness was unavailable at the time, the Student asked to go to Mr. Gardner's room, which was also unavailable. The Student then requested

to see Mr. Johnston. Ms. McNaughton allowed him to do so, but told him he needed to fill out a pass. The Student grabbed a blank piece of paper instead of a pass and told her this is fine. Ms. McNaughton told him that if he was not going to fill out a proper pass, he needed to make sure his destination was on the paper. The Student refused to do this. She asked him several times to write “to Dru” on the paper, but the Student kept arguing with her, insisting his piece of paper was adequate. Ms. McNaughton told the Student he did not have permission to leave this room until the paper she was permitting him to use as a pass said “to Dru.” The Student insisted he did not need to do this, and left the classroom. The Student received an in-house suspension for his behavior. [P-337]

**63.** On January 25, 2012, Ms. McNaughton emailed the Mother to let her know the District would be conducting NWEA testing that week. [S-447, P-89, Testimony of J. McNaughton] In advance of the testing, Ms. McNaughton spoke with the Student twice, and he was receptive. They discussed choosing the time and place for his test, and allowing the Student to take the math test first, which was his choice. Ms. McNaughton took these steps to avoid the problems the Student had encountered with testing in the fall. [P-89, Testimony of J. McNaughton] The Mother responded that she wished Ms. McNaughton had contacted her in advance, as she could have prepared the Student for this.<sup>4</sup> [P-89, S-447] During second period, the Student refused to take the NWEA test, and asked to use his “Vicki” pass. Ms. McNaughton told him that the nurse was not available until after 10:30 a.m. [Testimony of J. McNaughton] The Student then complained that he was dizzy, but he did not appear so. Ms. McNaughton made him sit down and stay in the room because he claimed to be very dizzy.

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<sup>4</sup> The Mother always believed the Student’s story over that of school staff, which is understandable from a parent’s perspective, but the facts show that the Student was not always truthful, and that he willing to say and do anything at times to get his way. Here, the Mother testified that the Student told her he did not know he was going to have testing that day. This hearsay testimony was countered by credible testimony from Ms. McNaughton to the contrary set forth in this paragraph, the latter of which is accepted as fact.



[Testimony of J. McNaughton, K. Brooks, P-91] Ms. McNaughton then went to Wellness, and right after she left the classroom, the Student left without permission and without a pass and went to Wellness. There was a line of Students waiting to see Ms. Gabrion, so the Wellness secretary instructed the Student to go to his class, and Ms. Gabrion would come and get him. She also asked the Student to get a pass. The Student did not mention feeling dizzy, and he refused to do as instructed. [P-95] The Student then asked to go to Mr. Gardner's room, and did so without permission. When he arrived there, he did not mention being dizzy or exhibit any signs of dizziness. [P-95] As a consequence for his behavior, the Student received a one-day in-house suspension to be served on Monday, January 30. [P-95]

**64.** On January 30, 2012, the Student called the Mother to explain about his in-school suspension. He was with Mr. Gardner at the time, who spoke with the Mother after the Student had done so. The Mother did not understand why the Student was suspended and did not think he knew either. [Testimony of Mother] She became quite upset and said that the Student would not be serving an in-house suspension. She told Mr. Gardner to have the principal call her back within one-half hour, and added that if the Student were made to serve this suspension, she would not go through with the psychological evaluation she had agreed to at mediation, would pull him from school and force the District to tutor him at home.

[Testimony of C. Jacobs, S-433] Ms. Jacobs called the mother back about an hour later, and told her that the Student would be serving his in-house suspension and that they would provide him with his work and any help he needed to complete it. The Mother continued to argue until Ms. Jacobs said she was done arguing and their conversation was over.

[Testimony of C. Jacobs, S-433] About 15 minutes later, the Mother arrived at school, and went to Mr. Gardner's room where the Student was. She was also very upset that the Student

had brought home a low-level reading book that had accidentally been sent to Mr. Gardner's room by a substitute teacher and was not intended for the Student. [Testimony of Mother, Ms. McNaughton, S-430] The Mother held up the book to Mr. Gardner, and said, "Are you fucking kidding me?" [Testimony of Mother] She was verbally combative and swearing at Mr. Gardner in front of the Student.<sup>5</sup> [Testimony of C. Jacobs, S-433] Mr. Johnston met briefly with the Mother, and found her very argumentative and challenging to speak with. She expressed her frustration with the school and various staff in front of the Student, which prompted Mr. Johnston to ask to meet with her without the Student present. [Testimony of D. Johnston, S-436] Mr. Johnston felt the Mother was very disrespectful to the staff and exceptionally dismissive of the Student's behaviors. He thought that her poor display was reinforcing and modeling bad behavior for the Student, encouraging his defiance and belligerence. [Testimony of D. Johnston, S-436] The Mother claimed that Ms. McNaughton's report of the Student's behavior on January 25 was not true, but Ms. Jacobs had verified with Ms. McNaughton on Thursday that the Student had left the classroom without permission. The Mother then went to the school office and used profanity in front of the school secretary and Mr. Gardner. She then spotted Ms. Jacobs in the hall, and began arguing with her about the discipline, saying that the Student did nothing wrong. [Testimony of C. Jacobs, S-433] Ms. Jacobs moved the Mother into her office for more privacy. The Mother insisted on talking with Ms. Brooks, who the Student said was left in charge of him on the day in question. Ms. Jacobs told the Mother she could not do this<sup>6</sup>, and that Ms. Jacobs would talk to Ms. Brooks and get back to her. The Mother ignored the principal, and unknown to Ms. Jacobs, took the Student and went looking for Ms. Brooks. Ms. Brooks was

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<sup>5</sup> The use of profanity is specifically prohibited in Maranacook. [Testimony of C. Jacobs]

<sup>6</sup> Mr. Gardner had also told the Mother that she was not permitted to look for Ms. Brooks. [Testimony of C. Jacobs, S-433]

heading to the staff room when she met the Mother and the Student. As she had not met the Mother previously, she was unsure who she was, and the Mother did not introduce herself, but began asking Ms. Brooks questions. Ms. Brooks assumed it was the Student's mother. [Testimony of K. Brooks, P-93] The Mother was very agitated, raised her voice and was shouting questions at Ms. Brooks. The hallway was crowded with many students, and Ms. Brooks felt this was an inappropriate place for a conversation. The Mother led her by the elbow towards the staff room, where she proceeded to ask Ms. Brooks questions about the incident on January 25. Ms. Brooks said she was very busy and could not remember the details. [Testimony of K. Brooks, P-93] Ms. Jacobs then witnessed the three of them in the staff room and asked them to come to her office. She explained to the Mother that her conduct was totally inappropriate. Ms. Brooks again replied that she could not remember the details. When Ms. Jacobs tried to answer a question, the Mother interrupted, becoming even more agitated. [Testimony of K. Brooks, P-93] Ms. Jacobs then sent Ms. Brooks back to her duties. The Mother became upset that Ms. Jacobs would not allow Ms. Brooks to stay and give her account of what happened. She kept repeating herself. [Testimony of C. Jacobs] Ms. Jacobs offered several times to speak with both Ms. McNaughton and Ms. Brooks about the incident and investigate what happened. This did not appease the Mother, and Ms. Jacobs told her that if she did not calm down, she would have to leave the building. [Testimony of C. Jacobs, S-433] Ms. Jacobs was preparing to call the police if the Mother continued her behavior, but she allowed the Student to return to his regular activities, and told the Mother that if, after her investigation, she determined that the Student left the classroom without permission, he would finish his in-house suspension another day. [Testimony of C. Jacobs] The Mother then left the building.

- 65.** After witnessing some of the Mother's behavior and hearing about it, Mr. Johnston recommended not allowing the Mother to have access to the school until the situation was resolved. He did not feel that she could manage herself well, and was a poor judge of what was appropriate or safe behavior in a school. [Testimony of D. Johnston, S-436] By letter dated January 31, 2012, Maranacook notified the Mother that it had made such a decision. [P-96, testimony of C. Jacobs] The letter explained that Maranacook had received repeated complaints about the Mother's behavior by staff who felt threatened by her, she had yelled at the principal in front of others, and her behavior was unacceptable. [P-96] This was done to protect the safety and security of the students, teachers and staff at the school. The Mother was not permitted to enter the school building, but she could request a meeting in writing, which would be scheduled as soon as possible. [P-96] She was also permitted to attend IEP team meetings and correspond with staff by email. A copy of the letter was sent to the Father.
- 66.** Ms. Jacobs immediately investigated the January 25 incident, but Ms. Brooks could not remember very well what had happened. Ms. McNaughton confirmed the account set forth in fact #64 above.
- 67.** The Student did not attend school on January 31, but the Mother told Mr. Gardner that she planned to home school him, and that if he was given detention, she would not take him to his evaluation with Dr. Rogers. [S-432]
- 68.** On February 3, 2012, Tim Rogers, Ph.D., conducted a psychological evaluation of the Student. Dr. Rogers' evaluation included the Achenbach Youth Self-Report, Child Behavior Checklist and Teacher Report Forms. Both parents and three teachers completed the checklists, with the results indicating that the Student had difficulties with anxiety, mood,

fears and worries, as well as a variety of physical complaints. [S-421] Most of the people completing the report forms also expressed concerns with the Student's attention and focus. Dr. Rogers concluded that the Student met the diagnostic criteria for Generalized Anxiety Disorder, which was consistent with Dr. Fink's 2007 and 2009 evaluations. Dr. Rogers noted that the intensity of the Student's anxiety appeared to have increased at the time of his evaluation, "likely impacted by changes in family structure including parental divorce, frequent moves and integration to a new school environment." [S-422] The Student told Dr. Rogers that he sometimes felt sad and depressed, but that was mostly due to school, and that he did not have problems outside of school, other than some adjustment challenges since his parents separated. [S-420] Dr. Rogers thought that the Student's worries about his school performance caused significant physical symptoms, affected his ability to do classwork, and may have been the underlying cause of the Student's problem behaviors. Dr. Rogers stated that

the Student *perceives* himself to be a student with a learning disability. He ruminates consistently regarding his lack of ability and anticipates failure especially on unfamiliar or challenging activities.

(Emphasis original). Dr. Rogers pointed out that this made it difficult for the Student to do his work, and he developed physical symptoms which aided him in escaping what he perceived as an aversive activity. Although Dr. Rogers noted that there were differing opinions from the Student's evaluators regarding whether he had a learning disability, Dr. Rogers felt it was important that the Student perceived himself to have a disability, and this was tantamount to having one for all practical purposes. [S-423] In other words, the Student did not believe he could do the work, which made him anxious and thus decreased his ability to actually do the work.

Dr. Rogers also diagnosed the Student with ADHD combined type. His recommendations included recognizing that the Student's resistant or avoidant behaviors were driven by anxiety, rather than a willful refusal of adult direction. [S-423] He believed that interpreting the Student's behavior as a result of anxiety would reduce the likelihood that he would be seen as a behavior problem, and advised against sending the Student to the behavior room for work refusal, as it only increased his anxiety. [S-424] Dr. Rogers also recommended teaching the Student anxiety management strategies. Additionally, he felt that allowing the Student to work in a quiet space away from his peers so that he could use books on tape and voice-activated word processing would be helpful, as well as accommodations commonly used for students with ADHD. [S-424]

**69.** When the Student visited Kennebec Behavioral Health on February 29, 2012, the Mother explained that the Student had been out of school for a month, but was doing schoolwork at home. Because the Student was nervous about his work being displayed, he did not want certain work sent to school. He did not work on the literacy assignments that the school sent home. The Mother told the doctor she "never plans to return him to the public school." [P-814] She reported a significant reduction in anxiety and improvement in the Student's mood since he left school.

**70.** While awaiting Dr. Rogers' report, which was mailed to the family by March 2, the Mother kept the Student home from school, reporting that the Student was too ill to attend. [S-341, 343, 344, 375, 377, 385, 391] The Student's outside agency case manager, Christine Lamoreau, contacted Ms. Jacobs and said the Student might be out on an extended leave of absence, and was wondering whether he could get his assignments until he returns to school. [S-370] The District sent home assignments for the Student.

71. On Sunday, March 4, 2012, the Mother wrote an email to the Superintendent, Mr. Collins and Ms. Jacobs stating that the Student had been neither physically nor emotionally well enough to handle school since serving his in-house suspension. [P-177, testimony of Mother]
72. On March 6, 2012, the Mother contacted Aucocisco School (“Aucocisco”) to inquire about the Student’s attendance there. [Testimony of B. Melnick, P-393]
73. In anticipation of the IEP team meeting on March 15, 2012, the Parents were sent a draft behavior plan on March 7, 2012. [S-684] The purpose of the IEP team meeting was to review Dr. Rogers’ and Dr. Colan’s reports and develop a behavior plan and placement for the Student. [S-303] The Mother said she did not think the Student could return to Maranacook because he had suffered humiliation there and was demeaned by the school staff. [S-304] Mr. Collins noted that the two evaluations contained very different approaches: Dr. Colan suggested a more heavy-handed approach that the Student be held more accountable for engagement with school work through a response-cost system that involved detentions and suspensions, while Dr. Rogers said that the school needed to reduce the Student’s anxiety using anxiety management strategies with the Student throughout his day. [Testimony of L. Collins, S-304] Mr. Collins wished he had this evaluation information in October. Had the Parents consented to Dr. Rogers’ evaluation when Mr. Collins first requested it, the report might have been available then. [Testimony of L. Collins] He also recommended a reentry plan for the Student’s return to school. [S-304, S-284] Dr. Rogers stressed a desensitization plan with progressive steps, gradually returning to a full day. The proposed plan contained small progressive steps, accompanied by at least one therapeutic session before moving on to the next step. [S-284] Mr. Collins also suggested that the draft behavior plan be adjusted to remove detentions and suspensions, and to provide for frequent breaks whenever the Student

perceived he was experiencing high anxiety. [Testimony of L. Collins, S-304] The Mother requested a complete neuropsychological evaluation performed by an evaluator of the Parents' choice. As there was no consensus, Mr. Collins determined that the Student's placement would continue at Maranacook, that his social work services would increase to three 30-minute sessions weekly, and his behavior plan would be adjusted to include anxiety management. Mr. Collins also offered a temporary placement for the Student at the District's day treatment program, which Mr. Johnston supported, but the Family did not. [S-305] The focus of this program was to meet the Student's emotional needs and provide behavioral support.

74. On March 23, 2012, Mr. Collins corresponded with the Father about the Student's schoolwork. Mr. Collins said that he did not believe it was appropriate to continue the arrangement of sending work home for the Student, as the school needed to supervise his instruction in order to grant credit. [P-183] He added that he did not realize this would be a long-term situation, but the Student had now been out of school almost two months. Mr. Collins offered to discuss the possibility of tutoring the Student in a neutral location. [P-183]
75. In mid-April, the Mother corresponded with Barbara Melnick, director of Aucocisco, about starting the Student at Aucocisco three days a week and partial school days. [P-412]
76. The Student's draft re-entry plan dated April 17, 2012 said the school was looking for honest agreement and a unified perspective between clinical providers and the Family for getting the Student back into classes. [S-272] Lisa Kinney, a Board-certified behavior analyst with a Masters degree in Applied Behavior Analysis, reviewed this plan and she thought it was an excellent plan to help the Student reenter school. [Testimony of L. Kinney] The plan mentioned off-campus tutoring for the Student, and progressive steps for desensitizing the



Student back into the school environment. The Student's draft behavior plan was also offered for discussion with the Family. The plan was intended to increase the Student's sustained attention in the classroom while reducing unwanted distracting behaviors, and aiding with completion of schoolwork. This plan was restructured based upon Dr. Rogers' opinion that the Student's anxiety was the cause of the Student's problems at school, and that the anxiety had to be addressed for the Student to engage. It also provided positive reinforcements. [S-274-275]

77. The April 24, 2012 IEP team meeting was held to review the draft reentry and behavior plans and continue discussions about placement. [S-248A] The Father stated that the reentry plan needed to target the Student's anxiety triggers. The Father did not feel that school was in and of itself was a trigger, but the Student's fear of humiliation with reading and writing was. [S-249] The Mother said she did not think Maranacook could provide for the Student, as he was quite dysfunctional and hated school. The Parents said that there was an opening at Aucocisco, and they wanted the District to place the Student there at the District's expense. [S-249] Mr. Collins said that the school had a tutor who could begin working with the Student the following week. He added that Aucocisco could not provide anything different or unique that Maranacook wasn't prepared to provide to allow the Student to be successful. The Parents rejected the District's plan, and Mr. Collins rejected the Parents' request for a placement at Aucocisco. [S-249-50] The Father then said that the Parents would be placing the Student there unilaterally and asking for reimbursement from the District. [S-250] He also asked the District to provide compensatory education for the Student's past three months of being out of school. Mr. Collins responded that the Student's lack of attendance coincided precisely with the letter the District sent the Mother regarding her behavior in school, and

that the school had not suspended the Student, but the Parents voluntarily removed him. [S-250]

**78.** The Student began attending Aucocisco in early May of 2012 three days a week. Aucocisco is a small, state-approved K-12 special purpose school located in Cape Elizabeth, Maine. The student population is around 36 students. [Testimony of B. Melnick] It is 140 miles from the Student's home. All of the staff there are trained in CPS, and classes are very small. Programming is very differentiated and social work services are integrated throughout the day. [Testimony of B. Melnick] When the Student arrived at Aucocisco, he was shut down, argumentative and not very friendly. Whatever anyone said to him, he tried to find a flaw in it and argue with him or her. [Testimony of B. Melnick] The Student's reading work was focused on relationship building at first. School director Barbara Melnick tried to find a teacher who would be a good match for the Student, and chose Karen Neidlinger. The Student did not respond well to her, however, and got along with her only when she did not expect him to read. [Testimony of B. Melnick] The Student did well with his math teacher. [Testimony of Mother]

**79.** The Student registered for the Aucocisco summer program, which was two three-hour days per week for six weeks. [P-416, testimony of B. Melnick] Ms. Melnick assigned the Student a different reading teacher in the summer, Brenda Laliberte, but this was also unsuccessful. [Testimony of B. Melnick] The Student would not do his work. Aucocisco tried doing some work with Lexia, but the Student had a hard time with that. Ms. Laliberte also tried using Seeing Stars, Megawords, Wilson and Great Leaps literacy programs. [P470]

**80.** During the summer of 2012, the Parents contracted with Marcia Hunter, Ph.D., to conduct a neuropsychological evaluation of the Student. On five occasions between July 10, 2012 and

September 26, 2012, Dr. Hunter evaluated the Student. [P-249] The Parents and District agreed to meet and review the report when it became available. [S-210]

**81.** On July 1, 2012, Ryan Meserve took over the job of Director of Special Education in the District. [Testimony of R. Meserve] Although the Student was due for a triennial review, the Mother revoked her consent for achievement testing that she had given the District in April. [S-206]

**82.** Ms. Melnick spent a lot of time with the Student to get a better sense of what he was reacting to, and to figure out what was needed to teach him. He was very reactive to writing. [Testimony of B. Melnick] The Student claimed to get headaches when he tried to read and that his arm hurt when he wrote, but he would write numbers in math class without any problem. He would not use Dragon at school. [Testimony of B. Melnick]

**83.** For the fall semester, Ms. Melnick again changed the Student's reading teacher, this time to Julie True. This has worked out well. The Student was scheduled to have reading at the end of the school day. His performance was "unbelievably inconsistent." [Testimony of B. Melnick] Some days he read fluently but could not comprehend, and other days he stumbled through decoding, but understood everything. [Testimony of B. Melnick] He recently moved up to level C, lesson 1 in reading. The level he completed was a xx grade level.<sup>7</sup> The end of level C is a xx grade reading level. [Testimony of B. Melnick] In the Student's integrated math class, he was the only middle school student among high school students.

**84.** On September 7, 2012, the IEP team met for the Student's annual review. [S-209] The team agreed to review Dr. Hunter's evaluation when it became available in place of the District doing an assessment, even though the District wanted to do the achievement testing to which

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<sup>7</sup> The Student was reading at a xx grade DRA level with 95% accuracy when he entered the xx grade at Maranacook. [Fact #22]

the Parents had withdrawn their consent. [Testimony of R. Meserve, S-210] The Parents consented to two classroom observations at Aucocisco. The District also wanted to conduct the Student's triennial evaluation, but the Parents would not consent to this until the District spoke with Dr. Hunter about specific tests. [S-210] The IEP was drafted based upon the most recent evaluation information and teacher reports, with new goals focusing on the Student's needs arising from his ADHD and Generalized Anxiety Disorder.<sup>8</sup> [S-199-200, 210] In setting up the Student's program and services, the IEP used Dr. Rogers' report, and focused on skill remediation, engagement, executive coaching, task initiation, developing and using coping skills, keyboarding and looking at the Student as a whole. [S-210] The Student would still receive over 5 hours per week of direct instruction in reading and written expression plus over five hours of specially designed instruction in assignment completion. Added to this was 45 minutes per day of executive coaching and organization. [S-199] Accommodations were added at Dr. Rogers' recommendation to address the Student's ADHD. [S-424, 200] The Parents were not in agreement with the proposed IEP, so Mr. Meserve adopted the plan presented to the team with adjustments made to reflect input from the team.

**85.** On September 18, 2012, behavioral specialist Lisa Kinney observed the Student at Aucocisco on behalf of the District. She observed him in STEM (science, technology, engineering and mathematics), during his outside break with 15-20 other students and 5-6 teachers, and in coaching with three students and one teacher. [Testimony of L. Kinney] Before beginning, Ms. Kinney spoke with Ms. Melnick, who said that as far as she knew, this was a typical day for the Student thus far. [S-202] She explained that if Ms. Kinney observed the Student during his 1:1 reading, he would shut down. STEM class was a group of three students and

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<sup>8</sup> Although Mr. Chatalbash testified that he was astounded that there was only one goal for behavioral issues, this was not the case. [S-197-198] It was unclear from his testimony, however, whether he had the opportunity to review this IEP, or was referring to earlier versions.

two teachers. At the beginning of this class, the students were building a bridge, and the Student seemed engaged and on task. There was a lot of discussion, and his participation decreased, he became disruptive and began engaging in off-task behaviors such as playing with the materials in a way that was not intended and asking a lot of questions about unrelated things. The other students remained engaged together working on the project. [S-202] When answering questions, the Student gave more accurate answers than his peers, but he was not doing what he was supposed to. [Testimony of L. Kinney] During this class, the Student was on task about 20% of the time, compared with his two classmates, who were on task 70% and 100% respectively. [S-203] When Ms. Kinney had observed the Student informally at Maranacook, he was interested in interacting with other students, but was not interested in working with them at Aucocisco, preferring to work with adults. The teacher there gave him some reminders, but rather than interacting with his classmates, the Student went back to the teacher and had a conversation about something other than the bridge project. [Testimony of L. Kinney]

Ms. Kinney then observed the Student on the playground, where he was not interacting with his peers but talked with his STEM teacher, Mr. Scott. He tattled on another student, telling him to stop what he was doing and acting like he was the student's teacher.

[Testimony of L. Kinney] Ms. Kinney then observed the Student in his coaching class at the end of the day. The group was revamping a birdcage to get ready for the arrival of a bird. The Student refused to engage in the activity of taking care of the birdcage. [Testimony of L. Kinney] During a ten-minute period, the Student was off-task for eight minutes. The other students were on task much more of the time.

Ms. Kinney observed that the Student interrupted a lot, and if a teacher were paying attention to another student, he would be disruptive until he got the teacher's attention. He spoke to adults more frequently and for longer durations than any other student, and only briefly interacted with peers. Even in a small group setting, the Student commandeered 1:1 attention much of the time. [Testimony of L. Kinney, S-204] He did, however, follow staff instruction to stop his disruptive behaviors. Ms. Kinney noted that although the Student was able to work in large groups at Maranacook, he was disruptive of small ones at Aucocisco. [Testimony of L. Kinney] Seeking attention was the function of his off-task behavior. At Maranacook, the attention he got from his peers seemed to suffice, but not at Aucocisco. She thought he needed to move towards learning to share adult attention and move towards getting attention from his peers. She did not observe any social skills instruction during her three-hour observation. [Testimony of L. Kinney] Ms. Kinney recommended implementing programming and behavior supports that teach and reinforce learning skills such as working cooperatively with other students, completing schoolwork independently, and staying on task for successively longer periods. [Testimony of L. Kinney, S-205] She advised against smaller groups or 1:1 staffing at high frequencies or for long durations because the Student would likely become dependent upon it quickly and this would impede his independence as he progressed through high school. She also thought he needed programming and behavior support to teach him to socialize with other students absent teacher facilitation. [Testimony of L. Kinney, S-205]

- 86.** The Student received social work services from David Chatalbash, LCSW. Mr. Chatalbash is essentially responsible for the behavioral climate of the school. [Testimony of D. Chatalbash] The Student's teachers felt that he would benefit from social work counseling to help manage

his problems with organization and social interaction. [P-430] The Student had a history of problems with counseling, and the Mother was concerned that he would not develop a relationship with Mr. Chatalbash. [Testimony of D. Chatalbash, P-430] At the beginning of their counseling relationship, the Student was guarded, defensive, and feeling out the new school situations. Mr. Chatalbash's goals for the Student were to gain an understanding of what makes people behave the way they do, and develop an understanding of his own behavior, and how it affects others. [P-430] The Student presented with trust issues, which Mr. Chatalbash worked on first. [Testimony of D. Chatalbash] The Student did not think it was Mr. Chatalbash's job to fix family issues, but Mr. Chatalbash wanted to address these fairly early, along with the ramifications of the Student's learning challenges. He also observed the Student developing very good relationships with some of his teachers at Aucocisco, which was important because the Student had previously felt that teachers were not trustworthy, so Mr. Chatalbash had to teach him that some teachers were. [Testimony of D. Chatalbash] In January 2013, the Student wanted to increase his sessions with Mr. Chatalbash from 15 minutes to 30, then asked to increase his time to 45 minutes, which is the Student's current amount of social work time. Mr. Chatalbash thought the Student used his social work time very well, and noted that he was not doing it to avoid class. [Testimony of D. Chatalbash] He thought the Student was happy most of the time at Aucocisco and did not try to avoid class, but would not say that the Student wanted to be there, but did not think the Student was ready to return to a public school in his community.

At the end of the Student's xx grade year at Aucocisco, Mr. Chatalbash reported that the Student had developed a strong therapeutic relationship with him. [Testimony of D.

Chatalbash, P313] Mr. Chatalbash observed the Student becoming involved with his peers, demonstrating leadership and a great sense of humor. [P313-314]

Mr. Chatalbash saw his next step as challenging the Student's belief that he could not overcome his disabilities, but thought this would be painful and difficult. [Testimony of D. Chatalbash] He hoped that a year from now, the Student would develop a trusting relationship with his reading and writing teachers. During the fall of 2013, Mr. Chatalbash will only be at Aucocisco one-half day per week because he is going into semi-retirement.

It was Mr. Chatalbash's opinion that the Student's behavior plan at Maranacook made by Dr. Colan was very poor and totally punitive, and that positive supports would have been helpful. [Testimony of D. Chatalbash] He thought that the District's proposed IEP dated March 2013 only had one behavioral goal with a social worker, and needed a treatment plan. [Testimony of D. Chatalbash, S-77]

**87.** Ms. Melnick noted that the Student's attention issues were very significant, although he is no longer very argumentative, and he now took directions quite appropriately. [Testimony of B. Melnick] She felt that an area of need for the Student was writing, and that he really needed to do this. She also thought that the Student communicated his needs, and that it was important to listen to him. Aucocisco has tried a number of things with the Student, and he is very reactive about some things, including data collection. [Testimony of B. Melnick] Aucocisco has never needed to call the Parents about the Student's behavior or to send him home. [Testimony of Mother]

**88.** The IEP team met again on November 7, 2012. [S-133] This meeting was an IEP program review and to discuss the Student's possible reentry to Maranacook. The team reviewed classroom observations conducted at Aucocisco and the draft reentry plan. The District



offered the revised behavior plan and entry plan at that time, along with a new data sheet prepared by Ms. Kinney. [S-139-144] During the 2½-hour meeting, the Parents said they needed more time to review the plan and decide whether to pursue it. [S-133, testimony of R. Meserve] The Parents said they would contact the District if they chose to pursue bringing the Student back to Maranacook. They did not contact the District. Additionally, the Parents still had not received the report from Dr. Hunter. Mr. Meserve said that until the District received Dr. Hunter's report, the District would need consent from the Parents for the Student's triennial evaluation.

**89.** Dr. Hunter believes her undated report was sent to the Parents in December of 2012, but the District did not receive it until sometime in early 2013. [S-83] Dr. Hunter notes that the Student has “had a particularly difficult two years, secondary to an abrupt change in family living situation, parental divorce, and issues related to his father.” [P-252] In addition to this, the Student is feeling increasingly handicapped by his learning issues. Dr. Hunter noted that the Student gets very stuck, rigid and he perseverates. [Testimony of M. Hunter] The Achenbach Child Behavior Checklist yielded significant elevations on his parents' reports for anxious/depressed, withdrawn/depressed and somatic complaints, while his teachers at Aucocisco reported clinically significant ratings on the anxious/depressed scale. [[P-256-257] Dr. Hunter administered the WISC-IV cognitive test, and the Student's full scale IQ was a 121, with index scores ranging from 106 in processing speed to 127 in perceptual reasoning. [P-257-258] On the test of sustained visual processing and mental flexibility, using the Trail Making test, the Student was in the 10<sup>th</sup> percentile. [S-91] The Student's memory skills varied. He had very poor skills when he needed to retrieve factual information presented in an oral format, but could recall very well designs and abstract symbols.

[Testimony of M. Hunter, P-260] The Student scored very low on the Gray Oral Reading test (“GORT-4”), with reading rates and accuracy in the 2<sup>nd</sup> and first percentiles respectively. [P-262] Dr. Hunter thought he was overly reliant in trying to recognize the words he has memorized. She thought he was highly at risk of developing a major mental health disorder, and has very limited distress tolerance, noting his biological vulnerability to mental health problems. [Testimony of M. Hunter] Dr. Hunter observed that the Student distorted things he saw; for example, he might perceive a well-meaning teacher as insulting and patronizing, then will not change his view or get it out of his head. [Testimony of M. Hunter] He was very prone to shame. Despite his high intellectual potential, he “presents an array of developmental delays, atypical behaviors and psychosocial challenges that are suggestive of a developmental disorder.” [S-97] She diagnosed the student with a Reading Disorder, Disorder of Written Language, Dysgraphia, ADHD-inattentive type, and suggested the possibility of Pervasive Developmental Disorder, not otherwise specified. [S-98] Dr. Hunter also thought the Student met the criteria for Mood Disorder, NOS.

Dr. Hunter recommended a very specialized approach to the Student’s education, and thought he presented a challenge for educators. She thought he had engaged in the community at Aucocisco, and made a good connection with Mr. Chatalbash, which was very important and fulfilled a huge need for the Student. [Testimony of M. Hunter] Dr. Hunter also thought that another benefit of Aucocisco was that it provided “in the moment support” and used CPS. [Testimony of M. Hunter] She thought the Student was not ready to transition from Aucocisco.

**90.** The District convened an IEP team meeting on February 25, 2013 to consider Dr. Hunter’s evaluation. [S-109] The team agreed that this would be considered the Student’s annual

meeting, and the proposed IEP would run through February 25, 2014. [Testimony of R. Meserve, S-110] The IEP was updated to reflect information from Dr. Hunter and included the behavior plan and reentry plan reviewed at the November 2012 meeting. The District still wanted to pursue certain additional evaluations for program purposes and to clarify statements from Dr. Hunter, and requested consent for the following tests: Occupational Therapy evaluation, WIAT Reading Assessment for Silent Reading, and Test of Written Language (“TOWL-4”). [S-110] The Parents signed the consent form, which was received by the District on March 8, 2013. The IEP services were divided into those that would continue through the end of xx grade, which were essentially unchanged from the September and November 2012 IEPs, and those services offered from August 25, 2013 to February 24, 2014, when the Student would be attending high school. [S-78] The high school services included: specially designed instruction in reading and written expression--2 weekly sessions of 1 hour and 20 minutes each, and once a week for 1 hour and 30 minutes; and assignment completion, organization and executive coaching--2 weekly sessions of 1 hour and 20 minutes each, and once a week for 1 hour and 30 minutes. [S-78] The Student would continue to have social work services for 30 minutes twice a week, and OT consult monthly for 30 minutes. The behavior and reentry plans remained the same as those offered previously, subject to modification if necessary.<sup>9</sup> These plans were not discussed at this meeting, but were scheduled to be discussed when the team next meets if the Parents decided they wanted to pursue returning the Student to public school. [S-110] The Parents rejected the proposed IEP, so Mr. Meserve adopted the IEP presented to the team, with minor changes based on team participation. [S-110]

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<sup>9</sup> The behavior plan was inadvertently not attached to the IEP, but the IEP indicated that there was one and the team had received copies. [S-66]

91. Ms. Holinger administered the reading comprehension subtest of the WIAT-III and the TOWL-4. [S-12] She wanted to compare the Student's oral versus silent reading. [Testimony of S. Holinger] The Student got an average score of 96 on the WIAT silent reading comprehension. On the TOWL-4, the Student fell into the average range on the vocabulary and sentence combining subtests, but did poorly on spelling. Consequently, his contrived writing composite index was a low 75, but his spontaneous writing composite index was 109. [S-13] Ms. Holinger noted that the Student did not appear stressed by the silent reading exercise, and that when reading for content, the Student should read silently. She recommended an accommodation that minimized his need for oral reading. [S-14]
92. The cost of the Student's attendance at Aucocisco since May of 2012 had been \$36,514.46 plus \$2160 for the summer program. [P-416, 418-423] This fall, the Student will transition to high school. Ms. Melnick would like to see the Student attend five days a week, or a minimum of four days, but she was not sure that the Student was emotionally or physically ready for a full day or a full week of classes. [Testimony of B. Melnick] Due to the Student's partial schedule, he has not had any history instruction yet, but will have to start history in high school.

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

##### **A. Brief summary of the position of the Parents:**

The parents are entitled to compensatory relief because the District failed to provide the Student with FAPE since April of 2011. The District's program not only avoided addressing his needs effectively, but also exacerbated his anxiety and avoidance behaviors through the implementation of an inappropriate program. His IEP contained no behavioral support plan, despite the Student's anxiety-based behaviors. Furthermore, his IEP no longer contained the

accommodations or all of assistive technology that was provided to the Student in his prior school. Consequently, the IEP resulted in tremendous growth in the Student's refusal behavior with respect to literacy work in both the special and regular education settings. The Student's progress reports from April through June 2011 contain ratings of inadequate progress on his key academic goals for reading and writing, and there was no evidence that the Student received a beneficial education during this period.

The September 2011 IEP as designed and implemented also failed to provide the Student with FAPE. Although the September 2011 IEP acknowledged that the Student engaged in behaviors that impeded his learning, it contained no behavioral interventions, no behavior plan, and no appropriate social work goal. Although the District may argue that it could not develop appropriate behavioral interventions without Dr. Rogers' report, this position lacks merit, as Dr. Fink had already provided detailed information about the Student's school-related anxiety. Yet the IEP lacked any effective programming to deal with this anxiety. The Student's performance through the first half of xx grade showed a lack of progress. Nonetheless, the District did not change course or treat the Student differently. His grades in December of 2011 were Ds.

The Student is entitled to a compensatory remedy for the District's abject failure to educate him appropriately. The Parents seek reimbursement for the costs they paid in connection with the Student's unilateral placement at Aucocisco since May of 2012. Reimbursement is an appropriate form of compensatory relief when parents have acted unilaterally and with proper notice. The Parents placed the Student at Aucocisco to compensate him for the educational harm he suffered while a student at Maranacook. Under the IDEA, it does not matter whether the parents first purchase necessary compensatory services and then seek reimbursement or commence a due process hearing seeking future compensatory services. A hearing officer may

order reimbursement if the District did not make FAPE available to the child in a timely manner. Reimbursement should also be awarded for the Parents' proper rejection of the District's inappropriate IEPs and placement offers for the Student's xx grade years. These IEPs were based upon misguided application of a desensitization approach and rely heavily on the prospect of the Student re-engaging with Mr. Johnston for counseling, despite inadequate social work goals.

The Student needs highly specialized programming to address his academic deficits to prevent his school-related anxiety from blocking his attainment of educational benefit.

Aucocisco has figured out how to do this and has implemented a successful program for the Student, while the District has offered no evidence that it even knows how to approach this task or that it has the expertise to develop such a program for the Student. To obtain reimbursement, the Parents must only show that the unilateral placement was proper under the IDEA. It need not be the least restrictive placement, but must simply be capable of conferring educational benefit. Aucocisco easily satisfies the liberal test set forth in the IDEA. As the Student is making progress there, it is appropriate as compensatory education.

Lastly, the District engaged in retaliation in violation of the IDEA against the Mother for her advocacy on the student's behalf by restricting her access to the Student's school.

**B. Brief summary of the position of the District:**

The burden of proof in each of the issues rests with the Parents.

When determining whether an IEP and placement is appropriate, the First Circuit Court of Appeals has repeatedly ruled that an IEP must be viewed in terms of what was reasonable at the time the IEP was developed. 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 evidence shows that the IEP developed and delivered by the District for the end of the Student's xx grade year was reasonably calculated to provide the Student with meaningful educational benefits. It was almost identical to the Student's IEP in Mapleton, which the family strongly supported and believed had resulted in great progress during half of the Student's xx grade year. When a pattern of refusal behaviors surfaced during xx grade, the District made considerable efforts to respond, working closely with the Family's therapist to develop a behavior plan.

There was extensive evidence that the family breakup played a major role in the Student's emotional turmoil, although the Mother tried to attribute it all to the District. Nonetheless, his year was an academic success, and he made progress in reading. Additionally, the District took steps to work with the Student's emerging problem behaviors.

The Student's 2011-2012 educational program was also reasonably calculated to provide him with educational benefit. To the extent that the IEP failed to provide actual benefits, this was caused by the Family's clear delay in permitting the school to undertake necessary evaluations of the Student's problems, and their removal of the Student from school just when the District received information necessary to adjust the Student's program. At the beginning of the school year, District personnel and the Parents saw that the Student was upset and not engaging. When the team met for its annual review shortly after the school year began, it ordered a comprehensive psychological evaluation with one of the best school psychologists in Maine to look at why the Student was refusing to engage and to suggest approaches. The Parents would not cooperate with the evaluation. Although the parties reached an agreement at mediation about this, while District immediately followed up with its obligations under this agreement, the Parents did not give consent for the evaluation until early January. Dr. Rogers' evaluation

applied a very different analysis of the Student's behaviors than the Student's own psychologist, and sought to change the Student's program to reflect that approach, but the Family withdrew the Student from school before the District had an opportunity to implement Dr. Rogers' recommendations. Every step of the way, however, the District's actions were reasonable, but the Family delayed and hindered the process in response to a tantrum by the Mother at the end of January 2012.

Although the Parents removed the Student from the District, the District continued its efforts to make a program available to the Student. The IEPs proposed by the District at the September 2012 and February 25, 2013 IEP team meetings were reasonably calculated to provide the Student with educational benefit. The IEPs also included a well-developed behavior plan and re-entry plan to return the Student to Maranacook. The Family did not offer any expert testimony challenging any of the IEPs provided or offered by RSU #38, but the District presented testimony in support of this programming.

The District does not believe there were FAPE violations, so no remedy is needed. If the hearing officer finds otherwise, the remedy would vary, depending upon the time period involved. The compensatory order should be tailored to the actual harm identified, rather than to the costs incurred by the Family. If the hearing officer finds the District's programming was deficient, Aucocisco does not offer any element of special education services in which the public school placement was deficient. Thus far, Aucocisco has not required him to write, and he continues to refuse to read. He has not made any progress with reading at Aucocisco.

Regarding the Parents' retaliation claim, the hearing officer has no jurisdiction over such claims. In any event, the claim should also be dismissed on its merits. The Mother's inappropriate behaviors in front of staff and the Student were the reason the District limited her



access to the school, not any retaliatory intent. The Mother nonetheless would be able to communicate with school staff via email, meet with staff at IEP meetings and other times by appointment.

### **C. Discussion of Issues:**

The U.S. Supreme Court, the First Circuit and the U.S. District Court in Maine have all held that in a due process hearing, the burden of proof lies with the party challenging the IEP. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005), *Regional School Unit No. 51 v. John Doe*, 60 IDELR 163 (D. ME. 2012); *DB ex rel Elizabeth v. Esposito*, 675 F. 3d 26, 35 (1<sup>st</sup> Cir. 2012) . Therefore, the Parents must prove that the evidence supports their position on the issues before the hearing officer.

All students eligible for special education services are 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). In accordance with the IDEA, the IEP must be designed to provide an eligible student with an educational program tailored to meet his individual needs that is "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). 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 (1<sup>st</sup> Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

As the First Circuit stated in *Lenn v. Portland School Comm.*, the law sets a fairly modest goal of an appropriate, rather than an ideal, education, and 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 term "education," however, is not limited to academic growth alone, which is not the only indication of educational benefit. 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. *See also Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

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<sup>d</sup> Cir. 1999) (holding that the "meaningful benefit" standard requires "significant learning." (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3<sup>d</sup> Cir. 1988)).

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

**1. Was the Student's IEP and programming implemented by the District from April 2011 through June 2012 reasonably calculated to provide him with a free, appropriate public education in the least restrictive environment?**

The Student arrived at Maranacook for xx grade with an IEP from his school in Mapleton. Based upon evaluations by Drs. Fink, Fisher and Bray, this IEP was amended in January of the Student's xx grade year. The IEP provided 6.5 hours of direct instruction in reading, writing and spelling in the special education setting per week, and 45 minutes of occupational therapy per month. He also had numerous accommodations. That year, the Student earned straight As, and the Mother felt that he was really learning.

The IEP team's decision to essentially keep the same programming as was in the Mapleton IEP was a reasonable one. His programming at Maranacook utilized literacy programs with which he had been successful in Mapleton. Although the Student did not have social work services in his Mapleton IEP, Maranacook added these services for 30 minutes per week to address the Student's anxiety disorder, his the Parents' separation and the Student's relocation.

The Mother took issue with the District's decision to remove the Student's eligibility as a Student with a learning disability, and this had the unfortunate effect of causing her to mistrust the District and to engage in a power struggle with the District for control over the Student's education. On the other hand, this change did not have any effect upon the Student's actual educational program, as his services remained unchanged. The Mother also took issue with the elimination of Kurzweil, but the evidence does not support a conclusion that this was what led to problems for the Student during xx grade.<sup>10</sup>

The Student has an unusual profile of an intelligent boy with superior math skills, but a history of anxiety and ADHD. Learning to read and write had always been a challenge for him. The Student also had a history of wanting to get his way and of using various tactics to do so. He argued with teachers and engaged in power struggles with them to try to do what he wanted,

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<sup>10</sup> In practice, the Student would not have used Kurzweil very much because he refused to use it in front of others, including his teacher. [Testimony of B. Melnick, H. Lord] Furthermore, although it was not in his accommodations, Hope Lord allowed him to use it, but he chose not to. [Testimony of H. Lord]

sometimes taking liberties with the facts when reporting things to his mother or other teachers in an attempt to manipulate the situation in his favor.<sup>11</sup> He struggled with school, and throughout elementary school, seemed to do well only when he connected with his teacher, and did not do as well when he and his teacher did not “click.” His success while in Mapleton was very mixed. The District could not have known this at the time, but perhaps the most important factor in the Student’s xx grade success was that he connected well with his teacher.<sup>12</sup>

Although the Student earned straight As during his first trimester at Maranacook, he began experiencing problems there from the outset. There is considerable evidence from several witnesses that this was largely to his parents’ divorce, frequent moves and integrating into a new school, not to the District’s programming or the IEP. [Facts #31, 68, 89] Adolescence can be very difficult for any child, and divorce is a major stressor for children, but can be even worse for a child with an anxiety disorder and a history of depression.

When faced with the Student’s work refusals, the District attempted to help with additional social worker support and other measures. With the Mother’s support, the District staff worked with Dr. Colan, the Student’s personal psychologist, to develop a behavior plan to address work refusal. Although Dr. Colan’s recommendations were not always very effective, it was reasonable for the District to turn to him for advice and to try his recommendations.

The Student was unwilling to do much of his reading and writing assignments at Maranacook, and he has continued to resist reading and writing during his year at Aucocisco. Towards the end of xx grade at Maranacook, things got progressively better, with data showing that the Student’s work refusal declining in the last month or so of school.

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<sup>11</sup> See note #4 above. Additionally, Dr. Hunter reported that the Student distorted things, misperceiving reality at times. [Fact #89]

<sup>12</sup> This continues to be true today, as he did not work well with certain teachers at Aucocisco, and tried three reading teachers before he found one with whom he connected.

This was a difficult time of transition for the Student, the Parents and the educators attempting to serve the Student. Throughout this time, the District continued to try to improve the Student's experience and address problems that arose. Things did not always work out the way everyone would have liked, but it was not for a lack of effort or a reasonable calculation, given the information the District had, about how to best provide the Student educational programming in the least restrictive environment. The evidence supports a conclusion that the Student's programming from April 2011 until the end of xx grade was reasonably calculated to provide him with FAPE.

For xx grade, the Student's IEP contained essentially the same services as the previous year, but he had a new special education teacher, Ms. McNaughton. Ms. McNaughton seemed a good choice for the Student, given her considerable experience working with students with behavioral challenges, and she prepared conscientiously to learn what she could to be an effective teacher for the Student. She tried to provide the Student with a smooth transition by setting up a meeting with the Mother and Student before the school year started, but the Mother and Student did not show up. Ms. McNaughton continued to provide the Student with 1:1 instruction using Spellography and Megawords, as well as Lexia<sup>13</sup>, which had been recommended by Dr. Bray and had been successful in the past. He had OT goals involving keyboarding skills so that he would not have to hand write assignments. There was no dispute about appropriateness of the Student's goals or level of services.

When the Student began xx grade, however, things did not go well, beginning with the Student's refusal to attend ELA in the mainstream classroom. At the September 13, 2011 IEP team meeting, the Mother suggested that the Student would work better with a positive incentive plan. To this end, Mr. Collins wanted to have child psychologist Tim Rogers perform a

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<sup>13</sup> Aucocisco also attempted to use Lexia with the Student without success. [Fact #79]

psychological evaluation of the Student to figure out what was causing him to refuse work, and to help craft a more effective behavior plan. Dr. Rogers offered to see the Student right away and get a report done by October. Unfortunately, however, the Mother would not consent to this. As a result, the District took the appropriate step under the IDEA of requesting mediation to resolve this issue. At the November 29 mediation, the Parents agreed to sign the consent form, but through no fault of the District, the Mother did not actually sign it until early January 2012. In the interim, the Student's refusals to do his work and other defiant behaviors increased, and because he was refusing to do his work, was doing very poorly in school. Mr. Johnston thought the Student needed significant support for his mental health, and Mr. Hollander reported that Dr. Hermida was concerned that the Student had an emerging disorder.<sup>14</sup> No doubt, he was not benefitting from his educational program. Nonetheless, without permission from the Parents to obtain a psychological evaluation, the District's hands were tied and could not get the information it needed to address the Student's problems in school.<sup>15</sup> Despite Mr. Collins' efforts to obtain their permission, the Parents effectively delayed obtaining a psychological evaluation by six months, during which time the Student was not doing his work, was getting Ds in his classes, and was ultimately withdrawn from school by the Mother.

For the reasons discussed above, this IEP, when developed, was reasonably calculated to provide the Student with FAPE. When it was apparent that the Student's program was not working, the District immediately sought a way to solve the problem, but the Parents impeded this effort by refusing to consent to the much needed psychological evaluation. Their reasons for

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<sup>14</sup> Dr. Hunter also expressed this concern in her evaluation. [Fact #89]

<sup>15</sup> During this time, the Mother told the principal that school staff needed to be more sympathetic to the Student's emotional needs, but at the same meeting, insisted that the District did not need a psychological evaluation that would help the staff understand and be better able to address those needs. [Fact #53]

doing so were unreasonable.<sup>16</sup> The Mother claimed that no additional evaluative information was needed, as Dr. Fink had done an evaluation two years earlier. Since Dr. Fink's evaluation, however, much had changed for the Student, and the District was prudent to obtain new information that took into account his present circumstances. Furthermore, if no additional evaluations were necessary, why did the Parents seek a much more extensive independent evaluation from Dr. Hunter shortly after Dr. Rogers issued his report?

Based upon the results of Dr. Rogers' evaluation, it is very conceivable that the Student's difficulties in xx grade could have been avoided, including the January 2012 incidences that resulted in the Mother withdrawing him from school, if the IEP team had Dr. Rogers' evaluation results in October 2011.<sup>17</sup> When the IEP team finally had this report on March 15, 2012, it was clear that Dr. Rogers was taking a very different approach to the Student's disability than the Student's own psychologist had. He explained that the Student's avoidant behavior was driven by his anxiety, rather than a willful refusal, and recommended addressing the Student's anxiety first, advising against doing things that increased the Student's anxiety.

By this time, however, the Mother had decided that she would never return the Student to public school, and began exploring the prospect of sending him to Aucocisco. When the Parents attended the IEP team meeting on March 15, 2012, they had already decided that they would not

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<sup>16</sup> It was reasonable for the Parents to want to "check out" Dr. Rogers before consenting, but this could have been done in September, rather than dragging it out so that the District had to go to mediation to obtain consent for its evaluation. Additionally, school districts have the legal right to choose their evaluators, but the District was willing to give the Parents a choice of evaluator at mediation. *Falmouth School Dept.*, 40 IDELR 83 (ME SEA 2003), *Falmouth School Dept.*, 102 LRP 4426 (SEA Me. 4/24/00) Parents who disagree with the school's evaluation have the right to have the child evaluated by an independent evaluator, possibly at public expense, but they do not have the right to insist on how the District conducts its own evaluations.

<sup>17</sup> Although I have not concluded that the District failed to provide FAPE, there is case law 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 (11<sup>th</sup> 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. Courts should be reluctant to award monies to parents who refuse or hinder the development of a FAPE or IEP.)

accept the District's offer of programming. The District had presented a behavior plan and a school re-entry plan based upon Dr. Rogers' recommendations, and which behavior specialist Lisa Kenney thought were excellent plans. [Fact #76] The behavior plan did not include punishments for behaviors that were driven by the Student's anxiety. It provided anxiety strategies and positive reinforcements<sup>18</sup>. Additionally, the re-entry plan was very flexible and the District was seeking input from the Parents about it. The plan offered tutoring while the Student slowly, based upon his therapeutic process, reentered the public school. Dr. Rogers' approach made sense for the Student, and this approach implementing his recommendations had a reasonable likelihood of success.

For these reasons, I conclude that the District made every reasonable effort to offer the Student FAPE during xx grade, and to the extent this was not possible, it was due to the actions of the Parents in impeding the process. There was no IDEA violation.

**2. Was the IEP and program for the 2012-2013 school year, as designed and implemented by the District, sufficient to offer the Student a free appropriate public education in the least restrictive environment?**

Although the Student was attending school at Aucocisco, the District continued to offer an educational program to the Student. When the IEP team met for the Student's annual review, the District wanted to do testing, but the Parents would not consent. Because the Parents were in the process of having Dr. Hunter evaluate the Student, the District agreed to review the results of this evaluation in place of the District doing an assessment.<sup>19</sup> [Fact #84] The IEP offered at the September 7, 2012 meeting contained a number of changes to the Student's goals and services to take into account Dr. Rogers' recommendations and focus on addressing the Student's anxiety as the cause for his work refusal. It also contained a reentry plan and behavior plan, consistent with

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<sup>18</sup> Mr. Chatalbash agreed that the Student needed positive supports in his behavioral plan. [Fact #86]

<sup>19</sup> As discussed in footnote 10, the District had the right to evaluate the Student with an evaluator of its choice rather than accept Dr. Hunter's evaluation.



Dr. Rogers' recommendations. Discussion of this plan was postponed until the November 7, 2012 IEP team meeting while the team awaited Dr. Hunter's evaluation report, but the team met for 2 ½ hours nonetheless.

Based upon all of the information available at the time this IEP was drafted, I conclude that this IEP was reasonably calculated to provide the Student with educational benefit in accordance with the requirements of the IDEA. Dr. Rogers' approach to the Student's anxiety and work refusal was made a lot of sense, and the District's reliance upon this approach was reasonable. The Student's IEP and behavior plan was then drafted to meet the Student's need for support for his anxiety. It took a kinder, gentler approach than that of Dr. Colan. As Mr. Johnston had said previously, the Student's mental health needs should take precedence over his academic needs, and addressing the former will have the effect of allowing the Student to benefit from his instruction. Other than the Parents, witnesses for either party criticized the reentry plan. In fact, the Father had acknowledged that school was not the Student's anxiety trigger, but fear of humiliation regarding reading and writing was. The new IEP was geared to avoid those triggers. It appears to have the essential elements necessary to meet the Student's needs.

Interestingly, the approach taken in the IEP with the reentry and behavior plans is not all that different from the approach taken by Ms. Melnick and Mr. Chatalbash at Aucocisco. As Ms. Melnick testified, it has been a long, slow process for the Student at Aucocisco, and he has yet to attend a full school schedule. [Fact #93] Although he appears relatively happy there, he has significant attention issues, and progress in his areas of need has been slow and very inconsistent. He is very reactive to things, and continues to resist writing. [Fact #82] It might not be easy, and would require cooperation from the Parents to enhance the likelihood of success, but the evidence supports a conclusion that the District has the ability to provide this program in

a much less restrictive environment than Aucocisco, an environment in which the Student would still be spending approximately two-thirds of his day in the mainstream. As quoted above, 20 U.S.C. § 1412(a)(5)(A) and the Maine Unified Special Education Regulations § X.2.B. require a Student to be educated in a public school unless “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.”

**3. Has the District failed to offer the Student an IEP that is reasonably calculated to provide him with a free, appropriate public education for the 2013-2014 school year?**

The IEP offered for xx grade was essentially the same program as offered for xx, but it would be delivered in the high school setting and consistent with the high school schedule. For the reasons discussed above, this appears reasonably calculated to provide the Student with educational benefit.

Dr. Hunter testified that she recommended a very specialized approach to the Student’s education, and that he was not ready to transition from Aucocisco. Aucocisco offers a very specialized, child-centered approach to education, and the Student has made connections there. This is not, however, the issue before me. The issue is whether the District can offer the Student FAPE in the least restrictive environment. I believe the evidence supports a conclusion that it can. Dr. Hunter did not testify that the District’s program failed to offer FAPE. When the Parents elected to place the Student at Aucocisco without allowing the District to implement the changes to the Student’s program recommended by Dr. Rogers, they took a risk that the District’s proposed program would be determined to be appropriate. While the law does not require parents to keep a child in a program they feel is inappropriate, "it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings,

without the consent of State and local school officials, do so at their own financial risk." *Roland M.*, 910 F.2d 983, *citing Burlington*, 471 U.S. at 373-74.

**4. Does the hearing officer have jurisdiction over the Parents' retaliation claim against the District? If so, did the District retaliate against the Parents by restricting the Mother's access to the school building and staff?**

Although the District argues that the hearing officer has no jurisdiction to hear the Parents' claim of retaliation, I have previously held that the case cited by the Parents, *Hesling v. Avon Grove Sch. Dist.*, 47 IDELR 256 (E.D. Pa. 2007), among other cases, supports the Parents' right to bring a retaliation complaint under the IDEA. Based upon the facts in this case, however, I cannot conclude that this was the motivation for the District's decision to restrict the Mother's access to the school building and staff.

While it is understandable that a parent can become very emotional when she suspects her child has been treated unjustly, the Mother's conduct on January 30 was outside of acceptable boundaries.<sup>20</sup> The District has a responsibility to provide a safe and appropriate environment for students and employees. The Mother's use of profanity, threatening behavior, disrespectful treatment of school employees and refusal to obey the principal's reasonable requests demonstrated that she could not control herself to act appropriately in a school. This was the reason the District limited her access to the building, not the fact that she was a strong advocate for the Student. She had been a strong advocate for the Student all along, but it was when her personal behavior crossed a line that would not have been tolerated of any parent that the District decided it could not allow her free access to the school. The Mother was not deprived of her rights under the IDEA. She could still attend IEP team meetings, send emails to the Student's teachers and administrators, and meet with them by making an appointment.

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<sup>20</sup> As Mr. Johnston testified, the Mother's display was reinforcing and modeling bad behavior for the Student, encouraging his defiance. [Fact #64]

**5. If the hearing officer determines, in her conclusions about the issues listed above, that the District violated the IDEA, what remedy is appropriate?**

As the District did not violate the IDEA, no remedy is ordered.

**V. ORDER**

1. RSU #38 did not violate state or federal special education laws by failing to provide the Student with a free, appropriate public education from April 2011 through June 2012.
2. RSU #38 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.
3. RSU #38 has offered the Student an IEP for the 2013-14 school year that is reasonably calculated to provide him with a free, appropriate public education in the least restrictive environment.
4. The hearing officer has jurisdiction over the Parents' claim that the District retaliated against the Parents by restricting the Mother's access to the school building and staff, and concludes that the District did not retaliate against the Parents for exercising their rights under the IDEA or in violation of the IDEA.

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SHARI B. BRODER. ESQ.  
Hearing Officer