

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Guardian of)
Student)
v.)
RSU #72)

ORDER

This hearing was held and this decision issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on June 27, and July 23, 24, and 25, 2013, in Portland, Maine. Present for the entire hearing were: Hearing Officer David Webb, Esq; Dick O’Meara, Esq., attorney for the Guardian; Mother and Guardian of the Student; Eric Herlan, Esq., attorney for the School; and Pat Menzel, Director of Special Education, RSU #72.

Testifying at the hearing were:

Mother/Guardian	The Student’s Mother and Guardian;
Aunt	The Student’s Aunt;
Laura Slap-Shelton, Psy.D.	Neuropsychological Evaluator;
Vickie Shufton	Representative of the Eagleton School;
Pat Menzel	Director of Special Education;
Nancy Hall	Former Director of Special Education;
Pender Makin	Director of the Real School;
Carrie Heath	Speech Pathologist;
George Shekart	School Psychologist;
Fran Pouzol	Special Education Teacher, Fryeburg Academy;
Carol Gregory	Special Education Ed Tech; and
Jim Thurston	Fryeburg Academy Administrator.

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On May 15, 2013, the Guardian requested a due process hearing regarding her son (“Student”). The School submitted a Partial Motion to Dismiss based upon the statute of limitations. On June 18, 2013 a telephonic prehearing conference was held. Participating in the conference were: Hearing Officer David Webb, Esq; Dick O’Meara, Esq., counsel to Parent; Mother and Guardian of the Student; Amy Tchao, Esq., counsel to RSU #57 (covering for Eric Herlan, Esq.); and Pat Menzel, Director of Special Education, RSU #72. Documents and witness lists were exchanged in a timely manner.

Both parties submitted additional documents after the five-day deadline without objections. The Parents submitted 1367 pages, herein referenced as P. #. The School submitted 2001 pages, herein referenced as S. #. The parties agreed that the first day of hearing would be dedicated to presenting witnesses on the School’s Partial Motion to Dismiss. On June 27, 2013, a hearing on the District’s motion to dismiss was held.

On July 12, 2013, the Hearing Officer granted the School’s Partial Motion to Dismiss, thereby dismissing claims alleged to have occurred during the Student’s xx grade (2009-2010) and xx grade (2010-2011) school years based upon the statute of limitations of the Individuals with Disabilities Education Improvement Act (“IDEA”) and the Maine Unified Special Education Regulations (“MUSER”). As a result, the Guardian is only able to assert claims against the School relating to events, or their absence, after May 15, 2011.

At the close of the testimony on July 25, 2013, both parties requested to keep the hearing record open until September 3, 2013, for the submission of closing memoranda. The School submitted a 32-page closing argument and the Guardian submitted a 63-page closing argument. The record closed upon receipt of these documents, on September 3, 2013. The parties and the Hearing Officer further agreed that the decision would be due on September 19, 2013.

II. ISSUES

Evidence was taken on the following issues:

1. Did the Student's IEP and placement during the XX grade (2011-2012) school year fail to provide the Student with a free, appropriate public education?
2. Did the School improperly conclude that the Student's behavior leading to his expulsion from Fryeburg Academy was not a manifestation of his disabilities?
3. Did the Student's IEP and placement during the xx grade (2012-2013) school year fail to provide the Student with a free, appropriate public education?
4. If the answer to either 4, 5, or 6 above are yes, is the Guardian entitled to reimbursement of her costs for her unilateral placement at the Eagleton School since November 2012 or is the Student entitled to any other remedy under state or federal special education laws?

III. FINDINGS OF FACT

1. The Guardian filed her due process hearing request on May 15, 2013.
2. The Guardian adopted the Student (d.o.b. xx/xx/xxxx) from Vietnam in 1995 when he was xx old. [Hearing request]
3. The Student initially lived in Rumford with his family and received services through CDS for developmental delays, particularly in the area of speech-language skills. In particular, the Student would speak in brief and incomplete sentences and word retrieval was difficult for him.
[Testimony of Guardian]
4. The Student attended xx in Rumford (MSAD No. 43) during the 1999-2000 school year. His education was governed by an IEP issued to him as a student with Speech-Language Impairment. [S-1673].
5. The Student's family moved to Fryeburg in November 2001, shortly after the Student started xx grade. He arrived with the IEP that had been in use in MSAD No. 43, which continued to identify him as a student with a

speech-language impairment. [S-1639,1640]

6. The Student attended the Snow School in RSU 72 for the remainder of xx grade (2001-2002), and continued to attend that school through his xx grade year (2005-2006). [Testimony of Guardian]
7. During the Student's xx grade year (2002-2003), the School changed his eligibility category to Other Health Impairment. [S-1591] The Guardian began community-based counseling services for the Student at around this time. [Testimony of Guardian]
8. During the Student's xx grade year (2003-2004), the School dismissed him from special education services. [S-1536]
9. The School re-identified the Student as eligible for special education and related services under the category of a speech and language disability on April 11, 2005 during his xx grade year. [S-1490] The IEP offered by the School included 90 minutes per week of speech-language therapy, including a social group, and 2.5 hours per week of direct instruction in reading comprehension. [S-1470, 1490]
10. During xx grade (2005-2006), the Student received special education services all year. [S-1469]
11. The Student graduated to the Molly Ockett Middle School for his xx grade year, where the Guardian is a xx grade math teacher. The Student continued to be eligible for special education services as a student with a speech-language impairment. [P-001]

12. The Student received IEP services for most of the xx grade academic year (2007-2008). After the school conducted further testing in the early spring of 2008, it was determined that he no longer met the criteria as a student with a speech-language impairment. As a result, the Student was dismissed from special education on April 1, 2008. [S-1314]
13. In the spring of 2009, due to the Guardian's continuing concerns with the Student's language abilities and social skills, the Guardian sought out a private psychological evaluation with Dr. Michael Broderick in Portland. [Testimony of Guardian]
14. The Guardian referred the Student for consideration of his special education needs on May 14, 2009, based on Dr. Broderick's report. She listed the Student's suspected areas of disability as "ADHD, language, OHI, social." [S-1299]
15. The Student enrolled to attend Fryeburg Academy beginning in his xx grade year. Fryeburg Academy is the contract school for high school students residing in Regional School Unit No. 72. [S-1301, Testimony of Guardian]
16. At the ensuing IEP Team meeting held on June 2, 2009, the School determined that the Student did not qualify for special education, representing that the evaluation results showed no "adverse effect of his working memory within his academics." [S-1265]

17. The Student was provided with a 504 Plan in June 2009 in an attempt to address his “core receptive and expressive” language deficits with classroom accommodations. [S-1270].
18. At a 504 Team meeting for the Student on June 9, 2009, it was determined that the Student would be placed in the “Transition Program” at Fryeburg Academy, along with a 504 Plan for xx grade that provided the following accommodations: arrangements for oral presentations; permission to leave class to speak to a designated person; and an allowance for the Student to provide delayed responses. [P-014, 015, 016, 017, 018]
19. For xx grade at Fryeburg Academy (2010-2011), the School removed the Student from the Transition program and provided him with a normal schedule of college-prep level courses. [Testimony of Guardian]
20. The Guardian made another parental referral for IDEA evaluation on January 21, 2011. [P-045; S-1212]
21. The School had Nancy Smith-Jewell, Ph.D., evaluate the Student during March and April 2011. [S-1167-1188] She obtained WISC-IV index scores for the Student of 67 for Verbal Comprehension, which is in the “extremely low range-first percentile.” [S-1184] Dr. Smith Jewell’s report noted significant concerns with the Student’s Working Memory with a standard score of 68, which she categorized in the “extremely low range-

second percentile.” [S-1184]¹ Due to the discrepancy of these scores, she could not calculate a full-scale IQ for him. [S-1179] Dr. Smith-Jewell noted: “the picture painted by [the Guardian] of a boy in psychological distress is not a perception shared across his teachers and administrators...[The Student] is not demonstrating significant behavioral or emotional challenges within the school setting.” Although Dr. Smith-Jewell concluded that “the Student’s ability to interact socially with his peers in a meaningful way” was affected by “significant language issues,” she opined that it “does not appear that his school based behavioral needs necessitate a residential placement at this time.” [S-1184]

22. Carie Heath, SLP, the School’s Speech and Language Pathologist, conducted a speech-language assessment of the Student on April 15, 2011, using the “CELF-4” test. [S-1145]. According to that test, the Student’s language scores all registering at or below the first percentile: 60 for Core Language; 56 for Receptive Language; 53 for Expressive Language; 64 for Language Content, and 56 for Language Memory Index. [S-1146] Ms. Heath concluded that although the Student’s academic grades are “within average” [his] “overall scores are severely below his peers.... Teachers have noted his difficulty with expressing his thoughts and needs in class.” [S-1147]

23. After the April 2011 testing had been completed and shared with the IEP

¹ Dr. Smith-Jewell’s report noted that the Student’s testing scores included a 94 for Perceptual Reasoning and 103 for Processing Speed, both of which were in the average range. [S-1179]

Team at its meeting on May 4, 2011, the Student was identified as eligible for IDEA services. [S-1103-1009] His eligibility categories were Speech-Language Impairment [S-1117-1120] and Specific Learning Disability [S-1110-1115]. The School subsequently issued an IEP for him, which was mailed to the Guardian on May 19, 2011. [S-1125-1140]

24. The School's proposed IEP for the Student, to be implemented at Fryeburg Academy, included 45 minutes per week of speech-language therapy and four 45-minute sessions per week of special education services in the Academy's Learning Center. [S-1125-1140] The team also ordered classroom accommodations and supports to assist the Student in his regular education settings. [S-1134, Fran Pouzol testimony] These included obtaining additional help outside the classroom, extra time to respond to oral questions, assistance with processing discussion of difficulties, and access to the Learning Center to complete work. [S-1134] The IEP included no extended school year (ESY) services.
25. The Guardian engaged Carie Heath, SLP, privately for summer speech and language services in 2011 [S-1100, 1096, 1091] An assessment of the Student conducted by Sweetser on June 30, 2011, listed the Student's primary diagnosis as Autistic Disorder, with secondary diagnoses of Mixed Receptive and Expressive Language Disorder and Depressive Disorder NOS [S-1084, 1085]. In addition, in July 2011, the Student began to receive Home and Community Treatment ("HCT") in-home services through Kerry Zabicki, LCPC, for 4-6 hours per week at his

home. [P-102].

26. At the Guardian's request, an IEP Team meeting was held on September 8, 2011, to review information from the Guardian regarding the Sweetser assessment and diagnosis, and information on the Student's summer programming and plan for the upcoming school year. [S-1050-1053]. The Team did not change the IEP at that meeting, but did require that there be additional reporting between home and school on the social scripts during the Student's speech and language sessions. [S-1050-51; Heath testimony] In addition, the IEP stated that Ms. Baylies, a school psychological services provider, "may start a social group [that] could include the Student" [S-1051]. This proposed social group offering never came to fruition. [Testimony of Guardian]

27. The Student's xx grade academic schedule included several "vocational" level courses including "Integrated Science and Physics" and "Integrated Algebra II." His course work also included a US History course, Latin II, Fitness/Health, a Study Practicum, and a vocational level English course. [S-1053]

28. Carie Heath, the Student's speech and language services provider, worked with the Student on a 1:1 basis for 45 minutes per week, including working with the Student on his social skills goals. [S-1133; Heath testimony] Ms. Heath also provided consultation services with other staff which involved regular communication with the Guardian and other team members. [Carie

Heath testimony] While the IEP called for this consultation service on basis of 1 time per month for 15 minutes, Ms. Heath testified that she provided more frequent consulting services than called for in the IEP. [S-1133; Heath testimony].

29. Ms. Heath testified that during the fall of 2011, she observed growth in the Student's social skills and interactions. The Student told her he "felt good" about his progress. [Carie Heath testimony] In the course of this programming, she also addressed with him how he might better communicate with his mother, an issue that he had identified as being difficult for him. [S-1130; Heath testimony]

30. Fran Pouzol, the Student's special education teacher, testified that she felt the Student was benefiting in a meaningful way from program in the fall of 2011. [Pouzol testimony] She testified that the Student got more involved with student activities at school, including working in the student union, "running balls" for the soccer team and managing the hockey team. She testified that he was expressing himself to teachers , was talking more, and was "starting to come out of shell." [Pouzol testimony]

31. The Student's IEP Progress Report dated October 28, 2011, indicated he had achieved "limited progress" and his transcript for the first semester had grades all in the C range or above. [S-1039, S-845, P-112]

32. In late October, 2011, Ms. Pouzol observed that the Student was missing some of his classes with her. [Pouzol Testimony] She sent an e mail to the Guardian on November 2, 2011. [S-1036] In this email and in her testimony, Ms. Pouzol noted that the Student was “taking the ‘social’ piece a little too far” and that she thought the Student had “found another student he has become friends with, and I’m hoping he is not following that student’s lead.” [S-1036]. Ms. Pouzol testified that she was surprised when the Student didn’t come to class, since he was “always eager to go to class and to learn.” [Pouzol Testimony]
33. On November 4, 2011, the Guardian notified the District’s special education director, Nancy Hall, that she would be keeping the Student home due to concerns regarding bullying and the Student’s safety at school. [P-116; P-117]. The Student’s IEP Team met on November 9, 2011, in an attempt to address the safety concerns raised by the Guardian. [S-1032] The Team discussed the need for “IEP adjustments to be made to deal with the Student’s feelings of being ‘unsafe’ while at school, and most recently, missing classes and going home and sometimes returning on his bike.” [S-1032,1033] The Written Notice indicates that the Guardian requested that the Student receive group-based social skills instruction. The team did not add this requested instruction. [S-1034] Ms. Stevens, the School’s Special Education Coordinator, replied that psychological services provider is consulting or working with the students individually for scheduling reasons. Ms. Pouzol expressed that she has encouraged other group activities for the student, and that the Student has

been involved with the soccer and hockey teams, and works in the student union in the morning before school. [S-1034]

34. The parties thereafter reached agreement that the Student's IEP should be enhanced to include a 1:1 educational technician escort beginning on November 14, 2011. [S-1029] The School agreed to tighten up communication, add a behavior plan to the Student's IEP, and to have him meet daily with Ms. Cote-Crosskill, his advisor at the Academy. [S-1033]

35. Ms. Pouzol explained at the team meeting on November 9, 2011 that the student was "making small advancements, but still needs prompting and coaxing. When [the Student] can complete his assignment book, discuss how he worked his social skills goal without leading him with question after question, then he's in 'satisfactory progress' and moved towards 'achieved'. He has only been working on this for 6 to 8 weeks." [S-1034]

36. The written notice dated November 9, 2012, stated that the 1:1 escort service was implemented because the Student "has told his mother how unsafe he feels at school. He has told her of being bullied in classrooms and in between classes." [S-1033] The written notice dated November 10, 2012, stated: "in addition, the Student "felt unsafe when asked, and went home without telling anyone ...[and] the school needs to know that the Student is safe and in classes," ... and "[w]ithout the escort, the Student has shown that he can easily leave school and go home" [S-957]. The escort service added to the amended IEP was to run from 7:30 to 2:34 "in all classes and in between classes." [S-929, 932] According to the amended IEP:

he will meet his Ed. Tech escort, who will escort him throughout the morning classes and to the SU or Dining Hall to pick up his lunch and return to Ms. Dunham's room [the "Essential Skills" room] to eat. At lunch, he will meet another Ed. tech, [sic] who will escort him through his afternoon classes and to the bus or the main entrance at the end of the school day depending on his after school plans and permissions from Pat. The Ed. Techs [sic] will keep a record of escort dates/times/incidents. They will be directed to seek out Jim Thurston (the Assistant Principal at Fryeburg Academy) if 'unsafe' situations occur and inform Ms. Pouzol so she can assist [the Student] in processing his feelings to be able to express them." [S-932].

37. On November 10, 2011, the Student "took off for home without telling anyone" after meeting with Fran Pouzol and Jim Thurston. [S-968] On November 15, the Student was found sleeping in the Academy's so-called "dungeon" when he did not show up at the appointed time for his escort. [S-966]
38. Ms. Heath testified that the Student was very concerned about his appearance and wanted to fit in like a normal kid. Once an educational technician was assigned to him, the Student's friend TJ did not want to hang out with him. Ms. Heath testified that the Student was very upset about losing his friend. [Heath testimony]
39. Carol Gregory was the educational technician assigned to the Student to escort him to and from his morning classes through lunch which was held at the Student's "essential skills" class. [Carol Gregory testimony] At the Student's request, Ms. Gregory agreed to maintain a moderate distance between herself and the Student as the Student had expressed some

concern to her about being embarrassed by other students who might see him with an educational technician escort. [Gregory testimony] On December 7, 2011, she and the Student had arranged to meet at a pre-determined location after the Student's final class before lunch. [Gregory testimony] The Student left ahead of her, however, and walked away at a speed that would not allow her to keep up. She did not follow him, but rather went on to the essential skills location where he was supposed to go to get his lunch. Ms. Gregory waited at this location for the entire period, but the Student did not show up. [Gregory testimony] After that lunch period, she then went on to his next class and found him waiting for her there. Ms. Gregory noted his absence in her notes but did not alert anyone that the Student had eloped [Gregory testimony, 890]. The Student eloped on each of the following two days while being escorted by Ms. Gregory. [Gregory testimony, 886; 884]

40. On December 14, 2011, it was determined that the Student had stolen sneakers from one of the Academy dormitories during his elopement from Ms. Gregory on December 7. Ultimately, the Academy's Judicial Board determined to expel the Student from the Academy, finding him guilty of "stealing sneakers from the dorm during the school day." [S-866]

41. On December 14, 2011, Jim Thurston wrote a note documenting that he met with the Student and the Guardian at 1:00 p.m. and "informed [the Student] of the decision to expel." [S-856] In this note, Mr. Thurston wrote: [the Student] and his aide (Jody) cleaned out his locker into a box that I provided...[the

Guardian and the Student] left the main building at 1:09 p.m. [S-856 to 857, 866; testimony of Jim Thurston].

42. On January 6, 2012, the District held a manifestation determination IEP team meeting to determine whether the theft of sneakers by the Student on December 7, 2011, had been a manifestation of his disability. [S-836 to 838; testimony of Ms. Menzel, Ms. Pouzol] The team concluded the theft of sneakers by the Student was not a manifestation of his disability. At the hearing, Ms. Heath testified that in her opinion the theft of the sneakers was not a social communication problem or an ‘initiating’ problem related to the Student’s disabilities. [Carie Heath Testimony]

43. At the January 6, 2012, manifestation determination IEP team meeting, the team ordered tutoring for the Student starting on January 18, 2012 for a duration of 2.5 hours per day [S-790, 837, 822]. The School did not provide the Student with educational services between December 14, 2011, and January 18, 2012, when tutoring began for the Student. [Guardian testimony] At an IEP Team meeting held on February 2, 2012, the Guardian objected to the Student’s abbreviated day tutorial schedule. [S-783] In the Written Notice prepared in connection with this meeting it was noted that “Team members all agreed that [the Student] required a full-day program” [782].

44. The Guardian disagreed with the manifestation decision but decided not to seek readmission of the Student. [testimony of Guardian, Jim

Thurston; S-837, S-782]

45. At an IEP team meeting on February 2, 2012, the discussion continued around alternative educational programs and possible schools for placement. [S-788, 783]. The School identified the REAL School as a possible placement for the Student. [S-788]

46. On February 10, Pender Maken, Director of the REAL School, informed Nancy Hall, Director of Special Education for RSU 72, that they were willing to accept the Student at the school. [S-771] On February 14, Nancy Hall arranged a meeting with the Guardian to discuss placement there. [S-767, 765]

47. The Guardian and the Student looked at a variety of other schools for the Student to attend before agreeing to the Student's placement at the REAL School starting on February 27, 2012. [Guardian testimony, S-763] The Student's placement at the REAL School was confirmed through a Written Notice without a team meeting on February 14, 2012. [S-739 to 740]. The Guardian understood that the REAL School program was provided in a shortened day format, and expressed concern about the shorter day. [S-740]

48. The Student commenced Section 28 rehabilitation services at home starting on February 27, 2012. [Guardian testimony] These services were

provided by DHHS after the Student returned home from the REAL school at about 4:15 p.m. until 7:00 p.m. [Guardian testimony]

49. The REAL School is a state-licensed educational program located in Falmouth for special education or regular education students in grades 7-12. [Pender Makin testimony] The school serves disabled and non-disabled boys and girls, who attend the school primarily from the Windham/Raymond school district. [Makin testimony] Ms. Maken testified that the REAL School is a “project-based” learning center, where students are taught in both traditional and interdisciplinary settings in the community. Ms. Maken noted that the typical REAL School student is one who has had a difficult time in a traditional school setting. REAL School students attend school for 4 ½ hours per day, and in addition participate in extended outdoor adventures including camping, hiking and sea kayaking. [Makin testimony]

50. Carie Heath testified that she also continued to provide speech therapy to the Student while he attended the REAL School, working with him from 7:30 to 8:00 a.m., one day per week. [Heath testimony] The revised speech/language services were reflected in the Student’s IEP dated April 2, 2012. [S-608]

51. On March 30, 2012, the IEP Team met to discuss the Student’s placement at the REAL School. [S-632] The Guardian continued to advocate for the Student to attend full day school or tutoring. [S-632] The Written Notice

reflects that the School declined the Guardian's request, noting that the REAL school schedule "addresses student's needs throughout their day" in a way that is different from traditional schools where students will spend time in lunch, study halls and passing time between classes. [S-633] Ms. Maken testified that student's outdoor trips involve extra time that is not reflected in the 4 ½ hour day. [Makin testimony]. The IEP team did not address ESY services for the Student at the March 30, 2012 IEP Team meeting. [S-632]

52. As a result of the March 30, 2012, IEP Team meeting, the team determined to continue the Student's placement at the REAL School, to keep his current goals, and to add goals with regard to his social behaviors and transition planning. [S-633] The team declined the Guardian's request for tutoring or a longer school day. [S-633]

53. The Guardian testified that the Student has found a sense of "comfort and safety" at the REAL school, noting that the Student had a special relationship with Rod Nadeau, the Adventure-Based Counselor at the REAL School. [Guardian testimony] The Guardian noted that the Student "loved" the camping trip taken with the REAL School staff in April, 2012. [Guardian testimony]

54. The REAL school conducted a Functional Behavior Assessment and prepared a Positive Behavior Support Plan for the Student which was reviewed by the IEP team at a meeting held on March, 30 2012. [Makin

Testimony; S-632] The REAL school prepared a Positive Behavior Support Plan in the spring of 2012. [S-392; Makin Testimony]

55. The REAL School report card for the Student issued on June 19, 2012, indicated grades in the mid 90's for both the third and fourth quarters, and a passing mark for his "adventure based" programming.² [S-460] The Student missed only one day of school during the spring semester of 2012. [S-457; S-496] The Guardian wrote a number of times how wonderful it was for the Student and how much he liked it, and how happy she was with the staff and programming at the REAL School.³ [Guardian testimony]
56. REAL School's proposal for the Student's summer program consisted of 9 hours of social work services with Leslie Differ, LCSW, and three days of adventure programming. [S-457]. According to a June 22, 2012 e-mail from REAL School Assistant Principal Martin Mackey, summer programming is "not based upon any meetings...[but is] included in the annual programming...[and] a reflection of what we do to maintain student commitment to our school." [S-455]
57. The proposed summer social work services did not take place for the

² In an e-mail dated May 29, 2012, Sarah Anderson, the Student's Special Education Teacher wrote: "[The Student] demonstrates a fantastic work ethic...[and] has done quality work, but does need to continue to work on sentence fluency and writing flow...[he] continues to exhibit some social awkwardness, but he is making progress and is very receptive to feedback" [s-496]

³ In an e-mail dated June 7, 2012, the Guardian wrote to REAL school staff: "...I am very grateful that the situation was dealt with like it was...you are all awesome..[the Student] is awesome to be able to deal with everything like he has...THE REAL SCHOOL IS REALLY REAL...(it is true!!!) thanks, [the Guardian] [S-471]. On July 11, 2012 the Guardian wrote in an e mail to REAL school staff: "...you are all awesome and we appreciate all you do."

Student, however the Student met with Page Nichols, his Special Education Teacher, and attended two summer kayak trips one of which involved another student. [Testimony of the Guardian]

58. During the summer of 2012, Dr. Laura Slap-Shelton issued a neuropsychological report on findings from evaluations conducted on the Student between March 26, 2012 and July 21, 2012. [S-344-364] The evaluations were made at the request of Steve Pelletier, the Student’s Sweetser Case Manager. [S-344] The School received Dr. Slap-Shelton’s full evaluation report on or about August 15, 2012 [S-336]. Many of the Student’s scores were in the average range, with the exception vocabulary, understanding directions and fast paced less structured memory testing.⁴

⁴ **Testing summary-Laura Slap-Shelton Spring 2012**

WAIS

Scale	Composite Score	Percentile Rank	Qualitative Description
Verbal Comprehension	80	9th	Low Average to Borderline
Perceptual Reasoning	94	34	Average
Working Memory	86	18	Low Average
Processing speed	97	42	Average
Full Scale	86	18	Average

Academic Achievement Testing Results

Scale	Composite Score	Grade Level	Qualitative Description
Math Cluster	102	13.0	Normal
Math Fluency	120	18.0+	Advanced
Applied Problems	94	9.1	Mildly impaired to normal
Broad Reading Cluster	92	9.1	Mildly impaired to normal
Word Attack	96	8.0	Normal
Letter-Word ident.	93	9.5	Normal
Reading Fluency	98	10.9	Normal
Passage Comprehension	86	6.1	Mildly impaired to normal
Written lang. cluster	94	9.1	Normal
Spelling	107	13	Normal to advanced
Writing fluency	83	6	Mildly impaired
Writing samples	90	7.4	Mildly impaired to normal

[Slap-Shelton testimony.] Dr. Slap-Shelton found that the Student met the criteria for a diagnosis of Autism due to his “significantly impaired use of nonverbal behaviors and gestures used to regulate social interactions,” lack of development of “peer relations consistent with his developmental level,” and lack of “social and emotional reciprocity.”
[S-359]

59. In recommending programming and placement for the Student, Dr. Slap-Shelton considered him to be “a candidate for therapeutic residential placement for adolescents with Autistic Disorder and other developmental

Scale	Composite Score	Grade/percentile
<u>Contextual conventions:</u>		
Writing Mechanics	8	6.4/25%
Creating sentences	9	9/37%
Story Construction	9	6/37%

Neuropsychological Testing Results

Scale	Composite Score	Percentile Rank	Qualitative Description
Motor Functions	91	27	Mildly impaired to normal
<u>Language Functions:</u>			
Picture Vocabulary	86	18	Low Average
Understanding Directions	71	2.7 (grade level)	Mildly impaired
<u>Memory functions:</u>			
Sustained attention			normal
Faster/less structured test			Mildly impaired
Auditory Memory	88	21	Low average
Visual Memory	85	16	Low average
Visual Working Memory	91	27	Average

Executive Functions

Scale	Composite Score	Percentile Rank	Qualitative Description
Mental Flexibility			Normal
Deductive reasoning	80	9th	Normal
Complex figures	28	1st	Low Average to Borderline

disorders.” [S-361]

60. In August 2012, the Student was evaluated for auditory processing deficits by Dr. Elizabeth Fagan, SLPD, who concluded in a report that the Student had an Integration Deficit that adversely affected his auditory processing of language. [S-321, 328]

61. At the IEP Team meeting on August 27, 2012, the Student spoke at the meeting, stating that he rates the REAL School as “perfect... there is nothing he would like to see differently.” [S-293, 299] He said that he was pleased to be able to work on academics without bullying and teasing. [S-299] At this meeting, Pender Makin “noted there have been both high and low times at school with peers” for the Student, conceding that while he has made friends at the REAL School, he does not see these friends outside of school” [S-294]. The Guardian advocated for a compensatory placement, and reiterated her concerns with the abbreviated academic day at the REAL School and the long commuting time for the Student. [S-294, 299] At this meeting, the team was unable to complete discussions and expressed a need to reconvene as neither Dr. Slap-Shelton nor Dr. Sheckart were available to attend. [S-293, 294]

62. At the follow-up IEP Team meeting held on September 10, 2012, the Team reviewed the recent evaluation reports from Dr. Slap-Shelton and Dr. Fagan. [S-266] During the meeting, several concerns were raised about Dr. Slap-Shelton’s assessment. [S-266] Although there was no

dispute about the Student's identification as a student with multiple disabilities, the team was unable to reach agreement as to the identification of autism⁵. Both the Guardian and Dr. Fagan requested increased speech-language services and the School requested additional time to consider Dr. Fagan's evaluation and recommendations since the report had only been provided to the team at the IEP meeting. [S-260]. There was no agreement by the team with regard to the Guardian's request to place the Student residentially [S-261]. In response to the Guardian's stated concerns regarding the Student's commute to and from school, the team noted that changes were made in the transportation to provide for a direct bus that reduced the Student's drive time.⁶ [S-261, testimony of Pender Makin]. The Student, who attended the IEP team meeting, said that "he likes the school he is at [sic] and has developed a rapport with staff and peers at the school." [S-261]

63. The Written Notice from the September 10, 2012 IEP team meeting indicated that the Student would be assessed by Dr. Sheckart and would be entitled to "attend high school a 5th year." [S-259]

64. George Sheckart, Ph.D. was hired by the School to conduct additional testing of the Student in order to explore executive skills, perceptual processing, and personality features in order to develop the Student's

⁵ The September 10, 2012 IEP noted that "some of the members did not believe that the Student demonstrates a severe impairment in verbal communications and social skills."

⁶ Ms. Makin testified that an additional driver was hired to do a direct trip each way for the Student. Despite the length of the trip, it did not appear to take away from the Student's engagement in the program, and she received no reports from staff that he was negatively impacted by the ride.

educational program at the REAL School. [S-236] On September 18, 2012, Dr. Sheckart conducted the following tests after a brief clinical interview and records review: Bender Motor Gestalt Test 2, which measures perceptual processing; Wisconsin Card Sorting Test, which measures executive functioning; and the Minnesota Mutliphrasic Personality Inventory (MMPI); which measures aspects of personality as they affect performance. [S-236] Dr. Sheckart’s 3-page report concluded that the Student has “the capacity for organization, insight, and flexibility”, revealing “typical range” scores for the Bender Motor Gestalt Test and the Wisconsin Card Sorting Test. [S-237] With regard to the Student’s MMPI scores, Dr. Sheckart notes in his report that the Student sees himself as “relatively anxious and tense.” [S-238] Dr. Sheckart concludes: “a good deal of the processes of thinking, which interact with social interactions, is [sic] pressure points for the Student. These pressure points lead to and enhance some of the confusion that he may experience.” [S-238] Dr. Sheckart testified that during his observations of the Student, he noted that the Student attended to the teacher’s instructions and directions, and was attentive to his assignment. [Dr. Sheckart testimony] Dr. Sheckart noted that the Student didn’t interact with other peers to get side-tracked, but interacted with his teacher, asked questions and “looked like a student who could understand and complete assignments”. [Dr. Sheckart Testimony] Dr. Sheckart testified that the Student’s teacher told him during his observation on September 18, 2012 that the Student’s performance on the day of his observation was a “typical” for the Student. [Dr. Sheckart testimony]

65. Dr. Sheckart was not able to opine on whether the Student was properly diagnosed with autism. [Dr. Sheckart testimony] In his opinion, the Student's "label" did not matter as much as whether the Student is received the programming that he needs through his IEP. [Dr. Sheckart testimony]
66. Dr. Sheckart testified that in his opinion a residential placement for the Student was unnecessary, and that the Student had demonstrated an ability for success within the public school framework which was a good indicator about his ability to succeed in that environment [Dr. Sheckart testimony] Dr. Sheckart noted that he did not believe it was appropriate for the Student to be placed at an "all-boys" residential placement, which and that he felt was inconsistent with the Student's interest in girls and his social needs to be in an environment with an array of peers, both male and female. [Dr. Sheckart testimony]
67. The Student participated in a "service trip" with others from the REAL School to work with sea turtles in Florida beginning on September 24, 2012 [S- 219]. There were four students, including the Student, and three adults, including Ms. Makin, Ms. Differ, and a volunteer. [S-218; 189; P-299; 158].
68. Leslee Differ, a Clinical Counselor at the REAL School, noted that the Student was one of four students offered to attend the Florida trip due to his "positive academic engagement" and "consistent demonstration of social,

emotional and behavioral control”. [S-158] Ms. Differ’s report noted “significant progress” in the Student’s connection with peers and his awareness of his social challenges. [S-158] She noted that although the Student did require staff redirection twice, he “was better able to discuss his challenges and work on needed skills due to the connection he established with his peers, an opportunity that he readily accepted.” [S-158]

69. In an e-mail from Pender Maken to the Guardian dated September 29, 2012, Ms. Maken wrote: “[The Student] seemed to thrive-engaging fully in every activity and debriefing with introspection about his growth in social skills...overall [he] contributed much leadership and kindness to our group.” [S-189] The Guardian testified that she couldn’t say that the Florida trip “wasn’t a great experience” for the Student, which she attributes in part to the level of supervision provided for the Student. [Guardian testimony]
70. The Student's grade transcript for his time at the REAL School during the 2012-2013 year reflected the following grades: English/Language Arts: 98; Math: 98; Science: 98; social Studies: 95; integrated service learning: P; Adventure Based Learning/P.E.: P. [S-80, 122]
71. The Student’s October 31, 2012, Educational progress notes prepared by Paul Field, the Student’s case manager and Special Education Teacher, noted that the Student has had “many opportunities to practice social skills and demonstrates more

effective strategies for building and maintaining friendships.” [S-123] Mr. Field also noted that the Student “participates in discussions and activities and completes all classroom assignments” and asks for help when needed. [S-123]

72. On October 10, 2012, the Guardian formally became the Student’s guardian under Maine law [180].
73. The Guardian provided the School with a notice letter dated October 16, 2012, explaining her decision to place the Student unilaterally at the Eagleton School. [S-142; 178] She wrote that she was rejecting “as inappropriate the IEP and placement offered to the Student for the 2012-2013 school year” and further stated that she believed that the Student was entitled to compensatory services for the past failure of the School to provide the Student with a free appropriate public education [S-142]. The School denied the Guardian’s request for reimbursement of the cost of the Eagleton program. [S-95-97; 84-87]
74. Dr. Sheckart issued a follow-up report containing the results of his observation and the classroom edition of the Vineland he administered, which relied solely on feedback from the Student’s REAL School teachers. [S-137] The report noted that the Student’s score of 71 in the socialization skills domain indicated ongoing concerns for the Student to develop and maintain interpersonal relationships with his peer group outside of the educational environment and adult supervision. [S-138] The

report noted, however, that it is also possible that “some skills exist, but are outside of the observed performance that is available within the school setting...General observations in the school setting report the Student to be a productive and positive student.” [S-138] The report noted that “[a]t present there is virtually no difference between the performance of the Student and students in his peer group where he is now engaged and learning...based on teacher reports [the Student] is a willing and capable student, exhibiting a positive image in his current placement.” [S-138]

75. A Speech and Language progress noted prepared by Carie Heath on November 1, 2012, noted that the Student had direct speech therapy for 7 sessions during the school year. [S-101] The report stated that the Student has worked on his goals, with a strong focus on his advocacy skills and [the Student] has been observed to grow in these skills.” [S-101]

76. In the November 1, 2012, IEP Team meeting, the team went over the results of the Florida trip with the Student. Ms. Heath noted that she has seen a “huge difference [in the Student] after the Florida trip and that he would have continued to benefit from staying at the REAL School placement.” [S-1146, Carie Heath testimony] The team reviewed the Sheckart report and denied the Guardian’s request for reimbursement of the cost of the Eagleton program [S- 95-97; 84-87].

77. Carie Heath testified that the Student wanted a girlfriend, and that in her opinion it was important to place the student in a setting where he can

interact with girls of his age in order for him to utilize and develop his social skills with members of the opposite sex. [Carie Heath testimony]

78. The Student began his programming at Eagleton the following week on November 5, 2012. At Eagleton, The Student participated in a full-time 24/7 residential program, with instruction in academics, social skills, and activities of daily living, as well as counseling and therapeutic interventions. [Vickie Shufton testimony]

79. Vickie Shufton, Eagleton's Education Director, testified that Eagleton School serves approximately 60 male students at a time, age 11 and up, with a variety of disabilities, ranging from reactive attachment disorder and sexualized behaviors, to trauma/abuse and autism spectrum disorders. Students are grouped by ability and age, with no more than a 48-month age difference among members of classes and other groupings.

80. Ms. Shufton testified that the Student has done very well at Eagleton, has blossomed socially and despite a dip in the fourth quarter ended the school year with an over 3.0 grade point average. [Shufton testimony; P-1043] Ms. Shufton feels that the Student will be ready to transition back to the REAL school for the fall provided that he receives support for his social/emotional and autism deficits, along with weekly speech and language support for one or two hours. [Shufton testimony]

81. The School reconvened The Student's IEP Team for a meeting on March 25, 2013 [S-25]. The team discussed his programming at Eagleton and noted that Student was involved with the "Safe Options" group which meets weekly and works with sexually traumatized youth. The team noted that while there are no female students for the Student to practice skills with, they do "role play" scenarios and attempt to make it as real as possible." The Written Notice prepared in connection with this IEP stated that Eagleton was utilizing the IEP developed by the School (RSU #72) at the November 1, 2012 IEP team meeting in collaboration with Eagleton representatives, who participated by telephone, the School developed a new IEP for the Student, but again called for his placement at the REAL School. [S-25, P-620]
82. From November 2012 through August 2013, the Guardian expended \$115,782.30 on the Student's program at the Eagleton School, consisting of monthly charges for tuition, room, and board, plus travel expenses of \$1,835.00. [P-1367]
83. The District agreed to abide by the earlier decision of the IEP Team and permit the Student to complete his education with a fifth year of high school during the 2013-2014 school year. [P-649 and P-650] His placement will be implemented primarily at the REAL School, following his completion of the Eagleton program in late August 2013.
84. The Student's aunt testified that since the Student has

been enrolled at Eagleton in November 2012, he has dramatically improved his communication skills. In addition, she noticed that the Student showed tenderness to both his elderly grandmother and his 2 year-old niece in ways that she never had witnessed before. [Aunt testimony]

III. POSITIONS OF THE PARTIES

The Guardian's Position:

The Guardian argues that neither the Student's IEP nor his placement at Fryeburg Academy (or subsequently at the REAL School) was reasonably calculated to address his special needs particularly in the area of the Student's delayed social communication and pragmatic skills.

At the start of the Student's xx grade year in September 2011, the Guardian argues, the Student quickly became overwhelmed by school, failed many assignments, and began showing symptoms of depression. His peers treated him poorly, with teasing, taunting, and other forms of bullying.

The Guardian maintains that the School did not appropriately respond when evidence arose that the Student was beginning to leave the campus during the school day. The School's plan to have educational technicians accompany the Student failed when the Student was allowed to elope, whereupon he entered one of the dormitories and stole a peer's sneakers. The Guardian asserts that the School improperly dismissed the Student from school on December 14, 2011, and then following dismissal failed to provide appropriate educational programming for the Student for approximately one month thereafter, apart from some abbreviated day tutorial services. The School improperly determined that the Student's theft was not a "manifestation" of his disability or a direct result of the school's failure to implement the IEP.

After the Student attend the REAL School, the School improperly failed to find the student as eligible under the autistic spectrum of disorders despite reports from the Student's doctor that confirmed his autism spectrum diagnosis. Additionally, the School

denied the Student a free and appropriate public education (FAPE) when it reduced his weekly speech therapy sessions to 30 minutes, which was insufficient to provide for the Student's needs.

The Guardian asserts that the Student was denied a FAPE when the School failed to provide him a full school day of services, instead providing programming through the REAL School for just 4½ hours per day, with approximately three hours of commuting time for the Student. While the Student had moments of success at the REAL School, his most critical area of need – social communication and pragmatics- was not properly addressed in the planning and delivery of his educational programming. As a result, the Guardian unilaterally placed the Student at the Eagleton School in Great Barrington, Massachusetts. The Guardian seeks reimbursement for said placement, noting that the IDEA allows such awards as a form of compensatory relief when parents or guardians have acted unilaterally and with proper statutory notice in an attempt to compensate their child for past violations of his IDEA rights.

Finally, the Student was denied FAPE insofar as he received no Extended School Year (ESY) programming during the summer of 2011, and only minimal services during the summer of 2012.

The School District's Position:

The School argues that the burden of proof on each of the issues in this case rests with the Guardian, who has not satisfied her burden in this case. The Guardian failed to provide qualified witnesses to carry her burden that the Student's was denied FAPE.

The School argues that during the period from September through December 2011, the team made a reasonable calculation about the Student's IEP and placement for the start of the year with programming in the area of speech and language as well as reading comprehension, the primary deficits demonstrated by the Student. When difficulties arose in early November of 2011, the team reconvened and made reasonable calculations about how to address the issues that were arising by providing 1:1 escort services for the Student.

The School contends that the Guardian has failed to carry her burden of proof to establish that the IEP team was wrong when it concluded that the Student's theft of sneakers was not directly and substantially related to his disability. Additionally, the inability of the Student's educational technician escort to stay with the Student, who was purposefully avoiding the escort, should not be viewed as the School's failure to implement the IEP.

The School maintains that the Student's attendance at the REAL School for the 2011-2012 school year, plus summer services, was reasonably calculated to provide him with educational benefits, and in fact it did provide him with such benefits. As the Student was benefiting from his attendance at the REAL School, changing the Student's placement to a residential setting was inappropriate and violates principals of least restrictive programming for the Student. Finally, the School argues that because the Student was benefitting from his program at the REAL school, the private parental placement at the Eagleton School was inappropriate and more restrictive than the Student required. As a result, the Guardian should not be reimbursed for her costs for this placement, which were assumed at her own financial risk.

IV. ANALYSIS

In order to decide any of the issues in this case, it is first necessary to determine which party has the burden of proof. As the Supreme Court held in *Schaffer v. Weast*, "we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." 546 U.S. 49 (2005); see also *Regional Sch. Unit No. 51 v. John Doe*, No. 2:12-cv-29-DBH, slip op. at 42 (D. Me. 11/29/12) (Magistrate Judge), aff'd, 2013 WL 357793 (D. Me. Jan. 29, 2013).

In this case, the Guardian requested a due process hearing to assert that the School failed to provide a free appropriate public education (FAPE) during the Student's xx grade (2011-2012) and xx grade (2012-2013) years. Accordingly, the Guardian bears the burden of proof.

Maine Unified Special Education Regulations (MUSER) § VI.2.J.(4) provides that one of the major IEP Team responsibilities is to develop or revise an Individualized Education Program as described in § IX to provide each identified child with a disability

a free appropriate public education. In developing each child's IEP, the IEP Team must consider the academic, developmental and functional needs of the child. MUSER § IX.3.C(1)(c).

The IEP must be developed in accordance with the procedural requirements of the IDEA and designed to provide an eligible student with an educational program that is “reasonably calculated to enable the student to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The First Circuit elaborated that the student’s educational program must guarantee “a reasonable probability of educational benefits with sufficient supportive services at public expense.” *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). In *Town of Burlington v. Department of Education*, 546 U.S. 49 (2005), 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. *Id.* . The educational benefit must be meaningful and real, not trivial or *de minimus* in nature.

The First Circuit Court of Appeals has declared that “the IDEA entitles qualifying children to services that target ‘all of [their] special needs,’ whether they be academic, physical, emotional, or social.” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993) “Educational performance in Maine is more than just academics.” *Mr. and Mrs. I v. Maine School Administrative District No. 55*, U.S. Court of Appeals, First Circuit 06-1368 06-1422 107 LRP 11344, March 5, 2007.

In *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), the First Circuit Court held:

Congress indubitably desired “effective results” and “demonstrable improvement” for the Act’s beneficiaries. *Burlington II*, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency of educators’ policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, “related services,” 20 U.S.C. § 1401(17), are required to address a Student’s needs. *Irving Independent School Dist. V.*

Tatro, 468 U.S. 883, 889-90 (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

Id. at 989.

Among the related services which must be included as integral parts of an appropriate education are “such development, corrective, and other supportive services (including psychological services and counseling services) as may be required to assist a handicapped child to benefit from special education.” 20 U.S.C. § 1401(17).

Although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential. As the First Circuit stated in *Lenn*, the law does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Lenn*, F.2d at 1086. The IDEA sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. *Id.* at 1089. In *Roland M.*, the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.*, 910 F.2d at 991 . As the First Circuit explained:

The issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate education" as defined in federal and state law . . . For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C.

Id.

The law is also clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. § 1412(a)(5); MUSER § X(2)(B). What is least restrictive depends upon an individual’s needs. The goal is to educate the Student, whenever possible, with nondisabled students, and as close as possible to the child’s home. MUSER § X(2)(B). An out-of-district placement is only appropriate when the District is unable to provide the Student with FAPE. “Parental preference alone cannot be

the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, (D. Me. 1993).

a. Did the Student's IEP and placement during the XX grade (2011-2012) school year fail to provide the Student with a FAPE?

The IEP developed in May 2011 was reasonably calculated to address the Student's academic and functional needs as indicated in the evaluations conducted in March and April, 2011. In particular, it included goals to address his speech and language issues, and his need to "interact socially with his peers". Specifically, the Student's IEP included 45 minutes per week of speech-language therapy and four 45-minute sessions per week of special education services in the Academy's Learning Center. The team also ordered classroom accommodations and supports to assist the Student in his regular education settings. These included obtaining additional help outside the classroom, extra time to respond to oral questions, assistance with processing discussion of difficulties, and access to the Learning Center to complete work.

The evidence supports a finding that the Student was showing signs of progress after his programming began in the fall of 2011. Although the Student's IEP Progress Report dated October 28, 2011 indicated "limited progress", Carie Heath, the Student's speech/language provider, testified that the Student was "showing growth in his social skills and interactions." Fran Pouzol, the Student's special education teacher, noted that the Student became involved with several student activities at school, including working in the student union, "running balls" for the soccer team and managing the hockey team. At the team meeting on November 9, 2011, Fran Pouzol noted that the Student "is making small advancements, but still needs prompting and coaxing." Ms. Pouzol testified however that the Student was expressing himself to teachers and was talking more and "starting to come out of shell."

While it is clear that the Student was not making dramatic gains and still had challenges to overcome, there is evidence that he had made progress in a relatively short period of time, indicating that he was receiving meaningful educational benefit. As discussed above, the IDEA does not guarantee the best possible option for a student. It

merely promises appropriate, rather than ideal education, and an adequate, rather than optimal, IEP.

In early November 2011, when concerns were raised regarding the Student's attendance and possible bullying at school, the Student's IEP Team met on November 9, 2011. The parties thereafter reached agreement that the Student's IEP should be enhanced to include a 1:1 escort beginning on November 14, 2011. The written notice dated November 10, 2012, stated the 1:1 escort service was due in part because "the school needs to know that the Student is safe and in classes," ... and "[w]ithout the escort, the Student has shown that he can easily leave school and go home". The team also agreed to tighten up communication, add a behavior plan to the Student's IEP and to have him meet daily with his advisor at the Academy. The escort service added to the amended IEP was to run from 7:30 to 2:34 "in all classes and in between classes". The IEP directed the escort to "seek out Mr. Thurston if 'unsafe' situations occur and inform Ms. Pouzol so she can assist [the Student] in processing his feelings to be able to express them."

Carol Gregory was the educational technician assigned the Student to escort him to and from his morning classes through lunch which was held at the Student's "essential skills" class. Prior to their planned meeting on December 7, 2011, the Student walked away from Ms. Gregory who was unable to follow him.

On December 14, 2011, it was determined that the Student had stolen sneakers from one of the Academy dormitories after he walked away from Ms. Gregory on December 7. As a result of the theft, the School's Judicial Board recommended that the Student be expelled. Although the Student was not formerly expelled until December 20, 2011, the Assistant Principal told the Student that he was expelled on December 14, 2011, and at the same time gave him a box to clean out his locker. The Guardian understood the Student was not allowed back on school property, and the School did not provide the Student with educational services from December 14, 2011 until tutoring began for the Student on January 18, 2012.

On January 6, 2012, the District held a manifestation determination IEP team meeting to determine whether the theft of sneakers by the Student on December 7, 2011, had been a manifestation of his disability. The team concluded the theft of sneakers by the Student was

not a manifestation of his disability, and ordered tutoring for the Student starting on January 18, 2012, for a duration of 2.5 hours per day.

MUSER XVII 1. B.(2) provides in relevant part:

after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (D) of this section.

MUSER XVII.1(D)(1)(a) provides:

following expulsion, the goals must then be reasonably calculated so as to enable the child to continue to participate in the general curriculum, although in another setting and to progress towards meeting the goals set out in the child's IEP.

See also 34 CFR 300.530; *Farrin v. M.S.A.D. No. 59*, 165 F. Supp. 2d 37 (D. Me. 2001).

The evidence supports a finding that the School failed to provide the Student with FAPE when it did not provide programming after the expulsion exceeded 10 consecutive school days. It is the School's obligation to provide services, pursuant to this section, which should have commenced on the 11th school day following the Student's notice of expulsion on December 14, 2011 up until the time that tutoring services began for the Student.⁸

The Guardian additionally argues that the Student's placement at the REAL School was inappropriate insofar as the Student had only 4½ hours of classes per day, compared to the 6 ½-7 hours offered at Fryeburg Academy or other traditional school settings. The Guardian argues that there was no IEP Team determination for an abbreviated day, and that MUSER § II.1 and § VI.2.L obligate the School to maintain a

⁸ Although the Student was not formerly expelled until December 20, 2011, the Assistant Principal told the Student that he was expelled on December 14, 2011. The evidence supports a finding that the Guardian understood the Student was not allowed back on school property, and the School did not provide the Student with educational services from December 14, 2011 until tutoring began for the Student on January 18, 2012. In addition, the Guardian states in her brief that apart from some abbreviated day tutorial services that began on January 18, 2012, the Student received no education at all until he attended the REAL School. Once tutoring began, there was no evidence to support this allegation of insufficient tutoring services, however. MUSER XVII.1(D)(1)(a) modifies the goals for a properly expelled child, and provides that following expulsion, the goals must then be reasonably calculated "so as to enable the child to continue to participate in the general curriculum, although in another setting and to progress towards meeting the goals set out in the child's IEP". See 34 CFR 300.530; *Farrin, Id. at 52*.

full-day program before determining that an abbreviated day was appropriate and necessary.

MUSER II.1. defines “Abbreviated school day” as any day that a child eligible under this chapter attends school or receives educational services for less time than age/grade peers without disabilities within the same school and/or school program. The REAL School uses a 4 ½ hour day schedule for all students, including non-disabled students. The REAL School schedule provides direct instruction for the entire time students attend including students’ outdoor trips which are not reflected in the daily schedule. The Student was receiving the same a 4 ½ hour day schedule in this specialized placement as used for all students.

While the Guardian noted her concerns around the shortened day, she ultimately consented to the Student’s placement at the REAL School on February 14, 2012, after considering a variety of other schools for the Student to attend.⁹

Based on the above analysis, the evidence does not support a finding of a violation of IDEA based upon an inappropriate abbreviated program for the Student. In addition, the evidence supports the conclusion that Student’s IEP at the REAL School for the remainder of the 2011-2012 school year was adequate and that he was continuing to make demonstrable improvements in his educational and personal skills. The Student’s report card issued on June 19, 2012 indicates only one absence and grades in the mid 90’s for both the third and fourth quarters. The Student seemed to be making progress even through the eyes of the Guardian, who wrote to REAL school teachers and administrators in June and July, 2012 about how happy she was with the staff and programming at the REAL School.

b. Did the Student’s IEP and placement during the xx grade (2012-2013) school year fail to provide the Student with a FAPE?

The IEP developed in April, 2012 for the 2012-2013 school year was reasonably calculated to address the Student’s academic and functional needs. The team determined to maintain the Student’s placement at the REAL School, to keep his current goals and to

⁹ The parent and school had also considered placement at Future Builders, Sebago Education Alliance Program and the Community School at Tamworth. [S-740]

add goals with regard to his social behaviors and transition planning, as well as a Positive Behavior Support Plan for the Student.

Although not part of the Student's IEP, the REAL School offered limited summer programming to the Student, as part of the curriculum offered to all students to "maintain student commitment." During the summer of 2012, the Student met with his Special Education Teacher and attended two summer kayak trips.

In August, 2012, Dr. Slap-Shelton issued a neuropsychological report on the Student reporting on findings from evaluations conducted on the Student between March 26, 2012 and July 21, 2012. Dr. Slap-Shelton found that the Student met the criteria for a diagnosis of Autism due to his "significantly impaired use of nonverbal behaviors and gestures used to regulate social interactions, lack of development of peer relations consistent with his developmental level," and a lack of "social and emotional reciprocity." In recommending programming and placement for the Student, Dr. Slap-Shelton considered him to be "a candidate for therapeutic residential placement for adolescents with Autistic Disorder and other developmental disorders.

Dr. Slap-Shelton's evaluation revealed, however, that since 2011 the Student had shown some growth in his verbal comprehension and working memory scores, two challenging areas for the Student. In Dr. Slap-Shelton's 2012 report, the Student's WAIS score for verbal comprehension was 80, in the 9th percentile, it showed improvement over the Student's scores on the same test in March 2011 when he received a 67 for verbal comprehension, placing him in the first percentile. Similarly, the Student's 2012 WAIS working memory score of 86 placed him in the 18th percentile, compared with the Student's 2011 working memory score of 68, which placed the Student in the second percentile. While not showing dramatic growth, these evaluations corroborate other evidence that the Student was making progress during his placement at Fryeburg Academy and the REAL School.

Dr. Sheckart testified that he had evaluated and observed the Student on September 18, 2012. In his September 18, 2012, report, Dr. Sheckart's noted that the Student has "the capacity for organization, insight, and flexibility", revealing "typical range" scores for the Bender Motor Gestalt Test and the Wisconsin Card Sorting Test. Dr. Sheckart noted that the Student didn't interact with other peers to get side-tracked,

asked questions and “looked like a student who could understand and complete assignments”. He testified that the Student had demonstrated an ability for success within the public school framework and that in his opinion a residential placement for the Student was unnecessary.

The Student demonstrated progress in his social and peer interactions during a REAL School trip to work with sea turtles in Florida in late September 2012. According to a report prepared by Lesley Differ, a clinical counselor at the REAL School, the Student was one of four students offered to attend the trip due to his “positive academic engagement” and “consistent demonstration of social, emotional and behavioral control”. During the trip, Ms. Differ’s report noted “significant progress” in the Student’s connection with peers and his awareness of his social challenges. In an e-mail from Pender Makin to the Guardian dated September 29, 2012, Ms. Maken wrote: “[The Student] seemed to thrive-engaging fully in every activity and debriefing with introspection about his growth in social skills...overall [he] contributed much leadership and kindness to our group.” The Guardian agreed that the Florida trip was a positive experience for the Student, although she attributed his success to the level of supervision provided for the Student.

Paul Field, the Student’s Special Education Teacher, also noted the Student’s progress in an October 31, 2012, report where he noted that the Student has had “many opportunities to practice social skills and demonstrates more effective strategies for building and maintaining friendships.” Mr. Field also noted that the Student “participate[d] in discussions and activities and completes all classroom assignments” and asked for help when needed.

The Student's grade transcript at the REAL School during the 2012-2013 year also indicates progress: English/Language Arts: 98; Math: 98; Science: 98; Social Studies: 95; integrated service learning: P; Adventure Based Learning/P.E.: P.

The evidence supports a conclusion that the IEP developed in April, 2012 was reasonably calculated to address the Student’s academic and functional needs and that the School provided the Student with a FAPE during his xx grade (2012-2013) school year from the start of school in September until the Guardian unilaterally placed the Student at a private residential placement on November 5, 2012. The appropriate nature

of the Student's IEP at the REAL school is supported by the fact that the IEP developed by RSU #72 was used during the Student's subsequent placement at the Eagleton School in November, 2012.

The Guardian asserts that the School deprived the student of a FAPE by failing to provide him with Extended School Year Services (ESY) during the summer of 2011 and the summer of 2012. As set forth in MUSER, Extended School Year Services must be provided only if a child's IEP Team determines that the services are necessary for the provision of FAPE to the child. MUSER §X.2.A.(2) (7) MUSER specifies that the need for ESY and particular services is demonstrated by means of:

- (a) A review by the child's IEP Team of relevant information including, but not limited to, progress reports and relevant assessments, parent report, observations or documentation;
- (b) Consideration by the child's IEP Team of the significance of the child's disability, progress toward IEP goals; and
- (c) Consideration of the impact of previous service interruptions, if applicable, and the probability that the child is unable to recoup, in a reasonable amount of time, skills previously mastered.

MUSER §X.2.A.(2) (7)

While the Guardian argues that the School should have provided ESY, she offered little evidence that suggests that the School inappropriately deprived him of this service. In the present case, the May 2011 IEP Team reviewed the evaluations of Nancy Smith-Jewell, Ph.D, and Carie Heath conducted in March and April 2011. While both evaluators noted concerns with regard to the Student's working memory, neither identified concerns with regard to previous service interruptions or the Student's ability to recoup previously mastered skills. There was no evidence of any regression or recoupment concerns for the Student noted at the March 30, 2012, IEP team meeting. Accordingly, the Guardian has not satisfied her burden to establish that the School deprived the Student of a FAPE by failing to provide him with Extended School Year Services (ESY) during the summer of 2011 or 2012.

- c. Did the District improperly conclude that the Student's behavior leading to his expulsion from Fryeburg Academy was not a manifestation of his disabilities?**

On January 6, 2012, the School held a manifestation determination IEP team meeting to determine whether the theft of sneakers by the Student on December 7, 2011, had been a manifestation of his disability. Over the Guardian's objection, the team concluded the theft of sneakers by the Student was not a manifestation of his disability.

With regard to discipline issues and their relationship to a Student's disability, MUSER § XVII.1.E directs districts to "conduct a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct." In such an event, the regulations then set forth a series of specific steps the IEP Team must take to ascertain the relationship between the student's conduct and the disability, as well as whether the conduct is related to a district's failure to implement an IEP.

As set forth in the above section, the trigger requiring a manifestation determination only applies if the code of conduct violation results in a "change of placement." 34 CFR §300.536 defines "change of placement due to disciplinary removals" as the removal of a child "for more than 10 school days in a row a school year."

In the present case, although the School's Judicial Board made a finding that the Student was guilty of stealing sneakers on December 14, 2011, the School did not formally expel the Student until December 20, 2011.¹⁰ Because the conduct violation in the present case constituted a change of placement, as defined in 34 CFR §300.536, 20 U.S.C. §1415(k)(1)(E)(i) of the IDEA requires that the Team ask:

- (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

See also MUSER XVII.1(E)(1) (2013); 34 C.F.R. § 300.530(e).

¹⁰ The December 14, 2011 Judicial Board Report stated in relevant part the Board's "Decision" was that the Student was "guilty of stealing sneakers from the dorm." The Board's "recommendation" was that the student be expelled. [S-866] Even if the School had formerly expelled the Student on December 14, any delay in holding the manifestation review, considering the holiday period, was harmless. See *Farrin v. M.S.A.D. 59*, 165 F. Supp. 2d 37 (D. Me. 2001).

With regard to the first prong, whether the conduct in question was caused by, or had a direct and substantial relationship to the child's disability, the Guardian testified that she believed the theft was related to the Student's disability, and that the Student had stolen sneakers on other occasions.

Dr. Sheckart testified that he did not see a direct relationship between the Student's disability and the theft, nor did he note any unusual thought disturbances that "one might find with an individual who has a significant theft problem." Carie Heath, the Student's Speech and Language Therapist, testified that in her opinion that the theft of the sneakers was not a social communication problem or an "initiating" problem related to the Student's disabilities.

The Guardian offered no other testimony, expert or otherwise, to support her assertion that the Student's theft of sneakers was directly and substantially related to the student's disability or that the Student's disability made him more likely to steal. Based on the above analysis, there is insufficient evidence to establish that the theft of sneakers was directly and substantially related to the Student's disability.

The second prong of the two part test requires a finding that conduct in question was the direct result of the local educational agency's failure to implement the IEP.

On the day of the theft, an educational technician was assigned to the Student pursuant to his IEP due to concerns about the Student feeling unsafe while at school and for his propensity to leave school without notice. The educational technician testified that at the Student's request, she gave the Student some space so that he would not be embarrassed by other students.

On the date of the theft, The Student left ahead of her, however, and walked away at a speed that would not allow her to keep up. As the educational technician did not believe that the Student's elopement was a safety issue, she did not report the incident other than to make a note of the incident in her log. After that lunch period, she then went on to his next class and found him waiting for her there.

The record supports a finding that the theft was not the direct result of the local educational agency's failure to implement the IEP. The School implemented the IEP as

written by providing the agreed upon educational technician escort.¹¹ While the School may bear responsibility for failing to prevent the Student's elopement, it is difficult to see how this could be done without creating an overly restrictive environment for the Student. In any event, the School was not responsible under the IEP to prevent the Student from committing theft, which was the conduct that was the subject of the manifestation determination.¹²

d. Is the Guardian entitled to reimbursement of her costs for her unilateral placement at the Eagleton School since November 2012 or is the Student entitled to any other remedy under the special education laws?

The Guardian request that she be reimbursed for tuition and other expenses incurred as a result of her unilateral placement of the Student at the Eagleton School in Great Barrington, Massachusetts. The School asserts that the Student was receiving a FAPE and benefitting from his program at the REAL School and that in any event the Eagleton placement was inappropriate and overly restrictive for the Student.

When a student is deprived of FAPE, he is entitled to "such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Compensatory educational services are one possible remedy. Reimbursement for an appropriate private placement may be awarded as a form of compensatory relief or tuition reimbursement when parents have acted unilaterally and with proper statutory notice. *Ms. M. v. Portland Sch. Comm.* 360 F.3d 267 (1st Cir. 2004); *Regional School Unit No. 51 v. John Doe, et al.*, No 2:12-cv-29-DBH (Nov. 29, 2012).

A private placement is an appropriate self-help remedy when a public school system has failed in its obligations under the IDEA, if the education provided by the

¹¹ It is undisputed that the Student's escort failed to notify Mr. Thurston when the Student eloped on December 7, 2013 as an 'unsafe condition'. For purposes of the ruling on the manifestation issue, it is unnecessary address the issue of whether this represented a failure of the School to implement the IEP as any such violation occurred after the theft, and therefore was not directly related to the theft incident in question.

¹² The Student's IEP Team met on November 9, 2011 to discuss the need for "IEP adjustments to be made to deal with the Student's feelings of being 'unsafe' while at school, and missing classes and going home. The written notice dated November 9, 2012, stated the Student has told her of being bullied in classrooms and in between classes." The written notice dated November 10, 2012, stated that the Student "felt unsafe when asked, and went home without telling anyone The amended IEP dated November 29, 2011 provides that the Student's escort will be "directed to seek out Mr. Thurston if 'unsafe' situations occur and inform Ms. Pouzol so she can assist [the Student] in processing his feelings to be able to express them." [S-932].

private school is reasonably calculated to enable the student to receive educational benefits. *Rafferty v. Cranston Pub Sch. Comm.*, 315 F.3d 21, (1st Cir. 2002) citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11, citing *Rowley*, 458 U.S. 176. However, parents make a private placement at their own financial risk. *Florence*, 510 U.S. at 15 (1993) (quoting *Burlington*, 471 U.S. at 373-74 (1985)).

As a remedy, a private placement must provide some element of special education services missing from the public alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit. *Mr. and Mrs. I.*, 480 F.3d at 25 (citing *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003)). The private placement does not have to meet every special education need. *Id.* (citing *Frank G. v. Bd. Of Educ. Of Hyde Park*, 459 F.3d 356, 365 (2nd Cir. 2006)), *cert. denied*, 552 U.S. 985 (2007).

As noted by the above analysis, the Guardian has not established a “missing element” of special education services from either Fryeburg Academy or the REAL school, thereby justifying reimbursement for her private placement at Eagleton. While the evidence shows that the Student has made progress at Eagleton, the evidence likewise supports a finding that the Student made progress at Fryeburg Academy and the REAL school between May, 2011 and November 2012.

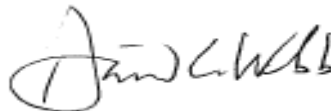
The Student is, however, entitled to a remedy for the School’s deprivation of FAPE for several weeks after his expulsion in December 2011. In *Pihl v. Mass Dep’t of Education*, 9 F.3d 184 (1st Cir.1993), the court explained, “[t]he nature and extent of compensatory education services ... varies according to the facts and circumstances of a given case. *Id.* at 188, n. 8. Hearing officers in Maine have carefully tailored compensatory orders to the harm actually identified, rather than to the costs incurred by the family. *See Portland Public Schools*, 113 LRP 4683 (SEA Me. 1/22/2013). In *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C. Cir. 2005), the court noted that the compensatory services should place the Student in the same position he would have occupied, had the District complied with the IDEA. *Id.* at 525. Finally, compensatory awards “must do more” than simply provide some educational benefit—they “must compensate.” *Reid*, F.2d at 525; *See also MSAD #22*, 43 IDELR 268 (Me. SEA 2005).

In the present case, the School failed to provide the Student with any programming between the 11th school day after December 14, 2011 and January 18, 2012. Therefore, the Student is entitled to reasonable compensation for his educational losses during that period. This shall consist of the following: (1) payment for 15 days of tutoring for 2 ½ hours each day at a maximum rate of \$50 per hour; (2) three weeks of speech-language therapy at a frequency of 45 minutes per week; and (3) transportation to and from said tutoring and speech-language services, either provided in the form of mileage reimbursement or transportation provided by the School.

ORDER

1. During the 2011-2012 school year, RSU #72 violated state and federal special education law by failing to provide the Student with a free, appropriate public education when it did not implement that portion of the Student's IEP requiring programming between the 10 day period following his expulsion on December 14, 2011 and January 18, 2012.
2. RSU #72 is ordered to provide compensatory educational services in the form of:
 - a. tutoring for the Student for 15 days in the amount of 2 1/2 hours per day at a rate not to exceed \$50 per hour;
 - b. three weeks of speech-language therapy at a frequency of 45 minutes per week; and
 - c. Mileage reimbursement or transportation provided to the Student to obtain these services. The Guardian shall provide bills for these services to RSU #72 so that it may pay for these services directly, unless the parties mutually agree to a different payment arrangement.
3. RSU #72 properly concluded that the Student's behavior leading to his expulsion from Fryeburg Academy was not a manifestation of his disabilities.
4. The Student's IEP and placement during the xx grade (2012-2013) school year provided the Student with a free, appropriate public education.

Dated: September 19, 2013



David C. Webb, Esq.
Hearing Officer