

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

**October 15, 2013**

**13.076H— Parents v. Cape Elizabeth School Department**

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

**REPRESENTING THE DISTRICT:       Eric Herlan, 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 July 17 & 19, August 29 and September 4, 2013 at the offices of the Drummond Woodsum in Portland, ME. Present for the entire proceeding were the Mother, Father, Attorney O’Meara, Jane Golding, Director of Special Education for the Cape Elizabeth School Department (“District”), Attorney Herlan, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Richard Doiron, Ph.D.	Clinical Neuropsychologist
Victoria Papageorge	Educational Consultant and Evaluator
Barbara Melnick	Educational Consultant and Evaluator
Terese Roberts	Teacher, Cape Elizabeth Middle School
Laura Manuel	School Psychologist
Tammy Thatcher	Special Education Teacher, Cape Elizabeth Middle School

All testimony was taken under oath.

**I.       PROCEDURAL BACKGROUND:**

On June 5, 2013, the Parents filed this hearing request on behalf of their daughter (“Student”). On July 10, 2013, a prehearing conference was held at the offices of Drummond Woodsum in Portland, Maine. Participating in the conference were: the Mother; the Father;

Richard O’Meara, Esq.; Eric Herlan, Esq., Hannah King, Esq.; Jane Golding, special education director; and Shari Broder, hearing officer. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 959 pages of exhibits (herein referenced as P-#), and the District submitted approximately 800 pages of exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of four days. Both parties requested to keep the hearing record open until September 30, 2013 to allow them to prepare and submit closing memoranda. The District submitted a 24-page memorandum and the Parents submitted a 59-page memorandum. The record closed upon receipt of these documents on September 30, 2013. The parties further agreed that the hearing officer’s decision would be due on October 15, 2013.

## **II. ISSUES:**

1. Did the District violate the Individuals with Disabilities Education Act (IDEA) in the spring of 2013 when it determined that the Student was no longer eligible to receive special education and related services pursuant to state and federal special education law and rules?
2. Did the District violate the IDEA by not reimbursing the Parents for the independent evaluation they obtained in preparation for the May 2013 IEP team meeting?
3. If the hearing officer determines that the District violated the IDEA, what remedy is appropriate?

These issues are addressed below.

## **III FINDINGS OF FACT**

1. The Student is 14 years old (DOB: XX/XX/XX), and lives with her mother (“Mother”), father (“Father”) and older sister in Cape Elizabeth, Maine. Since XX grade, she has been receiving special education and related services under the category of Specific Learning Disability (SLD).

2. As a preschooler, the Student first began receiving speech and language services from Child Development Services because she was slow in learning to talk.
3. The Student began kindergarten at the Pond Cove School in Cape Elizabeth. Although initially she was placed in a reading recovery program, she was referred for a special education evaluation towards the end of XX grade. [Testimony of Mother] At that time, she was identified as a student with a learning disability. [P-1]
4. In September of 2006, the Student started XX grade with an IEP that provided 25 minutes per day of direct instruction for reading fluency in the resource room. [P-1-1.2] The remainder of her day was in mainstream classes. Cognitive testing revealed that the Student had a Full Scale IQ of 114. [P-1.2]
5. At the beginning of XX grade, the Student was struggling to learn to read and spell. In December 2007, the District had Alina Perez-Smith, Ph.D., conduct a psychological evaluation of the Student. [P-2, testimony of Mother] The Student's scores on most of the testing was in the average range, but she was below average in her reading rate (16<sup>th</sup> percentile), and her accuracy was in the 25<sup>th</sup> percentile, which resulted in a fluency score in the 16<sup>th</sup> percentile. [P-7] Dr. Perez-Smith noted,

Inconsistencies and 'encapsulated weaknesses,' such as those noted in [the Student's] verbal fluency, mental sequencing and phonological memory on the CMS [Children's Memory Scale], her poor spelling ability, and below average oral reading fluency, along with [the Student's] above average intellectual abilities, are very similar to those described as typical of dyslexic individuals . . . [P-12]

. . . As is typical among very bright dyslexic children it is sometimes difficult to identify a single area of psychological processing that represents a processing deficit, as they are able to utilize their intellectual strengths to mask areas of deficit as well as utilize many compensatory strategies . . .

Dr. Perez-Smith diagnosed the Student with a reading disorder. She made a number of recommendations for developing the Student's reading skills and using learning strategies,

including a combination of empirically-based reading interventions that focused simultaneously on fluency, decoding and phonological skill building, such as *Wilson* and *Seeing Stars*. [P-12, 14] Dr. Perez-Smith encouraged the Parents to continue to read at home as they had been doing, with increased emphasis on guided oral reading by having the Student read aloud and the Parents assisting her with decoding. [P-15]

6. In December 2007, during XX grade, the District also conducted an educational evaluation of the Student using the Wechsler Individual Achievement Test (WIAT-II), the Woodcock Johnson Test of Achievement fluency tests (WJ-III), Dynamic Indicators of Basic Early Literacy Skills (DIBELS), and the Comprehensive Test of Phonological Processing (CTOPP). The Student scored very high in reading comprehension, in the 92<sup>nd</sup> percentile with a grade equivalent of 8:5. [S-560] In word reading, however, she had a 2:5 grade level equivalent, and 2:1 in spelling. [S-560] On the CTOPP, the Student's composite scores fell within the average range, except for phonological awareness, which was below average. [S-562] Her phonological awareness test was in the 12<sup>th</sup> percentile, and tasks involving elision skills proved to be an area of weakness for her. [S-564]
7. The IEP Team met on January 15, 2008 and completed the Maine Department of Education Learning Disability Evaluation Report (henceforth "LD document"). The team concluded that the Student had a score 1.5 standard deviations below the mean score on the CMS, and a score 1.0 standard deviation below the mean on the CTOPP phonological awareness test. [S-553] The team also concluded that the Student was not achieving adequately for her age or meeting state-approved grade level standards in basic reading skills. [S-554]
8. In February 2008, the Student began receiving specialized instruction using the Orton Gillingham (OG) method. The frequency of the Student's lessons were an hour a day three

days each week, and were early in the morning before the Student's regular classes. She was upset about this scheduling. [Testimony of Mother] Additionally, she found the OG method very difficult. The Student practiced reading and writing at home with her parents as well.

9. Because it was a difficult spring for the Student educationally, the Mother asked Dr. Perez-Smith for advice. Dr. Perez-Smith recommended getting an outside perspective from Candice Bray, a learning disabilities specialist. [P-17]
10. In August of 2008, Candice Bray conducted an evaluation of the Student. [P-27, testimony of Mother] Dr. Bray thought the Student had many learning strengths and abilities, but had processing issues that were impacting her development in reading, spelling and written language. [P-30] She administered the WJ-III, Test of Word Reading Efficiency (TOWRE), Rapid Automatized Naming and Rapid Alternating Stimulus Tests (RAN/RAS), as well as several informal assessments. [P-28-30] The Student's scores were below grade level on a number of these assessments, particularly on the RAN/RAS, on which the Student scored poor (8<sup>th</sup> percentile) on "numbers" and "letter/numbers," and below average on "letters" and "letters/numbers/colors." [P-29] On the TOWRE, the Student's Total Word Reading Efficiency score was an 83, the 13<sup>th</sup> percentile. [P-29] Dr. Bray concluded that the Student had significant delays in reading, particularly with oral fluency, and also thought the Student appeared very fragile regarding her continued need for explicit instruction in literacy. [P30-31] She recommended continued systematic, multisensory literacy instruction across an integrated program, and noted that the Student would need this work on a daily basis, but should also be challenged across her many areas of ability. [P-31] Some specific programs Dr. Bray recommended using were *Lexia SOS*, a computerized program, *Great Leaps*, *Quick Reads*, and *One Minute Readers*. [P-32]

- 11.** On September 10, 2008, shortly after the Student entered XX grade, the IEP team met for the Student's annual review, and reviewed Dr. Bray's evaluation at that time. The team decided to continue providing the Student with direct instruction in reading for three hours per week from an outside OG tutor, and 30 minutes per day, five days a week of direct instruction in the resource room to address spelling and reading fluency skills. [P-34] The team also decided to obtain a speech and language evaluation, to which the Parents consented. The Student began working with special educator Tom Robinson using *Great Leaps* and *Spellography*, and other programs recommended by Dr. Bray. [P-39-43]
- 12.** In January of 2009, the Parents asked Dr. Bray to do another evaluation. Dr. Bray readministered the TOWRE and several informal assessments. In several months, the Student's Total Word Reading Efficiency score on the TOWRE increased to an 89, 23<sup>rd</sup> percentile, up from the 13<sup>th</sup> percentile. Dr. Bray concluded that her reassessment showed that the Student was making progress in her decoding and reading fluency, but that she continued to exhibit significant delays in literacy, particularly at the text level. [P-56] Dr. Bray observed that the Student was making little progress in spelling, and opined that she would require intensive literacy instruction and an integrated approach to her intervention. She thought the Student would benefit from *Lexia*, and to continue her work in reading fluency with *Great Leaps* on a daily basis. [P-57]
- 13.** The Mother expressed her dissatisfaction with the District's programming for the Student in a letter dated February 3, 2009. [P-59] She explained that she was placing the Student at the Aucocisco School, for two to three additional hours of tutoring per week, and would seek reimbursement for this expense. The Aucocisco School is a state-certified special purpose school in Cape Elizabeth for students who have difficulty learning in traditional schools. The

Mother corresponded with Dr. Bray about this decision in March of 2009, reporting that the Student was doing well with Kathy Condon<sup>1</sup> as her tutor. The Mother also mentioned that she visited the Landmark School and was looking into their summer program. [P-73]

- 14.** In the late spring of XX grade (May 2009), Alina Perez-Smith conducted another psychological evaluation of the Student in preparation for her annual review. It was limited in scope because of a decision of the IEP team not to conduct further standardized cognitive and memory tests that may cause the Student anxiety. An interview with the Student revealed that she “dreads” her OG tutor and had trouble falling asleep on nights before tutoring. [S-506] She was excited to go to XX, which began in XX grade in Cape Elizabeth. Mr. Robinson reported that although the Student had made some progress with *Spellography*, he was concerned about the change in her demeanor from “bubbly and happy” to down and withdrawn over the course of the year. [S-508] In addition to her diagnosis of Reading Disability, Dr. Perez-Smith also diagnosed the Student with Adjustment Disorder with Mixed Anxiety and Depressed Mood. [S-509] The District also conducted an educational achievement evaluation. [S-513-519] On the CTOPP, although the Student had made progress, her score on phonological awareness and elision were Below Average. [S-517]
- 15.** When the IEP team met on June 9, 2009 for the Student’s annual review, it again completed the LD document. In that report, the District indicated that the Student continued to present with characteristics consistent with a reading disability, but that she did not qualify any longer as a Student with a Specific Learning Disability (SLD) because she did not exhibit a disorder in one or more psychological processes. The report noted that she scored 1.0 standard deviation below the mean on only one test in the recent assessments, that she was

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<sup>1</sup> Kathy Condon is a teacher at the Aucocisco School.

achieving adequately for her age or was meeting state-approved grade level standards based on a DRA score of 40 (grade level), NWEA scores at the 70<sup>th</sup> percentile in reading and above grade level in math, WIAT-II and WJ-III scores in the average range, and a DIBELS score almost at grade level. [S-370, P-114-115] The Parents disagreed with this determination, and filed a complaint with the Department of Education. [P-132, S-365] The result of the consequent complaint investigation was that the District failed to utilize the requisite criteria when determining that the Student was no longer eligible for special education, and therefore violated the Maine Unified Special Education Regulations (MUSER).

**16.** The Parents enrolled the Student at the Landmark School during the summer of 2009. The Student received three hours per day of instruction for six weeks. [Testimony of Mother] She enjoyed this and liked being with other children who were smart but had poor reading fluency. The Student's Gray Oral Reading Test (GORT-4) scores from the testing administered at Landmark on July 31, 2009 showed that she was in the 9<sup>th</sup> percentile in reading rate and 5<sup>th</sup> percentile in fluency. [P-136] GORT-4 is a test requiring students to read aloud and answer comprehension questions in a multiple-choice format.

**17.** The Student entered XX grade at Cape Elizabeth Middle School in the fall of 2009. In December of 2009, the Parents hired Vicki Papageorge for consultation about the Student's educational programming. [P-158] Ms. Papageorge is a certified special education consultant, and has 34 years of experience as a special education teacher. She currently runs Hyperion Learning Services in southern Maine. [Testimony of V. Papageorge] She noted that the Student made gains in certain areas of reading with her OG program, and that this would support the student's accuracy and automaticity. [P-161] Because the Student was still weak in reading fluency, she needed to have appropriate methodologies provided five days a week



for 50 minutes per day. Ms. Papageorge recommended Lindamood-Bell *LIPS* and *Seeing Stars*, as well as intensive work with reading fluency by providing daily drills with *Great Leaps*, *Lexia* and other programs.

- 18.** The IEP team met on December 15, 2009 to implement the complaint investigation corrective action plan. The team restored the Student's eligibility for special education and developed a new IEP that provided the Student with 20 minutes of direct instruction five days per week, plus one hour of OG tutoring three days per week. [S-341] The team decided that the Student should finish the OG program. [S-273]
- 19.** In late May of 2010, Barbara Melnick, Director of the Aucocisco School, performed an educational evaluation of the Student. She administered the GORT-4, TOWRE and Test of Written Language (TOWL). [S-279-281] Ms. Melnick concluded that the Student's GORT scores showed that she had made significant gains in her reading, but was still behind her peers in reading rate, accuracy and fluency. [S-280] The Student's reading fluency was in the 25<sup>th</sup> percentile.
- 20.** After completing XX grade, the Student returned to Landmark for the summer of 2010. At the end of the summer program, the Student's GORT scores were in the 25<sup>th</sup> percentile, reading at a late XX grade level. Her word attack scores were consistently good and above grade level. [S241]
- 21.** In January of 2011, during the Student's XX grade year, the IEP team held a meeting for the Student's annual review. The team agreed to continue providing two hours a week of direct instruction in the special education setting in the areas of reading fluency and writing. [S-204] When the team met on June 6, 2011 to review the Student's program, it determined that during XX grade, the Student would receive 45 minutes per day of direct instruction for

reading fluency and writing support, as well as finish the remaining levels of Lexia during XX grade. [S-169]

22. The Student returned to Landmark for a third summer in 2011, following the conclusion of XX grade. On August 5, 2011, the Student's GORT-4 scores showed her reading on a XX grade level, and she was in the 50<sup>th</sup> percentile in reading fluency. [P-247] The family was very excited about this achievement. [Testimony of Mother]

23. The Student's XX grade year was considerably different than XX and XX grades.

[Testimony of Mother] She was in the advanced math class. Instead of taking Spanish, she received reading fluency instruction in the resource room with special educator Tammy Thatcher, the Student's case manager, using the *Read Naturally* program. [Testimony of Mother] Ms. Thatcher has been employed as a special education teacher at Cape Elizabeth Middle School for 20 years, and has a Master's degree with an emphasis on literacy.

[Testimony of T. Thatcher] The Student completed level 7 of the *Read Naturally* program sometime in September 2011, and stopped receiving direct fluency instruction at that time.

[Testimony of T. Thatcher, S-144] She continued to use the *Lexia* program. Ms. Thatcher also continued to monitor the Student's reading rate on a monthly basis, and her reading fluency scores with grade level material consistently met and often exceeded her goal of 150 correct words per minute. [Testimony of T. Thatcher, S-144] The reading probes were "cold reads," in which the Student was exposed to the reading prompt for the first time when she was asked to read it. [Testimony of T. Thatcher] Ms. Thatcher described the Student as a very motivated, and great student who did not give up. She wished she had a classroom full of students like this. Although the Student started XX grade with anxiety and nervousness, she became more comfortable, was very positive and usually smiling.

24. The Student's IEP team met on January 3, 2012 for her annual review. [S-143] At that time, consultation time of 30 minutes per month was added to the IEP, and the Student was to continue to receive 20 minutes a day of direct reading instruction until she completed the *Lexia* program in March. At that point, the Student was moved to consult status for the remainder of the IEP year. [S-143] She continued to receive occupational therapy on consult status for 15 minutes per month for the purpose of monitoring the Student's access to keyboarding and voice activated software to help maintain and improve the Student's efficiency with written output. [S-144] At the IEP team meeting, the Student's teachers reported that she was doing well and that she was an excellent student. [S-144-145] Her math teacher said the Student was a perfectionist. [S-144] The only concern expressed by the Parents was the Father's fear of regression, which had been an issue for the Student in the past. [Testimony of Father, S-145] He explained that the Student worked for six years to achieve the level of fluency evident in a GORT score of 50%, and he wanted the Student's reading fluency to be monitored. The District agreed to do so. To this end, the Student's January 2012 IEP provided for monthly fluency probes to maintain the Student's skills so that she could maintain her reading speed of approximately 150 words per minute with grade level material. [S-135] The IEP said that although the Student had dyslexia, she had made gains in reading, fluency and writing, and was no longer in need of direct instruction. [S-132] The Father continued to read to the Student every night. [Testimony of Father] He observed that the Student was not self-sufficient with her schoolwork the way her older sister was, and that she needed assistance regularly.
25. Ms. Thatcher did the monthly reading probes using the EasyCBM program, which were what then special education director Dominic DePatsy wanted her to use. [Testimony of T.

Thatcher] The Student read grade level material for one minute, although this material was not from the regular school curriculum. The Student continued to do well on these; for example, she was reading 179 correct words on her April 11, 2012 reading probe. [S-126]

**26.** The Student did not want to attend summer school for the summer of 2012. Because she had done well on her reading, her parents agreed to give her break and she did not attend the Landmark School program that summer. [Testimony of Mother]

**27.** The Student was scheduled for a triennial review during XX grade. Cheryl Joys, a special education teacher at Cape Elizabeth Middle School, emailed the Parents about this and asked for their input about which tests should be administered. [Testimony of Mother] The Mother replied with the Parents' agreement that the following tests be administered: WISC-IV, CMS, CTOPP, Test of Orthographic Competence (TOC), GORT-5, and TOWL-4. The Parents expressed a preference for the Woodcock Reading Mastery Tests III (WMRT-III) and the TOWRE in lieu of the WIAT-III, and only wanted the math, reading and writing fluency subtests of the WJ-III. [S-114] The Mother also asked to have someone other than Dr. Perez-Smith conduct the testing. [Testimony of Mother, P-259] The District then selected Laura Manuel to conduct the psychological evaluation. [S115] Ms. Manuel is a Masters level nationally certified school psychologist, and is certified in Maine as a school psychologist. She has been practicing since 2007.

**28.** The Student began her XX grade year on monitor status, and was receiving no direct instruction. Ms. Thatcher gave her monthly fluency probes to ensure that her reading rate did not decline. [Testimony of T. Thatcher]

**29.** The District conducted its triennial evaluation of the Student in December of 2012. Laura Manuel and Tammy Thatcher administered the tests, with Ms. Manuel administering tests of

processing abilities, while Ms. Thatcher administered academic tests. [Testimony of L. Manuel] Ms. Manuel also conducted interviews with the Student's parents and teachers. The Parents reported they had no concerns regarding the Student's social emotional skills or behavior. [S-81] The Student described herself as happy and friendly, and someone who tries hard to do her best. [S-83] She added that homework was neither hard nor easy, and she could not think of anything that could make school easier. At times she worried about school because she did not want a bad grade, and school could cause feelings of stress when projects were due because the Student worried her projects would not be correct. [S-83] On the WISC-IV test of cognitive abilities, the Student's scores were 108 for verbal comprehension (70<sup>th</sup> percentile), 99 for working memory (47<sup>th</sup> percentile), and 115 for processing speed (84<sup>th</sup> percentile). The first two scores were in the average range, and the processing speed score was high average. [S-84] On the WMRT-III, a reading test, the Student scored in the average to above-average range on all tests, with a standard score of 100, or the 50<sup>th</sup> percentile, on oral reading fluency, one of the Student's areas of challenge. [P-270] Her above average scores were in the reading comprehension cluster, which was one of her areas of strength, where she scored in the 95<sup>th</sup> percentile. The Student's GORT-5 score was a 92, which was the 30<sup>th</sup> percentile, with a score in the 25<sup>th</sup> percentile for reading rate. [P-271] According to the administration manual, because the GORT-5 was a different test than the GORT-4 the Student had taken previously, it was not possible to compare a student's performance on these two tests. [Testimony of T. Thatcher, P-282] The two tests are normed differently, and have other differences as well, such as on the GORT-4, students are permitted to have the passage they have read in front of them when answering comprehension questions about the passage, but this is not the case with the GORT-5. [Testimony of L. Manuel] Additionally,

questions on the GORT-5 are open-ended, as opposed to multiple choice on the GORT-4.<sup>2</sup>

The Parents were concerned about the Student's regression on her GORT score.

**30.** In lieu of the CMS, Ms. Manuel administered the Wide Range Assessment of Memory and Learning (WRAML-2), which she believed was the preferred measure for testing memory for someone the Student's age. [Testimony of L. Manuel] The Student's scores on the WRAML-2, which was comprised of 12 tests, were all in the average range, except that she obtained a high average score in the 79<sup>th</sup> percentile on visual memory. [S-86] Her attention/concentration score, although in the average range, was on the low end of that spectrum, in the 27<sup>th</sup> percentile. For phonological processing, the Student was administered the CTOPP. Although five years earlier, the Student demonstrated a weakness phonological awareness, she scored in the average range in that area, with a score of 109, and in the average range for phonological memory and alternate rapid naming. All of her processing scores were average or above except in the area rapid naming, where her score was in the low average range of 82.<sup>3</sup> [S-87] This is an area of relative weakness for her. To be 1.5 standard deviations below the mean would be a standard score of 78 or below, and a 1.0 standard deviation would be an 85 or below. [Testimony of L. Manuel] The Test of Orthographic Competence is an academic test that measures skills in conventions, spelling speed and spelling accuracy. [S-87] The Student scored in the average range on conventions and spelling speed, but was below average on spelling accuracy. [S-88] Based upon the results of these assessments, the Student's score in one area, rapid naming, was 1.0 standard deviation

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<sup>2</sup> When Ms. Papageorge testified that the Student's scores on the GORT-5 were lower than on the GORT-4, she did not mention anything about the differences between the two tests, or that the administration manual cautioned against comparing the scores.

<sup>3</sup> Rapid naming measures the ability to efficiently retrieve phonological information from long-term or permanent memory and execute a sequence of operations quickly and repeatedly. Individuals who score poorly on this commonly have problems with reading fluency. [S-87]

below the mean. Ms. Manuel concluded that the Student did not meet the requirement under the Maine special education regulations for a processing deficit. [Testimony of L. Manuel, S-89]

- 31.** On the TOWRE-2, the Student was given basic sight words, and was also given real and nonsense words to read aloud. Her score on sight word efficiency was 100, which is average, and 95 on phonemic decoding efficiency, which was also in the average range. The TOWL-4 is a writing test that assesses for vocabulary, spelling, punctuation and sentence writing. The Student 's performance on this test ranged from average to superior. [P-274] With the exception of spelling, which was her lowest score, in the 37<sup>th</sup> percentile, her remaining scores were on the high end of the average scale to superior. Her superior score was in spontaneous writing, where her composite score was in the 98<sup>th</sup> percentile. [P-274] The Student was also given the WJ-III fluency tests. Although the District would have only administered the reading fluency test, it administered the writing and math fluency tests at the Parents' request. [Testimony of T. Thatcher] The Student's reading and math fluency scores were in the average range, and her writing score was high average. [P-276]
- 32.** On January 3, 2013, the IEP team met to review the Student's evaluations. The IEP team also reviewed the Student's most recent NECAP and NWEA tests, in which she was meeting or exceeding grade level expectations in both reading and math. [P-295] The Student was also a solid A student in all classes. The IEP team used the LD document, and concluded that the Student did not have a disorder in one or more basic psychological processes under the definition in MUSER §VII (2)(L)(2)(ii). [P-289] The Parents did not concur with this decision, and filed a due process complaint. The Parents and District ultimately entered into a settlement agreement that permitted the Student to retain her IDEA eligibility and IEP while

the Parents obtained an independent evaluation of the Student, which would be reviewed at a later IEP team meeting. [S-64]

- 33.** The Parents obtained an academic evaluation from Victoria Papageorge. On February 26 and March 15, 2013, Ms. Papageorge administered many of the same academic tests administered by the District in December 2012, including the TOWRE-2, WRMT-II oral reading fluency, and the GORT-5, and she also administered the Symbol Imagery Test from Lindamood Bell. [S-23, Testimony of L. Manuel] Ms. Papageorge's testing produced notably lower results on the TOWRE-2, which measures how quickly and accurately a student can read a list of words. The Student's sight word efficiency was an 88, or 21<sup>st</sup> percentile and 87 (19<sup>th</sup> percentile) on phonemic decoding. [S-23] Ms. Papageorge thought the Student needed to be able to read these words accurately and efficiently, but only read 74 words in 45 seconds, while a "normal" student would read 85-90 words. [Testimony of V. Papageorge, S. -24] On the WRMT-III oral reading fluency, the Student received a 98 (45<sup>th</sup> percentile), and on the GORT-5, the Student's scores were in the low average range, with an oral reading index of 84 (14<sup>th</sup> percentile). [S-24] Ms. Papageorge's report notes that the Student's acceptable rate of reading did not begin to fall off until she attempted her sixth reading in the test, and reached her ceiling for fluency on the ninth passage. [S-25] On the TOC, Ms. Papageorge noted that the Student had many errors like b/d letter reversals, which she explained was a serious weakness for someone the Student's age. [Testimony of V. Papageorge] The Symbol Imagery Test measures accuracy and efficiency in visual processing. [S-29] Ms. Papageorge explained in her report that this area of processing is measured by a student's ability to "visually image letter strings and whole word formation," and is directly correlated to reading fluency, word recognition, and encoding. [S-29-30] On



that test, the Student scored in the fifth percentile. [S-29] Ms. Papageorge did not think the WJ-III fluency tests were a good indicator of fluency because they only measured reading at a one-sentence level. [Testimony of V. Papageorge] She concluded that the Student continued to demonstrate weaknesses with phonological processing, specifically rapid naming, elision, visual processing and orthography. [S-32] Ms. Papageorge recommended the *Seeing Stars* program to stimulate visual memory for increased sight word development and spelling, and outlined a series of steps to increase the Student's reading fluency, including introducing the Student to all "grid endings" for multi-syllable words using Lindamood Bell's *LIPS* methodology. [S-33-34] She felt the Student required intensive remediation in these areas, comprised of two to three hours daily during the summer and at least one hour a day during the school year. Before releasing her evaluation, Ms. Papageorge sent a draft to the Parents to allow them to make corrections, which they did. [Testimony of V. Papageorge, P-335]

- 34.** The Parents also obtained a neuropsychological evaluation from Richard Doiron, Ph.D. Dr. Doiron has practiced clinical neuropsychology since 1985, and is certified in school psychology. In evaluating the Student, he administered several tests, including the Children's Memory Scale. The Student scored in the average range on all measures except visual immediate index, on which she scored in the high average range. [S-614] On the attention/concentration index, the Student's scores increased from very low in 2007 (5<sup>th</sup> percentile) to average (42<sup>nd</sup> percentile) in 2013. [S-614] Dr. Doiron also administered the WIAT-III. On the subtests, the Student scored above grade level and average or above (considerably above average on some tests) on most of the tests, except in her areas of weakness: pseudoword decoding (grade 6.2 or 34<sup>th</sup> percentile), oral reading fluency (grade

7.7 or 42<sup>nd</sup> percentile) and spelling (grade 7.5 or 32<sup>nd</sup> percentile). [S-617-618] The Student also took the Nelson Denny Form G reading test, scoring in the solid average range on vocabulary and comprehension, but only in the seventh percentile on reading rate. [S-619] The Nelson Denny reading rate test is a one-minute prompt, but it only counts number of words read, not accuracy. [Testimony of L. Manuel] Dr. Doiron explained that the Student's learning disability is an inability to perceive sounds and symbols in a sequential fashion that has to be accomplished to be able to read and accomplish other academic tasks, and that the Nelson Denny test includes a measure of this. [Testimony of R. Doiron] He used this test because he believed it was more demanding than the WIAT-III in that it required the ability to read under time pressure more dense text information similar to what the Student would be reading in high school and college. [Testimony of R. Doiron, S-619] Ms. Manuel testified that this test is not a measure of reading fluency, as there is no measure for accuracy, and as it is not a processing measure, it cannot be used to assess or diagnose processing disorders. [Testimony of L. Manuel] Dr. Doiron also administered the Million Adolescent Clinical Inventory (MACI). On this assessment, the Student answered questions in a way that Dr. Doiron thought suggested she was likely experiencing a mild level of anxiety. [S-619]

- 35.** Dr. Doiron wrote his evaluation report on February 21, 2013, at which time he sent it to the Parents to give them an opportunity to edit it, make corrections and additions. [Testimony of R. Doiron, P-438, P-407, P-464-467] The Parents made many edits to the report, primarily correcting the history, but they made other changes as well, and Dr. Doiron incorporated these edits into his final report. [Testimony of R. Doiron, P-464-467, P-438-463]
- 36.** On March 13, 2013, Ms. Papageorge corresponded with Dr. Doiron about their respective evaluations of the Student. [P-407-408] Ms. Papageorge asked Dr. Doiron to administer the

RAN/RAS<sup>4</sup> because she was not licensed to do so and “if we don’t have at least 2 scores of 85 or less or one of 78 . . . the school district is not going to accept that [the Student] has a learning disability, although our tests indicate otherwise.” [P-408] Although Dr. Doiron had already completed his evaluation, he responded to Ms. Papageorge that he would administer the RAN/RAS test with the Student. [P-407] This was the first time Dr. Doiron administered this test, which measures processing ability. [Testimony of R. Doiron] He told Ms. Papageorge that he agreed with her statement that the Student continued to suffer from dyslexia, and that he hoped they would obtain the scores they needed so the Student would be identified as having a learning disability. [P-407]

**37.** Dr. Doiron issued his final report on April 4, 2013<sup>5</sup>. [S-49-64] Although Dr. Doiron administered the RAN/RAS to the Student, he did not mention it in his evaluation report. [Testimony of R. Doiron, P-551-556] On the six RAN/RAS tests, the Student scored in the solid average range with a high average on one test and a low of 95 (37<sup>th</sup> percentile) on numbers, but with scores between 106-114 on the remaining measures (65<sup>th</sup>-82<sup>nd</sup> percentile). [P-552] Dr. Doiron diagnosed the Student with the following: the reading disorder dyslexia, particularly in the area of reading fluency and its associated effect on her reading comprehension; ADHD, predominantly inattentive type; and adjustment disorder with anxiety secondary to her dyslexia. [Testimony of R. Doiron, S-622] He recommended specialized instruction in the area of reading fluency, with an emphasis on the Student’s ability to read with speed and accuracy. [S-622]

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<sup>4</sup> As noted in Fact #10, the Student did poorly on the RAN/RAS when administered by Dr. Bray in 2008.

<sup>5</sup> In response to the District’s document request, the Parents produced a report from Dr. Doiron found at P-496 and dated April 4, 2013, which was different from the report supplied to the District, which begins at S-49. At the hearing, Dr. Doiron was unable to explain the interplay between these two documents.

**38.** On May 18, 2013<sup>6</sup>, the Parents submitted a two-page statement of their concerns about the Student's education and the possibility of her being dismissed from special education. [S-13-14, P-922-923] They were concerned about dismissing the Student from special education during this transitional time, and felt that the Student's challenges with sight word recognition, reading fluency and spelling would make it very difficult for her to succeed as her school work became harder and the texts she would use would become denser. [P-922] The Parents believed that the Student required remediation to bring her reading up to grade level. They were also concerned that this would have significant negative psychological effects. They strongly disagreed with the view that simply because the Student was earning good grades her dyslexia was not adversely affecting her educational performance. The Parents added that Ms. Papageorge made recommendations to help the Student make long-term gains in her areas of need, such as *Seeing Stars*, but the District had not offered such programming. [P-923] Additionally, the Parents were concerned about the ramifications of the Student not receiving the accommodations she required for academic success, and they requested that the Student receive all of the accommodations recommended by Ms. Papageorge. [P-923]

**39.** At the IEP team meeting on May 22, 2013, the team reviewed the evaluations of Ms. Papageorge and Dr. Doiron in addition to the District's evaluations, input from family and staff and other indicators of the Student's performance. [S-1-4] Dr. Doiron did not disclose to the team that he had administered the RAN/RAS to the Student. Ms. Manuel said that there was no empirical evidence to support that the Symbol Imagery Test administered by Ms. Papageorge was valid or reliable, and it was not a processing test. [Testimony of L. Manuel,

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<sup>6</sup> S-14 shows that the Parents submitted the document to the District on that date, although the letter is dated May 16, 2013.

S-2] For this reason, special education director Jane Golding said that the District would not consider this assessment when completing the learning disability document. The Parents asserted that the Student presented with a processing disorder based upon the Symbol Imagery Test, the TOC, and Rapid Naming Composite on the CTOPP. [S-2] Of these three tests, only the Rapid Naming Composite on the CTOPP is a processing test. [Testimony of L. Manuel] Ms. Manuel explained that she would not make a decision based upon two out of 48 tests, particularly as the Student scored in the average range on the alternate rapid naming CTOPP.<sup>7</sup> [Testimony of L. Manuel]

40. Terese Roberts, the Student's language arts and social studies teacher, reported that with the use of technology and other strategies, the Student has been successful. [Testimony of T. Roberts, S-4] Ms. Roberts only noticed the Student's dyslexia when she was asked to write without the aid of the computer and when she was not given time to edit. [P-296] She described the Student as an excellent student who always kept up with her work and her test scores were great. The Student was always positive, appeared very comfortable in class and got along well with her classmates. [Testimony of T. Roberts] Reading assignments in class were both on and above grade level. The Student occasionally volunteered to read aloud, and did so without hesitancy when the class took turns reading. [Testimony of T. Roberts, P-296] Although the Student had a signal she could give Ms. Roberts to indicate that she did not want to read aloud, she never used this. [Testimony of T. Roberts] Ms. Roberts added that although the Student had the ability to take extra time if needed, she seldom used this accommodation. [S-4] Without special education support, the Student earned an A+ in both Language Arts and Social Studies. [S-789, Testimony of T. Roberts] The Student's math

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<sup>7</sup> By the date of the hearing, Ms. Manuel had the opportunity to see Dr. Doiron's RAN/RAS test results, which tested the same area of processing as the rapid naming tests on the CTOPP, and this further reinforced her view.

teacher reported that the Student continued to excel in Algebra, and her Spanish teacher said she did a tremendous job in class. [P-4] Ms. Papageorge expressed her concern that the Student was not stable in her orthographic processing and fluency, and that she needed to receive instruction in visual processing or she will “crash” in high school. [S-4-5] The team completed the LD document and concluded that the Student did not present with a processing disorder as defined by the MUSER. [S-2, 7-11] The team agreed that the Student had not obtained a composite score lower than 1.5 standard deviations below the mean on at least one index or scale of cognitive functioning. [S-7] The District concluded that the Student was achieving adequately for her age or meeting state-approved grade level standards in all areas. [S-8] The LD document noted that the Student’s NWEA Winter 2013 scores were in the 89<sup>th</sup> percentile for reading and 81<sup>st</sup> percentile for math, and that her NECAP scores in the fall of 2012 were proficient with distinction in reading and math, and proficient in writing. [S-8] The Parents and their advocates dissented from the determinations made by the majority of the team, disagreeing that the Student was achieving adequately in the area of fluency. The Mother pointed out that the Parents support the Student at home, and the Student studied hard to obtain her grades. [S-5, Testimony of Mother] The Mother also asked that the Student receive instruction in the *Seeing Stars* program. [S-5] Jeff Shedd, Cape Elizabeth High School principal, explained that even without special education, the Student could have reasonable accommodations such as extended time on assignments and assessments, and offered to meet with the Parents to discuss the possibility of an intervention plan. [S-5]

**41.** The Student continued to work hard. She earned straight A’s on her report card, earning a final grade of A+ in eight out of ten classes she took during XX grade. [S-789] Ms. Thatcher continued to monitor the Student’s reading fluency monthly with one minute EasyCBM

prompts. [S-788] In September and October 2012, the Student's reading rate was 151 and 150 respectively, below the target 50<sup>th</sup> percentile rate of 154, but her scores between November 2012 and June 2013 were between 160 and 187 correct words per minute. [S-788, testimony of T. Thatcher, L. Manuel]

- 42.** The Student elected to attend school at Landmark during the summer of 2013, from July 8, 2012 through August 2, 2013. [S-794-800] She was planning to take all honors classes in high school, and her mother did not think her fluency was as good as it should be. [Testimony of Mother] The Parents informed Ms. Golding that they would be seeking reimbursement for the cost of this program from the District. [S-597] Landmark agreed to work on the *Seeing Stars* program for one hour per day, and do to an hour per day of instruction on fluency. Her tutorial focused primarily on reading fluency, but included spelling, writing, and broadening her vocabulary. [S-795] The Student worked on improving her reading fluency using the *Read Naturally* program. At the end of the summer program, she was able to read, after several practices, approximately 179 words correctly per minute from Level 8 of that program. [S-795] The report from Landmark<sup>8</sup> said that the Student had a tendency to struggle with specific sight words that will require practice, but did well attacking unknown multi-syllable words as well as reading with expression. [S-799] The Student also attended math classes, and worked on algebra and geometry. [S-798]
- 43.** During the summer of 2013, Barbara Melnick, Director of the Aucocisco School, consulted with the Family about the Student's reading. [Testimony of B. Melnick] The Student and Ms. Melnick looked at books the Mother selected that were part of the high school curriculum, including *Of Mice and Men* by John Steinbeck, *The Absolutely True Diary of a Part-Time*

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<sup>8</sup> The Landmark report was not written until partway through the hearing process. Once it became available, the Parents shared it with Barbara Melnick, but did not produce it for hearing. It was only through Ms. Melnick's rebuttal testimony referencing the report that the District and the hearing officer learned of it.

*Indian* by Sherman Alexie, and *Ways of the World*, a history text. Ms. Melnick was unsure of the Lexile levels of these books. She conducted three one-minute timings of the Student reading these texts aloud. [Testimony of B. Melnick] It was Ms. Melnick's opinion that the Student is not reading as well as she could be, and that she needs intensive remediation, as she had difficulty with texts that had words longer than two syllables, and her decoding was slow and not automatic. The Student was having difficulty with dialect in the books. Ms. Melnick was concerned about the Student's orthographic processing and reading fluency with the level of work she would be asked to do in high school, as reading still required a good deal of effort for her. [Testimony of B. Melnick]

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

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

Under both state and federal law, a child qualifies for special education under the specific learning disability category if she meets two requirements. There is no dispute that the Student meets the requirement that she exhibits a pattern of strengths and weaknesses in performance or achievement indicative of a learning disability. The other requirement is that she does not achieve adequately for her age in reading fluency skills when provided with general education instruction. The Parents believe the evidence easily satisfies this standard. Under Maine law, however, there is an additional requirement that for a student to prove she has a "processing disorder." As this criterion is restrictive and contrary to the federal law, the Parents contend that Maine's regulation is invalid and cannot be enforced.

Even if the Maine regulations were valid and enforceable, the Parents assert that the Student's learning disability would qualify her for services under the IDEA. The list of potential processing areas that may lead to a learning disability on the LD document is not exclusive.



Orthographic processing ability is key to a student's success in reading fluency, and the Student's score on the Symbol Imagery Test, which measures orthographic processing, was measured at a standard score of 75, well in excess of 1.5 standard deviations below the mean. This is sufficient to satisfy the Maine requirement. Alternatively, the Parents contend that the Student's scores on the Rapid Naming Composite of the CTOPP and on the TOC combine to qualify her under the alternative language of the Maine regulation as well, as both are more than one standard deviation below the mean and relate to two different forms of psychological processing.

If a student struggles in only one of the eight areas in the federal regulations, she would be eligible for special education under the SLD category. The Parents take the position that the Student's scores demonstrate that, despite years of special education services, including services privately funded by the Parents, the Student's reading skills remain inadequate for a student her age, as shown in the GORT-5 and Nelson Denny reading tests, as well as in Barbara Melnick's work with the Student. The Parents allege that the Student's EasyCBM results are unreliable, and have never correlated with her lower GORT results, which is the gold standard for assessing reading fluency in dyslexic students. The focus of the federal law, especially for a student with an SLD, is not on her overall progress in the regular education program, but on whether she requires special education services to address her disability based deficit in the area in question. The evidence demonstrates that the Student requires remediation of her orthographic deficits, and this can only be accomplished through specialized instruction, such as the Lindamood Bell *Seeing Stars* program recommended by several experts outside of the District.

The Family asserts that it is entitled to reimbursement for the independent evaluations conducted by Dr. Doiron and Ms. Papageorge. Under the regulations, when parents disagree with

the school district's evaluation and request an evaluation at public expense, the burden falls on the school district to either pay for the evaluations or commence a due process hearing against the parents to show that the school's evaluation is appropriate. The District's December 2012 evaluation lacked appropriate breadth and depth in seeking to identify the nature of the Student's processing deficit and its impact on her reading fluency.

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

The only disability at issue is eligibility for a specific learning disability. State and federal law both require that a student demonstrate a processing disorder in one or more of the basic psychological processes as part of eligibility for special education under the exceptionality of specific learning disability. Although Federal law fails to define such a disorder, MUSER §VII (2)(L)(2)(a) defines it as exhibiting a score of 1.5 or more standard deviations below the mean for the child's age on tests in one area of processing or one or more standard deviations below the norm in two or more areas of psychological processing. The First Circuit has recognized that states are free to adopt additional standards to clarify federal eligibility terminology that is otherwise undefined. *See Mr. and Mrs. I v. MSAD No. 55*, 480 F. 3d 1, 17 (1<sup>st</sup> Cir. 2007). The Student does not meet this standard under Maine law.

The Parents had two evaluations done, but these did not result in evidence of a processing disorder. The District presented evidence that the "symbol imagery" test is not an assessment of a processing disorder; it is a test for measuring a particular skill taught through a Lindamood Bell program. Of the 14 subtests Dr. Doiron gave of the Student's processing, all of them placed the Student in the average range or above, even when he and Ms. Papageorge went test shopping for a processing measure on which they thought the Student might not perform well. It is remarkable that he testified that the Student had a processing disorder, given his own test results to the

contrary. Including Ms. Manuel's processing measures, the Student took 48 processing subtests, scored in average or above on 46 of them. Two low average scores in the area of rapid naming generated a single composite score of 82. Clearly, the Student did not have any tests in one area of psychological processing that met the 1.5 standard deviations below the mean. The Student did not meet the other standards for a specific learning disability either, as she showed adequate achievement in her area of weakness, reading fluency, participated in mainstream courses, and did very well on state assessments for measuring proficiency in those areas. Federal IDEA regulations prohibit the use of "any single measure or assessment as the sole criterion for determining whether a child has a disability, as school departments must use a variety of assessment tools, including student observation, classroom performance and grades." Here, the Student earned straight As during her XX grade year, was a superb student in every way, and scored well on state assessments during which time she received no direct instruction and no tutoring. The District believes the record supports a conclusion that she did not need special education to receive reasonable benefit from her school program.

The District also asserts that it is not required to reimburse the Family for its private evaluations. There was no showing that the school evaluations administered were inappropriate. Even if the hearing officer were somehow to conclude otherwise, she should deny the Family's request because reimbursement orders are equitable in nature, and the behavior by the Family and Dr. Doiron of withholding highly relevant report information from the District should not be countenanced by allowing reimbursement.

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

As the U.S. Supreme Court has held, in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005),

*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.

**1. Did the District violate the Individuals with Disabilities Education Act (IDEA) in the spring of 2013 when it determined that the Student was no longer eligible to receive special education and related services pursuant to state and federal special education law and rules?**

In order to qualify as a "student with a disability" under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include a specific learning disability, and (2) need special education and related services as a result of her disability to benefit from her educational program. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007). For the reasons set forth below, I conclude that the Student currently meets neither of these requirements.

The definition of a specific learning disability under both state and federal law is “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as . . . dyslexia.” MUSER §VII (2)(L); 34 CFR §300.8(c)(10). Federal law does not define a disorder of basic psychological processes, but the Maine regulations set forth specific criteria, including

The child scores 1.5 or more standard deviations below the mean for the child’s age on tests in one area of psychological processing, or 1 or more standard deviations below the mean in two or more areas of psychological processing. Instruments used for determining processing disorders must have peer reviewed, scientific research documentation, independent of that provided in the test manual, that supports a correlation between the processing problem and the academic deficit; Such tests may include measures of memory, phonological skills, processing speed as well as other measures which explicitly test psychological processing, and

For children in grades 4-12, the following criteria must also be met: The child obtains a composite standardized score that is no lower than 1.5 standard deviations below the

mean on at least one index/scale of cognitive functioning from a standardized measure of general cognitive ability. The index/scale must include at least 3 subtests and the score must be interpretable according to the test used.

MUSER §VII (2)(L)(2)(a).

Citing Office of Special Education Programs (OSEP) opinions, the Parents argue that this language is restrictive, erecting a barrier to SLD eligibility, and that it is contrary to the U.S. Department of Education's well-established interpretation of the IDEA.<sup>9</sup> I do not believe I have authority to determine the legality of the Maine regulations. A due process hearing officer's jurisdiction arises under 20 U.S.C. §1415(f). My authority as a hearing officer is limited to making decisions about determinations relating to the identification, evaluation or educational placement of a child with a disability or the provision of FAPE to the child. Although this issue relates to the identification of a child, the Parents are asking me to determine the legality of the Maine regulations. This determination goes beyond my authority, and should be made by a court. Consequently, I will apply the Maine regulations in this case as they are written.

The IEP team must also determine that the Student is not achieving adequately for her age or does not meet state-approved grade level standards in one or more of eight areas when provided with learning experiences and instruction appropriate for her age or state-approved grade level standards. 34 CFR §300.309(a)(1); MUSER §VII.2 (L)(2)(c)(i)(I). The only one of the eight areas listed that is applicable here is "reading fluency skills." Lastly, the IEP team must conclude that the Student meets one of the following requirements: (1) she does not make sufficient progress to meet age or state-approved grade level standards in at least one of the areas identified in the state and federal regulations when using a process based on the child's response

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<sup>9</sup> 34 CFR §300.307(a)(1) specifies that states cannot require the use of a *severe* discrepancy between intellectual ability and achievement for determining whether a child has a SLD, but the MUSER do not require this. The 1990 OSEP opinion in *Letter to Kennedy* (16 EHLR 1082) cited by the Parents was interpreting a previous version of the IDEA and involved the severe discrepancy standard.

to scientific, research-based intervention, or (2) the Student exhibits a pattern of strengths and weaknesses in performance, achievement or both, relative to age, state-approved grade level standards or intellectual development that is determined by the IEP team to be relevant to the identification of a SLD, using appropriate assessments consistent with the regulations. 34 CFR §300.309(a); MUSER §VII.2 (L)(2)(c)(i)(II). There is no dispute that the first of the two requirements in this paragraph is not applicable here.

A school district must reevaluate a student who has been identified as eligible for special education at least every three years but is not allowed to do so more than once a year unless the parents and school district agree otherwise. 34 C.F.R. §300.303(b). In conducting an evaluation, a school district must “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent,” to determine whether a student has a disability. 34 C.F.R. § 300.304(b)(1). Moreover, no single measure or assessment can be “the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.” 34 CFR §300.304(b)(2).

As part of the Student’s triennial review, the District conducted academic and cognitive testing. Although the District had the authority to select its own evaluators, it honored the Parents’ request not to use Dr. Perez-Smith for the psychological testing. Instead, the District chose Laura Manuel, who administered a variety of tests to measure the Student’s processing abilities. Of the 31 subtests of processing abilities, including in areas of the Student’s historical weakness, all but two of these subtests produced a score in the average or high average range. There were two CTOPP subtests of rapid naming which produced a single composite score of 82, which is low average but is not 1.5 standard deviations below the mean.

Dr. Doiron also conducted several measures of processing, and all of these were in the average or high average range.

Dr. Doiron's actions in conducting his evaluation have at the very least called his credibility as a witness into question. As discussed in the facts above, after the Student did not achieve the results Dr. Doiron desired on his usual testing, he and Ms. Papageorge corroborated to find another test to give the Student with the hope of obtaining a low enough score for her to meet the Maine requirements for a processing disorder. They chose the RAN/RAS, on which Dr. Doiron knew the Student "scored particularly low" on two of the subtests when Dr. Bray administered them in 2008. [S-601] When the Student performed well on the RAN/RAS, however, Dr. Doiron failed to disclose the test results in his report and to the IEP team. His conduct as an evaluator was goal oriented and not objective, and affected the weight that was given to his testimony.

The Parents assert that the list of potential processing areas that may lead to a learning disability is not exclusive, and that the Student's orthographic processing, which was measured as a standard score of 75, was in excess of 1.5 standard deviations below the mean. Alternatively, they argue that the Student's scores on the CTOPP Rapid Naming Composite combined with her TOC scores qualify her under the alternative language of the Maine regulations. Both of these arguments are unpersuasive. The Parents cite no legal authority that the list of processing areas is not exclusive, and the language of the MUSER does not indicate otherwise. Furthermore, while it may be true that a deficit in orthographic processing can have an impact upon a student's reading fluency, the TOC is an academic test of skills, not a processing test. The Symbol Imagery Test, as the District points out, is not an assessment of a processing disorder either. As

Ms. Papageorge explained, she is not licensed or certified to diagnose processing disorders or to evaluate them, and she was the one who administered the TOC and Symbol Imagery Tests.

The District correctly concluded that the Student did not score 1.5 standard deviations below the mean in at least one area of psychological processing or 1 standard deviation below the mean in 2 or more areas.

The Parents believe that the Student is not achieving adequately in the area of reading fluency, citing the Nelson Denny test score and GORT-5 score administered by Ms. Papageorge. Although reading fluency is an area of weakness for the Student, it did not prevent her from earning consistently excellent grades or from doing well on Maine standardized tests. There were numerous measures that showed she was reading adequately, such as her NWEA<sup>10</sup> and NECAP scores, Ms. Thatcher's monthly reading probes and other tests and evaluations administered during XX grade. It is noteworthy that Ms. Thatcher's monthly reading probes produced similar results in terms of the number of correct words read as the Student's testing at Landmark during this past summer. While her score declined on the District's administration of the GORT test from the 50<sup>th</sup> percentile on the GORT-4 to the 25<sup>th</sup> percentile on the GORT-5, the GORT-5 was a considerably more difficult test that did not involve multiple choice answers to the reading comprehension questions. Therefore, it is unclear whether this was an indication of a decline in reading skills or simply the product of a harder test.<sup>11</sup>

The Parents assert that the focus of the IDEA is whether the Student requires special education services to address her disability-based deficit in the area in question. They cite no authority for this assertion, and it is contrary to the IDEA's requirement that to be eligible for

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<sup>10</sup> The NWEA is untimed and has multiple choice answers, so it is not the kind of test that would normally pose a challenge for the Student's areas of weakness.

<sup>11</sup> It is also not possible to reconcile why Ms. Papageorge's administration of the GORT-5 resulted in lower test scores, but several other assessments showed that the Student was reading at a satisfactory rate and not regressing.



special education, a student must need special education and related services as a result of her disability to receive an educational benefit from her educational program. Here, the Student received no special education and related services since March of 2012, and earned straight A's, including A pluses in most of her classes, and scored well on state assessments. She worked hard to earn her grades, but did so without receiving outside tutoring during XX grade, nor did she attend the Landmark summer program in 2012. She demonstrated that she was very able to achieve commensurate with her abilities and to benefit from her educational program without special education services.

This case is similar to *Carlynton School District*, 109 LRP 21673 (PA SEA Jan. 6, 2008) cited by the District, in which a hearing officer found that a student's eligibility as a student with a SLD was appropriately terminated despite repeated testing showing that the student had a relative weakness in word decoding, but the student was achieving consistently with her abilities, and despite some weaknesses in spelling, was doing well in class. *Id.* at 10. The hearing officer concluded that although the student exhibited some reading weakness, it did not rise to the level or yield the requisite adverse effect to qualify her for continued special education services.

This is not to say that the Student currently has no weak areas in her learning, or that she could not become a better reader. It was Barbara Melnick's opinion that with certain types of instruction, the Student could continue to improve in her reading fluency. Every child has weaknesses and strengths. Fortunately, the Student has a great many strengths and a very supportive family, and no doubt these factor into her success. For a number of years, the Student required specialized instruction to help her benefit from her education. The programming provided by the District, the efforts of the Parents, which included providing some outside tutoring and summer programming, and the Student's hard work and perseverance helped the

Student succeed despite having a learning disability. Her story is one of success. The dedication of the Parents to ensuring that the Student succeeds to the best of her abilities is admirable, as is their advocacy on her behalf. As the courts have made clear many times, however, the purpose of the IDEA is to provide an “appropriate” education, and not a potential-maximizing education.<sup>12</sup> The evidence in this case points to the conclusion that the Student is benefitting from her education without special education services, and that she no longer needs these services to benefit. Therefore, she does not qualify as a student with a disability under the IDEA.

On a final note, the Parents were concerned about how the Student would fare in high school with its increasingly difficult curriculum, given that oral reading fluency and spelling are areas of weakness for the Student. If the Student has difficulty and may again require special education to benefit from her program at Cape Elizabeth High School, the Parents may request an IEP team meeting, and school officials should be alert to the Student’s progress in accordance with the District’s obligations under the IDEA.

**2. Did the District violate the IDEA by not reimbursing the Parents for the independent evaluations they obtained in preparation for the May 2013 IEP team meeting?**

Under the IDEA, parents of a child with a disability have the right to obtain an independent educational evaluation of their child, meaning an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the child’s education. MUSER §V (6); 34 CFR §300.502(a)(3)(i). Parents have a right to an IEE of their child at public expense if the parent disagrees with the evaluation obtained by the school district unless the district demonstrates in a due process hearing that its own evaluation of the student was appropriate or the evaluation obtained by the parents did not meet district criteria. 34 CFR §300.502(b)(1)-(2). The parents are only entitled to one IEE at public expense each time the

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<sup>12</sup> In *Board of Education v. Rowley*, 102 S. Ct. 3034 (1982), the Supreme Court made clear, “[W]hatever Congress meant by an “appropriate” education, it is clear that it did not mean a potential-maximizing education.”

school department conducts an evaluation with which the parent disagrees. MUSER §V (6)(B)(5)

MUSER §V (2)(B) and (C) govern how evaluations are conducted. The regulations require that the district must use a “variety of assessment tools and strategies to gather relevant functional, development and academic information that may assist in determining whether a child has a disability under the IDEA and the content of the child’s educational program.” MUSER §V (2)(B)(1). Furthermore, as discussed above, the District cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability, and the instruments used must be technically sound “that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” MUSER §V (2)(B)(2).

The fact that a parent may disagree with the conclusions of the evaluator does not render the evaluation inappropriate. *E.g., Gwinnet County School District, 59 IDELR 21 (SEA Ga. 2012).*

The Mother testified that the Student was not properly tested for phonological and orthographic processing, but this is not borne out by the facts. Ms. Manuel and Ms. Thatcher used a full battery of measurements, including the CTOPP for phonological processing and the TOC for orthographic processing. Their testing was more diverse and more objective than the tests conducted by Dr. Doiron and Ms. Papageorge. Additionally, Ms. Papageorge repeated a number of tests that the District administered, and which were not supposed to be administered so soon after the District’s testing. [Testimony of L. Manuel]

I find that the District's evaluations were conducted appropriately and in a manner consistent with the provisions of MUSER §V (2). Therefore, the Parents are not entitled to reimbursement for the cost of their "independent" evaluations.

**3. If the hearing officer determines that the District violated the IDEA, what remedy is appropriate?**

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

**V. ORDER**

1. The District did not violate the Individuals with Disabilities Education Act (IDEA) in the spring of 2013 when it determined that the Student was no longer eligible to receive special education and related services pursuant to state and federal special education laws and rules.
2. As the District's evaluation of the Student was appropriate under the IDEA, the Parents are not entitled to reimbursement for the independent evaluations they obtained in preparation for the May 2013 IEP team meeting.

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SHARI B. BRODER. ESQ.  
Hearing Officer