

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

**November 5, 2013**

**13.083H— Parents v. Regional School Unit #4**

**REPRESENTING THE FAMILY:** Nicole Bradick, Esq., Stacey Neumann, Esq.

**REPRESENTING THE DISTRICT:** Amy Tchao, Esq. and Hannah King, Esq.

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

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This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on August 19 & 28, September 18, 20 & 30, and October 4, 2013, at the offices of Drummond Woodsum in Portland, ME. Present for the proceeding were the Mother, the Father, Attorney Bradick, Dr. Will Burrow, Director of Special Education for the District, Attorneys Tchao and King, and the undersigned hearing officer. Testifying at the hearing were:

The Mother	
The Father	
Teacher “A”	Special Education Teacher, RSU #4
Bruce Chemelski, Ph.D.	Psychologist, Spring Harbor Academy
Jonathan Kimball, Ph.D.	Board Certified Behavioral Analyst
Catherine Newell	Former RSU #4 Music Teacher
Doreen Newcombe	Special Education Teacher, RSU #4
Georgia Pashley	Educational Technician, RSU #4
Jamie Pratt	Regional Director, Merrymeeting
Kayshia Smith	SMART Child and Family Services

All testimony was taken under oath.

**I. PROCEDURAL BACKGROUND:**

On June 24, 2013, the Mother and Father (“Parents”) filed this hearing request on behalf of their son (“Student”). On August 5, 2013, a prehearing conference was held in Portland at the

offices of Drummond Woodsum. Participating in the conference were: the Mother; the Father; Nicole Bradick, Esq., and Stacey Neumann, Esq., counsel to the Parents and Student; Amy Tchao, Esq., and Hannah King, Esq., counsel to RSU #4 (“District” or “RSU”); Dr. Will Burrow, special education director; and Shari Broder, hearing officer. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 161 pages of exhibits (herein referenced as P-#), and the District submitted approximately 2,828 pages of exhibits (herein referenced as S-#, A-#, B-# or C-#).

As noted above, the hearing took place over the course of six days. At the start of the hearing, the hearing officer heard arguments on the Parents’ Motion in Limine to remove or redact certain documents and exclude as irrelevant information about the Mother’s mental health. The hearing officer ruled that this information may be relevant and therefore would not be excluded, except document C-152. The parties requested to keep the hearing record open until October 21, 2013 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 65-page memorandum and the Parents submitted a 53-page memorandum with an attached decision. The parties further agreed that the hearing officer’s decision would be due on November 5, 2013.

## **II. ISSUES:**

1. Did the District violate state or federal special education law by failing to provide the Student with a free appropriate public education (FAPE) during the 2011-2012 and 2012-2013 school years?
2. Did the District violate state or federal special education law by failing to provide the Student with a free appropriate public education during the 2013-2014 school year?
3. If the District violated state or federal special education law, what remedies are appropriate?

Included in issue #3 is whether the proposed placement of the Student at Merrymeeting Child Development Center or a similar program is proper under the law.

These issues are addressed below.

### **III FINDINGS OF FACT**

1. The Student is xx years old (DOB: xx/xx/xxxx), and lives with his mother (“Mother”), father (“Father”) and twin toddler siblings in Sabattus, Maine. He is currently eligible for special education and related services as a student with Autism.
2. When the Student was xx years old, he began receiving occupational therapy (OT) from Child Development Services (CDS). CDS referred the Student for a psychological evaluation with Debbie Anctil when he was xx, and found the Student had global delays, receiving a diagnosis of Autistic disorder-moderate. [Testimony of Mother, P-13] CDS then placed the Student at the Merrymeeting Center for Child Development (Merrymeeting) from July 2006 through June 2007. There was a highly trained staff there, and the Student did well. [Testimony of Mother, P-29-44]
3. In the spring of 2007, the District held a transition PET meeting to plan for the Student’s transfer to the Libby-Tozier School for xx. [S-614] The Student was eligible for special education under the disability of Autism. [S-561] His instruction was in the regular education classroom with special education assistance. [S-575] At the PET meeting on October 17, 2007, the Student’s teachers reported on his progress. The Parents said that they were happy with the Student’s program. [S-586] The IEP developed at the meeting noted that the Student had a wonderful memory, and that he was happy and quite talkative in school. [S-562] It added that the Student was becoming more independent. The IEP indicated that the Student’s behavior did not impede his learning. [S-566] His program included direct instruction for 90 minutes per day from a special educator, occupational and speech therapy, plus 1:1 support

from an educational technician (ed tech). He also received extended school year (ESY) services.

4. The Student began xx grade in the fall of 2008. The IEP team met on October 17, 2008 to discuss his programming. His services remained similar to the previous year, with direct instruction, OT, physical therapy (PT), speech therapy and ed tech support. [S-506] The team also set up the Student's triennial evaluation, which was to be completed by February 2009. [S-511] The Mother expressed her concerns about the Student's ability to communicate effectively, but was happy with the Student's academic progress. [S-490]
5. The IEP team met again in February 2009 after the Student's evaluations were completed. The meeting minutes stated that the Student was doing a great job in school, and that there had been much improvement in his academic, communication and social skills. [S-470] The Mother commented that she was pleased with the Student's progress. [S-471]
6. The Student continued at the Libby-Tozier school for xx grade (2009-2010). Pursuant to his xx grade IEP, the Student received OT, PT, speech/language services, adaptive physical education, direct instruction for academics, and a 1:1 ed tech. He was in the mainstream classroom for social times, such as lunch and recess, as well as for story time. [S-426] The Student had a visual schedule to help him be more independent and to assist him with transition periods throughout his day. Special education teacher Brenda Mansir suggested that a similar schedule could be designed to help the Parents at home. Members of the team who worked with the Student on the visual schedule described it as "amazing" in how well it worked for the Student. [S-427-428] Ms. Mansir said the Student was improving in every academic area due to social and behavioral improvements. The Parents were very happy with the Student's progress and wanted him to continue with this program. [S-428]

7. During the summer of 2010, the Student attended the extended school year (ESY) program at the Carrie Ricker School. This was part of the plan to transition him there for xx grade. [S-369] The Student had a lot of help with the transition to this new school. [Testimony of Teacher “A”)
8. For xx grade (2010-2011), the Student attended Carrie Ricker. The IEP team met on October 7, 2010 to discuss the Student’s programming. His regular education teacher, Mrs. Prue, noted that the Student’s ESY attendance at Carrie Ricker was beneficial because he appeared to be doing fine with all of the adjustments that took place with attending a new school. [S-369] The Student spent 39% of his school time in the mainstream, attending physical education, library, social skills and computer with his regular education peers with ed tech support. [S-365] His case manager and special education teacher was Teacher “A”. and she worked with him on a number of reading and math programs. Teacher “A” had many years of experience working with children with Autism and with behavior management techniques. [Testimony of Teacher “A”] The IEP provided for 4 ½ hours of direct instruction in the functional life skills program. [S-370] Teacher “A” reported that the Student had been making progress with social communication. She continued to use the visual schedule with him, which made his transitions easier. [Testimony of Teacher “A”] His parents shared that they noticed that the Student was dealing with change better than in the past, and that he loved riding the school bus<sup>1</sup> and coming to school. [S-370] Teacher “A” noticed this as well, and that the Student showed no anxiety. [Testimony of Teacher “A”]
9. Teacher “A” had a very good relationship with the Student. He complied with most of her requests, and did not have behavioral issues during xx grade. The Student had a home-school journal, and Teacher “A” tried to write in it daily about how the Student’s day went. The

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<sup>1</sup> The Student previously took the special education bus to school. [Testimony of Mother]

Mother was very good about writing back. [Testimony of Teacher “A”] Teacher “A” did not see the Student having any problems with transitions. The Parents said they were pleased with the Student’s programming. [S-371]

**10.** The Student started his xx grade year attending adaptive music class due to a scheduling conflict with his mainstream class and the functional life skills program. [A-347] For the spring semester, however, music teacher Catherine Newell arranged for the Student to attend regular music class with a different mainstream class. Most of the students in this class were unfamiliar with the Student and his learning and behavioral differences. [Testimony of C. Newell, A-347] During one class, out of the blue, the Student called out, “ninety-nine-nine the wolf!” and one of the students laughed and repeated this once. After class, Ms. Newell spoke with that student and his teacher to explain why the mimicking was not appropriate. The Student did not seem concerned by this, and Ms. Newell did not notice any negative changes in his mood or behavior thereafter. [Testimony of C. Newell, A-347] It was an isolated incident, and she did not recall telling the Parents about it, as it did not seem consequential. The Student continued to appear excited about music and was happy in class. [Testimony of C. Newell, A-347] Ms. Newell never witnessed other students tease the Student, and did not witness any bullying of him. [Testimony of C. Newell, A-347] Ms. Newell had the Student in music classes for four years, and was impressed with his accomplishments in his school program. [A-347]

**11.** On May 11, 2011, the Parents were sent a Written Notice amending the Student’s IEP to remove ESY services for July of 2011. [S-348b] The Written Notice said that budget and staffing issues caused the District to reexamine student performance and data, and that it would apply the Maine Unified Special Education Regulations (MUSER) standard requiring

that a student be at risk for regression of skills to be eligible for ESY. [S-348b] Teacher “A” had been keeping progress charts. [A-211-236] She looked at the level of the Student’s skills before and after school vacations, and the data did not show any regression of skills.

[Testimony of Teacher “A”]

12. When the Student returned to school for xx grade (2011-2012), Teacher “A” did not notice any regression of either the Student’s behavior or of his academic skills. [Testimony of Teacher “A”] The IEP team met on October 4, 2011 to review the Student’s educational program. The team did not significantly change the IEP, although the amount of time the Teacher “A” explained that this was because as children got older, the rigor of the academic program increased, and the Student’s educational abilities were not as closely aligned with his peers as in earlier years. The PT reported that the Student made significant gains with his gross motor skills, and the OT reported improvement in fine motor skills. Because the Student met his PT goals, the team dismissed the Student from this service. [S-343] The speech therapist, Mrs. Custer, said that meeting the Student’s needs could be challenging at times, but that he was more successful with visual supports. [S342-343] The Parents mentioned the Student’s echolalia and scriptive speech, and were working with the Student’s doctor to see whether this was connected with the Student’s anxiety, for which he took medication. The Mother asked about using picture communication at home with everyday tasks and routines, and Teacher “A” discussed this with the Parents following the meeting. [S-343] Teacher “A” then prepared picture communication cards for the Parents with a protocol for showering. [Testimony of Teacher “A”] The Parents said they were pleased with the Student’s programming. [S-343]

- 13.** In July of 2011, the Mother became pregnant with twins and told the Student this sometime in November of xx grade. In December 2011, the Mother was confined to bed. Around this time, she noticed that the Student was becoming difficult to control at home. [Testimony of Mother] At school, Teacher “A” tried to prepare the Student for the arrival of the babies. Teacher “A” was doing things with the Student, such as social stories, to help him adjust to the arrival of the babies. She did this because changes in routine could be Teacher “A”, A-69]. Teacher “A” explained this to the Mother, but only did two social stories because the Mother was adamant that Teacher “A” should not talk with the Student about the babies, as this was upsetting the Student.
- 14.** Also at this time, Teacher “A” first started experiencing the Student refusing to do his work. He would be in the middle of a task, then walk away and do something that would calm him. Teacher “A” had things in the room that were soothing for him, like plastic jewels and bingo chips. He would push his work away, and there was a rise in his echolalia and verbal scripting. [Testimony of Teacher “A”] Initially, she thought the Student was excited about the holidays, but when she started observing more aggressive behavior, she became concerned that there was something else at play. The Student had a good part in the Christmas concert, but bolted at the end. [Testimony of Teacher “A”] This was also when the Parents learned of the incident during which a classmate mimicked the Student in music class the previous spring. The Mother considered this to be bullying and assumed this was the cause of the Student’s increased aggression and work refusals. [Testimony of Mother]
- 15.** In January 2012, the Mother gave birth to the twins, who were two months’ premature. [Testimony of Mother] The twins had to remain in the hospital for approximately seven weeks. The Student did not want to see them, so the Parents did not push him to do so. He



visited the Mother once during her four-day stay at the hospital following the birth. The Student's grandmother, who played a large role in his life, stayed with him while his mother was in the hospital. [Testimony of Mother]

- 16.** When the Student returned from the holiday break, Teacher "A" noticed he was refusing work more often and had behavior issues, such as sitting under table. She had cue cards with visual prompts that said, "please be quiet" and similar directions. Teacher "A" would point to these cards to try to bring him back to what he was supposed to be doing, and this seemed to work.
- 17.** After the birth of the babies, the Student became the most aggressive that his parents had seen. The Mother thought something was wrong and tried to get the Student to talk about it, but the Student would not respond. [Testimony of Mother]
- 18.** On February 23, 2012, the Mother sought case management services for the Student through Tri-County Mental Health Services ("Tri-County"). Jocelyn Shiok was assigned to the Family as the case manager. Initially, the Mother told Ms. Shiok that the Student needed a therapist who understood Autism and could help the Family with communication, respite and school. [C-1073] Four days later, the Mother called back and told Ms. Shiok that she did not think counseling would be helpful for the Student, and that she wanted the Student "out of his present school and in a specialized program for children with autism." [C-1074]

Although the Mother was reluctant to do this in the past because she was concerned about the behaviors the Student would learn from the other children, given his recent behaviors, the Mother thought he now needed a program such as the one offered at the Margaret Murphy Center. The Mother reported to Ms. Shiok that the Student had been resisting going to school for the past two to three months, and that he was kicking, screaming, hiding his backpack and

becoming physical. [Testimony of Mother, C-1073] Ms. Shiok explained that there would need to be an IEP team meeting to discuss any change in placement. [C-1074] Ms. Shiok arranged special transportation to school for the Student.

- 19.** In early March, the twins came home from the hospital. [C-1044, Testimony of Mother] On February 28, 2012, Ms. Shiok called Teacher “A” who told her there had been an increase in the Student’s negative behaviors since December 2011, including refusals to attend art and PE class, tantrums and refusal to go to school. [C-1074] Teacher “A” said that the District was concerned because the Student’s behavior was drastically different from the way it had always been. [C-1074] Although she did not share this with the Mother, Teacher “A” thought the Student was acting this way because he was not properly prepared for the changes in his household brought on by the arrival of the babies. [Testimony of Teacher “A”] Teacher “A” thought the Student was in crisis mode, and he needed structure across all settings. She invited Ms. Shiok to come to school to observe the Student in her classroom. Teacher “A” also explained that the District had contracted with Jonathan Kimball, an Autism behavior specialist with experience in Applied Behavioral Analysis (ABA), who had been observing the Student and consulting with Teacher “A” about his behavior issues. Dr. Kimball is a certified behavioral analyst (BCBA) with a Ph.D. in special education and experience working with children with Autism. Dr. Kimball came to the classroom to observe the Student on January 31, February 15 and March 6, 2012, although the Student was not present on the February date. [S-284, Testimony of Teacher “A”] Dr. Kimball thought that what Teacher “A” was doing to address the Student’s behaviors was sound. She was using positive reinforcements like giving the Student access to highly preferred activities when he acted appropriately, and she used good visual support. [Testimony of J. Kimball] Teacher

A” gave the Student a variety of choices, sometimes involving deciding the order of their tasks that day. The Student liked having choices, and Dr. Kimball thought that this was a good approach, rather than allowing him to fixate on one thing. [Testimony of Teacher “A”, J. Kimball] Teacher “A” also designed special money the Student could earn to purchase iPad time for good behaviors. [A-118-131] This money was modeled after real dollar bills, but had a picture of the Student instead of George Washington, and the Student liked this money so much that he wanted to bring it home with him. [Testimony of Teacher “A”J. Kimball] Dr. Kimball also thought the physical setup in the classroom was excellent, as it was safe, eliminated distractions, and gave the Student his own space when needed. Dr. Kimball made a number of suggestions to address the Student’s problem behaviors that essentially tweaked what Teacher “A” was already doing, and gave her a behavior data sheet to track the Student’s behaviors.<sup>2</sup> [Testimony of J. Kimball, B-46-49, S-285, 704, A-60] Teacher “A” shared Dr. Kimball’s suggestions with the Mother, and told her that Dr. Kimball wanted to meet with the Parents to provide them with support and suggestions. [Testimony of Teacher “A”] Although a meeting was scheduled, the Parents cancelled it due to the Student’s refusal to attend school that day. [Testimony of J. Kimball, S-285]

**20.** When the Student did attend school, his behavior began improving with the implementation of Dr. Kimball’s recommendations. [Testimony of J. Kimball] He did not attend school on March 13, 2012 because the Mother found it too difficult to get him on the school bus, and she asked Ms. Shiok for help with transportation. [C-1076] That day, Teacher “A” reported that the Student was still in “crisis” mode and continuing to get 1:1 support throughout the

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<sup>2</sup> Teacher “A” did not have the opportunity to use the data sheet because the Student stopped attending school. [Testimony of J. Kimball, Teacher “A”]

day, but was not responding to his usual positive reinforcer, which was having time to use his iPad.

**21.** On Monday, March 19, the Student did not attend school because he refused to go, broke his bedroom door and threatened to jump out his bedroom window. [Testimony of Mother, C-1078] The Student did not go to school for the rest of the week. That day, Teacher “A” offered to come to the Student’s house on Monday, March 26 to help the Student prepare to attend school<sup>3</sup>. The Mother approved of this plan. [C-1078] On March 20, Ms. Shiok asked the Mother whether she wanted the Student to have a crisis evaluation, but the Mother said she did not want the Student removed from home, as she could handle him at that point. [C-1078] On March 22, the Mother told Ms. Shiok that she was feeling overwhelmed because the Student was at home. [C-1078] Ms. Shiok called Pediatric Associates to set up an appointment for the Student to be evaluated by George Shekart, Ph.D., a psychologist. The Mother also filed a claim for Social Security Disability benefits for the Student, and sent a form to Carrie Ricker for Teacher “A” to complete. [S-295] On this form, Teacher “A” reported that since mid-January, the Student was having serious problems with a variety of tasks involving acquiring and using information, and attending and completing tasks, and that his attention and ability to complete tasks had severely diminished. [Testimony of Teacher “A”, S-300] She explained that the Student was acting defiant, having tantrums, and refusing to do as directed. [S-303] Brenda in Dr. Shekart’s office spoke with Ms. Shiok on March 23, and said she supported Ms. Shiok’s efforts but could see the barriers that the Mother was presenting, and that it was disappointing that the Mother was not open to more ideas. [C-1079]

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<sup>3</sup> Teacher “A” had jury duty the week of March 19, 2012, and therefore had to wait until the following week to visit.

22. On March 26, Teacher “A” called the Mother to confirm that she was going to follow through with the planned visit, but the Mother did not answer the telephone. [Testimony of Teacher “A”, A-101] Teacher “A” left a message to this effect, but the Mother did not return the call. Instead, at 9:30 a.m., the Mother called Ms. Shiok and told her she did not want Teacher “A” coming to her house. [C-1082] The Mother was feeling overwhelmed, and one of the babies needed surgery the following morning. Ms. Shiok told the Mother not to answer the door if she did not want to see Teacher “A” [C-1082] Not knowing that the Mother had changed her mind, Teacher “A” drove to the Parents’ house with Christine Lajoie-Cameron, the school principal, to see whether she could interact with the Student and get him to come to school. [Testimony of Teacher “A”, A-101] The Student’s grandmother answered the door, and said it was not a good time for them to visit, and turned them away. The Mother was very concerned about Teacher “A” behavior in coming to her home, and thought it was “over the top.” [Testimony of Mother, C-1082] At 11:00 a.m., Teacher “A” called Ms. Shiok and expressed her concerns about the Mother’s well being. They discussed a number of issues, and Ms. Shiok asked Teacher “A” not to visit again. Teacher “A” then informed Ms. Shiok that an IEP team meeting the Parents had requested was scheduled for April 11 at 11:00 a.m. [A-101, C-1082] That day, the school principal sent the Mother a letter explaining that their visit was to offer any assistance they could to the Mother and her family, not to cause her additional stress. [A-102] The Principal said she was very sorry if the visit caused the Mother distress, and renewed her offer to help solve issues surrounding the Student’s attendance at school. She added, “Unless you want to contact us, we will wait to hear from you.” [A-102]

- 23.** Teacher “A” spoke with Ms. Shiok on a few occasions, and made various offers of assistance to the Parents, including tutoring the Student. [Testimony of Teacher “A”, C-1088] Ms. Shiok told her that it was the Family’s wish that the school back off. The Mother did not want Teacher “A” tutoring the Student either. Meanwhile, the Student continued to be absent from school. Sometime in the spring, the Family began receiving therapeutic support through the Providence Program. [S-267]
- 24.** The Mother felt that Teacher “A” relationship with the Student was too close. [Testimony of Mother] At some point, Teacher “A” sent the Student a gift of a hat. On April 6, 2012, the Mother told Ms. Shiok that she was concerned about the upcoming IEP team meeting and about a letter she had received from the school, referring to a letter Teacher “A” sent to the Student that she closed with the word, “love.” [C-1084] The Mother thought this was very inappropriate, and planned to cancel the upcoming IEP meeting until after the Student’s psychological evaluation. She told Ms. Shiok several times that month that she did not want Teacher “A” working 1:1 with the Student. [C-1085, 1086, 1089]
- 25.** On April 11, 2012, when the IEP team met, the Parents did not appear. The school tried to call the Parents, but was unable to reach them. [Testimony of Teacher “A”] Ms. Shiok participated by telephone, and told the IEP team that the Parents had left a message that they wished to reschedule. Ms. Shiok reported that the Parents wanted to work together to get the Student back in school as quickly as possible. The IEP team determined that the school would work closely with the Family and Ms. Shiok to create a re-entry to school plan that would maintain the Student’s access to appropriate educational programming. [S-284] The team also agreed to reconvene upon completion of an outside evaluation of the Student, which was scheduled with Dr. Sheckart for May 11, 2012. [S-284] Teacher “A” shared with

the team her work with Dr. Kimball, and discussed ways she tried to help the Parents get the Student to school. After the meeting, the special education secretary confirmed that the Parents had left a message. Principal Lajoie-Cameron wrote the Parents a letter that day explaining what had transpired, and that they would hold another IEP meeting once Dr. Sheckart's evaluation was completed, unless the Parents requested to meet earlier. [P-59]

**26.** The IEP drafted at the April 11 meeting added psychological services with a behavior consultant to the Student's related services, and continued the rest of the Student's services. [S-280] It also noted the great difficulty the Student had been experiencing recently. [S-274]

**27.** In mid-April, Tri-County assigned Jessica Allen, an employee of Providence Service Corporation (Providence), to work as the home and community treatment (HCT) clinician for the Student. Providence is a home and community-based behavioral health treatment service that also runs Merrymeeting.

**28.** On April 23, 2012, Ms. Shiok went to Carrie Ricker, where Teacher "A" gave her a tour of the functional life skills program and showed her the Student's classroom materials. [C-1088] At home, the Student was continuing to act out. For example, when the Mother did not allow him to have soda for breakfast, he hit her in the face, punched and kicked her and almost broke his door off the hinges. [C-1089]

**29.** Dr. Sheckart conducted his evaluation later in April, and administered the Wechsler Intelligence Scale for Children (WISC-IV) and several other tests. [S-266] This was the first time the Student had cognitive testing<sup>4</sup>. [Testimony of Mother] The Student obtained the following scores: 45 in verbal comprehension, 55 in perceptual reasoning, and 54 in working memory. His full scale IQ was a 45, indicating that mild mental retardation underlied his

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<sup>4</sup> When Debbie Anctil evaluated the Student, she could not test for IQ at that time. [Testimony of Father]

Autism. [S-272] Although he was xx years old at the time of testing, Dr. Sheckart said he was operating with a performance capacity in terms of understanding and behavioral output that was more like that of a xx year old. [S-271] Dr. Sheckart noted that the Student was demonstrating a degree of frustration within the family and striking out at them. [S-266] It was Dr. Sheckart's opinion that the Student needed a functional life skills program, plus home support and case management. [S-272]

**30.** Tri-County tried to assist the Parents and Teacher "A" in getting the Student back in school, and Ms. Allen offered to shadow him all day on May 3, 2012 Teacher "A" that Ms. Shiok and Ms. Allen had instructed the Mother not to talk with the school, and that they were concerned about Teacher "A" relationship with the Student. Neither of these statements were true. [C-1092] Ms. Shiok had repeatedly told the Mother that she could speak with whomever she wanted, and wrote that both she and Ms. Allen were concerned about the Mother's splitting<sup>5</sup> and reporting things to the school that were not true. [C-1092] Ms. Shiok and Ms. Allen determined that there would not be any providers alone in the Mother's home because of her splitting and making accusations that were not true, as this would be safest for everyone. [C-1092]

**31.** In April and May 2012, Providence prepared a comprehensive HCT assessment in which the Parents reported that the Student's aggressive and destructive behavior had increased in intensity during the past three months, and he "now refuses to attend school." [C-1010] The clinical assessment summary reported that the Student was having great difficulty adapting to the addition of his siblings into the home, and that prior to this, the Student was successful at home, school and in the community. [C-1023] It reported that the Parents stated they were

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<sup>5</sup> Splitting is defined by the DSM-IV-TR as a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation. The Mother had a history of panic attacks, bipolar disorder, borderline personality disorder and post traumatic stress disorder. [S-531]



overwhelmed by the Student's behaviors and the demands of the newborn twins, who had medical problems, and they were concerned about the Family's safety. [C-1023] The plan developed by Providence was for home services with large amounts of clinician and behavioral health provider (BHP) time to help stabilize the Student, develop a routine for him and his family, and return the Student to school.

**32.** In an attempt to help get the Student to school, Teacher "A" tried to reach the Mother, but they were unable to connect by telephone. [Testimony of Teacher "A"] Teacher "A" spoke with Ms. Shiok to confirm that transportation had been arranged for the Student to return to school on May 7. [Testimony of Teacher "A", A-110] The District arranged transportation for the Student for May 7 and 8, but the Student did not show up at school on either day. On May 9, the Mother called the school and said she wanted to slow down the Student's return to school, and requested a meeting to develop a re-entry plan. [Testimony of Teacher "A", A-114] Ms. Shiok also told Teacher "A" that the Mother thought Teacher "A" was too close to the Student. Teacher "A" did not understand what the Mother meant by that. [Testimony of Teacher "A"] Teacher "A" called the Mother and asked her what she meant, and apologized if she had done anything to offend the Parents. The Mother said that Teacher "a" felt like part of the family. [Testimony of Teacher "A"]

**33.** The IEP team met on May 23, 2012 to plan the Student's reentry to school. [S-257] The team discussed having a field trip with the Student to a local ice cream store on May 25. [Testimony of Teacher "A", S-258] As Teacher "A" had a very good relationship with the Student, the team discussed having her come to the house and either assist with transportation or work with him at home if he refused to go to school. [Testimony of Teacher "A", S-259] Teacher "A" had offered this before, and asked the Mother whether this was all

right with her. The Mother agreed, then became upset and went for a walk. [Testimony of Teacher “A” ] Ms. Shiok then asked to speak with Teacher “A” privately, at which time she told her that the Mother had said that she thought Teacher “A” was sexually abusing the Student. Teacher “A” was devastated to hear this, and very upset. [Testimony of Teacher “A”] Teacher “A” nonetheless returned to the meeting and helped develop a re-entry plan for the Student. The team discussed ESY services, and the District said it was offering a two-week “Jump Start” program in August. [S-259] The Mother was very upset about this, as she felt the Student should be in a program that provided services every day throughout the summer, such as Margaret Murphy. [S-260] The Parents also raised concerns about the Student’s behaviors at home. He had grown, and being larger, it was more difficult for his parents to deal with his refusals. He was hitting, punching and kicking. [S-260] The Parents added that the Student had been hiding his backpack in an effort to avoid school, and was refusing to bathe or get dressed on a daily basis. [S-260]

- 34.** May 25, 2012 was the field trip to an ice cream shop. The Student saw his peers and got on the bus for the field trip, which went well. The Student also played Legos with his teachers who came on the trip, but Teacher “A” did not attend. [Testimony of Mother, C-1098] Ms. Shiok’s notes said that the Mother tried to sabotage the field trip plan first thing in the morning but Ms. Allen held the Mother to it. Ms. Shiok also reported that she spoke with Dr. Sheckart’s office, and that the doctor did not recommend that the Student attend Margaret Murphy because he is too high functioning. [C-1098] Dr. Sheckart requested that Ms. Shiok attend the meeting with the Mother at which he was going to explain the evaluation results.
- 35.** The Student attended school on May 30, 2012, and Doreen Newcomb was the Student’s new special education teacher. [Testimony of D. Newcombe] The Mother was pleased that

Teacher “A” would not be working with the Student. [C-1098] Ms. Newcomb had experience working with children with Autism, and had received training from Margaret Murphy. She had worked with the Student previously helping him with swimming. [Testimony of D. Newcombe] Ms. Newcombe implemented the Student’s reentry plan to return to Carrie Ricker. [S-240, testimony of D. Newcombe] She tried different things with the Student to see how he responded, and he was mostly compliant. [Testimony of D. Newcombe, A-19-23] The Student continued to progress, and by June 11, he was asking to come to school. [S-240, A-13-14]

**36.** On May 31, 2012, the Mother told Ms. Allen she did not want in-home services any longer. The Mother terminated the services of Ms. Allen, and accused her of being late, not always showing up, and she accused both Ms. Allen and Ms. Shiok of lying and not being supportive. [Testimony of Mother]

**37.** The discharge summary from Providence dated June 25, 2012 described the services provided to the Family as “brief intensive service to stabilize home situation,” and noted that the Student’s increased aggressive behaviors, tantrums and lengthy school refusal were thought to be caused in “great part due to the addition of twins to his family, one being medically needy, that resulted in major changes to routines and the availability of his parents.” [C-1031, 1034] The Student was discharged from services early because he was successfully reintroduced to school, and his aggressive and angry behaviors declined to a minimal level.

**38.** During the summer, Doreen Newcomb taught the Student’s summer program. The Student had been out of school for about a month when the summer program began, but he was dressed and ready for school on July 11, 2012, and happy to see Ms. Newcombe. [A-24] On

July 12, the Student had a good day initially, then had some behavioral problems. Ms. Newcombe wanted to discuss these with the Mother at pick-up time, but was unable to do so because the Student, who had to date been refusing to ride in the car with his twin siblings, finally got in the car with them. [B-14] The Mother was so excited about this that Ms. Newcombe did not want to hold her up with conversations about the day and therefore did not discuss the Student's difficulties at that time. [Testimony of D. Newcombe, B-14] On other days, the Student continued to refuse to get in the car with the twins. [B-14] Ms. Newcombe was hoping that she could work as a team with the Parents. When Ms. Newcombe provided the Mother with the details of the Student's day, Ms. Newcombe found the Mother to be very reactive and demanding, and she would start talking about sending the Student to Margaret Murphy, thereby making communication difficult. [Testimony of D. Newcombe, B-14] Ms. Newcombe told Dr. Burrow that she preferred to email him when the Student displayed aggression rather than going into specific details with the Mother. Dr. Burrow advised Ms. Newcombe to inform the Mother through a summary of the summer program, unless the Student failed to recover on a particular day. [B-14]

**39.** Ms. Newcombe worked exclusively with the Student two days per week through August 2, 2012. From August 13 through August 23, she worked with the Student daily in a program with his peers. [Testimony of D. Newcombe] Throughout the summer program, the Student was largely compliant, although he had some manageable behavior issues. [A-24-42, Testimony of D. Newcombe]

**40.** Ms. Newcombe completed a teacher questionnaire on July 24, 2012, on which she wrote that the Student's strengths were that he had a good memory for routines, songs and videos. He could do 100 piece puzzles and navigated well around the Internet. [P-73] Ms. Newcombe

also recorded that the Student had difficulty accepting changes that produced anxiety, and that he would refuse to do nonpreferential tasks. She felt he needed a lot of structure, consistency and limits set for him, with clear expectations and outcomes. Although very verbal, the Student had difficulty expressing himself effectively and appropriately. [P-73]

41. On August 31, 2012, the IEP team met to discuss the Student's educational program. At the meeting, the team agreed that Dr. Kimball would do an observation of the Student in school, and meet with the Mother. The IEP team was set to reconvene on September 26, 2012 to discuss the Student's progress and review Dr. Kimball's recommendations. [S-245]
42. The Student started xx grade in September 2012 with Ms. Newcombe as his special education teacher. He was attending school for most of the school day, and Ms. Newcombe's goal was to have the Student in class full time and participating fully. [Testimony of D. Newcombe] The Student was engaged in academics and receiving OT and Speech, but he was refusing to go to specials. Although the Student was "testing the limits," he was responding to directives and learning to function within the limits set for him. He was continuing to grow and make progress. [Testimony of D. Newcombe]
43. On September 17, 2012, the Mother and Student had an initial meeting with Aerial Draper of Sweeter Services, who was the Family's new case manager. The Mother discussed her concerns about the Student's current educational placement, and said she would like the Student to attend Margaret Murphy. [C-1154] Throughout her visits and calls with the Mother over the next few days, Ms. Draper emphasized with the Mother the need for the Student to attend school, and the Mother talked repeatedly about sending the Student to Margaret Murphy. [C-1155-1160] The Mother expressed her fear of the Student's aggressive behavior around the babies, and that he threatened to hit them when they cried. [C-1160,

1166] She applied for home services for the Student through Connections for Kids. [C-1165, 1168]

- 44.** During September 2012, Dr. Kimball had four visits to the Student's classroom to meet with Ms. Newcombe and work with the Student. [Testimony of J. Kimball] He also met with the Mother and Aerial Draper on September 21. He thought the District offered very good programming, and was impressed with the commitment of the staff, calling it one of the finest, data-based instructional programs out there. [Testimony of J. Kimball] The Mother again brought up Margaret Murphy, and they discussed using ABA with the Student at Carrie Ricker as well as tracking specific data to show the Student's progress. Ms. Draper wrote in her notes, "this particular school is currently [the Student's] best option," and Dr. Kimball agreed with this. [C-1157]
- 45.** Dr. Kimball met with Devin Custer, the Student's speech and language therapist, and attended the September 26 IEP team meeting. Due to the Student's absences, Dr. Kimball was only able to observe the Student twice. He was planning to look at a system of visual supports to help facilitate the transition from home to school. [Testimony of J. Kimball]
- 46.** At the September 26, 2012 IEP team meeting, Dr. Kimball offered his impression that the Student was receiving an appropriate education at Carrie Ricker from which he seemed to be benefitting. [Testimony of J. Kimball] He noticed that the Student made very solid progress between September 5 and September 21, and the school had a systematic process for integrating the Student back with his peers. For example, the Student started the school year with barriers to prevent distraction and needed to be coaxed to school with a Subway sandwich, but within a few weeks, he was working at a table with others and was accepting help. [Testimony of J. Kimball] The Mother continued to wonder whether the Student would

benefit from a placement at Margaret Murphy because they use ABA there, to which Dr. Kimball explained that although Margaret Murphy used different terminology, it did not do things much differently than the Student's program at Carrie Ricker. He felt that if change and disruption were hard for the Student, it would not be wise to present another major change right now, and that sending the Student to a more restrictive private program now with the goal of returning him to public school was not as beneficial as working with the District to increase the Student's compliance. [Testimony of J. Kimball, S-236] The Mother expressed her belief that the Student was bullied at school and this was why he did not want to attend. [C-1159] She described the Student's aggressive behavior at home, to which the principal replied that the Student did not have those behaviors at school. [C-1159] The team discussed using a visual script to get the Student on his transportation in the morning, and the Parents reported being satisfied with this.

47. The Mother continued to have trouble getting the Student to go to school, and thought she needed support for this. The District responded that this was the responsibility of the Family's in-home support. [Testimony of Mother] Because the District would not provide tutoring or an out of district placement, the Mother felt the District was not supportive. [Testimony of Mother] The Student stopped attending school on September 28, 2012. This surprised Ms. Newcombe, as there was no reason for her to think he would not return. [Testimony of D. Newcombe] The Student had been engaged in academics and was not having behavioral issues, although he did require repeated cues. In the 38 days from June through September when Ms. Newcombe worked with the Student, he had five documented behaviors. [Testimony of D. Newcombe]
48. On September 28, 2012, the Student was discharged from case management services with

Tri-County because the Mother had not been responding to telephone calls, despite transferring the Mother's case to a different case manager at the Mother's request. Tri-County reported that the Student made minimal progress due to his Mother changing services without utilizing them and asking for new workers without notice. [C-1051]

49. As agreed upon in the Student's IEP, Ms. Newcombe met with Devin Custer and occupational therapist Dana Tobey to develop a visual system to help the Student with the transition from home to school. [Testimony of D. Newcombe] Ms. Newcombe also prepared a book for the Student about the fun things that happen at school. [Testimony of D. Newcombe, S-231-232]<sup>6</sup>
50. School principal Christine Lajoie-Cameron sent a letter to the Parents dated October 29, 2012 regarding the Student's 16 unexcused absences from school. [P-81] The letter noted that on October 3, the Parents requested that the District not provide the Student with transportation unless the Parent called, and the District had received no requests for transportation. The letter set forth the many attempts the District had made to help the Student attend school, and explained Maine truancy law. The principal asked the Parents to meet with the superintendent, special education director and principal to come up with a plan that the Parents will enforce to get the Student to attend school. Otherwise, Maine law required the District to report the Student's truancy to the Department of Health and Human Services. The principal proposed three meeting dates. [P-81] The Mother was very upset by this letter, and decided to contact a lawyer. [C-1176] She had previously told the District that she did not want to be contacted, and would let the District know when the Student was ready to return to school. She was also on a waiting list for in-home support after being discharged from

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<sup>6</sup> The Parents did not use the book for long because they said when they showed it to the Student, he became upset. When the Student was in Hampstead Hospital, the staff there used this book and did not have any type of negative response from the Student. [Testimony of D. Newcombe]



Tri-County's services. [Testimony of D. Newcombe]

- 51.** On November 5, 2012, the Mother and Ms. Draper met with school officials to discuss the Student's truancy. The Mother requested tutoring at home, but the District was unwilling to offer this any longer because the Mother made allegations of sexual abuse against the Student's teacher during the previous school year. [C-1179] The school officials and Ms. Draper offered several ideas to the Parents regarding transporting the Student to school, but each one was rejected by the Mother. [C-1179]
- 52.** On November 6, 2012, the Parents wrote a letter to the District asking for an independent functional behavioral assessment (FBA) to look at the Student's school refusal and avoidance behaviors and to develop a plan. [S-219] The Parents also requested an IEP team meeting. Attorney Atlee Reilly at the Disability Rights Center was now representing them. On November 20, 2012, Mr. Reilly sent an email to Dr. Burrow requesting an FBA, the development of a comprehensive behavior intervention plan, and the implementation of such a plan across all settings. [P-83] He also requested an IEP team meeting to discuss what services, including parent counseling and training, social work, psychological services and transportation, would be necessary to ensure the implementation of the Student's program.
- 53.** At a meeting with Ms. Draper on November 13 to discuss issues regarding the Student's truancy, MaineCare, and obtaining in-home behavioral support, the Mother said she did not feel supported by Ms. Draper, that Ms. Draper acted as a mediator and was not 100% on her side. [C-1187] The Mother discontinued Sweetser's services and applied for services through SMART Child and Family Services. She was assigned Kayshia Smith as her targeted case manager. Ms. Smith graduated from the University of Maine at Farmington with a degree in rehabilitation services in 2011. [Testimony of K. Smith] When Dr. Kimball followed up with

Ms. Newcombe about how things were going with the Student, Ms. Newcombe told him about the Student's lengthy absence from school, and that the Mother hoped in-home support would be in place to help her prepare the Student for school. [Testimony of D. Newcombe, B-15]

**54.** In late November or December 2012, the Family received HCT services from Janet Hamilton, a Master's level clinician. The Mother did not think Ms. Hamilton was providing the level of services needed and that she was not a good fit for the family. She was providing more information to the District than the Parents wanted her to provide. Consequently, the Mother terminated Ms. Hamilton's services in early January 2013. [Testimony of K. Smith, C-312-313]

**55.** On November 29, 2012, the IEP team met. Kayshia Smith attended the meeting with the Mother, along with Attorney Reilly and Michael Oken of the Autism Society of Maine. At this meeting, the parties agreed upon a similar plan to the one implemented in the spring to bring the Student back to school, only this plan was abbreviated because he had missed school for so long. [Testimony of D. Newcombe] Dr. Burrow agreed to coordinate a FBA, which would include observations and data gathering at home and at school. [S-206] Mr. Oken, who was also a parent of a child with Autism, spoke of the possible effects of puberty on the Student's behavior. When the Parents again asked that the Student be placed at Margaret Murphy, Mr. Oken remarked that Margaret Murphy was a place for children who could not be successful in public school, but he did not feel this was the case with the Student. [S-207] He was optimistic about the Student's chances of success and commented that his child had been in both public and private schools.

**56.** As part of the re-entry plan, Dana Tobey and Ms. Newcombe went to the Student's house on

December 4, 2012. When they arrived, the Student got out of his seat to hug and greet them. The two-hour visit went very well, and they planned to return the following day and bring the Student to the Libby-Tozier school. [Testimony of D. Newcombe, B-23] When they arrived the following day, however, the Student was not ready to leave, as he was using his laptop and eating a snack, and did not want to give up those items. In the past, he had been dressed with his shoes, coat and backpack, and ready to leave. [Testimony of D. Newcombe, B-28] He began acting out, and started hitting his mother and grandmother. At the Mother's request, Ms. Newcombe and Mr. Tobey left. Consequently, the District decided that staff would not be returning to the Family's home until there were outside agency personnel in place, partly due to concerns over their safety and partly because the Mother had made false accusations against the school and its personnel in the past. [B-35] The District offered to provide the Student with educational services at any District school or other acceptable neutral site. Ms. Smith was in the home when the school personnel arrived, but the Mother did not reveal this until late in the visit. Additionally, during the visit, the grandmother was recording a video of the staff but did not notify them or ask permission to do so. [B-28]

57. Following the December 5 visit, the District felt that it was mandated by law to report what it felt were unsafe conditions in the Family's home. The Student was out of control and acting out in an aggressive manner by beating on his grandmother and punching his mother in the stomach. The principal explained in an email to Attorney Reilly that her intent was to get the Family crisis intervention before someone in the Family was injured. [P-86] The principal also wrote that she was truly concerned for the safety of the Student and Family. Following a safety assessment, the Department of Health and Human Services made no finding of neglect. [P-167]

**58.** In December, Brian Meldrum conducted a FBA and issued a report in early January of 2013.

[S-191-201] Mr. Meldrum is a licensed clinical professional counselor, licensed psychological examiner and school psychologist. He came to the home and interviewed the Parents, did behavioral observations and interviewed Teacher “A” and Ms. Newcombe. Mr. Meldrum concluded that the Student’s refusal to go to school was being reinforced by his access to preferred activities at home, and he had become accustomed to not attending school. [S-199] His aggression was reinforced by the adults in his family backing off of expectations and demands. Mr. Meldrum also noted that there were a number of circumstances that coincided with the Student’s school resistance, particularly the birth of the twins, changes in routine, and possibly puberty. [S-199] He thought that a successful return to school would involve much work on the part of the family and in-home providers to turn around the current pattern that the Student had learned: that refusal, coupled with escalated behaviors, would help him avoid tasks that were either aversive or less preferable. [S-200] In his report, Mr. Meldrum wrote that Ms. Newcombe felt that it would be worth the effort to try to reintegrate the Student into his program at Carrie Ricker. Mr. Meldrum thought that the Student’s program there, which has been based for some time on ABA principles, was appropriate for the Student. [S-196]

**59.** On January 4, 2013, one of the Student’s siblings was crying, and the Student became frustrated and damaged the kitchen. The police were called, but by the time they arrived, the Student was out of control. [P-100] The Student was admitted to Hampstead Hospital (Hampstead) on January 6, 2013 because of increased aggression and out of control behavior. [P-100] Hampstead is a psychiatric hospital in New Hampshire, where the Student was treated for one month. At Hampstead, the Student initially exhibited task refusals with some

tantrums and aggression, but the staff waited him out, reiterated expectations, and offered prompts. Soon, the Student was compliant with treatment expectations, and was able to participate in school there. [P-101] Because his mood was stable and he was no longer engaging in self-injurious or aggressive behavior, the Student was discharged on February 6, 2013. The Student's social worker at Hampstead, Jody Vourgarakis, wrote that the Student responded very well to Hampstead's structured environment, and said that it was important that the Student continue with the same level of structure and consistency at home and school to ensure the Student's successful transition. [S-143] Ms. Vourgarakis expressed concern about vacation times and the Student's transition back to school. She felt the Student should participate in a school program with extended year programming throughout the summer. [S-143]

**60.** While the Student was in Hampstead, Dr. Kimball corresponded with Ms. Newcombe about things that worked with the Student while with Teacher "A" Dr. Kimball's notes indicated that the Student was protesting his transition from school to home as well as from home to school. [B-46] Additionally, the IEP team met on January 22, 2013 to consider a reentry plan to public school. The team reviewed Mr. Meldrum's FBA and the District staff planned to observe the Student at Hampstead. [S-169] There was considerable planning and coordination for the Student's return to school between Ms. Newcombe, Ms. Smith, and Ms. Vourgarakis. [B-55-70] The re-entry plan drafted was intended to closely model the routines established at Hampstead, which were also to be supported by the Student's in-home services. [S-157] The specific practices used would be adjusted by the Student's teacher in consultation with the District's behavioral specialist and Dr. Kimball.

**61.** Shortly after the Student returned home from Hampstead, Jamie Wheeler began working

with the Family as the clinician providing home support. Ms. Wheeler developed a treatment plan and provided support for the Mother for three to four hours per week. Ms. Wheeler was very direct, and the Mother did not feel supported by her, so terminated her services.

[Testimony of K. Smith] HCT clinician Will Liberty and BHP Luke Van de Krol were then assigned to work with the Family.

- 62.** The plan for the Student's return to school was that Tammy Fisher, the District's behavioral consultant, would go to the Student's house just before pickup for school to assist with coordinating behavioral strategies between home and school. [B-55] At Carrie Ricker, Ms. Newcombe tried to replicate aspects of the Student's classroom environment at Hampstead. [Testimony of D. Newcombe] The Student returned to school on February 7, 2013, and this went well. [B-71] The Student waited for Marcia, his transportation provider, to arrive, and responded with excitement when she did. [B-72] He got on the van, and Ms. Fisher was impressed with Mr. Van de Krol. Georgia Pashley was assigned to be his 1:1 ed tech. Ms. Pashley was a retired teacher with a Master's degree in special education and 40 years of experience working with students with disabilities. [Testimony of G. Pashley] She has also worked as a special education director and consultant. Ms. Newcombe recruited Ms. Pashley when she knew the Student would be returning. Ms. Newcombe was in touch with Dr. Kimball, and she began collecting data on the Student's behavior right away. [Testimony of D. Newcombe] This data was shared with Dr. Kimball and the Parents. [Testimony of G. Pashley] The Student's program used a picture schedule, visual timers, and a reward system for positive reinforcement of targeted behaviors, based upon the re-entry plan. The Student earned tokens that were the equivalent of a quarter, so four tokens added up to one Student dollar. [Testimony of G. Pashley] The Student enjoyed keeping track of how many dollars he

earned each day and could cash them in for other rewards like iPad time or edibles, thereby incorporating practical math into the reward system. [Testimony of G. Pashley] This system was very successful. The Student also had a self-evaluation program he completed every day that recorded his activities, feelings and successes. [E.g., A-361, 363]

**63.** The following week went very well, and the Student got in his van with Marcia without incident. [B-74-78] Ms. Fisher believed that the Student's success was due to having consistency and predictability, and he needed the adults around him to provide this. [B-84] On February 14, the Mother emailed Ms. Newcombe to ask what the school's plan was for February vacation week. [B-79, 83] This was the first time Ms. Newcombe learned that the Mother expected services during vacation. [Testimony of D. Newcombe] Because no services were available, Ms. Newcombe gave the parents a sheet with numerous activities that they could do with the Student during vacation week. [S-140-141] When the Student returned from vacation, Ms. Newcombe did not notice any regression. [Testimony of D. Newcombe]

**64.** On March 1 and 14, 2013, the Mother emailed Ms. Newcombe about the Student's success in school, telling her how pleased she was with the program. [A-355, 357] The Mother had an

opportunity to observe the Student in his class, which she had not done before, and was very impressed. [Testimony of D. Newcombe, B-105]

**65.** The IEP team met on March 14, 2013 for the Student's annual review. [S-125] The IEP called for direct instruction in the functional life skills program, and provided both speech therapy and OT, each for 30 minutes twice per week, private transportation, and behavioral consultation with Dr. Kimball. [S-120-121, testimony of D. Newcombe] It also provided ESY services in the Jump Start program from mid to late August to create a transition back to school. [S-126] The Parents wanted more extensive summer services, but the District said the Student did not qualify because there was no evidence of loss of skills over the summer that would require more intervention. [S-126] Ms. Newcombe believed the IEP was reasonably calculated to provide the Student with FAPE in the least restrictive environment. [Testimony of D. Newcombe] Ms. Pashley explained how the Student had progressed since returning to school, and that the primary goal was to shape behavior while systematically introducing expectations, time limits and academics. [S-127] The Mother shared that when the Student first came home from the hospital, he was more compliant and willing to do more, but that she had seen a spike in his behaviors recently. [S-127] It was typical for the Student to test limits to determine who was in charge, but it was important to redirect him and maintain expectations when the Student demonstrated task refusal or aggressive behavior. [S-127] On March 14, Ms. Smith's notes reported that she attended the IEP team meeting, that the Student was succeeding in school, and the District is beginning to put more demands on him. [C-227]

**66.** On March 21, 2013, Will Liberty, LMSW, was assigned to be the Family's HCT. When he met the Mother and Student, the Mother talked at great length about the Student's refusal to



go to school because he was scared. [C-110] Ms. Smith never heard the Student say he was afraid to go to school. [Testimony of K. Smith] On March 26, Mr. Liberty was at the Student's home to help develop a morning routine. Although the Student required prompting, he did not become escalated, nor did he refuse to go to school that morning. [C-108] When Mr. Liberty visited the Mother on April 3, 2013, she expressed her fear that these services would be discharged because the BHP asked the mother to be part of the Student's morning routine by giving him verbal prompts. [C-106] Although Mr. Liberty assured her this was not the case, he did stress the importance of her becoming increasingly involved with the Student's routine and management of behaviors so she could increase her comfort level with this process. [C-106] On April 4, 2013, Mr. Liberty spoke with the Student, who said he was happy and sad about going to school, but did not say anything about being scared when asked. [C-105]

- 67.** The Student attended Carrie Ricker from February 7, 2012 until April 5, 2013. [A-348-350] During that time, he had five minor behavior episodes and missed three days of school. [A-348-350]. Things were going very well, and the Parents were pleased with the Student's program and Ms. Pashley. [A-351-] Daily and weekly reports were sent home to the Parents listing the Student's activities and other information. [A-351-457]
- 68.** On April 12, 2013, the Student was admitted to Spring Harbor Hospital. Bruce Chemelski, Ph.D., is the clinical director of the Spring Harbor Academy [Spring Harbor], the school that serves the developmental delays unit. There are 12 children on the unit. [Testimony of B. Chemelski] The team at Spring Harbor Academy, a Department of Education licensed school, includes special education nurses, OTs, and a behavioral coordinator. Because there is a four-week waiting list, Dr. Chemelski thought the Parents applied for admission at least

three weeks before April 12. [Testimony of B. Chemelski] The reason the Parents gave for the placement was unsafe behavior including emotional dysregulation at home and school, and the chief complaint from the Mother at the time of admission was that the Student had “been out of school for months and refuses to go to school and becomes aggressive.” [C-392, 395] The Parents did not inform the District that they were seeking to hospitalize the Student. They reported to Spring Harbor that the Student’s problem behaviors only happened at school. [Testimony of B. Chemelski, C-396] It was clear to the Spring Harbor staff, however, that the Student had difficulties with emotional regulation and communication that could happen at any time of day, and not just at school. [C-396] The Parents also reported that they believed there was an incident of bullying and possibly physical or sexual abuse of the Student, but they gave no information about any specific events that form the basis of such an allegation. [C-392] Consequently, the social worker did not feel that there was anything that required reporting. [Testimony of B. Chemelski] Spring Harbor listed the birth of the twins as one of stressors in the Student’s life. [C-393] Dr. Chemelski reported that this kind of change could have a significant impact on a child like the Student, and it would be more stressful than for children who do not have Autism. [Testimony of B. Chemelski] Dr. Burrow did not think it was merely a coincidence that the Mother placed the Student at Spring Harbor immediately before spring break, and was concerned that the Mother’s behavior would hurt the Student. [B-118] Throughout the Student’s stay at Spring Harbor, the Mother was “quite insistent’ that Spring Harbor should be able to change the Student’s school placement, although staff were very clear that they did not have the power to do that. [C-395] The Mother also specifically requested that the staff not share information about the Student with the District, and to report any attempt by Dr. Burrow to contact Spring Harbor.

[Testimony of B. Chemelski] Spring Harbor usually worked with a child's school department, but could not here because the Parents would not permit it.

- 69.** The Student's behavior plan began at the time of admission to Spring Harbor, as is the case with all children admitted to Spring Harbor. [C-918] The Student's target behaviors were aggression, emotional dysregulation, and noncompliance. [C-394] Within four days of his admission, he began to show behaviors, and had 54 aggressive behaviors, 3 episodes of emotional dysregulation and four noncompliance behaviors on his fourth day at Spring Harbor. [Testimony of B. Chemelski, C-395] Because Dr. Chemelski was not pleased with the trends in the Student's aggression and noncompliance, the behavior plan was changed. The Student was in the mid-to-high average range of their students for challenging behaviors, and was not responding to all of the interventions. [Testimony of B. Chemelski] Some days, the Student had no aggression, and would have 180 incidents on the next day. [C-559] Although most children on the Autism spectrum have a level of anxiety, the Student was diagnosed with an undertreated Anxiety Disorder, NOS, as he was above the typical level of anxiety for children with Autism. [Testimony of B. Chemelski, C-394] The Student would pick up the energy from the Mother's anxiety, and this was a trigger for him. [Testimony of B. Chemelski, C-585] The Student's program used a token system similar to the one used by Ms. Newcombe and Ms. Pashley at Carrie Ricker. [S-65] While at Spring Harbor, Dr. Chemelski saw the Student experience significant growth in all of the targeted behavioral areas. Emotional dysregulation and noncompliance went down steadily over the length of his stay.
- 70.** While the Student was at Spring Harbor, his social worker, Bruce Ludders, spoke with Kayshia Smith at length, and Ms. Smith reported, "The Mother frequently misconstrues what

others say and anyone that is conveying information to or from her needs to check or know what actually was said.” [C-603] She added that the Mother “flips back and forth from doing very well and managing herself appropriately with [the Student] to the other side of being highly anxious and dysregulated which becomes a trigger to [the Student]” and that this appears as if the Mother is sabotaging the Student’s schedule for the day, but her anxiety “totally highjacks her and she wants everyone to quickly attend to her needs.” [Testimony of K. Smith, C-603]

71. The IEP team met while the Student was at Spring Harbor. Because Spring Harbor Academy is located in Westbrook, however, the Student’s education while a patient there is the responsibility of the Westbrook School Department. Consequently, the IEP team was composed differently than the one in the District. It was lead by Westbrook Special Education Director Deborah Peck. Dr. Burrow asked Ms. Peck to invite him, Ms. Lajoie-Cameron and Ms. Newcombe to the IEP team meeting, to which Ms. Peck responded that she could not do so, as “The mother is digging in her heels on the issue and they need to work with her.” [B-122] Dr. Burrow’s memo mentioned that the placement at Spring Harbor was not generated by educational issues. [B-122]

72. Staff at Spring Harbor meet with families regularly, and parents observe their child’s plan in action. The Parents were very involved and interested in the Student’s plan. They seemed competent at running it. [Testimony of B. Chemelski] Parent training was a critical component of the program, as it is essential to continue the program at home to make the hospital stay worthwhile. [Testimony of B. Chemelski] The Student’s discharge summary noted that his knowledge and abilities appeared higher than his reported IQ of 45. [C-395, testimony of B. Chemelski] During the Student’s last few days at Spring Harbor, he did not

do well. Even when children miss home, they often have anxiety about leaving, and the Student showed this. Spring Harbor usually tries to prepare children for the transition by coordinating with the child's regular school, but could not do so here because the Parents would not allow it. In Dr. Chemelski's opinion, this was not the correct way to coordinate programming for the Student upon discharge. [Testimony of B. Chemelski] Additionally, the Mother was showing increased anxiety with the Student's pending discharge and wanted him to remain at Spring Harbor longer, but he was discharged based upon medical necessity. [Testimony of B. Chemelski, S-66] It was Dr. Chemelski's opinion that the Student would be better off with consistent programming during school breaks, but did not have any data regarding whether the Student regressed during these breaks, so he could not give an opinion of what that programming should be. [Testimony of B. Chemelski]

**73.** The Westbrook-led IEP team met on June 11, 2013, just prior to the Student's discharge. [S-65] The purpose of the meeting was to review the Student's programming while attending Spring Harbor. Dr. Burrow, Ms. Newcombe and Ms. Pashley were in attendance, as well as Kayshia Smith, Joan Kelley, the Parent's advocate, the Parents, and Spring Harbor Staff. At this meeting, Dr. Chemelski learned that the Student had been attending school for two months prior to his admission with only five incidences of violent behavior. [Testimony of B. Chemelski] This was a lower level of behavioral concern than Dr. Chemelski was seeing at the hospital. At the meeting, the Parents asked that the Student attend Merrymeeting Center, but Dr. Burrow responded that he felt the District's program was appropriate and could meet the Student's needs. [S-66]

**74.** The IEP team met again on July 2, 2013 to discuss the Student's summer programming. The District proposed amending the Student's IEP so that he would attend ESY services at

Winthrop's Autism program from July 8, 2013 through August 14, 2013, and receive speech services there. [S-25] Sue Hunt, the Winthrop special education director, attended the meeting to answer questions about the program. This program had highly trained staff, including a BCBA on site, 1:1 ed techs, and used ABA. The Student's program would include two hours twice per month of behavioral consultation to the Carrie Ricker staff by Dr. Kimball. [S-26] The District proposed this in part to test the Parents' allegation that the home-based problems were a function of the Student's alleged fear of Carrie Ricker. [S-28] The District also stated that the Family, their home-based service providers and the District needed to work collaboratively to address the Student's school attendance. [S-28] The Parents declined the Winthrop placement, but agreed to visit the program. They again requested a full-time year-round placement for the Student at Merrymeeting Center, but the District believed that the available behavioral data strongly supported that the Student's least restrictive placement was at Carrie Ricker in the functional life skills program. [S-26] The Spring Harbor teacher recommended a program with a small setting, trained staff, consistency, ABA, data collection, and a data-based review process. [S-27] The Student's program at Carrie Ricker had all of these components.

**75.** On July 18, 2013, the District offered the Student an IEP for xx grade. [S-9-23] This IEP contained a lot of behavioral services, including parent training and support with a behavioral consultant for an hour four times per month for two months, then twice a month for the remainder of the IEP period, to assist the Family and coordinate with in-home providers to facilitate the Student's attendance at school. [S-14, testimony of J. Kimball] Additionally, the behavioral consultant would continue to provide one or two hours each week consulting with the special education staff. [S-21] The IEP continued the Student's direct instruction in the

functional life skills program, speech and OT as before, private transportation, plus greatly increased behavioral consultation to help the Student transition to school. [S-21] The Student would continue to work with Ms. Pashley, and the District staff would have access to two BCBA's, Tammy Fisher and Dr. Kimball, both of whom worked with the Student in the past. Dr. Kimball and Ms. Newcombe believed this was an appropriate program for the Student that did not fall short in any way. [Testimony of J. Kimball, D. Newcombe]

76. By July 19, the Parents had not consented to the District's offer of summer programming. Dr. Burrow sent them a letter that day setting forth additional services the District was offering the Student for the summer. This included attending the remaining portion of the Winthrop ESY Autism program, transportation to the program, and collaboration between the Student's summer teacher and ed tech with Ms. Newcombe and Ms. Pashley to transition the Student to the District's Jump Start program at Carrie Ricker. [S-9] To facilitate a smooth transition, Dr. Kimball became involved, providing three hours per week of consultation to school staff. [S-10, testimony of J. Kimball] Dr. Kimball met with staff in the Winthrop program and with Amanda Henson, the ed tech from the District who would be working with the Student in Winthrop. He also took steps to coordinate between what the home service providers were doing and the school programming. [Testimony of J. Kimball]

77. The Student began attending the Winthrop program on July 31, 2013. It went very well. [Testimony of J. Kimball, Mother] Dr. Kimball observed the Student for at least eight hours in this program. The Student made rapid strides in the amount of work or difficulty of work he would tolerate and the extent to which he interacted with his peers. Even on his first day, he participated in circle, recess and an art activity. There was only one minor episode of work

refusal. [Testimony of J. Kimball] The Mother was pleased with the program at Winthrop.  
[Testimony of D. Newcombe]

**78.** The IEP team met again on August 13, 2013 to discuss some changes to the IEP. [S-690-692]

At that meeting, the District offered programming on an interim basis at an alternative location to ensure that the Student received educational services during the pendency of the due process hearing. [S-691] The District offered Oak Hill Middle School because the Parents believed that Carrie Ricker was a trigger for the Student. [Testimony of D. Newcombe] As part of this program, the Student would receive tutoring by Amanda Henson and Georgia Pashley with services from Dr. Kimball at the levels provided in the xx grade IEP. [Testimony of Mother] The Student visited Oak Hill with Ms. Henson, and everything went well. [Testimony of Mother] Dr. Kimball explained that based upon his experience, the Student could handle attendance at Oak Hill Middle School. [Testimony of J. Kimball] The Parents rejected the District's proposal, and requested a full-time placement at the Winthrop Autism program. [S-691] The District rejected that option because it was not the least restrictive setting in which FAPE could be provided. The District also agreed to add ESY at the Winthrop program for the summer of 2014. [S-691]

**79.** Around the time of the Student's transition to Winthrop, Dr. Kimball wrote "procedures" for working with the Student. [S-1] He observed the Student on four occasions there, and thought the Student went through the program with virtually no problems. [Testimony of J. Kimball] He then drafted a behavior plan dated August 1, 2013, which essentially put in writing the behavior management program the District had been implementing since the Student first began having behavior issues in January of 2012. [A-460-462]. It involved the use of positive reinforcements, including the tokens and dollars that worked well in the past,



and procedures for preventing and managing challenging behavior. These were appropriate strategies, as the Student was successful when these were implemented in the past.

[Testimony of D. Newcombe, J. Kimball, A460-462]

**80.** Dr. Kimball did not believe it was likely that any alleged bullying incident caused the Student's challenging behaviors. [Testimony of J. Kimball] He thought Carrie Ricker was also a very unlikely trigger, and saw no evidence that it was a trigger when the Student attended school there or when he was at Winthrop. When Ms. Newcombe visited him in Winthrop, he was happy to see her, and he also interacted with a child he knew from Carrie Ricker. [Testimony of D. Newcombe, J. Kimball] If the Student had an aversion to Carrie Ricker, it would color most things associated with that school, but did not do so here. [Testimony of J. Kimball] Dr. Kimball thought the explanation in Mr. Meldrum's FBA was more plausible: that the Student refused school because he could not predict the next available reinforcement there, but knew well what he had at home, where there was a history of reinforcing his refusal behavior. [Testimony of J. Kimball] In other words, the Student's refusal to go to school was being reinforced by having access to preferred activities at home. Dr. Kimball was also familiar with the Merrymeeting Center, and thought the program was more restrictive than the Student needed, and not an appropriate placement for him. His opinion was that the Student was well served at Carrie Ricker, and that this would be a better placement for him than Merrymeeting. [Testimony of J. Kimball]

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

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

The Parents are entitled to compensatory relief because the District failed to provide the Student with FAPE during xx and xx grades at Carrie Ricker. The District's failure to properly

address the Student's significant behavioral needs constituted a deprivation of FAPE. The District failed to conduct appropriate evaluations necessary to program for the Student's behavioral needs. The usual means for doing this is with a FBA, which the District did not conduct until over a year after the Student's serious behaviors became apparent. Additionally, the District failed to conduct evaluations regarding the Student's anxiety, appropriate intelligence testing or an assistive technology evaluation.

The Student had very significant behavior needs, but the District failed to create a positive behavioral support plan or to include behavior goals in his IEP until the spring of 2013. Although the Student's behaviors became a significant problem in the fall and winter of 2012, the goals added in March 2013 did not address his school avoidance behaviors. Furthermore, the District did not program for the Family at home, either by training the Parents or working in any real way to help get the Student to school in the morning. As explained in the case of *Richmond County Sch. Dist.*, 52 IDELR 55 (SEA GA March 10, 2009), school districts have an obligation to assist students in getting to school under these circumstances. Failure of the District to do so resulted in a significant deprivation of FAPE for which the Student is entitled to compensatory education.

The appropriate remedy is a placement going forward for the Student at the Merrymeeting Center for Child Development. This is also an appropriate remedy in light of the District's inappropriate IEP and placement offer for the Student's xx grade year. Given that the Student spends no time with his mainstream peers, and has had to be hospitalized twice, this is a good indication that the Student requires a more restrictive placement which might help him avoid the most restrictive placement: future hospitalizations. Additionally, this IEP does not

provide for the year-round programming the Student needs, and it offers no services aimed to address the school avoidance goals.

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

The burden of proof for each of the issues in this case rests with the Parents. *D.B. ex rel. Elizabeth v. Esposito*, 675 F.3d 26, 35 (1<sup>st</sup> Cir. 2012) They must prove that each of the IEPs at issue was not reasonably calculated to provide the Student with some educational benefit. Furthermore, the Family is confined by the statute of limitations to claims arising after June 21, 2011, but waived the issue of ESY during the summer of 2011 by failing to raise it in the due process hearing request.

The Family has not met their burden for several reasons. First, they rely solely on their own opinions and observations, specifically the Mother's, yet there was no evidence that she possessed the educational qualifications or credentials to credibly assess the Student's programming or progress, and no expert testimony was offered to support the Mother's beliefs. Case law establishes that this alone is insufficient to meet a parent's burden of proof. None of the Parents' experts offered an opinion regarding the District's past or future offerings of programming. The Parents did not even testify that the IEPs were not reasonably calculated to provide the Student with educational benefit. The District, conversely, provided credible testimony from numerous sources, all of whom testified that the Student's educational and behavioral program was reasonably calculated to provide meaningful benefit. The evidence also supports a conclusion that the Student received meaningful benefits from both his 2011-2012 and 2012-2013 IEPs. The IDEA does not require a school to support a disabled child in a more restrictive setting to remedy problems in the home or make up for some other deficit not covered by the Act.

Collaboration between schools and parents is crucial to any IEP team process, and is especially important in cases like this one, in which the Student is not attending school because of in-home behaviors. Courts have repeatedly held that when a parent's actions frustrate the school's efforts to provide FAPE or the family fails to cooperate with these efforts, the family may be barred from reimbursement under the IDEA. Here, the District made repeated efforts to get the Student back to school and keep him there, but the Parents, at best, failed to fully cooperate with the District, and at worst, sabotaged the District's efforts. Because a school is not liable for the failure to provide FAPE when it is the result of the parents' own actions, the hearing officer should deny the Family's request for compensatory education even if she finds that the Student did not receive FAPE.

The District's decision not to order a FBA until November 2012 did not result in a denial of FAPE because it had not been previously necessary. Between March and November 2012, the District had limited access to the Student because he was not attending school, and had limited access to the home environment where the problem behaviors were occurring. The District did have a BCBA work with the Student's teachers to develop effective behavior strategies that were consistently implemented during XX and XX grades. When the Student attended school, these strategies were successful. Although the plan was not put into writing until August 1, 2013, this was the same plan the District had been implementing since January of 2012.

The record does not support the Parents' theories about the cause of the Student's aggressive behaviors, and there is much evidence that their own actions had ongoing negative consequences for the Student, hampering the District's efforts to provide him with FAPE. The Student's teachers, Dr. Chemelski, and Providence Behavioral Health Service all attributed the Student's behavioral decline entirely or partly due to the birth of the siblings, and this transition

was exacerbated by the Mother's refusal to allow the Student to be prepared for these changes. The Mother then made completely unfounded accusations of sexual abuse, and this prevented the Student from receiving tutoring or in-home help from the District in the Spring of 2012. There was also no evidence to support the Parents' allegation that Carrie Ricker was a trigger for the Student.

### **Discussion of Issues:**

#### **1. Burden of Proof**

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

As the District pointed out in its brief, there is no issue regarding programming for the summer of 2011, as this was not raised in the due process hearing request and was not listed as one of the issues for hearing.

#### **2. Did the District violate state or federal special education law by failing to provide the Student with a free appropriate public education (FAPE) during the 2011-2012 and 2012-2013 school years?**

All students eligible for special education services are entitled under state and federal law to receive a "free and appropriate public education . . . designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). In accordance with the IDEA, the IEP must be designed to provide an eligible student with an educational program tailored to meet his individual needs that is "reasonably calculated to enable the student

to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP.” 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff’d*, 471 U.S. 359 (1985).

As the First Circuit stated in *Lenn v. Portland School Comm.*, the law sets a fairly modest goal of an appropriate, rather than an ideal, education, and these are terms of moderation. The IDEA does not require that the benefit conferred must reach the highest attainable level or the level needed to maximize the child’s potential. 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993). The term “education,” however, is not limited to academic growth alone, which is not the only indication of educational benefit. The *Lenn* court also stated that the IEP must be designed to target, “all of a child’s special needs, whether they be academic, physical, emotional, or social.” 998 F.2d 1083, 1096. *See also Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990).

When determining whether an IEP provides FAPE, the IEP must be viewed in terms of what was reasonable at the time the IEP was promulgated. *Roland M.*, 910 F. 2d. at 992. In *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, the First Circuit explained that while actual educational progress can demonstrate that an IEP provides FAPE, the inverse of this is not necessarily true, “that a lack of progress necessarily betokens an IEP’s inadequacy – would contradict the fundamental concept that ‘a[n] IEP is a snapshot, not a retrospective.’” 518 F. 3d 18, 29 (1<sup>st</sup> Cir. 2008) *quoting Roland M.* 910 F.2d at 992.

At the time the 2011-2012 IEP was drafted, on October 4, 2011, the Student was progressing in his school program, and all members of the IEP team, including the Parents, agreed with the IEP. Given the Student’s history in the District, there was no reason to think that

he would not continue to do well under this program, and there was no evidence to the contrary. The Student was stable and was having success educationally. The changes from the Student's program the previous year were: (1) that he was discharged from PT services because he had met his PT goals, and (2) his time with non-disabled peers was reduced from 39% to 20%. The District offered evidence of why this was appropriate: Teacher "A" explained that as children got older, the rigor of the academic program increased, and the Student's educational abilities were not as closely aligned with his peers as in earlier years. [Fact #12]

The Student then had a major change in his life that affected his needs. Although the Parents contend that this was caused by an incident in music class the previous spring, the evidence points to a conclusion that the dramatic change in the Student's behaviors was more likely due to his Mother's pregnancy and the birth of twin siblings in January of 2012. The Student's anxiety<sup>7</sup>, which had not been an issue in school previously, and aggressive behaviors increased when the Mother first went on bed rest in December of 2011 and became worse after the babies were born. This would be a stressful event for any family and for any normally developing child who had been an only child for xx years. As Teacher "A" explained, based on her demonstrated expertise in this area, change in routine can be more detrimental for children with Autism. The record supports her belief. There was considerable evidence in the record, including from the Student's health care providers and Providence Behavioral Health Services, that the Student's school resistance directly correlated with the dramatic change in his family situation. Dr. Chemelski testified that this could have a profound impact on a child with Autism. Both Dr. Chemelski and Dr. Kimball stressed the importance of predictability and consistency,

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<sup>7</sup> The Parents allege that the District failed to conduct evaluations regarding the Student's anxiety. Contrary to their contention, there was no prior evidence in the record that anxiety was a problem for the Student in school. As Teacher "A" testified, the Student did not display any anxiety about coming to school. [Fact #8] In other words, anxiety was not a suspected area of disability. When the Student was at Spring Harbor, he was first diagnosed with Anxiety Disorder, NOS. His circumstances had changed significantly by then.

and the necessity of preparing the Student for small transitions, yet he had almost no preparation for this major transition.<sup>8</sup> There were also repeated references in the record to the Mother being overwhelmed by caring for the Student and the twins, who were born prematurely and had unique medical needs. This responsibility would likely overwhelm anyone and would change the entire family dynamic.

Although the Parents contended that Carrie Ricker was a trigger for the Student, as will be discussed below, the evidence does not support this. There is ample evidence, however, that the Student had significant triggers at home. The twins were a trigger for the Student. He refused to get in the car with them, did not want to see them in the hospital after they were born, reacted with undesirable behaviors when they cried, and threatened to harm them. The Mother's anxiety was also a trigger for the Student. [Fact #69]

It is unfortunate, however, that instead of simply acknowledging how stressful and demanding the Family's situation was, with its adverse impact upon the Student, making an already challenging state of affairs even more so, the Parents chose to blame the District for the Student's aggression and school resistance with baseless allegations. They alleged that the Student's behaviors were due to being bullied and possibly being sexually abused by Teacher A".

There was no evidence that the Student was bullied or that the incident described by Ms. Newell could have anywhere near the impact upon the Student that the Mother ascribed to it. The fact that the incident happened in the spring of 2011 and the Student's behavior became a problem in December 2011 is just one fact that belies that allegation<sup>9</sup>. Additionally, Dr. Kimball

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<sup>8</sup> Although Teacher "A" tried to prepare the Student, the Mother was adamant that she not discuss the babies with the Student. [Fact #14]

<sup>9</sup> Ms. Newell also testified that the Student did not appear affected by this, it was an isolated incident and the Student continued to be happy in class and excited about music. [Fact #10]



testified that he did not believe that it was likely that any alleged bullying incident caused the Student's challenging behaviors.

The Mother's description of an emotional and teary encounter with Ms. Newell about what the Mother characterized as "bullying" was not credible, and the facts were resolved in Ms. Newell's favor. The Mother was, by all accounts, an unreliable historian. The record contains numerous misrepresentations made by the Mother, whether intentional or simply the result of her own misperceptions,<sup>10</sup> that were contradicted by more reliable witnesses and records. For example, when the Parents admitted the Student to Spring Harbor, the Mother's chief complaint was that the Student had "been out of school for months and refuses to go to school and becomes aggressive." [Fact #68] The Student had been attending school quite successfully, however, for almost two months, having made a smooth reentry from Hampstead. [Facts #62, 63, 64, 67] The Parents also reported that the Student's behaviors only happened at school, when in fact, most of the Student's behavioral problems were at home. Additionally, Tri-County staff noted that the Mother was reporting false information and was concerned about her splitting. [Fact #30] They were sufficiently concerned about the Mother's false reports that they determined not to allow providers to be alone with the Family in their home. The District made a similar decision to protect its staff. Because the Mother was not a reliable or credible witness, when her testimony was inconsistent with credible statements made by other witnesses or contained in reliable documents, inconsistencies were resolved in favor of the more credible sources of evidence.

There is no reason to believe that anything about Teacher "A"'s relationship with the Student was inappropriate. Teacher "A" was a very caring, knowledgeable teacher who was willing to go the extra mile to help the Student, and there is not one scintilla of evidence that she

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<sup>10</sup> Kayshia Smith confirmed that the Mother frequently misconstrued what others said and that she was not a reliable source.

crossed any boundaries in her relationship with him. Her sensitivity towards the Student's situation and her teaching and behavioral methods to help him deal with it were very supportive and impressive. The Mother's allegations about Teacher "A" were completely baseless.

Once the Student began having challenging behaviors, regardless of the cause, they were interfering with his ability to benefit from his educational program, and needed to be addressed. The Parents appear to have decided that the behaviors could best be addressed at a private special purpose program for children with Autism, such as Margaret Murphy or Merrymeeting. This became a theme throughout their dealings with the District—they wanted the Student educated elsewhere.<sup>11</sup>

The Parents assert that the District failed to conduct appropriate evaluations necessary to successfully program for the Student's behavioral needs. The evidence demonstrates that the contrary is true. The District responded appropriately by contracting with a very experienced behavior specialist, Jonathan Kimball, who observed the Student in the classroom and worked with Teacher "A" to adopt and implement behavior strategies using ABA methodology, including recording data. Although they were having some success, the Student stopped attending school when his twin siblings came home from the hospital. The District then hired Brian Meldrum in December 2012 to conduct a FBA, which he completed in January 2013. [Fact #58]

Although the Parents take issue with the District's alleged failure to conduct a FBA, citing this hearing officer's decision in *Parent v. RSU No. 21*, 8 ECLPR 93 (2010), this decision is distinguishable from the case at hand. A FBA is a method often used for evaluating student behaviors to develop a behavior intervention plan. FBAs are usually done in association with the

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<sup>11</sup> The Parents did not introduce any expert testimony that either Margaret Murphy or Merrymeeting were appropriate placements for the Student. There was considerable evidence introduced by the District that these placements were too restrictive.

removal of a student from school for behavioral reasons, and the IDEA only *requires* them in connection with serious disciplinary matters not present here. *See* 34 CFR 300.530(f). The general purpose of an FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with problem behaviors, especially when they interfere with a child's education. In the *RSU No. 21* case, I quoted the Department of Education comments that the IDEA took a proactive approach to behavior issues, stating,

as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change of placement. In fact, the Act emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, 'the use of positive behavioral interventions, and other strategies to address the behavior.' . . . This provision should ensure that children who need behavior intervention plans to succeed in school receive them.

71 Fed. Reg. 46721 (2006).

There are significant differences between the situation in *RSU No. 21* and the case at hand. In *RSU No. 21*, there was no behavioral expert, no involvement with the IEP team, and the process was so informal that the mother did not even know about it, despite having requested a FBA. Here, the District appropriately and swiftly took a proactive approach. It immediately engaged a highly qualified behavior analyst with expertise in ABA to observe the Student in Teacher “A’s” classroom. Dr. Kimball thought Teacher “A” was already doing a very good job addressing the Student’s behaviors, but made a number of suggestions to essentially refine her approach. [Fact # 19] Although not recorded in writing as a formal behavior intervention plan, the Student had positive behavior interventions, supports and reinforcements. Dr. Kimball also provided Teacher “A” with a behavior data sheet to track the Student’s behaviors. Teacher “A” shared Dr. Kimball’s suggestions with the Mother, and attempted to arrange a meeting with Dr.

Kimball to get input and provide the Family with support and suggestions, but the Parents cancelled the meeting. What Teacher “A” was doing in school, with help from Dr. Kimball, was effective. There is no evidence to the contrary. Dr. Kimball continued to work with the Student’s teachers during xx grade to address the Student’s behaviors, also with good results, while the Student was in school. Under the loose definition in the MUSER, which defines a FBA as including direct assessments, indirect assessments and data analysis designed to assist the IEP team to identify and define the problem behavior and address it, Dr. Kimball’s work would be considered a FBA.

Contrary to the Parents’ contention, the District made appropriate and continuing efforts to return the Student to school and to address any behaviors that were interfering with his attendance. In addition to Dr. Kimball’s services, the District had Brian Meldrum conduct a FBA and used the services of Tammy Fisher to address the Student’s behavioral issues. District staff tried to work with the Parents, but the Parents usually did not welcome these efforts. For example, when the Student refused to get on the school bus and the Parents were unable to address this without in-home services, Teacher “A” offered to come to the house to assist them. Although the Mother initially agreed to this, she changed her mind due to her baseless theories about Teacher “A”. [Facts #20, 22]

Both Dr. Kimball and Mr. Meldrum believed, in their sound professional judgment, that the Student’s school refusal was caused by his home situation, and that the Student refused to go to school because he could not predict the next available reinforcement there. He learned at home that his parents would back down if he refused to do things, and would allow him to continue his preferred activities. Mr. Meldrum believed that there needed to be a focus on in-home behavior interventions that would have to be worked out between the Family and social service agency

behavioral health providers. This proved difficult as well, and the District had no control over the Parents' in-home support. Not only was there a waiting list for services in the first place, but providers who were assigned often did not remain employed for long. The Mother fired six in-home providers for various reasons, such as she thought they were not a good fit or were not sufficiently supportive.<sup>12</sup> Consequently, the Family was without necessary in-home support for lengthy periods and this often meant that the Student did not attend school.

As noted above, the Parents refused the District's offers of assistance to help the Student attend school, they did not want District staff in their home, and did not want the District to contact them at various times. This occurred during both the Student's xx and xx grade years. While the Student was in Spring Harbor, the Parents obstructed a smooth transition back to school by refusing to authorize the Spring Harbor staff to provide important information to the District, and made other efforts to prevent the District from obtaining information about the Student that would be useful in his educational programming.<sup>13</sup>

As the District asserted in its brief, the only evidence of a failure to provide FAPE was the Mother's opinions and observations. Neither of the Family's expert witnesses, Dr. Chemelski or Dr. Pratt,<sup>14</sup> had an opinion regarding the District's programming for the Student. The Parents have not shown that the District failed to provide FAPE during xx and xx grades.

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<sup>12</sup> It appears from the evidence that the Mother expected the social service agency providers to agree with and advocate for her point of view 100% of the time. Taking a contrary view, particularly with matters involving the District, apparently made the Mother feel unsupported.

<sup>13</sup> Courts, as well as this hearing officer, have consistently held that when a parent's actions are uncooperative or unreasonably prevent the school from being able to provide FAPE, the school may not be liable for its failure to provide FAPE. *C.G. and B.S. v. Five Town Comm. Sch. Dist.* 513, F. 3d 279, 288 (1<sup>st</sup> Cir. 1008); *Loren F. v. Atlanta Indep. School System*, 349 F. 3d 1309 911<sup>th</sup> Cir. 2003).

<sup>14</sup> Jamie Pratt of Merrymeeting Center had not met the Student or the Parents, but had spoken with Mother. She could not give an opinion about the appropriateness of the Merrymeeting program for the Student or about the appropriateness of the District's IEPs. The record was devoid of evidence to support the Parents' contention that Merrymeeting was an appropriate placement for him.

The evidence in the record supports the District's position that the 2011-2012 and 2012-2013 IEPs were reasonably calculated to provide the Student with FAPE. The Student's program was successful until he began having behavioral issues likely unrelated to his educational program or his school. The District made a reasonable effort to address the Student's behaviors resulting therefrom when the Student attended school, and to help the Student transition back to school when he stopped attending.

The Student's teachers and ed techs testified about the progress he made in his program when he was in attendance. Dr. Kimball and Ms. Newcombe testified that the Student made progress when attending school from May 30, 2012 through September 2012. Although he was not doing academics initially, the goal was to successfully transition him back to the classroom, and he achieved this goal. As time passed, he was engaged in academics and interacting with peers and teachers. Ms. Newcombe, Teacher "A", Ms. Pashley and Dr. Kimball all felt the Student was receiving an appropriate education at Carrie Ricker.

Despite the fact that the Student was doing well in school during his first month in xx grade, he stopped attending on September 28, 2012. Again, the Parents did not want the District to contact them, but the District did, and offered help to get the Student back in school. The District proposed a reentry plan similar to the one that worked previously. Once the Student returned to school, the District was fortunate to have found a very experienced special educator, Ms. Pashley, to work with the Student. The evidence of the Student's program as delivered by Ms. Pashley and Ms. Newcombe was very impressive.

Contrary to the Parents' assertion, it was not the District's failure to educate the Student appropriately during XX and XX grades that resulted in the Student missing a year and a half of school. When the Student attended school, he did quite well. Dr. Chemelski, upon learning just

before the Student's discharge from Spring Harbor of the Student's success in returning to school following his Hampstead hospitalization, noted that the Student had "a lower level of behavioral concern" at school than at Spring Harbor. [Fact #73]

Although the District took the position that the Student did not qualify for ESY during the summer of 2013 because there had been no evidence of regression, a position the Parents did not counter with any evidence, the District nonetheless offered him a placement for almost the entire summer in the Winthrop Autism program.<sup>15</sup>

As the Student's IEP's for xx and xx grade were reasonably calculated to provide the Student with FAPE, the District did not violate the IDEA.

**3. Did the District violate state or federal special education law by failing to provide the Student with a free appropriate public education (FAPE) during the 2013-2014 school year?**

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

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<sup>15</sup> The Parents alleged that failure to provide year-round programming was one of the deficiencies in the Student's proposed IEP, yet the Student missed three and one-half weeks of the Winthrop Autism program this past summer. There was no explanation regarding why the Parents waited until July 31 to avail the Student of this program when he could have commenced attendance there during the second week of July.

setting would violate the IDEA's mainstreaming requirements. *See Abrahamson v. Hershman*, 801 F. 2d 223, 227 n.7. (1<sup>st</sup> Cir. 1983)

If the District can offer the Student a program for xx grade that provides him with FAPE in the public school, this is least restrictive environment. The record supports a conclusion that the July 18, 2013 IEP does this.

As discussed above, this IEP contained additional behavioral services, including parent training and support to assist the Family and coordinate with in-home providers to facilitate the Student's attendance at school. The IEP continued the Student's direct instruction in the functional life skills program, speech and OT as before, private transportation, plus greatly increased behavioral consultation to help the Student transition to school and succeed there. Under the xx grade IEP, the Student would continue to work with Ms. Pashley, and the District staff would have access to two BCBA's, Tammy Fisher and Dr. Kimball, both of whom have worked with the Student in the past.

Although the District did not believe Carrie Ricker was a trigger for the Student, in an attempt to assuage the Parents' concern, the District offered, during the pendency of this due process hearing, to implement the Student's program at a school he had not attended previously: Oak Hill Middle School. The Parents rejected that offer, asserting that the 2013-2014 IEP was deficient in two primary ways: it offered no services aimed to address the Student's school avoidance and had no provision for year-round programming. The District correctly points out that the Family presents no expert testimony challenging the appropriateness of this IEP.

With respect to the allegation that the Student needed year-round programming, as noted above, the Family presented no expert testimony to support their argument that the Student required a program like Margaret Murphy or Merrymeeting. On the other hand, there was



credible expert testimony and evidence to the contrary. [Facts # 34, 44, 46, 55, 79 ] Although Dr. Chemelski said the Student would be “better off” with consistent programming during school breaks, he qualified his opinion by adding that he did not have any data regarding whether the Student regressed during these breaks, and could not give an opinion about what programming would be appropriate. [Fact #72] Dr. Kimball also believed consistency was important for the Student, but did not think this equated to a year-round program. Ms. Vourgarakis wrote that she was concerned about school vacation times and the Student’s transition back to school, adding that it was important for the Student to have a program that offered ESY programming throughout the summer. [S-143] The proposed IEP, as amended, does this.<sup>16</sup> While the opinions of Dr. Chemelski and Ms. Vourgarakis are insightful and valuable, both worked with the Student briefly, and neither has knowledge of how the Student has fared when returning to school following a vacation.

Under the IDEA and MUSER, services must be provided if a child’s IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 CFR 300.106, MUSER IX.3. The need for these services is demonstrated by consideration of the following by the child’s IEP team: (1) information, including progress reports, relevant assessments, parent report, and observations; (2) the significance of the child’s disability and progress toward IEP goals; and (3) the impact of previous service interruptions, and the probability that the child will be unable to recoup, in a reasonable amount of time, skills previously mastered. Thus, whether the child will regress is an important factor, but not the only factor. The standard still boils down to whether these services are necessary for the Student to make reasonable educational progress and to benefit from his educational program.

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<sup>16</sup> The IEP was amended to add more extensive ESY programming after the Parents filed this hearing request.

Historically, the Student did not lose skills during vacation periods. Following the birth of the twins, the Student had numerous interruptions in his educational program for reasons other than school vacation. With the right plan and supports, he was able to transition back to school, sometimes quite easily. Even during February of 2013, when the Student had only been back to school for a week between his hospitalization at Hampstead and winter break, Ms. Newcombe did not notice any regression, and the Student returned to school without any problem. [Fact #63]

The evidence points to a conclusion that while the Student may indeed benefit from continued services throughout the year, there is insufficient evidence that he requires these services to receive FAPE. No doubt it will benefit the Student during his current period of volatility to have a longer ESY program at Winthrop during the summer of 2014, rather than a two week “Jump Start,” program, and the former is provided in the proposed IEP. Additionally, it is how the Student’s transition following vacations occurs that appears to be the most important factor in the Student’s successful reentry.

This segues into the other issue raised by the Parents: whether the IEP offers adequate services to address the Student’s school avoidance. Although the Parents allege that the IEP offers no such services, the evidence does not support this contention.

The IEP contains measurable annual goals, along with progressive short-term objectives, for getting the Student to school, and returning him successfully to his educational routine there. With a high level of behavioral consultant services for both the Parents and school staff aimed at addressing the Student’s behaviors that have caused his school attendance problems, the IEP is reasonably calculated to reintegrate the Student back to school so that he can benefit from his educational program.

For these reasons, I conclude that the District's proposed IEP for xx grade is reasonably calculated to provide the Student with educational benefit in accordance with the requirements of the IDEA.

**4. If the District violated state or federal special education law, what remedies are appropriate?**

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

**V. ORDER**

1. RSU #4 did not fail to provide the Student with a free, appropriate public education for the 2011-2012 school year.
2. RSU #4 did not fail to provide the student with a free, appropriate public education for the 2012-2013 school year.
3. RSU #4 has offered the Student an IEP for the 2013-14 school year that is reasonably calculated to provide him with a free, appropriate public education in the least restrictive environment.

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SHARI B. BRODER. ESQ.  
Hearing Officer