

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

Hearing #14.054H

**Parent, individually and)
as parent and legal)
guardian of Child,)
a minor)
)
)
v.)
)**

ORDER

**Falmouth School
Department**

This decision is issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. A due process hearing was held on September 5, 8, 9 and 12, 2014 in Portland, Maine. Present and participating throughout the hearing were: Parent; Richard O’Meara, Esq., attorney for the Parent; Eric Herlan, Esq., attorney for the Falmouth School Department; Penny Wheeler-Abbott, consultant at Drummond Woodsum; Gene Kucinkas, Director of Special Services, Falmouth School Department; and David Webb, Esq., Hearing Officer. Caitlin Wright, Associate at Murray Plumb & Murray and Melanie Frazek, Esq., Due Process Hearing Officer observed the hearing. Pauline Lamontagne, Education Specialist III with the Department of Education, Observed the hearing on September 9, 2014.

Witnesses:

The Student’s Mother;
Christopher Kaufman, Ph.D., Psychological Evaluator;
Gretchen Jefferson, Ph.D., Behavioral Evaluator;
Kathleen Coffin, Lindamood Bell Tutor;
Gene Kucinkas, Director of Special Services, Falmouth School Department;
Kim Mosca, Special Education Teacher, Falmouth Elementary School; and,
Beth Weller, Speech Therapist, Falmouth Elementary School.

All witness testimony was taken under oath

I. PROCEDURAL BACKGROUND

On June 13, 2014 the Parent filed a due process hearing request on behalf of her daughter, (“Student”). On August 11, 2014, a prehearing conference was held in Portland, Maine. Documents and witness lists were exchanged in a timely manner. A prehearing conference was held with the Hearing Officer, counsel and parties on August 27, 2014. A Prehearing Report and Order was issued by the Hearing Officer on August 12, 2014. On August 27, 2014, the Prehearing Report and Order was amended by agreement of the parties thereby adding the following additional issue:

Whether the Student’s claims under the IDEA for the period between September 1, 2013-December 17, 2013 were waived as a result of the Parent’s signing a Due Process Hearing Withdrawal Request Form on December 17, 2013.

All parties agreed that evidence on this issue would be offered within the regularly scheduled hearing dates and counsel would brief the issue in post hearing memoranda. It was also agreed that the Hearing Officer would incorporate his ruling on this issue and any related damages in this order.

The Parent distributed 653 pages of documents (herein referenced as P-#) and the District distributed 1,355 pages of documents (herein referenced as S-#) at the prehearing conference and at the hearing with the agreement of the parties. Following the hearing, both parties requested to keep the hearing record open until September 29, 2014 to allow the parties to prepare and submit closing arguments due on September 22, 2014 and reply briefs by September 29, 2014. Pursuant to a post hearing order issued on September 16, 2014, the initial closing arguments were limited to a maximum of 35 pages and reply

briefs to a maximum of 10 pages.

The District submitted a 27-page final argument memorandum and the Parent submitted a 35-page final argument memorandum. The record closed upon receipt of the reply briefs on September 29, 2014. The parties further agreed that the hearing officer's decision would be due on October 14, 2014.

II. ISSUES: Evidence was taken on the following issues:

1. Did the District fail to provide the Student with a free appropriate public education (FAPE) and placement in the least restrictive environment during the 2013-2014 academic year?
2. Did the District violate the Student's rights under the IDEA by not providing a Functional Behavior Assessment for the Student during the 2013-2014 academic year?
3. If the answer to either 1 or 2 above are yes, what changes, if any, are necessary to the Student's IEP to ensure that she receives a FAPE in the least restrictive environment during the 2014-2015 academic year?
4. If the answer to either 1 or 2 above are yes, is the Parent entitled to reimbursement of her costs associated with the Lindamood Bell literacy tutorials or is the Student entitled to any other remedy under the special education laws?
5. Are the Student's claims under the IDEA for the period between September 1, 2013-December 17, 2013 waived as a result of the Parent's signing a Due Process Hearing Withdrawal Request Form on December 17, 2013.

III. FINDINGS OF FACT

1. The Student is X years old (d.o.b. XX/XX/XX) and resides with her mother in Falmouth, Maine. She is beginning her X grade year at Falmouth Elementary School. [Parent Testimony]
2. The Student's mother (Parent), is a certified special education teacher with experience instructing students with disabilities in both Florida and Maine. [Parent Testimony]

3. The Student has been diagnosed with Down Syndrome, has an intellectual disability as well as Attention Deficit Hyperactivity Disorder. [S-514; Kaufman testimony] She is currently eligible for special education and related services under the category of multiple disabilities, reflecting an intellectual disability and other health impairments. [S-189]
4. The Student began speech-language therapy through Child Development Services (“CDS”) when she was six months old and communicated only through American Sign Language until age four. [Parent testimony]
5. The Student attended the Lunt School in Falmouth for kindergarten (2010-2011) and was found eligible for special education services under the category of Other Health Impairment. [P-26] The Individualized Education Program (“IEP”) team determined that the Student would receive 11.5 hours per week of direct instruction, and two hours each per week of speech/language services, occupational therapy and physical therapy. [P-26]
6. In November 2010 the Student’s direct instruction services were reduced to 6.5 hours per week, physical therapy was reduced to one and a half hours per week, with the addition of 30 minutes per week of adaptive physical education and consultation with a speech/language pathologist. [P-48]
7. The Student attended first grade at Falmouth Elementary School (2011-2012). [Parent testimony] The IEP team met in November 2011 and determined that the Student would receive 10.5 hours per week of direct instruction, 1.5 hours per week of physical therapy, 2 hours per week of occupational therapy and 2 hours per week of speech/language therapy. [P-104] The IEP also included 30

minutes per week of adaptive physical education and speech/language consultation. [P-104]

- 8.** The IEP team met on June 6, 2012, and reduced the Student's pull out services to promote opportunities for the Student to participate with her peers as much as possible. [P-131] The IEP team determined that the Student would receive 10.5 hours per week of direct instruction, 1.5 hours per week of physical therapy 2 hours per week of occupational therapy and 30 minutes per week of in-class speech/language therapy. [P-131] It was further determined at the June 6, 2012 meeting that no extended year services ("ESY") would be provided as the Parent planned to have the Student attend Camp Senter, a mainstream camp program. [P-131]
- 9.** The Student began second grade in September, 2012. [Parent Testimony] Her special education teacher was Rachel Roberts and her general education teacher was Carol Daigle. On November 7, 2012, the Student's IEP was modified without a team meeting by adding an additional physical therapy goal for the Student. [S-1349]
- 10.** At the time of the November 7, 2012 IEP meeting, the Student was reported to be reading at level 8 on the Developmental Reading Assessment ("DRA") scale. [P-156] The team set three annual reading goals: mastering "final -e" endings, mastering consonant blends with 90% accuracy, and attaining Level 16 (mid-first grade) on the DRA by November 2013. [P-158] It also approved a token-based behavior plan. [P-176]

11. In late November 2012, the Parent emailed the Student's teachers to express her concern with the Student's reading instruction. [P-177].
12. On February 26, 2013, the IEP team met and determined that the Student's specially designed reading instruction would increase to a total of 1 hour daily and specially designed math instruction would increase to a total of 45 minutes daily. [S-1345] The team also determined that the Student's re-evaluation testing would occur within 45 school days. [S-1345]
13. Jayne Boulos, the District's School Psychologist, evaluated the Student as part of her triennial evaluation at the end of second grade. She reported that the Student's cognitive scores dropped from when she was four year old, and that her scores were in the "extremely low" range. [S-6] She noted that this was not surprising given the task demands on the assessments, and that "her innate skill can no longer always be enough." [S-6] Ms. Boulos recommended academics taught at the Student's level and progress monitoring, direct social skills training and positive behavioral supports. [S-6].
14. Rachel Roberts, the Student's Special Education Teacher, also administered academic assessments as part of the Student's triennial evaluation. [S-7] Ms. Roberts noted that the Student's test scores on the Phonological Awareness Test were below average, but that she was "developing in her phonologic skills." [S-9] The Student's score on the Test of Early Written Language-3 has a below average score of 81. Her score on of Early Reading Ability-3 score of 72 was in the 3rd percentile. [S-11] Ms. Roberts concluded that the Student's scores were

not surprising, given that she requires much support, repetition, supplemental aids and prompts. [S-12]

- 15.** Susan Christy, a Speech/Language Pathologist with the District, also evaluated the Student in the spring of 2013 and concluded that the Student “has a good understanding and use of basic vocabulary” and “recognizes word relationships and general critical features with which to determine word relationships.” [S-19] Ms. Christy reported that the Student made “significant gains” in her expressive language skills and that she is able to state similarities but requires cues to understand the more critical thinking skill of determining how words differ semantically. [S-20]
- 16.** The IEP team met on May 14, 2013 following the Student’s triennial evaluations in April and May 2013. [S-30] The IEP team determined that the Student would receive ESY services 2 times per week for 3 hours and Occupational Therapy and Speech Language Services 2 times per week for 30 minutes. [S-31]
- 17.** The Student did not access the 2013 ESY programming offered by the District. [Parent Testimony]. Instead, the Parent privately enrolled the Student in the Bates College Summer Reading Program, which met for 2 hours, once a week, for 6 consecutive weeks. [Parent Testimony]
- 18.** In September, 2013, the Student started her third grade at Falmouth Elementary school with a new educational team. Her regular education teachers included Ms. Coppinger and Ms. Palmer. [S-189] Beth Weller was the Student’s speech pathologist. Her special education teacher was Kim Mosca, who also served as the

Student's case manager and literacy instructor. [S-189] The Student's math instruction was delivered by Megan Huckins. [S-189]

- 19.** The Student's reading levels were documented using the DRA level system which is correlated to student grade levels. [Mosca testimony; S-192] DRA level 8-16 is within the 1st grade level. [Kucinkas Testimony] The levels were distinguished between "able to read with minimal support" and "able to read with support" [Mosca testimony] The labeling of DRA of books is usually done not by teachers but specialists. [Kucinkas Testimony]
- 20.** An IEP meeting was held on October 3, 2013 to discuss parental concerns. [S-96] As a result of this meeting, the Student's physical therapy was reduced by 20 minutes per week. 10 minutes per day of Educational Technician ("Ed Tech") support was added to the Student's IEP to work on "sensory tools." [S-98] The District also proposed a structured reading program for the Student. [S-99]
- 21.** At an IEP team meeting on October 31, 2013, the Student's DRA level for her ability to read with minimal support was determined to be at a level 8, while her instructional level was determined to be at a level 10. [S-189]
- 22.** At the October 31, 2013 IEP meeting, the team included a social skills goal and determined that the Student would receive 8 hours and 45 minutes per week in specially designed instruction in literacy and math. [S-226] The team also determined that the Student would receive 60 minutes per week of physical therapy, 2 hours per week of occupational therapy (1.5 in special education classroom and .5 in the regular classroom), 2 hours per week of speech therapy (1.5 in special education classroom and .5 in the regular classroom), 30 minutes

per week of social skills activities and weekly participation in a lunch-time “friendship group” with her guidance counselor. [S-189; S-154-155]

- 23.** The Student’s literacy instructional goals were established at the IEP team meeting held on October 31, 2013. [Mosca testimony; S- 221 – S-225] The Student’s DRA reading goal was set at level 16, the reading goal from her prior IEP. [S-216; S-224]
- 24.** In a Written Notice dated October 31, 2013 and sent to the Parent on November 5, 2013, the District proposed that the Student receive 60 minutes per day of reading instruction in “Spire” [sic]. [S-155]
- 25.** SPIRE is a teacher directed, systematic, multisensory, synthetic phonics literacy instructional program developed by Orton-Gillingham. [Kaufman testimony; S- 515] The Student’s literacy teacher, Kim Mosca, was not trained in SPIRE at the time of the Written Notice, and did not receive SPIRE training until August 2014. [Mosca testimony]
- 26.** On November 5, 2013, the Parent filed a due process hearing request. [S-319] Her amended complaint, dated December 2, 2013, included the following allegations: 1) Lack of effective instruction from [School Year] 2011 to present.. due to non-evidenced based instructional programs...demonstrated by lack of progress; 2) Lack of effective programming and scheduling; 3) Lack of trained staff; 4) Lack of staff training in inclusion and Down syndrome; 5) Failure to complete accurate evaluations 6) Failure to provide the Student with a gluten-free lunch; and 7) Failure to apply the appropriate diagnostic criteria for the Student. [S-319]

27. In a letter dated November 14, 2013, the Parent wrote to Mr. Kucinkas and Polly Crowell (the District's co- director of Special Education) stating that she was not in agreement with the proposal to use the SPIRE reading program for the Student. [Parent testimony, S-269] In particular, the Parent was concerned that SPIRE was not "evidenced based" because there was no objective research proving that it could help the Student. [Parent testimony, S-269]
28. Mr. Kucinkas and the Parent met on December 13, 2013, and reached an agreement, as documented in Mr. Kucinkas's letter dated December 12, 2013. [S-335] The terms of the agreement included 1) Use of a daily communication sheet; 2) A weekly e-mail from the Student's case manager; 3) A monthly meeting among Ms. Mosca, Mr. Kucinkas, and the Parent; 4) An evaluation by Dr. Kaufman; 5) The previously promised AT evaluation; 6) The previously promised consultation by Dr. Jefferson; 7) A reading of determinations at the end of IEP Team meetings; and 8) A promise to provide written notice 7 days prior to implementation. [S-334] Mr. Kucinkas noted at the end of this letter that the Parent said that "based upon this agreement, you have said that you would withdraw your current due process hearing." [S-335] There was no discussion between Mr. Kucinkas and the Parent regarding the Student's SPIRE program. [Kucinkas testimony]
29. On December 17, 2013, the Parent signed a Hearing Withdrawal Request form, drawing a box and placing a checkmark next to a paragraph that stated "With Prejudice... All hearing issues were settled in a written Resolution or Mediation Agreement." [Parent Testimony, S-351]

- 30.** The Parent testified that she chose this option on the form because it gave her what she needed and she “didn’t want a hearing in January as she was too busy with the holidays.” [Parent Testimony] The Parent testified that it was not her intent to release her past claims against the District. [Parent Testimony] When the Parent signed the hearing withdrawal form she did not disclose to the District that she was reserving the right to file for claims prior to the date she signed the form. [Parent Testimony]
- 31.** While the Parent was not represented by counsel at the time she signed the withdrawal, she had recently worked with an advocate who had provided advice on other matters. [Parent testimony]
- 32.** Gene Kucinkas testified that the District did not take steps to put SPIRE in place for the Student after the October 31, 2013 IEP team meeting since the Parent informed the District that she was not in agreement to use SPIRE. [Kucinkas testimony; S-261-269]
- 33.** Kim Mosca testified that she did not use the SPIRE program with the Student, but provided daily literacy instruction to the Student using level system books, the Wilson FUNdamentals fluency program, and Lexia, a computer-based phonics program. [Mosca testimony]
- 34.** Ms. Mosca kept records of the Student’s reading on daily instruction sheets, which she sent home to the Parent each day. [Mosca testimony; S-B4-B60] These instruction sheets documented a structured literacy instruction format involving predictability with characters, decoding texts, pictures and grammar

sequencing. [Mosca testimony] After the Student read the text, Ms. Mosca highlighted errors with the Student. [S-1043; Mosca testimony]

- 35.** The Student utilized the Lexia reading program to work on her segmenting, consonants, vowels and medial word skills. [Mosca testimony]. The Student was not able to use Lexia independently because she was distractible. [Mosca testimony]
- 36.** Beth Weller, the Student's Speech/Language Pathologist testified that she worked with the Student for three 30 minute "pull out" speech sessions per week. [Weller testimony] For two of the sessions she worked with the Student on a 1:1 basis, and one of the sessions was with two other students. [Weller testimony] Ms. Weller also worked with the Student on social pragmatics and reciprocal communication skills. [Weller testimony] Ms. Weller testified that she worked with the Student on the goals established in her IEP, including speech sounds, syllables, accuracy, verbal expression, multiple definition words, initiating and using follow-up questions, word endings and expression of concepts. [Weller testimony; S-195-198] As part of the Student's Speech/Language consultation, Ms. Weller met weekly with other staff order to coordinate and reinforce the Student's literacy skills and training. [Weller testimony] Ms. Weller testified that communication between team members was excellent. [Weller testimony]
- 37.** The Student's articulation goal, cited in her October 31, 2013 IEP, was to achieve 80% accuracy in 8/10 sessions. [S-194] Ms. Weller testified that the Student made "decent progress" with her articulation goal, where she was able

to achieve 80% accuracy in 4/10 sessions by March 28, 2014. [S-1139] Ms. Weller noted that, although it was clearly difficult for the Student, she felt that the Student had a beneficial year and made reasonable progress. [Weller testimony]

- 38.** Ms. Weller testified that she is familiar with both the LiPS and SPIRE literacy programs. [Weller testimony] She explained that SPIRE offers a comprehensive reading program that uses phonological awareness concepts including vocabulary, comprehension, encoding, spelling, phonemic and fluency. [Weller testimony] She further noted that although SPIRE works on a different use of mouth than the LiPS program, there are “lots of ways to develop” phonemic awareness skills with students and that the Student is ready for SPIRE. [Weller testimony]
- 39.** Ms. Mosca wrote an e mail to the Parent on January 10, 2014, noting that the Student was reading at a DRA level 13. [S-356] Ms. Mosca also reported that there were two incidents that involved the Student hitting other students during the week, which she believed were mostly attention seeking and not vindictive behaviors. [S-356]
- 40.** Dr. Gretchen Jefferson, Behavioral Evaluator, was retained by the District in January, 2014 to conduct a program evaluation to “inform planning for increasing [the Student’s] engagement and productivity during general education activities and to determine whether her time in the general education classroom can be increased...” [S-482]

41. As part of her evaluation, Dr. Jefferson interviewed school staff and the Parent, and observed the Student working on her specially designed literacy program with Kim Mosca on January 16 and 17, 2014. [S-482; Jefferson testimony] During this observation, Dr. Jefferson testified that the Student seemed to know what was expected, was oriented to the instruction, demonstrated accuracy of 80% and no apparent loss of instructional time or the Student's engagement during the 70 minute session. [Jefferson testimony] Dr. Jefferson noted that the Student was engaged in both pull-out and mainstream programming, however she reported that at recess the Student seemed isolated and did not actively engage with her peers. [Jefferson testimony]
42. The Student participated in a social skills program from 8:45 a.m. to 9:00 a.m. on Tuesdays and Thursdays, however she occasionally missed these programs due to her late arrival at school. [P-234, 235; Mosca testimony]
43. Dr. Jefferson opined that based on her observations the District's program was "excellent" and that the "team was making it work." [Jefferson testimony] She noted, however, there were areas within the program where it could be more efficient. [Jefferson testimony] Dr. Jefferson's findings and recommendations were documented in a program evaluation report dated March 18, 2014. [S-482]
44. Dr. Jefferson also noted no observations or incidents of the Student having significant behavior issues or being disregulated as she was gathering information for her March 18, 2014 report. [S-482; Jefferson testimony]
45. In January 2014, Dr. Kaufman was hired by the District to evaluate the Student's neurodevelopment including memory, language, visual spatial and

sensory/motor functioning. [Kaufman testimony] Dr. Kaufman understood that the parties had agreed to use him as the evaluator of the Student. [Kaufman testimony]

46. Dr. Kaufman evaluated the Student's academic functioning using the Wechsler Individual Achievement Test, the Wilson Assessment of Decoding and Encoding, (WADE), the Gray Diagnostic Reading Test, the Gray Oral Reading Test, and the Adaptive Behavior Assessment System. [Kaufman testimony; S-501].
47. Dr. Kaufman's original report reflected his understanding that the Student was using the SPIRE program. [S-448] Dr. Kaufman issued a corrected report after later learning that the Student had not received the SPIRE program. [Kaufman testimony, S-501]
48. Dr. Kaufman's findings reflected that the Student has substantially limited oral reading skills compared to her age and grade, citing scores consistent with an early first grade functional level. [Kaufman testimony; S-527, S-501]. Dr. Kaufman noted that the Student has pervasive challenges in the broader developmental domain and "fairly substantial challenges across intellectual, processing, academic, and self-regulatory domains" that will impact her development of a range of adaptive functions as well. [Kaufman testimony, S-508]
49. Dr. Kaufman observed Ms. Mosca doing phonetic and word family work as well as "guided oral reading" with the Student. [Kaufman testimony] While Dr. Kaufman recommended additional instructional approaches, he did not

observe any instruction offered to the Student by the District that was either inappropriate or significantly inconsistent with the types of reading practice done for students who have reading disorders. [Kaufman testimony; S-516]

50. Dr. Kaufman recommended a heavily teacher directed, systematic, multisensory, synthetic phonics instructional program of the type developed by Orton-Gillingham. [Kaufman testimony; S- 515] The four Orton-Gillingham instructional programs include: 1) The Lindamood Phoneme Sequencing Program (“LiPS”); 2) The Orton-Gillingham reading program; 3) Barbara Wilson's adaptation; and 4) SPIRE. [Kaufman testimony]

51. Dr. Kaufman testified that Orton-Gillingham-inspired programs are multisensory to the extent that students engage the use of their bodies, especially their fingers, arms and hands in understanding the sound structure of language. [Kaufman testimony] He recommended the LiPS program for the Student in light of its strong emphasis on developing of the oral motor mouth movement to address the Student’s articulation issues. [Kaufman testimony] Dr. Kaufman testified that there are many literacy specialists who would see SPIRE as being a program that is reasonably calculated to benefit the Student. [Kaufman testimony]

52. Dr. Kaufman testified that the Lexia “screen-based” reading program has a strong research base and can be quite effective and powerful. [Kaufman testimony] The challenge with screen-based programming is that the student has to be able to maintain independent focus. Accordingly, there has to be someone, either an educational technician or a resource teacher, paying

attention to the student to cue him or her to attend, and that can happen effectively in resource rooms and in other remedial learning contexts.

[Kaufman testimony]

- 53.** Dr. Kaufman testified that it is possible to successfully transition from a LiPS program into other forms of reading instruction. [Kaufman testimony]
- 54.** Dr. Kaufman testified that the Student's improvement from 9 vowel sounds to 11 vowel sounds and 21 consonant sounds to 24 consonant sounds following the 40 private LiPS sessions was "fairly limited" and "somewhat disappointing."

[Kaufman testimony]
- 55.** While SPIRE and other programs have less direct research support, its construction is based upon research done on its programmatic elements that have been assembled into the SPIRE program. [Kaufman testimony]
- 56.** In an e-mail dated February 14, 2014, Kim Mosca wrote to the Parent stating that the Student was "doing great" with reading consonants, and has begun reading DRA level 14 books. [S-393]
- 57.** In an e-mail to the Parent dated March 12, 2014, Ms. Mosca noted that the Student was reading at a DRA level 14. [S-437] On March 21, 2014, Ms. Mosca wrote an e-mail to the Parent noting that the Student "dabbled" in [DRA] level 16, but reading at that level was "a stretch" for independent reading. At this time, a "cold read" (no pre-teaching of the book to the Student before reading) remained difficult for the Student at a level 14. [Mosca testimony; S-535] In May 2014, the Student achieved an instructional DRA level of 14 and an independent DRA level of 10. [Mosca testimony]

- 58.** In an e-mail to Kim Mosca dated February 14, 2014, the Parent noted that that she was “glad that [the Student] was making limited progress, although she stated that she continued to advocate for her to have an instructional method that fits her needs...” [S-394]
- 59.** The IEP team then met to review Dr. Kaufman’s and Dr. Jefferson’s evaluations on March 28, 2014. [S-539] More meeting time was needed, and a follow up meeting was scheduled for a few days later. [S-546] The Parent requested a postponement of the follow up meeting because the physical therapist was unable to attend. [Kucinkas Testimony; S-547]
- 60.** On April 17, 2014, the Parent informed the District that she would be pulling the Student out of her literacy program beginning on May 2, 2014, in order to have her receive private LiPS literacy instruction during the regular school day. [S-596, 736]
- 61.** At the May 1, 2014 IEP team meeting, it was determined that the District would provide the SPIRE literacy program, the Great Leaps methodologies, additional literacy goals, and additional consultation with Dr. Jeffereson. [S-677; S-711-714]
- 62.** Since that time, Dr. Jefferson provided consultation [S-A-8 –A- 10] and has developed a draft behavior plan for use with the Student. [S-l 180] The Parent has continued to keep the Student out of school for literacy instruction during the new school year. [Parent testimony]
- 63.** In April and May of 2014, the Student engaged in several “hands-on” behavioral incidents with other students. [S-548, 580; Mosca Testimony]

- 64.** On April 29, 2014, Dr. Jefferson requested that Falmouth fund three more hours of her time to develop a formal behavior plan for the Student due to the “uptick in hands-on behavior.” [S-660]
- 65.** On May 1, 2014, the Student’s IEP Team met to discuss the Student’s behavior support plan, her reading goals and other aspects of the Student’s programming. [S-177]
- 66.** At this meeting, the IEP team determined that the “zones of regulation” behavior system would be used to address the Student’s behavior regulation issues, along with the use of coins instead of tokens. [S-732] In addition, the District would contract with Dr. Jefferson “for up to three visits, to observe and look at target behaviors, behavioral programming...[and] would seek to implement Dr. Jefferson’s recommendations.” [S-177] The District denied the Parent’s request for LiPS instruction and agreed only to provide the Student with SPIRE instruction beginning in September 2014 [S-808]
- 67.** The Parent requested a functional behavior assessment (“FBA”) for the Student on May 12, 2014. [S-751]
- 68.** Following her review, Dr. Jefferson concluded that it would not be appropriate to conduct a functional behavior assessment (“FBA”)¹ at that time. [S-774]
- 69.** Dr. Jefferson explained that in order to conduct a reliable FBA, it was necessary to gather data in a very structured manner, including “before and after behaviors and reinforcing behaviors.” [Jefferson Testimony]

¹ A functional behavior assessment (“FBA”) is an evaluation that provides the foundational support for a student’s behavior support plan. Maine’s regulations specify that an FBA is a school based process used by the [IEP] Team . . . to determine why a child engages in challenging behaviors and how the behavior relates to the child’s environment.” MUSER § I.15.

- 70.** In her behavior consultation notes dated May 28, 2014, Dr. Jefferson stated that the Student was not able to effectively use the “zones of regulation” system, which was “too complicated” for the Student. [Jefferson testimony; S-A-9] Dr. Jefferson noted that other factors could be contributing to the Student’s behavior issues, including regularly missing her morning social group and decreased instruction in social/conversation skills. [Jefferson testimony] Dr. Jefferson also noted that the Student’s removal from school to attend private literacy training could have deprived her with respect to peer interaction. [S-A-8]
- 71.** Dr. Jefferson testified that it was a “permissible practice” to implement a behavior plan without conducting an FBA with respect to programs in the “construction phase”. [Jefferson testimony]
- 72.** Dr. Jefferson recommended further data collection on the Student’s aggression, along with the development of a formal behavioral support plan to address the behavior concerns. [S-A-8-10] A Point System Protocol was prepared by Dr. Jefferson on June 4, 2014, along with a draft Behavior Support Plan on June 11, 2014. [S-1180]
- 73.** On April 17, 2014, the Parent provided the District with written notice that the Student would be receiving private LiPS instruction beginning in early May 2014 [S-596]. The Parent retained Kathleen Coffin, a private language therapist capable of delivering the LiPS program. [Parent testimony] Ms. Coffin is a “Language Therapist/Reading Consultant” in private practice who has a bachelor’s degree in psychobiology and has been trained in LiPS and other Orton/Gillingham literacy programs. [Coffin testimony]

74. Kathleen Coffin testified that on May 5, 2014 she began working with the Student on the LiPS program at a frequency of 3 times per week for approximately one hour. As noted in an undated “Progress Report,” Ms. Coffin performed an informal assessment on the Student’s strengths/weakness during her initial session with the Student. [P- 584] In this report, she noted that the Student was able to correctly identify “most” of the consonant sounds and “a few” of the vowel sounds. [P- 584] The report also stated that the Student “had difficulty when the letters were combined into words.” [P- 584]
75. Ms. Coffin testified that unlike other Orton/Gillingham programs, LiPS has more of an oral/motor component and establishes a student’s phonemic awareness to get to where they can use other literacy programs. [Coffin testimony] Ms. Coffin testified that the average student undergoes 120 hours of LiPS training, and that the Student has had about 50 hours of training as of September 5, 2014. Ms. Coffin noted that the Student sometime has trouble keeping attention and “doesn’t always last the whole hour.” [Coffin testimony] Ms. Coffin testified that in her opinion it is easier for the Student to “feel” sounds-in her mouth than to “tell her” about the sounds. [Coffin testimony]
76. In an undated “Progress Report” prepared by Kathleen Coffin, it was noted that the Student was able to correctly identify all of the consonant sounds and 11 vowel sounds on August 3, 2014 after 40 LiPS literacy sessions. [P- 584] Ms. Coffin testified that she doesn’t test using qualitative measures but only performs informal testing when a student seems “pretty constant.” [Coffin testimony]

77. Ms. Coffin testified that it would be inappropriate for the Student to participate in a traditional language program or another Orton/Gillingham literacy program until she completed her LiPS training. [Coffin testimony]

78. The Parent filed for the current due process hearing on or about June 13, 2014.

IV. SUMMARY OF THE PARTIES' ARGUMENTS

Brief summary of the position of the Parent:

The Parent argues that all three of the Student's IEPs, developed and implemented prior to and during the 2013-2014 school year, failed to provide the Student with a FAPE. She claims that, the reading component of the Student's IEPs insufficiently targeted the Student's decoding skills. She cites the IEP developed on October 31, 2013, which purported to provide the SPIRE and claimed that the District never took any steps to implement this program. She stated that, while she may have disagreed with the IEP Team decision at the time, the District remained obligated to move forward with programming as determined. She asserts that, at the very least, the District should have notified her that it was suspending the implementation of SPIRE pending further discussion of the program's research basis. She notes that the SPIRE program has not been subjected to peer-reviewed research, contrary to IDEA standards, which require that services provided to children with disabilities be "based on peer-reviewed research to the extent practicable."

The Parent argues, in the alternative, that it was practicable for the District to use the Lindamood Phoneme Sequencing Program ("LiPS") with the Student, which is a peer-reviewed program. She states that the Student's IEP, as amended in May 2014,

remained inappropriate in the area of literacy skill instruction due to the continued lack of direct peer-reviewed research and Dr. Kaufman's recommendations.

The Parent also claims that, the District failed to provide direct social skills instruction to help the Student attain her goals on this critical set of functional skills. She asserts that none of the IEPs provided for any direct specialized instruction in this area for the Student. She requests compensatory services designed to provide the Student with services to allow her attain the level of skill and function she would have developed had proper services been delivered in a timely fashion.

The Parent argues that the District failed to conduct a timely FBA. When the Student's behavioral spiked in April and May 2014, the Parent requested a functional behavior assessment (FBA) to determine the cause of these increased negative behaviors. She asserts that, despite her request, the District inappropriately failed to conduct an FBA and disregarded a recommendation from Dr. Jefferson that an FBA would be a "best practice" when formulating a behavioral support plan for the Student. She states that, instead, the District improperly implemented a behavior support plan that was a) drafted without parental input; b) never reviewed with her at an IEP Team meeting; and c) prepared without full knowledge of the Student's sensory issues, as set forth in her most recent OT evaluation.

Finally, the Parent claims that signing of a Withdrawal Request Form in December 2013, was not a voluntary and intentional release of her FAPE violation claims that she alleges to have occurred during the first 3½ months of the Student's third grade year. She states that it was her intent to merely ensure that the hearing, scheduled for

January 2014, did not go forward as scheduled in order to have time to review the independent evaluation results before potentially re-filing her hearing request. She notes that IDEA waivers require a higher standard of review; that she did not have the benefit of consulting with counsel; and that she did not adequately understand the meaning of the term “with prejudice” before drawing and checking a box on the form that she found to be confusing.

B. Brief summary of the position of the District:

The District argues that the Parent has the burden of proving that each of the IEPs she is challenging failed to meet IDEA standards and that the Student suffered educational harm as a result. It asserts that the Hearing Officer must view the IEP as a unitary whole and in terms of what was reasonable when the document was promulgated, not in hindsight. It asserts that special education is not a guarantee of success, but a reasonable calculation or programming that will result in educational gains in the least restrictive environment and that the evidence shows that the Student’s IEP met this standard.

The District also argues that the law is well settled that parents do not have the right to compel a school district to provide a specific program or educational methodology. It claims that the Student received a comprehensive literacy program from Kim Mosca, the Student’s special education teacher during the 2013-14 school year. It notes that all the school witnesses testified in favor of the beneficial nature of the programming in the area of literacy delivered by Ms. Mosca and that the Student demonstrated success and a level of progress consistent with what might be expected of her, given the nature of her disability. It highlighted Dr. Kaufman’s testimony that he

found nothing negative about the reading program the Student received during her third grade year.

The District also argues that the Student's DRA levels, moving from an instructional level of 10 to 14 between October, 2013 and April 2014, suggest that the Student was benefitting from her literacy program. It points to Ms. Mosca's qualitative assessment that the Student's independent DRA reading level moved from an 8 to a 10 during the similar period. The District suggests that there was no evidence that the Student should have progressed more notably during this time period, noting that even the Parent stated that she had seen reading improvement during the year.

With regard to the SPIRE program, the District asserts that the Parent expressly stated that she was not in agreement with this program for the Student. As a result, the District believes that it appropriately withheld this part of the Student's reading program. It points to expert witnesses testimony that approved the appropriate nature of the SPIRE program for the Student, and the likely benefits she will receive when it is delivered to her.

The District urges that the Parent also waived her claim of FAPE violations alleged to have occurred during part of the 2013-2014 school year when she signed the Withdrawal Request Form in December 2013. It argues that the language of the Form clearly states that all hearing issues were resolved, including past claims against the District relating to the Student's literacy and other programming. The District asserts that, if the Parent did not intend to waive past claims, her signature on this form was part of her plan to deceive the District into entering into an agreement that she knowingly did not intend to follow.

The District believes that it appropriately denied the Parent's request for an FBA in light of Dr. Jefferson's recommendations. It states that it followed the advice of Dr. Jefferson, the sole behavior expert in this case, who testified that that an FBA was not appropriate in light of the type and frequency of the Student's reported behaviors.

The District urges that the Parent failed to establish any educational harm to the Student, and therefore her request for compensatory education should be denied.

V. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). As such, the Parent bears the burden of persuasion in this matter.²

B. The Student's claims under the IDEA for the period between September 1, 2013-December 17, 2013 are barred as a result of a private settlement agreement and waiver signed by the Parent.

The Parent cites a Third Circuit case for the proposition that IDEA waivers should be held to a higher standard of review. *W.B. v. Matula*, 67 F.3d 484, (3d Cir. 1995). In *Matula*, the court held that it is necessary to review the totality of circumstances when considering an alleged IDEA waiver, taking into account whether 1) the language of the agreement was clear and specific; 2) the consideration given in exchange for the waiver exceeded the relief to which the signer was already entitled by law; 3) the signer was

² The issue of the burden of proof on the Parent's waiver is discussed below, *infra*.

represented by counsel; 4) the signer received an adequate explanation of the document; 5) the signer had time to reflect upon it; and 6) the signer understood its nature and scope. *Id.* at 497.³

Even applying the Matula standards, I find that the Parent waived her claims under IDEA for the period between September 1, 2013-December 17, 2013. First, the Parent checked and initialed a hand-written box next to a paragraph that indicated that she wished to withdraw her hearing “with Prejudice,” which states in parenthesis on the form: “all hearing issues were settled in a written resolution or mediation agreement.” [S-351] While the paragraph on the form that Parent *did not* sign contained redundant language with regard to the “with and without prejudice” option, there was no testimony from the parent that she was confused by this choice, which ultimately she did not select.

The Parent’s amended hearing request included an allegation that the District failed to provide “effective instruction from [School Year] 2011 to present.. due to non-evidenced based instructional programs...demonstrated by lack of progress” [S-319] The evidence supports a finding that the Parent knew that by dismissing her hearing request, she was dismissing her claim for compensatory education damages for the District’s alleged instructional failures since 2011.

While the Parent was not represented by counsel at the time she signed the withdrawal, she had recently worked with an advocate who had provided advice on other matters. [Parent testimony] The Parent is an experienced special education teacher, more sophisticated than most parents with respect to special education issues. [Parent

³ No first circuit cases were located that address the issue of whether IDEA waivers should be held to a higher standard of review.

testimony] Therefore, while there was no testimony from the parent that she was confused about these documents, she knew how to avail herself of legal advice or advocacy in the event that she had any questions about the terms or ramifications of the withdrawal request.

This form was signed in conjunction with December 13, 2013 settlement letter in which outlined 10 different items that the District had agreed to do, ranging from Student evaluations to specific communication and notice protocols with the Parent. [S-335]. While the IDEA requires student evaluations and communication with parents, there is no evidence to support a finding that the District was offering items that it was already required to do under the IDEA or MUSER. Mr. Kuncinkas's wrote that "based upon this agreement" the Parent would withdraw her current due process hearing request. [S-335]. Furthermore, there is no evidence that the District failed to comply with the settlement terms outlined in this letter.

Lastly, the evidence does not support a conclusion that the Parent was given insufficient time to review the December 13, 2013 proposed agreement before signing the withdrawal request form on December 17, 2014. The Parent's testimony on this subject was contradictory. On the one hand, she testified that she "thought all issues were settled" and that "she didn't want a hearing in January" because she was "too busy with the holidays" coming up. On the other hand, she stated that she never intended to release her past claims⁴. [Parent testimony] I find that the Parent's testimony that she was reasonably confused about the waiver form or her reasonable belief that she was preserving claims prior to December 17, 2013 is not credible.

⁴ The Parent did not notify that Mr. Kucinkas of her intent to preserve claims prior to the filing of her hearing request on November 5, 2013.

Under Maine law, waiver is an affirmative defense, so the burden of proving its existence rests with the District. *Blue Star Corp. v. CKF Properties, LLC*, 2009 ME 101 ¶ 25, 980 A.2d 1270, 1276 (Me. 2009). I find that the District met its burden and that the Parent waived her claims that occurred prior to December 17, 2013.

C. The District provided the Student with a free appropriate public education (FAPE) and placement in the least restrictive environment during the 2013-2014 academic year.

The U.S. Supreme Court has prescribed a two-part test for analyzing challenges to an IEP and educational placement. “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive education benefits?” *Board of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982). The First Circuit suggests that the first part of this test is more instructive than dispositive, and that compliance with the second part is likely to nullify a violation of the first. See *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984). (“The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.”)

Pursuant to that standard, procedural violations will undermine an IEP only if there is “some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Roland M. v. Concord Sch. Comm.* 910 F.2d 983, 994 (1st Cir. 1990)

i. Literacy Instruction

In a Written Notice, dated October 31, 2013, the District proposed that the Student receive 60 minutes per day of literacy instruction in the SPIRE program. [S-155] In a letter dated November 14, 2013, the Parent wrote to the District stating that she was not in agreement with the proposal to use the SPIRE as there was no objective research proving that it could help the Student. [Parent testimony, S-269] As a result, the District did not provide the SPIRE program to the Student as determined at the October 31, 2013 IEP team meeting. The District argues that the Parent knew or should have known that the SPIRE program was not provided to the Student, and that the District's failure to offer the SPIRE program is more properly the responsibility of the Parent who "refused to permit" the program to happen.

There is no evidence on the record, however, that the Parent openly obstructed or refused to permit the SPIRE training. Rather, in a letter dated November 14, 2013, the Parent wrote to Mr. Kucinkas stating that she was not in agreement with the proposal to use SPIRE as she was concerned that it was not "evidenced based." [Parent testimony, S-269] The evidence in this case does not support a finding that the Parent's behavior rose to a level of parent obstructionism as suggested by the District, thereby relieving it of its obligation to fulfill the requirements of the Student's IEP.⁵ Unlike the "obstructionist" cases cited by the District, there is no evidence that the Parent prevented the District from providing programming to the Student, and the District made no effort to follow up with

⁵The Parent's disagreement in this case can be distinguished from the cases cited by the District: In *Lessard v. Wilton-Lydenborough Cooperative Sch. Dist.* 518 F.3d 18, (1st Cir. 2008) the Parent's unreasonable delay in acting upon a completed IEP despite several efforts by the district to identify the parent's concerns. In *Roland M. v. Concord Sch. Comm.* 910 F.2d 983, 992 (1st Cir. 1990), the parents removed the Student from school and had specifically asked the school to refrain from independently testing the child, putting the district in a poor position to remedy the omissions.

the Parent with regard to her lack of agreement with SPIRE.⁶

I find that the Parent believed that the Student was being trained in SPIRE. The Parent's own testimony and by Dr. Kaufman's first report in which stated that the Student was using the SPIRE program supports this finding [Kaufman testimony, S-448].

As set forth in MUSER §VI.2.I it is ultimately the District's responsibility, even if Parents disagree, to ensure that the IEP includes the services that the child needs.⁷

While the District's failure to provide the SPIRE literacy program constitutes a procedural violation, there must also be a finding that this procedural inadequacy was severe enough that is deprived the Student of a FAPE. *Roland M.*, 910 F.2d at 994. The question, therefore, is whether the implementation of the IEP, as a whole, provided a FAPE despite the procedural violation?

For this question, it is necessary to review the Student's literacy program during the 2013-2014 academic year which was implemented by her special education teacher Kim Mosca. Ms. Mosca instructed the Student in literacy for approximately 60 minutes

⁶ The District did not attempt to address this issue in connection with the settlement discussions with the Parent leading up to the letter prepared by Mr. Kucinkas. [S-335]

⁷ MUSER §VI.2.I states in relevant part as follows:

The IEP Team should work toward consensus, but the SAU has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive educational placement. It is not appropriate to make evaluation, eligibility, IEP or placement decisions based upon a majority "vote." If the team cannot reach consensus, the SAU must provide the parents with prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation.

MUSER §IX.3.B.(3) provides in relevant part as follows:

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability

per day on a 1:1 basis using level system books, the Wilson FUNdamentals fluency program, and Lexia, a computer-based phonics program. [Mosca testimony]

Beth Weller, the Student's Speech/Language Pathologist testified that she worked with the Student for three 30 minute "pull out" speech sessions per week and worked with the Student on social pragmatics, reciprocal communication skills and the goals established in her IEP, including speech sounds, syllables, accuracy, verbal expression, multiple definition words, initiating and follow up questions, word endings and expression of concepts. [Weller testimony; S-195-198] As part of the Student's Speech/Language consultation, Ms. Weller met weekly with other staff order to coordinate and reinforce the Student's literacy skills and training.

During his observations of the Student in January and February, 2014, Dr. Kaufman observed Ms. Mosca doing phonetic and word family work as well as "guided oral reading" with the Student. [Kaufman testimony] Dr. Kaufman testified that while he had other recommendations to improve the Student's literacy instruction, he did not observe any instruction offered to the Student by the District that was either inappropriate or significantly inconsistent with the types of reading practice done for students who have reading disorders. [Kaufman testimony; S-516].

Dr. Kaufman noted that although the Lexia "screen-based" reading program requires an educational technician or a resource teacher to pay close attention to the student while delivering the training, it can be "quite effective and powerful". [Kaufman testimony] Kim Mosca testified that she used the Lexia program while working with the

Student on a 1:1 basis. Accordingly, the record supports a finding that a requisite level of supervision was provided to allow the Student to benefit from the Lexia program.

Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” courts and hearing officers must use “an approach requiring a student-by-student analysis that carefully considers the student’s individual abilities.” *Ridgewood Bd. of Educ.*, 172 F.3d at 248 (decision-maker must “analyze the type and amount of learning” that a student is capable of when determining whether “meaningful benefit” has been provided). Whether a program provides a “meaningful benefit” however, must be individualized, based upon each student’s potential for advancement. *Polk v. Central Susquehanna Interm. Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

In the present case, it is undisputed that the Student has significant disabilities. The Student’s triennial test results at the end of the Student’s second grade year noted cognitive scores in the “extremely low” range, with scores on the Phonological Awareness and Early Written Language tests in the below average range. [S-6S-9; S-11]. On October 31, 2013, the Student’s DRA level for her ability to read with minimal support was determined to be at a level 8, while her instructional level was determined to be at a level 10. [S-189] Based upon his 2014 evaluations and observations, Dr. Kaufman noted that the Student has “fairly substantial challenges across intellectual, processing, academic, and self-regulatory domains” and “low general intelligence ... substantial working memory difficulties and substantially limited oral reading skills as compared to her age and grade...” [Kaufman testimony; S-527, S-501].⁸

⁸ The Student’s challenges were observed within her private LiPS training sessions. On August 3, 2014, after completing 40 private LiPS training sessions, her vowel sound recognition improved from 9 to 11 and consonant sound recognition improved from 21 to 24, which Dr. Kaufman characterized as “fairly limited” and “somewhat disappointing”. [Kaufman testimony]

Despite the Student's challenges, I find that the Student made demonstrable gains in her literacy skills. On January 10, 2014, Ms. Mosca wrote an e-mail to the Parent, noting that the Student was reading at a DRA level 13. [S-356] In an e-mail dated February 14, 2014, Ms. Mosca wrote to the Parent stating that the Student was "doing great" with reading consonants, and has begun reading DRA level 14 books, prompting a response from the Parent that she was "glad that [the Student] was making limited progress." [S-394; S-393] Beth Weller, the Student's Speech and Language Pathologist, testified that the Student had a beneficial year and made reasonable progress. [Weller testimony] Dr. Jefferson observed the Student working on her specially designed literacy program and testified that the Student was oriented to the instruction and demonstrated 80% accuracy in her skills. She added that there appeared to be no loss of instructional time or the Student's engagement during the 70 minute session.

On March 12, 2014, Ms. Mosca noted that the Student was reading at a DRA level 14 and by May 2014, the Student achieved an instructional DRA level of 14 and an independent DRA level of 10. [Mosca testimony; S-437] ⁹

Even if LiPS, SPIRE or some other methodology *could have* increased the Student's gains, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. As the First Circuit stated in *Lenn v. Portland Sch. Comm.* 998 F.2d 1083, (1st Cir. 1993) the law does not promise perfect

⁹ The Parent incorrectly quotes an undated report prepared by Kathleen Coffin, the Student's private LiPS instructor. In the Parent's closing brief, she asserts that Ms. Coffin "wrote in her progress report that the Student's participation in the District's program had left her, in May of third grade, unable to identify most phonemes "when the letters were combined into words, including two letter words". Ms. Coffin's report, which provides only general information on the Student's skills and deficits, merely states that the Student "had difficulty when the letters were combined into words." She noted that the Student was able to correctly name and give the isolated sounds for "most" of the consonant sounds and "a few" of the vowel sounds. [P- 584]

solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Id.* at 1086. The Individuals with Disabilities Education Act (IDEA) sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. *Id.* at 1089.

In *Roland M.*, the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.*, 910 F.2d at 991. As the First Circuit explained:

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

Id.

Despite the District’s procedural violation by not providing the SPIRE program as determined in the October 31, 2013 IEP, I find that the District provided the Student with a FAPE. The literacy program delivered was reasonably calculated to provide educational benefit for the Student. Taking the Student’s abilities into account, I find that the Student achieved demonstrable improvement in her literacy skills.

Accordingly, I find that the Parent, as the party seeking relief, did not meet her burden of persuasion with regard to the claim that the Student was not provided with a FAPE during the 2013-2014 school year.

ii. Methodology.

The Parent argues that IDEA standards require that services provided to children with disabilities be “based on peer-reviewed research to the extent practicable,” and that

neither the program provided or the proposed SPIRE program meet this standard, and thereby deprived the Student of a FAPE. The Parent argues that it remains practicable for the District to use the Lindamood Phoneme Sequencing Program (“LiPS”) with the Student, as recommended by Dr. Kaufman.

The Parent correctly points out that in 2004, Congress added the following provision to the IDEA: “[T]he term 'individualized education program' or 'IEP' means a written statement for each child with a disability ... that includes ... a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child.” 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This language was incorporated into the revised IDEA regulations in 2006. 34 C.F.R. § 300.320(a) *Ridley School District v. M.R.; J.R., Parents of Minor Child E.R. v. Janet Cenname* 680 F.3d 260 58 IDELR 271 112 LRP 25613 U.S. Court of Appeals, Third Circuit 11-1447 May 17, 2012.

In *Ridley*, the parents of a child with a reading disability alleged that the district violated the IDEA for offering a reading program known as “Project Read” which had not been thoroughly tested with regard to its effectiveness for their child’s unique combination of disabilities. *Id.* The parents argued that the district should have provided the Wilson Reading System, a program already proven to be effective for teaching students with learning disabilities similar to those of the student. *Id.* The *Ridley* Court affirmed the District Court’s finding that although Project Read may not have had the same level of peer review and support, it had been shown to be helpful in improving the reading skills of students with disabilities similar to the child in pending case. Ultimately, the Court held:

Given that the IDEA does not require an IEP to provide the "optimal level of services," *D.S.*, 602 F.3d at 557 (citations omitted), we likewise hold that the IDEA does not require a school district to choose the program supported by the optimal level of peer-reviewed research. Rather, the peer-reviewed specially designed instruction in an IEP must be "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers*, 587 F.3d at 182 (citation omitted)... In selecting special education programs, a school district must be able to take into account not only the needs of the disabled student, but also the financial and administrative resources that different programs will require, and the needs of the school's other non-disabled students. *See J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70 (2d Cir. 2000)

Ridley School District v. M.R.; J.R., Parents of Minor Child E.R. v. Janet Cenname 680 F.3d 260 58 IDELR 271 112 LRP 25613 U.S. Court of Appeals, Third Circuit 11-1447 May 17, 2012

The present case is factually similar to *Ridley*. Dr. Kaufman testified that although SPIRE has less direct research support, its construction is based upon research done on its programmatic elements and is a program that he believes is reasonably calculated to benefit the Student. Beth Weller, the Student's Speech/Language Pathologist, testified that SPIRE offers a comprehensive reading program with phonological awareness concepts including vocabulary, comprehension, encoding, spelling, phonemic and fluency. Based upon this credible testimony, I find that the programming offered and delivered to the Student was based upon research and designed to provide educational benefit to the Student.

With regard to the literacy program received by the Student during her 2013-2014 school year, there was no evidence that the literacy programs provided by the District were not researched based. Dr. Kaufman testified that he did not observe any instruction offered to the Student by the District that was either inappropriate or significantly inconsistent with the types of reading practice done for students who have reading disorders. [Kaufman testimony; S-516].

Educational methodology generally falls within the discretion of the school district unless the method is distinctive or exclusive. *Central Bucks School District* 40 IDELR 106, 103 LRP 52413, Pennsylvania State Educational Agency, November 13, 2003; see also, *Medina Valley Independent School District*, Texas State Educational Agency, 106 LRP 29730 October 10, 2005; *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (d. Me. 1993), quoting *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir.), *cert. denied*, 109 S.Ct. 308 (1988). As noted by Dr. Kaufman, there were several different literacy programs that could be viewed as appropriate for the Student, including the SPIRE program.

Accordingly, although the literacy programs offered to the Student may not have been optimal, the record does not support a finding that the District deprived the Student of a FAPE by offering her the SPIRE or the modified literacy program provided during the 2013-2014 school year. See *S.A. v. Riverside DeLanco Sch. Dist.*, 2006 WL 827798 (D.N.J. March 30, 2006)

iii. Social and Behavioral Instruction.

The Parent also argues that the District failed to provide direct social skills instruction, and that none of the IEPs provided for any direct specialized instruction in this area for the Student.

The term “education” has a broad meaning under the IDEA and is not limited merely to academic growth. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007); Accordingly, an IEP must be designed to target ““all of a child's special needs, whether they be academic, physical, emotional, or social.”” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993), 20 U.S.C. § 1415(d)(1)(A).

In the present case, the Student's IEP team determined at the October 31, 2013 meeting that she would receive 30 minutes per week of social skills activities and weekly participation in a lunch-time "friendship group" with her guidance counselor. [S-189; S-154-155] The Student participated in a social skills program with her peers from 8:45 a.m. to 9:00 a.m. on Tuesdays and Thursdays, however she occasionally missed these programs due to her late arrival at school. [P-234, 235; Mosca testimony]

Once the Student's behaviors towards her peers became a concern in April 2014, the Student's IEP Team met to discuss her behavior support plan and other aspects of the Student's programming. [S-177] At the May 1, 2014 meeting, the IEP team determined that a "zones of regulation" behavior system would be used to address the Student's behavior regulation issues, along with the use of coins instead of tokens. [S-732] In addition, it was determined that the District would contract with Dr. Jefferson "for up to three visits, to observe and look at target behaviors, behavioral programming...[and] would seek to implement Dr. Jefferson's recommendations." [S-177]

MUSER §VI.2.J.(4) provides that one of the major IEP Team responsibilities is to develop and *revise* an Individualized Education Program. (emphasis added). A school district is obligated, within a reasonable period of time, to review and develop a programming alternative once it becomes clear the student's IEP is not working. M.C. ex rel. JC v. Central Regional School District, 81 F.3d 389, 396-97 (3d Cir.), cert. denied, 519 U.S. 866, 136 L. Ed. 2d 116, 117 S. Ct. 176 (1996).

I find that the District provided appropriate social skills programming for the Student in the least restrictive environment, and appropriately responded to her behavior issues when they became pronounced.

It is noteworthy that Dr. Jefferson explained during her testimony that the Student's behavior issues could be related to regularly missing her morning social group and removal from school to attend private literacy training. In effect, Dr. Jefferson noted that these absences from school could cause a form of deprivation with respect to her peer interaction that may have contributed to her negative behaviors. [S-A-8] While the causes of the Student's behavior are uncertain at this point, the District should not be liable for a denial of FAPE to the extent that the omission may have been due to Parent action.

See, Lessard v. Wilton-Lydenborough Cooperative Sch. Dist. 518 F.3d 18, (1st Cir. 2008); *Roland M. v. Concord Sch. Comm.* 910 F.2.d 983, 992 (1st Cir. 1990), *supra*.

D. The District did not violate the Student's rights under the IDEA by not providing a Functional Behavior Assessment for the Student during the 2013-2014 academic year.

As noted above, the Student's IEP Team met On May 1, 2014 to discuss the Student's recent behavior issues. At this meeting, the team determined that Dr. Jefferson would be retained "for up to three visits, to observe and look at target behaviors, behavioral programming... [and that the team] would seek to implement Dr. Jefferson's recommendations." [S-177] Following her review, Dr. Jefferson concluded that it would not be appropriate to conduct an FBA at that time. [S-774] In her testimony, Dr. Jefferson explained that a reliable FBA was based upon data gathered in a very structured manner, including "before and after behaviors and reinforcing behaviors." [Jefferson Testimony]. She stated that, since there were only a small number of incidents, the data necessary to perform an FBA would not be reliable. Instead, she prepared a behavior

plan without conducting an FBA, which she testified was a “permissible practice” with respect to programs in the “construction phase”.

The Parent argues that the FBA responsibility is triggered under the IDEA requirement that a student be “assessed in all areas of suspected disability” 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); MUSER V.2.C.4.

The Parent’s argument on this point lacks merit. The District’s obligation to assess students does not necessarily trigger a responsibility to conduct an FBA. While the regulations require that the FBA process must “include the parent,” there are only limited circumstances where the MUSER requires a school administrative unit to conduct and FBA, none of which are applicable here.¹⁰ I find that Dr. Jefferson’s testimony is credible that an FBA in the present case was not appropriate. Additionally, I find that the District appropriately responded to the Student’s behaviors by addressing the issue in the May 1, 2014 IEP meeting, retaining Dr. Jefferson and implementing her recommendations.

E. If the Hearing Officer determines that the District failed to provide the Student with a FAPE or violated the IDEA, what remedy is appropriate?

As the District provided the Student with FAPE and did not violate the IDEA, no remedy is required.

¹⁰ MUSER § XVII F. requires a school administrative unit to conduct an FBA or review and modify an existing behavior plan if the IEP team determines that a student’s conduct was a manifestation of the student’s disability.

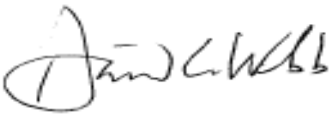
ORDER

After consideration of the evidence presented during this due process hearing,

It is hereby ORDERED that:

1. The District provided the Student with a free, appropriate public education during 2013-2014 school year despite a procedural violation by not providing SPIRE training to the Student;
2. The District did not violate the Student's rights under the IDEA by refusing to provide a Functional Behavior Analysis during 2013-2014 school year;
3. The Parent's claims for compensatory education damages from the commencement of the 2013-2014 school year through December 17, 2013 are barred as a result of the agreement reached between the parties and the Parent's signing of a Hearing Withdrawal Request form on December 17, 2013.

Dated: October 14, 2014



David C. Webb, Esq.
Hearing Officer