

State of Maine
SPECIAL EDUCATION DUE PROCESS HEARING
15.030AH — Parent and Parent v. Sanford School Department
April 17, 2015

Representing the Parents: James Clifford, Esq.

Representing the District: Amy Tchao, Esq.

Hearing Officer: Sheila Mayberry, Esq.

This hearing was held and this decision was issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), Title 20-A M.R.S.A. § 7202 *et seq.*, Title 20 U.S.C. § 1415 *et seq.*, and accompanying regulations. The hearing was held on January 20, 22, and February 4, 5, 2015, in Portland and Sanford, Maine. Present for the proceeding were: Amy Tchao, Esq., counsel for the Sanford School Department (“School”); Stacey Bissell, Special Education Director; James Clifford, Esq., Counsel for the Parents; the Student’s mother, (“Mother”), and the Student’s father, (“Father”).

Testifying at the hearing were:

- Mother
- Stacey Bissell
- Dr. Laura Slap-Shelton, Psychologist
- Dr. Victoria Reynolds, School Psychologist
- Rebekah Bickford, Director, Sebago Alliance School

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On October 28, 2014, the Parents requested a due process hearing regarding their son, Student (“Student”). (Case No. 15.030H) On November 14, 2014, the School submitted a Sufficiency Challenge based upon the language on the hearing request form. The Sufficiency Challenge was granted on November 20, 2014, and the Hearing was dismissed with leave to amend. The School received an amended hearing request from the Parents on December 1, 2014.

On January 13, 2015, a prehearing conference was held in Portland, Maine. Participating in the conference were the following: the Parents; Mr. Clifford; Ms. Bissell; and Ms. Tchao. Documents and witness lists were exchanged in a timely manner. Both parties submitted additional documents after the five-day deadline without objections. The Parents submitted 391 pages of documents. The School submitted 1,184 pages of documents.¹

At the close of the testimony on February 5, 2015, both parties requested to keep the hearing record open until March 16, 2015 for the submission of closing memoranda. The School submitted a 41-page closing argument and the Parents submitted a 38-page closing argument. The record closed upon receipt of these documents on March 16, 2015. The parties and the Hearing Officer further agreed that the decision would be due on April 17, 2015.

II. THE ISSUES

The issue in this matter is as follows:

Whether the School failed to provide the Student with a FAPE since November 19, 2013, under the IEP for the 2013-2014 school year.²

III. SUMMARY OF THE FACTS

1. This case involves the Student, a xx-year-old boy (d.o.b. xx/xx/xxxx) who lives with his Parents in Sanford, Maine. (Hearing Request form; Mother's testimony)
2. Since early childhood, the Student has had an extensive history of aggressive, manipulative, and unpredictable behavior, which has included, among other things, throwing objects at children and adults, flipping over tables and chairs, frequent melt-downs, noncompliance, hiding under tables, "screeching," and running away from staff and teachers. (S.1, 2, 65, 72; Mother's testimony)

¹ School documents are notated as "S." and Parent documents are notated as "P."

² The Parents notified the School and the Hearing Officer at the hearing, and reiterated in their brief, that they are withdrawing their claim that the School denied a FAPE under the IEP for the 2014-2015 school year.

3. The Parents were asked to remove the Student from multiple daycare settings when the Student was xx years old after he engaged in behaviors that included pushing a child down the stairs, throwing furniture, and breaking windows. (Mother's testimony) Thereafter, he received services from Child Development Services ("CDS") at the Spurwink School where they focused on his social and emotional difficulties. (S.42).

4. On July 25, 2009, Dr. Alan Fink, PhD., submitted his psychological evaluation in response to a referral from CDS due to the Student's significant behavior problems at home and within the daycare setting. (S.1) Dr. Fink found that the Student rated at the clinically significant level of above the 95th percentile on many subscales of the Child Behavioral Check List ("CBCL"). He summarized that "Formal parent rating as well as verbal parent and daycare reports indicated highly significant issues of emotional dysregulation which resulted in unpredictable rage reaction and related aggressiveness toward adults and peers. Upsets can be extended in nature or as long as 20 to 30 minutes. During formal evaluation, (the Student) did present with subdued affect, and difficulty/reluctance to process feelings or social interactions verbally. There is no contributory reported social history, general temperament has always been difficult, and there is some genetic risk of anxiety." (S.4) Dr. Fink made four recommendations: 1) a special-purpose preschool program be considered directed toward behavior and emotional issues; 2) counseling to include individual play therapy and behavior management parenting support; 3) general mood issues to be continually monitored with consideration of a formal mood-related diagnosis and possible medication over the coming one to two years; and 4) a discussion by the IEP team about practical issues of daycare support, extending to time outside therapeutic preschool attendance. (S.4)

5. These behaviors occurred both in school and at home, where he has physically threatened his mother and hit his sister on the head with hard toys. (S.10)

6. The Student attended xx (2010-2011) at the John F. Kennedy Memorial School in Biddeford where he received special education services under the category of Other

Health Impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”). While there, Student continued to exhibit aggressive behavior. (S.12, 56)

7. Because of the Student’s unsafe behavior, school officials have regularly employed the use of restraints or seclusions to ensure his safety, and the safety of those around him. (S.34)
8. While attending xx in Biddeford, a Positive Behavior Support Plan (“PBSP”) was implemented. It provided that, in the event Student’s behavior escalated to an unsafe level, the Special Education Staff would “employ Physical Management as defined in the Safety Care training.” (S.34, Mother’s testimony)
9. The Mother approved of the Biddeford School Department’s PBSP, including the use of restraints, both when it was implemented and at the time of this hearing. (Mother’s testimony)
10. In April of his xx-grade year (2011-2012), the Parents moved to Sanford, and the Student spent his first few weeks at the Carl J. Lamb School, and then the rest of xx grade and all of xx grade (2012-2013) in the more restrictive behavioral program at the Emerson School. (S.76, 79; Mother’s testimony) The Mother was told that the Emerson School was the only school that had the resources to “contain” the Student. (Mother’s testimony)
11. While enrolled at the Emerson School, the Student was provided with a behavioral program including many behavioral supports. (S.79-91)
12. Throughout the school year at Emerson, the Student received in-school and out-of-school suspensions, and there were 12 reported incidents of restraint or seclusion. (P. Addendum No.1.1-47)
13. On May 16, 2013, while at Emerson, the Student’s behavior escalated in response to the enforcement of a rule that stated that a second library book could not be taken out if the first one was not returned. The Student began “running around the building, up and down the stairs, and disrupting other students and would not respond to verbal redirection.” He

ran into the break space and, while in the room, removed his shoelaces and wrapped them around his body. (S.122)

14. After seeing the Student in the break space with his shoelaces wrapped around his body, his Mother withdrew him from school on May 16, 2013. (S.123)

15. An IEP meeting occurred on May 29, 2013 to develop the IEP for the 2013-14 school year. (S.118) Reported highlights of the meeting include the following:

- The Student to qualify for Extended School Year Services;
- The Mother expressed concerns that the Student was not making adequate progress, that his needs were not met, and that he was not getting the behavioral supports he needed;
- The Mother expressed safety concerns and her intention to pull the Student from school for the remainder of the 2012-2013 school year;
- The Student did not meet any of his behavior goals;
- The School rejected the Parents' request for a 1:1 educational technician.

(S.119, 120)

16. An IEP meeting was held on June 13, 2013 to discuss the Parents' concerns regarding the use of restraints and seclusion at school. There was agreement that the Student displayed "some challenging behaviors" and the team considered obtaining additional evaluations to assess his social and emotional functioning, achievement testing, and occupational therapy to look at his sensory profile. The School offered the Student 1:1 tutorial services while his mother kept him out of school, but the Parents choose not to access them.

(S.122-123) The District also offered to send the Student to the Sweetser summer program, a therapeutic placement. The Parents rejected the offer and instead opted for the Student to receive summer tutoring. (S.124)

17. The Student moved to the Willard School for his xx-grade year (2013-2014), following the closure of the Emerson School. (Mother and Bissell testimony)

18. While at the Willard School, the School developed and revised the Student's IEP. It included specially designed instruction for 315 minutes per day, tutorial services for 120 minutes per day, occupational therapy ("OT") for 30 minutes per day, and behavioral

consultation with Dr. Reynolds for 60 minutes per month. (S.156, 168; Reynolds testimony)

19. The Student also received 155 minutes per week of social work services from the School's social worker, Ms. Cyr, the most of any of her students. (S.168; Reynolds testimony) During these sessions the Student's primary focus was on de-escalation techniques. (Reynolds testimony)
20. On September 4, 2013, the District developed a Behavior Improvement Plan ("BIP") for the Student, designed to teach him positive strategies for when his behavior began to escalate. This included a "level" system where Student could earn points, money, or gems for "social positives" that included working quietly, using kind words to staff and peers, and ignoring negative behaviors. In addition, Student was provided two opportunities per day to call his parents. (S.135, 136)
21. The BIP included six goals: 1) learn to communicate his needs without aggression toward peers or adults; 2) develop age-appropriate social skills; 3) learn to accept adult direction without escalation of behaviors; 4) attend school daily and be on time; 5) not be dismissed or sent home for behaviors; and 5) take the bus to and from school.
22. The BIP also provided a significant number of preventative interventions. These interventions included "time away," which was a break the Student could take from the classroom; a "walking pass," which Student could use to leave the classroom whenever he was feeling too overwhelmed; and use of Mr. Tranchemontagne's classroom as an in-school suspension room. (S.136) It included four targeted behaviors, such as "use words" and "access quiet area." It also included 10 teaching strategies and behavior reinforcements, including monitoring his behavior and communicating with family members. (S.135, 136)
23. The Student received points and positive reinforcement whenever he opted to use one of these techniques. (Bissell testimony; S. Appendix A)

24. The BIP also stated that the IEP would convene on October 31, 2013 to review the Student's progress toward his goals and adjust the behavior plan if needed. (S.136)
25. The BIP did not include the Student's strengths or known triggers. It did not identify intervention methods or responsible staff. It did not include a safety plan or a crisis intervention plan outlining various responses to certain behaviors.
26. On September 9, 2013, the Student was restrained in a "therapeutic hold" for five minutes in the principal's office after running in the hallway, throwing items, and resisting efforts to calm down." Thereafter, his mother brought him home. (S. 137)
27. On September 20, 2013, the Student was suspended for one day after punching a first-grader, shoving a second-grader, and grabbing a third-grader at recess. (S.142)
28. On September 24, 2013, an IEP meeting was convened to discuss the Student's behavior. (S.148B-148G)The District and the Parents agreed that, in order for the Student to be successful in school, he needed consistency and a "united front" between the School and his Parents. As such, the Parents and District decided they would provide the Student with three consistent messages: he would be in school, on time, every day; he would take the bus to and from school; and he would not be sent home for behaviors. (P.317; S.148B)
29. During the September 24, 2013 IEP meeting, the Parents requested a functional behavior assessment. (Mother's testimony) The Mother reported that she believed the use of restraints and seclusions were "triggers" for the Student, which led to further escalation of inappropriate behavior. She requested that the staff stop using such interventions. (Mother's testimony) Ms. Harris stated that pursuant to the School's policies and procedures³, staff may need to use restraints and seclusion as a last resort if the Student's

³ Sanford School Department ("SSD") Policy "JKAA" governing the use of physical restraint and seclusion defines seclusion as "the involuntary confinement of a student alone in a room or clearly defined area from which the student is physically prevented from leaving, with no other person in the room or area with the student." (P.288 (I)(B)(1)). The policy clarifies that "seclusion does not include time out," which is defined as an intervention where a student requests or complies with an adult request for a break. *Id.* (I)(B)(1)

behavior became a danger to himself and others or if he committed significant property damage. She stated that under these circumstances, the Student would be directed to either the classroom time-out or time-away space when he was showing signs of escalation, or he would be requested to use the space to regulate himself. (S.148E) The Student's teacher in the self-contained classroom, Ms. Parent, also stated that she would like to implement a safety plan at school because she had not seen any progress in the Student's ability to use strategies to regulate his behavior due to inconsistent attendance and lack of buy-in to the behavior plan. (S.148C)

30. Also on September 24, 2013, the Student was examined by his pediatrician. (P.258) Dr. Bordeau's office notes state that the Student "was seen for rib pain. Patient complained that he was held from behind for 10 minutes; arms were squeezed tightly to rib cage." (P.258) During her testimony, the Mother confirmed that she took the Student to the pediatrician after he complained of being physically restrained at school on September 20, 2013. (Mother's testimony)
31. On September 26, 2013, the Family requested a due process hearing, alleging that the School failed to conduct a proper behavioral assessment and develop an appropriate behavior plan. (P.224-228)

SSD Policy "AAA" defines "physical restraint" as "an intervention that restricts a student's freedom of movement or normal access to his or her body, and includes physically moving a student who has not moved voluntarily." (P.288 (I)(A)) The policy clarifies that "restraint does not include physical escort," which is defined by the School as "a temporary touching or holding of the hand, wrist, arm, shoulder, hip or back for the purpose of moving a student voluntarily." *Id.* (I)(A)(1) SSD Policy "JKAA-R" sets forth procedures on physical restraint and seclusion. (P.290) Among other prohibited forms or uses of restraint and seclusion, staff may not use physical restraint or seclusion "as a therapeutic or educational intervention ... or to control challenging behavior," or "solely to prevent property destruction in the absence of an imminent risk of injury." (P.290 (II)(B); P.292 (III)(B)) Policy JKAA-R further states that physical or seclusion may be used "only as an emergency intervention when the student presents imminent risk of injury or harm to the student or others, and only after less intrusive interventions have failed or been deemed inappropriate." (P.290 (II)(A)(I); P.292 (III)(A)(I)) Finally, Policy JKAA-R requires two staff members to monitor a student placed in a restraint until there is longer an imminent risk of harm. It also requires at least one staff member to monitor a student who has been involuntarily secluded until the student no longer presents an imminent risk of harm. (P.290 (II)(C); P.292(III)(C))

32. The actions taken by the IEP Team at the September 24, 2013 meeting were set forth in the Written Notice, dated October 7, 2013. (S.148A) Action items included continued collection of behavioral, and the completion of a functional behavioral assessment (FBA) of (the Student's) interfering behaviors." (S.148B)
33. In response to the due process hearing request, the IEP Team held a resolution session on October 11, 2013. A tentative agreement was reached that provided for the completion of an FBA; monthly behavioral consult; written monthly summaries offered by the School; implementation of the BIP, dated September 4, 2013; and provision of extended school year ("ESY") services.
34. In addition, the Student's IEP was amended to include the following: an additional social work goal, including progress notes within the document; an increase in the level of social work to 155 minutes per week; and a 30-minute monthly consultation period. (S. 155-157, 168 Bissell testimony)
35. The staff attending the resolution meeting on October 11, 2013 noted that, since the IEP meeting on September 24, 2013, the Student had been consistently on time, had not left school early, and had bought into the classroom's behavior incentive programs. They noted that the Student was "consistently on level III for nine out of the last 10 school days." It noted that the behavior plan had been based on the Willard School's behavior classroom expectations and was subject to change as new information became available based upon the FBA that would be done. (S.156-57)
36. Ms. Reynolds was also contracted to complete a psycho-educational evaluation to clarify the Student's needs as part of his triennial evaluation. (S.191-195, 201-203) At the Parents' request, the School agreed to add behavioral consultation to Student's program, which was provided by Ms. Reynolds from November 2013 through the end of the 2013-2014 school year. (S.208; Reynolds testimony 191-195; S.201-203) Ms. Reynolds found that the restraint and seclusion techniques employed by school staff were necessary for the Student and also beneficial because, with the exception of one incident where these

techniques were used, “Student was successful in being able to regain his self-regulation and successfully return to the classroom.” (S.203; Reynolds testimony)

37. Between October 1 and 15, 2013, there were three reported instances when the Student’s behavior escalated to the point where the school implemented its restraint and seclusion procedures (October 1, 9, and 15, 2013). (S.149, 52, 171)
38. On October 15, 2013, Dr. Bordeau wrote a note to the IEP Team, which stated, “Please do not place (the Student) in seclusion or restraints until re-evaluated by Dr. Slap-Shelton.” (S.174)
39. On October 25, 2013, Ms. Bissell wrote to the Parents in response to Dr. Bordeau’s request, stating that the School would continue to use restraints and seclusion if the Student presented a risk of harm to himself or others. (S.182)
40. Also on October 25, 2013, Ms. Reynolds completed her psychological evaluation. (S.191) In an addendum (S.201), Ms. Reynolds concluded the use of “time out/seclusion, escorts, and therapeutic holds” was appropriate and opined that the Student’s behavior was “in essence communicating his need for support and intervention to help him regain his self-control.” (S.203)
41. On November 5, 2013, Ms. Bissell presented the Parents with the FBA completed by Ms. Delaney. (S.196) In the document, Ms. Delaney reviewed the Student’s placement, identified problem behaviors, and assessed “what is/is not working” and possible antecedents. (S.198) She theorized that “possible antecedents” included academic requests (usually literacy), non-preferred activities, and sometimes when he is not given what he has requested. (S.199) She made four recommendations: 1) Maintain the current behavior plan using the point system to support the expected behaviors throughout the day, 2) Link to the expected behaviors system to a system that can be used in the home as well, 3) Develop a “tool box” of strategies to assist the Student with communication and social situations, 4) Debriefing after an incident, although important, should also be reviewed in a positive way later in the day as a way to earn points. (S.200)

42. On November 8, 2013, the IEP Team was convened to review the educational evaluation performed by Ms. Parent, the occupational therapy evaluation performed by Ms. Payeur, the psychoeducational evaluation performed by Ms. Reynolds, and the FBA completed by Ms. Delaney. (S.205-211)
43. In November 13, 2013, the Student began to see Dr. William Grapentine, psychiatrist, at Counseling Services, Inc. (S. Appendix E) At that time he was diagnosed with attention deficit Hyperactivity Disorder (“ADHD”), Oppositional Defiance disorder (“ODD”), Mood Disorder, and Anxiety. (S. Appendix 15-16) The Student was noted to have learning and developmental issues. (S. Appendix E.1, 4, 5, 7, 9, 12) and “possible ASD” (Autism Spectrum Disorder) (S. Appendix E.9) He also recommended further psychological testing by Dr. Slap-Shelton. (S. Appendix E.2)
44. On November 19, 2013, the Parents and the School executed a settlement agreement (“Settlement”) in which the School agreed to provide ESY services, behavioral consultation services, and implement the FBA. In exchange for the Parent withdrew their hearing request and agreed to release the School from any and all claims arising out of the Student’s school program. (S.212, 213)
45. The release language in the Settlement stated the following:
- In consideration of the promises and covenants herein, (the Parents), on their own behalf and on behalf of their minor, (the Student) (the “Releasers”), agree to forever release and discharge (the School), its agents and employees (the “Releasees”), from any and all claims arising out of the Student’s school program during his attendance in (the School’s) schools, including any and all claims for compensatory education, reimbursement, damages, attorney’s fees and costs, and any Claims arising in any manner out of state or federal disability laws and regulations and specifically including, and intending to release Claims based on, alleging or arising out of (i) alleged violations by Releasees of the Individuals with Disabilities Education Act, including federal and state special education regulations; and (ii) alleged violations by the Releasees of Section 504 of the Rehabilitation Act the Releasees, up through the date of exclusion of this Agreement. (S.212)
46. On December 17, 2013, an educational technician scratched the Student’s arm in an attempt to stop him from eloping. (S.Appendix C.82; S.214)

47. On January 10, 2014, the Student was momentarily restrained in response to threatening to punch his peers, kicking them, kicking and head-butting staff, and running through the hallways. (S.216, 219, 220). He received a one-day in-school suspension. (S.220)
48. On January 15 and 16, 2014, the bus staff reported four or five incidents in which the Student used foul language, was uncooperative, and threatened the safety of staff and students on the bus. (S.221, 229) A request was made by an administrator to Willard's principal, Chuck Potter, to develop a behavior plan to use when the Student is on the bus. (S.223)
49. The Student's attendance improved during this time period (November 2013 to March 2014) compared with the month of September 2013, when the Student had five absences, one out-of-school suspension, eight tardies, and two early dismissals. In the month of November 2013, the Student had only 2 absences, 1 early dismissal, and no tardies. (S.339, 340; Reynolds testimony)
50. In December 2013, Student had no absences, three tardies, and two early dismissals. *Id.*
51. In January 2014, the Student arrived to school on time, every day, and was not dismissed early. He had one in-school suspension. *Id.*
52. In February 2014, Student had perfect attendance and was tardy three times. *Id.*
53. Between November 2013 and January 2014, the Student saw Whitney Binette, his outside counselor from Counseling Services, Inc. ("CSI"), nine times between November 19, 2013 and May 1, 2014. (S. Appendix E.132-134)
54. At no time between November 2013 and early March 2014 did the Parents request any changes to the Student's BIP or IEP. (Bissell testimony)
55. On March 3, 2014, the Mother submitted a written complaint to the School, pursuant to the Maine Department of Education Rule "Chapter 33". (Bissell testimony; S. Appendix C.1-3)

56. On March 5, 2014, it was reported that the Student ran out of the classroom, kicked lockers, ran into the principal's office, and then into the cafeteria. The incident report indicated that two staff members were "able to get (the Student) to go to the support and transition room." (S.243)
57. Between March 6 and May 6, 2014, the Student was involved in four behavioral incidents at school that endangered his safety and/or the safety of others, requiring the use of restraint and/or seclusion techniques. (S.244, 251, 255, 341-344)
58. On March 6, 2014, the Student's behaviors escalated in response to a request to do his work. He ran out of his classroom, slammed the door, and ran into the tunnel where he stood behind the door and held it shut. When a teacher walking through the tunnel with her first-grade class tried to close the door, the Student attempted to slam the door on her, and when that didn't work, he became physically assaultive, hitting her a number of times. The Student then began yelling obscenities at Mr. Tranchemontagne, climbed on a Zamboni and tried to get it to move, slammed doors, purposefully ran into students and teachers, spit all over the floor, and tried to punch Mr. Holland while saying, "you want to fight old man? You mother f***er?" The Student also stated that he wanted to be "kicked out of school" like he was at his last school. (S.245) Once the Student was directed to the break space, he was able to calm down. (S.244-247) Also during this incident, the Student twisted his finger in a teacher's sweater and told her he was going to "break his finger and say you did it, you A-hole" so that his mom could "sue [the school]." (S. 246; Bissell testimony)
59. On March 7, 2014, the Student saw his pediatrician, Dr. Bordeau, to treat his finger. (P.262) The Student told Dr. Bordeau that Mr. Potter "bent his finger back" and that he was "having BM in his pants, and that it happens so fast he doesn't know it's coming." (P.262) Dr. Bordeau's notes stated that the Mother reported that the Student was "having more encopresis and streaks in his underwear. This is not diarrhea. No daytime enuresis (bed-wetting)...Mom states that this doesn't happen on weekends at home. There is a

new teacher in the classroom and this behavior started when they were preparing for the other teacher to go out on maternity leave.” (P.262)

60. Due to a mistaken interpretation of the Chapter 33 laws, the District believed they were required to call an IEP meeting subsequent to this March 6 incident. Accordingly, Mr. Potter, on behalf of the District, spoke with the Mother on March 10, 2014 about scheduling an IEP meeting, (S Appendix B.26, 30) A meeting was scheduled for March 21, 2014. (S. Appendix B.34-36)
61. On March 11, 2014, the Mother emailed the School stating that she knew “there should be a meeting by law due to the Student being kicked out of school on Thursday.” (S. Appendix B.29)
62. Also on March 11, 2014, the Mother reported to Ms. Binette that she was looking at new schools for the Student, including the Aucocisco School. (S. Appendix E.36, 37)
63. On March 13 and 14, 2014, several emails were exchanged between the Mother and Ms. Cyr regarding the Student’s disruptive and uncooperative behavior and ways to communicate about it. (P. Addendum 1.3)
64. Around this same time, the Student began to refuse to go to social work and his behaviors started to deteriorate. (S. Appendix B.33, 38, 44-45, 51, 53; S.251-253) For example, on March 13, 2014, the Student told Ms. Cyr that he would only come to social work if she “let [him] play with toys for the whole 30 minutes... if not, then no way [would he go to social work] so go away.” (S. Appendix B.33) He also exhibited increased verbal and physical aggression while in sessions, such as telling other students they were “stupid” or calling them “idiots” and telling his peers they “better give [their toy] to [him].” (S. Appendix B.44) When peers would not comply with the Student’s demands, he would grab the item out of their hands and throw it or smash it on the ground until it broke. *Id.* As a result, the Student’s social work peers began stating that they did not feel safe being in social group with him. (S. Appendix B.45)

65. The Student also began telling staff that he “was going to another school and didn’t need to listen to [them] anymore.” (Bissell testimony)
66. On March 17, 2014, the Mother sent the School a list of parental concerns. (S. Appendix B.34) Around that same date, Ms. Bissell realized that the School had already met their Chapter 33 duties on October 11, 2013. (Bissell testimony, S Appendix B.36) She had been under the belief that the School was required to call an IEP meeting after every third incident of restraint or seclusion. (Bissell testimony) She was thereafter informed that the Maine Department of Education regulations only require one meeting, which must occur after the third incident of restraint or seclusion. (Bissell testimony, ME Dept. of Ed., Rule Governing Physical Restraint and Seclusion, Ch. 33 9(2)(A)).
67. On March 19, 2014, Ms. Bissell communicated to the Mother that the March 21, 2014 meeting was cancelled due to her own misunderstanding of the Maine rules but would like to reschedule the meeting to discuss the concerns raised in the Mother’s statement of parental concerns. (S. Appendix B.36) Ms. Bissell offered several possible dates in early April as potential meeting times. (S. Appendix B.40)
68. On March 18, 2014, after refusing to attend his social work session, the Student’s behavior escalated: mocking and provoking other students, ripping pages out of his text book, swatting the hand of a teacher, and flipping over a table. As a result of this behavior, the school was forced to evacuate the other students, all of whom were crying as they were scared of the Student. The Student continued to “knock items over and throw items around the room and at [teachers].” The Student was directed to the break space, where he once again challenged teachers to fight, called them “mother f~ers,” spat on the door, and threw his boots at the ceiling in an attempt to break the lights. When two teachers entered the room to remove Student’s boots, he threw his boots at them and tried to bite them. After this incident, Student’s peers shared that they “felt really scared of [Student] and didn’t want to be near him.” (S.251-254)

69. On March 20, 2014, Dr. Slap-Shelton notified the School that she was evaluating the Student and it appeared to her that he may have a diagnosis of PTSD. She stated that once the evaluation was complete she would be sending a copy to the School. (P.2)
70. In March 28, 2014, Dr. Grapentine's notes for the first time that the Student's symptoms may be those related to possible PTSD diagnosis. (S. Appendix E.12)
71. On April 1, 2014, an incident occurred relating to the transportation of the Student on a school bus. The Student attempted to leave his assigned school bus, jumped over seats, and scared small children, all while the bus was stopped at a different school in the district picking up students. Teachers escorted the Student off the bus and into the school building, where the Student proceeded to tear objects off the wall and throw them at staff. The Student also picked up a pencil and tried to use it as a weapon. At that point, the School called the police. When the Student's mother arrived he bolted for the door. (S.255-257, 342; Bissell testimony) Thereafter, he was dismissed for the day and given a two day in-school suspension on April 3 and 4, 2014. (S.338)
72. Also on April 1, 2014, the School issued its findings with respect to the Parents' Chapter 33 complaint. The report indicated that, while the School failed to report three instances of restraint, and that an IEP meeting should have been convened, there was no evidence that the staff's use of restraints and seclusion otherwise violated Chapter 33. (S. Appendix C.65-85)
73. On April 9, 2014, the Student was dismissed from school for the remainder of the day and given a one day out-of-school suspension for "aggressive behavior" (throwing a ball at a student, swearing at a student, and refusing to be redirected). (S.341, 342)
74. The Student's IEP Team met on April 10, 2014. (S.258) The Written Notice summarized these discussions. (S.258-263) The Team reported on the Student's progress. Ms. Bissell reported that academically, the Student had scored within the average range on all standardized academic tests. His lower scores were in reading within the comprehension

aspect. (S.261) Mr. Holland, the Student's teacher, reported that the Student had been successful working up the level system, but not when he was in transition or had a disciplinary action. He also reported that the Student's level of engagement depended on his mood and most often was not engaged. During read-aloud, the Student often "roamed around the room," did not attend, and often asked to go see Mr. Potter or another place instead of doing a task asked of him. (S.259) Mr. Holland reported that he did not have any completed assignments from the Student, except for one piece of writing. (*Id.*)

75. Ms. Reynolds reported that she had been providing consultation services with the Special Education Teacher and social worker. She had done observations and had recommended ways to teach coping strategies, inflexibility and self-regulation. She felt that the Student was appropriately placed. When she has observed the Student, she has seen him engaged, that he knew where his materials were, what the exceptions were and could explain the leveling system. (S.259)

76. Ms. Cyr, Student's school social worker, reported that she had been working with the Student to identify where the "safe places" were and the words he could use to express his needs. She noted that processing an event from the day before became a trigger for him. She stated that he talks through how he could respond if something does not go as expected. She stated that he was now able to demonstrate some flexible thinking in the group session but did not demonstrate that outside the session. She also reported that the Student was an emerging social thinker and working on valuing opinions of others, how his behavior choices affected others, how to handle his emotions if he does not win a game, and how to handle it if he is not in the leadership role with his peers. She noted that the Student was receiving 155 minutes of social work per week, the highest level of services on her caseload. (S.260)

77. Ms. Payeur, the Student's occupational therapist at school, reported that she had been working with the Student on "Zones of Regulation." She commented that emotional triggers included writing tasks and his belief that his peers do not think he is smart which she believed resulted in his work refusal. She stated that she would like to see him

become more confident. She noted that the Student was now able to use the swing and now understands what it felt like to be in the “Green Zone.” (S.260)

78. The Mother reported to the IEP Team that Dr. Slap-Shelton had diagnosed the Student with dyslexia and believed that the Student felt bad about himself because he can’t do something, such as read, which causes a trigger and an escalation of his emotions. (S.262)

79. The Mother stated that she was not sure that the School continued to be the right placement and that she was thinking about unilaterally placing the Student in an alternative school, such as Aucocisco, which she had already visited. Ms. Tchao, the School’s legal counsel also attended the meeting. She asked the Team members about their thoughts regarding an out-of-district placement. The Written Notice summarized Ms. Bissell’s opinion as follows:

We have demonstrated that there has been significant progress since September 2013, although there has been a recent increase in escalation. (The Student’s) behavior plan needs to be followed to fidelity, he needs to get to school on time have prescribed times to call home and go to the support/transition room. However, (the Student) has a lot of power and reported at school that his mom has a new lawyer and is going to sue you again. For all of those reasons, we are at a place where we should consider an out of district placement, although we don’t have control over a lot of factors that are needed to do what we need to do for (the Student). (S.261)

80. Ms. Bissell was reported not to agree with an academically based program and believed that the Student needed a more therapeutic program such as Sebago Alliance or Sweetser. (S.261)

81. At the IEP meeting on April 10, 2014, the IEP Team agreed upon a process for investigating three different outside placements: the Aucocisco School, the Sweetser program, and the Sebago Alliance (“Alliance”). (S.261) The Team also agreed that Ms. Reynolds, on behalf of the School, and the Mother, on behalf of the Parents, would separately learn about and visit all three programs and the Team would then reconvene on May 20, 2014 for the purpose of making a final placement determination. (S.261, 262)

82. The IEP Team also discussed the use of restraints and seclusion at the April 10, 2014 IEP meeting. The Mother reported that the Student had stated that he felt like a “monster”

when he was restrained and secluded. (S.260) Ms. Bissell reported that the one time a restraint was not used, the Student “destroyed the classroom which frightened the other students.” (S.260) She clarified that a restraint was always used as the last resort, but that the Student was telling the staff that he could not deescalate by himself. (S.260)

83. Based upon the review of the Student’s needs and progress, the IEP Team concluded that his needs at that time included: structure; predictable routine; small group setting; quick feedback; peer relationship skills; support for work completion; activating prior knowledge; accessing OT for sensory needs; support to increase level of compliance; increased engagement in academic time; improved self-confidence; therapeutic process to respond to escalation; and external support to connect the dots that his feelings are related to his actions. (S.260)

84. On April 15, 2014, during social work, the Student was involved in an incident that did not involve the use of restraint or seclusion. The social work group was playing with Legos, and although there were enough Lego people for each student, the Student’s behavior became escalated when another student began playing with a piece the Student wanted. When the peer would not accede to the Student’s demands for the piece, the Student grabbed it, along with the Lego project that the peer was building. The Student smashed the project on the table and said “Look see I got it didn’t I you idiot, now I told you it was mine and now I proved it was mine.” The other child began to cry, and stated he did not want to participate in the group with the Student anymore. This child was directed to return to class. The Student turned to a third student in the room and said “Don’t worry, you didn’t have my favorite Lego guy, I’m not gonna bother you.” For the remainder of the session, the Student refused to participate in exercises to process his aggression. At the end of the session, when the Student told the support and transition teacher that he couldn’t find his jacket, Ms. Cyr offered to help. In response Student said, “Shut up you old lady you mother f**er you don’t need to know what I do and how I do it, you stupid.” At this point, the Student was directed to the office, where he stabbed the countertop with a pen, and threw objects at the secretary and at Ms. Bordeaux. The Student also proceeded to run through the hallways, disrupt other classes (whose students needed

to be escorted to a safe location), grab, hit, and kick Ms. Bordeau and Mr. Potter, and interrupt an IEP meeting. (S.264-267) Thereafter, he was suspended for three days. (S.264)

85. On May 6, 2014, the Student's behavior became escalated after he refused to participate in social work and was informed he would not get any social work points that day. Student ran through the school and into the tunnel, where he wedged his arm in a door to keep it shut and would not let other students pass. Mr. Potter attempted to open the door, the Student screamed and ran outside into the parking lot, and then up the hill behind the school. The Student then ran back down the hill, where Mr. Potter met him at the front door. The Student hit, kicked and taunted Mr. Potter, and was thus placed in a hold and escorted to the break space, where he was able to calm down. When he was calm, the school radioed for the nurse to come and check on the Student's arm, which had been wedged in the door. The nurse reported that the Student was not hurt, but acted as if he was hurt when he was holding the tunnel doors closed. (S.341; P Addendum 2.12, 14-16) He was placed in a hold and then put in seclusion. He was dismissed from school after lunch and later suspended. (S.337, 341)

86. After the incident on May 6, 2014, the Parents decided to remove Student from school for the remainder of the year. (Mother's testimony)

87. On May 16, 2014, Dr. Slap-Shelton submitted her final neuropsychological evaluation to the School. (S.301) Her findings included the presence of clinical levels of depression, anxiety, aggression, social withdrawal, symptoms of impaired social interactions, and problems with adaptability, executive functioning impairments, and learning problems. (S.301) He also met criteria for Autism Spectrum Disorder and Asperger's Disorder and had behavioral ratings that were significant for the presence of PTSD. (*Id.*) She stated that the use of restraints represented a "very significant PTSD trigger" and led to "flight behaviors" which put the Student at risk. (S.303) She further stated the following: "The use of placement in an isolation room, an empty room, or in any room in which (the Student) is left alone to calm down must also be avoided as this is also a trigger for (the Student). Further episodes of traumatic experiences will lead to further mental and

physical harm for this boy. Because of this it is recommended that (the Student) have a more detailed Functional Behavioral Analysis plan and that his behavioral plan be frequently monitored and reevaluated.” (S.303)

88. On May 20, 2014, the Student’s IEP Team reconvened as scheduled, at which point the Team determined that Student would be placed at Alliance, effective July 1, 2014. (S.321-325)

89. The Mother and Dr. Laura Slap-Shelton both attended this IEP meeting and both agreed with the IEP Team’s placement determination. Although an earlier start date at Alliance was considered, the IEP Team, including the Mother, decided it would be best for Student to receive tutoring for what little time remained of the school year before summer programming began (May 21 to July 1, 2014). (Bissell testimony, S.321-324) The Parents and the School also agreed that the Student’s OT and social work services would be discontinued until the Student began at Alliance. (S.324) This decision was reached for a number of reasons, but largely because Student had already reached his OT goals and was now refusing to attend his sessions at Willard. (S.167; Bissell testimony)

90. In addition, the Mother stated that she preferred a tutoring schedule that would allow her to have the Student see Ms. Binette twice a week as had been recommended by the counselor. (S.324)

91. Staff from Alliance attended the IEP meeting on May 20, 2014. They made it clear that that if the Student attended Alliance, they could not agree to refrain from the use of restraints when the Student’s behavior risks causing harm to himself or others. (Bickford testimony) The Parent agreed that this would be acceptable and signed a contract to that effect. (S.335, 336)

92. The Student began at Alliance on July 1, 2014, as scheduled. (Bissell testimony) When the semester began in the fall, the Student’s inappropriate behavior began to escalate when he was faced with academic challenges. (Bickford testimony)

93. In his first two months at Alliance, the Student was restrained five times. (Bickford testimony; S.437-442) These behaviors included “property destruction, attempts to hurt staff, often not be in a designated area... he would remove part of the molding around the floor or he pulled up the carpet and there was glue underneath that he got. And so sometimes he would have some object that presented a safety issue or he would be engaged with some furniture or something else that presented a safety issue.” (Bickford testimony; S.437-442)
94. The Student’s behavior was so significant at times that staff from the whole building would be called to try to support him. At one point, Alliance was unsure they could continue to educate him. (Bickford testimony)
95. As recently as January 29, 2015 and February 5, 2015, the Student had to be restrained due to his behaviors. (Bickford testimony)
96. Dr. Slap-Shelton has never been an employee of a public school, carries no special education certifications, and is not trained in special education. (Slap-Shelton testimony) Despite having concluded that the use of restraints in school caused the Student PTSD, Dr. Slap-Shelton observed the Student in an educational setting for 1.5 hours. During this time, the Student’s behavior did not seriously escalate. (Slap-Shelton testimony)
97. Dr. Slap-Shelton’s other experience with the School was a phone call with Ms. Reynolds and her attendance at the IEP meeting on May 20, 2014, in which she recommended the Student be placed at Alliance. (Slap-Shelton testimony)
98. Dr. Slap-Shelton testified that prior to her preparation for this hearing in January 2015, she had not reviewed any of the incident reports generated by the Sanford School Department regarding restraints or seclusions of the Student from the 2013-2014 school year. (Slap-Shelton testimony)
99. Dr. Slap-Shelton also testified that she was unable to form opinions regarding the implementation of the 2013-2014 IEP because she had “not reviewed [the IEP] and [she]

did not interview people about how it was being implemented so [she] did not have an opinion on that.” (Slap-Shelton testimony)

IV. BRIEF SUMMARY OF PARTIES’ POSITIONS

Parents’ Position

As an initial matter, the Parents state that they are withdrawing claims that the Student was denied a FAPE during the 2014-2015 school year, as well as their claim that the School failed to provide the Student with related services during the 2013-2014 school year.

The Parents argue that the School denied the Student a FAPE during the 2013-2014 school year by failing to implement the Student’s IEP and BIP from that year. While they acknowledge that they waived all the claims against the School that may have occurred prior to the execution of the Settlement, they aver that the Student’s needs changed significantly after November 19, 2013, enough to warrant amendments to his IEP and BIP.

The Parents acknowledge that during the months of December 2013 through January and February 2014, the Student’s behavior at school improved, noting only two incidents involving a restraint or seclusion (December 17, 2013 and January 10, 2014). It was at that time that the Student began psychological counseling and psychiatric treatment with Ms. Binette, Dr. Grapentine, and Dr. Slap-Shelton. The Parents argue that the Student’s behavior started to regress significantly sometime in March 2014, which coincided with the departure of his teacher, Ms. Parent, who went on maternity leave. They cite incidents of restraint and seclusion that occurred on March 5, 6, 18, April 1, 2, 10, and May 6, 2014; nine out-of-school suspension days during the last trimester of the school year; and seven in-school suspension days. The Parents emphasize that other than notes regarding the Student’s OT and social work goals, there was no documentation about his academic progress or grades for the final trimester of the 2013-2014 school year.

The Parents also argue that by the time the IEP Team met on April 10, 2014 and changed his placement on May 20, 2014 to Alliance, it was too late to make any meaningful change that would have allowed the Student to make educational gains. (Citing *Neosho R-V Dist. v. Clark*, 315 F.3d 1002, 1029 (8th Cir. 2003); *In re Student with a Disability*, 64 IDELR 188 (SEA Montana, 4/24/2014)(district's failure to convene an IEP meeting to address the student's increasing violence and disruptive behaviors impeded her ability to learn)).

The Parents assert that the IEP Team was notified on April 10, 2014 that the Student was diagnosed with PTSD but ignored the requests made by the Mother, Dr. Bordeau, and Dr. Slap-Shelton to refrain from using restraints and seclusions, which they believed exacerbated his emotional well-being and jeopardized his safety, thereby denying him a FAPE. (Citing *Lincoln (NC) Charter School*, 63 IDELR 83 (OCR 12/23/12); and *Rutland City Public Schools*, 63 IDELR 273 (SEA VT, 2013)(Continued use of restraints traumatized the student to the point that it resulted in a denial of a FAPE)).

The Parents also claim that the failure to provide a BIP during the Student's bus transportation also resulted in a denial of FAPE. (Citing *Corpus Christi Ind. SD*, 57 IDELR 297 (SEA TX, 2011)).

School's Position

The School argues that the Parents have the burden to prove that a material change, in the conditions or circumstances of the Student's needs, presentation, or disabilities, occurred after November 19, 2013, the execution date of the Settlement, which would have caused the IEP Team to reconvene and address those unforeseen changed circumstances. (Citing *South Kingstown Sch. Comm. v. Joanna S.*, 773 F.3d 344 (1st Cir. 2014); *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 900 (3d Cir. 1997)).

The School argues that once the Settlement was executed, the Parents waived future claims alleging inadequacies of the Student's IEP or BIP, because no material changes occurred after November 19, 2013.

The School asserts that many of the claims that the Parents raised in this Hearing regarding the design and implementation of the IEP and BIP were the same ones raised in the fall of 2013, prior to the execution of the Settlement (e.g., that the BIP did not include all suggested interventions; and the School's misuse of restraints and seclusion). However, the Parents thereafter agreed to language in the Settlement that the School would "implement the behavior improvement plan that had been developed by Ms. Parent, the behavioral classroom teacher." (S.155). The School also claims that the Parents' concerns regarding the use of restraints and seclusion were the same ones raised prior to November 19, 2013. It asserts that they knew that the School was using restraints and seclusion techniques to address the Student's unsafe behaviors prior to November 19, 2013, and knew that the School intended to continue using these interventions in the future, but only as a last resort to maintain the Student's safety and the safety of others. The School notes that with this knowledge and understanding of the School's position on the use of restraints and seclusion, the Parents signed the Settlement, which does not prohibit the use of these techniques, on November 19, 2013. It emphasizes that the Parents understood that physical intervention and restraints may be used when they agreed to the placement at Alliance. The School notes restraints have been needed at Alliance during the 2014-2015 school year.

The School argues that there was no "change in circumstances," even if there was some deterioration in the Student's behavior as it reverted back to his previous status quo. (Citing *South Kingstown, supra.*).

The School avers that even if the Parents provided evidence of a material change, the details of the Student's IEP clearly show that his programming was tailored to meet his unique needs, citing the specific special education instruction, related services, and supplementary aides in the IEP. The School also states that despite his behavioral difficulties, the Student was still able to make adequate progress in most of his goals and short term objectives up until March 2014, and some of his OT goals thereafter.

The School asserts that the negative behaviors exhibited by the Student starting in March 2014 were the result of what was happening at home, over which School staff had no control. It

points out that the Student was tardy six times, absent three times, dismissed early once. It also suggests that the Student was receiving information at home that may have influenced his behavior at school, such as the knowledge that he may be leaving Willard, and the Parents' conversations about the impending legal action they would be taking. The School argues that the Student manipulated the adults around him (with his behaviors) to influence the outcome that occurred – leaving Willard. It also suggests, for example, that he knew that his Mother would pick him up at school if his behaviors were disruptive to the school environment.

The School emphasizes that staff was quick to schedule an IEP meeting when the Student's behaviors became severe in March 2014. Despite it being postponed, the IEP in April 2014 is evidence that the School was taking the Student's apparent regression seriously by responding in a reasonable time frame and making changes in his placement when it became evident that they had run out of options for the Student.

The School dismisses the opinion of Dr. Slap-Shelton, that the Student was suffering from PTSD due to the use of restraints and seclusion at Willard from November 19, 2013 through May 6, 2014. It asserts that her credibility is in question because she failed to interview anyone at the School; failed to observe the Student in the school setting; failed to review school records; and failed to review the psychological evaluation performed by Dr. Fink this person has not been introduced yet one year prior. It asserts that Dr. Slap-Shelton used only information provided by the Mother's response to the PTSD Inventory and the Student's self-report to form her opinion. It notes that there is a view in the field of psychology that the PTSD Inventory is notoriously problematic because no person is a good judge of their own character, especially children. Also, the School suggests that Dr. Slap-Shelton's opinion on this issue is even more questionable given that she approved of the placement at Alliance, where restraints have been used regularly. The School points to the assessments of the Student's private psychologist, Dr. Grapentine, as well as the School's mental health professionals and Dr. Bickford, Director of Alliance, who disagreed with her diagnosis of PTSD.

The School finally argues that the Student's BIP was known to all staff that worked with him, and therefore the School was not required to have it attached to his IEP. (Citing *Lessard v.*

Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 20, 25-26, (1st Cir. 2008); U.S.C.; §1414(d)(1)(A)(i)(ii); MUSER IX.3(A)(2)(a)).

V. LEGAL STANDARDS

The IDEA requires local school units to provide disabled students with a FAPE in the least restrictive environment. The IEP must include, *inter alia*, present levels of performance, annual goals, a determination of services that are reasonably likely to accomplish those goals, and an educational placement that can implement the plan in the least restrictive setting that is appropriate for the child. (See, e.g., 20 U.S.C. §§1412(a)(5)1414(d)(1)(A); 34 C.F.R. §§300.320(a), .114 to .116; MUSER IX.3(A)) Also, if a student’s behavior interferes with his ability to made educational progress, the IEP Team must consider the use of positive behavioral interventions, supports, and other strategies to address the behavior. (20 U.S.C. §1414(d)(3)(B)(1); MUSER IX.3.C(2)(a))

The IDEA requires that school districts review and revise an IEP to address “(i) any lack of expected progress toward annual goals; (ii) the results of any reevaluation conducted under this section; (iii) information about the child provided to, or by, the parents; (iv) the child’s anticipated needs; (v) other matters. (20 U.S.C. §1414(d)(4)(A))

The Supreme Court has set a two-part standard for determining the appropriateness of an IEP. The Court first asks whether the IEP was developed in accordance with the IDEA’s extensive procedural requirements, and then whether the IEP is reasonably calculated to enable the child to receive “some educational benefits.” (See *Bd. of Educ. Of Hendrick Hudson Cent. Sch, Dist. v. Rowley*, 102 S. Ct. 3034, 3047, 3051 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist*, 518 F.3d at 27; *T.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004))

The First Circuit has explained the IDEA’s duty for appropriate programming as follows:

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the

handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990)

Thus, as long as an IEP is reasonably calculated to provide some educational benefits, the program need not maximize the student's educational potential. (See *Rowley*, 102 S. Ct. at 3048, 3051.) In *Lenn*, 998 F.2d at 1086, the First Circuit stated that the program must be "adequate." It has also stated that an IEP can be appropriate even if it is not "the only appropriate choice, or the choice of certain select experts, or the child's parents' first choice, or even the best choice." *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991)(emphasis in original)

When determining whether an IEP meets this standard, the Court must view the IEP decisions, not in hindsight, but in terms of what was reasonable "at the time the IEP was promulgated." *Roland M.*, 910 F.2d at 992. The First Circuit has explained this "reasonable calculation" standard by saying:

[a]ctual educational progress can (and sometimes will) demonstrate that an IEP provides a FAPE.... But to impose the inverse of this rule—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. Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology ex post merely because the disabled child's progress does not meet the parents' or the educators' expectations.

Lessard, 518 F.3d at 29 (internal citations omitted)

In *Lenn*, the court also stated that the IEP is to be judged as a unitary whole and not piecemeal. Just because some portion of the IEP might not be as strong as it could be, the IEP will still pass legal muster if the overall document is reasonably calculated to provide some educational benefit. *Lenn*, 998 F.2d at 1089-90 (cautioning against "balkanization" of the FAPE question)

When there is a challenge to the implementation of an IEP, the party raising the challenge must show more than a *de minimis* failure to implement all elements of the IEP. Instead, courts

have found that “the failure to implement a material or significant portion of the IEP can amount to a denial of a free appropriate public education.” *S.D. v. Portland Pub. Schs.*, No. 2:13-cv-00152-JDL, 2014 WL 4681036, at *6 (D. Me. Sept. 19, 2014) (internal citations and quotation marks omitted)(quoting *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478, 484 (4th Cir. 2011)) However, “perfect implementation is not necessarily required.” *Id.* See also *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821 (9th Cir. 2007)(“There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a [FAPE].”); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)(Parent must show failure to implement “substantial or significant provisions of the IEP.”); *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014)(Citing *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007)(establishing a material failure standard))

Furthermore, where a student’s program addresses strategies to improve functional behavioral progress when the behavior interferes with educational performance, even if more positive behavior intervention could be employed, “that fact is largely irrelevant if the school district made a good faith effort to help the student achieve the educational goals outlined in the IEP.” *Gray v. Lathrop R-II School District*, 611 F.3d 419 (8th Cir. 2010), *cert. denied* 131 S. Ct. 1017 (2011)

Where there is a settlement agreement resolving and/or waiving all prior allegations of violations of a student’s educational programming, a parent will only be allowed to raise issues that had been part of the settlement agreement if there is a material or sufficient change in the student’s conditions or circumstance. *South Kingstown Sch. Comm. v. Joanna S.*, 773 F.3d at 352, 354-355 (1st Cir. 2014)(No material change had occurred post settlement agreement that warranted an additional evaluation that was not agreed upon as part of the settlement.); *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 109 F. 3d 896, 900 (3d. Cir. 1997)(A change in the cost of an alternative school placement was not a material change.)

VI. ANALYSIS

In order to decide any of the issues in this case, it is first necessary to determine which party has the burden of proof. As the Supreme Court held in *Schaffer v. Weast*, “we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” 546 U.S. 49 (2005) The Court acknowledged that the rule applies with equal effect to school districts. In this case, the Parents have the burden of proof.

The Parents do not challenge the substantive aspects of the Student’s IEP based upon the release language of the Settlement. Rather, they allege that the School denied a FAPE to the Student by not properly implementing or revising the IEP or BIP when it became apparent to them that he was showing significant regression in his educational progress in the spring of 2014.

The Student began the 2013-2014 school year with an IEP that was effective from May 30, 2013 through May 28, 2014. Historically, the Student had exhibited disruptive, harmful, and dangerous behaviors since at least xx grade and continuing up through the 2014-2015 school year. Under the 2013-2014 IEP, the Student was provided special education and related services under the exceptionality of Other Health Impairment. He was academically on grade level in mathematics, but below grade level in literacy. Both areas required specially-designed instruction due to his maladaptive behaviors. On a functional level, the IEP was clear that the Student needed external supports during the day to help him regulate his body and behavior. He required “significant” teacher support during inappropriate and unexpected behavioral incidents, including positive praise and reinforcement for positive behavior, assistance in recognizing his positive choices, and assistance with role modeling an appropriate way to deal with his aversive feelings and low level of alertness. The Student’s significant difficulty in the areas of coping during periods of emotional distress adversely affected his ability to attend to academic tasks in school settings, thereby requiring a highly structured small group special education program.

The IEP included academic and literacy goals, and short term objectives. Most of his goals included improving his ability to attend to his self-regulation, expressing his feelings in a safe manner, using problem-solving strategies when in distress, and increasing his skills at using sensory integration techniques.

The special education and related services detailed in the IEP included specially-designed instruction, tutorial services, and supplementary aids, services, modifications, and support. With respect to modifications, the Student was to have adult support in the general education setting; frequent breaks; modeling appropriate behavior; sensory and/or movement breaks; opportunities to use a break space; as well as others. In summary, the majority of the Student's goals and short-term objectives focused on improving his skills and strategies in becoming emotionally self-regulated, so that he could develop his academic and functional abilities.

While not included in the IEP, the Student's BIP, effective in the fall of 2013, prior to the execution of the Settlement, included similar goals with motivating strategies, such using a token economy and other interventions if his behaviors escalated to the point of needing redirection. These interventions included a "time-away" area that was self-directed when he felt the need to separate himself from the activities in the classroom. It also included the ability to use a walking pass to remove himself from possible emotional triggers, and phone calls to his Parents in order to reduce the escalation of those triggers. Also, the BIP included the use of in-school versus out-of-school suspensions when his behavior required him to be removed from the general population.

It was apparent that the Student struggled during the first three months of the 2013-2014 school year. He was either absent, tardy, dismissed, or suspended in 14 out of the first 16 days of school. The IEP Team met on September 24, 2013 to discuss the Student's maladaptive behaviors and the strategies to be used by the School, and the Parents at home, to help the Student regulate his own behaviors. These behaviors included noncompliance, elopement, aggression towards others, and verbalizing his understanding that he would be sent home if he acted out. The IEP Team discussed the possible antecedents to his behaviors and agreed that an FBA should be completed. The School made it clear that if the Student's behavior escalated to the point where he might injure himself or others, or if he engaged in property damage, they may need to implement restraints and seclusion procedures by trained staff as a last resort in order to calm him. The School defined seclusion as a space only used if a student was attacking another

student or adult, was bolting, or if there was a threat of imminent danger.⁴ The School also defined “time-away” space as an area in the classroom with sensory tools and a curtain that could be pulled closed for privacy that could be accessed by the Student voluntarily when he felt the need to break away from the classroom activities.

The Parents were not satisfied with the outcome of the IEP meeting and thereafter filed a request for a due process hearing, alleging that the School failed to provide a FAPE by 1) not conducting an FBA by a qualified behavior consultant, and 2) changing his program to include more task demands than the Parents believed the Student was equipped to handle or complete. They also alleged that restraints and seclusions were detrimental to him due to abuse he experienced as a younger child, believing that they would cause further regression.

The Parents and the School reached their Settlement regarding these issues, which included releasing the School from *any and all* claims of violations of the IDEA, as well as other statutes and regulations, stemming from the Student’s programming through November 19, 2013, the date the Settlement was executed.

I find, therefore, that while the Student exhibited significant maladaptive behaviors during the early implementation of the 2013-2014 IEP through November 19, 2013, any claims raised by the Parents through November 19, 2013, regarding alleged violations of the IDEA, MUSER, and accompanying regulations, were resolved or waived pursuant to the Settlement. (See *South Kingstown*, supra.)

November 20, 2013 – May 20, 2014

The implementation of the IEP after November 19, 2013 was apparently successful until March 2014, with the exception of four incidents of disruptive and/or dangerous behavior.⁵ The Student made “adequate progress” in most of his IEP goals through March 5, 2014.

⁴ Stacey Bissell clarified at the hearing that the area of seclusion was called a “break space.” The “time-away” space was a curtained-off area of the classroom where the Student could voluntarily go when he felt the need to remove himself.

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- December 17, 2013: An Ed Tech intervened to stop the Student from potentially bolting and accidentally scratched his arm;

From March 5, 2014 through April 2014, the Student's maladaptive behaviors increased.⁶ An IEP meeting was scheduled for March 21, 2014, initially to discuss the use of restraints and seclusion that had been used. However, it was postponed to April 10, 2014. In the meantime, the School's staff continued to implement the BIP and use de-escalation techniques when the Student displayed maladaptive behaviors.

At the IEP meeting held on April 10, 2014, the Team agreed that the Student's behavior was continuing to interfere with his ability to attend to his educational program. Possible antecedents were discussed. While the School surmised that there must have been changes in his home life, including having inconsistent routines, the Parents believed that the departure of the Student's teacher, Ms. Parent, and the transition to a new teacher were emotional triggers that interfered with the Student's progress. What was clear to everyone was that the IEP Team needed to reassess the Student's programming due to the Student's increased emotional deregulation. The IEP Team agreed that the Student continued to need the following: strong clinical support from the social worker and school psychologist; structure in his program; predictable routine; small group setting; quick feedback; peer relationship skills; support for

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- January 10, 2014: The Student bolted from the classroom, screamed at students, kicked a student, and head-butted a teacher; he was subsequently placed in a hold and taken to the office to eat lunch with an adult;
 - January 16, 2014: On the bus, the Student used profane and provocative language toward students and the driver, and threaten to harm a student;
 - February 7, 2014: The Student was banging on a bus seat.

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- March 5, 2014: The Student eloped from the classroom and hid; kicked lockers; slammed doors; ran to office; grabbed objects from a desk; wedged door shut; escorted to support and transition room; was picked up by his mother at her request;
- March 6, 2014: The Student eloped from the classroom, ran through the halls; held a door shut, screamed; and ran outside into the parking lot, up the hill near the school and back; hit and kicked a teacher before he was placed in a hold and escorted back into the school;
- March 18, 2014: The Student engaged in property destruction in the classroom, causing other students to be escorted out of the room; threw objects at teachers; swore, spit, attempted to punch a teacher; grabbed and held a teacher by the shirt; escorted to the break space; picked up by his mother;
- March 26, 2014: The Student tore up his class work, and that of another student;
- March 31, 2014: Upset in PE, the Student would not give back his racket;
- April 1, 2014: The Student was screaming and jumping on chairs in the bus; caused property destruction; exhibited threatening behavior (police were called);
- April 9, 2014: The Student ran from the café; threw basketballs at kids; swore at kids; refused redirection;
- April 15, 2014: The Student disrupted a social work session and ran around the school disrupting other classes; caused the school to clear all the hallways.
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work completion; activating prior knowledge; accessing OT for sensory needs; support to increase level of compliance; increased engagement in academic time; and improved self-confidence. (S.260) In addition, Ms. Bissell insisted that the Student's BIP must be followed to "fidelity," including having him arrive at school on time and ensuring that he had prescribed times to call home and go the support/transition room. (S.261) However, the IEP Team ultimately agreed that his behaviors were interfering with his educational progress to such an extent that consideration of a change in placement to a therapeutic program such as Alliance or Sweetser was warranted. (S.261)

After a final incident on May 6, 2014, wherein Student's behavior led to a restraint and seclusion, the Mother chose to unilaterally remove the Student from the School for the rest of the school year. Thereafter, on May 20, 2014, the IEP Team, including the Parents, agreed that the Student would be enrolled at Alliance.

I find that while the frequency of the Student's maladaptive behaviors increased during March and April 2014, it was not a material change from the behaviors he exhibited prior to November 19, 2013, the effective date of the Settlement. His disruptive and sometimes violent behaviors dated back to daycare, when Dr. Fink reported that his behaviors were significant. While they declined somewhat between December 2013 and February 2014, there was only a three-week span in April 2014 (from April 16 through May 5, 2014) when no emotional outbursts requiring adult intervention occurred. Also, the type and degree of severity of the disruptive behaviors did not change. The Student continued to present emotional disturbances that posed a danger to himself and others (e.g., threatening harm to his peers, hitting, kicking, and grabbing his teachers), as well as engaging in property destruction. As in the past, the School used physical interventions (restraints and seclusion) as well as in-school and out-of-school suspensions during these serious incidents. These were not new interventions. During prior IEP meetings in 2013, as well as in written communications, the School had reiterated to the Parents that restraints and seclusion would be used only if necessary, and as a last resort, by staff trained in safety protocols. Therefore, any issue regarding the use of restraints and seclusion was

covered under the scope of the Settlement and waived by the Parents.⁷ Therefore, I find that the Parents' allegations, that the School failed to deliver a FAPE to the Student during the 2013-2014 school year, continued to be waived based upon the release language detailed in the Settlement. (See *South Kingstown*, supra.)

I also find that, even if the frequency of the Student's maladaptive behaviors was a material change that would cause the IEP Team to review the Student's IEP and BIP, the School made a good faith effort to provide a FAPE to the Student despite the IEP Team's ultimate decision to place him at Alliance. On April 10, 2014, the IEP Team reviewed the Student's needs, reinforced the need to follow the BIP consistently, and discussed the possible antecedents to his behaviors. The IEP's detailed goals and objectives continued to be relevant, as well as the related services, supplemental aids, and services. The Team reiterated the need for everyone involved, including the Parents, to have the Student follow consistent routines at school and home. After April 10, 2014, there were only two reported incidents of serious behavior (April 15 and May 6, 2014) that resulted in the staff interventions. While not a perfect outcome, the School's reinforced efforts appeared to have a positive effect on the Student's ability to regulate his emotional triggers. Based upon this good faith effort to provide continued positive interventions until the Student was placed at Alliance, I find that the School continued to provide a FAPE to the Student. (See *Gray*, supra.).

The Parents raise the issue that the School failed to provide sufficient support on the bus, which could have helped the Student alleviate his emotional distress during his transport to school. I find merit in this allegation. In at least two reported incidents after the execution of the Settlement, the Student caused major disruption on his bus. In addition, the School reported at the IEP meeting on April 10, 2014, that at least three drivers and two monitors had not been able to transport the Student due to his behavioral problems. While I find that the School provided a FAPE to the Student, I also find that it should have increased support during the Student's transportation. Since there were only two reported incidents of problems on the bus, I find that

⁷ The issue of whether the School properly utilized restraints and seclusion and aversive intervention measures, pursuant to Chapter 33 of the Maine Department of Education's regulations, is not within the jurisdiction of the hearing officer to resolve. The determinations in this due process hearing are confined to whether the School provided the Student with a FAPE pursuant to the IDEA and accompanying federal and state regulations.

the lack of support does not rise to the level of a failure to provide a FAPE, or would warrant compensatory relief. If there had been additional major incidents of this sort, then additional support would have been ordered.

The Parents cite *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1002 (8th Cir. 2003) in support of the proposition that by the time the IEP Team met in April 2014 and changed his placement in May 2014, the School had already denied him a FAPE during this xx grade year. “He spent little or no time with his peers, missed a considerable amount of school, and made no progress toward his goals or objectives.” (Parents’ brief). However, *Neosho* stands for the proposition that when an IEP requires a behavior management plan, the plan referenced by the IEP must be approved by the IEP Team and must qualify as a behavioral management plan. *Neosho* is not relevant to the facts of this case. Here, the Settlement reached by the Parties and executed on November 19, 2013, included a specific waiver of any and all claims regarding the Student’s programming up to that time. The BIP implemented in the fall of 2013 comes within the waiver period and was affirmed by the Parents. Therefore, even if the BIP, as written, was inadequate to address the Student’s behaviors, the Parents waived that claim when they executed the Settlement. The records also reflect that the BIP continued to be appropriate after the execution of the Settlement despite regression that occurred in March and April 2014. The IEP Team met and reviewed the Student’s IEP and BIP in April 2014, reinforced the need to continue the interventions, while at the same time considered, and ultimately agreed upon, an out-of-district placement.

The Parents also cite *Rutland City Public Schools*, 63 IDLER 273 (SEA Vt. 2013) and *Lincoln (NC) Charter School*, (63 IDELR 83) for the proposition that the use of restraints and seclusion exacerbated the Student’s regression in his behaviors. “Staff could see from their own experience that using restraints and seclusion was backfiring.” (Parents’ brief.) In *Rutland*, the hearing officer found that the pervasive use of restraints and seclusions was clearly detrimental to the student’s mental health. In addition, there was no evidence that the school district attempted to discuss alternative strategies, or whether an out-of-district placement was warranted, before the parent unilaterally removed the student.

The facts in *Rutland* are significantly in this case. Restraints and seclusion were not used “pervasively.” There were four instances of necessary restraint and seclusion after the execution of the Settlement. In addition, the Parents’ argument that the use of restraints and seclusion was detrimental to the Student’s mental health is diminished by the fact that they agreed that these techniques could be used at Alliance during the 2014-2015 school year.

The Parents place emphasis on Dr. Slap-Shelton’s diagnosis of PTSD for their argument that the School’s use of restraints and seclusion may have caused or at least exacerbated the Student’s emotional dysregulation. While PTSD may have been one of the Student’s many diagnoses, Dr. Slap-Shelton did not formally submit her evaluation to the School until May 16, 2014. By that time the IEP Team was actively looking at out-of-district placements. It is important to note that, while the evaluation was extensive and informative, it did not recommend the prohibition of restraints and seclusion. The recommendation was that they should be avoided. (S.303) It is apparent that the School has always maintained a policy that the use of restraints and seclusion should be avoided and only utilized as a measure of last resort. As the record reflects, they were used only to prevent harm to the Student, his peers and staff. The School found it absolutely necessary to place therapeutic holds on the Student when he actually engaged in violent behaviors or fled the School. These behaviors have continued at Alliance where the staff have also had to use restraints. Therefore, I find that the use of restraints and seclusions did not deny the Student with a FAPE.

In *Lincoln (NC) Charter, supra.*, the Office of Civil Rights (“OCR”) investigated whether a student was denied a FAPE under Section 504 of the Rehabilitation Act of 1973 (“Section 504”). In that case, the Student was diagnosed with PTSD, depression, and anxiety that affected his major life activity of socialization. OCR found that the school failed to create a 504 plan that addressed his maladaptive behaviors; failed to provide him with a 1:1 aide; and failed to have a written BIP in place. It found that informal behavior interventions were used inconsistently and could not be monitored for effectiveness. For example, while the student was allowed to leave class during a difficult emotional situation, administrators would allow him only five minutes out of class and send him back before he was calm, leading to more disciplinary infractions.

The facts in *Lincoln* are not similar to those in this case. The Student had an IEP with extensive goals and short term objectives focused on his functional and behavioral needs. He had a written BIP that included many positive intervention strategies that were reviewed in the FBA and endorsed by the IEP Team in the fall 2013. The School monitored his behaviors with daily tracking. Finally, the School convened an IEP in April 2014 to address the Student's regression in his ability to self-regulate his emotions. As a result, the IEP Team reviewed and assessed his BIP and his overall needs. Ultimately, the IEP Team concluded that a more therapeutic program was needed.

VII. CONCLUSION

I find that the School provided a FAPE during the 2013-2014 school year. Therefore no compensatory relief is warranted.

It is so ORDERED.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Hearing Officer

April 17, 2015
Portland, Maine