

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

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Parents)	DECISION and ORDER
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v.)	
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RSU No. 75/MSAD No. 75)	
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A hearing was held and this decision was issued pursuant to Title 20-A, MRSA §7202 *et seq.*, and 20 U.S.C. §1415 *et seq.*, and accompanying regulations. The hearing took place on April 3, 4, 5, and 6, 2018 in the Topsham Town Hall, Topsham, Maine, and on April 9, 2018 via telephone conference. Those present for the proceeding included the Mother, the Father (“Parents”); Richard L. O’Meara, Esq., attorney for the Parents; Heidi O’Leary, RSU No.75/MSAD 75 (“District”) Director of Special Education; Connor J.K. Beaty, Esq. and Daniel A. Nuzzi, Esq., attorneys for the District; and the undersigned hearing officer.

Testifying at the hearing were:

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| 1. The Mother | |
| 2. The Father | |
| 3. Peter Asaro | Landmark School teacher/advisor |
| 4. Marsene Caswell | MSAD 75 psychologist |
| 5. Catherine Curtis | Mt. Ararat Middle School special services coordinator |
| 6. John Feerick | Landmark School public school liaison |
| 7. Tanji Johnston | Mt. Ararat Middle School special services coordinator |
| 8. Paul Krueger | Landmark School academic advisor |
| 9. Nancy Marstaller | Former Mt. Ararat Middle School case manager |

10. Abigail McKenzie (f. Harvey) Bowdoinham Elementary School Title I teacher
11. Beth Ann Nickerson Mt. Ararat Middle School special education teacher
12. Heidi O’Leary District Director of Special Services
13. Bridgett Ortiz Bowdoinham Elementary School special education teacher
14. Carlton Winslow Landmark School residential advisor

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

A Due Process Hearing Request (“Hearing Request”), dated November 21, 2017, was received by RSU No.79 / MSAD No. 1 (“District”) on November 27, 2017. It was filed by the Parents on behalf of their son, [REDACTED] (“Student”), alleging violations of the Individuals with Disabilities Education Act (“IDEA”) by the District.

On March 19, 2018, the hearing officer held a telephonic prehearing conference. Documents and witness lists were submitted in a timely manner. The Parents submitted 791 pages of exhibits (herein referenced as P.#), and the District submitted 189 multi-page exhibits (herein referenced as S.#). Transcripts are herein referenced as T.#.

On March 16, 2018, the District filed a partial motion to dismiss based upon a two-year special education filing limitations period cited in MUSER 05-071, Chapter 101, § XVI.5(A)(2)(2010); MUSER § XVI.13(E)(2010). On March 30, 2018, the Motion was denied based upon the U.S. Appeals Court decision in *Ms. S. v. Reg’l Sch. Unit 72*, 2017 U.S. Dist. LEXIS 191257 (D. Me. Nov. 20, 2017).

The parties requested to keep the hearing record open until June 4, 2018, to allow them to prepare and submit closing arguments. The Parties agreed to have the Hearing Officer submit the decision on June 22, 2018.

II. ISSUES TO BE RESOLVED

1. Did the District's IEP and placement for the Student during fourth grade (2013-2014), either as designed or as implemented, fail to provide him with a free public education ("FAPE") under the IDEA, thereby entitling him to compensatory educational services?
2. Did the District's IEP and placement for the Student during fifth grade (2014-2015), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitling him to compensatory educational services?
3. Did the District's IEP and placement for the Student during sixth grade (2015-2016), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitle him to compensatory educational services?
4. Did the District's IEP and placement for the Student during seventh grade (2016-2017), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitling him to compensatory educational services?
5. Did the District's proposed IEP and placement for the Student for eighth grade (2017-2018), fail to provide him with a FAPE under the IDEA?
6. If the District violated the Student's rights under the IDEA, is his family entitled to reimbursement of the costs associated with his placement at the Landmark School and/or other compensatory relief?

III. FINDINGS OF FACT

1. The Student is 14 years old (born [REDACTED]). During the school year he lives at the Landmark School in Prides Corner, Massachusetts. (T.98). Otherwise, he resides in the

District with his [REDACTED] (“Mother”) and [REDACTED] (“Father”) [REDACTED] (together referred to as “Parents”). (xxx).

2. The Student was identified with a Specific Learning Disability (“SLD”) in August 2013. (S.18, p.2, S.21). Prior to his eligibility determination, the Student showed weaknesses in reading and writing, and was provided Title 1 services in first and second grades. (P.19; MacKenzie testimony).
3. During the 2009-2010 school year, the Student attended kindergarten at St. John’s Catholic School in Brunswick, Maine. (P.1; T.6-8). While at St. John’s, he received Title 1 reading services due to his weak pre-reading skills (P.19; T.6-8, 993).
4. The Parents provided the Student with additional private reading instruction at the Sylvan Reading Center during the summer of 2011. (T.12).
5. By January 2011, the Student was reading at a mid-kindergarten to early first grade level. (P.19). By May 2011, St. John’s staff determined that he was reading at a mid-first grade level. (P.20). However, his teacher had concerns for his future success as a second grader and encouraged reading during the summer and continued private work with the Sylvan Learning Center program. (Id.)
6. The Parents moved to Bowdoinham, Maine in 2011. The Student entered the second grade at Bowdoinham Community School in the District in the fall of 2011. The Parents provided the District with the Student’s educational records, including those from the Sylvan Learning Center. (P.21-22). They also explained the Student’s reading weaknesses in the District’s questionnaire. (P.23-25).
7. The District determined that the Student academic level in literacy and math were at a level lower than determined by St. John’s assessment. The District determined that at that time, he was reading at level “C” under the Fontas and Pinnell Leveled Literacy Intervention Program (“F&P”). (S.2; T.394-96, 387; T.996). The goal was to try using less restrictive

methodologies using Response to Intervention (“RTI”), which would also help determine the extent of his needs. (T.996-97). The District continued with Title 1 reading services and provided instruction using the F&P. (S.2, p.3; P.36; T.394-96).

8. By the end of second grade the Student had advanced to F&P Level H. (P.36; T.394-401, 998-99). This was considered a year’s growth. (T.394-401). The benchmark was a level M. (P.36).
9. The Student entered third grade in the fall of 2012. (T.17). Assessments indicated that he had regressed in his reading to a level G, a first-grade level. (P.34-36, T.18). By November 2012, District staff were questioning whether the Student had visual perception problems. (P.37). He was neglecting the ending of words, searching through words, reversing sounds, including inference in retelling, segmenting, and deleting initial phonemes in blends. (P.37). His teachers noted that the Student’s self-confidence needed improving as a first priority, followed by word study (P.38).
10. The District staff developed an action plan with goals to be met by late January. (P.38). They started using the Wilson Program for his literacy instruction. (S.8, p.6; T.20, 43). Wilson builds a student’s skills in both decoding and encoding through a series of books with steps and sub-steps. (T.442,469). While there is a general recommendation to complete the program in two years, it also requires a student to master each skill before advancing to the next step. (T.442-43, 493, 590-591, 618).
11. The Student continued receiving RTI support in math during third grade. (T.994).
12. By March 2013, he was reading at Level H in the F&P. (S.8, p.1). The benchmark was P for the end of third grade. (Id.). In addition, he was “partially meeting” unit skills in math using the Everyday Math Day Unit-tests. (Id.). Also, “extensive support for literacy skills” was shown in his Title I History Form. (Id.).

13. On March 13, 2013, the Student had an Optometry Vision assessment performed by Blaine Littlefield, OD, COVD. (S.57-66). It was determined that the Student's "basic visual and binocular skills were not well developed, making learning to read and reading to learn tasks extremely challenging" for him. (P.66). A program of therapy and eyeglasses were recommended, as well as tutoring to close the educational gap. (Id.).

14. A "Referral for Individual Evaluation" was submitted on April 2, 2013. (S.8). It indicated that the Student was reading at Level H and working in Level I books. (S.8, p.2). While he was described as "a great kid with a positive attitude," and had good relationships with his classmates, (S.5, p.3), his academic progress was faltering. His reading and math struggles were reported as follows:

(The Student) is reading independently at an H and is working with a teacher on Level I books. He has made progress over the past year and a half (since he came to Bowdoinham), but it has been slow. He relies heavily on meaning, as comprehension is a strength for him. He relies much less on visual cues, looking mostly at the beginning sounds in words. He has a hard time recognizing patterns in words. He has letter-sound correspondence for most consonants and sort vowels. Reversals do show up in his reading work. His word study program has been modified. He has been receiving instruction in Wilson Reading.

Written Instruction: (The Student) struggles to put his thoughts on paper. The physical act of writing is so difficult that he often shortens and simplifies his stories. He uses more complex vocabulary and sentence structure and elaborates more when offered a scribe. When he writes words, he writes most of the sounds he hears. His spelling interferes with making sense of what he has written. He does not spell most trick/high-frequency words correctly.

Penmanship: His penmanship is nearly illegible. There are frequent reversals of letters g, h r, b d, p, q, as well as numbers, though he is getting better at catching them. He has been most successful at cursive.

Math: (The Student's) math skills are not at grade level. He does best with concrete concepts such as geometry and measurement. He is most successful at computation when he has manipulatives. He reverses individual numbers and place values. For example, 41 is often written as 14 or vice versa. Mathematical symbols are tricky for (the Student). For example, he can multiply and divide, but has a hard time writing a number model with the correct operation shown. (S.8, p.20).

15. The concerns by District's staff, as noted in the referral for educational evaluations, were whether he had a learning disability, whether he had vision problems, and whether there were phonological processing issues. (S.8, p.3). The Parents gave formal approval for evaluations on April 3, 2013. (Id.). It was reported that the Student was showing some avoidance of work issues and seemed to be sensitive to whether he looked different than his peers. (Id.; T.23-24).
16. The IEP team met on March 23, 2013, to discuss the Student's academic progress. (S.6). It was agreed that comprehensive evaluation was warranted. (S.8).
17. During the spring of 2013, several evaluations were performed. An occupational therapy ("OT") evaluation report indicated that the Student had standard scores in visual motor integration, note-reduced visual perception; fine manual control; and manual dexterity. However, it was determined that the Student struggles with the physical mechanics of handwriting, including letter formation, directionality of letters and numbers, spatial organization of letters within writing lines, and spacing. (S.9, p.5; P.73). It was recommended that he receive direct OT. (Id.).
18. In May 2013, District staff began to question whether the Student had social/emotional needs or attention issues, as well an anxiety. (S.10).
19. A psychoeducational evaluation was performed in early June 2013, by Marsene Caswell, psychological examiner for the District. (P.75; S.15). Tools used included The Wechsler Intellectual Scales for Children, fourth edition ("WISC-IV"); Comprehensive Test of Phonological Processing ("CTOPP"); Bender Gestalt-II; Wide-Range Assessment of Memory and Learning; Delis-Kaplan Executive Function Test (D-KEFS); Behavior Rating Inventory of Executive Function (BRIEF); Achenbach Behavior Rating Scales; Informational Sentence Completion Task; interviews with staff, parents, and Student; and a review of school files. (S.15, p.2). The WISC IV scores indicated that the Student had "unusually uneven development." (S.15, p.3). Most of the Student's cognitive scores were in the average range. His processing speed was low (standard score of 78). Specifically, his

visual scanning speed for symbols was lower than typical for his age; he has slow copying speed for symbols on simple pencil /paper tasks, and he recalled 2 of 9 symbols. This suggested “possible visual memory delays.” (S.15, p.3).

20. The Student’s scores on the CTOPP, which measures phonological processing and naming speed, were age-appropriate but with labored effort. (S.15, p.4). He worked more slowly than his peers on rapid naming tasks, scoring in the 2nd to 15th percentile. (Id.)
21. The Student’s scores on the Bender Gestalt-II is a measure of visual motor integration and memory. The Student scored 98 in copying and 83 in memory. (S.15, p.4, P-78). The memory score indicated that the Student had limited visual memory and was only able to recall two of 12 designs. (Id.).
22. The WRAML-2 scores indicated that he had “solid rote recall for verbal information,” but his visual memory scores varied. (S.15, p.5).
23. The D-KEFS subtest scores, which measures higher-level cognitive functioning, indicated low scores in flexibility in thinking with respect to number sequencing, letter sequencing, and number-letter switching. The verbal fluency subtest, which measures the ability to generate words fluently while simultaneously shifting between concepts, indicated average ability in this area. (S.15, p.5).
24. The BRIEF rating scale for executive functioning indicated that the Student was within typical range with the exception of cognitive shifting or responding to new situations with flexibility. (S.15; P.6)
25. The Achenbach Behavior Checklist indicated that the Student exhibited behaviors within typical limits with the exception of borderline elevation of anxious/depressed and somatic complaints reported by teachers. Noted complaints included stomachaches, headaches, nausea, feeling inferior or self-conscious, feeling hurt when criticized, feeling nervous, fearful, or afraid of making mistakes. (S.15, p.7).

26. Ms. Caswell indicated that the Student's weakness was in the area of orthography. (S.15, p.8). She summarized as follows:

(The Student) is a cheerful and engaging young man who is putting a great deal of effort into learning. Results suggest uneven development with areas strength and weakness. In general (the Student) has solid reasoning skills. He is able to understand and solve problems using both language and visual information. He has an age-appropriate fund of knowledge about the world and can generate ideas fluently. Recognizing and copying visual patterns are solid as is his visual motor integration. (The Student's) ability to understand and manipulate sounds making up words is also age-appropriate, as are his visual motor skills.

Despite his hard effort and these substantial strengths, (the Student) continues to struggle with reading and writing. Some areas of weakness emerged that likely impact literacy development. Most notable are deficits in visual memory, particularly related to symbolic information. He has more difficulty recognizing, copying, and remembering geometric forms and symbolic information. (The Student) appears to have great difficulty holding on to visual components of letters, numbers and words - orthography. Taken along with performance on academic assessments and written samples, this suggests deficits in word form and letter recognition and production that greatly impacts his ability to read and spell. It is somewhat unclear what degree visual deficiencies may also play a role. (The Student) is less fluent in retrieving phonological information from memory (rapid naming). This may affect his ability to become a fluent reader.

In addition, emotional and behavioral factors likely play a role in (the student's) learning. (The Student) lacks self-confidence and is anxious about performance situations, particularly tests. He is sensitive to criticism and does not want to stand out from peers. He may also experience difficulty responding to change, situations, or criticism. The stress that (the Student) experiences around these areas likely diminishes his ability not only to perform, but also his ability to be open to attending to instruction and taking risks in learning. (The Student) also shows behavioral strengths in executive functioning. His ability to establish connections with teachers and his positive attachment within a supportive family are assets for (the Student).

(Id.)

27. Several recommendations were made by Ms. Caswell including the following:

- Foster motivation and emphasize his strengths
- Daily explicit and intensive reading and writing instruction delivered by highly trained staff
- Build a positive connection with his teacher and other staff
- Individualized instruction based upon strengths, balance small group instruction with mainstream instruction.

- Scaffold and differentiate instruction- example: provide reading assignments at his instructional level or allow him to listen to taped material; provide him with a scribe or allow oral responses; frequent check-ins for comprehension, reduce quantity and focus on quality of written work
- Modify assessments with multiple choice or used of a word bank
- Consider adaptive technology as he gets older
- Promote this self-worth by providing opportunities to serve as a subject expert or act as a mentor for a younger student
- Continue home/school communication
- Promote sense of competency by provide extracurricular activities in areas of interest
- Have family consider community-based counseling to help develop positive self-esteem and self-confidence, reduce anxiety around learning, help to process past negative school experiences.
- Offer the Student guidance/social work assistance supports at school.

28. On May 23, 2013, an Educational Evaluation was performed by Catherine Curtis, RTI Learning Strategist for the District. (S.13). She used the Woodcock Johnson III Tests of Achievement (“WJ III”), Classroom Observations, and File Review to make her findings:

(The Student) scored in the average to low average range on overall math, academic applications and academic knowledge. He scored in the below average range (standards score 80-89) on basic reading skills and math calculation skills. He scored significantly below average range (standard scores 68-79) on overall reading, overall written language, written expression, academic skills and academic fluency. (S.15, pp. 2-3).

29. Ms. Curtis noted that the Student was reading at a level I, which is an end-year first grade level, the benchmark being a level P. (S.13, p.4). She stated that he struggled with pattern recognition in words, had letter-sound correspondence for most consonants and short vowels, but that he sometimes reversed letters when reading. (Id.) He spelled 7 out of 26 words correctly in a three-sentence story, reversed letters, did not use lowercase and capital letters consistently, had spaces between most words, and failed to use periods. His story became 14 more detailed sentences when he dictated the same story. (Id.)

30. Ms. Curtis concluded that the Student "is demonstrating significant literacy needs," and that for him, writing is “exceptionally challenging.” (S.13, p.5). In her classroom observation, she noted that other students did not require the level of support the Student needed regarding dictation by the teacher. (S.14).

31. The IEP Team met on June 14 and 22, 2013. (S.18-19; P.88). The Team determined that that the Student was eligible for IDEA services as a student with a specific learning disability (“LD”). (S.19, p.2; S.21). The Team reviewed the LD Evaluation Report, which indicated that the Student was not achieving adequately for his age or meeting State-approved grade level standard in written expression, basic reading skill, and reading fluency skills. (P.93). While the report noted that the Student had visual function deficiencies, the IEP Team agreed that this was not the primary reason for the Student’s lack of achievement and that the LD finding was based upon the Psychoeducational Report and the information from the vision report that focused on processing, as opposed to the visual component. (P.94). The Parents indicated that they needed time to consider the information before they consented to special education and related services. (S.18-19; T.4331, 471, 474, 1012, 2014). The IEP Team agreed to meet in August. (S.19, p.2). The District provided resources for them to consider over the summer. (S.19; T.207).
32. The IEP met reconvened on August 22, 2013. (S.19). The Parents signed a consent for the provision of special education and related services at that time. (P.110; T.1012-1013). The IEP Team drafted the Student’s IEP at that time. (S.19).
33. The IEP included a summary of his present level of performance, indicating that he was reading at a level I, late first grade level, and noting that the benchmark was P for his age and grade level. It summarized the academic assessments done in June 2013. (S.20).
34. The IEP included goals for Reading, Writing, Math, and OT. (S.20, p.7-8; P.103-104). The reading goal was to have the Student Reach Level K by the end of fourth grade. (Id.). Progress would be measured by the DRA II, F&P, running records, and WADE (or similar assessment). (Id.). His writing goals included decreasing letter reversals in his writing from 6 to 3 over 10 opportunities; increase his capital letters at the beginning of sentence from 1 to 4 in 10 opportunities; increase his ability to spell VC words and glued sounds from 2 to 6 in 10 opportunities; and increase his ability to use beginning and ending punctuation from 1 to 5 in 8 opportunities. His math goals were to meet grade level standards on unit

assessments; score 75% or above on grade level End of Year math assessments. His OT goals focused on pencil grasp; locating objects as being on the left/right on himself, objects, and others standing across from himself; use proper directionality when forming number 1-10, in from 4 to 6/8 out of 10 trials; form and place letters within writing lines when given a sentence to copy; and use proper spacing between words, beginning capitalization, and ending punctuation up to 60% of the time.

(Id.).

35. The IEP indicated special education services would include 10 hours per week to address needs in reading writing and math. (S.20, p.9; P.105). Ms. Bridgett Ortiz, the Student's case manager and special education teacher, primarily used the Wilson Reading Program (T.31).¹ The IEP also included OT services at a rate of 90 minutes per month. (Id.). The IEP included several supplementary aids and supports. (S.20, pp. 10-12).
36. The IEP indicated that the Student would be with his non-disabled peers 67% of the time. (S.20, p.13).
37. The IEP did not address extended school year services.
38. The Student began his fourth-grade year in fall 2013. The effective date of the IEP was August 28, 2013. (P.20, 97). The Student's IEP was sent to the Parents on September 1, 2013. (S.20; P.97).
39. The Student's progress in literacy had regressed over the summer of 2013 after third grade. (T.489, 593, 595). Ms. Ortiz had to move the Student back to Book One in Wilson. (T.495). She explained that the Student was sensitive to having his reading instruction done in the classroom and would be embarrassed if his peers saw his struggle to sound out words they already knew, so she would pull him out of class to do this work. (T.487-488). She

¹ Ms. Ortiz is a licensed special education teacher with a master's degree. (T.462). She is certified in Wilson and the Teacher's College training method and has received training in the Visualizing and Verbalizing reading method and has attended professional development training on orthographic processing. (T.588-90).

also explained that he needed a good relationship with his teachers so as to not “shut down,” but be open to learning. (T.489-491). During the fall of his fourth-grade year, it took up to eight weeks until he was comfortable with her. (T.491).

40. During the fall of 2013, the NECAP for fourth grade was administered in the District. (S.22). The Student scored in the “substantially below proficient” range for both reading and math skills. (S.22). The District staff internally discussed that the Student could reach Level M by the following September. (P.114).
41. Ms. Ortiz believed that the Wilson Reading Program was a good fit to provide the Student with his literacy programming because that program focuses breaking down words to help students see how the parts of words combine into actual language. (T.596). The decision to use Wilson was a joint decision among the IEP Team members, including the literacy specialist and Special Education Director. (T.1032). Ms. Ortiz tailored her lessons to the Student’s particularized needs. (T.544-45, 548-54, 558-59). For example, she would give the Student his assignments with auditory instruction because of his visual weaknesses. (Id.). She also used these methods and other creative ways to provide the Student with math instruction. (T.545-47, 1016).
42. In November 2013, his IEP progress was “inadequate” for both of his reading goals, one of his writing goals, and one of his OT goals. (S.20, pp. 7-8). He made adequate progress in all of his other goals, including math. (Id.). By March, he had made “inadequate” progress in one reading goal, and “inconsistent” progress in another. He also continued to make “inadequate” progress in one writing goal. (Id.). He made “adequate” progress in all of his other goals. (Id.).
43. The Parents reported that completing homework became a nightly struggle in fourth grade. (T.36). His teacher reported that the Student would tend to shut down and become unreceptive to teaching and learning. (S.23) The District staff understood this and also recognized that the Student was having anxiety issues. (S.23, P.128). They saw a great deal

of task avoidance during independent work time. (S.23). District staff offered information on outside resources to the Parents. (P.128, 130).

44. By March 2014, the Student was making “inadequate progress” or “inconsistent performance” on his IEP goals in reading. (P.168.) He was making “adequate progress” in his writing goals, but “inadequate” progress in spelling and grammar. (Id.). He made “adequate” progress in math and on his OT goals. (P.168-169).
45. In April 2014, the Mother reported that the Student had completed vision therapy and had made “huge gains” with visual processing and memory. She reported that he knew left from right without needing to wear his bracelets but continued to have weaknesses, including letter reversals, slow reading pace, decoding, and writing words. She reported that he fell about 1.5 to 2 grades level behind. She stated that he was on the dyslexia scale and that they would be pursuing a neuropsychological evaluation in the summer. (P.140).
46. Over the course of 2014, the Student participated in the AIMSWeb standardized reading assessment, as well as the Reading MAZE, a silent reading assessment. (P.155, 174). By the end of the school year, the Student fell “well below average” in reading and comprehension skill levels. (P.174).
47. The Student’s special education teacher, Ms. Cortiz, explained that as the material became more challenging for the Student, he would become more frustrated. (T.652-653). At times he would “shut down” on her, slowing his progress. (Id.). She would discuss with the Mother in a roundabout way whether the Student would benefit from social work services with respect to the anxiety that she was seeing. (T.653).
48. In May 2014, the IEP Team met to develop his IEP for fifth grade, the 2014-2015 school-year. (S.32; P.142). The new IEP indicated that with respect to reading, while the Student was seeing himself as a reader, his present level of performance was a reading Level J, early second-grade level. (S.32, p.6). The IEP noted the Wilson Reading Program continued to be used. (Id.). His “needs” were described as follows:

(The Student) relies heavily on meaning, as comprehension is relative strength for him. He struggles to recognize word patterns and demonstrates less confidence when decoding based on sequenced, letter sound relationships. He sometimes reverses letters when he reads (b/d). He has received Wilson instruction and continues to work on decoding longer words, and vowel teams. (S.32, p.6).

49. With respect to writing, the IEP stated that the Student's showed that he was able to draft a well-planned essay using three examples and a conclusion using a scribe or assistive technology. He used varied vocabulary and excellent detail. However, his physical handwriting contained several letter reversals, inconsistent punctuation and use of lowercase and uppercase letters. Spelling and legibility continued to be challenging. (S.32.p.6). In math, the Student worked diligently, but either partially met or failed to meet grade level math standards. (Id.) With respect OT performance it was note that Student's orthographic performance indicated that the overall writing process was challenging; his visual motor integration skill was difficult and spelling challenges made it difficult for him to read what he had written. (Id.)
50. The IEP for 2014-2015 included reading, writing, math, and OT goals. He had two reading goals. His reading goal went from level J to L with 96% accuracy. (S.32, p.7). His reading fluency goal went from reading 60% of words correctly to 80%, as measured by charting or word list assessment. (Id.). It was noted that the measurements were based on the DRA II, F&P, running records and WIST. (Id.). His writing goals included decreasing letter reversals in his writing from 5 to 3 over 10 opportunities; increasing his capital letters at the beginning of sentence from 3 to 6 in 10 opportunities; increasing his ability to spell VC words and glued sounds from 4 to 6 in 10 opportunities; and increasing his ability to use beginning and ending punctuation from 3 to 6 in 8 opportunities. His math goals included increasing his math skills from "partially meeting" to "meeting" grade level standards on grade level unit assessments; scoring 75% or above on grade level End of Year math assessments; increasing use of appropriate mathematical symbols from 4 to 6 out of 10 opportunities; increasing place value skills from 3 to 5 opportunities; creating number models that fit the mathematical operation from 2 to 6 opportunities. His OT goals remained the same, with the addition of increasing touch-typing from 3 words per minute to 5 words per minute. (S.32, p.8, P.121).

51. The IEP indicated that the Student would receive weekly special education and related services as follows: 3 hours for writing, 3 hours for math, and 4.5 hours for reading. (S.32, p.9). He would also receive .5 hours per month of OT consultation services, and 90 minutes per month of direct OT (S.32, p.9-10). The IEP included the same supplementary services from the former IEP, with the exception of a change to writing: the services included a dictation device (i.e. laptop, I-pad). (S.32, p.10).
52. The IEP did not change the percentage of time he would be with his non-disabled peers from 67% of the time. (S.32, p.13).
53. In June 2014, the Student's IEP indicated he was making "adequate" progress on his fourth grade IEP goals, with the exception of spelling ("inconsistent performance") and his goal for reaching a 75% or higher score on grade level math ("inadequate progress"). (P.163-164).
54. The Student's teacher, Ms. Ortiz, explained that one reason why the Student may not have achieved better progress was his absenteeism. (T.496). He was absent for a total of 11 days during the school year: three times during the first trimester, and four times during the second and third trimesters. (S.17). He was tardy once. (Id.). She also said that there were occasions when the Parents would request a "break" from specialized instruction. (T.496).
55. The IEP did not address extended school year services ("ESY"). He did not receive ESY during the summer of 2014.
56. The Student began fifth grade in September 2014. On or about September 14, 2014, the Student became angry with his teacher, Ms. Ortiz, and shouted at her when they were working on reading. (S.35). The Mother reported to Ms. Ortiz the next day that the Student indicated he was frustrated with school work and did not want to read aloud and was nervous doing it. (Id.) She suggested that a reward system may help. (Id.).

57. Ms. Ortiz related that the Student was not receiving his specialized instruction because he was resisting being pulled from his mainstream classes. (T.508-510). She testified as follows:

Q: Okay. So describe then your role in the fifth grade. Was it similar?

A: It was. Yes, It was. I still --I still provided the same services, it just was a lot different. As [REDACTED] matured, he wanted--he liked me and we had a great relationship but he didn't want the special ed teacher coming in to get him as much. He didn't want that and so we tried a thing of having him come down to my classroom on his own and he just wouldn't come, and so I'd have to go down and try to be as inconspicuous as a big, tall person can be trying to get him out of the classroom but he, you know, the older he got and his friends -- he had bonded and he just didn't want to come out of the classroom as much.

Q: So what did you do to try to address those concerns or those behaviors?

A: I communicated with mom and dad and, you know, they communicated with me and they were seeing the exact same thing, hearing the same thing, and so several times he wouldn't come out, he'd stay in class and he'd read or get into whatever Read Aloud they were doing in class, but it takes its toll. You've got to have five days a week doing that all the time and we were losing that consistency piece because he really didn't want to look different, they didn't make it up, that's true, he really didn't want to and as much as he may have liked me, he wanted nothing to do with the special ed teacher. It was a constant tug in fifth grade.
(T.508-509).

58. On September 17, 2014, Ms. Ortiz responded to the Mother stating that she was trying to work on ways to allow the Student to achieve his reading goals and explained the techniques that were used in the Wilson Reading Program for doing so. (S.36). She reported that the Student seemed to have had a more positive attitude and was very cooperative after the incident. (Id.).

59. On October 2, 2014, the Mother reported that the Student seemed to be progressing in his reading fluency and working on math. (S.37).

60. An IEP meeting was convened on November 14, 2014, for the Student's annual IEP review. (S.41). No other recommendations were made to the IEP except for the provision of social work services in preparation to transition into middle school. (S.41, p.2). However, the Parents denied consent. (S.41, p.2). The Parents indicated they would like the

Student to have a “reading buddy” at school and at home (S.41, p.4). The IEP Team also agreed to have an educational evaluation performed. (S.39).

61. An educational evaluation was performed on November 20, 2014. (S.39). The tools used included the WJ- IV and Gray Oral Reading Test -V (“GORT”). (Id.). The Student scored in the “below average” range for broad academic skills. Reading and spelling were the consistent weakness. (S.39, p.2). He performed “below average” on the reading skills subtest, with his greatest weakness in reading fluency and decoding. He relied more on phonetics to decode rather than sight word memory. His writing score was “below average,” with his poor spelling skills as a great weakness. (S.39, pp. 2-3). The Student’s math skills ranged from “below average” to “average” for his age. His weakness was in calculation and math fluency but his math problem solving was a strength. (S.39, p.3). The Student scored in the average range in content knowledge in science, social studies and slightly “below average” in humanities (art, music, and literature). (Id.).
62. The Student’s scores on the GORT were all “significantly below average.” His scores in all subtests placed him in less than the first percentile. (S.39, p.5). This test is a wholistic assessment of reading rate, accuracy, fluency, and comprehension. (Id.). The note indicated that Student’s “reading comprehension of grade level passages likely will be difficult for him to read at the same pace as his peers.” (Id.).
63. In summary, the education evaluation indicated that, while written language as well as math problem solving were relative strengths for the Student, his spelling, decoding, and fluency rates could significantly impact his ability to efficiently and successfully convey his knowledge in writing. It was suggested that he would benefit from assistance reading grade level material in order to understand his academic tasks. (Id.). Recommendations included: use of a laptop for writing tasks; extended timelines to complete work; modified tasks as alternatives to written assignments or assessments to demonstrate knowledge; check-ins from teacher to ensure proper application of new knowledge; and support in reading information texts to identify essential content material. (S.39; P.6).

64. Mrs. Ortiz reported that during the first half of fifth grade, it was very difficult to get the Student to engage with his literacy program. It appeared to her that social stigma of being in a special education setting was overwhelming and so his cooperation waned at school and at home. (T.638). The Parents continued to struggle with his homework despite their efforts. (S.36-37T.46).
65. The Student's annual IEP was effective as of November 22, 2014. (S.50). It indicated that the IEP Team meeting was held on November 14, 2014. At some point in November he attained Level K in his reading (mid-second grade). (S.40, p.7, P.790). His reading goal went from level K to N (third grade reading level) with 96% accuracy, at least 80 words per minute, and with at least three correctly answered comprehension questions as measured by Teachers College/F&P; increase his word, nonsense word, and sight word fluency from reading 75% of words correctly to reading 85% correct as measured by charting (or word list assessment). (S.50, p.4).
66. His Writing goals included decreasing letter reversals from 5 to 2 in 10 opportunities as measured by student writing and OT samples; increase his ability to use beginning and ending punctuation from 6 to 8 opportunities as measured by student writing and OT samples; increase his use of capital letters at the beginning of sentences from 4 to 7 in 10 opportunities; be able to self-monitor and edit his work; write legibly so he can read what he has written from 50% up to 100% of the time. (S.50, p 4).
67. His math goal remained at "Meeting" grade level standards. (Id.). No OT goal was indicated in the IEP. Many supplemental aide and services were provided in the IEP. (S.50, pp.7-8).
68. The IEP included the same frequency of special education instruction and services as noted in the prior IEP and that he would be with his non-disabled peers 67% of the school day. (S.50, pp.10).

69. The Student continued to struggle the first half of fifth grade. He had a score of 32 on the reading fluency assessment, the R-CBM, in December 2014. (P.188). Of those students who were below the benchmark, the Student had the lowest score. (Id.). He was noted to have “major pragmatic delays” given other assessments in January 2015. (P.193.)
70. In March 2015, the Student had progressed to Level L, a first-grade reading level. (S.44).
71. On May 27, 2015, Sandra Garner, M.S. CCC-SLP, administered a speech-language evaluation. (S.49). In summary, the Student’s scores indicated that he demonstrated articulation, voice, and fluency skills within the age-appropriate expectations. He had overall receptive and expressive language proficiency. (S.49, p.3). His weaknesses were in formulating sentences and flexible word use. (S.49, p.4). Recommendations included selecting vocabulary from high interest topics and practicing formulating sentence using coordinating and subordinating clauses. (Id.)
72. On June 9, 2015, the Student’s teacher and Mother both remarked about the Student’s positive progress. (S.51). The Mother noted that she thought the staff was working hard with him (Id.). In reading, the Student had gone from Level L in March 2015, to Level M by June 2015, and was reading from book 4 in the Wilson Program. (S.50, p.4; T.528, 595-96).
73. On June 17, 2015, the IEP Team reviewed the speech and language (“SL”) evaluation results and determined that he did not need SL therapy. (S.56).
74. The Student did not have ESY during the summer 2015. However, the Student read two books in the *Wimpy Kids* series and was reading *Middle School* by James Patterson. (S.572-573, 580). Ms. Ortiz believed these were end-of-grade-school or beginning-middle-school level books, however she believed that at that time these books were above the Student’s reading level. (T.571-573, 580-82).

75. On August 31, 2015, a referral for further evaluation on Speech Language was performed. (S.47). The referral form indicated that the Student's reading level was at Level L (mid-second grade); writing expression was at a first-grade level; math skills were being met or partially met; and penmanship was at a third-grade level. (S.47, p.2). It was reported that math tasks were challenging for the Student due to language deficits; language processing difficulties were apparent in reading, writing, and math; his written language skills were at a first-grade level, specifically with mechanics, organization, punctuation, and spelling. (Id.).
76. In the fall of 2015, the Student transitioned to Mt. Ararat Middle School ("MAMS") for sixth grade. (S.58). His new case manager was John Hawley, was also his special education math teacher. He used the Math 180 system for the Student's math instruction. (T.674-75, 237). Mr. Hawley reported that while the Student seemed excited about middle school, he struggled academically. (T.49). His literacy teacher, Ms. Nickerson, was certified to teach the Wilson Program and the SPIRE Reading Program. (T.731-32). She also used the Teacher's College program for writing instruction. (Id.).
77. He received his specialized literacy instruction from Ms. Jean Mauck during "Target Time" sessions four days per week. (S.65; T.675-76, 245). Ms. Mauck, a retired special education teacher, returned as an educational technician. She was trained in the Wilson and SPIRE reading programs. (T.249-50, 676, 1020). One other student was with the Student and Ms. Mauck for literacy instruction. (T.677, 682).
78. The Parents and the District agreed to wait until October to have the next IEP meeting. (S.62)
79. On October 8, 2015, the Student's teacher, Ms. Nickerson, asked the Student's former teacher, Ms. Ortiz, what reading program she used with Student, noting that he had "significant weaknesses. Very, very low." (S.66). Ms. Ortiz reported back to her that she had been using the Wilson Program lessons 4 to 5 days each week to work on decoding,

spelling, and handwriting. She stated that she used “TC” methods to increase stamina and volume and for teaching reading behaviors. (Id.).

80. On October 16, 2015, the Mother and Mr. Hawley communicated about the Student’s math progress, indicating that progress was being made on the paper tasks but that he needed practice with the on-line tasks. (S.67). The Mother noted, “Hoping this year is as successful as last and we continue with progress. We will see what we can do about the online math.” (Id.)
81. In the fall of 2015, the Student took the NWEA Math and Reading assessments. (P.216). His reading and math scores put him in the first percentile in both areas. (Id.).
82. Progress on IEP goals were reported out on November 13, 2015. He made “inconsistent” progress on reading and math goals and “adequate” progress his writing goals. (S.69.). The Mother emailed the school in mid-November, stating the Student was making the same mistakes in his spelling and was getting frustrated. (S.72).
83. Ms. Caswell performed an educational evaluation was performed in mid-November 2015, using the same evaluation tools used in her prior evaluation. (S.71, P.219). She reported that the Student had a full-scale IQ of 107 on the WISC-V. (S.71, p.3). He scored “slightly higher” than previous evaluations in several areas. (S.71, p.3). He scored in the “average” range in verbal comprehension; visual spatial; fluid reasoning; speed processing; and working memory, with the exception of working memory, which was in the “low average” range. (S.71, p.3).
84. In summarizing the results from the WISC-V and WRMAML-2, CTOPP.2, Ms. Caswell specifically noted that, despite his overall upper end of “average” cognitive functioning and strong reasoning skills, and above-average ability to recognize patterns and solve novel problems, the Student continued to have “pronounced” weaknesses in basic literacy and math skills. He continued to have deficits in visual memory, particularly related to symbolic information. Learning associations between sounds and symbols is difficult,

which may make it more difficult for him to hold onto visual components of letters, numbers, and words, indicating orthographic weaknesses. (She stated that the Student continued to be less fluent in retrieving phonological information from memory which may impact his ability to become a fluent reader. He also had varied measures of memory function. While he could remember information presented in context, he had great difficulty memorizing information that is unconnected. She stated that this could impact learning new information, such as math facts. (S.71, pp.7-8).

85. In assessing the Student's executive functioning (behavior, executive functioning, emotional function), the Student presented in the average range based upon teacher and parent rating scales, and student-interview. (S.71, pp. 6-7).

86. Ms. Caswell also reported on the Student's emotional status, stating:

Emotional and behavioral factors appear to play a lesser role in learning than in the past. (The Student) appears more confident about his learning and is better able to adjust to change or new situations. He may still be self-conscious and more worried about making mistakes than peers such that his stress level should continue to be monitored. In addition, (the Student) may have more difficulty sustaining focus in some learning environments. During testing, (the Student) was observed to be somewhat fidgety and expressed a strong desire for movement opportunities; however, teachers do not report significant concerns with hyperactivity or impulsivity. Parents and teachers alike report behavioral strengths in executive functioning as well as his ability to make positive connections with peers which likely serve him well. (S.71, p.8).

87. Ms. Caswell made 13 recommendations. (S.71, pp. 8-9). They included the following:

- a. "Highly individualized educational program"
- b. Daily explicit and intensive reading and writing instruction
- c. More practice with computation skills
- d. Balance small group or one on one focused instruction with opportunities for learning in the mainstream
- e. Modification to classroom instruction: assignments at his reading level; listening taped material; access to a scribe; allow oral responses; comprehension check-ins; alternative assessments
- f. Explore speech-to-text technologies and word prediction technology
- g. Access to audio or alternative media format for textbook and trade books
- h. Foster motivation, emphasize strengths
- i. Support memory deficits by providing context, areas of interest, accommodation for literacy delays

- j. Use techniques to support attention and build endurance
- k. Engage him with spotlighting strengths – being expert witness in areas of strengths
- l. Consistent home-school communication
- m. Encourage extra-curricular activities.

88. In late November 2015, Mr. Hawley completed the Student’s academic evaluation. In summary, the Student scored well below average in most areas in the WJ-IV:

- a. Broad reading: 62
 - b. Broad writing: 64
 - c. Broad math: 79
 - d. Letter word ID; 65
 - e. Math computation: 70
 - f. Spelling: 48
 - g. Sentence reading fluency: 60
 - h. Math facts fluency: 72
 - i. Sentence writing fluency: 62
 - j. Reading comprehension: 83
 - k. Applied math: 106
 - l. Writing samples: 100
- (S.74, p. 2; P.229).

89. The comments about his reading skills indicated that, with respect to decoding it he relied heavily on phonetics to decode rather than sight word memory. His greatest area of weakness was reading fluency, “which will impact his ability to maintain the pace of instruction and tasks as compared to his peers.” (S.74, p.3). Also, with respect to writing it was noted that the Student’s poor spelling skills will impact his ability to regularly produce written language at the level of his peers. (Id.). Math calculation and math fluency were his weakest areas in math (Id.). The one area of strength was the Student’s content area of knowledge, especially in the areas of science and social studies. This was not true for knowledge about art, music, and literature, where was below average. (Id.).

90. His GORT-V scores were placed in under the 1st percentile for reading rate; reading accuracy; reading fluency; reading comprehension; and his oral reading quotient. (S.74, p. 5).

91. During the fall 2015, the Parents continued to struggle with having the Student complete homework. (T.52-53). They worked with him “several hours” per night. (Id.). They read his assignments to him and then scribed his answers. (Id.). He was not independent in completing his work at home. (52-53). There were arguments and tears when they tried to get him to cooperate with homework. (Id.).
92. It was apparent to the Parents that the Student did not mesh well with his reading teacher, Ms. Mauck, and communicated this to the District staff. (T.55-56; S.80). The school acknowledged that situation, however reported to the Parents that there was no other staff to work with the Student. (S.82; T.57).
93. In December 2015, internal communications between District staff indicated that the District had considered changing the Student’s placement to a more restrictive learning environment. (S.86; P.236). One of the suggestions was placing him in the Believing in Learning Differences (“BILD”) program in the District, a more restrictive setting. Ms. Caswell raised her concerns about these suggestions. She stated in her reply email in 2015: (The Student) is a unique young man. He has some strong cognitive ability and will continue to need intellectual stimulation. I would be concerned to have him moved into the BILD setting with more impaired students. His struggles with literacy and to some degree math are fairly specific to decoding/encoding and working with symbols. He has one of the most pronounced cases of dyslexia I have seen... I believe he requires a very individualized program. (S.88, T.60, 857).
94. An IEP meeting was held on December 15, 2015. (S.97). The Team discussed the Student’s continuing needs, especially in his mainstream science class. Kim Granger, the science teacher, was very assertive about the need to have more assistance in her class for the Student. (T.61-62). It was agreed that his schedule would be changed to provide assistance in science, which was ultimately provided by Ms. Mauck. (T.62).
95. The IEP Team drafted goals for spelling, reading decoding, math computation, and writing. (S.96, pp. 6-8; P.244). No goal was included for reading fluency or reading comprehension. While these were areas the Student’s substantial areas weaknesses, Ms. Nickerson was unable to explain the lack of goals in these areas in his IEP. (T.748-750). In addition, the

use of the F&P assessment measuring tool was replaced with WJ achievement testing or other comparable standardized assessment. (S.96). Also, a new 10-point gain in the Student's WJ scores was set for his goals in spelling, reading and math. (Id.). There was no explanation at the IEP meeting as to why the WJ would be used in this way. In addition, OT was reduced from 90 to 30 minutes per month. (S.96).

96. In February 2016, the Student was pulled out of his mainstream art class for additional academic instruction. (S.99; P.101). It was explained to the Mother that he was being pulled out to join a support study class in place of art in order for him to focus on this work completion. (S.99-100). Ms. Hawley told the Mother that he thought it would be a good idea to keep him in support study until he was caught up with work, then he would be allowed to return to art class. (S.100). He did not want to seem to the Student that it was a punishment, but rather an intervention. (Id.).
97. The Student's behavior was reported to have become more negative and he was resistant to doing his work or accepting assistance in study hall. (S.102). Internal communication between District staff queried whether the Student would benefit from social work services. (P.273, 226; T.878). The Student's frustrations continued at home with homework. (T.70). The Parents felt that the Student was not progressing. (T.71).
98. The Student began to be pulled from science class to work one-on-one with Ms. Mauck. (S.111). She noted that he would avoid school assignments and would get upset and become rude when Ms. Mauck insisted that he work with her. (S.116). The Student felt like people were hovering over him and treated him "like a two-year old." (S.122). Ms. Nickerson acknowledged the Student's frustration but that his science worksheets could not be deciphered by the teachers; reading concepts were challenging; and therefore, he needed more support. (S.122).
99. By the Student's end-of-year NWEA score increased by 21 points in reading but continued to place him in the 1st percentile. (S. 126). His math score improved by 12 points, which placed him in the 3rd percentile. (Id.).

the end of May 2016, the Student continued to show work avoidance and disrespect towards his teachers. (S.124). The District and Parents communicated regularly regarding the Student's struggles. (S.70, 85, 94-95, 110, 112-113, 116, 119; T.705-06).

100. No ESY services were offered to the Student for the 2016 summer.
101. The Student began seventh grade in the fall 2016. There was no teacher assigned to him for his specialized instruction in reading at the beginning of the year. He was assigned to two regular education settings: one for language arts and for math. (P.310-311; S.96, 132, P.331; T.886, 900, 904, 952, 266). The classes were co-taught by regular education teachers. Mark Dugal, and special education teacher, Nancy Marstaller taught the English language arts class. (T.266, 901-02, 951-52).

Ms. Marstaller is trained in reading programs SPIRE, Megawords, and Visualizing and Verbalizing. (T.946). However, by late September 2015, Ms. Marstaller needed more assistance with the Student because his level of literacy was "very low" and needed more than she could provide. (P.311).

102. An educational technician, Barb Swisher, was eventually assigned to the Student along with another student. (P.310-11; T.73). She was working on Book 4 in the Wilson Program with the other Student, so she started with the Student in the same book. (S.183; P.311, T.72-73, 904-05, 949).
103. The Parent reported that the fall was difficult for the Student in that he did not want to go school and made somatic complaints. (T.74). Completing homework assignments took several hours a night and created serious stress for the family. (Id.).
104. In mid-October 2017, the District staff recommended to the Parents that the Student switch his World Language class to a support study class. (S.128). The Parents were supportive of this idea and stated that this would help the Student get used to the idea in a positive way so it would not seem punitive. (Id.). While the Student wanted to keep his schedule, the

District staff all agreed that he would benefit from the support study. (S.131). The Parents responded that they had spoken with the Student and he agreed to try it. (S.132).

105. Ms. Swisher reported in November 2016 that the Student continued to read at Book 4 in the Wilson Program, working on vowel/consonant/silent “e” words in multi-syllable words. (S.135).

106. The GORT was administered on November 20, 2106. His scores indicated the following change in percentiles from third grade:

- Rate: 5th to 9th
- Accuracy: 5th to 16th
- Fluency: 5th to 9th
- Comprehension 9th to 37th

(P.769).

107. By December 2016, the Student was not meeting math standards. (S.136). He lacked focus, engagement, and progress on independent work and needed consistent reminders to refocus and that a teacher needed to sit next to him for him to complete work. (S.136). His social studies teacher stated that the Student struggled with writing, usually did not finish “current events” writing, and did not seem to understand concepts and struggled with details. (S.136, p.5). His science teacher reported that the Student failed to complete a majority of assignments, and those he did were illegible, stating that reading was a “huge barrier for comprehending text-based learning.” (Id.)

108. Ms. Marstaller also reported that the Student had “very low” writing skills (poor use grammar, lack of detail). (P.333). His math skills were low and he required constant supervision to complete assignments. (Id.) However she reported that the Student was making “adequate” progress on his IEP goals. (S.96, p.6). There is no evidence that a WJ assessment was administered. (Id.).

109. The IEP Team met on December 7, 2016, to review these teachers’ reports. The Written Notice indicated that the Student was reading in book 4 in the Wilson Program and that his

reading fluency was “very low.” His writing was “minimal” and showed that he did not understand concepts. (S.139). He continued to need math supports and practice to learn math concepts. (Id.).

110. The IEP Team made added a supported study class to give him more time to complete his homework. (S.128; T.906-07, 955-56). While it was not in his IEP, the IEP written notice indicated that the Student was open to talking to the guidance counselor about his lack of focus and attention. (S.139. p.3).
111. At that point in the year, Mr. Burns, the Student’s social studies teacher, believed that he did not have the ability or know-how to teach the Student in a way that he could learn and indicated that he needed an educational technician in the room for support (T.77).
112. The Student’s 2017 winter NWEA scores indicated that he was in the first percentile in math and at the 7th percentile in reading. (S.141).
113. In late February 2017, the District placed the Student back in the special education setting in math with Mr. Hawley because of his lack of progress in the co-taught, regular education class. (S.145-46, 157; P.363). By late March 2017, he had completed one of 10 assignments. (S.150). Progress on his IEP goals was minimal to inconsistent. (S.152).
114. On April 11, 2017, Ms. Marstaller contacted the Mother to talk about the possibility of placing the Student in a more restrictive setting for his specialized instruction in all areas for eighth grade, citing the BILD program that the Student had with Mr. Hawley. (S-153). She also talked to them a few days earlier about the academic struggle the Student was having in general. (Id.).
115. Through April 2017, the Student continued to struggle. Weekly teacher’s reports from Ms. Marstaller indicated that he consistently failed to complete work; had rude and off-task behaviors; was uncooperative; and was in the habit of avoiding challenging work. (S.143-44, S148; P.356, 360, 392). She indicated, “we are concerned that he is not even close to

grade level with writing, and he continues to not even try to compete the grammar work or use tools he could.” (S.148; P.392).

116. Mr. Dugan commented in his assessment in late April that the Student had “major” gaps in his learning and that he needed more than what a classroom setting can give him. He believed that he would progress in a smaller less distracting environment. (423).
117. The Parents reported that they were unable to help the Student at home and that it was “nearing the impossible.” (T.82). In addition, they had difficulty accessing his assignments electronically from the “Empower” software at home or accessing recorded texts on Book Share. (T.85-86). His teacher, Ms. Marstaller, reported to the Parents that he was not keeping up with his homework and was missing other work. (S.143).
118. The IEP Team met on April 27, 2017. (S.173). The Team discussed the Student’s progress and recommended that he be placed in the BILD program, a more restrictive special education setting where he could receive a higher level of support than he was receiving in the mainstream classroom. (Id.) There was concern on the part of the Parents that the Student may be stigmatized. (S.173, p.3). As a group, the BILD students have a broad range of cognitive profiles. (T.91, 858). However, the Parents agreed to discuss the program with the BILD teacher. (Id.).
119. On May 3, 2017, the Parent met with Stacy Chubbuck, the eighth grade BILD teacher. (S.159; P.427). She informed them that she would not be returning in the fall of 2017. (S.159; P.427; T.90). At that point in time, the District had not hired her replacement.
120. The Student’s NWEA scores for Spring 2017 placed him in the 4th percentile in math (a three-point increase) and in the 2nd percentile for reading (a five-point decrease). (S.177).
121. A Written Notice was drafted indicating that the IEP Team met on May 16, 2017. (S.175, P.443). It indicated that the Student was not meeting reading or writing standards and that he needed a more structured program. (P.444). It noted how emotionally fragile the Student

was and felt ashamed and stupid because of his lower level of reading and writing ability. It stated the District offered to place him the BILD for the 2017-2018 school-year and that the Parent agreed that the Student needed the increased time and direct instruction that was offered by the BILD program, but that they were looking at out-of-district options. (S.175; P.443-444). The Parents did not agree to the BILD placement. (T.92).

122. The District drafted an IEP, dated May 16, 2017. (S.174). It changed the location for all of his specialized instruction to the special education setting. In added counseling for 30 minutes per week. It reduced the percentage the Student would be with non-disabled peers to 40%. (Id.).
123. On May 31, 2017, the Father notified the District that the Parents reiterated that they were looking at alternative schools, stating, “[h]aving his needs met are at the center of our thought process. We’re not sure his needs can be currently met, even in the BILD environment with the right teacher, let alone an instructor that is unknown to us at this point.” (S.172). He explained they were looking at the Landmark and Carroll schools, and noted that, “if the decision is to remain at Mt. Ararat, BILD would more likely be the choice, or more accurately we don’t think we’d have a choice. A counselor would be a good thing as well as long as he would be comfortable with this.” (S.172).
124. The Parents explored other options for the Student’s program. On June 6, 2017, they visited the Landmark in Massachusetts. (T. 98). It had small class sizes, an individualized approach to instruction, a daily 1:1 literacy tutorial focusing on students’ deficits, an integrated curriculum in which literacy skills are reinforced in all classroom settings across the day, and experienced staff knowledgeable with learning disabilities. It did not have any middle school openings but did have openings for their boarding school program for that age group. (P.464; T.93). The Parents decided to apply for admission to Landmark. (S.161). They also asked for recommendations from his teachers, which were made. (S.162-163, 165-167).

125. The Student's IEP progress as of June 2017 indicated that he made "limited" progress in spelling and "inconsistent" progress in writing. (S.174, p.4-6). His NWEA spring scores indicated that he was in the 2nd percentile in reading and 4th percentile in math. (S.177). He was "well below state expectations, the State's standardized, MEA assessment." (P.773). Ms. Marstaller reported that the Student had advanced to Book 5 in SPIRE while he was with Ms. Swisher. (S.166).
126. The District's proposed IEP for 2017-2018 included specially designed instruction in the special education setting for reading, writing, and math totaling 17 periods per week, two periods per week of supported study, counseling for 30 minutes per week and OT for 30 minutes per month. (S.174). He would also receive support in science class. (Id.). The special education setting would be in the BILD program.
127. The BILD program for 2017-2018 would have included classes of three to four students in reading, writing, and math with instruction specifically designed for the Student. (T.933, 1027, 1027, 1069). It would have also addressed organizational skills and executive function skills. (T.1070).
128. The District staff believed that the 2017-2018 student cohort in BILD would have been more appropriate as the Student's peers than in years past. (T.873). They had similar decoding difficulties and were more typically functioning children having more typical cognitive ability. (T.873). They did not have intellectual or cognitive disabilities or significant behavioral issues. (T.1073-74).
129. Ms. Marstaller explained that the District believed the Student would feel like he was one with his peers and be more confident about what he could do. (T.940-41). She stated that because the District could provide the Student's educational programming in the BILD program, it was unnecessary to send him out of district. (T.942).
130. On June 12, 2017, the Student was accepted at the Landmark School. (P.469). The Landmark staff recommended a schedule that included a Lindamood Phenome Sequencing

Program (“LiPS”) tutorial and an extra reading class, as well as a “low level” language arts class. (P467-468). In total, the Student would have three periods per day that focused on literacy skills. (Id.).

131. The Parents notified the District that the Student would be going to Landmark, and Ms. Marstaller responded that she believed he would do well there. (P463).
132. On July 24, 2017, the Parents formally notified the District of their unilateral placement of the Student at Landmark. (S.181, P.481).
133. The Parents reported the Student’s good progress at Landmark. He is more confident about school and less anxious about attending school. (T.1091). His progress reports indicated that he is an engaged student; he completes his homework independently; and felt successful as a reader. (S.187; P.777). While it has been difficult for them as Parents, they did not regret the decision they have made. (T.98).
134. On August 7, 2017, the District responded that they received the notice to unilaterally place the Student at Landmark on July 31, 2017. (S.183).
135. On August 31, 2017, the IEP Team held a meeting to discuss proposed to amend the Student’s IEP. (S.185). Among the changes included adding more specific reading goals to address syllable types to support the Student’s needs in reading; reflecting self-concept needs in the functional performance section of the IEP; adding the option to record a lecture as part of an accommodation; increasing direct OT from .5 hours per month to 60-minutes per week. (Id.). Because the Parents had already unilaterally placed the Student at Landmark, they rejected the offer. (Id.). The District did not amend the IEP to include these proposes.
136. The Student’s IEP lapsed in mid-December 2017 and has not been renewed since that time.

IV. DISCUSSION AND CONCLUSIONS

A. Summary of the Parents' Position

The Parents argue that the District failed to provide a FAPE to the Student because it implemented the inappropriate methodologies that did not address his specific learning disability. It asserts that the Student's IEPs and placement were not reasonably calculated to provide him with a FAPE. They assert that while the District knew that the source of his learning disability was in orthographic processing, as opposed to the more common phonological processing disorders, the District used the Wilson Program for his literacy instruction, which focuses on phonics-based deficits, not orthographical weaknesses.

The Parents assert that where the Student had average cognitive ability and could aurally receive and orally express grade level information, his IEP and placement should have instructed him in how to read using appropriate and effective methods that took into account his specific learning disability, with the aim to have him access grade-level material in the general curriculum. They assert that the District did not consider other methodologies when it became apparent that the Student was not making reasonable progress. They claim that instead; the District lowered its expectations of the Student and reduced the expected level of progress when it appeared he was making very little progress during third and fourth grade. They argue that after the Student could not reach the lower goals and was further behind after fourth grade, the District offered social work services, rather than addressing the orthographic deficits.

The Parents argue that the Student continued to fall behind his peers in fifth grade due to his disability. Instead of providing him with appropriate instruction to address his orthographic disability, the District added more pull-out services away from his regular mainstream peers. The result was more resistance to receiving instruction and therefore a decline in his progress.

The Parents add that despite his flagging progress, the Student was not offered end of school year services during the summer after fifth grade and before entering middle school.

The Parents claim that upon entering middle school in sixth grade, District staff were unprepared to teach the Student. They assert that an end-of-year assessment was not completed to determine what level he reached in literacy after fifth grade. In addition, the Student received his instruction with 14 other students, and did not have one-on-one literacy instruction until he was assigned to an educational technician during target time, a 40-minute period four times per week (160 minutes) in which he received instruction using the Wilson Program. The Parents note that was a reduction in the level of services in a one-on-one setting that he received in fifth grade. They assert that the IEP Team never called for a reduction in services during the fall of sixth grade. The Parents further state that the Student's writing instruction and reading comprehension were offered in a supplanted English-language arts class four times per week for 50 minutes and once for 40 minutes (240 minutes total). They state that nowhere in the record did the IEP Team determine to reduce the Student's programming from 450 minutes to 400 minutes per week, as noted in his IEP. The Parents assert that not only were the IEPs inappropriate but harmful as the District materially deviated from the terms of the IEPs that were developed.

The Parents further assert that the relationship between Ms. Mauck, one of his teachers, and the Student never developed well, which impacted his progress. They stated that they informed the school about this problem, but no action was taken.

The Parents point to the Student's sixth grade evaluations to claim that his progress had halted. They cited his WJ sub-scores that were all lower than they were in 2013. They highlighted the comment by the Mt. Ararat Middle School ("MAMS") coordinator that despite the Student's "slightly above average" cognitive ability, the Student was "significantly below grade level" with a "very low reading score" in sixth grade. They also cited Ms. Caswell's overall assessment that the Student had one of the most pronounced cases of dyslexia she had ever seen.

The Parents argue that the IEP created in December 2015 was materially flawed because it contained omissions that rendered it inappropriate. It only included spelling and decoding for literacy goals. In addition, the only measured tool for these goals was the WJ-IV 10-point

standard score, which they say is not a measured tool. The Parents suggest that because Mr. Hawley, the Student's case manager wrote the IEP, he seemed to have done it without the input of staff, since no witness could explain the omissions or odd measuring regime included.

The Parents cite the Student's low performance and teacher evaluations as evidence that the Student's programming was ineffective. They note that he remained at book level 4 in the Wilson Program, a level that he had apparently already achieved in third grade and had 0% accuracy with his spelling assessment. They note that none of his NWEA assessments ever rose above the first percentile.

The Parents argue that the Student's IEP was never implemented correctly in seventh grade. He did not receive his instruction in a special education setting, with the exception of 160 minutes per week in Target Time for reading. He did not receive any support in social studies during the year. He was placed in a regular education setting for English Language Arts ("ELA") that included 18 students and in a regular education setting for math that included up to 12 students. While the math and ELA classes were co-taught with a special education teacher, the Parents note this was not a special education setting as required under the IEP.

The Parents argue that the Student's literacy program was switched to the SPIRE program from the Wilson Program merely because the teacher was already using it in her classes as a general matter. They note that though it became apparent that the Student was much further behind than the teacher anticipated, it was not until late October that the Student started to be pulled out to re-engage him with the Wilson Program with Ms. Swisher to work on Book 4. The Parents suggest that while the Student began working in Book 5 at the end of seventh grade, it took five years for him to reach that level of progress, evidence that the IEP was not reasonably calculated to provide a reasonable level of educational benefit.

The Parents argue that through seventh grade, the Student's progress was negligible, citing reports from Ms. Marstaller and their own observations of his resistant behavior when he was asked to focus on homework, giving them "attitude" about doing school work. The Parents began looking for alternative placements sometime in the spring of 2017, when it became clear

to them that the Student was not functioning effectively as a learner in the District's middle school program. It seemed to them that the Wilson Program was not helping him to progress as a reader and therefore slowed down his progress across his academic experience.

The Parents agreed to visit the District's more restrictive BILD program to see if the program was something that could be a possible alternative for the Student. Once they found out that a new teacher was to be hired, they seriously doubted that the Student could be successful in it without knowing more about how the program would operate under a new faculty person. They felt that the only two choices they had were to experiment with the BILD program or place him in an out-of-district placement that was a known entity. Therefore, they decided that placement at the Landmark School was appropriate for the Student.

B. Summary of the District's Position

The District argues that the IEP Team designed appropriate IEPs for the Student each year at issue. They have been reasonably calculated to provide FAPE in the least restrictive environment and consistently developed under IDEA's procedural criteria. They contained challenging goals based upon the Student's assessments and teacher observations and were designed to enable the Student to make progress in light of his unique circumstances. The District worked consistently with the Parents as equal members of the IEP Team and was in contact with them throughout the year.

The District argues that the Student's progress was slow due to the Parents' reluctance or opposition to the provision of special education to the Student. They initially refused consent for the Student to be eligible for special education due to their reticence about "labeling" him as a student needing special education. They refused the District's offer of counseling and social services. They frequently asked to have the Student not attend his literacy instruction outside of the mainstream classroom. Based upon the conduct of the Parents and knowing that they could withdraw consent for the provision of special education, the District argues that it needed to offer services that the Parents would be willing to accept and paired him with teachers that were likely to develop a good relationship with him. They disagree with the Parents that the Student and Ms.

Mauck did not pair well, but rather, Ms. Mauck was a special teacher, liked by all students and staff. She was also a highly experienced teacher who chose to return to teach as an educational technician after retirement.

The District also argues that during the last four years, the IEP Team has found it necessary to implement more intensive specially-designed instruction and OT in more restrictive settings in order for the Student to make academic progress. Over the course of the timeframe at issue, the Student made meaningful academic progress each year.

The District argues that the Student's academic progress cannot be measured at the same rate as a non-identified student would make over the same period of time, especially when the Parents have enabled his avoidance of instruction. While the District did not use F&P to measure reading progress in middle school, the Student's standardized scores on the NWEA and GORT showed that he continued to make progress in fifth and sixth grades. Teachers also noted his progress in reading, writing, and math on his report cards. Any lack of progress can largely be attributed to resistance to special education programming and to the Student's avoidance behaviors that were enabled by the Parents.

The District asserts that while the Parents may have disagreed with the IEP Team's determination that the Student needed instruction in a more restrictive setting, such as the BILD program, they cannot simultaneously claim that the District did not provide a FAPE entitling him to an out-of-district placement. The District argues that it was prepared to provide the Student with a FAPE in eighth grade by placing him in the BILD program. It would have provided the Student with a significant increase in services for reading, writing, and math. It would have also addressed his avoidance behaviors by surrounding him with peers who were at a similar cognitive and academic level, as well as providing him with counseling services. The student cohort would have included appropriate peers for the Student.

The District argues that the Landmark School, in which the Student was unilaterally placed by his Parents, does not offer any element of special education services in which the District services were deficient. It was an inappropriate placement as well, because it took the

Student completely out of his mainstream setting into the most restrictive setting. The District argues that the only difference that Landmark has made for the Student is the provision of his literacy instruction using the Lindamood Bell's LiPS reading program, as opposed to the Wilson Program.

The District asserts that the Student had already advanced from the area in LiPS that he was working on at Landmark, and that he was not making great advances in reading fluency by the second trimester. It suggests that, by contrast, the Student had made significant progress in the Wilson Program over the course of four years.

Finally, the District claims that the Parents' obstruction of the Student's provision of services must also be weighed in determining whether Landmark was an appropriate placement and whether it should bar reimbursement.

C. Legal Framework

As a preliminary matter the burden of proof lies with the party seeking relief in IDEA complaint hearings challenging an IEP. *Schaffer v. Weast*, 546, U.S. 49, 41 (2005) *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35, n. 3 (1st Cir. 2012) Therefore, in this case, the Parents must establish any violation of IDEA and their entitlement to a remedy.

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). An IEP is the centerpiece of the IDEA's education delivery system for disabled children. *Honig v. Doe*, 484 U.S. 305, 311 (1988). The hearing officer must examine whether the Student's educational program contained in his IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

The Supreme Court addressed the "more difficult problem" left open in *Rowley* of establishing a legal test for substantive appropriateness of IEPs. *Endrew F.*, 137 S. Ct. at 993,

998. The Court explained that an IEP must be “reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances” and that “a student’s . . . educational programming must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Endrew F.* 137 S. Ct. at 1000 (2017). The Court directed that “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001.

The Court in *Endrew F.* also explained that the "reasonably calculated" standard means that crafting an appropriate program of education requiring “prospective judgment” is a “fact intensive exercise” that must be “informed not only by the expertise of school officials, but also by the input of the child’s parents.” *Id.* at 999.

The IDEA requires that students be educated with non-disabled peers “to the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); MUSER § X.2.B. As such, a public school may remove a child with disabilities from the regular educational environment only when “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); MUSER § X.2.B. The educational benefit and least restrictive environment requirements “operate in tandem to create a continuum of educational possibilities.” *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990). As such, schools must make a continuum of placement options available. 34 C.F.R. § 300.115; MUSER § X.2.B.

In this case, then, the questions are whether, in each year at issue, the Student’s IEPs were reasonably calculated and reasonably ambitious to enable him to make appropriate progress in light of his circumstances. If they were, the next level of inquiry is whether they were implemented with fidelity in order for him to make reasonable progress. There are no issues of procedural violations, so the focus is on the Student’s programming contained in the IEPs themselves and its implementation.

The Student has average cognitive abilities and can aurally receive and orally express grade level information. Therefore, the Parents assert that despite the need to remediate his orthographic processing disability, it is a “reasonable prospect” for the Student to “aim for grade level advancement,” under the *Andrew* standard. They contend that only if his disability makes it unreasonable to expect advancement on par with grade-level expectations does the IDEA permit the use of a lower standard, but this still requires a higher level of benefit than the former standard of “meaningful, non-trivial benefit.” It asserts that the District did not address the Student’s core orthographic weaknesses (dyslexia), and instead focused on developing his phonic-related skills. The District, on the other hand, contends that the Student’s IEPs have been appropriate in light of the Student’s circumstances, and that he made adequate progress. It suggests that he could have made more progress but for his work avoidance and negativity towards school, which hampered his progress. Further, it claims that the Student’s Parents have enabled their son’s behaviors by refusing and delaying consent to provide special educational and related services.

D. Issues

1. Did the District’s IEP and placement for the Student during fourth grade (2013-2014), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitling him to compensatory educational services?

The Student was identified as being eligible for special education and related services during the summer of 2013 under the LD category, specifically in the areas of basic reading skills, reading fluency, and written expression. He had been receiving intensive reading instruction in the Wilson Program in third grade with poor results. While his cognitive ability was average, his disability involved an orthographic weakness, later identified as dyslexia and diagnosed with a visual perception weakness. In third and fourth grade, he also exhibited anxiety during assessments. At the beginning of the 2013-2014 school year, fourth grade for the Student, his literacy level was at Level I on the F&P measurement scale, which is equivalent to a late first-grade reading level. Under the F&P scale, Level P would be at grade level. His IEP goal in reading was to achieve Level K, a mid-second grade reading level, by the end of fourth grade, using the Wilson Program. He started out in Book 1 of 12 in the Wilson Program at the

beginning of the year, a regression from third grade. During the year, his frustration level was evident when he went through his reading instruction. While his teacher made note of it, there was no action taken on the part of the IEP to explore or address the root cause of the frustration.

By the end of the fourth grade, the Student had not reached his reading goal. He was reading at Level J, corresponding to an early second-grade level. He was also not meeting his math goal to be at grade level. While the District believes his progress was hampered by his absenteeism, he had approximately 11 absences during the year. I find that this was not the primary reason why he did not make adequate progress in fourth grade.

Primarily, I find that the IEP Team failed to consider the underlying cause of the emotional and psychological issues that were emerging in fourth grade. The IEP Team did not consider whether the methodology they were using was appropriate given the Student's orthographic impairment. In fact, it is apparent from testimony of the District's staff that they did not understand that his disability was of an orthographic nature. They were approaching his learning from a phonological aspect, focusing on mastering Book 1 and 2 in the Wilson Program. While this may have been a necessary part of the Student's programming, the IEP Team did not consider how to also address his orthographic impairment. Ms. Caswell's evaluation specifically stated that the Student's orthographic deficits in visual memory, particularly related to symbolic information (letters, numbers, and words) made it difficult to learn and hold onto the associations between sounds and symbols. His orthographic deficits also made it more difficult for him to retrieve phonological information from memory. Ms. Caswell was explicit in her recommendations that his instruction should focus on this aspect of learning. "He has strengths in his ability to process the sounds of words (phonological awareness). However, he may be slower than peers in retrieving phonological information." (P.82). The IEP Team did not address this fundamental orthographical weakness. His IEP did not specifically include goals for improving his visual memory deficits as it related to learning and maintaining the associations between sounds and symbols. His stated goals in reading and writing presumed that he would be able to retrieve phonological information from memory and learn the associations between symbols and sounds. For example, his reading goals stated, in relevant part, "[The Student] will increase his reading from Level I (DRA 16) to Level K (DRA 20) with 96% accuracy," and

“[The Student] will increase his word and nonsense word and sight word fluency from reading 60% of words correctly to reading 80% correct as measured by WADE or similar word list.” (S.20, p.7). Without goals and services specifically addressing the orthographic nature of his disability, it is not surprising that the Student made little or no progress in these goals by the end of fourth grade. (Id.).

The more difficult question is whether the District was using the proper methodology to allow the Student to make progress. While school districts have discretion to determine what methods to use to instruct students, it is unclear from the record why the District continually chose to use the Wilson Program with the Student. Clearly, he was not retaining much of the lessons he was receiving in Wilson since he was only making incremental progress from attaining a Level I to a Level J— half year’s growth in literacy. His rate of progress may be understood based upon Ms. Caswell’s cautionary insight that since the Student’s visual memory was poor, he may not recall the phonological information he had previously learned. The IEP Team needed to question whether the Wilson Program was the effective tool and/or whether he needed a different or additional tool to aid him with his orthographic processing weakness. In any event, I find that the IEP Team failed to reconvene during the year when it became necessary to question in methodologies and strategies as the Student’s progress was stagnating and his emotional frustration was increasing.

I commend the District teachers, especially Ms. Ortiz, for attempting to provide the Student with an appropriate education. Clearly, she was devoted to the Student’s learning, but she had never taught a student with an orthographic disability and may not have understood how to approach it. However, this does not excuse the IEP Team’s responsibility for not including goals and services in the IEP that addressed the fundamental root cause of the Student’s learning disability. Even more concerning is that the IEP Team was not convened sooner than April 2014 once it became apparent that he was barely progressing. While it is not necessary to have more than one IEP meeting during the school year, it was imperative for the Team to convene and reassess what was happening when he was failing to make progress on his IEP goals.

I find, therefore, that the Student's IEP for fourth grade was not reasonably calculated to enable the Student to make progress in light of his circumstances and therefore failed to provide a FAPE to the Student.

2. Did the District's IEP and placement for the Student during fifth grade (2014-2015), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitling him to compensatory educational services?

There are few records of the Student's progress before the IEP Team met in mid-November 2014 to develop the Student's annual IEP in November 2014. The only record of his progress is through emails between the Parents and Ms. Ortiz. They both lamented the Student's emotional frustration over his reading. Ms. Ortiz understood how difficult it was for the Student to master the lessons in the Wilson Program. By November 2014 of fifth grade it was reported that he had attained Level K in reading, a mid-second grade reading level. The Education Evaluation continued to show that the Student was significantly below grade level, even below the first percentile in all levels of literacy. (S.39).

The record provides only scant objective information about the Student's progress in fifth grade after November 2014. Only an email between the Mother and Ms. Ortiz in early March 2015 indicated that the Student had attained Level L in reading, a mid-to-late second-grade reading level. (S.45; P.790). While the District staff was concerned that his low receptive and expressive language skills could be impeding his progress, the results of a speech language evaluation indicated that he was in the average range within his age group for articulation, voices, and fluency skills. By the end of the year, he had attained Level M, a late second-grade reading level, which was considered "adequate progress" as graded in his IEP. While the grade recorded in the IEP indicated that he was making "adequate progress" in math in March 2015, he was not doing so by June 2016.

To put his progress into perspective, by the end of the fifth grade in June 2015, the Student had made less than a year's progress in literacy (progressing from Level J in the fall to K in November, L in March, and M in June) and remained at the second-grade reading level. He was also unable to meet even the minimum of fifth-grade level standards in math. Later

assessments in the fall confirmed his stagnant progress in literacy and math. By November 2015 it was apparent that while the Student's cognitive functioning fell in the upper end of the "average" range and showed appropriate vocabulary and fund of knowledge with strong reasoning skills, he continued to have "pronounced" struggles with basic literacy and math skills. (S.71, pp.7-8). Processing deficits continued to impact his basic literacy and math skills. This is a student who has been told that he can attain grade level math and significant improvement in literacy. However, the same orthographic deficits in visual memory, particularly related to symbolic information were same characteristics that were hampering his progress in fifth grade as they did in fourth grade They continued to be major impediments to his learning unless changes in strategy were made. Since the IEP Team was aware of the Student's severe processing deficits and less-than-expected progress in literacy and math, I find that it had a responsibility to question what was happening and consider different strategies and methodologies.

Therefore, I find that while the Student made some progress in fifth grade, it was less than what could have been achieved and less than what the District believed he could have achieved based on his IEP goals. After all, he had above average cognitive functioning and reasoning skills, as well as an appropriate fund of knowledge. If he had instruction that was specifically addressing his orthographic processing deficits, there was a *reasonable prospect* that he could have attained his goals and eventually reached grade-level advancement, especially in math.

Therefore, I find that the Student's fifth grade IEP was not reasonably calculated to enable the Student to make progress in light of his circumstances and therefore failed to provide a FAPE to the Student.

3. Did the District's IEP and placement for the Student during sixth grade (2015-2016), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitle him to compensatory educational services?

First Half of Sixth Grade: September through December 2015

The Student began sixth grade at MAMS in the fall of 2015. The IEP that followed him was implemented in November 2014. Upon arrival, the Student was placed in the special education setting with 14 other students for ELA and a pull-out Target Time session for two-to-one reading instruction with Ms. Mauck. His special education math teacher, Mr. Hawley, was his designated case manager. What is apparent is that he was only receiving 400 minutes of specialized instruction in literacy, whereas his IEP called for 450 minutes per week. His new ELA teacher, Ms. Nickerson, neither understood that the Student had very significant needs nor knew what programming had been used in fifth grade; it was not until the second week in October that she reached out to Ms. Ortiz and asked what programming had been used in fifth grade. By mid-November 2015, he was making “inconsistent progress” on his reading and math goals, and “adequate” progress on his writing goals. His NWEA scores for the fall of 2015 indicated that he was in the 1st percentile for both reading and math. His scores on the WJ-IV and Gort-V were very low. For example, he placed in the .05 percentile in all the reading subcategories in the GORT assessment.

Ms. Caswell’s triennial psychoeducational evaluation performed in mid-November 2015 indicated that while the Student was assessed at above average in cognitive function and reasoning skills, he still had the same orthographic deficits as in 2013. These were *significant* deficits that could severely impact his ability to learn and remember key aspects of reading skills. Overall, he was reading at a mid-second-grade level in November 2015. His learning disability was reaffirmed in December 2015, although it was noted that the Student was attentive and well behaved in class. The evaluation concluded that no other factors attributed to his low academic progress other than his learning disability. (S.87).

By mid-December 2015, the Student was still working in Books 3 and 4 in the Wilson Program, only partially meeting grade-level standards in writing, yet was being read grade-level texts as part of his normal participation in class. (S.81, 86). He continued to have “very significant” encoding and decoding problems. (Id.) At that point, the District staff acknowledged that something needed to change and discussed with each other whether a more restrictive setting was needed for reading, writing, and math. (Id.). Ms. Caswell reiterated that the Student “had one of the most pronounced cases of dyslexia” she had seen and expressed her concern that a

more restrictive setting with more impaired students may not be the best fit for him. In addition, the staff understood that the Student was not meshing well with Ms. Mauck, his Target Time teacher, and that the Parents continued to report nightly struggles with completing homework. Ultimately, the IEP Team decided to provide heavier support to the Student in science and social studies and move him to a more restrictive math class called Math 180.

I find that the Student's educational programming during the fall of his sixth grade failed to provide the Student with a FAPE, both because the IEP was not appropriate, as stated above, but also because, even if it was, the District staff ignored the educational setting the Student needed in order to make any meaningful progress. The record is replete with evidence indicating that the Student made little to no progress on his literacy goals. His IEP was not being implemented with fidelity, as his level of literacy instruction was short by 50 minutes per week. He continued to work in the same Wilson Reading Program book that he had used in fifth grade. His assessments showed minimal or no improvement. The District staff's concern about the options they had at the end of December is evidence that the Student's progress was flagging. By the end of the calendar year, the staff understood that the Student's programming needed to change and considered the BILD program, a more restrictive setting where the Student could receive more intensive instruction.

Second Half of Sixth Grade: January through June 2016

The IEP that was created after the IEP meeting in December 2015 had some glaring reductions in service levels. There were no goals for reading fluency or reading comprehension, his weakest area of deficit. The only literacy goals included encoding, decoding, writing, and a math computational goal. There were no standards to guide the frequent capture of measures other than the annual WJ-IV evaluation. The description of his present level of academic performance merely repeated evaluation scores for his strengths. A reader of this IEP would not be enlightened with respect to the depth of his orthographic deficits and how they impacted his access to education. It was noted that he would be spending 60% of his time with his non-disabled peers, which included math, science and social studies.

The record evidence of the Student's reading comprehension and writing instruction indicates that, Ms. Mauck continued with the Wilson Program in a 2:1 setting, but the Student never advanced out of Book 4. For his writing instruction, his teacher Ms. Nickerson acknowledged that she did not focused on writing but focused on assessing his cognitive engagement with reading and did not discuss or oversee the work the Ms. Mauck was doing with the Student or ask her why the Student was still on Book 4 of the Wilson Program. She knew that the Student was practicing writing through dictation with his Mother. Since the IEP did not require any assessment tools to gauge the Student's performance during the year, there was no frequent objective assessment of the Student's progress, especially in the areas of his greatest weaknesses.

I find that the IEP was inappropriate because it did not include goals reflecting his needs in all areas of reading fluency and reading comprehension, the Student's weakest areas. It is apparent that the IEP failed to heed Ms. Caswell's emphatic explanation that the Student had an orthographic deficit impacting his reading fluency and comprehension. There was no explanation in the record for the failure on the part of the District to exclude such crucial programming. For the goals that were included, the IEP failed to indicate what tools or form of measurement would be used to assess the Student's progress against those goals. I find that the WJ-IV is an ineffective measuring tool because it has only been used during triennial evaluations and not as a measure of progress throughout the year. There was no explanation by the IEP Team as to why the F&P measurement tool was eliminated. If its use had been continued, there would have at least been objective data to compare how he was progressing over a shorter period of time and whether adjustments needed to be made during the year. The only assessment we have is that he scored in less than the first percentile on his NWEAs. There only form of evidence to gauge the Student's progress was his level of frustration and work avoidance, both of which continue to rise. Furthermore, there is no evidence that the IEP Team considered ESY services in its meeting on December 16, 2015. There was evidence that he was not retaining the lessons learned, which may require summer services to avoid the regression which seemed to appear each fall.

For these reasons, I find that the IEP developed and implemented in January 2016 was not reasonably calculated to enable the Student to make progress in light of his circumstances and therefore failed to provide a FAPE to the Student.

4. Did the District's IEP and placement for the Student during seventh grade (2016-2017), either as designed or as implemented, fail to provide him with a FAPE under the IDEA, thereby entitling him to compensatory educational services?

The Student entered seventh grade with the same IEP drafted in January 2016, which indicated that all of his special education instruction was to be provided in a special education setting. However, at the beginning of seventh grade, the Student was placed in the regular general education setting for all of his instruction, with the exception of 160 minutes reading instruction during Target Time that included a group of seven students. While the class of 18 students was co-taught by a special education teacher, the IEP called for direct instruction in a special education setting. In addition, the IEP called for added support in social studies, which was not provided.

The Student's reading instruction in Target Time did not stabilize until early October. Ms. Marstaller, the Student's special education teacher, was not certified to teach in the Wilson Program. Instead she started using SPIRE, which she was qualified to teach and what she was using with her seven students. In late September, once it became clear that the Student needed significantly more direct instruction, he was assigned to Ms. Swisher in a 2:1 setting for Target Time. She worked with the both students in Book 4 of the Wilson Program, the same level the Student had been working on since at least fourth grade.

There is no recorded level of measure on progress the Student was making in his areas of reading fluency or reading comprehension for seventh grade. In his sight word assessment in early October he scores were inconsistent, ranging from 95% correct in short vowels to 25% correct for three-syllable words. By mid-November the Parents agreed that the Student needed the support study time instead of his world language course, as suggested by his teacher. In November 2016, he showed "adequate" progress on the IEP goals he did have.

By December 2016, the Student's teachers were all reporting inadequate progress in all areas. He was not turning in homework or consistently completing assignments. The IEP Team understood that his reading fluency was in the 9th percentile and that he continued to working in Book 4 in the Wilson Program. His writing was illegible, the quantity of his writing was minimal, his understanding of concepts was rarely demonstrated, and his grammar and detail were inconsistent. He also continued to need direct support and practice in learning math concepts. All of his teachers acknowledged that the Student lacked focus, was easily distracted and was not working independently, all of which obstructed his general learning. However, the IEP Team concluded that the program that was implemented outside of the IEP process in the beginning of the year as was what was needed and did not consider any changes or other options to address what they were all seeing.

The Student's new IEP, based upon what they knew of the Student by December 2016, indicated that his special education should be provided in the mainstream classroom with Target Time four periods a week, and two periods of supported study time. This was a significant reduction of the intensive direct instruction that was called for in his prior IEP. For the first time, the IEP added a functional goal to "stay focused and complete assignments at from less than 50% of the time to 60% of the time." His writing and typing skills would be addressed with OT for 30 minutes per month.

Through February 2017, the IEP Team continued to see the same lack of progress. Weekly updates from his special education teacher continued to report that he lacked focus and was not completing his assignments and homework. His NWEA scores showed a reduction growth in math (1st percentile) and zero growth in reading (7th percentile). By mid-February, the IEP Team knew that action was needed. It decided that instead of having his entire special education program be transferred to the BILD program, as had been discussed in sixth grade, the IEP Team decided to try to provide math instruction in BILD setting in order to receive direct instruction in math. Through March and April, progress continued to wane in reading and writing, as well as work completion in science and social studies, according to his teachers. His graded IEP indicated "minimal" to "some" progress in his goals. However, "adequate" progress was noted on his math goal. The concern about the Student's progress was so great that his case manager

and teacher, Ms. Marstaller, acknowledged that options needed to be discussed for eighth grade because he was overwhelmed by the demands being asked of him. The option suggested was to place the Student in the BILD program for all of his special education instruction.

The District understood by that time the Student was not being successful and that he needed a more restrictive placement. He went through essentially an entire school year with special education programming that the District knew or should have known was not going to be effective. It had all the information it needed based upon what happened during the second half of sixth grade and the experience he had when he was not given the appropriate special education setting that the IEP Team determined he needed at the end of sixth grade. His progress, for what it was, became negligible in seventh grade. His motivation to succeed at school had virtually disappeared. As Ms. Marstaller acknowledged, he was just too overwhelmed.

I find that the District failed to provide a FAPE to the Student during his seventh grade. It was foreseeable that the Student was essentially set up for failure during the seventh grade given the reduction in the direct instruction he was getting, along with a methodology that was not addressing his specific learning disability. His frustration level, lack of focus, and lack of motivation to succeed were symptoms of the ineffective programming decisions made by the IEP Team.

I find that the District's argument that the Parents enabled the behavior of the Student lacks merit. The constant communication between the District's staff and the Parents indicate the Parents' attempts to encourage the Student to succeed, however their efforts could only go so far. The fact that they declined social work services cannot be the primary cause for the Student's lack of progress. I find that the failure on the part of the District to offer an appropriate special education program is by far the primary reason for the Student's lack of progress.

As stated earlier, the failure of the IEP Team to consider any other methodology to provide the Student's literacy instruction to address the orthographic deficits of the Student doomed the Student's progress. While the District focused on his phonological issues, it failed to address his specific needs in visual memory problems and other orthographic issues described by Ms.

Caswell in 2013 and 2016. The IEP failed to design an IEP that was reasonably calculated to enable the Student to make progress in light of his circumstances.

5. Did the District's proposed IEP and placement for the Student for eighth grade (2017-2018), fail to provide him with a FAPE under the IDEA?

Once the District acknowledged that the Student needed intensive direct instruction for all of his special education instruction, the only choice it could offer the Parents was the BILD program. It would have considered it more seriously in sixth grade but the cohort of students in the program at that time were functioning on a lower cognitive level than the Student at that time. By the end of seventh grade the District was billing the program as more appropriate since it would only include other students who were relatively at the same cognitive level as the Student. The District argues that the program was designed to also address the Student's organizational skills and executive functioning skills for to him be able to complete his school work and make academic progress.

The IEP that was proposed and then finalized at the May 16, 2017 IEP meeting, provides for all of the Student's reading, writing, and math instruction in a special education setting for 15 periods per week. He would also be in a supported science class in the regular education setting. He would be provided with counseling as a related service as necessary to provide help with his self-esteem and level of confidence about his academic status. OT would remain the same at 30 minutes per month as well as a support study time for two periods per week. However, the IEP Team met in late August 2017 and proposed amendments to the IEP, which was set to expire in mid-December 2017. While the proposals were made at the August 2017 IEP Team meeting, the IEP dated May 16, 2017 was not amended to reflect the proposals. I find, therefore, the IEP that was proposed in May 2017, was the one that that continued to be binding through December 13, 2017. (Cite).

The issue is whether the IEP, dated May 16, 2017, was reasonably calculated to enable the Student to make progress in light of his circumstances. I find that, at the time it was drafted, the Student needed intensive direct instruction in a special education setting in reading, writing, and math. However, it is unclear to me if his literacy instruction methodology was going to remain

the same or if the District was considering options. It has been apparent that the Student did not appear to be progressing at a meaningful rate in his reading fluency or reading comprehension. In fact, this has not been the focus of his learning in sixth grade according to his teacher Ms. Nickerson. By the end of seventh grade he had finally advanced to Book 5 in the Wilson Program, which he began in third grade. None of the written notices indicated that the IEP Team had considered different options with respect to how to approach his orthographic deficits.

The Court in *Andrew F.*, supra, directed school districts to focus on the unique circumstances of students when developing IEPs and to provide access to instructional strategies based upon those unique circumstances. Throughout the Student's elementary and middle school years at issue, it is not apparent that the IEP Team focused on his unique circumstances, despite having knowledge about him. It is not apparent that there would have been any different strategies used in the BILD program that would allowed him to progress in his literacy. The IEP should have been more individualized than it was given what was known about his severe deficits. To merely change the setting to a more restrictive intensive setting without considering the educational strategies and methodologies it would be using does not meet the more ambitious approach outlined in *Andrew F.* Based upon the above I find that the May 16, 2017 IEP was not reasonably calculated to enable the Student to progress in light of the Student's unique circumstances.

6. If the District violated the Student's rights under the IDEA, is his family entitled to reimbursement of the costs associated with his placement at the Landmark School and/or other compensatory relief?

When a student is deprived of FAPE, he is entitled to "such relief as the court deems is appropriate." 20 U.S.C. S 14150)(2)(B)(ii). Compensatory educational services requested by the parents are intended to place the Student in the same position he would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). In *Burlington School Comm. v. Department of Education*, The Supreme Court determined that reimbursement of private school costs is an appropriate remedy when a school district's IEP and placement fails to provide an appropriate education and the unilateral private placement is "proper under the Act." 471 US 359, 370 (1985). Private school tuition

reimbursement is available as a remedy under the IDEA where a hearing officer finds that: 1) the school department did not make FAPE available to the student in a timely manner prior to the private enrollment; and 2) the private placement is determined to be appropriate. 34 CFR 300.148; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1992). A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the local school department. Under the holding of *Florence County*, supra, the parents must demonstrate that the public school did not provide a free, appropriate public education, and that the private school placement is proper, which means, “education provided by the private school is reasonably calculated to enable the child to receive educational benefits.” *Florence County*, 510 U.S. at 11. It is not necessary that this unilateral placement be in the least restrictive setting. The Third Circuit Court of Appeals noted that imposition of the least restrictive environment requirement on such a placement “would vitiate the parental right of unilateral withdrawal,” and that “the test for the parents' placement is that it is appropriate, and not that it is perfect.” *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 84 (3d Cir. 1999).

While parents are at their peril if they take a financial risk and unilaterally place their student in an out-of-district placement, they are entitled to equitable recovery if their decision to reject the IEP and enroll the student elsewhere is found to be correct at hearing. *Florence County*, supra, 510 U.S. at 15.

Since the District has failed to provide the Student with a FAPE, I find that the Student’s placement at Landmark School is appropriate. It is a well-established private school providing instruction for students with language-based disabilities. It relies on a variety of learning methodologies for increasing decoding, fluency and comprehension skills. In addition, it has a full schedule of academic classes which integrate literacy skills. It is notable that the Student had progressed in his reading fluency from 62 words per minutes to 100 words per minute on near grade level materials by midway through the school year. He is more confident, independent, completes homework on his own, and his anxiety has been resolved. Based upon these facts, I find that the Landmark School is an appropriate placement for the Student.

Based upon the above, I find that an appropriate remedy to compensate the Student for not being provided a FAPE during the relevant years, is reimbursement to the Parents for the costs incurred in their unilateral placement at the Landmark School. However, I also find that the reimbursement is limited to the non-residential portion of the total cost of the Landmark School.

ORDER

1. The District violated state or federal special education laws by failing to offer an IEP reasonably calculated to enable the Student to make progress in light of his circumstances and failing to provide a FAPE for the 2013-2014; 2014-2015; 2015-2016; and the 2016-2017 school years.
2. The District is ordered to reimburse the Parents for the cost of the Student's tuition at the Landmark School for the 2017-2018 school year, plus transportation expenses permitted under the IDEA as compensatory education series for the failure to provide a FAPE during the above years. This excludes the cost of residential boarding at the Landmark School since it is not required for him to receive his education.
3. The District is ordered to pay the cost of the Student's tuition at the Landmark School for the 2018-2019 school year, plus transportation expenses permitted under the IDEA as compensatory education series for the failure to provide a FAPE during the above years. This excludes the cost of residential boarding at the Landmark School since it is not required for him to receive his education.

It is so ORDERED

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

Sheila Mayberry, Hearing Officer

June 22, 2018