

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

20.038H – [REDACTED] v. Portland Public Schools

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE FAMILY: Richard O’Meara, Esq.

HEARING OFFICER: Rebekah J. Smith, Esq.

This hearing was held and this decision issued pursuant to Title 20-A M.R.S. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on July 27, 28, 30 and 31, 2020, via Zoom videoconference due to the state of emergency in Maine resulting from the COVID-19 pandemic. Present for the entire proceeding were [REDACTED], the mother of Student [REDACTED] (“Student”); [REDACTED], the Student’s Father; Richard O’Meara, Esq., counsel for the Family; Deborah Mullis, Director of Special Education for Portland Public Schools (“School District”); and Eric Herlan, Esq., counsel for the School District.

Testifying at the hearing under oath were:

[REDACTED], the Student’s Mother
[REDACTED], the Student’s Father
Sherri Beall, Consultant for Portland Public Schools
Dr. Ann Christie, Evaluator
Dr. Marcia Hunter, Evaluator
Boyd Marley, Principal of East End Community School
Barbara Melnick, Aucocisco School Director
Dr. Mary Scammon, Evaluator
Deborah Mullis, Special Education Director for the School District
Kelly Thornhill, Assistant Principal of East End Community School

I. PROCEDURAL BACKGROUND

The Parents filed a request for a hearing on November 6, 2019. On November 20, 2019, a telephonic scheduling conference was convened and a Scheduling Order was issued setting hearing dates for January 14, 15, 22, and 24, 2020. On December 12, 2019, a telephonic scheduling conference was convened and Scheduling Order was issued amending the hearing dates to February 7, 11, 12, and 14, 2020. On December 18, 2019, an Amended Scheduling Order was issued scheduling hearing dates of February 7, 12, 14, and 24, by agreement of the parties.

On January 27, 2020, a telephonic scheduling call was convened. An Amended Scheduling Order was issued on February 5, 2020, granting the parties' joint continuance request to allow the Parents to file an amended complaint challenging the IEP and placement offered at the most recent IEP meeting and to allow the parties additional time to seek resolution of the matter. The hearing dates were set for March 10, 11, 17, and 27, 2020. A telephonic scheduling conference was convened on February 24, 2020, and an Amended Scheduling Order was issued granting the parties' joint request to alter the hearing dates to avoid scheduling conflicts. The hearing was rescheduled for March 27, March 31, April 3, and April 6, 2020. On March 17, 2020, a telephonic scheduling conference was convened and an Amended Scheduling Order was issued on March 20, 2020, granting the parties' joint continuance request on the basis of school closures and the state of emergency, which rescheduled the hearing to June 3, 4, 5, and 10, 2020. On April 30, 2020, a telephonic scheduling conference was convened and an Amended Scheduling Order was issued on May 6, 2020, granting the parties' joint continuance request on the basis of scheduling conflicts and the need for additional time to train on

the use of remote videoconferencing for hearings and setting new hearing dates of July 27, 28, 30, and 31, 2020. On June 10, 2020, a scheduling videoconference was convened and a Conference Order was issued. On July 17, 2020, a prehearing videoconference was convened and a Conference Order was issued identifying the issues for hearing and setting deadlines for prehearing submissions. The hearing was held on July 27, 28, 30 and 31, 2020.

The record includes 51 documents submitted by the Parents, identified as pages P. 1 through P. 367, and 65 documents submitted by the School District, identified as pages S-1 through S-294, as well as five appendices submitted by the School District. All documents were admitted without objection. At the close of testimony, the parties jointly requested that the record remain open for the submission of written closing briefs. The record closed with the Hearing Officer's receipt of each party's closing brief on the agreed-upon deadline of September 4, 2020.

II. ISSUES

The issues for hearing are:

1. Whether the School District violated the IDEA's child find referral and identification obligations and/or denied the Student's right to a free appropriate public education ("FAPE") by failing to find [REDACTED] eligible for special education and related services from December 2017 to November 2019.
2. Whether the School District's January 2020 Individualized Education Program ("IEP") and placement offer failed to provide the Student with a FAPE in light of [REDACTED] individual circumstances.
3. Whether the Student is entitled to a compensatory remedy and/or reimbursement to [REDACTED] Parents for services provided to [REDACTED] through Aucocisco School from May 2019 through August 2019 (partial day tutorials) and/or since January 2020 (full day placement), and/or continued programming and placement at the Aucocisco School or some other remedy.

4. Whether the School District acted with deliberate indifference in failing to find the Student eligible for special education and related services under the IDEA from December 2017 through November 2019.

The Hearing Officer ruled in the Conference Order of July 17, 2020, that she did not have jurisdiction to hear Issue #4. The parties did not request the opportunity to submit further briefing or argument on the jurisdictional issue.

III. FINDINGS OF FACT

The Student is now 10 years old. (S-267.) ■ lives with ■ Parents within the Portland School District. (S-267.)

Kindergarten (2015-2016)

The Student attended kindergarten at East End Community School within the School District. (S-7.) ■ end-of-year report card indicated primarily scores of 2 (“making progress towards target”) with some scores of 3 (“progress meets target”) in all reading and writing skills, with predominantly scores of 3 in math skills. (S-27.)

First grade (2016-2017)

In anticipation of the Student’s first grade year at East End Community School, the Student’s Mother filled out an Educational Placement Information form. (S-29.) She indicated that although the Student got along well with other students, ■ was a stickler for the rules and often directed other kids to follow the rules. (S-29.) She noted that the Student often complained of other boys bullying ■ noting she was not sure how true it was. (S-29.) The Student’s Mother indicated that the Student cried easily when corrected or criticized. (S-29.) She reported that they read to the Student every night but ■ tended to memorize books rather than try to read them. (S-29.) She indicated that the

Student stated that ■ hated reading but she felt that ■ quit too soon and didn't apply ■ because it was hard for ■. (S-29.) The Student's Mother noted that the Student liked science and math, asked great questions, was very imaginative, and enjoyed pretend play. (S-29.) The Student's Mother explained that ■ was easily distracted, requiring frequent reminders of what ■ was supposed to be doing. (S-29.)

The Student's first grade teacher at East End Community School was Christina Mesevage. (S-47.) In March 2017, a Phonemic Awareness Assessment was administered to the Student, who scored 9 out of 26 on the Rhyming and Alliteration portion of the assessment. (S-37.) The Student's scores were coded as not competent in Rhyming and Alliteration, minimally competent in Sound Manipulation, and moderately competent in Word Parts, Sound Positions, and Sound Separation. (S-42.) On the Rhyming and Alliteration portion, the assessor noted that the Student was "very uncomfortable" and the assessor had to rephrase the question. (S-37.) The assessor also concluded that the Student displayed inconsistent understanding and needed work with middle and ending sounds. (S-37.) The results of the Phonemic Awareness Assessment were not shared with the Parents. (Tr. 16-17.)

In April 2017, a Progress Monitoring Form indicated that the Student's strengths included an eagerness to learn; a love of science and math; and being read to a lot at home. (S-43.) Areas of concern included ■ reading level; ■ writing skills (including spelling and problems with letter swapping, for example spelling "baby" as "abab"); and ■ lack of mastery of high frequency words. (S-43.) Goals were set to increase ■ reading level and mastery of high frequency words. (S-43.) A plan was created to have ■ read with an educational technician twice a week, receive pull out services twice a

week, and practice high frequency words with an AmeriCorps volunteer. (S-43.) At some point, notes were added on the monitoring form indicating that the Student's reading level had not improved despite working with an educational technician twice a week. (S-43.) The notes also indicated that the pull-out sessions that had been planned for twice a week occurred only a handful of times. (S-43.)

A May 2017 Progress Monitoring Form, not shared with the Parents, indicated areas of concern to be reading and writing. (S-44; Tr. 21.) The eight-week to twelve-week goals included a discussion with the Student's Parents regarding concerns about the Student's lack of focus and inconsistencies; teaching the Student ten new high frequency words; and moving the Student up a reading level. (S-44.) The plan was to meet with the Parents to advise that the Student see ■■■ pediatrician over the summer regarding attention concerns; schedule an AmeriCorps volunteer to work with the Student; and have the Student read with an educational technician twice a week. (S-44.)

As of May 2017, the Student had mastered 64 out of 100 first grade high frequency words. (S-31.) At some point, notes were added to the May 2017 Progress Monitoring Form indicating that Ms. Mesevage had met with the Parents on May 15. (S-44.) The Student's reading level remained at Level C, below the level expected for the start of first grade. (S-45.) The Fountas and Pinnell reading materials utilized by the School District set the following standards: at the beginning of first grade, Level D met expectations; at the end of first grade, Level J met expectations. (P-362.)

The Student's first grade report card indicated that ■■■ was making progress towards targets in most language arts, writing, and math skills; the only "area of concern," notated by a score of 1, was ■■■ third trimester score in guided reading. (S-47.)

■■■■ was marked as meeting targets in all work habits areas. (S-48.) ■■■■ teacher noted that the Student had a great year, was always thoughtful and caring, followed the rules, and was a pleasure to have in class. (S-48.)

On June 23, 2017, around the end of the school year, the Student's Mother called the East End Community School to express concern about the Student's academic growth. (S-B-1.) The message was forwarded to Boyd Marley, Principal at East End Community School. (S-B-1.) Mr. Marley and the Student's Mother had a follow up conversation in which Mr. Marley shared information about ■■■■ own child's development and suggested that it was best not to push ■■■■, which might cause ■■■■ to struggle even more, because eventually the skills would just fall into place. (Tr. 24.)

Second grade (2017-2018)

Prior to the start of second grade, the Student's Mother again filled out an Educational Placement Information form. (S-50.) She indicated that the Student had improved in math and science but continued to have difficulty reading. (S-50.) The Student's Mother questioned whether the Student needed special help or a professional evaluation to determine if ■■■■ had dyslexia or if there was another reason for ■■■■ difficulties. (S-50.) She noted that ■■■■ did have some of the characteristics of dyslexia. (S-50.) The Student's Mother noted that ■■■■ remained focused on following rules and became frustrated when other kids misbehaved. (S-50.) She observed that ■■■■ could be controlling or bossy which might lead to ■■■■ being teased, bullied, or labeled as a tattletale. (S-50.) The Student's Mother indicated that the Student could be emotional and cried easily. (S-50.) The Student was placed in the classroom of Janice Pelletier. (S-78.)

On September 12, 2017, at the request of Mr. Marly, the Student's Parents sent ■■■ an email detailing their concerns about the Student. (S-B-2.) They explained that they felt that testing was necessary to determine if the Student had a learning disability such as dyslexia that was preventing ■■■ from comprehending reading and ultimately to determine the right teaching method to assist ■■■ (S-52.) The Parents expressed concern that the Student continued to read at a Level C while most of ■■■ peers had advanced to a Level J. (S-52.) The Parents explained that they were unaware that the Student was not advancing similar to ■■■ peers until near the end of first grade. (S-52.) They recognized that ■■■ was struggling and it became more and more apparent over time that something was wrong. (S-52.) The Student's Parents observed that they were not able to read the writing ■■■ brought home at the end of first grade and realized at an open house where other student work was displayed that ■■■ peers were all able to write better than ■■■ was. (S-52.) They noted that the Student's Father and others in their family struggled with reading and writing and it was suspected that they suffered from dyslexia. (S-52.) The Parents reported that they had discussed the Student's characteristics with a family member who taught ESL and they believed that the Student met a lot of the criteria for dyslexia. (S-52.)

The Parents explained that the Student refused to try to read at home, seemed shy and embarrassed, and tried to use pictures to determine story lines. (S-52.) They noted that the Student wrote some letters and numbers backwards and often misunderstood words and pronunciation. (S-52.) The Parents concluded by asking for testing to be scheduled as soon as possible in order to help get the Student up to speed. (S-53.)

On NWEA testing administered on September 18, 2017, the Student's scores in literacy were all markedly below expectations. (S-100.) The Student received a score of 3 in Phonemic Awareness (compared to a class average of 27.6); a score of 5 in Phonics/Writing (compared to a class average of 17.1); and a score of 3 in Reading (compared to a class average of 23.6). (S-100.) In math, the Student met expectations in only the category of Patterns/Functions. (S-100.) The Student received a score of 3 in Measurement (compared to a class average of 33.7); 21 in Numeracy (compared to a class average of 29.5) and 14 in Operations (compared to a class average of 34.4). (S-100.) Ms. Pelletier classified [REDACTED] NWEA score as "fail." (S-77.)

On September 26, 2017, the Student's Parents again emailed Mr. Marley to follow up on their request for an evaluation. (S-B-6.) The Student's Mother indicated that she was becoming more aware, in doing [REDACTED] homework with [REDACTED], that the Student's reading was far behind grade level, noting that [REDACTED] was struggling with simple sight words such as "what," "with," and "and." (S-B-6.) [REDACTED] homework assignments were taking [REDACTED] 60 to 90 minutes per night and [REDACTED] was exhibiting significant frustration. (Tr. 28-29.) The Student's Mother expressed alarm that [REDACTED] seemed to be spelling words backwards, which [REDACTED] found frustrating. (S-B-6.) The Student's Mother requested the opportunity to meet with Ms. Pelletier and Mr. Marley to discuss Ms. Pelletier's understanding of the Student's academic development and what was being done to help [REDACTED] (S-B-6.) She also asked what next steps could be taken to get an evaluation. (S-B-6.) The same day, Mr. Marley emailed Suzanne Hardy, Executive Assistant in Student Support Services, to inquire whether an initial IEP had been scheduled for the Student. (S-B-8.)

On September 27, 2017, Mr. Marley responded to the Student's Mother by email indicating that the special education office handled the referral process and should be in touch soon to schedule a meeting to determine next steps. (S-B-9.) He suggested they try to find a time to meet in the meantime. (S-B-9.)

On September 29, 2017, Ann Christie, PsyD., School Psychologist, recommended to JoAnn Smith, Student Support Service Coordinator, that RTI should be implemented during the Student's evaluation process and that documentation related to RTI should be brought to the IEP Team meeting for consideration when the Team filled out the Specific Learning Disability Eligibility Form. (S-B-13 & S-B-16.) Dr. Christie indicated that looking at "cognitive, learning, and development and achievement" in the specified area of concern would be useful. (S-B-16.)

A special education referral form was completed in late September 2017 that indicated that the Student's present levels of performance in reading and English Language Arts were below expectations. (S-54.) On September 29, 2017, the Student's initial referral was reviewed at a meeting attended by the Parents, Ms. Pelletier, Ms. Smith, and Helena Wescott, a special education teacher. (S-78.) The Team agreed to conduct academic and psychological evaluations and an observation. (S-81.)

On October 6, 2017, the Parents met with Mr. Marley and provided him with the executed parental consent form for evaluations. (S-B-18 & S-B-20.)

On October 12, 2017, the Student's Father emailed Ms. Pelletier and Mr. Marley to ask what their recommendations were while they were waiting for the referral testing to be done. (S-B-23.) He expressed confusion about whether someone was working with

the Student one-on-one in reading skills and what methodology was being used. (S-B-23.)

On October 15, 2017, Mr. Marley emailed Kelly Thornhill, Assistant Principal at East End Community School, to ask if someone could meet with Ms. Pelletier to look at the Student's scores and make recommendations and if someone could do some one-on-one reading with the Student. (S-B-25.) Ms. Thornhill responded that she would meet with Ms. Pelletier and would assign someone to work with the Student on reading. (S-B-25.)

On October 15, 2017, Mr. Marley let the Parents know that a plan was being developed to try alternative ways to teach the Student the concepts ■ was struggling with, which seemed to be around reading and phonological processing. (S-B-26.) Mr. Marley indicated that although the School District was not recommending any particular program at that time, the RTI team would look at the Student's scores and make recommendations. (S-B-26.) He stated that a staff member would be working with the Student on interventions. (S-B-26.)

On December 6, 2017, Dr. Christie issued a Confidential Psychoeducational Evaluation of the Student. (S-92.) In their interview with Dr. Christie, the Student's Parents reported that they had concerns about ■ reading and relayed ■ explanation that the letters were "jumping around" on the page. (S-92.) They noted that ■ had difficulty reading and spelling and continued to write letters in reverse. (S-92.)

Dr. Christie noted that during her observation of the Student, ■ did not raise ■ hand or appear engaged in a discussion of what the class was writing about. (S-94.) After the teacher gave repeated instructions about the assignment (writing down the steps

to build a snowman), the Student got paper and sat at ■■■ table and began sketching out the picture. (S-94.) The Student then began playing with erasers and singing. (S-94.) ■■■ worked for a short time and then sat looking around the room, continuing to talk with a peer. (S-94.) During most of the observation, the Student was not working on ■■■ writing; ■■■ completed a drawing and wrote down two sentences, while the other two students at ■■■ table finished three to four pages of drawing and writing. (S-94.)

During the observation, Dr. Christie approached the Student and asked about ■■■ work, but ■■■ did not add any more work product to the page. (S-94.) She concluded that although the Student appeared comfortable, ■■■ did not appear to be engaged in much of the lesson, either in the large group or the individual work; ■■■ did not participate in the group discussion; and when working individually ■■■ did a small amount of work and then did other things for the remainder of the writing time. (S-94.)

Dr. Christie noted that the Student's fall 2017 Children's Progress Academic Assessment ("CPAA") literacy scores all fell below expectations while ■■■ math scores ranged from at expectations to below expectations. (S-93.) Dr. Christie utilized the Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V"), Comprehensive Test of Phonological Processing, Second Edition ("CTOPP-2"), and the Wide Range Assessment of Memory and Learning, Second Edition ("WRAML-2") in testing the Student. (S-98.) She concluded that the Student's cognitive abilities fell primarily in the average to above average range, although ■■■ did less well on tests of phonological processing, noting ■■■ scores in the 18th percentile (below average range) and the 5th percentile (poor range). (S-99.) Dr. Christie noted that the Student's 5th percentile score on the CTOPP-2 Phonological Memory composite should be viewed with caution

because the Student performed in the average range on other measures - the Digit Span score from the WISC-V and the Number Letter Memory score on the WRAML-2 - which included tasks similar to one of the two subtests reflected within the CTOPP-2 Phonological Memory composite. (Tr. 685-86; S-95; S -98 & 99.)

Dr. Christie also noted that the other area the Student seemed to do relatively less well on were tasks of visual memory; though ■ attained an overall index score in the average range, she concluded that ■ score might have overestimated ■ abilities. (S-99.) Dr. Christie opined that the Student would benefit from ongoing phonological skill development to increase ■ ability to recognize different sounds that made up words; combining phonological awareness training with explicit phonics instructions; and the use of interventions focused on the visual components of word recognition, such as by teaching visual patterns of letters which impact how words sound. (S-99.) Dr. Christie did not evaluate the Student's orthographic processing skills directly and has not received training on those specific testing tools, which she specified was due to a debate about the usefulness of specific orthographic processing measures. (Tr. 736-737.)

At hearing, Dr. Christie testified that from what was reported to her, she understood that there had not been any specific interventions done on phonics even though small group interventions on reading skills and recognition of high-frequency words had been attempted. (Tr. 684.) Dr. Christie suggested that phonics instruction could be provided within the regular education setting. (Tr. 735.) Dr. Christie also acknowledged at hearing that she had a bias of not identifying students and instead preferred to give students supports in the regular education setting that could address

areas of concern to see if it helped improve their performance in that achievement area. (Tr. 681.)

In an undated report created in preparation for the Student's IEP Team meeting, Ms. Pelletier indicated that the Student was not proficient in reading or writing but was performing at grade level for math. (S-A-173.) She indicated that the Student was reading at Level E (competent for beginning first grade, roughly a year and a half behind), and was very labored and not fluent in reading even at that level. (S-A-173.)

On December 14, 2017, the Student's Team met to review the evaluations and determine eligibility for special education. (S-101.) The IEP Team meeting was attended by the Parents, Ms. Smith, Ms. Pelletier, Dr. Christie, and Janice Williams, a special education teacher. (S-102.) According to the Written Notice describing the meeting, Ms. Pelletier reported that the Student had very good comprehension of Level E materials. (S-110.) Ms. Pelletier also noted that the Student required assistance with writing and reading was very labored. (S-110.) Ms. Pelletier indicated that the Student had been challenged with last reading assessment and used the pictures as support. (S-110.) scored 25 out of 66 on a spelling inventory and literacy score was in the 3rd percentile on the CPAA. (S-110.) Ms. Pelletier reported that the Student knew 99 out of 250 high frequency words and was currently receiving intervention services twice per week; the Student was performing at grade level in math. (S-110.)

The Student's Parents reported that they read to frequently at home, oral expression was great, and loved to write. (S-110.) They expressed a desire that could be fluent in reading and not be frustrated every day at school. (S-110.) The

Student's Parents expressed concern that the Student's struggles to read made ■■■ feel that ■■■ was not very smart despite their encouragement. (S-112.)

Ms. Williams reviewed the Student's Wechsler Individual Achievement Assessment, Third Edition ("WIAT-III") scores, which were average and below average in composite scores, with subtests in the average range except for sentence building. (S-110.) According to the WIAT-III results, the Student's strength was oral word fluency and ■■■ weaknesses were basic reading and reading fluency. (S-110.) Dr. Christie reviewed her testing results, opining as she did in her report that the 5th percentile CTOPP-2 Phonological Memory composite score should be viewed with caution. (S-111.) Dr. Christie's classroom observation, in which the Student was not very engaged, productive, or on task, was also discussed. (S-111.)

The Team filled out the Specific Learning Disability Eligibility Form, but concluded that the Student did not have a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards or intellectual development relevant to the identification of a specific learning disability. (S-106.) As such, the Team concluded that the Student did not have a specific learning disability. (S-107.) All members of the Team agreed with the conclusions. (S-107 & S-112.) At hearing, the Student's Mother testified that the Parents felt pressured to agree with the determination that the Student was not eligible, noting that the Parents were sitting in a room full of experts and the individuals who did the testing. (Tr. 43.) The Student's Mother testified that the Parents did not know what the Specific Learning Disability Eligibility Form really meant and assumed that if there was an area of concern or there was an issue where the staff felt that the Student needed special help, it would be

provided. (Tr. 44.) She also felt embarrassed and guilty about being a “squeaky wheel” seeking help for the Student. (Tr. 44.) The Student’s Mother testified that since she has gained understanding of the scores on the Student’s assessments, she believes that she should not have signed the eligibility form and should not have trusted the professionals in the meeting that guided the Team to the decision that the Student was not eligible. (Tr. 44.) She stated that she felt like she had to sign it. (Tr. 44.) The Student’s Father added that at the meeting it was explained to ■■■ that ■■■ was “off-the-charts intelligent”; that ■■■ education should be left up the school; the School District would take care of the problem; and the Parents should not hire a tutor. (Tr. 282.)

On December 15, 2017, the School District issued a Written Notice confirming that the Student was not eligible for special education as a student with a specific learning disability in literacy. (S-110.) The Notice indicated that response to intervention (“RTI”) services would continue. (S-110.)

On January 10, 2018, the Student’s Parents reported to Ms. Pelletier and Mr. Marley that the Student had seen an optometrist who determined that the Student had a severe issue with ■■■ eyes focusing and recommended reading glasses, which the Parents had obtained. (S-B-39.) The Student’s Mother indicated that she was struggling with ■■■ at home and homework was difficult to get done, but she did observe that ■■■ was trying to write more notes. (S-B-39.)

Just two months after the Team had found the Student ineligible, on February 15, 2018, Ms. Pelletier emailed the Parents to express concern that the Student was not writing much but was instead focusing on designs and drawings in ■■■ writing projects. (S-B-47.) She indicated that the Student seemed very distracted and unfocused and that

■■■ math teacher indicated that ■■■ was struggling there as well. (S-B-47.)

Without making any tie-in to the question of whether the Student had a learning disability, Ms. Pelletier inquired whether anything was going on with the Student that would be hindering ■■■ from succeeding. (S-B-47.) She noted that ■■■ struggled to read a Level F text, which would meet expectations in the first interval of first grade. (S-B-47 & P-362.) The Student's Mother responded that she had observed lots of doodling on ■■■ papers when she tried to help ■■■ with math and she found ■■■ to be very distracted and unfocused. (S-B-46.) She reported that although she frequently redirected ■■■ back to ■■■ work and she knew ■■■ was capable of doing it, ■■■ lacked motivation and would rather draw. (S-B-46.) During this time period, the Parents experienced significant difficulty in helping the Student with homework because ■■■ was very resistant to help and ■■■ would shut down, yell, and cry. (Tr. 284.) The Student's Mother asked Ms. Pelletier if she had any suggestions, ideas, or solutions. (S-B-46.)

The Parents did not see any improvement in the Student's reading or writing skills by the end of second grade. (Tr. 52.) The Student's second grade report card reflected primarily grades of 2 ("making progress towards target") with some grades of 1 ("area of concern") in reading and writing. (S-114.) In particular, ■■■ Guided Reading score was a 1 in both the second and third trimesters; ■■■ scores in Topic Development/Organization, Spelling, Punctuation and Capitalization, and Handwriting dropped to 1s in the third trimester. (S-114.) In math, the Student's scores were 2s and 3s ("progress meets target"). (S-114.) The drops in the Student's language arts scores were alarming to the Student's Parents, but they did not know what to do to help the Student. (Tr. 53.)

At hearing, Ms. Thornhill testified that due to the poor quality of the data for the Student for the second half of second grade, ■■■ progress was unclear. (Tr. 523.) She noted that they were building the RTI program at that time and did not yet have in place protocols. (Tr. 523.) Although Ms. Thornhill could see that the Student was working on phonemic awareness and high-frequency words during interventions, she could not decipher exactly what the intervention was and the lack of monitoring made it impossible to tell if the Student was making progress. (Tr. 538.)

Third grade (2018-2019)

The Student's NWEA scores from the fall of 2018 were in the 1st percentile in math and in the 3rd percentile in reading. (S-119.)

On September 26, 2018, Mr. Marley responded to a request from the Student's Parents to meet to check in. (S-B-51.) He indicated that he had followed up with Kiley Floridino, the Instructional Support Teacher at East End Community School, who was working on a plan for the Student's reading instruction. (S-B-51.) Mr. Marley indicated that once the school had put their plan in place, they would schedule a meeting with the Parents. (S-B-51.)

On October 11, 2018, the Student's Mother informed Ms. Pelletier, who was again the Student's teacher, that the Student would miss a day of school to attend the funeral of ■■■ grandparent. (S-B-53.) The Parents planned to drive to the funeral and back in one day to avoid having the Student miss more than one day of school. (S-B-53.) The Student's Mother expressed her concern that every day of school was important for ■■■ to get caught up, which was a huge stress on the family, noting that they were taking

the task very seriously. (S-B-53.) She noted that she was sure that Ms. Pelletier was aware of the Parents' concerns. (S-B-53.)

On October 16, 2018, Ms. Floridino emailed the Parents to indicate that the Student would be receiving pull-out small group for explicit phonemic awareness teaching three or four times per week for 30 minutes per session. (S-B-54.) Although it would initially be one-on-one, additional students would be added to the group. (S-B-54.) The Student's Father responded that the Parents had been working with the Student on ■ reading most nights for 20 minutes or more and ■ had shown good improvement and interest. (S-B-54.) The Student's Father expressed hope that with Ms. Floridino's help the Student would continue to improve. (S-B-54.)

Ms. Floridino utilized the "Foundations" curriculum within the Wilson phonics program, starting the Student at the first level. (S-A-260.) As of December 13, 2018, the Student was reading Level H material at an instructional level (which would be meeting expectations in the February to March interval of first grade within the Fountas and Pinnell system being used). (S-138; P-362.) Ms. Floridino noted that the Student's fluency, on which ■ scored on the border between 1 and 2, needed work. (S-138.) A score of 1 was described as "reads primarily in two-word phrases with some three- and four-word groups and some word-by-word reading; almost no smooth, expressive interpretation or pausing guided by author's meaning and punctuation; almost no stress or inappropriate stress, with slow rate most of the time." (S-142.) A score of 2 was described as "reads primarily in three- or four-word phrase groups; some smooth, expressive interpretation and pausing guided by author's meaning and punctuation; mostly appropriate stress and rate with some slowdowns." (S-142.) The Student's

reading of Level F and G texts resulted in scores of 2 in fluency with a notation that the Student talked about the pictures as ■■■ read. (S-144 & S-150.)

In an undated “Response to Intervention Student Snapshot” form, the areas of reading, math, and writing were checked as areas of concern for the Student. (S-156.)¹

On January 10, 2019, the Student’s reading of a Level H text again resulted in a borderline fluency score of 1 or 2, with Ms. Floridino noting that ■■■ fluency was very low but everything else was great. (S-157; P-362.) On February 28, 2019, the Student’s reading of a Level I text resulted in a score of 1 in fluency with a teacher notation that the Student’s comprehension was amazing but ■■■ needed fluency improvement. (S-163.) On March 1, 2019, the Student’s Level J text reading, which was indicated to be an instructional level for ■■■ resulted in a score of 1 in fluency with a teacher notation that ■■■ needed fluency and more strategies. (S-169.)

Also on January 10, 2019, Ms. Floridino reported to Mr. Marley that the Student had made half a year’s growth since October and she projected that in a couple of weeks ■■■ would hit a year’s growth. (S-B-57.) She noted that she stopped reading with ■■■ at Level H because ■■■ fluency was very low, indicating she would work with Ms. Pelletier on strategies to improve ■■■ fluency. (S-B-57.) Ms. Floridino indicated she would reach out to the Student’s Parents when ■■■ hit the one-year growth mark. (S-B-57.)

On January 25, 2019, Ms. Floridino emailed the Parents to indicate that the Student had gone from Level D (meeting expectations at the end of Kindergarten) to Level H and ■■■ was very close to reading a Level I (meeting expectations at the end of first grade). (P-10.) She explained that the Student was doing well with direct explicit

¹ The handwriting on the page was not visible in the exhibits. (S-156.)

phonemic awareness instruction and had advanced quickly through lessons. (P-10.) Ms. Floridino expressed hope that the Student would be able to begin working on second grade phonemic skills within the next couple of months. (P-10.) She also indicated that the Student's writing had significantly improved. (P-10.) She noted that the Student was feeling very confident and enjoying the work ■■■ did with her. (P-10.) Ms. Floridino concluded by offering to show the Parents the Student's work or discuss ■■■ learning further. (P-10.)

On March 29, 2019, the Student underwent a dyslexia screening at school which classified ■■■ as "at risk for dyslexia." (S-176.) The Student's teacher's ratings had indicated a risk for dyslexia on eight out of ten items of academic concern. (S-176.) The form noted that a common next step after being classified as "at risk for dyslexia" was a comprehensive diagnostic evaluation. (S-176.) The screening results were not shared with the Student's Parents. (Tr. 289.)

In the spring of 2019, the Parents brought the Student to Aucocisco School for an independent reading skills evaluation because they heard that Aucocisco School, which is a non-profit special purpose private school, could help kids with dyslexia and they were concerned that the public school setting was not meeting the Student's needs. (Tr. 61 & 152; S-E-18.) On April 12, 2019, Lisa Murphy, M.S. Ed. and Certified Special Educator, at Aucocisco School, evaluated the Student's reading skills. (S-E-18; S-E-54.) Ms. Murphy utilized several instruments to evaluate the Student's orthographic processing, including the Symbol Imagery Test, the Kaufman Test of Educational Achievement, Third Edition ("KTEA-3") Word Recognition Subtest, and the Feifer Assessment of Reading ("FAR") Rapid Automatic Naming Subtest. (S-E-20.) The Student's score on

the Word Recognition subtest was a 67, resulting from ■■■ ability to decode only 11 of 23 attempted single syllable words. (S-E-21.) The Student scored 127 on the FAR Semantic Concepts subtest, which tested ■■■ ability to choose synonyms and antonyms in a multiple choice format, suggesting solid comprehension skills, but only in the 2nd percentile on the Gray Oral Reading Test, Fifth Edition (“GORT-5”), which tests for both fluency and comprehension. (S-E-21.) The Student could not fluently read a pre-primer or primer level passage that ■■■ had never seen before. (Tr. 174.)

As a result of the testing, Ms. Murphy recommended that the Student would benefit from explicit, multi-sensory instruction that targeted both phonological and orthographic processing, advanced phonological awareness, and word analysis skills that would help the Student begin to better utilize the auditory and visual aspects of written language. (S-E-22.) She recommended reading interventions including targeted strategies to improve phonological and orthographic processing starting at the single phoneme level and building through multisyllabic words. (S-E-22.) She indicated that once multisyllabic decoding strategies were in place, spelling with an emphasis on non-phonetic words, and common spellings of prefixes and suffices should be introduced. (S-E-22.) Ms. Murphy recommended that time should be spent on building automaticity (the number of words read in a minute) and overall fluency (a combination of rate and accuracy) with timed drills at the multisyllabic single-word, phrase, and passage level to help the Student increase the speed of ■■■ reading. (S-E-22.) She also suggested dictation sentence drills where the Student would hear, repeat, and write sentences with increasingly complex written conventions, which would enable ■■■ to express his ideas

more clearly. (S-E-22.) Ms. Murphy also provided a set of specific program recommendations. (S-E-22.)

On April 15, 2019, Ms. Murphy followed up with the Student's Mother after they met to review her recommendations. (P-11.) Ms. Murphy indicated that her initial impressions of the Student's testing were that ■■■ had strengths and weaknesses consistent with the learning disability dyslexia. (P-11.)

On May 2, 2019, the Student's Parents emailed Mr. Marley to explain that the Student had been seeing a therapist for several months, which they had let Ms. Pelletier know in January. (S-B-61.) The Student's Parents indicated that the Student had complained about bullies in school for years but in the current school year ■■■ had become increasingly emotional at home, crying all the time, and complaining about bullies a lot. (S-B-61.) They noted that in the fall, the Student had come home from school with self-portraits of crying faces and lots of tears, writing "I'm sad all the time," "I don't know why I'm so sad," and "I pretend to be working in the class when the teacher is looking at me." (P-12.)

The Parents also reported that the Student had become increasingly agitated about homework, doing less and less, and seemed to believe that ■■■ could not do the work and could not keep up, and therefore ■■■ must be stupid. (S-B-61.) The Student told ■■■ parents that another student told other kids not to touch ■■■ because ■■■ will make them stupider." (S-B-61.) The Student indicated that ■■■ was called "idiot" repeatedly by a group of kids. (S-B-61.) The Parents noted that the Student was painfully aware that the other students were far ahead of ■■■ in class. (S-B-61.) The Parents explained that the Student had been asking to get picked up early from school or to just stay home and

noted that ■ was crying a lot at home. (S-B-61.) The Student stated that ■ did not want to go to school and that ■ would be “dead meat.” (S-B-61.) The Parents expressed that they were heartbroken, distressed, and emotional to hear of the Student’s experiences. (S-B-61.) On May 3, 2019, Mr. Marley responded that ■ would be meeting with Ms. Thornhill and the school’s social worker to look at the Student’s social emotional needs and one of them would get back to the Parents. (S-B-62.)

Also on May 3, 2019, the Student’s Parents hand-delivered a letter to the School District indicating that they intended to make a partial-day unilateral placement of the Student due to their belief that the School District had violated the Student’s right to receive a free appropriate public education. (S-179.) They reported that the Student had been diagnosed with significant dyslexia, expressing their concern that they had been misled at the December 2017 meeting when the School District members of the Student’s IEP Team concluded that the Student was not eligible for special education services even though there was more than enough data at the time to support a conclusion of eligibility. (S-179.) The Parents requested that the Student be referred again for IEP eligibility but in the meantime, they needed to take action to address ■ needs and compensate for the losses ■ had already endured. (S-179.) The Parents explained that beginning in mid-May, the Student would be receiving intensive one-on-one tutoring services at Aucocisco School for partial school days, intended to address the gaps in ■ literacy skills. (S-179.) The Parents stated that they intended to seek reimbursement from the School District for all costs associated with the Student’s unilateral placement at Aucocisco, including tuition, transportation, and other related expenses. (S-179.)

On May 6, 2019, through email communication, East End Community School staff reviewed the Student's file, with Dr. Christie indicating that her review of the Student's evaluation did not indicate dyslexia and [REDACTED] cognitive scores did not suggest difficulties. (S-B-64.) She inquired whether the Student had received RTI in phonics as she had suggested. (S-B-64.) Ms. Floridino reported that she had been using the foundation phonics first grade program that was working well and she had incorporated a modified version of Leveled Literacy Intervention to also start working on [REDACTED] fluency. (S-B-66.) Mr. Marley indicated to other staff that the Student's Parents were asking for a new referral for special education eligibility. (S-B-67.)

Also on May 6, 2019, Deborah Mullis, Director of Student Support Services for Portland Public Schools, issued a response to the Parents and expressed concern that the Parents' tutoring plan would end up technically looking like the Student was just absent for part of each day. (S-180.) Ms. Mullis expressed a desire to work with the Family and indicated that the special education eligibility process would begin again. (S-180.)

On a reading comprehension assessment conducted four times during the Student's third grade year, the last of which was on May 9, 2019, the Student scored in the 1st percentile in all categories, below grade level and classified as a beginning reader. (S-182.) The Student's spring 2019 NWEA scores in reading and math were also both below expectations. (S-222.)

On May 10, 2019, Dr. Christie responded to other School District staff indicating that she recalled that the Student was a bright student who was somewhat less engaged in the classroom than [REDACTED] peers when she observed [REDACTED] (S-B-70.) She wrote: "I think I felt at the time it was perhaps due to not feeling challenged more than an inability to do or

difficulty with the work.” (S-B-70.) She also indicated that she did not think that the Student’s teacher had any concerns at the time. (S-B-70.) Dr. Christie concluded that although the Student’s phonological memory score was low, ■■■ attained scores in the average range on similar tasks on other measures and she did not see support for disability at the time. (S-B-70.)

Once the Student started attending Aucocisco School for tutoring on a partial-day schedule, ■■■ began to want to go to school, ■■■ mood improved very quickly, and ■■■ attitude around reading and schoolwork improved greatly. (Tr. 291.)

On May 10, 2019, a referral to special education was completed. (S-183.) Also on May 10, 2019, the Student’s reading of a Level K text resulted in a borderline fluency score between 1 and 2. (S-189.) ■■■ effort to read a Level L text (which would meet expectations in the second interval of second grade) was unsuccessful. (S-185.)

On May 20, 2019, Aucociso recommended 100 to 120 hours of direct reading instruction over the summer using the Seeing Stars Reading Programs, explaining that an intensive model of instruction would give the Student the opportunity to make progress towards ■■■ reading goals quickly and allow ■■■ to build on previous instruction. (S-E-24.) Seeing Stars is a decoding and encoding reading and spelling Lindamood Bell program that incorporates both phonological and orthographic work, which is how it differs from other reading program approaches such as Orton-Gillingham, SPIRE, and Wilson. (Tr. 164.) Orthographic processing allows a person to look at a word and know whether it looks right or wrong because the person can have the image in ■■■ mind of what the word looks like. (Tr. 168.) Orthographic processing can also be described as

the underlying skill needed to store and recall the visual forms of letters and words. (Tr. 246.)

On May 22, 2019, a Written Notice was issued regarding the Student's initial referral. (S-195.) The Written Notice stated that the Student's evaluations would include assessment of ■ academic achievement in reading, written language, and math; a psychological evaluation; and an observation of the Student in the learning environment. (S-196.) The Written Notice indicated that interventions in place for the Student would continue during the evaluation period. (S-196.) The IEP Team would be expected to reconvene on or before 45 school days of receipt of parental consent for evaluations to review evaluation results and determine eligibility for special education. (S-196.)

On May 20, 2019, the Student's next attempt to read a Level L text was also stopped because ■ was making too many errors. (S-198.)

The Student's third grade report card listed ■ as beginning or approaching all language arts and math skills. (S-204.) None of ■ skills were marked as meeting expectations. (S-204.)

On August 6, 2019, Aucocisco School issued a third and final update from the tutoring services Ms. Murphy provided over the summer. (S-215.) The report indicated that the Student had demonstrated mastery of all of ■ phonemes in isolation, had demonstrated mastery of up to four syllable words, was reading words with common prefixes and suffices, and was practicing breaking words into syllables then reading each syllable. (S-215.) The report indicated that work would continue on building fluency and automaticity working with words of three or more syllables. (S-215.)

The report indicated that during sight word practice, the focus had been building automaticity at the whole word level. (S-215.) The Student's estimated reading levels were at a 3.25 to 3.5 grade level for independent reading, a 3.5 to 3.75 grade level for supported reading, and a 3.75 to 4.00 grade level for challenge reading. (S-216.) The next goals were identified as: continue to build reading accuracy at the fourth grade level, continue to build reading speed at the third grade level, application to conventions of written language, and application to reading comprehension. (S-216.)

On August 29, 2019, the signed parental consent for evaluations related to the Student's rereferral were received by the School District. (S-217.) On August 30, 2019, the Student's Mother requested a transfer of the Student's records to Breakwater School, a private school. (S-219.)

Fourth grade (2019-2020)

The Student began fourth grade at Breakwater School, a private school, in the classroom of teacher Yasmin Azel. (S-221.) The Parents also hired a tutor, Jacob Murray, to work with the Student after school twice a week. (P-43 to P-45; S-D-4.) On September 29, 2019, a meeting was held at Breakwater School. (S-C-33.) Breakwater School staff recommended that the Student receive a neuropsychological evaluation to get a confirmation of ■■■ diagnosis, which would help them identify the gaps in ■■■ abilities and understand how ■■■ brain was working. (S-C-33.) Breakwater School staff recommended Dr. Marcia Hunter and another provider to the Parents as possible evaluators. (S-C-33.) Mr. Murray stated that the Student's reading level was equivalent to an early second grade level. (S-C-34.) He indicated that three hours a week of tutoring, as he had been providing, would allow the Student to retain what ■■■ had learned

but not to gain new skills, which would require five to ten hours of tutoring per week. (S-C-34.)

After the September 29 meeting, Breakwater School staff created a support plan identifying accommodations to be provided to the Student. (S-C-31.) Teachers noticed that the Student was often confused after group instruction and required additional explanation. (S-C-31.) The Student also had difficulty with name or word recall, such as friends' names or places ■■■ had been. (S-C-31.) The Student focused on ■■■ work and put in a lot of effort when ■■■ understood directions. (S-C-31.) Accommodations were provided in the areas of interpersonal/intrapersonal skills, presentation of material/subject, organization, assessments/testing, assignments, and language. (S-C-31-32.)

On October 27, 2019, Mary Scamman, Psy.D., issued the Student's psychoeducational evaluation. (S-221.) The diagnostic questions that she had been asked to answer were: does the Student have a specific learning disability; does the Student show a pattern of strengths and weaknesses consistent with a specific learning disability and if so, does it impact ■■■ in accessing the regular education curriculum; and how does the Student compare academically to same age peers in the areas of reading, writing, and math. (S-221.)

Ms. Azel reported to Dr. Scamman that the Student was caring and enthusiastic but was distractible; ■■■ was performing as expected in oral expression but below expectations in listening comprehension, reading, math and writing. (S-222.) She indicated that ■■■ required more one-on-one attention than other students and produced less work. (S-222.) Ms. Azel explained that the Student had difficulty attending to and

organizing ■ work and although ■ could listen when spoken to directly, ■ often did not understand directions. (S-222.) She indicated that ■ often forgot what ■ was supposed to do and had difficulty following directions. (S-222.) She also stated that although ■ remained seated when expected and could play quietly, ■ often daydreamt, appeared awkward and clumsy, was slow and careful in responding, and generally talked less than ■ peers. (S-222.) Ms. Azel endorsed seven out of nine characteristics of inattention but no characteristics of hyperactivity or impulsivity. (S-222.)

On October 29, 2019, Carolyn Foley, Student Support Services Coordinator for Portland Public Schools, observed the Student at Breakwater School. (S-223.) Ms. Foley observed that the Student took longer than other students to give ■ attention to the teacher; was not using ■ manipulatives to solve a math problem; needed to be supported by the teacher; and had to restart the process because ■ forgot how many manipulatives ■ had. (S-223.) The Student was unable to sustain attention when asked to complete a new math problem in the same format as the prior problem. (S-222.) The Student was one of two students in the class who indicated they needed help from the teacher. (S-223.) Ms. Foley concluded that the Student required adult monitoring and prompting to complete ■ work but ■ did not indicate frustration even when ■ was unsure of what ■ had to do. (S-223.)

Dr. Scamman utilized subtests from the Woodcock-Johnson Test of Cognitive Abilities, Fourth Edition. (S-223.) On the Woodcock-Johnson cognitive measures, the Student's standard scores were within the average range for Comprehension-Knowledge, Cognitive Processing Speed, Number Facility, Perceptual Speed, and Cognitive Efficiency-Extended as well as eleven subtests. (S-232.) The Student's scores were

within the low average ranges for Fluid Reasoning, Short-Term Working Memory, and Cognitive Efficiency. (S-232.) ■ scores were in the low range for the two subtests of Number Series and Numbers Reversed. (S-232.) On the Woodcock-Johnson oral language measures, the Student's standard scores were within the average range for Rapid Picture Naming and within the low average range for one cluster (Speed of Lexical Access) and one test (Retrieval Fluency). (S-232.)

Dr. Scamman also utilized the CTOPP-2, Achenbach Child Behavior Checklists, and the Behavior Rating Inventory of Executive Function. (S-230.) The Student's overall performance on the CTOPP-2 fell in the below average range. (S-232.) ■ was able to break apart and blend words but had more difficulty identifying specific sounds or phonemes within words and rapidly naming letters and numbers. (S-232.) Dr. Scamman did not utilize any instruments to evaluate the Student's orthographic processing abilities. (Tr. 770.)

The Student's Parents explained to Dr. Scamman that the Student was easily distracted, particularly when reading or doing homework; ■ had difficulty organizing ■ activities and did not follow instructions to finish homework; ■ avoided difficult tasks; spaced out in ■ own zone; focused on imaginative play; and lost personal belongings. (S-232.) They also observed that ■ was very sensitive. ■ became sad or cried if others didn't like ■ ideas, and ■ took it personally when given any type of correction. (S-232.)

Dr. Scamman's diagnostic impression was that the Student was reserved, artistic, and loved to be outside. (S-231.) She concluded that the Student's overall intellectual ability was in the average range, including a composite index of ■ fluid reasoning and

comprehension-knowledge intellectual abilities. (S-232.) The reports of the Student's Parents and [REDACTED] teacher led to a conclusion of attention disorder syndrome that included symptoms of dreaminess, mental fogginess, sluggishness, staring frequently, inconsistent alertness, and a slow working memory. (S-233.) Dr. Scammon noted that the syndrome had a negative impact on functioning such as lower educational attainment. (S-233.) Dr. Scamman felt that the evaluation results supported diagnoses of Attention Deficit Hyperactivity Disorder – Inattentive Type and processing deficits in short-term working memory, cognitive efficiency, and number series. (S-233.)

On October 30, 2019, Ms. Foley issued her academic achievement evaluation of the Student, which included the observation described by Dr. Scamman and results of the WIAT-III. (S-235.) The Student's composite standard scores in the areas of reading, mathematics, and written expression were below average. (S-238.) [REDACTED] composite standard score in the area of math fluency was in the low range. (S-238.) Ms. Foley made some educational recommendations including providing materials at the Student's reading level when appropriate, preteaching vocabulary prior to presentation of new content, instructing [REDACTED] in phonics to enforce skill development in reading and spelling, using a graphic organizer for writing, using a self-editing checklist for writing, and providing accommodations for assessments that could include small group settings, extended time, or verification of the understanding of directions. (S-238.)

On November 4, 2019, an Individualized Family Service Plan Team meeting was held at Breakwater School. (S-240.) In attendance were Dr. Scamman, Ms. Foley, the Student's Parents, Maggie Lyon (Academic Director at Breakwater), and Ms. Azel. (S-246.) The Team filled out the Specific Learning Disability Eligibility Form, concluding

that the Student was not achieving adequately in seven of the eight areas listed: listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematic calculation, and mathematics problem-solving. (S-243.)

The Team also found evidence that the Student was not achieving adequately for [REDACTED] age and exhibited a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards, or intellectual development that was determined by the Team to be relevant to the identification of a specific learning disability. (S-245.)

As strengths, the Team noted the Student's improvement in reading through RTI services while at East End Elementary School; [REDACTED] positive attitude and attributes as a hard worker when [REDACTED] knew what [REDACTED] was doing; [REDACTED] creativity and success with hands-on activities; [REDACTED] scores on the WIAT-III in Oral Language, Listening Comprehension, and Oral Expression; and [REDACTED] Woodcock Johnson scores in General Intellectual Ability, Fluid Reasoning, Cognitive Processing Speed, Number Facility, and Perceptual Speed. (S-245.) Regarding weaknesses, the Team cited the fact that the Student's 2017 CPAA scores were below expectation in literacy and math despite receiving RTI services; [REDACTED] had difficulty understanding and following directions, holding information in memory and recalling it later, and any working memory activities; [REDACTED] WIAT-III scores in Total Reading, Basic Reading, Reading Comprehension and Fluency, Written Expression, Math, Math Fluency, and Total Achievement; [REDACTED] WIAT-III scores in Short Term Working Memory, Number Series, Numbers Reversed, Speed of Lexical Access, and Retrieval Fluency; and [REDACTED] CTOPP-2 scores in Phonological Awareness, Phonological Processing, and Rapid Symbolic Naming. (S-245.)

All members of the Team agreed that the Student had a specific learning disability and that ■ required special education and related services. (S-246.) The Parents declined to sign the Specific Learning Disability Eligibility Form at the meeting but the next day informed School District staff that they had reviewed the form and wanted to sign it. (S-B-114.)

From September through December 2019, Mr. Murray provided the Student with 28.25 hours of tutoring. (S-D-4 to S-D-7.) By the end of the fall semester in 2019, the Parents had become concerned that they were wasting the Student's precious time by trying to force ■ into a school setting that they loved at Breakwater but was not really going to meet ■ needs. (Tr. 79.) An IEP Team meeting was convened to review the School District's offer of placement and programming. (Tr. 297.)

An Advance Written Notice was issued on January 10, 2020, scheduling a Team meeting for January 16, 2020, at East End Community School. (S-254.) Although the meeting had to be rescheduled, Ms. Mullis forwarded the Parents' advocate a draft IEP on January 16. (S-256.)

On January 24, 2020, the Team met again to review the Student's draft IEP. (S-256-264; S-267.) In attendance were the Student's Parents; Mr. Marley; Hayley Morin, Regular Education Teacher; Ms. Williams; Ms. Foley; Sherri Beall, Special Education Consultant; Richard O'Meara, Esq., Attorney for the Parents; Eric Herlan, Esq., Attorney for the School District; and Ms. Floridino. (S-272.) The Parents reported that the Student was not trying hard or making any progress in ■ reading despite having tutoring after school once a week. (S-269.) The Student was reported to be shutting down due to ■ awareness that ■ was not performing at grade level. (S-269.) The Team agreed that

the Student would benefit from meeting with a school social worker, noting that ■ had met with an outside social worker. (S-269.) The Parents expressed concern that although the Student had made progress over the summer in ■ programming at Aucocisco, ■ was not making progress during fourth grade at Breakwater. (S-269.) They also expressed distrust that the services identified in the IEP would actually be provided by the School District and concern that the Student would feel uncomfortable having support inside the classroom or being pulled out of the classroom if ■ returned to public school. (S-269.)

The Team reviewed the draft IEP. (S-269.) Ms. Beall reviewed the proposed goals and objectives that she had drafted in the areas of reading, writing, and math, and inquired about the availability of additional baseline data. (S-269.) She opined that the Student's instruction should include concrete visual representation, orthographic and auditory processing focus, and progress from concrete to abstract concepts. (S-269.) The Team determined that one-to-one and small group instruction would provide the Student with the best opportunity to learn. (S-270.) The Team also discussed the possible need for executive functioning skill development and self-advocacy. (S-270.) It was determined that social work services could address this need. (S-270.) Ms. Mullis explained that the School District had teachers trained in a variety of programs, including Concept Phonics, Seeing Stars, Lindamood Bell, Wilson, Lexia Learning, and Read Naturally, and that the Student's instruction could span multiple programs. (S-270.) The Parents indicated that they might consider having the Student attend a school in the School District other than East End Community School. (S-270.) Ms. Mullis noted that Lyseth Elementary School had special educators with training in dyslexia and Orton-

Gillingham instruction and Presumpscot Elementary School had two special educators trained in the Lindamood Phoneme Sequencing (“LiPS”) and Seeing Stars programs. (S-270.) She opined that the Student’s needs did not require the highly restrictive programming that Aucociso offered as a school with a small study body made up almost exclusively of students identified with disabilities. (S-270.)

The Team recommended additional informal diagnostic assessments for reading and mathematics to obtain current baselines in order to accurately complete IEP goals and objectives as well as an occupational therapy evaluation to include executive function and fine motor skills. (S-268.) The School District provided consents to the Parents that would allow Ms. Beall to assess the Student’s present levels of performance. (S-270.)²

Goals were developed in the areas of reading (phonological awareness, letter to sound correspondence, perception and order of sounds, sight word vocabulary, reading fluency, and rapid automatic naming); writing (paragraph writing); math (fact fluency, number sense, and whole number operations); and executive function (task initiation and self-advocacy). (S-268.) The Team also developed a set of accommodations and supplementary aids and services including the use of concrete examples of concepts before teaching abstract concepts; check-ins for comprehension prior to task initiation; preferential seating to reduce distraction; extended time for task completion; reading of assignments to the Student and verifying understanding of directions; utilizing visual aids; providing a list of steps necessary to complete tasks; using a graphic organizer for writing assignments; providing an exemplar of expected final products; using a self-editing checklist for writing; and providing accessible education materials such as digital

² The Family’s Attorney indicated at the meeting that the present levels of performance would not be

text and speech-to-text. (S-268.) An additional accommodation was the provision of adult support during the Student's classroom instruction in mathematics for 60 minutes per day. (S-282.)

The Team considered placement at East End Community School, Lyseth Elementary School, Presumpscot Elementary School, and any other elementary school in the Portland Public School system. (S-271.) All options within the School District were rejected by the Family. (S-271.) School District staff rejected Aucocisco School due to the lack of access to rigorous grade level curriculum and typical peers. (S-271.)

The Parents were concerned that the Student would have difficulty in the 70 percent of the time ■ spent in regular education settings because so much of the curriculum in other academic classes depended on ■ ability to read. (Tr. 83 & 298.) The Parents felt that the Student's experience in regular education settings within the School District in the past had left ■ without time to ask questions and feeling rejected by the teachers. (Tr. 298.)

The Student began attending Aucocisco School full-time in February 2020. (P-94.) Although ■ had made gains in the tutoring program there in the spring and summer of 2019, the gains were fragile and ■ lost quite a bit of ground without continued daily instruction. (Tr. 189.) Aucocisco School staff had to go back to the level at which the Student was stable and bring ■ back up again. (Tr. 189-90.)

On February 4, 2020, a meeting was held at Breakwater School, attended by the Parents and Ms. Azel. (S-C-61.) The Parents reported that the Student's transition to Aucocisco was going alright. (S-C-61.) Ms. Azel observed that ■ skills in reading and

challenged in the present proceeding. (S-270.)

writing made it difficult for ■■■ to participate in science and integrated studies, even though ■■■ understood content. (S-C-61.) They discussed that the Student had been able to strengthen ■■■ reading skills, including by checking for understanding and self-correcting, and still needed to focus on strengthening ■■■ writing skills, including the legibility of ■■■ hand-writing, basic punctuation, and sentence formation, and a modification such as a speech to text translator. (S-C-61.)

On February 5, 2020, a finalized IEP was forwarded to the Family. (S-273.) It included goals and objectives in areas of reading, writing, and math. (S-278.) It provided 450 minutes of specially designed reading and writing instruction per week in a one-on-one setting; 30 minutes per day of one-on-one specially designed instruction in math fluency; and consultation with school staff by the special education consultant for 70 hours per year. (S-283.) The Student would spend 70 percent of ■■■ time with non-disabled peers. (S-283.)

In March 2020, Dr. Marcia Hunter issued a report of the neuropsychological evaluation she conducted on the Student on November 25, 2019; December 2, 2019; and March 11, 2020. (P-339.) Most of the testing occurred on November 25 and December 2, 2019. (T. 333-34.) Dr. Hunter's test results indicated that the Student had a mixed cognitive profile, with a General Ability Index at the 53rd percentile. (P-344.) The Student's full-scale IQ was 94, in the 34th percentile. (P. 354.) On the Woodcock-Johnson IV Tests of Achievement, administered in November 2019, the Student's reading was in the 4th percentile, broad reading in the 4th percentile, basic reading skills at the 8th percentile, reading fluency at the 3rd percentile, mathematics at the 6th percentile, broad mathematics at the 6th percentile, math calculation at the 5th percentile, and overall

academic achievement at the 2nd percentile. (P-355.) On the GORT-5, also administered in November 2019, the Student's reading fluency was at the 2nd percentile as was [REDACTED] overall reading quotient. (P-346.)

Dr. Hunter concluded that the Student had good intellectual potential and was capable with verbal and non-verbal skills. (P-344.) The Student had general average potential in tasks calling for receptive and expressive language. (P-344.) [REDACTED] had a good vocabulary, strengths of semantic naming, and a broad fund of personal knowledge. (P-344.) [REDACTED] was able to follow simple auditory instructions and readily repeat language sounds presented as nonsense words. (P-344.) Nevertheless, despite [REDACTED] relative language strengths, the Student showed difficulties within cognitive domains critical to fluency of reading and writing; [REDACTED] had long-standing struggles with skills of literacy and continued to be delayed. (P-344.) [REDACTED] had poor sight word recognition and spelling; weak skills of reading comprehension; and insecure sound-symbol correspondence. (P-344.) The Student had not acquired reading fluency, phonological decoding skills, or rapid naming skills. (P-344.)

The Student's memory tests showed variable results. (P-344.) [REDACTED] demonstrated many average memory skills but was far less successful in learning and retaining visually complex inputs that included multi-level executive skills. (P-344.) The Student also struggled with tasks of working memory that required sustained attention to rote inputs, especially with a demand to mentally rotate the material. (P-344.) Dr. Hunter found that the findings had implications for reading in that the Student's immediate memory span for words was poor as was [REDACTED] memory for sight words presented within a written format. (P-344.)

The Student showed fairly good skills of visual-spatial processing. (P-345.) ■ had a history of relative delays of motor development and was reported to be uncoordinated, accident prone, and having sensory sensitivities within domains of sensory seeking, avoiding, and reactivity to sensory input. (P-345.) The Student also showed diffuse weakness within domains of executive mental functions, with a functional impact across tasks that was apparent, including weakness of working memory, poor cognitive efficiency, problems of self-regulation, sluggish cognitive tempos, and poor self-monitoring and self-awareness. (P-345.)

Dr. Hunter made several diagnostic impressions including Attention Deficit Hyperactivity Disorder, Predominantly Inattentive Presentation; a Specific Learning Disability in reading, writing, and math; Dysgraphia; Adjustment Disorder with mixed emotional features, with the note that should the Student's symptoms worsen or have a heightened impact on daily functioning, consideration of a disorder of Generalized Anxiety Disorder could be warranted. (P-345.)

Dr. Hunter opined that the Student required specialized instruction and a highly individualized academic program that included the following:

1. Specialized instruction in reading and writing; consideration to be given to a systematic program that attended to underlying speech-language issues and experiential learning styles such as Seeing Stars and Lindamood Bell programs;
2. Specialized instruction in math;
3. Possibly a technology consultation to identify compensatory strategies so that the Student could access grade-level content despite ■ reading disability;

4. Specific programming of daily oral reading that included planned reading time at home; and
5. Social work services to target symptoms of anxiety and build social skills, emotional resilience, and self-regulation.

(P-348.) Dr. Hunter testified that the Student had the capacity to be a good math student and had areas of splinter skills and strengths, but some of [REDACTED] math testing scores reflected orthographic errors. (Tr. 351.) She recommended math interventions to help [REDACTED] build recognition of symbols and nonmeaningful stimuli. (Tr. 351.)

Dr. Hunter opined that the determination in December 2017 that the Student was ineligible for special education did not “pass the straight face test,” noting that within the WISC-V itself the Student exhibited a pattern of strengths and weaknesses. (Tr. 355.) She observed that the Student’s reading scores (basic reading, reading comprehension, and fluency) were “very, very low scores.” (Tr. 359.) With regard to Dr. Christie’s indication that perhaps the Student’s difficulties were due to not being challenged enough, Dr. Hunter stated that there was much more data pointing in the direction of a learning disability than in the direction of a student who was not being sufficiently challenged. (Tr. 361.)

With regard to the IEP offered by the School District in January 2020, Dr. Hunter opined that the Student required far more services than offered, including a highly-individualized placement that was not a one-size-fits-all kind of approach because [REDACTED] deficits impacted every element of [REDACTED] day. (Tr. 363.) Dr. Hunter concluded that the Student needed a multifactorial approach that incorporated every subject area, including

instruction to address phonological, orthographic, and executive functioning issues. (Tr. 360.)

The Student successfully participated in remote education at Aucocisco, which was offered due to the pandemic beginning in March 2020, in small group and individual instructional settings. (Tr. 85-86.) On June 29, 2020, Barbara Melnick, Director at Aucocisco School, conducted end-of-year testing on the Student. (P-323-333; Tr. 147.) The Student's results on KTEA-3 subtests included a 5th percentile score in both tests of Letter and Word Recognition, a 21st percentile score in Nonsense Word Decoding, and a 4th percentile score in the GORT-5 oral reading index. (P-333.) The Student's Parents have noticed that the Student is reading stop signs and traffic signs as well as materials around their home. (Tr. 86-87.)

The Student continued in reading, writing, and math classes at Aucocisco through the summer of 2020. (Tr. 88.) The Student's Parents enrolled [REDACTED] at Aucocisco for the 2020-2021 school year. (P-95.)

IV. DISCUSSION AND CONCLUSIONS

A. Burden of proof.

Although the Individuals with Disabilities Education Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. Schaffer v. Weast, 126 S.Ct. 528, 537 (2005). Further, in an eligibility dispute, the parents challenging the IEP Team's decision have the burden of persuasion. See R.C. &

E.P. v. York Sch. Dep't, 5 IDELR 68 at 22 (D. Me. 2008) (magistrate recommended decision), aff'd by R.C. & E.P. v. York Sch. Dep't, 51 IDELR 217 (D. Me. 2008).

B. Whether the School District violated the IDEA's child find referral and identification obligations and/or denied the Student's right to FAPE by failing to find ██████ eligible for special education and related services from December 2017 to November 2019.

Each school district must have a plan to identify, locate, and evaluate at public expense students residing within the district who may be eligible for special education services. 34 C.F.R. § 300.111(a)(1)(i); MUSER § IV.2.A. This child find obligation extends to children who are suspected of having a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111(c)(1); MUSER § IV.2.A. A school district's child find process must include "obtaining data on each child, through multiple measures, direct assessment, and parent information, regarding the child's academic and functional performance, gross and fine motor skills, receptive and expressive language skills, vision, hearing and cognitive skills." MUSER § IV.2.C.

The purpose of the IDEA's child find requirement is to ensure that school districts promptly refer, evaluate, and identify all potentially eligible children with disabilities so they can receive the special education and related services to which they are entitled. 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(1)(i); MUSER § IV.2.A. The child find obligation of school districts is of "paramount importance." Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009). School districts must "maintain and implement policies and procedures to ensure that all children residing in the jurisdiction between the ages of 3 and 20 years . . . even though they are advancing from grade to grade, are identified and

evaluated at public expense.” MUSER § IV(a)(2)(A); see also 34 C.F.R. § 300.111(c)(1). A student’s Team must assess a student in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B); MUSER § V.2.C.4.

MUSER, consistent with the IDEA, defines a specific learning disability as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disabilities do not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or environmental, cultural or economic disadvantage.” MUSER § VII.2.L(1); see also 34 CFR 300.8(c)(10); 20 U.S.C. § 1401(30).

Also consistent with the IDEA, MUSER outlines a process for determining the existence of a specific learning disability as follows:

(2) Determination of the existence of a Specific Learning Disability.

(a) The IEP Team may determine that a child has a specific learning disability if:

(i) Evidence from multiple valid and reliable sources demonstrates that the child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:

- (aa) Oral expression.
- (bb) Listening comprehension.
- (cc) Written expression.
- (dd) Basic reading skill.
- (ee) Reading fluency skills.
- (ff) Reading comprehension.

- (gg) Mathematics calculation.
- (hh) Mathematics problem solving; and

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305 [Section V]. To determine a pattern of strength and weaknesses, the IEP Team must consider the following:

- (aa) data collected when using a process based on the child's response to scientific, research-based intervention; including general education interventions under Section III of this rule;
- (bb) Classroom performance data;
- (cc) Achievement data based on summative assessments, State assessments or scientifically-based assessments;
- (dd) Psychological processing data from standardized measures to identify contributing factors; and

(iii) The group determines that its findings under paragraphs (2)(a)(i) and (ii) of this section are not primarily the result of –

- (aa) A visual, hearing, or motor disability;
- (bb) Intellectual disability;
- (cc) Emotional disturbance;
- (dd) Cultural factors;
- (ee) Environmental or economic disadvantage; or
- (ff) Limited English proficiency.

(b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306 [Section V] –

- (i) Data that demonstrate that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- (ii) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents

(c) If measures with norms for the child's cultural and linguistic background, physical disability or other contributing factors are unavailable, then the IEP Team's assessment shall utilize multi-tiered problem-solving approaches such as analysis of work samples and other performance data to demonstrate the likelihood of a learning disability.

MUSER § VII.2.L(2); see also 34 CFR § 300.309.

The Maine Department of Education has issued a Specific Learning Disability Eligibility Form for Teams to use in determining if a student has an IDEA-eligible specific learning disability. Mirroring the state and federal regulations, Question #4 on the SLD form is “Does the child exhibit a pattern of strengths and weaknesses in performance, achievement, or both relative to age, state-approved grade level standards or intellectual development that is determined by the IEP Team to be relevant to the identification of a specific learning disability, using appropriate assessments?” The Form provides a grid listing four types of data to be considered under the regulations: data collected when using a process that is based on the child’s response to scientific, research-based intervention, including general education interventions under MUSER § III; classroom performance data; achievement data based on summative assessments in the district’s core curricula, State assessments and/or published national norm-referenced assessments; and psychological processing data from standardized measures to identify contributing factors, including standardized composite scores from nationally norm-referenced measures of such skills as, but not limited to, phonological processing, information retrieval and processing speed, language, working memory, long-term memory, short-term memory, auditory processing, visual spatial reasoning. Within each of the four categories of data, the Student’s strengths and weaknesses are to be verified.

A student with a disability is eligible if the student needs special education. MUSER § VII.2; 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A)(ii). A child “needs” special education and related services “when, because of the disability, the child can neither progress effectively in a regular education program nor receive reasonable benefit

from such a program in spite of other services available to the child.” MUSER § VII.1. Final identification of a student occurs after evaluation of the student and an IEP Team meeting. 20 U.S.C. §1414(b)(4)(A); MUSER § IV.2.A.

If a student is receiving general education interventions, the student’s Team must review the child’s progress no later than 60 school days after the start of the formal education interventions and approximately every 30 school days thereafter. MUSER § III.2.i. At each meeting, the Team must review data on the student’s progress and determine if modifications to the general education interventions are needed and/or if a referral to special education is indicated. MUSER § III.2.i. The Department of Education has issued Administrative Letter 85, further clarifying this requirement as follows:

The SAU’s duty to make the referral to special education, and to conclude that the general education intervention process has been completed, arises once it becomes sufficiently clear that the interventions are not being successful. The determination of when it has become sufficiently clear that the interventions are not being successful will necessarily be made on a case-by-case basis, taking into account the severity of the student’s presenting issue (and any relevant diagnoses the student has received), the length of time that the interventions have been implemented, and the degree to which the student has shown progress, lack of progress or deterioration. Loss of significant school time, whether due to removal by the school or refusal of interventions by the student, is another indicator that a referral must be considered.

Administrative Letter #85: Clarification of SAU’s obligation to refer students to special education (Me. Dep’t of Educ. June 12, 2012).

The Department of Education has also created a Special Education Required Forms Procedural Manual, which explains that the term “performance” in the regulation is defined as “how the child performs in the classroom,” while “achievement” is defined as “how the child performs on academic assessments.” The Manual also states that a

“child whose performance and achievement scores are uniformly depressed and are consistent with the child’s intellectual development does not demonstrate a pattern of strengths and weaknesses consistent with a learning disability, in contrast to a child whose performance and achievement scores show variable strengths and weaknesses across academic areas.”

Me. Dep’t of Educ. Required Forms Procedural Manual at 48 (updated August 1, 2017).

Parents’ Argument:

The Parents contend that the School District should have found the Student eligible as a student with a specific learning disability in December 2017 and that the determination to the contrary was unlawful and denied the Student a FAPE until [REDACTED] eventual identification two years later. The Parents maintain that there was ample evidence to conclude that Question #4 on the Specific Learning Disability Eligibility Form should have been answered affirmatively in December 2017. The Parents also maintain that Dr. Christie’s testimony that her bias “not to disable kids” by identifying them as eligible for special education services shows that inappropriate standards were used that are not reflected in the Specific Learning Disability Eligibility Form.

The Parents contend that the trigger for the obligation to refer a child for an IDEA evaluation is simply a suspicion that a child has a disability and needs special education. The Parents argue that the School District ignored all the signs pointing to suspicion that the Student required specialized instruction, including a dyslexia screening that resulted in a finding of risk of dyslexia, but they failed to act or alert the Student’s Parents’ to the mounting suspicions. The Parents state that their request for compensatory education reimbursement for the programming at Aucocisco School and tutoring while the Student

was at Breakwater School is reasonable because it will allow the Student to begin to catch up.

School District's Argument:

The School District argues that the Team made a reasonable determination regarding the Student's eligibility in December 2017 and it would be unfair to hold the Team responsible for information gained after that time. The School District maintains that there is rarely a simple, single answer as to whether a child meets the standards to be eligible as a student with a specific learning disability because there is significant room within the provisions for variable outcomes, in addition to a degree of ambiguity within some of the regulatory language.

The School District contends that Dr. Christie reasonably explained her selection of tests to perform on the Student. With regard to the "pattern of strengths and weaknesses" portion of Question #4 on the Specific Learning Disability Eligibility Form, the School District points out that any such pattern must be "relevant to the identification of a specific learning disability" and it is the Team itself that determines what pattern of strengths and weaknesses is relevant. The School District contends that Dr. Christie wanted to make sure that the observed weaknesses were not due to the absence of instruction in basic phonics skills for the Student, who was still only part way through second grade.

The School District points out that every composite score on the WISC-V was in the average range and Dr. Christie, Dr. Scammon, and Ms. Mullis did not believe that there was explanatory force for a disorder in a psychological process in the Student's average range processing scores. The School District argues that variances in processing

skills that are still within the average range would reasonably appear to identify learning differences rather than disorders or disabilities. The School District acknowledges that the Student had a composite score on the CTOPP-2 that fell below the range of average, the assessment of Phonological Memory, but contends that at the time, Dr. Christie felt that this weak score was contradicted by two other measures – one for Digit Span from the WISC-V and one for Number Letter Memory on the WRAML-2 - both of which assessed skills similar to what was measured on the CTOPP-2 Phonological Memory test. The School District asserts that Dr. Christie reasoned that the Student had not yet received good phonics instruction and this, rather than a specific learning disability, could be the explanation for ■■■ poor performance halfway through second grade.

With regard to the School District's child find duties from December 2017 through May 2019, when the Parents again requested a special education referral, the School District points out that the Student was in the RTI process after the initial eligibility determination and ■■■ performance was monitored and data was gathered, thereby satisfying its child find obligations. With regard to its referral obligations, the School District contends that the RTI phonics instruction it provided was successful but because concerns remained, the School District agreed with the Parents' request to rerefer the Student for possible special education eligibility in May 2019.

Analysis:

1. December 2017 Eligibility Determination

The allegations against the School District begin with the December 2017 determination that the Student was not eligible for special education as a student with a specific learning disability. In the approximately year prior to the Parents' referral of the

Student for a determination of special education eligibility in September 2017, the School District accumulated significant information regarding the Student's difficulties in acquiring reading skills and the Parents' concerns.

In the parental input form that the Student's Mother's filled out prior to the start of first grade in the fall of 2016, she indicated that the Student tended to memorize rather than try to read, ■ stated ■ hated reading, and ■ quickly gave up trying to read. Throughout first grade and during the initial period of second grade, until the time of the Parents' referral, the Parents' stated concerns did not seem to alert School District staff to the possibility that the Student had a learning disability, even while the data and observations of the School District also revealed the same possibility.

The first reading assessment of the Student in the record occurred in March 2017, while the Student was in first grade. The Student scored only 9 out of 26 on the Rhyming and Alliteration section of the Phonemic Awareness Assessment, on which ■ was coded as not competent; ■ also scored as minimally competent in Sound Manipulation. The assessor noted that the Student was very uncomfortable, that the questions had to be rephrased for ■, and that the Student had inconsistent understanding of middle and ending sounds. The results of the Student's Phonemic Awareness Assessment were not shared with the Parents.

A month later, an April 2017 Progress Monitoring Form indicated that the Student's reading level and ■ writing (which included spelling problems and letter swapping) were concerns as was ■ lack of mastery of high frequency words. Although some interventions were incorporated, it was subsequently observed that the Student's reading level did not move despite the supports, some of which were provided only

sporadically. In May 2017, another Progress Monitoring Form showed continued concerns about the Student's reading and writing and a plan was made to alert the Parents to the School District's concerns. In mid-May 2017, as first grade neared completion, the Student's teacher met with the Parents, at which time the Student's reading level remained at Level C, a level that would meet expectations in the second interval of kindergarten. The Student's first grade end-of-year report card identified guiding reading as an "area of concern." As the Student's first grade year ended, the Student's mother contacted the school to relay her concerns about the Student's development.

Prior to the start of second grade in the fall of 2017, the Student's Mother again filled out a parental input placement form that identified her concerns; this time she specifically questioned whether the Student needed special help or a professional evaluation to determine if ■■■ had dyslexia, since ■■■ seemed to have some of the characteristics, or if ■■■ had another learning disability that was causing ■■■ academic difficulties. The Parents reiterated their concerns just after the Student began second grade via email sent to the principal of East End Elementary School. The Parents explained that they were aware that the Student was not advancing as ■■■ peers were, ■■■ writing was illegible, and there was a family history of dyslexia. They explained that the Student refused to read at home, tried to use pictures to determine story lines, wrote some letters and numbers backwards, and misunderstood words and pronunciation. The Parents requested testing for the Student. Around this time, the Student's NWEA testing resulted in literacy scores well below expectations, with a score of 3 in Phonemics Awareness compared to a class average of 27.6, a score of 5 in Phonics/Writing

compared to a class average of 17.1, and a score of 3 in Reading compared to a class average of 23.6.

Having not heard back from the school, towards the end of September 2017, the Parents emailed the principal again to follow up on their request for an evaluation. The Parents provided additional information about the Student's difficulty reading simple sight words, the extended amount of time it took ■■■ to complete homework assignments, and ■■■ tendency to spell words backwards.

At that point, the School District began the referral process and Dr. Christie was scheduled to conduct a psychoeducational evaluation. While the evaluation was being conducted and data gathered, the School District informed the Parents that because the Student was struggling with reading and phonological processing, a staff member would work with the Student on interventions. In the meantime, during Dr. Christie's observation of the Student, ■■■ did not raise ■■■ hand, appear disengaged in the class discussion, and did not follow the instructions for writing that were given, despite Dr. Christie approaching ■■■ to prompt ■■■. Dr. Christie noted that throughout most of the observation, the Student sat fiddling with erasers, looking around the room, and talking with peers, rather than completing the assignment; ■■■ primarily drew and ■■■ wrote only two lines while ■■■ peers filled multiple pages with drawings and writing. It is unclear on what basis Dr. Christie drew the conclusion, in her later recollection of the evaluation, that the Student was unengaged because ■■■ was not challenged; there are no indications in the record to that effect while there were many indications that ■■■ was struggling to keep up.

The key question, Question #4, on the Specific Learning Disability Eligibility Form is whether a student exhibits (1) a pattern of strengths and weaknesses in performance, achievement, or both (2) relative to age, state-approved grade level standards or intellectual development (3) that is determined by the IEP Team to be relevant to the identification of a specific learning disability, using appropriate assessments. The Student's cognitive potential was well above average (■■■ full-scale IQ was 121) and ■■■ non-literacy-based scores were generally average. Nevertheless, ■■■ achievement in literacy skill areas was excessively low, with scores in the 2nd through 8th percentile in various WIAT-III composite scores (■■■ Basic Reading composite was in the 5th percentile, ■■■ Written Expression composite was in the 8th percentile, ■■■ Total Reading composite was in the 3rd percentile, and ■■■ Reading Comprehension and Fluency composite was in the 2nd percentile). Furthermore, the Student's CTOPP-2 Phonological Memory composite score was in the 5th percentile.

At hearing, Dr. Christie acknowledged that, looking back at the data, she would agree there was a pattern of strengths and weaknesses in both classroom performance and achievement relevant to a learning disability. (Tr. 706.)

In addition, Dr. Christie testified at hearing "I do have a bias of let's not disable kids and so when I'm writing a report or when I'm speaking to parents or when I'm speaking to teachers, my bias is let's see if we can give them some supports in the regular education setting that could address this area and see if that helps improve their performance in the achievement areas." (Tr. 681.) Dr. Christie's stated bias not to identify children as eligible for special education appears to have been implicated in this particular Student's eligibility determination.

Although the Parents signed the form agreeing that the Student did not have a specific learning disability, they testified at hearing that they felt compelled to do so given the expertise in the room during the meeting and that they trusted the School District to ensure that the Student's needs were addressed. Regardless of whether the Parents agreed to sign the form at the time, the School District had ample evidence upon which it should have concluded that the Student had specific learning disabilities that required special education.

Finally, although the School District argues that it is exclusively the Team's domain to determine whether a pattern is "relevant" to the identification of a specific learning disability, such a conclusion would essentially render the Team determination unreviewable after the fact.

In fact, the School District had extensive data and information as of December 2017 to conclude that the Student exhibited a pattern of strengths and weaknesses, which the Team did in fact document on the Specific Learning Disability Eligibility Form, by including information that verified both strengths and weaknesses within the four areas: data collected when using a process that is based on the child's response to scientific research-based interventions; classroom performance data; achievement data; and psychological processing data from standardized measures to identify contributing factors. The Team also had more than sufficient information and should have concluded that the Student's pattern of strengths and weaknesses was relevant to the identification of a specific learning disability. As such, I find that the determination that the Student was not eligible for special education and related services as a student with a specific learning disability was unreasonable and resulted in a denial of the Student's right to

FAPE. See, e.g., Forest Grove Sch. Dist., 557 U.S. 238-39 (failure to propose an IEP to a student requiring special education services is “at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP”).

2. December 2017 to November 2019

Following the determination of ineligibility in December 2017 until the Student’s determination of eligibility in November 2019, the Parents allege that the School District failed in its child find obligations to rerefer, evaluate, and identify the Student. As courts have stated, the IDEA’s child find obligations are fundamental and without clear child find and referral requirements, the substantive IDEA obligations would be significantly less meaningful.

The School District’s actions after the Team found the Student ineligible for special education included pull-out interventions in the general education setting, which simulated special education services. Although Dr. Christie indicated that she wanted to see if general education interventions would resolve the Student’s challenges, the Student had already been receiving additional supports, at least sporadically, since at least April 2017. Furthermore, a plan should have been put into place for the Team to conduct analysis and review of the data regarding those interventions to appropriately be alerted that the interventions were not succeeding and the Student’s eligibility required review. Pursuant to MUSER § III.2., the Team should have met no more than 60 school days after the start of the interventions and approximately every 30 days thereafter to review data on the Student’s progress to determine if modifications to the interventions were needed or if a review of the Student’s eligibility for special education was indicated. The Department of Education guidance explains that this process should include consideration

of the Student's presenting issue, the length of time that interventions had been implemented, and the degree to which the Student showed progress, lack thereof, or deterioration.

As Ms. Thornhill testified, the data about the interventions provided to the Student during the second half of second grade, from January to June 2018, and the Student's progress during that time is difficult to decipher from the record. In fact, in February 2018, the Student's classroom teacher emailed the Parents to express her concerns that ■ was not reading or writing, was distracted and unfocused in literacy courses, and was struggling in math as well. Without any acknowledgement of the Parents' repeatedly stated concerns that the Student had dyslexia or another learning disability or the weaknesses identified in the Student's testing, the teacher inquired as to whether anything was happening with the Student that would hinder ■ from succeeding. The Student's Mother's response confirmed that she shared the teacher's concerns and asked if she had any suggestions, ideas, or solutions. Despite this interchange, which clearly highlighted the Student's significant struggles in reading, writing, and also math, there is no indication that modifications to the Student's interventions were made nor was there a reconsideration of the Student's eligibility for special education services. It is unclear if there was any response at all to the Student's Mother's plea for any suggestions to help the Student. The Student's end-of-year report card scores showed ■ was increasingly not meeting expectations in literacy, with areas of concern noted in multiple reading and writing skills, a decline from previous report cards. The Student's Parents felt alarmed by ■ dropping scores, as the Student fell

farther behind █ peers' progress and in █ ability to meet expectations, but they did not know what to do.

Furthermore, although some gains were made in █ reading level and mastery of high frequency words in third grade, in general the Student did not fare significantly better. █ beginning of school year NWEA testing showed █ was at the 1st percentile in math and 3rd percentile in reading. Towards the start of the school year, the Student's Parents again asked the School District for support and intervention. By mid-October 2018, the Student began to receive pull out instruction from Ms. Floridino, which did allow █ to make some gains, but not enough for █ to bridge the significant gaps that had accrued in █ ability to meet grade level standards. Astonishingly, although a March 2019 screening revealed that the Student was at risk of dyslexia, a concern that the Parents had advanced for nearly two years, the results of the screening were not shared with the Parents or followed up on even though the screening form itself indicated that comprehensive diagnostic testing would be an appropriate next step. Further, from December 2017 forward, the Student's Team did not meet to review █ progress.

As such, I find that beginning in December 2017 the School District violated its child find obligations at 34 C.F.R. § 300.111(a) and (c) and MUSER § IV.2.A. as well as its obligation to have the Student's Team assess the Student's response to interventions in relation to █ eligibility for special education at the intervals required by MUSER § III.2.i. Further, the School District's failure to meet these obligations resulted in a denial of FAPE to the Student until the Student was identified as eligible in November 2019 and an IEP was offered to the Student in January 2020.

C. Whether the School District’s January 2020 IEP and placement offer failed to provide the Student with a FAPE in light of ■ individual circumstances.

A student who has been identified as eligible for special education is entitled to a FAPE provided by the school district in which ■ resides. 20 U.S.C. § 1412(a)(1)(A); 20-A M.R.S. § 7201. A FAPE includes special education as well as related services. 20 U.S.C. § 1401(9); MUSER § II.13. A school district must develop and implement a service plan for each IDEA-eligible student that describes the specific special education and related services that the school district will provide to allow the student to advance appropriately toward attaining annual goals; to be involved in and make progress in the general education curriculum in accordance with the regulation and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and non-disabled children in the activities described in the regulation. MUSER § IX.3.A(1)(d).

The IEP is the “legal touchstone for hearing officers and judges to assess [school districts’] efforts” to educate students with disabilities. York Sch. Dep’t v. S.Z., No. 2:13-CV-00042-NT, 2015 WL 860953, at 32 (D. Me. Feb. 27, 2015). An IEP is reviewed first for consideration of whether it was developed in accordance with procedural requirements and, second, whether the IEP and placement were reasonably calculated to provide the student with some educational benefits. Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (analyzing predecessor statute to IDEA). An IEP must be designed to provide a student with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Id. at 203. In addition, an IEP must include the student’s present levels of performance,

measurable annual goals, methods by which progress towards those goals will be measured, an explanation of to what extent the student will participate with non-disabled students, and the special education and supportive services necessary to help the student advance toward ■ goals, make progress in the general education curriculum, participate in nonacademic activities, and be educated with other children with disabilities as well as non-disabled peers. 20 U.S.C. § 1414(d)(1)(A); MUSER § IX.3.A.

As the First Circuit Court of Appeals has explained, the IDEA “does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.

Appropriateness and adequacy are terms of moderation.” Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993). Whether an IEP is reasonably calculated to enable a child to receive educational benefits depends on the student’s individual potential.

Rowley, 458 U.S. at 203. A student’s program must be geared toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs.” Town of Burlington v. Dep’t of Educ., 736 F.2d 773, 788 (1st Cir. 1984), aff’d, 471 U.S. 359 (1985); see also Sanford Sch. Dep’t, 47 IDELR 176 (Me. SEA 2006) (stating that progress must be made in a student’s specific area of need).

Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” each situation requires a “student-by-student analysis that carefully considers the student’s individual abilities.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3^d Cir. 1999) (holding that the “meaningful benefit” standard requires ““significant learning”” (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182

(3^d Cir. 1988)). An IEP can be appropriate even if it not “the only appropriate choice, or the choice of certain select experts, or the child’s parents’ first choice, or even the best choice.” G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991).

Finally, 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 2017, the Supreme Court expanded on its explanation of these standards in Endrew F. v. Douglas Cnty. Sch. Dist., 137 S.Ct. 988 (2017). The Court explained that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” and that the “progress contemplated by the IEP must be appropriate in light of the child’s circumstances.” Id. at 999 & 1001. The Court stated that “the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” Id. at 1001. The Court noted that “for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.”

Id. at 1000. The Andrew F. Court also stated that “[w]hen a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.”

Id. The question is whether it is a “reasonable prospect” for the child at issue to “aim for grade level achievement”; if so, the school district must provide programming sufficient to permit the student to succeed in the general curriculum. Id.

Parents’ Argument:

The Parents argue that the IEP and placement offered by the School District in January 2020 do not meet the Andrew F. test for substantive appropriateness. The Parents contend that the question posed by Andrew F. is whether, in view of the Student’s unique circumstances and average cognitive potential, ■■■ IEPs and placements were designed to assist ■■■ in reaching a level of literacy skills at or near grade level. The Parents argue that Ms. Beall, hired by the School District to oversee the Student’s programming from afar, acknowledged at hearing that she does not administer the Seeing Stars program with students or consult with districts about its implementation and had stated in a previous hearing that she did not find much value in the program.

In addition, the Parents find fault with the IEP’s expectation that the Student would spend 70 percent of ■■■ school day in general education settings, with approximately 20 to 23 students per class, noting that the Student had significant difficulties the prior year at Breakwater School in a class of nine students where some of the students were a year younger. The Parents argue that other than an hour of adult support in mathematics each day, the Student would face the rest of ■■■ schedule, including many academic courses that require grade-level literacy, in the general

education environment without assistance, which they contend would be a recipe for disaster.

School District's Argument:

The School District argues that the Parents agreed with the needs and goals as presented in the IEP but did not feel that the plan was going to be met. The School District argues that the Parents' concern that the IEP could not be implemented at an elementary school within the School District in a manner that could provide the Student a FAPE is not sufficient to meet their burden to show that the IEP offered by the School District constituted an unreasonable calculation of what the Student would need in order to obtain a meaningfully beneficial, adequate education in the least restrictive setting.

The School District notes that no allegations have been made regarding the process of developing and offering the IEP and maintains that because it offered implementation in any one of the School District's elementary schools, the Parents cannot convincingly argue that any bad feelings the Student might have about East End Community School would prevent ■■■ from attending any other elementary school. In response to the Parents' concern about the Student's participation in subject matter classes in which ■ would not be receiving direct instruction, the School District points to the accommodations in the IEP that were intended to support the Student in mainstream classes, including assessments and testing in small group settings, additional adult support in math class, the use of a reader in any assessments that did not assess reading, and the reading of assignments to the Student to verify ■ understanding of them. The School District maintains that the Family's desire to have School District staff utilize the

Seeing Stars program could have been accommodated by selecting a school that had teachers trained in using Lindamood Bell methodologies.

Analysis:

The IEP developed in January and February 2020 for the Student provided the essential elements required by state and federal law: present levels of performance (for which the parties agreed that more data was necessary in some areas), measurable annual goals (as well as objectives, which were not required), methods by which progress towards those goals would be measured, an explanation of to what extent the Student would participate with non-disabled students, and the special education and supportive services necessary to help the Student advance towards ■■■ goals, make progress in the general education curriculum, participate in nonacademic activities, and be educated with other children with disabilities as well as non-disabled peers.

The Parents' primary concern at the Team meeting at which the draft IEP was reviewed seemed to be their apprehension that the plan as described in the IEP would not be followed. Although the Parents' reluctance to place trust in the School District given the Student's history is understandable, it is not a basis upon which to find the IEP insufficient under the IDEA. The School District would have been obligated by law to provide all the services and accommodations identified in the IEP.

At hearing, the Parents argued that the IEP should have aimed to remediate the orthographic processing aspect of the Student's disability in order to be appropriate. The Parents cite three Maine due process decisions from recent years as analogous. In Parents v. Falmouth School Department, No. 17.052H (Me. Dep't of Educ. Oct. 31, 2017), a Hearing Officer held that a school district was required to instruct a student with

a specific learning disability in reading and reading fluency “using appropriate and effective methods that take into account [REDACTED] unique disabilities with the aim being that [REDACTED] may access the general education curriculum so that [REDACTED] can meet the educational standards that apply to all children” in the school district. Id. at 36-37. The Hearing Officer criticized the school district’s use of the Wilson reading program, which did not focus on orthographic processing, and the lack of a fluency goal in the IEP, neither of which are deficits of the proposed IEP in this matter. Id.

The Parents also cite Parents v. RSU No. 75, No. 18.047H (Me. Dep’t of Educ. June 22, 2018), in which a Hearing Officer ruled that an IEP Team erred when it did not consider whether the methodology that they were using was appropriate for a student with average cognitive ability and dyslexia featuring a significant orthographic weakness. Id. at 41-42. Finally, they cite Parents v. Falmouth, No. 20.053H (Me. Dep’t of Educ. April 11, 2020), in which a Hearing Officer criticized a school district for not conducting further evaluation to look more closely at a student’s orthographic processing issue and for not considering a change in programming to Seeing Stars. Id. at 41-42. In the present case, however, the School District was prepared to offer the Student the Seeing Stars program, as well as other programming, in the January 2020 IEP. Although all three of these due process decisions lend support to the conclusion that the School District violated its child find and referral obligations until the Student’s rereferral by [REDACTED] Parents in May 2019, they do not necessarily support the conclusion that the IEP offered by the School District in January 2020 would not have provided the Student with a FAPE.

The Parents are also concerned about the 70 percent of the time that the Student would spend in general education settings. The Parents maintain that a lack of support in

the general educational environment would doom the Student to failure. The IDEA, however, mandates that a Student be educated with non-disabled peers to the maximum extent possible. Although the Student was to receive specialized one-on-one instruction in reading and writing for 90 minutes per day and in math fluency for 30 minutes per day in the special education setting to redress ■■■ specific learning disabilities, the Student was scheduled to be in regular education classes the rest of the time other than a 30 minute period of social work service each week. Within the regular education setting, a series of significant accommodations were put into place, including with regard to instructional strategies, assessments/testing/grading (to occur in small group settings), and materials. And finally, an hour of adult support was to be provided to the Student during mathematics classroom instruction. These accommodations as well as the additional math instruction within the general education setting provided a strong backdrop of support for the Student outside of the 120 minutes per day of direct one-on-one instruction ■■■ would be receiving in reading, writing, and math.

The Parents also argue that the proposed IEP fails to commit to providing the Student the type of specialized reading instruction ■■■ requires, which they contend is Seeing Stars (or its equivalent) to address the orthographic processing at the root of ■■■ reading disability. Nevertheless, while the School District offered placement for the Student at any elementary school within the School District, the School District suggested Lyseth Elementary School because its special educators had additional training in dyslexia and in the Orton Gillingham reading program or Presumpscot Elementary School because it had two special educators trained in LiPS and Seeing Stars.

The Parents also take issue with the School District's hiring of Ms. Beall to serve as the consultant to the Student's literacy program, arguing that she had been critical of the Seeing Stars program in a prior due process proceeding. At hearing, however, Ms. Beall testified that she had used pieces or the entirety of the Seeing Stars program with all of the approximately 15 to 25 students she had worked with in the prior year. (Tr. 811.)

Finally, the Parents rely on Dr. Hunter's testimony that the Student needs one-on-one instruction. (Tr. 362.) When told that ■■■ would be getting 90 minutes per day of specialized instruction in reading and writing and 70 percent of ■■■ day in the general education setting (which was not actually the full extent of ■■■ specialized instruction), Dr. Hunter opined that the Student needed far more daily instruction than that because ■■■ needed a highly-individualized placement that was not one-sized fits all. (Tr. 362-63.) She went on to state that based on her knowledge of Aucocisco and the Student's success thus far at Aucocisco, the Student would do well in the Aucocisco learning environment which would be individualized for ■■■ across subjects. (Tr. 365.)

Although Aucocisco School may well provide the Student with an excellent individualized program, the IEP generated by the School District also constituted a highly-individualized program and placement. I find that the program and placement in the IEP issued by the School District in January 2020 was reasonably calculated to enable the Student to make progress appropriate in light of ■■■ circumstances while allowing ■■■ education with peers to the maximum extent appropriate, consistent with the Supreme Court's clarification of the FAPE standard in Endrew F.

D. Whether the Student is entitled to a compensatory remedy and/or reimbursement to ■■■ parents for services provided to ■■■ through Aucocisco School from May 2019 through August 2019 (partial day

tutorials) and/or since January 2020 (full day placement), and/or continued programming and placement at the Aucocisco School or some other remedy.

When a student is deprived of a FAPE, ■ is entitled to “such relief as the court deems is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). Compensatory educational services are one form of remedy, the nature and extent of which vary depending on the facts of each particular situation. Pihl v. Massachusetts Dep’t of Educ., 9 F.3d 184 (1st Cir. 1993). Although an IEP need only provide some benefit, “compensatory awards must do more – they must compensate.” Reid v. District of Columbia, 401 F.3d 516, 525 (D.C. Cir. 2005). An award of compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” Reid, 401 F.3d at 518; see also MSAD #22, 43 IDELR 268 (Me. SEA 2005) (stating that the typical compensatory education award is an award of “services in an amount sufficient to make up for the past educational deficiencies”). Compensatory education need not be an hour-for-hour replacement of lost time or opportunity; instead, a compensatory education award should be designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” Parents of Student W. v. Puyallup Sch. Dist. #3, 31 F.3d 1489, 1497 (9th Cir. 1994); see also Reid, 401 F.3d at 523 (rejecting a “cookie-cutter approach” that “runs counter to both the ‘broad discretion’ afforded by IDEA’s remedial provision and the substantive FAPE standard that provision is meant to enforce”). An award of compensatory education should be fact-specific, depending on the child’s needs. Reid, 401 F.3d 516 at 524; Pihl, 9 F.3d at 188 n.8.

An award of compensatory education may reimburse a family for services

obtained during the period of deprivation of FAPE, Draper v. Atlanta Independent School System, 518 F.3d 1275, 1285-86 (11th Cir. 2006), and also may require services at a future time to compensate for what was lost, Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 189 (1st Cir. 1993). Further, a compensatory education award “is very dependent on the particular facts and circumstances of the case.” Millay v. Surry Sch. Dep't, 2011 WL 1122132, *9 (D. Me. March 24, 2011), aff'd by 2011 WL 1989923 (D. Me. May 23, 2011).

Parents are entitled to reimbursement for a private school placement only if the public placement violated the IDEA and the private school placement was proper under the IDEA. 20 U.S.C. § 1412(a)(10)(C); MUSER § IV.4.G(3); see also Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-15 (1993). A parental placement may be appropriate even if it does not meet the standards that apply to an education provided by a school district. MUSER IV.4.G(3). The requirement that a placement be “proper under the Act” has been explained to mean that “when a public school system has defaulted on its obligations under the Act, a private school placement is ‘proper under the Act’ if education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26 (1st Cir. 2002) (citing Rowley, 458 U.S. at 176). Furthermore, “a private placement need provide only ‘some element of the special education services’ missing from the public alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit.” Mr. I ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 25 (1st Cir. 2007) (quoting Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 (6th Cir. 2003)).

Tuition reimbursement may be awarded as compensatory education. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also Doe v. Regional Sch. Unit No. 51, 60 IDELR 228 (D. Me. 2013). Reimbursement of educational expenses is an appropriate form of compensatory education when the parents have acted unilaterally to compensate their child for past IDEA violations and have provided proper statutory notice. Burlington Sch. Comm. v. Dept. of Educ., 471 U.S. 359, 370 (1985).

With regard to the evaluations performed on a student, a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. MUSER § V.6.B(1); 34 C.F.R. § 300.502(b).

Parents' Argument:

The Parents maintain that Aucocisco easily satisfies the liberal test established by the courts for determining whether a unilateral placement is proper under the Act and argue that they should be awarded full reimbursement of the tuition and transportation amounts they have incurred for the Student's Aucocisco placement. In addition, the Parents request reimbursement of Dr. Hunter's independent evaluation, which they obtained because they disagreed with both of Portland's evaluations that failed to address the Student's orthographic processing disorder in any respect, arguing that the School District did not appropriately evaluate the Student in all areas of suspected disability.

School District's Argument:

The School District argues that if it is found to have violated its child find or referral obligations in the earlier time period at issue in this matter but to have offered an appropriate IEP in January 2020, then it would be inconsistent with the IDEA's long emphasis on least restrictive programming for a Hearing Officer to order continued

placement at an out of district placement in those circumstances where the current IEP has been upheld. The School District maintains that a remedial order should not undercut the Student's right to FAPE in the least restrictive environment. The School District also requests that any remedial order take into consideration the RTI programming provided from October 2018 through May 2019, during which time it believes that the Student made meaningful and demonstrable progress in ■ reading level and in ■ command of high frequency words. Finally, the School District requests that the Parents' three-month delay in returning the consents for evaluations in 2019 should be factored into any remedial remedy.

Analysis:

In the present case, the Student's Parents unilaterally placed the Student in tutoring services at Aucocisco School beginning in May 2019 to begin remediation of the failure of the School District to provide the Student with special education services since December 2017. The Parents properly gave notice to the School District of their intent to seek reimbursement from the District for those services. Those tutorial literacy services continued through the summer of 2019. The Parents also provided the Student with after school tutoring through the fall of 2019 while ■ was enrolled at Breakwater. Then, in early 2020, the Parents enrolled the Student as a full-time student at Aucocisco.

The tutoring and programming provided by Aucocisco, as well as the tutoring provided while the Student was enrolled at Breakwater, easily satisfy the standard of being "proper under the Act" by providing some element of the missing special education services.

The period of December 2017, when the Student was denied FAPE, to January 2020, when the Student was offered an IEP by the School District that was reasonably calculated to provide ■■■ with a FAPE, is approximately two years. The Parents expended \$15,490 in tutoring and summer programming at Aucocisco beginning in May 2019, along with \$591.60 in transportation costs. (P-95.) In the fall of 2019, the Parents engaged a private tutor, on whom they expended \$1,562.50. (P-95.) In the spring and summer of 2020, the Parents expended \$28,172 in Aucocisco tuition, along with \$276 in transportation costs. (P-95.) Arriving at the upcoming 2020-2021 school year, the Parents have continued the Student's enrollment at Aucocisco, the annual tuition for which is \$45,675; the Parents have paid \$25,121.25 towards the 2020-2021 tuition which has been credited towards the first semester of school. (P-95; Tr. 303.)

The School District requests that the three month delay in the Parents' execution of consents to allow the Student's rereferral evaluations to occur in 2019 should be considered as a mitigating factor, as should the RTI instruction provided to the Student from October 2018 to May 2019. Those factors are taken into account in fashioning this compensatory education remedy (which covers 20 months of services rather than the 23 months for which FAPE was denied), although it is noted that the delay in the receipt of the consent forms occurred over a summer and thus likely did not have a very significant effect on the conducting of the evaluations and the subsequent determination of eligibility.


For the 20-month period of May 2019 through December 2020, I find that the Parents expended \$71,213.35 for educational services, which they are awarded as reimbursement of costs for services unilaterally obtained in order to address the deficits

caused by the School District's failure to provide the Student with a FAPE from December 2017 through November 2019. In addition, I find that the Parents expended \$6,100 on Dr. Hunter's evaluation, which directly assessed the Student's orthographic processing disorder as the School District's evaluations had not done, despite the requirement in MUSER § V.2.C.4. that a student must be assessed in all areas of suspected disability, for which the School District must reimburse them.

As such, as a form of compensatory education, the School District must reimburse the Parents \$77,313.35.

V. ORDER

Portland Public Schools failed in its child find and referral obligations to the Student, thereby denying ■■■ a free appropriate public education, between December 2017 and November 2019. Nevertheless, the IEP offered to the Student in January 2020 was reasonably calculated to enable the Student to make progress appropriate in light of ■■■ circumstances and thus offered ■■■ a free appropriate public education. As compensatory education for the approximately two-year denial of FAPE, the Parents are awarded \$77,313.35 in reimbursement of costs expended in educational services to redress the denial of FAPE. Because an appropriate IEP was offered in January 2020, ongoing placement of the Student at Aucocisco is not ordered.



Rebekah J. Smith, Esq.
Hearing Officer