

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

January 24, 2017

17.005H & 17.010H— Parents v. SAD #35

REPRESENTING THE FAMILY: Richard O'Meara, Esq., Amy Phalon, Esq.

REPRESENTING THE DISTRICT: Hannah King, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing took place on September 21, 23, 26, 28, October 14 & 20, and December 14 & 19, 2016, in Portsmouth, NH¹ and Portland, Maine. Those present for the proceeding were the Mother, Father, counsel for both parties, Carole Smith, Director of Special Education, and the undersigned hearing officer. Testifying at the hearing were:

The Mother
The Father
Victoria Papageorge
Lisa McManus
Christine Groleau
Jessica Belkus
Sean Kotkowski
Kerry Hoag, Ph.D.
Heather Blier, Ph.D.
Debra Brickett
Katherine Conte
Wendy Shaw
Danielle Durgin
Rebecca Ford

Owner, Hyperion Learning Center
Education Director, ██████████ Academy ██████████
Speech language pathologist, ██████████
ELA teacher, ██████████
Math teacher, ██████████
Psychologist
Psychologist
Special education teacher, SAD #35
Special education teacher, SAD #35
Speech pathologist, SAD #35
Special education teacher, SAD #35
Assistant to Special Ed Director, SAD #35

All testimony was taken under oath.

¹ The parties stipulated that the hearing is taking place in Maine pursuant to Maine special education law and regulations.

I. PROCEDURAL BACKGROUND:

On July 14, 2016, the Parents filed this hearing request (17.005H) on behalf of their daughter ("Student"). On July 28, 2016, SAD # 35 ("District") filed for due process regarding the Parents' alleged denial of consent for reevaluation (17.010H). The hearing officer consolidated the two cases.

On August 30, 2016, the hearing officer held a prehearing conference at the offices of Drummond Woodsum in Portland, Maine. Participating in the conference in person were: the Father of the Student; Richard O'Meara, Esq., and Amy Phalon, Esq., counsel to the Parents; Dr. Carole Smith, director of special education for the District; Hannah King, Esq., counsel to the District; and Shari Broder, hearing officer. Documents and witness lists were exchanged in a timely manner. The Parents submitted approximately 784 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1155 pages of exhibits (herein referenced as S-#, SA-#, SB-#, SC-#, SD-# and SE-#).

As noted above, the hearing took place over the course of eight days. Both parties requested to keep the hearing record open until January 4, 2017 to allow the parties to prepare and submit posthearing memoranda. The District submitted a 97-page final argument and the Parents submitted a 71-page final argument. The record closed on January 5, 2017.

II. ISSUES:

1. Did the Student's Individual Education Plan ("IEP") as developed and implemented for the 2014-2015 school year fail to provide her with a free, appropriate public education in the least restrictive environment?
2. Did the Student's IEP as developed and implemented for the 2015-2016 school year fail to provide her with a free, appropriate public education ("FAPE") in the least restrictive environment?

3. Is the District's proposed IEP and placement for the 2016-17 school year reasonably calculated to provide a free, appropriate public education to the Student in the least restrictive environment?

4. If the hearing officer concludes that the District did not provide or offer the Student FAPE during the school years in question, is the Student entitled to reimbursement for the costs associated with her unilateral [REDACTED] Academy placement or other forms of compensatory education? If the hearing officer concludes that any FAPE violation was the result of Parent obstructionism, should this reduce or preclude any remedy?

5. Did the District fail to comply with the Individuals with Disabilities Education Act ("IDEA") requirements for reevaluation of the Student? If so, what remedy is appropriate?

6. Have the Parents denied consent for reevaluation? If so, should the hearing officer override the Parents' failure to consent pursuant to Maine Unified Special Education Regulations?

Issue #3 above was not listed in the hearing request for 17.005H, but the Parents wished to pursue that issue at this hearing. The District objected because it was not raised in the hearing request. This objection is noted, but for the sake of adjudicatory economy, the hearing officer allowed the Parents to amend their complaint to add this issue without delaying the hearing dates previously set by the parties. The District did not object to remaining on the agreed-upon schedule.

These issues are addressed below.

III FINDINGS OF FACT

1. The Student is [REDACTED] years old (DOB [REDACTED]), and lives with her mother ("Mother") and father ("Father") in [REDACTED] Maine. [REDACTED] is within Maine School Administrative District #35. The Student is eligible for special education and related services under the category of Multiple Disabilities.

2. The Student has a language-based learning disability that affects her ability to learn reading, writing and math. [Testimony of Mother, K. Hoag] Dyslexia runs in her family, as her Father and other members of his family have been diagnosed with the condition. The Student has also been diagnosed with anxiety, photosensitive epilepsy and a hereditary skin condition that makes it difficult to walk in warm weather because she develops blisters on her feet. [Testimony of Mother]

3. When the Student was in [REDACTED] and [REDACTED] years old, she attended [REDACTED] School in [REDACTED] which is part of the District. That winter, the Parents requested an evaluation of the Student to determine whether she was eligible for special education services, and to determine what educational programming was needed to meet her needs. [P-3, S-183] As part of that referral request, in March of 2010, Douglas Schnackel, a licensed school psychological services provider, performed a special education evaluation of the Student. [S-1-6] Mr. Schnackel met with the Student twice for testing, and noted that she appeared “without noticeable difficulty both times, immediately presenting as comfortable and talkative.” [S-2, testimony of C. Smith] The Student’s score on the Wechsler Intelligence Scale for Children (“WISC-IV”) was a full scale IQ of 72, placing her in the borderline range, with the majority of her subtest scores being in the low average range. Comprehension was average, and Similarities and Vocabulary were in the borderline range. [S-3] The Parents were concerned about these scores. Mr. Schnackel also administered the Wide Range of Assessment of Memory Learning (“WRAML-2”) to assess the Student’s memory. The Student’s scores on this test also placed her in the borderline range. [Testimony of H. Blier, S-4] Other evaluations were done at this time. [P-3-15] Although the Student’s scores on academic testing were below average, the

evaluators concluded that these scores were commensurate with the Student's cognitive abilities. [P-9, testimony of Mother] On the Clinical Evaluation of Language Fundamentals ("CELF-4"), the Student's scores were consistently in the significantly below average to below average range on all expressive and receptive language tasks. Rebecca Woodman, a speech and language clinician for the District, conducted the special education evaluation and concluded that testing showed a "16-point significant discrepancy between receptive and expressive abilities, with the expressive language score being higher. This is indicative of a processing issue." (emphasis original) [P-10] The IEP team did not conclude that the Student had a learning disability at that time, but found her eligible for special education under the category of Speech and Language ("S/L") Impairment. [Testimony of Mother, P-12]

4. The Parents contacted Kerry Hoag, Ph.D., a psychologist, around this time, and Dr. Hoag began working with the Student. [Testimony of Mother] Dr. Hoag's opinion was that the Student had school-related anxiety secondary to difficulties she was experiencing with learning. [Testimony of K. Hoag, S-184] Additionally, the IEP team determined at its June 7, 2010 meeting to have Joseph Wojcik, Ph.D., a psychologist, perform a psychological evaluation of the Student. [P-781-784, S-183, testimony of Mother] The IEP team referred the Student for this evaluation to determine whether she had a specific learning disability, particularly dyslexia. [P-781] Although Dr. Wojcik had received background information about the Student from Dr. Hoag, he had difficulty administering the testing. The Student became overwhelmed by the testing process and began to cry, thus causing Dr. Wojcik to terminate the testing soon after beginning. [P-781] Dr. Wojcik

was concerned that the previous testing may have underestimated the Student's cognitive abilities due to anxiety during the testing process. [P-783]

5. The Parents "very specially chose" the Student's [REDACTED] grade teacher, Erin Darling. [Testimony of Mother] The Student started [REDACTED] grade in the fall of 2010. Although the Student received Title I reading services and math response to intervention (RTI) services during [REDACTED] grade, she struggled academically, and was concerned about going onto [REDACTED] grade because she could not read. [Testimony of Mother, P-515-521] The Parents provided her with private summer services at the [REDACTED] School in [REDACTED] where she was given Orton-Gillingham ("OG") reading instruction. This worked well, and the Parents shared this information with Carole Smith, director of special education for the District ("Dr. Smith"). [Testimony of Mother]
6. In [REDACTED] grade, the IEP team identified the Student as having a specific learning disability ("SLD") in reading, writing and math. [Testimony of Mother, S-11] The Mother felt that [REDACTED] grade was a better year for the Student. The Student began taking Depakote for seizures.
7. The Student also attended the summer program at the [REDACTED] School during the summer after [REDACTED] grade. [Testimony of Mother] That summer, the Parents arranged a conference call between members of the Student's IEP team and the [REDACTED] School to discuss the Student's reading instruction needs. The Parents followed up with an email to Dr. Smith in which they stated they hoped the Student would receive at least 90 minutes per day of reading instruction and 60 minutes per day of math. [SA-3]
8. At the beginning of [REDACTED] grade in September of 2012, Dr. Smith emailed the Parents proposing instruction in the SPIRE program to assist the Student with reading. She

explained how SPIRE was a research-based, OG approach developed by an OG Fellow.

[SA-4]

9. During [REDACTED] grade, the 2012-13 school year, the Student received pull-out services for S/L, reading, math, written language and occupational therapy ("OT"). Her teacher was Jen Wyatt. The Mother thought Ms. Wyatt really understood the Student's personality and what she needed to be successful and engaged. Ms. Wyatt thought the Student could spend more time in the mainstream classroom with support, as the Student was pulled out for most of her instruction. [Testimony of Mother] Ms. Wyatt also had the Student work with students in the pre-K room once a week because she loved teaching the younger children. [Testimony of Mother]
10. Dr. Smith requested that the Student receive a comprehensive reevaluation, including a neuropsychological evaluation in connection with her triennial evaluation. This testing was done by Laura Goldberg, Ph.D., in October of 2012 during [REDACTED] grade. [S-9-23] She also had a classroom observation and evaluation by Ms. Woodman. [S-26-34] Ms. Woodman's scores showed that the Student was making gains. [S-28, 32, testimony of Mother] At the time of testing, Dr. Goldberg noted that the Student came to the testing sessions willingly. While she was a little cautious and quiet initially, she was quick to warm up to Dr. Goldberg and establish rapport. Dr. Goldberg noted that the Student appeared to fatigue quickly, and her on-task time was shorter than was typical of children that age. [S-11] There was no reason to question the validity of the test scores. [Testimony of C. Smith] For cognitive testing, Dr. Goldberg administered the Stanford-Binet Intelligence Scale Fifth Edition, selected subtests of the WISC-IV and the Test of Memory and Learning. [S-9, 23] The Student's overall performance fell far below the level of same-aged peers, and her

overall IQ scores again fell within the borderline range of intellectual functioning. [S-12, 15, 23] Dr. Goldberg noted that the Student had strengths in specific areas, particularly listening comprehension, motivation and pragmatic language, including the ability to engage in conversation about a range of topics in a socially appropriate manner. [S-12, 18] On the Gray Oral Reading Test (“GORT”), the Student's rate of speed and accuracy both fell below a [REDACTED] grade level, with a score in the first percentile. [S-16] Dr. Goldberg thought the Student's working memory weaknesses and difficulty retrieving automatic information, both in the moderately low range, negatively affected her reading skills. [Testimony of C. Smith] She concluded that the Student had significant learning disabilities in reading, math and written language, and that her cognitive weaknesses impacted her ability to acquire academic skills at the level of her peers. [S-19] Her recommendation included placing the student in a small, structured, nurturing classroom with children who have a similar cognitive profile and full special education instruction in all areas. [S-19, testimony of Mother] She recommended that reading decoding skills be explicitly taught using a structured method and intensive, daily individual instruction. [S-19]

11. During the summer following [REDACTED] grade, the Parents hired special education teacher Christine Peskurich to work privately with the Student, in addition to her District Extended School Year (“ESY”) services. [P-523] Ms. Peskurich continued to tutor the Student throughout [REDACTED] grade. [Testimony of Mother] That summer, three special education staff members from the District—teachers Debra Brickett and Kathy Conte, and speech therapist Wendy Shaw--attended OG Level 1 training so they could begin using that methodology with the Student and other students with whom they worked. An OG

specialist came and observed them delivering the program mid-year. [Testimony of D. Brickett]

12. For [REDACTED] grade, the Student was transitioning from [REDACTED] School to [REDACTED] School ([REDACTED]). The Mother noticed that the Student had a lot of anxiety about the transition. [Testimony of Mother, SA-9] She arranged to have the Student come to school before the first day to meet her new special education teacher, Barbara Visciano, and walk around.

13. The Student entered [REDACTED] for [REDACTED] grade in the fall of 2013. Her special education programming consisted of 300 minutes per week for reading and writing, 250 minutes for math, 30 minutes of direct S/L therapy and 30 of S/L consult, and 30 minutes of OT twice weekly. [S-80] The Mother reported to Ms. Peskurich that the Student had a great first week there, and that she was very impressed with the Student's reading lately. [P-535, 538] The Student's program consisted of pull-outs for reading, writing, math and speech. Ms. Brickett began instructing the Student in OG reading at that time. Ms. Brickett is a certified special education teacher with highly qualified status and 21 years of teaching experience. She had OG Level 1 training, and training in SPIRE and Wilson reading programs. [Testimony of D. Brickett, SE-15] Ms. Brickett used Number Worlds for math, a research-based program that progressed at a slower pace than Everyday Math, the general education math program used in the District. This program was multisensory and used manipulatives. [Testimony of D. Brickett] The Student was making progress, mastering what they were doing in the program. [S-87-91]. Speech services were provided by Wendy Shaw, a speech pathologist. The Student also received some special services in the mainstream classroom. [Testimony of Mother]

14. On October 4, 2013, the Mother asked the Student's case manager, Ms. Brickett, whether she could have a meeting at the school that would include Dr. Hoag. The Mother thought that, because Dr. Hoag had worked with the Student since [REDACTED] she would have valuable insights into the Student's personality and anxiety, and how that affected the Student as a learner. This meeting occurred on October 18. [Testimony of Mother, SA-19] As the Mother wrote in a follow-up email on November 4, 2013, the Student had expressed that her work in the resource room seemed easy for her, and she wanted to be in the mainstream classroom with her peers. The Parents also thought the work was too basic, and wanted her math to "look more [REDACTED] grade." The Parents requested that the teachers collaborate to find as many mainstream opportunities for the Student as possible. They noted that in [REDACTED] grade, the Student "was truly engaged, which was evident by her confidence and excitement around school and the learning process." [SA-22] Dr. Hoag explained that the Student's self-worth and motivation increased when she did age-appropriate work. [Testimony of K. Hoag]

15. In the Student's annual review report from March 2014, it was reported that she was participating in two reading programs: OG and Think-Alongs. Ms. Brickett thought OG was a fantastic program for the Student because it was multisensory. [Testimony of D. Brickett] Think-Alongs is geared mostly towards comprehension, with questions embedded in the stories. It involves breaking down words, definitions, homophones, multiple meanings, and how they are used in the story. Ms. Brickett explained the five components of reading and that she used her knowledge of the progression of how to teach children to read and write. [Testimony of D. Brickett] The Student also worked on fluency and decoding as part of this program, and special education teacher Kathy Conte felt it was appropriate for the

Student. [Testimony of K. Conte] Ms. Brickett reported that the Student had a good year. She was hard working, motivated and persistent with her learning. [Testimony of D. Brickett] She read 67 words per minute on a mid-to-late [REDACTED] grade passage on an informal reading assessment, and surpassed her IEP goal regarding reading the Fry Word Lists². [S-85] This report was discussed at the March 14, 2014 IEP team meeting where the team developed the Student's [REDACTED] grade educational program, and a copy was given to the Parents. [Testimony of D. Brickett] Dr. Hoag, who had been providing therapy to the Student once or twice a month throughout [REDACTED] grade, attended the meeting. [Testimony of K. Hoag, SC-24] She explained that there were sometimes inconsistencies in the Student's learning due to her anxiety, and they had been working on strategies for reducing her anxiety. [Testimony of K. Hoag, S-54] Other staff members discussed how they helped the student calm down. The Student's speech therapist, Wendy Shaw, conducted a S/L review around that time. On the CELF-IV, the Student's overall language skills were in the low average range, with her receptive language abilities being stronger than her expressive skills. [S-41, testimony of W. Shaw] This was a considerable improvement over her scores on the CELF-IV in 2010. Her working memory was in the moderately impaired range, with a score of 72 putting her in the 3rd percentile. This affected the Student's ability to attend to, recall and work with orally presented information. [Testimony of W. Shaw, S-41] The Student's OT evaluation noted significant progress in handwriting, keyboarding, visual scanning and visual motor abilities. [S-42, testimony of Mother] The progress reports on the Student's measurable annual goals showed "Satisfactory" progress on almost all of them, but she only met the objective on

² These are lists of the most commonly used words in the English language. [Testimony of D. Brickett]

OT handwriting goal. [S-46-51] The team determined that the Student would receive 60 minutes of direct OT services per week, 300 minutes per week of specially designed reading and writing instruction, and 250 minutes per week of math instruction in the special education setting. [S-53, S-80] The Mother said that it was important for the Student to be in the regular education class as much as possible, including for her specially designed instruction. [S-56, testimony of Mother] Although the Student had considerable needs for specially designed instruction, the IEP provided that the Student would spend 66% of her time with nondisabled children in the mainstream setting, including for science, social studies, art, music, lunch and recess. [S-83, testimony of C. Smith] The IEP developed by the team included essentially the same level of services for █ grade as the Student was receiving in █ grade. [S-80] Members of the District staff who were present felt that the IEP was reasonably calculated to provide the Student with FAPE. [Testimony of D. Brickett, W. Shaw, C. Smith] No one on the IEP team raised concerns about the appropriateness of the goals, methods of delivery or other aspects of the Student's programming or proposed changes to it.

16. In April 2014, Dr. Hoag conducted psychological testing of the Student at the request of the Parents. Dr. Hoag noted in her assessment that the test environment was unique because of their therapy relationship for several years, and that she used techniques to reduce the Student's anxiety, such as not calling the evaluation a test, not informing the Student that some of the subtests were timed, and practicing coping skills or repeating positive statements before most subtests. On one of the testing dates, Dr. Hoag's therapy dog was at the session. [Testimony of K. Hoag, S-106] The Student believed she was helping Dr. Hoag, not that she was being tested. Dr. Hoag administered the WISC-IV and

the Student obtained index scores in the average to low average range. [S-109] Dr. Hoag concluded that the Student's cognitive profile was that of a student with a specific learning disability and that she did not have overall cognitive limitations. Dr. Hoag had not observed the Student in the academic setting nor provided academic instruction to her. She explained that the Student's expressive language skills were likely to be compromised by her anxiety. [Testimony of K. Hoag, SC-4] Dr. Hoag added that the Student's areas of strength were her reasoning and logic abilities and auditory processing skills. She "has incredible strengths including a significant awareness and accuracy in understanding the emotions of others." She added that her areas of weakness include visual-motor skills and visual reasoning, her processing speed, short-term visual memory, visual-motor coordination, cognitive flexibility, visual discrimination and concentration. Dr. Hoag recommended individualized instruction in reading, math and writing. [S-110]

17. The Parents provided Dr. Smith with a copy of Dr. Hoag's report in May 2014. Dr. Hoag reported to Dr. Smith in a June 12, 2014 letter that she felt the Student's learning disability was "her primary diagnosis with anxiety being secondary and often directly linked to her learning disability." The District was concerned about Dr. Hoag's deviation from the standard administration of the test, especially in light of the difference in scores between the 2010 and 2012 evaluations. [Testimony of C. Smith] Dr. Hoag responded that all standards were followed and therefore the testing was valid. [P-18]

18. During the summer between [REDACTED] and [REDACTED] grades, the Student received ESY services, participating in 16 hours of OG tutorials with Susan Hourihan, a certified OG tutor. Ms. Hourihan reported that using OG, "a multisensory, phonetic, systematic approach to reading, language and spelling, [the Student] has made significant gains." [S-132] She

began at Level 1, and made progress in a variety of areas, particularly in the decoding of one-syllable words with increased accuracy and confidence. She struggled most with reading fluency. Ms. Hourihan recommended consistent daily reading and practice at home with an emphasis on decoding increasingly longer and more difficult words to help the Student move towards her goal of mastering reading. [S-132]

19. Starting in the winter of 2013, during [REDACTED] grade, and annually thereafter, the Student took the Northwest Educational Assessment (NWEA) along with her classmates. This is a standardized test used throughout the country to measure an individual student's progress in reading, language usage and mathematics. Although the Student scored far below the mean scores, and did not meet her growth projections in the Spring of 2014, she met those projections in Math in the Spring of 2015 and exceeded them in Reading and Language Usage. [S-263]

20. For [REDACTED] grade, the Student's IEP provided: (1) reading and writing for 300 minutes per week; (2) math for 250 minutes per week; (3) OT for two 30-minute sessions per week; (4) S/L direct services for 30 minutes per week; and (5) S/L consult twice per week for 30 minutes each. The IEP also included ESY services. [S-53, S-80] The goals in her IEP were specific and measurable. It also contained approximately 22 supplementary aids, services or modifications. These included modifying the pace and delivery of instruction, breaking down tasks into small, sequential steps, check-ins for comprehension, and multi-sensory approach to learning, to name a few. [S-81-82]

21. The Student started [REDACTED] grade in September of 2014. Her regular education teacher was Sara Lindgren. [Testimony of C. Smith] On September 5, 2014, the IEP team met at the Parents' request and reviewed the results of Dr. Hoag's spring testing. [S-162-166] The

Parents always engaged in rich discussions with other members of the IEP team at team meetings. [Testimony of C. Smith] Dr. Hoag thought the Parents invested more time towards the Student's education than most families with whom she worked. [Testimony of K. Hoag] She stressed, "purposeful inclusion in the regular education setting" to increase the Student's self-confidence, and recommended accommodations, most of which were already contained in the Student's IEP. [S-164] The Mother restated her desire to explore how the Student could be included more in regular language arts class, expressed concern for the Student's social-emotional health, and her view that being in regular education classrooms fostered that health. [S-164, testimony of Mother] She also expressed her concern that one of the things that decreased the Student's self-worth was when she was given work below her ability. [Testimony of K. Hoag] The team agreed to have teachers explore this and plan for it. The team also agreed to move the Student's triennial reevaluation from November 2015 to May 2015, and would include academic and S/L evaluations. [S-163, testimony of C. Smith] These evaluations were to ensure the team had information on which to develop programming for the Student's transition to [REDACTED] school. [Testimony of D. Durgin, C. Smith] The team agreed to continue monthly staffings to keep the Parents informed of the Student's educational experience.

22. At the beginning of [REDACTED] grade, Ms. Brickett provided the Student's specially designed instruction in reading and writing. [Testimony of D. Brickett, C. Smith] The Student received her reading instruction in a small group setting with one staff member to two students. [Testimony of D. Brickett] Kathy Conte, another Maine certified special education teacher with Highly Qualified Status and 32 years of teaching experience, also provided direct instruction to the Student. She had OG Level 1 training, and was trained in

SPIRE. [SE-16] Throughout [REDACTED] grade, Ms. Conte taught math to the Student using Number Worlds. Ms. Conte designed the Student's lessons based upon her goals.

[Testimony of K. Conte] Wendy Shaw, a state certified speech and hearing clinician who also had OG Level 1 training, provided speech services to the Student in [REDACTED] and [REDACTED] grades. [Testimony of W. Shaw, SE-19] For [REDACTED] grade, Ms. Shaw provided the Student with 30 minutes of direct instruction in speech and language each week in a pull-out setting, and 30 minutes of instruction in the mainstream classroom supporting the Student's language development in that environment. [Testimony of W. Shaw, S-157]

23. The Student took NWEA tests again in late September of 2014. She misunderstood the nature of the test, was anxious about it and rushed through it. [SA-70, testimony of Mother] About a month later, Ms. Brickett noticed that the Student was acting "off." Her other teachers did not see her present this way. [Testimony of D. Brickett, SA-70] In late October and early November, the Mother corresponded by email with Ms. Brickett and Dr. Smith expressing her concerns about a number of issues. The Mother had asked the Student how school was going, and she responded "it was all good." [SA-70] Then the Mother asked the Student about her NWEAs, to which the Student responded that she had rushed through them and got very anxious because she knew it was to be on the report cards. The Mother added, "This year started so well, I hate to see her be so upset and give up because she thinks that her report card is ruined." She asked to address the Student's anxiety about the NWEAs. [SA-70] The Mother's November 2, 2014 email to Dr. Smith outlined five concerns, including that she did not believe the NWEA testing was conducted in accordance with the Student's IEP, specifically in a small group or 1:1 administration and that the Student was not receiving appropriate instruction to meet her

IEP goals. Also, she thought Ms. Brickett was not dictating sentences to the Student individually, as required in the IEP. [SA-72] She added that the Student was not engaged in class the prior week because the instruction was not appropriate to her needs. Dr. Smith explained that the Student was provided a small group administration of the NWEA with a 4:1 student to staff ratio, although there were two groups of four students with two staff members, one for each group working on the NWEA. [Testimony of C. Smith, SA-72] Dr. Smith offered to conduct a triennial evaluation sooner than scheduled. [Testimony of C. Smith] The Parents did not feel that Ms. Brickett was able to effectively meet the Student's needs, adding:

We really appreciate that you have always been responsive to our concerns. At this point, we feel that our concerns warrant more accountability. Until some issues are resolved, Debbie Brickett is not to conduct any standardized testing or assessments of [the Student], not including the weekly spelling tests and dictation, and is not to talk further about report cards with [the Student]. [P-582]

Although Dr. Smith disagreed with the Parents' allegations about Ms. Brickett, the District offered to have Ms. Conte take over the majority of the Student's specially designed instruction for the remainder of the school year and to have her conduct the upcoming triennial academic testing. [Testimony of C. Smith, SA-73]

24. Thereafter, Ms. Conte worked with the Student on her spelling, writing and reading comprehension, and used OG. The classroom had 10 students and two ed techs assisting Ms. Conte. The Student was in a group of three, and they were grouped by their learning abilities. The OG work was focused on vowel digraphs, homophones, and knowing different spellings for different meanings. Ms. Conte regularly measured the Student's progress through curriculum-based assessments. [Testimony of K. Conte] Ms. Brickett continued to have a limited role, instructing the Student on sight words from the Fry List

and fluency reads during two 20-minute periods during the day. [Testimony of Mother, D. Brickett, P-587] Ms. Conte updated the Parents at monthly staffings, and provided them with quarterly reports of the Student's progress, explaining precisely where the Student was in her learning. [Testimony of K. Conte, S-187-191] In response to the Parents' request for more home-school communication, in December, Ms. Conte began sending home weekly communications describing what the Student had worked on and the results of any informal assessments conducted. [Testimony of K. Conte, Mother, SA-77]

25. In February 2015, Ms. Conte prepared an annual report about the Student's educational program. [S-187-190] She thought the Student was definitely making progress in most areas. [Testimony of K. Conte] According to her testing, the Student could read 92 words per minute at a late [REDACTED] grade level and 85 words per minute at a beginning [REDACTED] grade level, and moved up to ThinkAlongs Level D. [S-130, 187] She did well on her spelling tests [Testimony of Mother, D. Brickett, S-187] The Student was able to answer comprehension questions from materials she had read with 70% accuracy and organize and plan a two-paragraph writing piece with pre-writing activities and a completed graphic organizer. [S-187, 215] In math, the Student was making progress on her goals with respect to place value to the thousands, multiplication facts, equivalent fractions, and two-digit subtraction. For example, for multiplication facts, she had mastered twos and fives. [Testimony of K. Conte] At the beginning of [REDACTED] grade, she did not know anything about fractions, but now understood the concept of numerator and denominator as it related to the parts of a whole fraction. In writing, she progressed from writing one paragraph to two, and in reading comprehension, she was learning how to look at questions in a less literal way. [Testimony of K. Conte] Ms. Conte recommended continuing pull-out services at the

same levels, but, “[i]n addition, [the Student] should receive specially designed instruction for fluency, phonological processing drills, and extra support where needed.” [S-188]

26. The IEP team met on February 23, 2015 to conduct the Student’s annual review and develop her educational program for the remainder of █ grade, as well as █ grade. At that meeting, attorney Mary Stevens represented the Parents and Michael Opuda of Drummond Woodsum led the meeting. [S-217] The IEP team had previously determined that it would conduct the Student’s triennial evaluation in May to use the information to better prepare for her transition to █ school. [Testimony of C. Smith] At that point, the Parents had not signed consent for the evaluation, and requested moving it back to its original November 2015 date. [S-214] The team concurred. The Parents presented a statement of concerns which included the Student’s rate of progress in math, reading and writing. The Parents noted that the Student’s progress was reported as “Satisfactory” from year to year, but many goals and objectives had neither been met or even introduced. [S-216, 219] The Mother thought it was important that the IEP contain fewer goals so they could focus on what is being taught, rather than have many goals, some of which are not introduced for instruction. [S-215] The Parents thought the group instruction was not meeting the Student’s unique needs, and wanted to see an increase in “individualized instruction,” but that the Student should be more fully integrated into the regular classroom. [S-216, 219] The team discussed progress the Student had made specific to the goals in her current IEP, and revised the IEP in accordance with the information presented at this meeting. Consistent with Ms. Shaw’s recommendation, the IEP team determined that for the remainder of █ grade, the Student would receive speech/language weekly for 60 minutes in the special education setting and 30 minutes in

the regular education setting. Ms. Shaw thought the Student “absolutely made progress,” and they provided her with more strategies to make her more functional in the classroom. [Testimony of W. Shaw] For the remainder of [REDACTED] grade, the IEP also called for the Student to receive 470 minutes per week direct instruction in language arts in the special education setting, 250 minutes per week of direction instruction in the special education setting for math, and 42 minutes per week of OT in the special education setting. This resulted in the Student spending 55% of her school day with typically developing peers. In response to the Parents’ concerns about the administration of the fall NWEA, standardized testing in the future would be 1:1 with the maximum use of test-approved accommodations. [S-192, 214] The Parents said that the Student tended to be more creative when using speech to text technology, and the team agreed that she would have access to this, as well as to a calculator. Although the team discussed social work services for the development and use of anxiety reduction strategies, the Parents declined these services, explaining that the Student was able to self-initiate such strategies and had private counseling. [Testimony of Mother, S-216]

Taking into account that the Student would have multiple teachers in [REDACTED] grade, the team developed the following program for that year: reading and writing for 275 minutes per week, Math for 275 minutes per week, OT for 42 minutes per week, S/L direct instruction for 42 minutes per week, S/L consult for 60 minutes per month, and 16 hours of ESY. The [REDACTED] grade IEP increased the time the Student spent with typically developing peers to 68% of her school day. [S-212] The entire team agreed to the proposed IEP goals and objectives, instruction and services. [S-213-15]

27. The Student's March progress reports on her IEP goals and objectives graded her as making "Satisfactory" progress in most areas, and graded a few math objectives as not yet introduced. [S-122, 125] On the Fry word list, the Student exceeded her IEP goal. She could read 83% of the fourth hundred and 81% of the fifth hundred Fry words. [S-128] With respect to reading comprehension, she started at level B of Think Alongs, was doing the end of level C at the close of [REDACTED] grade, and began level D during her first semester of [REDACTED] grade. [Testimony of D. Brickett, S-130] Ms. Brickett worked with her to answer comprehension questions dealing with thought processes such as cause and effect and prediction. Other assessments discussed were similar to those reported a month earlier by Ms. Conte for the annual review.

28. In March 2015, the Parents contacted Victoria Papageorge of Hyperion Learning Services for a consultation. Ms. Papageorge has 39 years of experience in special education, a Master's degree in that field, and specializes in learning disabilities. As part of her business, she evaluates students and provides tutoring and other education services. The Parents contacted Ms. Papageorge due to concerns about inconsistencies in the programming and goals for the Student, and asked her to review the Student's evaluations, processing strengths and weaknesses, and make specific recommendations. [Testimony of V. Papageorge] Ms. Papageorge did not do any actual testing, but did interview the Mother. [Testimony of Mother] The Parents did not tell the District that they had hired Ms. Papageorge and did not share her report dated March 6, 2015 with school officials³. Ms. Papageorge's notes in her report about the Student's previous evaluations contained errors regarding her psychological testing. About the March 2010 evaluation

³ The District first learned of Ms. Papageorge's report when preparing for this due process hearing.

she writes “results indicated excessive anxiety during this evaluation, so that validity of the results were questionable.” [P-602] Fact #3 above clarifies that this was inaccurate. Ms. Papageorge may have confused the March 2010 evaluation with Mr. Schnackel, where the Student had no anxiety, with the June 2010 evaluation with Dr. Wojcik, which could not be completed due to the Student’s anxiety. Ms. Papageorge was very concerned that the Student was only working at the consonant-vowel-consonant level in OG after two years of instruction, and from reading the IEP, thought she had no goal for phonological processing despite the Student’s documented significant weakness in this area.

[Testimony of V. Papageorge, P-604] She was also concerned that the Student had an IEP goal for encoding but not for decoding skills, and believed the reading comprehension and reading fluency goals in the Student’s IEP were inappropriate because the Student had not yet developed the skills required to read passages for comprehension or perform timed oral reading tasks. Ms. Papageorge also thought the Student should be stable in subtracting two-digit numbers before introducing fractions and multiplication. [Testimony of V. Papageorge, P-605] She questioned whether the Student regressed in her work with money because the IEP reports showed that she was making “Satisfactory” progress in that area in June of 2014, but that the goal was “not introduced” in December 2014.

[Testimony of V. Papageorge, P-604]

29. On March 17, 2015, the Mother emailed Ms. Peskurich. She wrote, “After a bumpy start this year, we have things back on track with the school – or as [sic] least as good as they can be.” [P-550] She asked Ms. Peskurich if she or someone she knew used the Lindamood Bell method and what she thought of that. She added, “things seem to be starting to click more and more with her reading and we want to support that and move

things forward.” [P-550] Ms. Peskurich replied that she had been using the Lindamood Bell Phoneme Sequencing (“LiPS”) and Seeing Stars programs with a student this year, and definitely has seen great improvement in the student’s reading, but that student was receiving a literacy lesson with leveled connected text. [P-550] The Mother did not ask the District about the possibility of having the Student’s reading instruction with the Lindamood Bell programs.

- 30.** On March 23, 2105, Attorney Stevens emailed the District stating that the Parents wanted to provide input and corrections to the Written Notice and IEP. [SA-84-86] Although the Parents did not tell the school about their consult with Ms. Papageorge, these goals contained some of her recommendations, such as for goals in decoding, phonological processing, word attack skills, and conventions of written language, due to the Student’s low NWEA score. [Testimony of V. Papageorge, SA-85, P-604] The letter also said the Student must continue to work with the concepts of time and money. The Parents also requested a universal graphic organizer for the Student. [SA-85]
- 31.** The District addressed the Parents’ concerns in a March 31, 2015 letter, and that is set forth here by subject: 1. Written Notice: Regarding the Parents’ disagreement with the written notice statement that the team had determined the Student had made progress specific to the goals in her current IEP, the District amended this to note that she made progress on some but not all of the goals. [S-232] 2. Reading: The District disagreed that IEP did not have a phonological processing goal, as Goal ID #34779 addressed that, but agreed to amend that goal to include application of phonology to both decoding and encoding. [S-232-233] 3. Math: The District agreed to amend the IEP to include telling time and using money as math goals. [S-233] 4. Writing: The District pointed out that, as stated

in the supplementary aids/services section, that the best practice was to match the graphic organizer to the task to be completed, as opposed to a one-size-fits-all organizer, and this is what the Student's teachers did. [S-233-234] The District also agreed to add a goal that the Student "will be able to produce sentences and paragraphs that include correct writing mechanics." [S-234] 5. Supplementary aids, modifications and supports: The Parents wanted the Student to receive her instruction in a smaller group setting than the 10-12-person group she was currently in, but the District responded that she is already in a small group setting and is making adequate progress. The District agreed to amend the IEP to add this language regarding testing, "While she is taking tests, check that she understands the directions and read any questions that [the Student] may want read to her." It also noted that the IEP already provided for testing in a 1:1 setting. [S-234-235] 6. Time: The Parents also requested a reduction in the Student's direct instruction reading time with Ms. Brickett so she could participate in class projects she was missing. Although the IEP team, including the Parents, agreed to 470 minutes of direct instruction in reading and writing at the February 23, 2015 IEP team meeting, the District concurred with the Parents' request and the team amended the IEP to reduce the Student's direct instruction time to 335 minutes per week for reading and writing. [S-235, 242]

32. The Student took the NWEA on May 26, 2015, and came home from school upset about having done poorly on it. Ms. Conte reported that the Student had panicked and did not get very far with the testing. [SA-97] The two discussed strategies to help reduce the Student's anxiety when taking the test again the following week.
33. On June 5, 2015, the IEP team convened to discuss the Parents' request that the Student participate in the mainstream ELA class in [REDACTED] grade. [Testimony of C. Smith, P-458] The

team determined that it was reasonable to try having the Student participate in the regular education setting with 1:1 support and accommodations in her IEP, such as pre-teaching and re-teaching of concepts, particularly in light of the District's obligation to place the Student in the least restrictive environment [Testimony of C. Smith, P-457, 458] To accommodate this, the Student's specially designed instruction in literacy was reduced to 200 minutes per week for [REDACTED] grade.

34. On June 14, 2015, the Parents emailed Dr. Smith to tell her that the Student's accommodations for the NWEA testing had not been followed in the most recent administration of the test. The Parents outlined that the test was supposed to be read to the Student, but when administered that month, the math portion was only read to her when she asked a question, and the language arts portion was only read in sections which the ed tech assigned thought were too hard. The Parents alleged that both sections should have been read to her as was done in the winter testing. [SA-98] Ms. Conte, the Parents added, had been very communicative with them since she was assigned, had gotten to know the Student and had been wonderful to work with. Ms. Conte also thought she had a good relationship with the Parents, which was important to the Student's education. [Testimony of K. Conte] The Parents reported that Ms. Conte looked into the matter and took responsibility for the error. [SA-98] Ms. Conte explained that she inadvertently failed to tell the ed techs to read everything, and so they only read the longer passages and anything the Student asked them to read. [Testimony of K. Conte]

35. At the beginning of the summer of 2015, the Parents visited [REDACTED] Academy (" [REDACTED] a private, special purpose school in [REDACTED], New Hampshire that serves exclusively students with disabilities. [REDACTED] is approved by the New Hampshire Department of

Education's Bureau of Special Education to educate students in grades three through twelve with the primary disability of Speech Language Impairment, learning disabilities, and Other Health Impairment such as ADHD. [P-88, P-446, testimony of L. McManus] They talked with Karen Staines, the executive director. The Parents wanted to explore their options for the Student. They saw small classrooms with students working 1:1 in the language and math labs. They also visited the [REDACTED] school and were favorably impressed. [Testimony of Mother]

36. During the summer of 2015, the Student participated in 16 hours of ESY tutorial services with her [REDACTED] grade special education teacher, Danielle Durgin. Ms. Durgin has a Master's degree in special education with a focus on literacy instruction, and is a Maine certified special education teacher with highly qualified status. She also has comprehensive and advanced training in OG, and training in Lindamood-Bell Seeing Stars, LiPS, Visualizing and Verbalizing, and On Cloud Nine Math. [Testimony of D. Durgin, SE-17] Ms. Durgin provided the Student's ESY programming at the Parents' request. [SA-95] Before starting to work with the Student, Ms. Durgin met with Ms. Conte to discuss the Student as a learner and her present levels. Ms. Conte provided Ms. Durgin with the OG scope and sequence for the Student from [REDACTED] grade. [Testimony of D. Durgin, K. Conte] The services were provided at [REDACTED] School (" [REDACTED] to assist the Student with her fall transition there. [Testimony of D. Durgin] Ms. Durgin introduced the Student to her classroom teachers, and showed her around the building. Ms. Durgin explained that during ESY, "they spiraled back to do short vowels, vowel teams, and magic e," as the Student's skills ebbed and flowed. Although in isolation she seemed to have the skills, the application of them did not always carry over. [Testimony of D. Durgin]

37. In August and September of 2015, the Parents had Ms. Peskurich assess the Student's reading skills, conducting the Comprehensive Test of Phonological Processing- Second Edition ("CTOPP-2") and the Test of Word Reading Efficiency ("TOWRE-2")⁴. The Student showed definite strengths and weaknesses on these tests. [Testimony of V. Papageorge] While she scored in the very poor range on elision, rapid digit naming and rapid letter naming, she scored in the average range on blending words, nonword repetition and segmenting nonwords. [P-027] The Student was excited to do the test with numbers, "as long as there was only addition and no subtraction." Ms. Peskurich noted that although the Student performed poorly according to age on the rapid naming subtest, she did not have any errors on the test. [P-28-29] The Student performed in the very poor range compared to same-age peers on the TOWRE-2, but when the Student took her time and read words at a slower pace, she had higher accuracy. [P-30] The Parents were unsure how to interpret these low scores in light of the Student's "Satisfactory" grades on her progress reports. [Testimony of Mother]

38. On August 31, 2015, Dr. Smith sent an email to the Parents asking to meet with them and the [REDACTED] assistant principal, Emily Stauffer, to "reset our work together. We remain committed to working with you on [the Student's] behalf and would really like a chance to sit and talk." [SA-112]

39. The Student was excited to attend [REDACTED] grade. Her anxiety was low, she knew the building and seemed content in her new surroundings. [Testimony of Mother] As the Student's case manager, Ms. Durgin was responsible for making sure the IEP was followed by all

⁴ The evaluation report omitted things normally found in such evaluations, such as the reason for the referral, a context for the evaluation, the Student's behavior or affect during testing, or any recommendations to assist with programming decisions. [P-27-30, testimony of H. Blier]

parties, and that teachers were aware of the Student's accommodations and modifications. She met with the Student's team weekly to discuss her progress, and felt that teachers were doing their job. [Testimony of D. Durgin, S-272] She worked with the Student for 42 minutes during her allied arts period three times a week⁵. When working with Ms. Durgin during this period, the Student was in a class with three other students and two staff. [SA-116] The Student also received specially designed instruction when other students had a 20-minute silent reading block. During this time, she would read a book used in the mainstream classroom with an ed tech whose instruction was overseen by Ms. Durgin. The two ed techs with whom the Student worked were both certified teachers. [Testimony of C. Smith, D. Durgin, SA-116] Nonetheless, the Parents did not like the fact that the Student was working with ed techs. [Testimony of Mother, SA-118] Staff working with the Student did comprehension reviews to be sure she understood the material, and would break down a word if the Student came upon one she did not know. In this way, the silent reading period was also a way to work on fluency and decoding, provide guided practice drill work specific to the reading skill sets being addressed, and help her with the mainstream curriculum. [Testimony of D. Durgin, SA-116] Ms. Durgin regularly assessed the Student's progress on her IEP goals using curriculum-based assessments, such as Fry word lists, Fountas and Pinnell fluency and comprehension probes, text-based fluency probes, and OG scope and sequence. [Testimony of D. Durgin, S-349-372, 375] One of the Student's ELA ed techs also worked with the Student in Ms. Durgin's math class. For math, Ms. Durgin used Lindamood's On Cloud Nine because it

⁵ The Parents waived allied arts time. [Testimony of Mother]

really chunked the math information and slowly built on it. [Testimony of D. Durgin] She assessed the Student's progress in this program as well. [S-388-403]

40. On September 22, 2015, the IEP team held a review of program meeting at the Parents' request to discuss the Student's transition to [REDACTED] school. The Parents said the student felt happy and supported at [REDACTED] that she exhibited low levels of anxiety, and was excited to come to school. [S-269] The Parents asked that the Student's triennial evaluation be pushed back to allow the Student to adjust to [REDACTED] school and form stronger relationships with the staff prior to being evaluated. At that meeting, the Mother told the team that the Student had recently completed a CTOPP, which showed weaknesses around phonemic awareness, and that she would share a copy of the results with the IEP team, although she did not do so at this meeting⁶. [S-270] Given the Parents' concerns about the Student's testing anxiety, the District proposed to have Heather Blier, Ph.D.⁷, a psychologist with expertise in psychological assessments and interventions, prepare an assessment plan to determine which evaluations were necessary for the Student's triennial review, due in November 2015. [S-269-270] The Parents gave permission to do this. [S-269]

⁶ Although the Mother testified that she brought a copy of Ms. Peskurich's test report to the IEP team meeting, the Written Notice said the Mother announced that this testing had been done, and that she would share a copy with the IEP team. The wording made it sound like the Mother would share this test in the future and did not bring it to the meeting. [Testimony of Mother, S-270] Dr. Smith testified that she saw the CTOPP at some point, but didn't recall receiving a hard copy because if she had received it, the test results would have been discussed at the IEP team meeting and there was no copy in the files. [Testimony of C. Smith] The District not having a copy was not dispositive, as this was also the case for a number of other records that should have been in the District's possession, including some that should have been produced for this hearing. Nonetheless, based upon the contemporaneously prepared Written Notice and Dr. Smith's testimony, I conclude that the Parents did not provide the IEP team with Ms. Peskurich's written report at that meeting.

⁷ Dr. Blier's experience includes publishing and speaking extensively on a wide variety of issues involving adolescent anxiety, learning disabilities and school and family-related issues. [SE-2-11]

41. On September 27, 2015, the Mother and Dr. Smith corresponded about Dr. Blier's evaluation. The Mother said she was "not agreeing to any conversation or observation by Dr. Blier of [the Student]. If that is something we decide to do moving forward, I am asking that the District get a new signature from us. I want to be very clear in this regard. It was my understanding that I was signing permission for Dr. Blier to speak to us, members of [the Student's] team and review the record." [Testimony of Mother, SA-135] Following an initial meeting with Dr. Blier, the Mother emailed Dr. Smith about the proposed evaluations of the Student. The Mother discussed the unique and positive relationship the Student had with her chorus teacher, and did not want to disrupt it by having the Student observed in that class. The Mother added,

We feel strongly that this outside review not put this under the microscope or disrupt it in anyway [sic]. I think keeping the current review focused to answer some specific academic questions is extremely important. Past school consultants have made broad generalizations of [the Student's] mental health and character. They have not only been not helpful but not accurate.

The Mother commended the District for the collaborative process in which they were engaged. [SA-151]

42. On October 28, 2015, Debbie Gelestino, one of the District's administrative assistants, emailed the Mother to schedule an IEP team meeting on November 30. The Mother sent an email to Dr. Smith questioning the need for an IEP team meeting, as opposed to a smaller group meeting, to discuss the Student's evaluations. The Mother added that she and the Father met the Student's teachers the previous night for conferences, and were

very impressed with how they are all working with [the Student] around style and strengths and weaknesses. Overall, things are going very well in regular ed and we believe staff are very invested to determine [the Student's] learning style and encourage her success. Even in regular ed ELA things are going well overall – with some more work that has to happen around grammar.

The Mother then questioned the appropriateness of Dr. Blier's assessment in light of how well things were going. [SA-159]

43. At the teacher conferences, the Student's Social Studies teacher, Ms. Gllpatrick, thought things were going well, although the book they were using was above the Student's reading level, and was not available in recorded format, so the Parents had to read it to her. The Student's regular ed ELA teacher, Kristin Vernace, thought the Student was doing well, although she seemed to be struggling with grammar. Ms. Vernace coordinated with the Parents about the Student's reading assignments so the Student could read aloud in the regular ed ELA class. On November 13, 2015, the Mother emailed Ms. Vernace that the Student was very excited about the book they were reading, *The Outsiders*, and wanted to read aloud in class again. According to Ms. Vernace, the Student did a nice job reading. [SA-168] The Mother told Ms. Durgin that the Student had practiced, and that she was struck with the Student's accuracy and fluency on the page she read in class, adding, "I haven't heard her read so fast in some time." [SA-169] Ms. Durgin emailed the Mother on November 16 about the informal assessments she gave the Student on a regular basis. At that time, Ms. Durgin reported that on the Fountas and Pinnell Benchmark Assessment of reading fluency and accuracy, the Student was reading at a beginning [REDACTED] grade level with 53 words per minute and 90% accuracy. [SA-171, testimony of D. Durgin] The Mother said she was extremely concerned that the Student was regressing in reading. [SA-171]

44. Following this email exchange, Ms. Durgin gave the Mother the Student's first quarter progress reports. The Mother was shocked because it appeared to her that the Student was making very limited progress. [Testimony of Mother, SA-178] According to the

assessments the Student's teachers gave her, she was making some progress in reading, particularly on the Fry word list. On the other hand, the Mother did not understand why the Student was reading at a beginning [REDACTED] grade level with 53 words per minute on the Fountas and Pinnell Assessment when Ms. Conte had reported that she was reading 85 words per minute in February. Furthermore, although in the past, the Student had consistently made satisfactory progress on almost all of her goals, the fall progress reports showed limited progress on 4 of her goals, three goals had not been introduced, and the rest were "Satisfactory". [P-31-48] Ms. Durgin met with the Mother to discuss progress in this regard, explained the discrepancy between the Fountas and Pinnell rates and the assessments that had been used during [REDACTED] grade. She explained that the Student had difficulty reading beyond the text and making inferences, drawing conclusions and engaging in higher level thinking skills that the Student was continuing to develop, and that this level of thinking was not required in the [REDACTED] grade assessments, but was in [REDACTED] grade. [SA-175] The Mother was sufficiently concerned that she called her attorney and Ms. Papageorge. [Testimony of Mother] Although the Student was earning As and Bs on her report card, she was only making progress on four out of eleven IEP goals. With 1:1 support, specially designed instruction and a number of accommodations such as pre-teaching and extended time, however, the Student was able to do work in the mainstream classroom satisfactorily. [Testimony of D. Durgin, C. Smith]

45. In addition to District staff sending home regular progress reports and emailing about the Student's progress, the District staff met with the Parents six times during the first four months of school. [Testimony of D. Durgin, C. Smith, Mother, SA 108-197]

46. During the first two months of school, the Mother thought the Student was assigned very little homework. In [REDACTED] grade, she had little or no homework in science and social studies. In fact, the Parents were requesting additional assignments to do at home. This changed in November of 2015. In [REDACTED] grade, concepts in the Student's science class were harder, and the Parents began spending close to three hours in the evening working on that subject with the Student. [Testimony of Father] As the Mother worked in Boston, this time commitment was very difficult, and did not include math or reading homework. [Testimony of Mother] This caused a lot of tension in the family, and sometimes the Father would arrive home from work and find someone in tears. [Testimony of Father]
47. In the late fall, the Student's EEG was stable, so her neurologist wanted to wean her off her seizure medication. [Testimony of Mother] The school nurse worked with the Parents to develop a health plan to respond to any potential seizure activity, including educating the Student's teachers about this. [Testimony of C. Smith, S-274]
48. During November, Dr. Blier completed a records review which included a review of all independent evaluations the Parents had made available to the District, evaluations conducted by the District, classroom observations, and the Student's general educational record and special education file. [Testimony of H. Blier, S-321] In her records review, she noted that despite the Parents and Dr. Hoag noting significant concerns about the Student's anxiety, particularly as a barrier to an accurate assessment of the Student's academic and cognitive abilities, there was: (1) no record of any anxiety assessment using standardized or normative tools that compared the Student to same-age peers; (2) nothing that considered her anxiety with respect to diagnostic criteria, or (3) systematically examined the degree to which anxiety presented in the classroom setting. [Testimony of

H. Blier, S-322] Consequently, she recommended a psychological evaluation. This was also important in light of the Parents concerns about how the Student's anxiety was manifesting in the [REDACTED] school environment. [Testimony of H. Blier, S-322] Dr. Blier also recommended intellectual testing because the scores between the first two evaluations and the most recent one were not consistent, and the most recent evaluation included a non-standardized test administration. Dr. Blier recommended a classroom observation because it was a requirement for special education evaluations, and specifically recommended observation of the Student's anxiety presentation by a trained evaluator, along with observation of IEP implementation, as that was a concern of the Parents. Dr. Blier thought it was important to conduct learning development testing due to the discrepancy between the Student's performance on academic work completed at home compared to classroom-based assessments. [Testimony of H. Blier, A. Stevens, S-322-323] She noted that the Student had shown growth in her academic goals with respect to both school-wide standards and her IEP goals. Also in Dr. Blier's recommendations was a S/L evaluation, and direct observation and data collection of the level of home-based supports, which could include an interview with the Parents and Student. [Testimony of H. Blier, S-321-323]

49. On November 16, the Father contacted [REDACTED] to arrange a visit. On December 4, 2015, the Parents toured the school. [Testimony of Father, P-777] Although the father wasn't immediately sold on it, he saw a student there who reminded him of the Student. That student told him [REDACTED] "was the best thing." [Testimony of Father]

50. On November 17, Dr. Blier emailed the Parents to tell them the next step in the process was a follow-up meeting, and her assistant would be contacting the Parents to schedule

this. The Mother responded that she wanted to schedule the meeting with Dr. Blier after a meeting already scheduled with the District on December 18. [SA-183] Although the Mother suggested finding a date for the follow-up meeting at the December 18 meeting, despite Dr. Blier's reminder at that meeting of the need to do this, the Parents left the meeting without discussing scheduling. [Testimony of H. Blier, S-321-322] Efforts to schedule a follow up meeting for Dr. Blier to discuss her recommendation with the Parents had failed, as the Parents did not respond to repeated requests to contact Dr. Blier's office. [Testimony of H. Blier, C. Smith] Despite the Parents' reluctance to have the Student evaluated due to her anxiety, however, they contacted Ms. Papageorge in November and arranged to have her conduct a privately-funded educational evaluation of the Student. Ms. Papageorge conducted her evaluation the Student on December 10, December 29, 2015 and January 9, 2016. [Testimony of Mother]

51. In addition to the District's attempt to schedule an IEP meeting in November 2015, it also unsuccessfully attempted to schedule one in early January of 2016.
52. On December 9-11, 2015, the Mother corresponded by email with Ms. Vernace about the difficulty the Student was having writing an essay. It was the first essay of the year, and Ms. Vernace explained that the Student became frustrated in class because she did not understand the report and how to use the outline. Ms. Vernace explained the steps to the Student privately and provided her with visuals. Nonetheless, the Student's frustration grew and she walked into the hallway crying. Her ed tech, Ms. Mundell, gave her guidance, then Ms. Vernace joined them in the hall and explained the process step by step, modeling again and asking the Student comprehension questions. The Student began working on her own, and later in the day, Ms. Durgin and Ms. Vernace reviewed the

process with her once more. [SA-190] Ms. Vernace told the Mother that she was becoming concerned about the Student meeting [REDACTED] grade writing standards. Although she was working on her IEP goals towards writing topic sentences, supporting these sentences and providing evidence, the Student had not yet mastered these steps, though all accommodations in her IEP were being met. [SA-190]

53. The District held a meeting with the Parents, Assistant Principal Stauffer, Dr. Blier, Dr. Hoag and Ms. Durgin on December 18, 2015 to discuss a number of the Parents' concerns. [S-272] Of the 17 meetings the District had with the Parents during the Student's last 18 months of school in the District, Dr. Smith was at 16 of them, but was unable to attend this one, due to a serious family medical emergency. [Testimony of C. Smith] At this meeting, Ms. Durgin thought they were going to talk about assessments, and "felt very thrown off" by the content of the meeting. The Parents raised a number of concerns and frustrations about the District's delivery of services to the Student, and particularly Ms. Durgin's role. They mentioned for the first time their frustration with the amount of homework the Student had over the past month. Ms. Durgin tried to address the Parents' concerns but felt attacked, and that they were being very aggressive towards her. In response to the Father's question about how much time Ms. Durgin spent talking with Ms. Conte to prepare for the Student's transition, Ms. Durgin explained that she had talked with her, exchanged emails, and had all of the Student's records from [REDACTED]. The Parents continued to contend that little or no communication between the two teachers occurred. [Testimony of D. Durgin, S-272] Ms. Durgin became too upset to respond, had to leave to return to class, and said she would provide a written response to the Parents other questions. [Testimony of D. Durgin] Ms. Stauffer wrote in her minutes

that there was little or no opportunity for District personnel to address the Parents' concerns due to the Parents' emotional state. [Testimony of D. Durgin, S-272-274] The Parents stated that the student's anxiety was directly affected by what was happening in school. Dr. Blier said it was important to make sure that supports and systems were in place if the Student was presenting with anxiety in school, and suggested that the team create a set of strategies based on Dr. Hoag's current work with the Student. One of the Parents asked her why this had not been in place from the start. When Dr. Blier responded that she was a new member of the team and could not speak to what happened in the past, the Father said in a mocking tone, "It is not my fault, I wasn't here." [Testimony of H. Blier]. Dr. Hoag said that she observed a decrease in the student's self-worth and increase in the lack of motivation. The Student's anxiety had resolved enough by the fall that she was not going to need therapy, but Dr. Hoag again began working the Student. Dr. Hoag mentioned that the Student's anxiety could manifest itself in atypical ways and this might not be readily apparent to the staff, such as in problems with verbal retrieval. [Testimony of K. Hoag]

54. Prior to this meeting, Ms. Durgin thought there had been a lot of collaboration between the Parents and the team. After this meeting, she felt like they were no longer working as a team. Ms. Durgin spent more time working with and meeting about this Student than any other Student in the past: work with regular education teachers, Parents and the Student, but she felt like whatever they tried was not enough to satisfy the Parents. It was also her opinion that the District's lack of achievement testing for the Student was a barrier to building a program. Educators needed to know where the Student was academically, yet the District had last conducted a comprehensive triennial evaluation in 2012, thereby

making it difficult to know where they needed to focus. [Testimony of C. Smith, D. Durgin]

The assessments the District was seeking were necessary to assure that this was the most appropriate placement. [Testimony of D. Durgin, SA-212, S-9]]

55. On January 2, 2016, the Parents submitted an application to [REDACTED] for the Student to begin attending school there. [P-55, 59]

56. On January 2, 2016, Ms. Durgin emailed her response to the Parent's concerns about the Student's progress based upon her June progress report and the report dated 10/31/15. The concerns and responses were as follows: 1. Why did the Student receive a "Satisfactory" progress in June saying she can compose a two-paragraph opinion piece with topic statement and supporting detail sentence, yet her 10/31/15 progress note said she received a "Limited" progress because she struggled to write a topic sentence independently. Response: The Student was working on this goal in the regular education setting and being measured against grade [REDACTED] Common Core standards. These were different, more complex skill sets than the Student worked on in [REDACTED] grade. [SC-88] She met her IEP goal to write a persuasive essay [S-467] 2. Regarding Fry words, in June, the Student received a "Satisfactory" saying she could read 94% of the 4th hundred and 88% of the fifth hundred. She had stopped being assessed for the 3rd hundred, since she had mastered them. Although she received a "Satisfactory" in October, she was assessed on the 3rd hundred at 95%, the 4th at 90% and the 5th at 87%. The goal was to introduce the 6th hundred. Response: The Student's trend line for grade [REDACTED] performance on the Fry word list was positive for growth. In January of 2016, the Student was reading Fry word lists as follows: 98% of the third hundred, 90% of the fourth hundred, 90% of the fifth hundred and 69% of the sixth hundred. [Testimony of C. Smith, S-373-374, 468] 3. In June, the

Student was assessed at reading 96 words per minute at a mid-█ grade level and 73 words per minute at a late █ grade level, yet the progress notes dated 10/31/15 have her assessed at reading on the beginning of the █ grade level at a rate of 53 words per minute with “Limited” progress. Response: In █ grade, the Student’s reading fluency was measured by words per minute read correctly only. The current assessment measured the Student’s comprehension of what she read, and the text used in █ grade included elements such as dialogue, plot, multiple characters, cause, effect and inference, thus resulting in the Student reading more slowly. 4. The Student could write the main idea and three supporting details, as she received “Satisfactory” progress in June. Although she received “Satisfactory” progress in October, the note said she could identify a main idea but has struggled writing a summary. Response: The Student can write the main idea with three supporting details with prior discussion of what will be written and a graphic organizer. She requires these supports to successfully write the summary. 5. In June, the Student received “Satisfactory” progress, and is now getting “Limited” progress because she doesn’t understand the larger picture. Response: The Student is able to understand literal intent within drama or a poem. She made limited progress on developing skills specific to understanding drama and poetry on the inferential levels. 6. In June the Student was getting “Satisfactory” progress on writing a summary, but now the goal hasn’t been introduced. Response: Within the curriculum presented in the mainstream class, this unit of instruction has not been introduced, and no █ grade students have worked on these skills. It will be taught later in the school year. 7. The Student was making “Satisfactory” progress with spelling words at ea/ee and oa and sight words. She is now having “Limited” progress working on short and long vowels with magic e. The Parents were

concerned that the Student had been working on vowel blends over the past couple of years, so this seemed to be going significantly backwards. Response: The Student demonstrates variability in these skill sets. Spiral instruction is required in order to ensure skill maintenance and mastery. [SA-198-99, SC-88-90]

57. On January 5, 2016, the District again attempted to schedule an IEP meeting as soon as possible with the Parents to discuss reevaluation and address the concerns the Parents raised at the December meeting. [Testimony of C. Smith, SA-212] The Parents responded that they “had been advised that it does not make sense to schedule the IEP meeting without the observation by” their own evaluator. The Parents added that “I am sure that you understand our urgency as parents to get answers and better understand why [the Student’s] progress has been so limited and why we and your staff have seen a marked increase in [the Student’s] school related anxiety over the last approximately two months⁸.” [SA-210] Dr. Smith responded that the school had been attempting to develop, with the Parents’ input, an evaluation plan for several months. She added, “We regret that we have been unable to propose the school evaluation to you and secure your consent for these evaluations. While we respect your right to secure your own evaluation and will consider this evaluation, we are also required and entitled to complete our own comprehensive assessments. We regret that without the school’s comprehensive assessment, it may be very difficult to address all of your concerns. The sooner we meet to propose our evaluation plan and secure your consent, the sooner we can complete the evaluations and be best able to address all of your concerns.” The IEP meeting was scheduled for February 11, 2016. [S-339] Because of the District’s inability to schedule a

⁸ Ms. Vernace was the only teacher who witnessed an increase in the Student’s anxiety in class.

meeting with the Parents to discuss Dr. Blier's evaluation proposal, the District asked Dr. Blier to draft a consultation note for the IEP team outlining her recommendations. [Testimony of H. Blier, C. Smith, S-321-323]. This was hand delivered to the Father on February 8, 2016. [S-323]

58. On January 7, 2016, the Mother asked Dr. Hoag to do an observation at [REDACTED] for her perspective on how this learning environment might support the Student and decrease her school-related anxiety. [SC-93] Dr. Hoag took a tour on January 20, 2016, and the Student toured the school on February 3, 2016. [Testimony of Mother] Dr. Hoag met with Karen Staines, the executive director, and spoke with her mostly about the program, not the Student. Dr. Hoag thought it was a great school and was very impressed. She liked the size, the hands-on learning, and how the students were excited about what they were doing. She thought the school would be ideal for the Student. [Testimony of K. Hoag, SC-83] After Dr. Hoag emailed the Mother with her impressions, the Mother emailed back inquiring whether [REDACTED] gave Dr. Hoag any sense of what they were thinking about the Student's application, as she had not heard from them and "we're hoping that we can move the process along quickly." [SC-83]

59. Sometime in January or early February 2016, Ms. Papageorge prepared a 26-page undated report of her educational evaluation of the Student, and a 10-page report dated January 29, 2016 of her January 25 observations of the Student in class at [REDACTED] [S-412-449] Although the Parents never provided the District with a copy of Ms. Papageorge's consultation done in the spring of 2015, they provided Dr. Smith with a copy of her January evaluation on February 8, 2016. [Testimony of C. Smith]

60. Ms. Papageorge evaluated the Student at Hyperion Learning Services in Kennebunk, ME.

When the Student arrived at the first session, she was somewhat apprehensive about the testing, as she had not previously met Ms. Papageorge nor been to her office before.

Once Ms. Papageorge explained the purpose of testing, the Student appeared more comfortable. As they worked, the Student became noticeably relaxed and developed a good rapport with Ms. Papageorge. [Testimony of V. Papageorge, SD-58, S-414] Although Ms. Papageorge reviewed Dr. Hoag's 2014 evaluation and made recommendations based upon the higher WISC-IV scores in that evaluation, Dr. Hoag's 2016 evaluation was not yet available. She knew processing speed was an area of weakness for the Student, but was unaware while preparing her recommendations that she had a processing speed of 69.

[Testimony of V. Papageorge, SD-75]

Ms. Papageorge noted that OG was a highly structured multilevel reading program, but did not have a strong phonological awareness component. The five components of reading are: fluency, vocabulary, phonemic awareness, phonics and comprehension.

[Testimony of Ms. Groleau, V. Papageorge, D. Brickett] Ms. Papageorge's testing showed that the Student was functioning well below her grade-level peers in basic reading skills, where she remained in the first percentile as measured by the Woodcock Reading Mastery Test. [S-286, SD-60] Ms. Papageorge was concerned that because the Student had a dual processing deficit in both phonological and orthographic processing, she did not have the foundation on which to build other reading skills. [Testimony of V. Papageorge] The Student's spelling was in the second percentile. On oral reading fluency, the Student scored in the 13th percentile, and in the 30th percentile for listening comprehension. [SD-60] Ms. Papageorge also concluded that the Student did not understand place values, and

scored in the 4th percentile on Basic Concepts, but had significant scatter among individual subtests, doing better on tasks involving visual processing and reasoning, and weaker in areas that require writing and solving number sentences. [Testimony of V. Papageorge, SD-67, 77] She showed nice progress with addition and subtraction, but poorly on multiplication and division, causing Ms. Papageorge to conclude that she did not comprehend the work conceptually. [Testimony of V. Papageorge]

To address the Student's weaknesses in phonological processing, Ms. Papageorge recommended the LiPS program, and Seeing Stars for visual processing. [Testimony of V. Papageorge, SD-78-79] She also recommended Lindamood Bell's Visualizing and Verbalizing for reading comprehension, and thought she should receive direct reading instruction one-to-one with a highly qualified reading specialist or special education teacher trained in these programs five days a week for 55-60 minutes a day.⁹ [Testimony of V. Papageorge, SD-79] For math, Ms. Papageorge thought the Student would benefit from Sharma Math, a process for teaching kids math which is not peer-reviewed and is not a boxed methodology. It teaches prerequisite skills and brings in all of the components of mathematics, using manipulatives throughout the program. [Testimony of V. Papageorge, SD-82]

61. Ms. Papageorge observed the Student at [REDACTED] on January 26, 2016, accompanied by Dr. Blier. Ms. Papageorge's notes from the observation were consistent with Dr. Blier's observations that day. [Testimony of H. Blier] In her mainstream ELA class, the Student was focused, and required and benefitted from a significant amount of support from the

⁹ That is the level of instruction that was in the 2014-15 IEP before the Parents requested a reduction in the 2015-16 IEP. [S-80]

classroom teacher and ed tech to complete the activities on which the class was working. With these supports, the Student was able to access the curriculum and better comprehend what was being asked of her. In special education literacy with Ms. Durgin, Ms. Papageorge thought the text was appropriately challenging, and the Student seemed comfortable and attentive throughout. She read word-by-word and without much intonation. While she was able to answer most comprehension questions involving detail, she needed assistance with more inferential comprehension questions. [Testimony of V. Papageorge, S-445-46] In math class with Ms. Durgin, the Student appeared quite comfortable with her peers. She easily interacted with the other students before and during instruction. The math class was well-organized and well-structured, but the Student did not understand basic math procedures. While her graphic organizer appeared to be an effective tool, the Student did not seem to totally understand its purpose and how to navigate through two-step problems independently. She required assistance from both her peers and Ms. Durgin. By the end of this class at 1:37 p.m., she appeared fatigued and to be losing focus. [Testimony of V. Papageorge, S-447] Her last class was ELA with Ms. Durgin. Although she seemed fatigued, she was stable with the consonant and vowel sounds being practiced through visual, auditory/kinesthetic and blending phoneme activities at the CVC and CCVC level for basic vowels and consonants. [Testimony of V. Papageorge]

62. On February 10, 2016, the Parents emailed [REDACTED] to find out the status of the Student's application, and learned that she was accepted. [REDACTED] offered to have her start attending on February 29. [P-611-612]

63. On February 11, the IEP team met to discuss the Student's reevaluation, which was now several months overdue. Dr. Blier presented her detailed recommendations for reevaluations, based upon her review of school records, IEPs, prior evaluations and classroom observations she made of the Student's classes when the Student was not present. [Testimony of H. Blier, S-321-323] The Parents shared the educational evaluation conducted by Ms. Papageorge, but Ms. Papageorge was not present to discuss her evaluation. [S-332] Dr. Blier did not feel comfortable discussing Ms. Papageorge's evaluation. [Testimony of H. Blier] In addition to Dr. Blier's recommendations and reasons therefor, the team considered input from Dr. Hoag, the Student's teachers and related service providers, the Parents and their advocate, Joan Kelly. Dr. Hoag told the team that she had already begun cognitive testing of the Student at the request of the Parents. [S-331] There was discussion about whether Dr. Hoag would be using the same unconventional testing practices she used in 2014 with the Student, and whether testing under those conditions would be considered standard administration of the assessment. Dr. Blier did not believe it would be, and Dr. Hoag disagreed. [Testimony of H. Blier, K. Hoag, S-331] As Dr. Hoag's assessment was not completed until April, the District did not have this information to consider while formulating the IEP. Dr. Smith was concerned about Ms. Papageorge's evaluation in terms of appropriateness. She administered many tests, and yet the Parents said it was important to have someone conducting the testing who had a relationship with the Student. Ms. Papageorge did not. She also did not think Ms. Papageorge's emphasis on grade levels had a place in interpreting the results, but had more to do with the products Ms. Papageorge used in her tutoring program. Ms. Durgin and Dr. Smith were also concerned about Ms. Papageorge's choice of tests.

[Testimony of D. Durgin, C. Smith] Ms. Papageorge did not conduct a WIAT. [Testimony of H. Blier] Dr. Smith and Ms. Durgin wanted Ms. Durgin, someone who had a relationship with the Student, to conduct a WIAT to look at the Student's reading, writing and math progress so they could obtain valid test scores. [Testimony of C. Smith, D. Durgin] The Father questioned whether Dr. Blier had conducted any evaluations of the Student yet, to which Dr. Blier replied that she had not because the Parents have yet to provide their consent for evaluations. It was her understanding that the evaluations would be conducted after this meeting and receipt of Parent consent. [S-331] The Team ordered reevaluation in the areas of academic, intellectual, classroom observation, learning development, speech and language, and psychological evaluations. [Testimony of C. Smith, S-330] The purpose of the testing was to consider the Student's eligibility for special education in the categories of OHI, S/L and multiples disabilities, and determine whether she possibly qualified for services as a student with a specific learning disability or emotional disturbance, to provide baselines for measuring progress and developing goals, and to inform educational program planning. [Testimony of H. Blier, C. Smith, S-321-323]

The discussion became very negative and contentious. [Testimony of H. Blier, K. Hoag] Having missed the December meeting, it was Dr. Smith's first meeting where the Parents' tone was accusatory. Prior to this meeting, Dr. Smith thought she had a wonderful relationship with the Parents. [Testimony of C. Smith] The Parents were given an opportunity to speak uninterrupted while the staff listened. There were pauses with complete silence, and some of the Parents' comments made the staff uncomfortable. Some staff members became very upset and tearful. [Testimony of H. Blier, C. Smith, S-331] As some members of the staff were emotionally shaken, Dr. Smith called for a short

break in the hope of allowing everyone to regain their composure. She decided to postpone a discussion of the remaining agenda items, including a list of Parents' concerns that they provided at the beginning of the meeting, and reconvene at a later date because the tone of the meeting was very adversarial and people were not in a state of mind to have a professional discussion. [Testimony of C. Smith, S-333] The Student's annual review was due in March so the team would have to meet again then. When Dr. Smith informed the Parents of her decision to adjourn the meeting, their advocate handed her a typed notice rejecting as inappropriate the Student's 2015-16 IEP and placement, and notifying the District of the Parents' intent to unilaterally place the Student at [REDACTED] and seek reimbursement from the District. [Testimony of C. Smith, S-335] The District was not aware that the Parents were seeking a placement at [REDACTED] [Testimony of C. Smith]

64. On February 26, 2016, the Parents received a copy of the Written Notice from the February 11 meeting and a hand-delivered Parental Consent for Evaluation form for their signature. [Testimony of Father, C. Smith, SA-242]. The Parents never signed this form.
65. On February 6 and 16, 2016, Dr. Hoag administered a psychoeducational evaluation of the Student. [SC-12-17] Dr. Hoag again brought her dog, as she found that kids with anxiety did better with the dog there. She administered the WISC-V, but did not call it a test. The Student seemed comfortable taking the exam. Dr. Hoag used a timer, but did not let the Student see it, just told her to work as quickly as you can." [Testimony of K. Hoag] The Student's Full Scale IQ was an 87, in the low average range. Her visual motor challenges resulted in an extremely low processing speed of 69, a full 16 points lower than when Dr. Hoag tested her in 2014, although her processing speed was her lowest score at the earlier testing as well. The report contained no explanation for this discrepancy, nor did Dr.

Hoag offer any other than that it was “rare for a student to change that much on certain subtest scores.” [Testimony of K. Hoag] The Student’s other scores were primarily average in the 90s, except for visual spatial, which was low average at 86. [SC-14, 16] A processing deficit like this would severely impact the Student’s ability to achieve on par with typically developing peers on standardized tests. [Testimony of C. Smith, W. Shaw] On the BASC Anxiety Scale, the Student rated her overall anxiety score to be 51, with a score of 50 being solidly in the average range for anxiety and test-based anxiety when compared with same aged peers. [Testimony of H. Blier, SC-1, S-567] Four of the Student’s teachers at ██████████ completed the BASC-III Teacher Rating Scale, with one teacher having no notable concerns, and one teacher, the Student’s regular education ELA teacher, rating the Student with an extremely high score for anxiety, as well as significant scores for attention concerns, hyperactivity, atypicality and functional communication. [SC-1] When Dr. Blier reviewed the scores provided by Dr. Hoag, she noted that Dr. Hoag’s impression regarding the Student’s anxiety did not appear to be supported by the scores and information in her report. Dr. Hoag made a number of recommendations, most of which were in the nature of accommodations, such as pre-teaching, extended time to take exams, breaking down assignments into smaller pieces, shortened writing assignments with support to complete them, and giving the Student a copy of notes at the beginning of class so she can highlight it. [SC-17-18] Dr. Hoag also recommended purposeful inclusion in the regular education setting to increase the Student’s self-confidence and belief in her own abilities. “This inclusion should be done in a way that [the Student] can succeed with pre-teaching or additional time to prepare so that she feels competent in her inclusion.” [SC-17]

66. The Student began attending school at [REDACTED] on February 29, 2016, pursuant to a unilateral placement by her Parents. [Testimony of Mother] [REDACTED] currently serves 52 students in grades 3-12, two-thirds of whom are boys. Class sizes range from one to seven students, and they are sorted into classes by reading level, although there are usually students of similar ages in the same class. [Testimony of L. McManus] [REDACTED] employs 24 teachers, 5 speech pathologists, an OT and 3 counselors. In addition to in-class programming, [REDACTED] offers Adventurelore, an outdoor adventure-based counseling service in which students spend every other Friday with the counselors, and do not receive regular classroom instruction. [Testimony of L. McManus]

67. The Student began at [REDACTED] using the IEP developed for her by the IEP team at [REDACTED]. The [REDACTED] teachers had some discussions about the IEP and decided they could use it. [Testimony of L. McManus, P-616] Lisa McManus, the education director at [REDACTED] thought the Student's IEP had a very high number of goals, but what was on the IEP was not far off from what [REDACTED] was teaching the Student. The one noteworthy change was that the Student's IEP called for 42 minutes of S/L per week, and the Student's new provider at [REDACTED] recommended two 30-minute sessions each week. [P-616] The Student's daily schedule was broken down primarily into half-hour segments which added up to the following: (1) two language labs for a total of 60 minutes per day, one of which was taught by Christine Groleau, a certified speech pathologist, and the other taught by a certified special education teacher [SB-2,3]; (2) one 90-minute language arts class taught by Jessica Belkus; (3) two math labs totaling 60 minutes per day using Sharma Math; (4) 30 minutes in practical arts, and (5) 45 minutes each in science and social studies. [P-26] Although the Student's language arts teacher, Jessica Belkus, was not certified to teach in

any state and did not have a degree in education, she had advanced OG certification, which included 400 hours of practicum, and training in several other reading programs. [Testimony of L. McManus, J. Belkus] ■■■ staff are trained in OG, LIPS, SPIRE, and Wilson reading programs. [P-478-81] Ms. Groleau received LIPS training during her practicum experience at the University of New Hampshire, and delivers the LIPS program to the Student. She is not trained in OG or Wilson. The Student's schedule contained a half-hour of recess, but there was no lunch break on her schedule. ■■■ does not offer a hot lunch and they do not have a nurse on staff. [Testimony of L. McManus] Tuition is \$237.54 per day of attendance. [P-639-643] The cost of OT and S/L services are not included in this rate. Speech was billed at \$120.60 per hour, and OT at \$120.44 per hour. [P-646-649]

68. Sean Kotkowski, the Student's math teacher, noticed that the Student could follow more math procedures than she could understand. She was good at counting, but did not have the bigger sense of what was happening. Mr. Kotkowski has observed her come to class very excited and engaged. In his class, he saw her emotional issues diminish quickly after she started attending ■■■ but heard this was an issue from other teachers. [Testimony of S. Kotkowski] In mid-May, she was still worried about not going to ■■■ school with her friends at ■■■ whom she missed. [SC-28] Although Sharma Math, which Mr. Kotkowski teaches, is not peer reviewed like the Lindamood-Bell math programs, it moves students through six levels of knowing mathematics, including intuitive, concrete, pictorial, abstract, applications, and communications. Students learn number sense, computation procedures, everyday mathematic concepts and mastery of arithmetic facts. [Testimony of S. Kotkowski, P-177-178] Ms. Groleau explained that while phonemic awareness is only

one aspect of reading, it was the first step, and once learned, decoding becomes less of a mystery. For this reason, she was concentrating on it with the Student, and anticipated that the Student would need LiPS throughout ██████ grade, based upon her experience with other students who have similar profiles. The Student found the entry level LiPS instruction difficult, but was gaining confidence with basic phonics skills. [Testimony of V. Papageorge] Ms. Groleau used AIMSweb as a weekly monitoring probe and quarterly benchmark probe. [Testimony of C. Groleau] Jessica Belkus delivered ELA for the Student, and delivered some instruction using OG. [Testimony of J. Belkus]

69. The first time the District saw Dr. Hoag's report was when Joan Kelly distributed it at the March 9, 2016 annual review IEP meeting. The Parents had not consented to the evaluations ordered at the February 11, 2016 IEP team meeting and had not signed the form they were sent in late February, The Father said that the District's evaluation request seemed excessive, describing the evaluations requested as "carpet bombing" his daughter with tests. Although Ms. Kelly contended the District did not have the right to evaluate in areas already covered by the Parents' evaluations¹⁰, the District disagreed, and maintained the need for the evaluations ordered at the February 11 meeting. [S-499, 501] The District staff read Ms. Papageorge's evaluation, and considered it in drafting the IEP. [S-501] The team considered Dr. Hoag's evaluations, although Dr. Hoag was not present to discuss them. They also considered input from the Father, teachers and Dr. Blier. [Testimony of H. Blier, S-499-501] The team then developed an IEP effective from March 10, 2016 through March 8, 2017, that included specially designed instruction for the following: ELA 5 days per week, with 62 minutes on 4 of those days and 52 minutes one

¹⁰ As discussed below, Ms. Kelly's declaration of the law and regulations in this area was incorrect.

day; Math five times weekly, with 62 minutes on 4 days and 42 minutes one day; reading fluency 4 times per week for 20 minutes; reading three times per week for 42 minutes. Other services include: OT once a week for 42 minutes; S/L once a week for 42 minutes; S/L consult once a month for 42 minutes; counseling services once per week for 50 minutes; and team-wide consultation monthly for 45 minutes. [S-502] The accommodations recommended by Dr. Hoag were included, and the IEP provided for the Student to spend 61% of her school day with typically developing peers. [S-518, 521] Ms. Durgin recommended additional time in the resource room, and the new IEP called for a little less time in the mainstream classroom. [Testimony of D. Durgin] Dr. Smith thought the IEP was reasonably calculated to provide the Student with FAPE. [Testimony of C. Smith] Although the Parents had placed the Student at a private special purpose school with no typically developing students, the Father expressed concerns about the IEP team reducing the Student's time in the mainstream classroom to increase her specially designed instruction in reading and writing. [Testimony of Father, S-502]

70. It was Dr. Blier's opinion that the interpretability of Dr. Hoag's assessments was affected by the numerous errors in administration and scoring. [Testimony of H. Blier, S-563] Dr. Blier explained that the test required following protocols to a "T," and the instructions were explicit about utilizing the exact age of the child at the first date of assessment for standardization. Dr. Hoag's many alterations to the test environment in 2014 and 2016, including her intentional misrepresentations to the Student of the purpose and nature of the assessment and failure to tell the Student that some of the subtests were timed, raised serious concerns about the validity of the testing. The WISCs had very specific instructions regarding alterations to the testing environment, including a guideline that the

evaluator should handle the time “as unobtrusively as possible to avoid appearing secretive to the child.” Dr. Blier thought this made it difficult to meaningfully compare Dr. Hoag’s test results with earlier cognitive testing. Dr. Blier also noted that Dr. Hoag did no assessments regarding anxiety in 2014, yet made conclusions about this in her 2014 report. [Testimony of H. Blier, S-556] Dr. Blier expressed concern about Ms. Papageorge’s testing because it was not a good practice to administer and interpret subtests of a larger instrument in isolation, as subtests can be over-interpreted, yet Ms. Papageorge had done so in her evaluation. [S-415, 418, 421, 422] It was important to consider them in the context of other scores. [Testimony of H. Blier, W. Shaw] She explained that it is possible to create an environment that is more comfortable for students who are anxious, such as meeting with the student ahead of time, choosing a location where the child is comfortable, and other approaches that do not involve varying from the standard test administration procedure. [Testimony of H. Blier]

71. Because the Parents did not sign and return the Consent to Evaluate form, Rebecca Ford, Dr. Smith’s assistant, mailed the Parents another copy on March 9, 2016. [Testimony of H. Blier, R. Ford, C. Smith, S-499-500] Ms. Ford specifically recalled doing this because, although she normally worked in Dr. Smith’s office, she was at the [REDACTED] school that day assisting the special education secretary there. Dr. Smith brought the parental consent to evaluate form to her at the [REDACTED] school, and Ms. Ford drove it to the post office because the mail had already been picked up.¹¹ [Testimony of R. Ford]

¹¹ The Father testified that the only form the Parents received was the hand-delivered one. As noted elsewhere in this Decision, there were issues with District’s record keeping, with documents being missing or overlooked in the process of producing them for this hearing. Nonetheless, Ms. Ford had a very clear recollection of the unusual circumstances of mailing the document, and her testimony was credible that she mailed it. As a miniscule amount of first class mail does not arrive at

72. On March 15, 2016, the Parents sent a letter to Dr. Smith requesting to know what additional data was needed to complete the Student's triennial evaluation. [S-481-482] The Parents accused the District of not collaborating with them regarding the testing.

73. When the Student arrived at [REDACTED] the staff there scored the IEP that had been in place in the District. [P-171-176] Five goals had not yet been introduced, and they scored the Student as making "Satisfactory" progress on 2 ELA goals, 3 math goals, and each of her OT and S/L goals. Ms. Groleau graded the Student as not making "Satisfactory" progress on her goal of reading 110-120 words per minute. In April, when reading passages at the [REDACTED] grade level, the Student read between 59-67 correct words per minute. By June, she was reading between 41 and 83 words per minute on passages at the [REDACTED] grade level. Ms. Groleau now thought she was making progress on the goal. [Testimony of C. Groleau, P-171] On her spelling goal, benchmark testing in March at the [REDACTED] grade level was 48 correct letter sequences in two minutes. The typical rate for [REDACTED] grade students is 118. The Student achieved her goal of 53 correct letter sequences at the [REDACTED] grade level and was working toward the goal of using 65 correct letter sequences from [REDACTED] grade lists. [P-204]

74. On May 27, 2016, Ms. Papageorge observed the Student throughout her school day at [REDACTED] [SD-33-43] During the spelling lesson with Mrs. Roberts, Ms. Papageorge noticed that the Student had been able to master a significant number of words since she started at [REDACTED] but continued to have difficulty with sequencing both phonologically and orthographically. [Testimony of V. Papageorge, SD-34] In math class, the Student was

its intended destination, and as the Parents have a strong and consistent record of resisting consenting to the District's efforts to evaluate the Student (see discussion in Issues 5 & 6 below), their "lost in the mail" excuse is not convincing.

working on foundational skills. She seemed comfortable with her teacher but continued to have difficulty with understanding basic math calculation skills on a conceptual level. Using manipulatives, she could better comprehend these concepts. It was Ms. Papageorge's opinion that to retain what the Student was learning, she needed to be taught math in this manner, and build on skills. [Testimony of V. Papageorge, SD-36] In language arts with Ms. Belkus, the Student required a great deal of support and attention from her teacher, particularly in her weak areas of sentence structure and cognitive organization of written language. She was unable to work independently when writing sentences. [Testimony of V. Papageorge, SD-39] Ms. Papageorge also observed a LiPS lesson where she worked at the most fundamental introductory level of phonology. It was Ms. Papageorge's view that the Student, without sensory stimulation in the cognitive areas for auditory and visual processing, would continue to struggle with sequencing sounds and letters correctly when reading and spelling. [Testimony of V. Papageorge]

75. [REDACTED] continued to use the District's IEP for the Student until June 14, 2016, when it developed its service plan for her. That service plan reduced the Student's ELA time from 90 minutes to 60. [Testimony of J. Belkus] The plan also included 30 minutes daily in each of the following areas, except on every other Friday: spelling, reading, math, S/L, and OT. [P-211-212] Although the plan said this was to be provided by a "certified educator," Ms. Belkus, the Student's ELA teacher, is not certified to teach in any state. There were eight annual measurable goals in the areas of written expression, higher order thinking skills, grammar and syntax, spelling, reading fluency, math, and OT. [P-198-213] Her written expression goal was to compose a one-paragraph response that included sentences with a subject and predicate and a main topic and three supporting details. For reading, her

goal for [REDACTED] grade was to read 100 words per minute with 80% accuracy using a [REDACTED] grade progress monitoring probe with appropriate expression and intonation in three out of five attempts. [P-205]

76. On June 16, 2016, Dr. Hoag observed the Student in her ELA class at [REDACTED]. It was not a typical day at school, as [REDACTED] students were preparing for their academic night where they showed their family the work they had done throughout the year. [SC-2] Dr. Hoag observed the Student demonstrate a lot of independence in her work and was proud of the final product. The Student reported to Dr. Hoag that she felt less anxious overall at [REDACTED] noting that she was able to take the time she needed to learn things, which made her feel more relaxed, and told Dr. Hoag in a May 2 therapy session that she loved her new school and was excited about it. [SC-3] Two weeks later, the Student told Dr. Hoag that one of the things she was worried about was not going to [REDACTED] school with her friends at [REDACTED] whom she missed. [SC-28] Dr. Hoag never observed the Student at [REDACTED] or [REDACTED]. [Testimony of K. Hoag] She recommended that further testing for the Student be kept to a minimum. [SC-3]

77. The Student completed her [REDACTED] grade year at [REDACTED] and participated in the summer program there. She received 12 hours of specially designed instruction by a certified special education teacher. [P-218]

78. On June 22, 2016, Dr. Smith had a conversation with Ms. McManus at [REDACTED] with the consent of the Parents. She asked about the kind of programming offered there. [SB-4-12] Ms. McManus provided a lengthy explanation of the school's offerings, and provided some information about the Student's current program. She explained that the Student's classmates presented with similar learning challenges. Ms. McManus thought processing

speed was a big factor interfering with the Student's learning. [SB-7] Her reading skills needed a lot of work. The Student has not presented as overly anxious, but she does have some anxiety, and becomes more anxious as the day goes by, getting caught up in her classmates' dramas which makes her more worn down by the end of the day. The Parents asked that [REDACTED] not do any standardized testing, although AIMSweb was used for benchmark testing. [SB-8] Ms. McManus said the school used LiPS, Visualizing and Verbalizing, OG and Wilson Reading.¹² Dr. Smith knew the District had staff trained in all of these reading programs, and that there was nothing [REDACTED] was providing that the District could not provide. [Testimony of C. Smith]

79. The Parents filed this due process hearing request on July 14, 2016, and on August 4, 2016, there was a resolution session. Both parties had counsel present, as well as two of the Student's [REDACTED] grade teachers and two administrators. [S-552] At the meeting, the District proposed supports and services to facilitate the Student's transition back to [REDACTED] in September of 2016. Although Dr. Smith believed the March 2016 IEP was appropriate, she wanted to be responsive to the Parents' concerns, so the District offered extended school day services for direct instruction in ELA using LiPS instruction by a speech pathologist¹³ trained in LiPS. [Testimony of C. Smith, S-551] The District also offered direct instruction in ELA and math in an amount equal to or greater than the amount being provided by [REDACTED] using a mutually agreeable methodology including Visualizing and Verbalizing and/or OG, and a mutually agreeable math methodology, direct

¹² Ms. McManus said none of those programs were being used with the Student, but they were thinking of selecting LiPS so the Student can get the kinesthetic connections before using OG. Ms. Papageorge, however, observed the Student receiving the LiPS program when she was at [REDACTED]

¹³ Rebecca Johnson has LiPS training [SE-20], and Ms. Durgin testified that both of the District's speech therapists did. [Testimony of D. Durgin]

instruction in social pragmatics, and consultation with a District literacy specialist. [S-547]

There was no discussion about the March IEP. [Testimony of C. Smith] The Parents informed the District that they did not intend to send the Student back to public school for the 2016-17 school year, and would be continuing her unilateral placement at [REDACTED]. Their attorney, Amy Phalon, said that the Parents did not think there was anything wrong with the annual IEP proposed in March of 2016 for the 2016-17 school year, but that the family was seeking compensation for past harms. [Testimony of C. Smith, S-550] The Father said that all of the Student's teachers should have Master's level education. The Parents also chose [REDACTED] because they thought the Student would need counseling services if she returned to [REDACTED] but did not need this at [REDACTED]. [Testimony of Mother]

80. The Student enrolled as a [REDACTED] grade student at [REDACTED] where she currently attends. [Testimony of L. McManus, Mother] Ms. McManus observed the Student in April and September of 2016, and wrote a letter to the Parents to describe her observations. Ms. McManus described how the Student struggled in ELA class initially despite lots of help from her teacher and classmates, and she struggled to maintain her attention in April. During the September observation, she saw a confident, academically focused student who navigated her environment comfortably, and made solid improvements. [Testimony of L. McManus, P-463-464] She noted that the Student was very social, and this component of school was very important to her. This motivated her to do better so she would be taught in classes and not 1:1. She very much enjoyed being helpful, and relished helping younger students with reading. [Testimony of L. McManus, S. Kotkowski] The Student also liked using AIMSweb, and was motivated by what she needed to do to move to the next level. [Testimony of Mother] At the start of [REDACTED] grade, the Parents were concerned that

the Student was being grouped in classes with students who were younger than she, and that it might hinder her socially. The Mother told Ms. McManus that it was important for the Student to interact with students her own age. [P-751]

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parents:

The District failed to provide the Student with a FAPE for [REDACTED] and [REDACTED] grade. During both years, the District provided the Student with a highly inappropriate IEP and inappropriate education placement in which to implement the IEP. Consequently, the Student emerged from this period lacking fundamental foundational skills needed to learn to read and do math, completely dependent on adults for her school work and homework, highly anxious about attending school and without friends.

Here, the District's selection of instructional programs and methods were inappropriate, providing programming that it had readily available, rather than programming the Student actually required. "Specially designed instruction" means adapting the content, and choosing the method most suitable to the eligible child's unique needs. If an IEP team determines that specific instructional methodologies are necessary for the child to receive a FAPE, those methods may be addressed in the IEP.

The Student, having failed to attain most of her academic IEP goals from her [REDACTED] grade IEP, was struggling with basic reading and math skills. Because of this lack of foundational skills, the goals set in her 2014-15 IEP were not appropriate for her. Although the District offered the Student OG, this focuses on decoding skills, but does not address underlying deficits in phonological or orthographic processing, foundational skills which the Student needed before being introduced to OG. Because her teachers were newly trained in

OG, they lacked the expertise to know how to deliver it effectively or recognize when it was not the correct program to be using with the Student. The Student's IEP failed to include goals for building the foundational phonological processing or word attack skills she lacked.

It became clear that the Student's program to date had not actually improved her reading skills, and she entered [REDACTED] grade essentially unable to read. She relied on rote memorization for both reading and math. Her program was not individualized, but moved with the resource room group in which she was placed, and her teachers delivered the program with which they were familiar.

The Student required an educational setting and experience that was fundamentally different from what the District made available. She needed a true language-based program as offered by [REDACTED] but instead her IEP team tried to find the elusive balance between her equally ineffective mainstream and special education experiences in the District. For this reason, the Parents removed her from [REDACTED] and placed her at [REDACTED]

Because the District violated the IDEA by not providing the Student with appropriate programming, she is entitled to compensatory education designed to assist her to make up for lost educational opportunities. The placement at [REDACTED] is appropriate under the test set forth by the courts.

Regarding the 2016-17 school year, the District's proposed IEP was more of the same services and instructional approach that failed to work in [REDACTED] and [REDACTED] grades. It would not turn an inappropriate program into one capable of providing the student with a FAPE.

The District's violations of the Student's right to FAPE were not caused by the Parents' obstructionism. There is no basis for such a conclusion on the evidence presented at the hearing. The District had an affirmative duty to design and implement an appropriate IEP,

regardless of the Parents' advocacy. The IDEA emphasizes the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the school department.

Lastly, the District failed to comply with the IDEA's regulations for reevaluating the Student that are required before asking for parental consent. Even if the District followed all procedures, the Parents have a right to refuse consent for assessments if they are not provided with information they require to reach an informed decision, or if the assessments are inappropriate, duplicative or redundant. The District failed to consider existing data, and failed to determine, with Parents' input, whether any additional data was needed for completion of the Student's triennial evaluation.

Brief summary of the position of the District:

Throughout the Student's history, the District has provided her with carefully designed, personalized instruction reasonably calculated to provide educational benefit. The Student has made demonstrable progress at all times at issue. The Parents presented no evidence that the IEPs were not reasonably calculated to provide the Student with a FAPE. No one testified to that effect. Aside from their own subjective opinion, the Parents offered no evidence to support their claims that the District failed to provide the Student with a FAPE during [REDACTED] and [REDACTED] grades.

An IEP can be appropriate even if it is not the only appropriate choice, the Parents' first choice or even the best choice. Well-established case law is clear that the IDEA confers upon the District primary responsibility to choose among competing methodologies. Nonetheless, not one witness testified that the methodologies used by Ms. Conte and Ms. Brickett to implement the Student's [REDACTED] grade IEP were inappropriate. All were peer-reviewed and

evidence-based. The standard for judging appropriateness is viewed in terms of what was reasonable at the time the IEP was promulgated.

With respect to the Student's [REDACTED] grade IEP, neither the Parents nor their legal counsel challenged any component of the IEP at the meeting. When the District received the Parents' requested changes, based on Ms. Papageorge's recommendations, although not revealed as such, it agreed to almost all of them. At the hearing, no one testified that the 2015-16 IEP was not reasonably calculated to provide the Student with FAPE.

The failure to perfectly execute an IEP does not necessarily amount to a denial of a FAPE. Any failure to implement must be more than *de minimus*. Curriculum-based assessments showed growth from the Student's present levels at the beginning of the year, and the NWEAs showed gains exceeding the Student's projected growth targets. The Student's gains must be measured against her disability and educational potential, and given her significant cognitive weaknesses, she was making progress appropriate for her.

There was evidence that Dr. Hoag's test results were outliers and not valid because she did not follow proper test protocols. Furthermore, her conclusion that the Student's anxiety impacted the validity of the 2010 and 2012 assessments was not based on data from any standardized assessment of anxiety or objective data. There was no data to support either Dr. Hoag's opinion or the Parents' assertion that the Student suffered from test-related anxiety compared to that of her peers.

To the extent any aspect of the Student's programming was not appropriate, it is attributable to the Parents obstructing the District's repeated efforts to evaluate her during [REDACTED] and [REDACTED] grade and failing to provide or not timely providing the District with private evaluations for consideration by the IEP team.

The District complied fully with state and federal guidelines for ordering reevaluation. Despite having all of the information necessary to provide informed consent for eleven months, the Parents have failed to provide written consent for reevaluation. Because the District remains obligated to develop an appropriate IEP for the 2017-18 school year and last reevaluated the Student in 2012, reevaluation continues to be necessary. The date for the Student's mandatory reevaluation was over a year ago.

Burden of Proof

As the U.S. Supreme Court has held, in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005), *Regional School Unit No. 51 v. John Doe*, 60 IDELR 163 (D. ME. 2012); *DB ex rel Elizabeth v. Esposito*, 675 F. 3d 26, 35 (1st Cir. 2012). Therefore, as the Parents are challenging the IEP team's decisions, they must prove that the evidence supports their position on the issues before the hearing officer. The District has the burden of proof on the issue of whether the Parents denied the District consent to evaluate the Student and any affirmative defenses they have raised.

Decision

1. Did the Student's IEP as developed and implemented for the 2014-2015 school year fail to provide her with a free, appropriate public education in the least restrictive environment?

Under the Individuals with Disabilities Education Act (IDEA), school districts are required to provide every student who is eligible for special education services under federal law (and Maine's corresponding law) with a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The hearing officer must examine whether the Student's educational program

contained in her IEP was “reasonably calculated to enable the student to receive educational benefit.” *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward “the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP.” 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law sets a fairly modest goal of an appropriate, rather than an ideal, education. The appropriateness of each student’s IEP must be gauged in relation to that student’s potential to obtain educational benefit. The benefit conferred does not need to reach the highest attainable level or the level needed to maximize the child’s potential. 998 F.2d 1083, 1086 (1st Cir. 1993). This is an important distinction because the issue before me is not whether the District is providing as good an education as [REDACTED] or whether [REDACTED] is providing the Student with a better education. That is not relevant to this analysis. The issue is whether the Student was receiving *meaningful educational benefit* from her education in the District during the two school years in question.

In addition to designing an appropriate IEP, school districts must offer students with disabilities an appropriate placement in which to implement the IEP. The placement must be capable of fully delivering the services set forth in the IEP in an effective manner, with appropriately qualified staff, and in settings that allow the student to progress. It also must be the least restrictive environment for the student. That means, disabled students must be educated with nondisabled students whenever possible and as close as possible to the student’s home. MUSER §X(2)(B). The school must ensure that “the child is educated in the

school that he or she would attend if nondisabled,” unless the IEP necessitates a more restrictive placement. 34 CFR §300.116(c); MUSER §X(2)(B).

One of the hotly disputed issues in this hearing is the choice of methodology. In *Brougham v. Town of Yarmouth*, the Federal District Court in Maine said:

Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.

823 F. Supp. 9, 16 (D. Me. 1993).

The Supreme Court has ruled that the IDEA confers primary responsibility upon the school district to choose among competing methodologies. *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F. 3d 18, 27 (1st Cir. 2008), quoting *Rowley*, 458 U.S. at 207. On the other hand, selection of methodology can be a critical issue in IDEA cases that focus on the development and implementation of IEPs. If a school district fails to utilize an effective methodology for instructing a student, then its choice can be overturned as a violation of FAPE. See, e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1999), citing *Polk v. Central Susquehanna Interm. Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989) In other words, as the Parents point out, school districts have no right to select or implement inappropriate methodology, or fail to deliver an appropriate method.

In 2006, when it issued a revised set of regulations, designed in part to address Congress’s new requirement that all IEPs provide special education and related services that are “based on peer-reviewed research to the extent practicable,” 34 C.F.R. § 300.320(a)(4), the Department reiterated its “longstanding position” that “if an IEP Team determines that

specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.” 71 Fed. Reg. 46,665 (2006).

At the outset, it was apparent from the evidence at this hearing that both the Parents and the District had the Student’s best interests at heart. The Parents were keen advocates for the Student and her education. They were dedicated to giving her the best chance and making sure her educational needs were met. The District was very responsive to the Parents’ requests, wishes and input. District staff were well qualified professionals who worked conscientiously and diligently to deliver the Student’s educational services.

Conscientious effort, however, is not the equivalent to providing a FAPE. Here, there are several factors that must be considered in determining whether the Student’s IEP as developed and implemented for each of the years at issue was reasonably calculated to provide her with a FAPE.

One factor is the Student’s abilities and learning challenges. As noted above, the appropriateness of the IEP must be gauged in relation to a student’s potential to obtain educational benefit. While the Student has a number of strengths, including her listening comprehension, pragmatic language, motivation, helpfulness and good social skills, she had serious challenges as well. The Student was motivated to learn and was willing to work hard. Her parents were very supportive. There was no dispute, however, that one of her biggest challenges was her processing speed. The Student’s very slow processing speed, in the borderline range on her 2016 cognitive testing, placed her in the 2nd percentile. Witnesses for both parties agreed that, regardless of her other abilities, the Student’s processing speed means that she will struggle with learning and learn at a slow rate. In addition to her processing speed, Dr. Hoag identified the Student’s areas of weakness to include visual-

motor skills and visual reasoning, short-term visual memory, visual-motor coordination, cognitive flexibility, visual discrimination and concentration. As Dr. Goldberg stated, the Student's working memory weaknesses and difficulty retrieving automatic information negatively affected her reading. Ms. Shaw's testing found the Student's working memory in the moderately impaired range, with a score of 72. Ms. Papageorge explained that the Student had a dual deficit learning disability, with significant weaknesses in both phonological processing and orthographic processing which has prevented her from making progress in learning to read. These limitations alone would cause the Student to progress at a considerably slower rate than typically developing peers.

There is also the disputed issue of the Student's cognitive abilities. Testing done by two different examiners in accordance with standard test protocols showed the Student functioning in the borderline range of cognitive ability. When Dr. Hoag did cognitive testing in 2014 and 2016, she tested the Student in an unorthodox way. The whole point of a standardized test, however, is that everyone takes it under very similar the conditions using the same questions. As Dr. Blier convincingly explained, the conditions under which Dr. Hoag administered cognitive tests to the Student were not consistent with the procedures dictated by the developers of the tests. Her unconventional methods of administering the test gave the Student an advantage that others taking the test in accordance with the standard procedures did not have, thereby making the results unreliable.

The Student's testing anxiety is not an acceptable reason to abandon test protocols. Not only is test anxiety a common problem among school children, particularly students with special needs, but there are ways to help students address testing anxiety ahead of time that do not require disregarding the test protocols. Furthermore, the evidence does not support a

conclusion that the Student had unusual levels of testing anxiety. Various evaluators whom the Student had never met before, including Ms. Papageorge, had no problem testing the Student, and she did not exhibit unusual anxiety. There was only one incident, when the Student was evaluated by Dr. Wojcik in 2010, when anxiety was a problem, and she has not had a similar experience since then. The Student also became anxious when taking the NWEAs, which were administered by people she knew well. Nonetheless, she continued to take these tests two or three times a year, and showed academic growth on them. As Dr. Blier, who has considerable expertise in this issue, explained, on the BASC Anxiety Scale, the Student's anxiety was in the average range, and Dr. Hoag's impression regarding the Student's anxiety was not supported by the scores and information in her report. There was no record of any anxiety assessment having been done using standardized or normative tools that supported Dr. Hoag's conclusions. [See Fact #48]

No doubt it is very difficult, even traumatic, for parents to learn that their child has disabilities of this nature. The Student's social and other strengths appear to compensate for some of her limitations. Nonetheless, the evidence points to a conclusion that the results of cognitive testing done in accordance with standardized testing procedures are more reliable, and therefore more indicative of the speed at which the Student can be expected to progress in an appropriate public school program.

No one criticized the formulation of the 2014-15 IEP or the use of OG as a reading instruction methodology, nor did any witnesses criticize other methodologies used in 5th grade. Although the Parents argue that OG was not the appropriate reading program for the Student, she had instruction in OG during her summers at the [REDACTED] School, and the Parents told Dr. Smith that it worked well for the Student. OG is commonly used to teach people with

dyslexia. The District then arranged for the Student to have instruction in this method, which she had both during the summer of 2014 with OG certified teacher Ms. Hourihan, and during the school year at [REDACTED]. One of her teachers at [REDACTED] uses OG to instruct her. Ms. Papageorge, in her March 2015 report, did not criticize the use of OG as a methodology. A year later, in her February 2016¹⁴ evaluation, she shared her opinion that OG was not the best program to use with the Student at this stage of her reading instruction, but at the time the IEPs were developed, there was considerable evidence that OG was an appropriate choice. The Student's teachers, although most had limited experience in OG, were qualified to teach it, and an OG specialist came to [REDACTED] mid-year to observe the program being delivered to the Student finding that it was being done correctly. The District professional staff were caring and conscientious in their work with the Student and delivery of her program.

There was no evidence to support the Parents' allegation that the program was not individualized. The fact that there were other students in the Student's classroom, or that other students were receiving similar instruction does not mean that the Student's program was not crafted to meet her unique needs. The evidence supports a conclusion that the IEP as developed was reasonably calculated to provide the Student with a FAPE in [REDACTED] grade.

The Student's 2014-15 graded IEP shows "Satisfactory" progress on many goals. All of her teachers testified that she made satisfactory progress. At the end of the term of the IEP, in March of 2015, the Mother reported to Ms. Peskurich that things seemed to be starting to click more and more with the Student's reading. In other words, she was making progress.

It is clear from curriculum-based assessments, NWEAs and the other measures that

¹⁴ The District received a copy of this 2016 report just three days before the Student stopped attending school at [REDACTED]

the Student made demonstrable gains. She met her Fry words goals and improved her written output in terms of legibility. She made some progress on keyboarding accuracy, although she had not increased her typing speed. Her progress was slow in other areas of reading, as one would expect with her disabilities, but did she improve. Although not all of her math goals were introduced, she made some gains in learning multiplication facts, fractions, place value, subtraction and word problems. Based on these gains, new goals were recommended for [REDACTED] grade.

On the NWEA, her reading score, after being flat through [REDACTED] grade, increased 18 points from 163 to 181, exceeding her projected growth of 12. Her language usage score increased from 162 in the fall of [REDACTED] grade to 175 in the spring. Her growth was consistent with the projections. The Student's NWEA scores in math showed less growth, going from a 162 in the fall to 170 in the spring. There was a misunderstanding about the Student's NWEA testing accommodation, which was not followed precisely. This was the only evidence of a failure to implement any part of her IEP. Her scores showed growth nonetheless, and the failure to implement this accommodation properly did not rise to the level of a FAPE violation.

The Student's program contained an array of appropriate instruction and services delivered by qualified professionals in her areas of need. She was instructed using methodologies that had been used to instruct her previously and with which she had experienced success. At the time the IEP was drafted, the continued use of these methodologies was logical. The Student's program was not perfect, and it is understandable that the Parents wanted her to progress at a more rapid pace, particularly given their belief that her cognitive abilities were not impaired. Based upon the evidence, however, I conclude that the Student's IEP for [REDACTED] grade was reasonably calculated to provide her with a FAPE

and that she made demonstrable improvement in that program. There was no violation of the IDEA.

2 Did the Student's IEP as developed and implemented for the 2015-2016 school year fail to provide her with a free, appropriate public education in the least restrictive environment?

The IEP team met on February 23, 2015 to draft the Student's IEP for [REDACTED] grade. The Parents were represented by legal counsel and an employee of the District's law firm led the meeting. After the Student's teachers discussed her progress over the past year, the Parents presented a statement of their concerns, which included the Student's rate of progress in math, reading and writing, her group instruction was not designed to address her unique needs, and that she required individualized instruction. Although wanting more individualized instruction, the Parents also wanted the Student, at the same time, to be more fully integrated into the regular education classroom.

The IEP team, including the Parents, had previously agreed to conduct the Student's triennial evaluation in May of 2015 to assess the Student's educational progress and needs in order to better plan for her transition to [REDACTED] school. At this meeting, however, the Parents made the first in what became a consistent and concerted effort to delay the Student's triennial evaluation. It is very difficult to develop appropriate programming without the necessary formal assessment information, but the IEP team agreed to the Parents' request and moved the Student's triennial evaluation back to the original November 2015 date. Consequently, the team did not have this information to use in formulating the Student's [REDACTED] grade program. In June, the team amended the Student's [REDACTED] grade IEP to incorporate the Parents' request to have more time in the mainstream classroom with 1:1 support, as well as

almost all of the other changes the Parents requested at the March meeting. [P-457, 458]

The team's decision to honor the Parents' request for more inclusion involved considerable effort and some risk, as the Student would be in [REDACTED] school with harder work that would involve more complex thinking. In agreeing to this, the District took appropriate steps to make this placement successful by providing the Student with 1:1 support from ed techs who were certified teachers and having Ms. Durgin meet with the Student's team, including her regular education teachers, before the school year started to be sure they were familiar with her needs, then continue to meet with them on a weekly basis to coordinate the Student's educational program.

After the Student enrolled at [REDACTED] the staff there thought that although there were too many goals and objectives in the IEP at issue, the goals were sufficiently similar to what [REDACTED] was teaching her that [REDACTED] could implement this IEP until they drafted their own service plan four months later. The IEP, with supports in place, was reasonably calculated to provide the Student with a FAPE.

Also, if the Parents had concerns about the legitimacy of the [REDACTED] staff's grading the IEP, the [REDACTED] staff gave the Student very similar grades upon her arrival at [REDACTED]

Despite the Parents' and Dr. Hoag's¹⁵ criticism of the District's transition planning for the Student's move to [REDACTED] none of which was supported by facts in the record, the evidence shows that the District took a very thoughtful and fitting approach to this. At the Mother's request, the Student's [REDACTED] grade special education teacher, Ms. Durgin, provided the Student's ESY services. This way, the Student got to know Ms. Durgin and become

¹⁵ At the December 2015 IEP team meeting, Dr. Hoag stated that the Student had experienced an increase in anxiety due to the "lack of proper transition planning." [Testimony of K. Hoag, H. Blier, S-276]

comfortable with her before the school year started. Ms. Durgin introduced the Student to both the [REDACTED] school building and her classroom teachers. Ms. Durgin also communicated with Ms. Conte to learn more about the Student, and Ms. Durgin's ESY work gave her an excellent idea of where the Student was educationally. This seemed a perfect way to help the Student adjust to her new school.

During the Student's first two months at [REDACTED] school seemed to be going well for her. She felt happy and supported, was exhibiting low levels of anxiety and was excited to come to school. Ms. Durgin was instructing her using OG for reading and Lindamood Bell's On Cloud Nine math program, which is essentially "Visualizing and Verbalizing" for math. This was a new methodology for the Student, and would help her learn the concepts behind the math processes she was being taught.

That fall, however, the Parents continued their efforts to avoid the District's attempt to obtain a triennial reevaluation of the Student. The District tried to be considerate of the Parents' concerns about testing the Student by hiring Dr. Blier to make evaluation recommendations, but the Parents refused to even allow Dr. Blier to observe the Student in class or speak with the Student as part of this process. I will discuss in greater detail in Issues 5 & 6 below.

The Parents and the District staff appeared to have a cooperative working relationship until December of 2015. In March of 2015, however, the Parents started being secretive about steps they were taking with regard to the Student's education. They obtained evaluations and information about the Student's progress, much of which they did not share with the District. Parents are not required to inform school departments of every step they take on behalf of their child's education, but in reviewing the evidence following the hearing, one could only

speculate about why they purposely withheld information about the Student that, if shared with the District, could have been used to improve her educational experience in public school. For example, it is unclear from the record why the Parents would have withheld the fact that Ms. Papageorge, with her expertise in education, had consulted with them about the Student's program in early 2015 and made recommendations. One can also only theorize why the Mother inquired with Ms. Peskurich about Lindamood Bell reading programs and yet did not ask the District the same question, when the District was delivering the Student's educational program and had staff, including the Student's special education teacher for [REDACTED] grade, trained to deliver Lindamood-Bell's LIPS, Seeing Stars, Visualizing and Verbalizing, and On Cloud Nine math.

Halfway through the first semester, the mainstream [REDACTED] grade curriculum was proving to be challenging for this Student due to her disabilities. She was unable to read at the level of the mainstream textbooks. Consequently, the Parents read a lot of this to her, thus making the amount of time the Student spent on homework unmanageable for her and the Parents. [REDACTED] school can be a huge adjustment for typically developing students, so it is not unusual that due to the differences between the Student's [REDACTED] and [REDACTED] school programs, she would hit a few road bumps and require some adjustments to her program. The fact that she was able to access the mainstream curriculum as well as she did was evidence that the Student's program was appropriately developed and was being implemented well. Teachers worked hard to assist the Student, and the District wanted to address the Parents' concerns.

When Ms. Papageorge observed the Student at [REDACTED] she noted that the Student was having a positive educational experience and, with supports, was focused, able to access the curriculum and better comprehend what was asked of her. Her observations

about the teachers and the Student's educational experience were mostly positive. Her criticisms were geared towards the choice of methodologies used, and it was her opinion that programs such as LiPS, Seeing Stars and Visualizing and Verbalizing would be more effective with the Student's phonological processing. The fact that the Student needed a lot of adult support was not evidence that the program was not reasonably calculated to provide a FAPE. In fact, the parties knew at the time the IEP was drafted that the Student would require a lot of support to succeed in the mainstream. Even when she transferred to [REDACTED] she still required a lot of adult support to access the curriculum there. The evidence from [REDACTED] showed that the Student had similar struggles there and that her challenges did not disappear in that setting.

The Student's program was implemented in a way that was providing her with a FAPE. While Ms. Papageorge's recommendations may have produced even better results for the Student, this information was not available to the District until three days before the Parents withdrew the Student from [REDACTED] a decision they had made over a month earlier.

3 Is the District's proposed IEP and placement for the 2016-17 school year reasonably calculated to provide a free, appropriate public education to the Student in the least restrictive environment?

The main differences between the program offered the Student at [REDACTED] and the program she had during [REDACTED] grade at [REDACTED] were the methodologies used and the fact that at [REDACTED] she was being educated for the better part of her day in the mainstream environment, and at [REDACTED] she was not.

As noted above, however, this decision is not about comparing [REDACTED] and [REDACTED] to determine which one would be the best placement for the Student for 2016-2017. The IDEA does not guarantee that a student's programming will maximize her potential. *Lenn v.*

Portland Sch. Comm, 998 F.2d 1083, 1086 (1st Cir. 1993). The issue is whether the 2016-17 IEP offered to the Student by the District was reasonably calculated to provide her with a FAPE. If so, then it would be the least restrictive environment in which the Student could receive her education. An out of district placement is not appropriate if the Student's needs can be met in her neighborhood school. See *Abrahamson v. Hershman*, 701 F. 2d 223, 227 (1st Cir. 1983).

The amount of specially designed instruction in the proposed IEP for the 2016-17 school year is similar to what the Student is receiving at [REDACTED] and exceeds Ms. Papageorge's recommendations. Dr. Hoag specifically recommended that the Student would benefit from spending time in the mainstream classroom with typically developing peers, and both her recommendations and those of Ms. Papageorge are incorporated into the proposed IEP. Furthermore, at the Resolution Session in August 2016, the District offered extended school day services for direct instruction in ELA using LIPS instruction by a speech pathologist trained in LiPS and direct instruction in ELA and math using a mutually agreeable methodology. Given the Student's difficulty with reading and her slow progress, the District offered her the opportunity to try a new approach consistent with Ms. Papageorge's recommendations.

The Father objected to the IEP, noting that he thought the Student's teachers should have Master's level education, yet the Student's teachers at [REDACTED] did not all have that level of education and her ELA teacher was not certified to teach in any state and did not have an education degree. Despite placing the Student in a school with no typically developing students, the Parents also objected to the IEP because it did not give the Student enough time in the mainstream classroom. Neither of these objections were supported by evidence.

The IEP offered by the District, despite not having the benefit of a recent triennial evaluation, makes improvements upon the Student's IEP from the prior year, and takes into account recommendations from evaluations by the Parents' evaluators. It is reasonably calculated to offer the Student FAPE in the least restrictive environment.

4 If the hearing officer concludes that the District did not provide or offer the Student FAPE during the school years in question, is the Student entitled to reimbursement for the costs associated with her unilateral [REDACTED] Academy placement or other forms of compensatory education? If the hearing officer concludes that any FAPE violation was the result of Parent obstructionism, should this reduce or preclude any remedy?

As the District offered the Student FAPE for the years in question, it is not necessary to address this issue.

5 Did the District fail to comply with the IDEA requirements for reevaluation of the Student? If so, what remedy is appropriate?

The Maine Unified Special Education Regulations section V(3) contain requirements for evaluations and reevaluations, which says:

A. Review of existing evaluation data [34 CFR 300.305(a)]-As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall:

- (1) Review existing evaluation data on the child, including:
 - a. Evaluations and information provided by the parents of the child;
 - b. Current classroom-based, local, or State assessment, and classroom-based observation; and
 - c. Observations by teachers and related service providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:
 - a. Whether the child is a child with a disability as defined in 34 CFR 300.8 [Section VII], and the educational needs of the child, or, in case of a

reevaluation of a child, whether the child continues to have such a disability and such educational needs;

- b. The present levels of academic achievement and related developmental needs of the child;
- c. Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- d. Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

B. Conduct of Review. [34 CFR 300.305(b)] The group described in paragraph 3(A) of this section may conduct its review without a meeting.

C. Source of data. [34 CFR 300.305(c)] The SAU shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (3)(A)(2).

D. Parental consent. — Following prior written notice each SAU shall obtain informed written parental consent, in accordance with subsection (1)(A)(4), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the SAU can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond. If the parent refuses to consent to the reevaluation, the SAU may, but is not required to, pursue the reevaluation by using the consent override procedures in 34 CFR 300.300(a)(3) [Section XVI.2] . . .

The IDEA requires that reevaluations occur at least once every three years, unless both the parents and the public agency agree that it is not necessary. 20 USC §1414(a)(2). There was no such agreement here.

One of the two essential purposes evaluations serve is to allow IEP teams to identify the special education and related services a student requires. As the First Circuit stated, "(e)valuations are a key means -- perhaps the key means -- for deciding the content of the protections IDEA offers. In the first instance, the school district must perform IDEA

evaluations." *South Kingston School Committee v. Joanna S.*, 773 F.3d 344, 346-47 (1st Cir. 2014). This is why the IDEA mandates that schools evaluate and reevaluate students, and has strict requirements about how and how often this must be done.

Although there was no dispute that the Student continued to have disabilities requiring special education and related services, her triennial evaluation was necessary to determine her academic achievement, her ongoing needs, and how to best program for her in the future.

I conclude that the record supports a conclusion that the District met all of the requirements set forth above. The District and the IEP team considered the existing data and gave the Parents an opportunity to provide input on the issue of what evaluations were needed for the Student's triennial evaluation. It has attempted to engage the Parents in discussions regarding the Student's reevaluation since the fall of 2014. The District was very accommodating of the wishes and concerns of Parents. It was perhaps too accommodating, as the Parents took advantage of the District's willingness to oblige them and used it to purposely delay the triennial evaluation process while obtaining their own evaluations.

6 Have the Parents denied consent for reevaluation? If so, should the hearing officer override the Parents' failure to consent pursuant to Maine Unified Special Education Regulations?

The IDEA and accompanying regulations are clear that school districts have a right to evaluate any student eligible for services under the IDEA, and they have the right to choose the evaluator. The Courts have consistently upheld the right of school districts to do this. *Andress v. Cleveland Independent School District*, 64 F. 3d 176 (5th Cir. 1995).

School districts have the right to evaluate students even after a parent has elected to have the student privately evaluated. In *M.T.V. et al v. DeKalb Cnty. Sch. Dist.*, 446 F. 3d 1153 (11th

Cir. 2006), the parents refused to consent to the student's reevaluation, complaining that the Student "has been tested and tested and that needless or repetitive testing must be avoided."

As the Eleventh Circuit held in *DeKalb County*:

Every court to consider the IDEA's reevaluation requirements has concluded, "if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation."

DeKalb, 446 F. 3d at 1160, citing *Andress*, 64 F. 3d at 178-79; see also *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F. 3d 554, 558 (7th Cir. 1996) ("Because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation."); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) (holding parents must permit mandatory reassessments under the Education of the Handicapped Act, the IDEA's predecessor, if they want their child to receive special education services); *DuBois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2d Cir 1984).

It is troubling how the Parents chose consistently and sometimes secretly to obstruct the District in complying with its legal obligation. Then, in the face of this behavior, the Parents ironically accused the District of not collaborating with *them*.

Although the Parents repeatedly asserted that they did not want the Student evaluated because of her test anxiety, it was apparent that what they actually objected to was allowing the District to evaluate the Student using evaluators of its choosing. They had no problem having people they selected evaluate the Student, including individuals the Student never met before. Interestingly, the Student did fine being tested by these strangers. As noted in the facts above, the Parents have not proved that the Student had unusual anxiety about being evaluated. If the Parents were concerned about the Student being evaluated too much, they

could have collaborated or coordinated with the District about evaluators or waited until after the District's evaluations to decide whether it was necessary to obtain their own.


The District bent over backwards to accommodate the Parents' concerns about evaluations and to answer their questions. Trusting the Parents' motives, the District repeatedly agreed to delay moving forward with the evaluations. The Parents were eminently aware that the District wanted their consent to evaluate the Student, and received a formal written consent form at least once and most likely twice. The evidence supports a conclusion that they were informed of all information relevant to the requested evaluations, and received more information than most parents do. Nonetheless, they refused to sign the consent form and refused to consent to the District's reasonable request to comply with its legal mandate to reevaluate the Student.

There were many reasons, some of which were set forth in Dr. Blier's testimony and consultation, why the District was justified in wanting to do its own evaluations. In addition to the reasons set forth in Facts #65 and 70, Ms. Papageorge's recommendations following her academic evaluation were made without the knowledge of the Student's borderline processing speed and upon Dr. Hoag's controversial cognitive test results.

The District cannot meet its legal obligations to the Student without a comprehensive reevaluation. As the District continues to have the obligation to provide the Student with a FAPE under the IDEA, to develop a 2017-18 IEP in March, and has valid reasons for evaluating the Student, I override the Parents' denial of consent. The Parents must make the Student available for the evaluations recommended by Dr. Blier and the IEP team in accordance with this Order.

V. ORDER

1. The District did not violate state or federal special education laws by failing to provide the Student with a free appropriate public education for the 2014-2015 school year.
2. The District did not violate state or federal special education laws by failing to provide the student with a free appropriate public education for the 2015-2016 school year.
3. The District's 2016-2017 IEP and placement for the Student is reasonably calculated to provide her with a free, appropriate public education in the least restrictive environment.
4. The District has complied with the requirements of the IDEA and accompanying regulations for evaluating the Student.
5. The School's request to override the Parents' refusal to consent to the triennial evaluations approved by the IEP team at its February 2016 meeting is GRANTED. The District may evaluate the Student without parental consent. If the Parents wish to have the Student considered for special education services by the District, the Parents must make the Student available for evaluation by the District in accordance with the plan approved by the IEP team within 30 days of the date of this order, unless the District agrees to a later date.


SHARI B. BRODER, ESQ.
Hearing Officer