

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

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Parent	)	<b>DECISION and ORDER</b>
	)	
v.	)	
	)	
RSU No. 79 / MSAD No. 1	)	
	)	
	)	

A hearing was held and this decision was issued pursuant to Title 20-A, MRSA §7202 *et. seq.*, and 20 U.S.C. §1415 *et seq.*, and accompanying regulations. The hearing took place on October 2, 10, 17, and November 14, 2017 in Caribou, Maine. Those present for the proceeding included [REDACTED], the Student’s mother (“Mother” or “Parent”)<sup>1</sup>; Denise Bosse, Special Education Director for the District; Eric Herlan, Esq., counsel for the District; and the undersigned hearing officer. Also attending the hearing was Brent Langley, [REDACTED]’s boyfriend. Testifying at the hearing were:

1. [REDACTED]
2. Denise Bosse                      Director of Special Education
3. Desiree Sowers-Felch            Special Education Teacher (ELA, Social Studies), and case manager
4. Sara Donahue                      Special Education Teacher (Math)
5. Barbara Bartlett                   Middle School Assistant Principal
6. Candy Junkins                      Consulting Teacher/Evaluator
7. Rebecca Shea                      Speech and Language Pathologist
8. Amanda Beaulieu                   Occupational Therapist
9. Dr. Susan Jarmuz-Smith           Independent Psychologist

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<sup>1</sup> Ms. [REDACTED] has also used the surname [REDACTED]. For purposes of these proceedings, she will be referred to as the Parent.

## **I. PROCEDURAL BACKGROUND**

On June 26, 2017, the Parent filed a Due Process Hearing Request (“Hearing Request”) on behalf of her [REDACTED], [REDACTED] (“Student”) alleging violations of the Individuals with Disabilities Education Act (“IDEA”) by RSU No.79 / MSAD No. 1 (“District”).

On September 6, 2017, the hearing officer held a telephonic prehearing conference. Participating in the conference were the Parent, Ms. Bosse, and Mr. Herlan.

Documents and witness lists were submitted in a timely manner. The Parent submitted approximately 1,356 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1,442 pages of exhibits (herein referenced as S-#, and appendices S-A-# through S-G-#).

The record was kept open to allow the parties to prepare and submit post-hearing briefs. The District submitted a 54-page, double-spaced brief and the Parent submitted a 21-page, single-spaced brief. The record closed on December 18, 2017.

## **II. ISSUES TO BE RESOLVED**

1. Whether the District violated the IDEA by failing to provide the Parent with an opportunity to review the Student’s Individual Education Program (“IEP”), from April 11, 2017 until June 14, 2017.
2. Whether the District violated the IDEA by including issues in the IEP that were not discussed with the Parent, specifically language regarding the Student’s current level of functional performance.
3. Whether the Student’s IEP was reasonably calculated to provide a free appropriate public education (“FAPE”) when it:

- a) Did not indicate that the Student has a print disability that requires accessible instructional materials to access his curriculum;
  - b) Did not include objectives in his IEP goals despite the use of alternate assessments;
  - c) Did not provide a description of the Student's academic performance;
  - d) Did not include results from assessments, including the NWEA<sup>2</sup> and BRIGANCE.
4. Whether the District failed to perform an assessment to determine the Student's assistive technology ("AT") needs, and if it did so, whether that resulted in a failure to provide a FAPE.
  5. Whether the District failed to provide appropriate goals in the Student's IEP related to his functional performance, and if it did so, whether that resulted in a failure to provide an IEP reasonably calculated to provide a FAPE.
  6. Whether the Student's IEP was properly implemented with respect to providing him with certain accommodations, including an iPad and specialized pen, and if not, whether that resulted in a failure to provide the Student with a FAPE.
  7. Whether the District incorrectly assessed the Student's progress on his measurable goals indicated in his IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.
  8. Whether the District inaccurately identified the Student's strength and weaknesses in the IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.
  9. Whether the District inaccurately identified the Student's current level of academic performance in his IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.

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<sup>2</sup> The Prehearing Report incorrectly referred to the NWEA as the "WNEA."

10. Whether the District inaccurately defined appropriate goals in the Student's IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.
11. Whether the District failed to address the Student's functional performance at the IEP meeting held on February 8, 2017, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.
12. Whether the District failed to address the frequency of the provision of instructional strategies in the IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.<sup>3</sup>
13. Whether the District improperly included the alternate assessment ("AA") in the IEP, and if so, did it result in a failure to provide the Student with a FAPE.<sup>4</sup>
14. Whether the District failed to appropriately identify the Student's least restrictive environment in the IEP, and if it did so, whether that resulted in a failure to provide the Student with a FAPE.
15. Whether the District failed to provide a written notice describing the reasons for denying requests for services requested by the Parent at the IEP Team meeting held on February 8, 2017, and if it did so, whether that resulted in a violation of the IDEA.
16. Whether the District failed to provide the Parent with the Student's general curriculum upon her request on April 10, 2017, and if it did so, whether that resulted in a violation of the IDEA.
17. If any violations of the IDEA, including a failure to provide a FAPE to the Student, are found to have occurred, what remedies shall be provided.

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<sup>3</sup> This issue was resolved by the Parties during the due process hearing and therefore will not be discussed.

<sup>4</sup> The Parties agreed to change the wording of this issue at the due process hearing.

### III. FINDINGS OF FACT

1. The Student is [REDACTED] years old (born [REDACTED]) (S-E-69). His mother and father, [REDACTED] (“Father”) (together referred to as “Parents”) are not married but both have shared parental rights. (S-E-69). The Student has been living with his Father and paternal grandmother, [REDACTED] (“Grandmother”) from Tuesday through Friday and with his Mother on the weekend through Monday. During the week, the Student goes to his Mother’s home after school and is picked up by his Father after work. (S-A-6). Both parents reside within the District’s jurisdiction and therefore the District has educational responsibility for him. The Grandmother has been granted permission by the Father to provide educational support to the Student. (S-84).<sup>5</sup>
2. The Student was identified with a Specific Learning Disability (“SLD”) in May 2011, when the Student was in first grade. (P-344, 899; S-F-3, 5, 7, 27-30). Assessments revealed his significant weakness was in long-term retrieval and short-term memory that interfered with skill development in basic reading skills, reading fluency, reading comprehension, math calculation, written expression, and spelling. (S-F-25). At that time, based upon standardized assessments<sup>6</sup>, he was reading at a mid- to late-kindergarten level and his math was at a late-kindergarten level. (P-267; S-F-6, 39). The Student also had issues with attention and focus in large and small group settings, and had difficulty following instructions. (P-267, 344).
3. An IEP Team determined that the Student was eligible for special education instruction and related services under the category of SLD. (S-F-32). His IEP called for 2.5 hours of specially designed instruction in reading and math in the resource room setting, with several supplementary aids, services, modifications, and supports for redirection and reading (i.e., scribe). (P-269-271, 344; S-F-39-43).

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<sup>5</sup> At the time of the due process hearing, the Parents were involved in a legal parental rights matter. (Mother’s Tr.). The Father did not attend the Hearing.

<sup>6</sup> Woodcock Johnson III (“WJ-III”) Test of Cognitive Abilities, WJ-III Achievement Battery, Early Math Diagnostic Assessment, Early Reading Diagnostic Assessment (P-843-853).

4. The Student made little improvement during second and third grades, and performed substantially below grade level. (P-273, 281, 353; S-F-69, 73; S-E-84, 87). He continued to need special education instruction and services in reading and math in the resource room setting. (P-273, 281, 350, 353; S-F-69, 73). His IEP noted that he continued to be inattentive, which interfered with his learning. (P-273, 281, 350, 354; S-F-73). In second grade, his specially designed instruction was reduced from 2.5 to 2 hours, but was increased back to 2.5 hours in third grade. (P-277, 285-286; S-F-77-78).
5. Triennial assessments performed in the spring of 2014 (fourth grade) indicated that the Student had made minimal progress in reading and math. (P-840; S-F-94, 101, 106). He was performing at a 1.6 grade level in Basic Reading Skills, K.0 grade level in Reading Fluency, 1.1 grade level in Reading Comprehension, 2.4 grade level in Math Calculation, 2.7 in Math Reasoning, 1.8 grade level in Written Expression, 1.5 grade level in Spelling, and 4.2 grade level in Academic Knowledge. (S-F-104). The Learning Disability Evaluation Report continued to find an SLD and stated that he continued to perform below grade level due to significant processing deficits in Long Term Retrieval and Short Term Memory. (S-F-105). The IEP Team acknowledged that the Student's progress was limited, that his lack of attention interfered with his learning, and that his SLD continued to exist. (S-F-104).
6. The District also reported progress in the Student's reading and math goals. He had mixed results in reading and writing goals: "limited progress" for five goals; "satisfactory progress" for one goal; and "met" for three goals. He "met" all of the goals in math. (S-F-116-117). His fifth grade teacher, Lori Hudson, was using *Recipe for Reading*, *SPIRE*, *ReadWork*, *Sidewalk*, and *Daily Oral Language* programs for reading and writing. (P-1025). She reported that she suspected the Student had "severe orthographic dyslexia" at that time. (P-1025).
7. His annual IEP was updated on April 17, 2014, and continued to call for 2.5 hours of special educational instruction in the resource room with multiple supplementary aides,

services, modifications, and supports. (P-295; S-F-106). He also was eligible for Extended School Year (“ESY”) services. (P-295; S-F-119).

8. The Student entered fifth grade in the fall of 2014. By April 2015, the Student had made “limited progress” on five out of seven goals in reading and “met” two of them. (S-F-116). He “made progress” in his writing goal. (S-F-116). He “met” all four of his math goals. (S-F-116-117).
9. Sometime in the Spring 2015, the Parent, who had not participated in any IEP Team meetings since May 18, 2011, began to become involved in the Student’s educational planning. She attended the IEP meeting held on April 15, 2015, to review the Student’s progress and discuss his annual IEP and plans for the Student as he entered middle school in the fall. (P-359; S-F-34; S-7).
10. The Written Notice from the IEP meeting held on April 15, 2015 reported that the Student was reading a “late first grade level” and was performing at a “3.5 grade level” in math reasoning and “3.0 grade level” in math calculations. (P-360; S-5). It was noted that he needed to have all problems read to him and required other supports (multiplication chart and/or calculator). (P-360; S-5). It was also reported that he continued to be “very inattentive in a larger group setting” and that all tests were taken in the resource room setting with accommodations. (P-360; S-5). The IEP Team discussed that when the Student entered middle school in the fall of the 2015-2016 school year, he would attend his English Language Art (“ELA”) and math in the resource room at the [REDACTED] ([REDACTED]). His core mainstream classes would be in science and social studies, and he would participate in exploratory classes and learning workshop classes.
11. The IEP resulting from the meeting held on April 15, 2015 continued to include 2.5 hours of specialized education instruction in the resource room setting with several supplementary aides, modifications and supports. (P-306-307; S-16-17). His IEP included two goals: one in reading and writing, and one in math, both with five objectives. (S-34). The IEP noted that his present level of academic performance was the late first grade /

beginning second grade level in ELA and beginning third grade level in math calculation and reasoning skills. (S-10).

12. By June 2015, the Student had made “limited” progress in reading and writing goals and made “satisfactory” progress on his math goals. (S-32-33).
13. The Student entered ██████ in the fall of 2015 (sixth grade). The District used the Corrective Reading Program (“CRP”) to deliver the Student’s ELA instruction. (Bosse, Sowers-Felch Tr.). The CRP was recommended to the District by expert reading consultant, Candice Bray, to deliver specially designed instruction in reading to the District’s students who struggle with reading skills, especially those who have been diagnosed with an LD, including dyslexia. (Bosse, Sowers-Felch Tr.; S-C-269-274).
14. The CRP begins at “Level A – Word Attach Basics.” It teaches basic reading skills, including phonemic awareness, sound-symbol identification, sounding out regular and irregular words, word reading, and sentence and story reading. The program expects an outcome of reading 60 words per minute with 98 percent accuracy, which is equivalent to a second grade reading level. (S-C-271).
15. The Student was placed at the beginning Level A in the CRP when he entered sixth grade at ██████. (Bosse, Sowers-Felch Tr.). He achieved “limited” to “inconsistent” progress in reading and writing through early November 2015. (S-33). He achieved “satisfactory” progress on his math goals. (S-34-35).
16. The Student took the NWEA assessment in the fall of 2015 and winter of 2016. He scored 153 and 155, respectively, in ELA, which placed him in the 1<sup>st</sup> percentile. He scored 181 (1<sup>st</sup> percentile) and then up to 191 (3<sup>rd</sup> percentile) in math by the winter of 2016. (S-55).
17. The Student’s progress on his IEP goals as of January 27, 2017 indicated that he received all “2s” (“satisfactory progress”). (S-131-132).



18. On March 31, 2016, the Parent and Ms. Sowers-Felch, the Student's case manager, and ELA teacher, exchanged e-mails about the IEP process. (P-1189-1190). The Parent was informed that she would be getting notice of all meetings going forward. The Parent also stated that it was her desire to work with the Student during the summer using CRP materials. She stated, "Also, I have been doing a bit of reading on Corrective Reading and I love the concept! I plan on purchasing some materials on the subject so I can work with (the Student) at home during the summer. I can't wait to meet so we can talk about it, thinking about (the Student) reading better on his own has me quite excited." (P-1189-1190).
19. By April 15, 2016, the IEP indicated that the Student was making "satisfactory" progress on all goals and objectives in reading and math. (S-33, 34).
20. An IEP meeting was held on April 13, 2016. Both Parents were present for this meeting. (P-369; S-29). The Written Notice reported that the Student was receiving ELA instruction using the CRP that included decoding and comprehension skill development. Ms. Sowers-Felch reported that the Student could not sound out basic words at the beginning of the school year, but had progressed to be able to read full sentences while sounding out new words. (P-368; S-29). The Written Notice also reported that the Student was performing at a late third grade level in math, noting that he struggled with reading, therefore everything in math was read to him. (P-368; S-28). The Written Notice also indicated that the Student did not exhibit any behavior issues within the school setting. (P-368; S-29).
21. At the IEP meeting on April 13, 2016, the Parents indicated that they were worried the Student had dyslexia and felt that a psychological evaluation was warranted to determine other causes of his learning problems. (P-368, 369; S-28, 29). The IEP Team agreed to conduct a psychological evaluation.

22. The IEP that resulted from the IEP meeting on April 13, 2016 included the Student's present level of performance in math and ELA. It stated that he was performing at a late second grade level in ELA with small group instruction and accommodations and was performing at a beginning third grade level in math calculation and reasoning skills. (P-312; S-41). The IEP included two goals, one in math and one in ELA, with one objective each. (P-312; S-41). The math goal stated:

By April 2017, given ability level Math curriculum material, (the Student) will improve his Math ability by 6 months as measured by completed curriculum material, teacher created work, quizzes/tests. (P-312; S-41).

The ELA goal stated:

By April 2017, given ability level curriculum materials, (the Student) will improve his ELA skills by 6 months as measured by teacher created curriculum materials, class work, quizzes, and tests. (P-312; S-41).

23. The ELA goal included three areas within one objective that corresponded to Common Core State Standards ("CCSS"). (P-313; S-42).
24. The grade level equivalents for reporting the Student's present level of performance in ELA in his IEP corresponded to the grade levels using the CRP equivalents and based upon mastery within the Levels in which the Student was working. (Bosse Tr., Sowers-Felch Tr., S-C-271). They were not based upon standardized test results. (Sowers-Felch Tr.).
25. The IEP called for four hours of specially designed instruction ELA, math, science, and social studies. (P-317; S-46). It also included several supplementary aides and accommodations, such as the use of scribing, small group testing, repeat/rephrase/review, and longer time limits. (P-316; S-45).
26. The IEP provided that he would be in his least restrictive setting 49% of the time during the school day, including academic classes and specials. His core classes would be in the special education setting. (P-317; S-46).

27. Sometime in the spring 2016, the Student took two standardized assessments, the Maine Education Assessment (“MEA”) for both ELA and math, and the NWEA for math only. (S-52, 55). On the MEA, the Student scored 630 in ELA and 640 for math, “well below state expectations.” (S-52, 54). For ELA, this scoring indicated that a student’s work demonstrated a “minimal understanding of the knowledge and skills needed to meet Maine’s ELA/Literacy Content Standards with tests of appropriate complexity for the grade level.” (S-52). For math, this scoring indicated that a student’s work demonstrated a “minimal understanding of, and ability to apply, the mathematics knowledge and skills needed for achievement relative to the grade level Math Content and Practice Standards. The student solves some problems that require applying simple strategies to basic areas of mathematics without an understanding of the reasoning behind the strategies.” (S-54). In the spring of 2016, the Student’s NWEA score for math was 198, placing him in the 5<sup>th</sup> percentile. (S-55).
28. The BRIGANCE assessment for math was also administered in the spring of 2016. It indicated that the Student was performing at a third grade level at 36% accuracy, second grade level at 94% accuracy, and first grade level at 100% accuracy. (S-B-1).
29. By the end of the 2015-2016 school year, the District reported that the Student received all “2s” (“satisfactory progress”) in his two IEP goals and objectives. (P-1057-1059; S-65).
30. The Student entered seventh grade in the fall of 2016. Ms. Sowers-Felch believed that the Student had accurately completed the Mastery Tests in Level A of the CRP and therefore could move ahead into Level B. She also decided to skip ahead and place the Student in Level B2 with the rest of the students in her class because she did not have the staff to give individualized attention to the Student. She was not giving the Student one-to-one instruction because the IEP called for instruction in small groups. (Sowers-Felch Tr.).
31. In a series of emails starting on October 11, 2016, the Parent inquired of Ms. Sowers-Felch about the psychological evaluation that the IEP Team agreed to conduct at the

beginning of the 2016-2017 school year. Ms. Sowers-Felch reported to the Parent that evaluations scheduled at the beginning of the school year were delayed due to the death of her brother, but that paperwork for the evaluations was going to be submitted the next day, and once it “cleared,” the evaluations would take place within 45 school days. (P-1191-1193, 1195).

32. The Student’s NWEA scores in math for the fall of 2016 were 197 (6<sup>th</sup> percentile). (S-139). No scores for reading were reported.
33. By November 2016, the Student was struggling with ELA. His teacher noted that, “At times (the Student) has difficulty maintaining attention to instruction therefore his success in growth has slowed. However, on days when he is attentive he progresses nicely. The Student is still having great difficulty in learning to read fluently.” (S-66). He appeared to be making satisfactory progress understanding text, knowing when to refer to parts of texts when writing or speaking about it, comprehending the comparing and contrasting of topics (e.g., good vs. evil), and understanding patterns in literature. (S-66). He also continued to make satisfactory progress in his math goal. (S-65).
34. By January 2017 the Student was not progressing in ELA. Ms. Sowers-Felch requested additional help in the classroom but the request was denied. (Sowers-Felch Tr. 784-794). She regretted that she had placed the Student into Level B2 without finishing A1, but felt that she did not have a choice based upon the lack of staffing. She had eight students who were all on Level B2 in the special education setting. (Sowers-Felch Tr. 795-796.)
35. The Student’s NWEA score in math for winter 2017 was 197 (6<sup>th</sup> percentile). S-139. His score for reading was 156 (1<sup>st</sup> percentile). This was a one-point increase from the winter of 2016, and a three-point increase from the fall of 2015. (S-139).
36. In order to prepare for the Student’s triennial IEP meeting, several assessments and observations were administered in late December 2016 and January 2017. Ms. Sowers-Felch performed an “Observation in the Learning Environment” assessment on December

27, 2016. (S-72). She reported that the Student “goofed off” and needed redirection throughout the class period. He was sometimes disrespectful and argumentative with teachers, but always apologized. She reported that everything needed to be read to the Student, but that he had no problem asking for help. She also reported that the Student often had a difficult time focusing on one task for more than a couple of minutes. (S-72).

37. A Special Education Report submitted by Candice Junkins, Consulting Resources Teacher for the District, analyzed and summarized several types of standardized assessments. (S-85).<sup>7</sup>
38. The WJ-IV subtests indicated that the Student’s grade equivalent scores were at the late kindergarten / early first grade level in Basic Reading Skills, kindergarten level in Reading Fluency, and late kindergarten / early first grade level in Reading Comprehension. (S-87). He was at the late second grade / early third grade level in Math Calculation Skills and mid-second grade / early third grade level in Math Problem Solving. (S-87). He was at a late kindergarten / early second grade level in Written Expression. He scored in the 2.7 second-grade level in Academic Knowledge. (S-87).
39. These scores fell in the “very low range” in Basic Reading Skills, Reading Fluency, Reading Comprehension, and Written Expression. (S-95). The math scores fell in the “low” range in Math Calculation Skills, Math Problem Solving, and Academic Knowledge. (S-95).

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<sup>7</sup> These assessments included:

- Woodcock-Johnson Psycho-Educational Battery – Fourth Edition (“WJ-IV”);
- Early Reading Diagnostic Assessment (“ERDA”);
- WJ-IV Tests of Oral Language;
- Sound Awareness Screening;
- Comprehensive Test of Phonological Processing (“CTOPP”)
  - Subtests: Phonological awareness
    - Phonological Memory
    - Rapid Naming
- Rapid Automatized Naming and Rapid Altering Stimulus (“RAN/RAS”) Tests
- WJ-IV Test of Achievement
- Test of Orthographic Competence (S-84-96).

40. His overall Phonological Awareness performance fell in the “Below Basic” category, with varying scores. His overall Phonics performance was “Proficient,” with varying scores. (S-95).
41. Under the WJ-IV Test of Oral Language, the Student’s Phonetic Coding (Segmentation and Sound Blending abilities) score was in the “average ability” range, however his Rhyming and Deletion abilities were “significantly delayed” (greater than a 1.5 standard deviation (“SD”) below the mean). (S-95)
42. The Student’s CTOPP scores were “low” for Phonological Awareness; “Below Average” for Phonological Memory; and “Very Low” for Rapid Naming abilities. (S-95).
43. The RAN/RAS indicated that the Student showed a “significant weakness” in rapid naming/retrieval (near 2 SD below the mean). (S-95).
44. The WJ-IV Tests of Achievement indicated that the Student’s spelling of sounds and spelling was in the “Very Low” range. (S-95).
45. The Test of Orthographic Competence indicated that the Student performed at the “Very Low” performance level in the area of Orthographic Ability (3.5 SD below the mean). (S-95).
46. The Student’s score in the WISC-V for IQ was 77, considered in “low” range (from 72 to 84). S-97).
47. Due to the Student’s disabilities, the Student will struggle to maintain focus and will make slow progress in reading. (Bosse Tr.).
48. Ms. Junkins reported that based upon the above assessments, “Since (the Student) was last evaluated approximately three years ago, he has increased his applied problems by nine months, Math Calculation Skills by eight months, and Passage Comprehension by

five months. (The Student's) scores in Basic Reading Skills, Reading Fluency, Written Expression, and Academic Knowledge have not increased as would be expected based on his age." (S-95).

49. Ms. Junkins made several recommendations based on the assessments above, including:
- a) Having tests and quizzes read aloud;
  - b) Providing phonological awareness activities to help increase his basic reading and writing skills;
  - c) Expanding his sight-word vocabulary by practicing them in small groups for mastery before starting another group;
  - d) Providing steadily-paced word drills with unknown words taught and reentered into the group for more immediate exposure; provide games for practicing sight words;
  - e) Improving word recognition strategies, including word walls, flow lists, word banks, flash cards, and games, with a focus on high-frequency words;
  - f) Using of graphic organizers and other visuals to help in developing his ideas in writing;
  - g) Allowing use of a calculator/math chart for computation to be able to concentrate on the reasoning.
- (S-96).

50. Ms. Junkins noted in her testimony that she sees the Student as a [REDACTED] who has good friends. He has appropriate oral language usage and a good vocabulary. (Junkins Tr.) She described that his literacy skills break down because of his significant short- and long-term memory deficits, along with both orthographic and phonological dyslexia, and the impact of Attention Deficit Hyperactivity Disorder ("ADHD")<sup>8</sup>. (Junkins Tr.). She predicted that he will struggle with learning to read, spell and write and would not make large gains, but with a scientifically-based program like the CRP, which targets both areas of his dyslexia, he should make some gains. (Junkins Tr.). She believes that direct one-on-one instruction would be best for him and that consultation with Dr. Candice Bray would be useful to determine real success. (Junkins Tr.). She also suggests that IEP goals should reflect both standardized norm goals and CRP goals. (Junkins Tr.). She believed that if he was reading out of a mid-second grade book, then a goal of reading at a third grade level would be appropriate. (Junkins Tr.). Ms. Donahue agreed with this view (Donahue Tr.).

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<sup>8</sup> See the report of William O'Connell, below.

51. In a series of emails starting on December 19, 2016, the Parent inquired about dates for the Student's psychological testing that had been agreed upon in March 2016. Ms. Sowers-Felch told her that she was informed that "it will be soon." She also told the Parent that the evaluator, Mr. O'Connell, had to take new referrals first and that he had a long list since he was the only school psychologist in the area. (P-1198, 1202). She recommended that the Parent call Mr. O'Connell's office herself "because there is more of a push when parents call." (P-1198). The Parent informed Ms. Sowers-Felch that she was in the process of scheduling a neuropsychological evaluation in order to get a second opinion on how to help the Student and "narrow down the right path." (P-1199, 1201).
52. Ms. Sowers-Felch also emailed the Parent about her reaction to the Student's academic testing scores. She stated:
- It broke my heart to read his academic testing report from Mrs. Junkins. I got it into the mail to you today, so you should have it soon. It boggles my mind that I can't get him to read, there must be something in there blocking him, and I didn't know about his health history. I would be very interested in hearing from a neurologist too- you can get a NeuroPsych in Bangor. Not sure on who the doctor is, but one of my students went a couple weeks ago. It's at two-day process. I would definitely look into it!
- (P-1200).
53. William O'Connell, M.A., P.C. conducted a psychological evaluation on January 23, 2017. (S-97). It was submitted on February 1, 2017. (P-1278, S-97).<sup>9</sup>

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<sup>9</sup> The tests administered included the following:

- a) Clinical interview;
- b) Observation in the Learning Environment;
- c) Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V");
- d) Woodcock Johnson Tests of Achievement – Fourth Edition ("WJ-IV");
- e) Child Behavior Checklist for Ages 6-18 – Second Edition (mother/father Achenbach);
- f) Teacher Report Form for Ages 6-18 – Second Edition (Achenbach);
- g) Youth Self-Report for Ages 11-18 (Achenbach);
- h) ADDES-Fourth Edition for Home (mother/father) and School (McCaney);
- i) Piers-Harris Children's Self-Concept Scale – Second Edition (Piers-Harris-2);
- j) Differential Test of Conduct and Emotional Problems ("DTCEP");
- k) Behavior Rating Inventory of Executive Functioning for Home (mother/father) and School-Second Edition ("BRIEF-2").



54. Mr. O’Connell reported that the Student was performing at the beginning to late kindergarten level in reading, mid-first grade level in writing, and mid-third grade level in math. (S-107). His Full Scale IQ was measured at 77 on the WISC-V. (S-102). He also had the following composite scores: Verbal Comprehension – 78 (“significant” weaknesses); Visual Spatial Composite – 94 (“significant” weaknesses); Fluid Reasoning – 88 (“profound deficits”), Working Memory – 82 (“significant” weaknesses); and Processing Speed – 86 (“significant” weaknesses). (S101-102). These score suggested that the Student was “solidly within the upper end of the Borderline classification” and indicted that he exceeded 6 percent of the early adolescents within the standardization group. (S-102).
55. The Student’s scores on the WJ-IV assessing his knowledge in reading, writing, and math indicated that he was performing at the following grade levels: Basic Reading Skill – K.9; Reading Fluency – K; Reading Comprehension – K.8; Math Calculation Skills – 3.2; Math Problem Solving – 3.0; Written Expression – 1.4; Academic Knowledge – 2.7. (S-103).
56. Mr. O’Connell confirmed the Student’s SLD in the areas of Basic Reading Skills, Reading Fluency, Math Calculation Skills, Mathematical Problem Solving, and Written Expression. (S-107). He also diagnosed the Student with Other Health Impairment (“OHI”) based upon the Student’s profound focus deficits for lengthy periods of time, using behavior rating scales that measure inattention, impulsivity, and hyperactivity in the education setting. (S-109). Based on these scales he made a diagnosis of Attention Deficit/Hyperactivity Disorder (“ADHD”). (S-109).
57. Mr. O’Connell reported that while he ruled out a diagnosis of Emotional Disturbance, the Student may evidence a medical diagnosis of Anxiety and recommended further assessment by a medical provider. (S-109). He also opined that the Student may have a language disorder based upon profound delays in language-based skills specific to reasoning, vocabulary development, and comprehension, as shown on the WISC-V assessment. He recommended a consult with a language pathologist for further

assessment. (S-109-110). He also suggested other neurological issues that may be impacting the Student's learning and behavior as an associated cause and recommended further evaluation in this area. (S-110).

58. Mr. O'Connell noted that the Student's self-esteem deficits due to his conflicts regarding Resource Room support and other behaviors associated with his academic delays could be addressed by the District's social worker to determine if services were needed. (S-110). He made recommendations for classroom modifications with respect to the Student's emotional dysregulation; task initiation; working memory; delays in planning and organization of work; and self-monitoring skills with regarding increasing his attention span. (S-110).
  
59. Mr. O'Connell recommended several educational modifications, including:
  - a) Reading materials to the Student
  - b) Use of a scribe
  - c) Small group instruction in the Resource Room
  - d) Check for comprehension
  - e) Repeat, rephrase, and review work
  - f) Longer time limits
  - g) Clear expectations
  - h) Assist with work completion/organization
  - i) Use of study guides, lecture notes, modified work (i.e., word banks, multiple choice instruction, short answer, math chart, and use of a math calculator)
  
60. Mr. O'Connell also made specific recommendations regarding the Student's weaknesses in certain areas of executive functioning:
  - a) Emotional Control – point out emotional dysregulation before outbursts, offer options to reduce opportunities for dysregulation; assist with reducing incidents in the classroom;
  - b) Task Initiation – reinforce previously learned material prior to including new material; scribe for written work, check of understanding, reinforce learning concepts, review work soon after completion
  - c) Working Memory – highlight essential materials to be learned, oral presentation of written material, check for oral comprehension and understanding, evaluate the quality of work soon after completion
  - d) Delays in Planning and Organization of Work – Have one piece of material or problem on his desk at a time to be completed before introducing new work

- e) Self-Monitoring Skills – use a one or five minute time clock when using his own behavior performance chart. Extend it based upon his level of attention and compliance.  
(S-110)

61. The Parents submitted a list of requests and concerns to be discussed at the IEP meeting scheduled on February 8, 2017. (S-114). They requested the following:

- a) Information on the Student’s reading interventions and program; how and when it was delivered; and who delivered it
- b) Information about why the psychological evaluation did not identify the origin of the Student’s disability
- c) Engaging a literacy expert to conduct a literacy assessment and provide ongoing consultation and support to ensure that the Student was provided with the research-based interventions necessary to build his literacy skills and used with fidelity; they suggested Dr. Candice Bray
- d) Include in the Student’s IEP a 90-minute literacy block for 1:1 literacy instruction provided by a certified teacher with expertise in delivering research-based remedial reading instruction, and to extend it through Extended School Year (“ESY”) services
- e) A comprehensive speech and language evaluation and a neuropsychological evaluation, as suggested by the psychological evaluation
- f) An assistive technology assessment to identify way in which technology could be used to give the Student access to the general education curriculum
- g) Conduct a curriculum-based assessment and other measures necessary to understand the Student’s current functioning with the specificity needed to draft appropriate and measurable IEP goals based on present levels of performance
- h) Create an IEP to use new assessment information to develop appropriate and measurable goals that target all specific areas of need (noting that in their opinion, the current IEP goals were not appropriate since they were not based on present levels of performance and did not target specific skills, and were not measurable)

(S-114).

62. A formal Learning Disability Evaluation Report (“LDER”), dated January 23, 2017, was submitted to the IEP Team by the District for discussion at the Student’s IEP meeting on February 8, 2017. (S-116) The LDER reaffirmed that the Student had a SLD . (S-120). The Report indicated that the Student was not achieving adequately in the areas of written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving, citing WJ-IV scores. (S-116).

63. In February 2017, a BRIGANCE assessment was completed, which indicated that the Student was performing at a kindergarten level in word recognition and oral reading, and a sixth grade level in listening comprehension. (S-2).
64. An IEP meeting was held on February 8, 2017 to review evaluations, assessments, recommendations, and the Parents' concerns and requests. (P-1013; S-124). Mr. O'Connell was present at the meeting and reported on his psychological evaluation. (S-125). In addition, he reported that he identified the Student as having a diagnosis of OHI due to evidence of the Student's ADHD. (S-125). He also recommended a Speech/Language test and noted that he would review the neuropsychological evaluation that the Parents were privately having performed. (S-125).
65. The Written Notice included several teachers' reports on the Student's progress at the IEP meeting on February 8, 2017. Ms. Junkins reported on her assessments. She summarized that the Student was at the kindergarten / beginning first grade in Word Attach and Word Identification. She reported that he had average scores in memory tests. She reported his gains in math calculation and passage comprehension, but no other gains in math. (S-125). Ms. Sowers-Felch also reported that the Student was performing on a first grade level in reading, but at a sixth grade level in listening comprehension, based upon the BRIGANCE assessment. She noted that in the mornings he participates completely in ELA, is not squirmy, and works as asked, but he could not sit still in the afternoons for social studies. He would be asked to go do jumping jacks in the side room, which "usually takes away his jiggles for the rest of the class." However, she pointed out that this did not help with his lack of focus or in holding his attention. (S-126).
66. Sara Donahue, Special Education Teacher, reported that the Student made a 17-point gain in his NWEA scores in math, from 181 the previous year to 198. (S-126). Barbara Bartlett, █████ Assistant Principal, reported that a 17-point gain was significant and usually not seen. (S-126). Ms. Donahue also reported gains in the BRIGANCE assessment. (S-126). She noted that the Student's memory is "slower" but is quickly jogged when he is given a quick reminder, and that he forgets "some skills" over the

weekends. (S-126) She stated that while he is a slow starter with new concepts, “once he gets it, he takes off with the skill.” She mentioned that she believed [REDACTED] medication would help with his learning. She also reported that the CRP has been used for students with dyslexia in the past. (S-126).

67. Leah Gagnon, Special Education Teacher, reported that the Student lacked motivation to work on his own, even if it required copying notes off the board, but would do it with one prompt. She noted that he was very capable and a strong auditory learner. She pointed out that he had low confidence in his schoolwork and often felt he was not smart. His attitude had improved based upon his good performance in science. (S-126).
68. Brian Cronin, Physical Education Teacher, reported that the Student was one of the kindest students, always participated enthusiastically in class, never argued, and assisted those that needed help. (S-126).
69. Denise Bosse reported that she had observed the Student having a hard time sitting still in ELA class. (S-126). She discussed the Team’s concern about dyslexia and that it fell under the SLD category.
70. The Written Notice reported that Ms. Bosse discussed the Parents’ concerns and requests at the IEP meeting, stating that:
  - a) Dr. Candice Bray was someone that the District had contracted with in the past;
  - b) Ms. Bray recommended the Corrective Reading Program currently used in ELA;
  - c) Certified teachers were providing the Student with research-based programming;
  - d) The Student was qualified for ESY due to evidence of regression.
  - e) Assessments used included the NWEA, BRIGANCE and other curriculum-based assessment.
  - f) IEP goals are matched to state proficiency-based goals.(S-126).
71. The Written Notice also noted that Ms. Bartlett, the [REDACTED] Principal, told the Parent that certain assistive technologies were already available to all students, including “text-to-speech.” (S-126).

72. At that time, Ms. Bosse did not want to have to do an AT assessment before trying to get the Student to use the technology already available. If he needed something different, she was willing to have an assessment done. (Bosse Tr.).
73. The IEP Team concluded that the Student would continue to receive 4 hours of direct instruction in the special education setting and be provided speech/language testing. It also agreed to amend his IEP to include the results from his current evaluations; and amend goals and services in the IEP at the annual IEP meeting in April 2017. (S-125).
74. The IEP resulting from the IEP meeting on February 8, 2017 was amended to include updated WISC-IV-I, WJ-IV, and ADDES results, and the added diagnosis of Phonological and Orthographic Dyslexia. (S-130). NWEA scores were not included in this IEP.
75. The Present Level of Performance section of the amended IEP indicated that the Student was “performing at a late second grade level in ELA with small group instruction and accommodations” and “at a beginning third grade level in math calculation and math reasoning skills.” (S-131). This section indicated that “(The Student) cannot read any math directions/problems independently. He requires assistance with all reading in order to continue moving forward in his math program.” (S-131). Under the “Instructional” area of this section of the amended IEP, there is another statement that reads, “Overall, (the Student) is performing at a second grade level in ELA with small group instruction accommodations.” (S-131).
76. The IEP did not include any Functional Performance levels or goals. (S-133). It included several supplementary aides and modifications that were recommended by Mr. O’Connell. (S-135). It included specially designed instruction “four times per day for 56 minutes.” (S-136).
77. After the IEP meeting on February 8, 2017, the Student began receiving one-on-one direct instruction at Level B1 of the CRP. (Sowers-Felch Tr.)

78. On February 27, 2017, Ms. Bosse provided to the Parent information she requested at the IEP meeting on February 8, 2017. The information included NWEA scores comparing 2016 with 2017, and a comparison of WJ-III and WJ-IV scores from 2014 and 2017. (S-138-140).
79. The comparison indicated that the Student's reading fluency had been at a kindergarten level in 2014 and at a second grade level in 2017. (S-140; Bosse Tr.). The data also showed that there was virtually no change in basic reading skills and reading comprehension from 2014, which remained at the first grade level using the WJ-IV scores. (S-140).
80. On March 9, 2017, the IEP was amended by agreement with Ms. Sowers-Felch and the Father to specifically include a statement that the Student would be taking the Multi State Alternate Assessment ("MSAA"). (Sowers-Felch Tr., S-141-142). The IEP stated, "(The Student) will take the MSAA Alternate Assessment beginning in March 2017 due to significant processing delays." (S-132). It noted that current standardized MEA testing rules prohibited reading to the Student during the reading portion of the test. Due to the Student's low reading ability and processing deficits, the District believed that the Alternate Assessment best suited his needs. (S-142). Ms. Bosse thought he qualified for the MSAA due to his significant cognitive disabilities, citing the evaluation of Mr. O'Connell and the WISC score of 77 for IQ that fell in the "low" range. (Bosse Tr.).
81. The Parent was not notified that a change was going to be made to the IEP until she was notified that it had already been made. (S-A-83, Mother Tr. ).
82. Sometime in March 2017, the Student was prescribed [REDACTED] for his hyperactivity by his physician, [REDACTED] (S-185); Mother's Tr.).
83. On March 29, 2017, Ms. Rebecca Shea, MS, CCC-SLP, submitted a report on her speech and language evaluation of the Student. (S-158). It was her clinical opinion that the

Student's receptive and expressive language and vocabulary skills were within the "normal limits" for his age. (S-159).

84. An IEP Meeting was held on April 10, 2017, in order to develop the Student's annual IEP. (S-166). The Parent resubmitted her list of Parent/Student Concerns. (P-987). In summary, the District staff reported that for two months, the Student had been working one-on-one 60 minutes per day with staff in the CRP. He was also being called out of class for extra reading time and during study hall for a total of about 90 minutes a day of reading. (S-168). The Student was reported to have progressed from reading word-to-word sentences to reading sentences fluently. He understood what he read and would frequently stop and comment on the material he read. While he struggled with words that contained "w" or "ch," he was working with word cards that contained these letters. He seemed less anxious in doing mastery tests after he did the first one. He read more fluently using a highlighter strip to underline sentences. It was reported that due to his dyslexia diagnosis, the Lexia program had been ordered for him, and that it could be accessed from anywhere with Wi-Fi. It was also reported that AT would be provided to the Student in the form of online text-to-speech, and the Parents would be instructed on how to use other applications ("apps") on the Student's iPad. The Team agreed that the Student should access the AT resources provided by the District before an AT assessment is performed. (S-167-168).
85. The IEP Team also revisited the issue of the AA and whether he should take it. (Bosse Tr. 262-263). Some members of the Team believed he just needed to take an AA in ELA and not in math and others believed it would be more helpful if he took the comprehensive MSAA. Ultimately the Team agreed that he should take the MSAA. The Mother participated in this IEP meeting. (Mother, Bosse Tr. 262-63).
86. It was also reported that the CRP is used in the high school, therefore the Student would not have to start over again with a new program when he entered high school. It was agreed that Candice Bray would be consulted if the Student's progress slowed. (S-168).



87. The IEP Team agreed upon ESY for four days a week during the summer of 2018.
88. The annual IEP resulting from the IEP meeting on April 10, 2017 made several changes to the former IEP. It changed the Student's disability from SLD to Multiple Disabilities due to the addition of OHI. (S-171). It included the need for AT. (S-172). With respect to the Student's current level of performance, the IEP stated that the Student was reading fluently at a second grade level with small group instruction and accommodations. (S-173). With respect to math, the IEP cited BRIGANCE and NWEA assessments (S-174, 175). It noted that the Student exhibits attention and focus issues that interfered with his daily performance and progress and that he needs continued direct instruction in ELA, math, science and social studies at his ability level. (S-175).
89. While not noted in the IEP, the current level of performance for reading was based upon the CRP reading levels and not the standardized test scores. (P-1334, Bosse Tr.).
90. The IEP described the Student's strengths and weaknesses as follows:
- Strengths: (The Student's) academic strengths are within his comprehension knowledge. He remembers what has been read to him and he can use such knowledge at a later date. (The Student) also has a strong vocabulary and has strengths within sound blending. (The Student) knows all of his sounds and sound blends in phonics. (The Student) knows all the short and long vowels, can read them in isolated words. (The Student) is reading fluently out of a second grade reading book. (The Student) can recall what he has read and use such information in answering comprehension questions. (The Student) retains everything that has been read to him and he can use the information when completing work in ELA, Science, and Social Studies. He really enjoys math, and progressing quickly at his level. Even though he requires numerous accommodations, (the Student) feels that math (is) his best subject and he enjoys it the most. According to the NWEA (February 2017) (the Student) has shown evidence of being able to do the following tasks: Identify shapes that are divided into equal parts, Identify shapes that have been divided into fours, identify shapes that have been divided into halves, Represent whole numbers that have been represented in models, Know place value name through hundred thousands, Read and write whole numbers within 1,000 as hundred, tens, and ones, Represent whole number of digits after the decimal point, using terms, Represent whole numbers within 20 with models, Represent groups of 10 objects as a numeral within 100, Compare whole numbers within 100 using terms, Identify corresponding sides and angles in congruent figures, Determine the number of lines of symmetry in 2-D figures, Compose or decompose 2-D shapes to form new shapes., Read analog clocks to the nearest five minutes, Measure length, width, or height to the nearest half inch Estimate the areas of figures using square

units, Determine the area of figures composed of whole squares, Represent multi-step addition and subtraction word problems with expression or equations whole numbers, Recognized skip-counting patterns in 100s charts, Analyzes and describes patterns without stating the rule, Create or extend growing/shrinking shape patterns given the rule; Read tables or charts to determine how many in a category, Represent data in table or charts, Add and subtract to answer questions about bar graphs with single-unit scales, and represent data in bar graphs with single-unit scales.

Needs: (The Student) is a student with a significant Learning Disability that affects his progress in all areas of the curriculum. He exhibits attention and focus issues that interfere with his daily performance and progress. (The Student's) weaknesses within reading fluency and reading comprehension therefore he requires continued direct instruction in reading. (The Student) requires direct instruction in ELA Math, Science, and Social Studies at his ability level. (The Student) needs to work on using context in order to self correct while reading difficult words. (The Student) needs to work on reading with appropriate expression and at an appropriate rate for fluency. (The Student) needs continued work on identifying long and short vowels. (The Student) needs continued practice with multi-step picture and bar graph problems. (The Student) needs to work on multiplication problems that include four digit numbers and on finding the area of various shapes. (The Student) needs to work on recognizing and generating simple equivalent fractions. (S-174).

91. The IEP included four math goals, six ELA goals, and one functional goal, all to be reached by April 2018. (S-176-177). The math goals included:
- a) Draw a scaled picture graph and a scaled bar graph to represent a data set with several categories; solve one-and two-step "how many more" and "how many less" problems using information presented in scaled bar graphs with 75% accuracy as measured by teacher observations, assignments, and assessments;
  - b) Multiply a whole number of up to four digits by a one-digit whole number, and multiply two two-digit numbers using strategies based on place value and the properties of operations; illustrate and explain the calculations by using equations, rectangular arrays, and/or area model with 75% accuracy as measured by teacher observation, assignments, and assessments;
  - c) Multiply side lengths to find areas of rectangles with whole-number side lengths in the context of solving real world and mathematical problems, and represent whole-number product as rectangular areas in mathematical reasoning with 75% accuracy as measured by teacher observations, assignments, and assessments;
  - d) Recognize and generate simple equivalent fractions (e.g.,  $1/2 = 2/4$ ) with 75% accuracy as measured by assignments, assessments, and teacher observations.
- (S-176).
92. The IEP's ELA goals were as follows:
- a) Use context to confirm or self-correct word recognition and understanding, rereading as necessary in 8 out of 10 trials as measured by teacher observation and documentation;

- b) Read grade 3 level text orally with accuracy, appropriate rate, and expression on successive readings in 8 out of 10 trials as measured by teacher observation and documentation;
  - c) Decode words with common prefixes and suffixes at a second grade level in 8 out of 10 trials as measured by teacher observation and documentation;
  - d) Distinguish long and short vowels when reading regularly spelled one-syllable words at the second grade level in 8 out of 10 trials as measured by teacher observation and documentation.
  - e) Read with sufficient accuracy and fluency to support comprehension at the third grade level in 8 out of 10 trials as measured by teacher observation and documentation;
  - f) Know and apply grade 3 level phonics and word analysis skills in decoding words in 8 out of 10 trials as measured by teacher observation and documentation.
- (S-177-178).

93. The IEP included one functional goal to address the Student's problems around lack of focus and inattention. (S-179). The goal stated that the Student "will participate in activity in order to rid himself of pent-up energy in four out of five trials as measured by teacher observation." (S-179). The activity included doing jumping jacks in a side room or standing during class. The IEP noted that he "occasionally will slap himself repeatedly, either on the leg or on his cheek." (S-179).
94. The IEP included the same supplementary aides and accommodations as the prior IEP, with some additions that included allowing movement breaks and ability to use text-to-speech and speech-to-text via iPad. (S-181). The AA also continued to be included in the IEP. (S- 172, 181).
95. The IEP included specially designed instruction "4 times per day for 54 minutes." (S-182). It also included ESY services "4 times per week for 1 hour." (S-182).
96. The IEP indicated that the Student would be in the least restrictive environment 49% of the time in school based upon his "inattention concerns, and significantly below grade levels skills in ELA and math" requiring small group instruction in ELA, math, science, and social studies. (S-183). It explained that all other academic classes and specials, extra-curricular, and other nonacademic activities would be with his non-disabled peers. (S-183, Bosse Tr.).

97. The District does not believe that the Student has a print disability and indicated as such on the IEP from April 2017. (Bosse Tr.).
98. Ms. Sowers-Felch reflected that the IEP should have had a goal for the Student's working memory, since it impacted his progress to such a large extent. (Sowers-Felch Tr.).
99. Ms. Sowers-Felch testified that she prepared the IEP for mailing, and gave it to the administrative assistant to be mailed on April 24, 2017, the date printed on the Student's IEP. (Sowers-Felch Tr. 621-23). She stated that sometimes it does not get mailed out until next day. (Sowers-Felch Tr. 623).
100. In the spring of 2017, the Parent privately engaged Susan Jarmuz-Smith, Psy.D., NCSP, BCBA-D to administer a psychological assessment of the Student. (P-1026; S-184). In her report, Dr. Jarmuz-Smith noted that many of her findings were based upon recent testing results and conclusions from the District's evaluations. (P-1026; S-184). She also performed her own assessments to look at the Student's cognitive and academic functioning. In summary, she concluded that the Student demonstrated a pattern of strengths and weaknesses. His performance in fluid reasoning, short-term memory, processing speed, and comprehension-knowledge were in the overall average range. However, his performance in long-term storage and retrieval, visual processing, and auditory processing required follow-up. With respect to long-term memory, she stated that the Student showed a relative strength in visual memory, but overall demonstrated challenges with retrieving information. She stated that his deficits in long-term memory would affect his ability to decode words, read sight words, read orally smoothly and fluently, and ultimately understand what is being read. She reported that the Student demonstrated difficulties in visual processing when motor skills were required or used as part of the test. With respect to auditory processing, she cited the variable and low ratings from testing completed in January 2017. (P. 1038, S-196).
101. Dr. Jarmuz-Smith reported academic achievement delays in reading, writing, and math, as cited in prior evaluations, highlighting challenges with phonological awareness and

long-term / rapid retrieval of phonological information. She noted that that the Student needed to work on specifically developing his knowledge of phonics and phonemes, and improving his ability to retrieve this information quickly and accurately. (P-1030, S-196).

102. Dr. Jarmuz-Smith provided several recommendations including:

- a) Time and a half on standardized assessments and academic assignments and administration in a separate setting;
  - b) Strategies to improve self-awareness about attention and organizational abilities, citing examples;
  - c) Academic programing that uses curriculum-based measurements to monitor progress toward his goals, including those that use data collection and graphing; weekly progress monitoring probes;
  - d) Use of Orton-Gillingham direct instruction curriculum for teaching reading fluency, accuracy, comprehension and written expression;
  - e) Use of the Self-Regulated Strategies Development program for writing;
  - f) Direct instruction of social-emotional skills with support for generalization across settings, such as participating in a social-emotional skills group;
  - g) Data collection for social-emotional goals
  - h) Individual counseling using cognitive-behavioral therapy for emotional and behavioral concerns.
  - i) An Occupational therapy evaluation to explore below average performance on visual tasks when motor skills are required;
  - j) A Speech-language evaluation and/or audiological evaluation to explore below average performance on task requiring audiological information.
- (P-1038, S-97-98).

103. The District reported progress on the Student's goals in the IEP dated April 10, 2017. (S-204-206). Two of his math goals were notated as a "5" (goal not being addressed at this time). (S-201, 204). The other two math goals were noted as "2" (making satisfactory progress). (S-204). With respect to the Student's ELA goals, he received two "2s", three "3s" (making progress, performance inconsistent); and no score notated on one of the goals. (S-205-206).

104. The Student's year-end report card for seventh grade indicated that he received "80s" and "90s" across all classes and a "100" in physical education. (S-212).

105. The Student's progress was also reported on the spring 2017 NWEA assessment given on May 23, 2017. (P-1328; S-213). There was a one-point increase in his NWEA score from 197 to 198 (5<sup>th</sup> percentile). (S-213). There was an eight-point increase in his NWEA score from 156 to 164 (1<sup>st</sup> percentile). (S-213).
106. On May 25, 2017, the Parent reported to the District that the Student's prescription for [REDACTED] medication had increased and asked if staff could notify her if they saw a change in him. (P-1322-1325). She stated that she believed that once his medication was adjusted, his "behaviors" would disappear. (P-1329).
107. On April 30 and June 8, 2017, the Parent requested information about ESY services for the Student scheduled to begin on July 10, 2017. (P-1265, 1216, 1313). Ms. Sowers-Felch replied that she was informed that ESY services were not for direct instruction but for additional practice of skills, so that the Student would not lose the skills he had developed throughout the school year. (P-1315).
108. On June 13, 2017, the Parent emailed Ms. Sowers-Felch wondering if his IEP was complete, noting that it was not completely filled out in certain parts. (S-A-133). She stated, "I could list everything I found but I probably should save it for the IEP team meeting. It would be easier to address there." (S-A-133).
109. An incident occurred on June 13, 2017, that resulted in a dispute over the Student's eligibility to play soccer. The Student had not signed up earlier and did not have a required doctor's note. By the time the issue was resolved, the Student had become so upset that he did not want to return to school. On that day, five days before the end of the school year, the Parent removed the Student from school, and he has been held out of school since that time. The Parent stated that the Student does not want to go back to school and she is respecting his wishes. He does not have a home school plan, but is using materials provided by the District. (Mother, Bosse, Bartlett Tr.).

110. The District did not provide any AT training or support to the Student in order for him to access the iPad provided to him before he was removed from school (Mother and Bosse Tr.). No training support was provided to show the Student to use Lexia. (Mother Tr.). Ms. Bosse reported that the District's technology staff person, Mr. Hunter, was unavailable at the end year due to work overload. (Bosse Tr.).
111. An IEP Team meeting was scheduled for June 20, 2017, to review the psychological evaluation performed by Dr. Jarmuz-Smith. However, the doctor became ill and could not attend. The Parent therefore cancelled the IEP Team meeting. (P-1276).
112. On June 19, 2017, Ms. Bosse notified Ms. Jarmuz-Smith of several errors in her report. She stated that the Student was classified as a student with multiple disabilities, SLD, and OHI; that he received special education and instruction 4 times per day for 54 minutes each time; that his IEP goals included Common Core State Standards in Grades 3 and 4 for math and Grades 2 and 3 for ELA. (P-1303). Ms. Jarmuz-Smith replied that she needed further clarification of these changes before she made them. (P-1306). Ms. Bosse replied that she believed the proposed changes to address the "inaccuracies" were clearly stated. (P-1307).
113. On June 24, 2017, the Parent emailed Ms. Sowers-Felch that she never received a copy of the IEP dated April 10, 2017. (S-A-139). She requested a copy of it, and she picked it up at the school the same day. (Mother's Tr.)
114. On June 26, 2017, the Parent filed for a due process hearing. (HO. Exh. 1). Ms. Bosse responded to the complaint on June 29, 2017. (P-992).
115. The Student started ESY services on or about July 10, 2017, but was pulled from the program by the Parent on July 17, 2017. (P-1214; S-218). The Parent emailed the District staff on July 11 and 12, 2017, reporting that it was her understanding that the Student was reading at a prekindergarten level, based upon standardized testing, but that he was being asked to read third grade material during the ESY session. She wondered if a

kindergarten teacher could work with him during his ESY. (P-1215). “I don’t think I’m asking for anything crazy or for too much, I just want him [to be] taught at the level the law says he should be and his testing says he should be. Doing this is the best chance (the Student) has to learn how to read and I think he is owed the support to do so.” (P-1217).

116. Ms. Bosse reported that the District had held three IEP meetings and that the Parent had been an active participant in them, especially the one wherein the IEP Team created the newest IEP for the Student. She also noted that the Parent cancelled the last scheduled IEP meeting. She stated that she had attempted to contact the Parent about any concerns she had about the IEP, but that the Parent had not returned phone calls and e-mails. (P-992).
117. The Parent replied to Ms. Bosse’s response. She noted that she had to physically get copies of the Student’s educational record despite asking for the District to send it to her, noting that she had not received all Written Notices of IEP Team meetings. (P-993). She replied that while she was active in creating the new IEP, “there is so much in the IEP that was not mentioned or talked about in the meeting.” (P-993). She reported that the IEP meeting was cancelled because Dr. Jarmuz-Smith was sick and could not attend to discuss her report. She also noted that the IEP did not accurately reflect the amount of time the Student was with his non-disabled peers, since he was being pulled from the Learning Workshop. She noted that Lexia program was not in the IEP, and that ESY services had not been provided, as agreed upon. (P-993).
118. On August 23, 2017, Ms. Bosse informed the Parents that the IEP needed to be corrected to indicate the Student’s correct age, include short-term objectives with his goals because he was taking the AAs, and indicate that he was receiving “daily” instructional strategies. (S-213). The IEP was amended on August 30, 2017 to include his correct age and daily accommodations and modifications. (S-238, 248). Objectives were not added.



119. On August 30, 2017, Ms. Bosse sent to the Parents proposed objectives to the Student's IEP. (S-269-270). On September 13, 2017, the Father agreed to have the IEP amended to include the proposed objectives. (S-284). The objectives were as follows:

- a. Reading Goal 1: Area of Focus – Instructional
  - i. By December 2017, given appropriate ELA materials, (the Student) will isolate and pronounce initial, medial vowel, and final sounds (phonemes) in spoken single-syllable words, as measured by teacher observations of classwork, quizzes, and tests.
  - ii. By December 2017, given appropriate ELA materials, (the Student) will read grade 3-appropriate irregularly spelled words as measured by teacher observations of classwork, quizzes, and tests.
- b. Reading Goal 2:
  - i. By December 2017, given appropriate ELA materials, (the Student) will use context to confirm or self-correct word recognition and understanding, rereading as necessary in 8 out of 10 trials as measured by teacher observations of classwork, quizzes and tests.
  - ii. By December 2017, given appropriate ELA materials, (the Student) will read grade 3 level text orally with accuracy, appropriate rate, and expression on successive readings in 8 out of 10 trials as measured by teacher observations, quizzes, and tests.
- c. Reading Goal 3:
  - i. By December 2017, given appropriate ELA materials, (the Student) will know spelling-sound correspondences for additional common vowel teams as measured by teacher observations, quizzes, and tests.
  - ii. By December 2017 given appropriate ELA materials, (the Student) will recognize words with prefixes and suffixes in a sentence and will understand their meaning. (Ed. Understanding the “re” means “again”) as measured by teacher observations, quizzes, and tests.
- d. Math Goal 1:
  - i. By December 2017, given appropriate math materials, (the Student) will understand two fractions equivalent (equal) if they are the same size, or the same point on a number line, as measured by teacher observations, quizzes, and tests.
  - ii. By December 2017, given appropriate math materials, (the Student) will understand a fraction  $\frac{1}{b}$  as the quantity formed by 1 part when a whole is partitioned into equal parts; understand a fraction  $\frac{a}{b}$  as the quantity formed by a parts of size  $\frac{1}{b}$ , as measured by teacher observations, quizzes, and tests.
- e. Math Goal 2:
  - i. By December 2017, given appropriate math materials, (the Student) will recognize areas as an attribute of plane figures and understand concepts of areas measurement, as measured by teacher observations, quizzes, and tests.
  - ii. By December 2017, given appropriate math materials, (the Student) will measure areas by counting unit squares as measured by teacher observations, quizzes, and tests.
- f. Math Goal 3:
  - i. By December 2017, given appropriate math materials, (the Student) will multiply one-digit whole numbers by multiples of 10 in range 10-90 (e.g.  $9 \times 80$ ,  $5 \times 60$ ) using

strategies based on place value and properties of operation as measured by teacher observations, quizzes, and tests.

- g. Math Goal 4:
  - i. By December 2017, given appropriate math materials, (the Student) will draw a picture graph and a bar graph (with single-unit scale) to represent a data set with up to four categories. Solve simple put-together, take-apart, and compare problems using information presented in a bar graph as measured by teacher observations, quizzes, and tests.
  - ii. By December 2017, given appropriate math materials, (the Student) will generate measurement data by measuring lengths of several objects to the nearest whole unit, or by making repeated measurements of the same object. Show the measurement by making a line plot, where the horizontal scale is marked off in whole-number units as measured by teacher observations, quizzes, and tests.

120. Ms. Junkins acknowledged that while the goals are based upon CCSS, one of the goals was incorrectly labeled and should be labeled as CCSS 2.3.D. (S-C-252, Sowers-Felch Tr.).

121. The Parent referred the Student for a speech and language evaluation performed in early August 2017 by Sydney Trask, CFY-SLP, at the Aroostook County Medical Center. (P-969). Ms. Trask confirmed the Student's SLD and that he was reading at a second grade level. (P-971). She reported that the Student demonstrated difficulty with vocabulary words during conversation, as well as some grammar and syntax errors at the conversational level, comprehending spoken paragraphs, and the expression of formulating sentences. (P-971). She recommended that the Student receive speech therapy services once a week for approximate 45-60 minutes to gauge phonological skills, reading fluency, grammar/syntax, and reading comprehension. (P-972). She also recommended long term and short-term goals. (P-972). She also noted that the Parent did not agree with a current reading level of second grade as reported by the District and used in her report. (The Parent believed that the Student had a lower reading level at that time.) (P-973).

122. The Parent referred the Student for an occupational therapy ("OT") evaluation performed in late July 2017 by Amanda Beaulieu, MS OTR/L at the Aroostook County Medical Center. (P-974). Based upon her evaluation, Ms. Beaulieu did not find it necessary to

provide OT services at that time. (P-980). She discussed the Student's weaknesses in reading and writing and noted that he was receiving services in this area at school. (P-280).

123. On August 30, 2017, the Student was assessed by Ms. Trask for progress in reading. (P-1355). She reported that, "The patient continues to have some difficult decoding words during attempt in reading fluency tasks, but he does demonstrate an ability to identify phonemes and subsequently sound out the word, begin to memorize that word as well as any sound patterns that he may come across during his reading. Overall (the Student) appears to be more confident while reading and is less apt to give up during his reading tasks." (P-1356).

124. Since June 13, 2017, the Parent has kept the student out of school. (S-254). The Parent has been provided with tutoring material for use at home. (S-254, Mother Tr.).

#### **IV. DISCUSSION AND CONCLUSIONS**

##### **Burden of Proof**

The burden of proof rests with the party who is bringing the proceeding on the particular issues in dispute. See *D.B. v. Esposito*, 675 F.3d 26 n. 3 (1<sup>st</sup> Cir. 2012); see also *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). Therefore, the burden is on the Parents to prove the issues they have raised in this matter.

##### **Legal Framework**

The Individuals with Disabilities Education Act (IDEA), along with corresponding federal and state statutes and regulations, requires school districts to provide every student who is eligible for special education instruction and services with a free appropriate public education ("FAPE") designed to meet their unique needs and prepare them for employment and

independent living. 20 USC 1400(d)(1)(A). The individualized education plan (“IEP”) is the document that specifies the instruction, services, and placement to be implemented that allows an eligible student to receive a FAPE.

The Supreme Court has set up a two-part analysis for determining whether an IEP is appropriate. The first inquiry is to determine whether the IEP was developed in accordance with the IDEA’s procedural requirement. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural inadequacies a) impeded the child's right to a FAPE; b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or c) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); MUSER XVI.15(A)(2). The burden is on the family to show “the harmfulness of the claimed procedural violations.” *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1<sup>st</sup> Cir. 1990).

If the procedures were adequate, then the next level of inquiry is whether the IEP was designed to be “reasonably calculated to enable the student to make progress appropriate in light of his circumstances.” *Andrew F. v. Douglas County School District RE-1*, 137 St. Ct. 988, 1000-1001 (2017). It must be “individualized to the child’s unique circumstances.” *Id.*, at 988, 1000-1001, citing 34 C.F.R. § 1401 (29). Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether it is ideal. (*Rowley* at 206-207).

The Court in *Rowley* did not provide concrete guidance with respect to a student who is not fully integrated into the regular classroom and not able to achieve on grade level because the student in that case was fully mainstreamed into the regular classroom. The Court in *Andrew F.* stated that if it is not a reasonable prospect for a student to be fully integrated into the regular classroom and not able to achieve on grade level, “[h]is educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 988, 1000.

While the Court in *Andrew F.* clarified the standard to be used in reviewing the appropriateness of an IEP, it declined to draw a “bright-line rule” for determining whether it is “reasonably calculated” to enable a student to make progress “appropriate” in light of his circumstances. Instead, it instructed that courts (and hearing officers) must not substitute their own notion of sound educational policy for those of school authorities, which they review. *Id.*, citing *Rowley*, 458 U.S. at 206. However, “a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the student to make progress appropriate in light of his circumstances” *Id.*

The First Circuit has weighed in further on what an appropriate IEP could look like. It stated:

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

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

Finally, a student’s educational program must be delivered in the least restrictive environment in which the child can receive educational benefits. This means that to the “...maximum extent appropriate,” the student must be placed in settings that provide access with non-disabled peers. See 20 U.S.C. 1412(a)(5)(A); 34 C. F.R. s 300.114(a)(2)(i); MUSER X.2.(B). This obligation must make a “continuum” of placement options available for the student, ranging from mainstream public school placements through placement in special day schools, residential schools, home instruction, and hospital placement. See 34 C.F.R. 300.115, 300.116(c), (e); MUSER X.2.(B). In determining the least restrictive appropriate placement, “correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities... To determine a particular child's place on the continuum, the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement.” *Roland*, 910 F.2d at 993.

## **The Issues**

The issues to be determined in this matter are both procedural and substantive challenges to the Student's educational programming. The procedural issues will be addressed first.

1. Whether the District failed to provide a written notice describing the reasons for denying requests for services requested by the Parent at the IEP Team meeting held on February 8, 2017. If so, did it violate the IDEA?<sup>10</sup>

### Parent's Argument

The Parent argues that she provided a list of parental concerns to the District in preparation for the February 8, 2017 meeting. She explains that she does not believe that the District provided her with a written notice that included responses to all of her requests and complete reasons for refusing those requests. She claims that some of her requests were not discussed at the IEP meeting.

### District's Argument

The District argues that it complied with the state regulations requiring it to provide a Written Notice documenting all of the decisions made by the IEP Team at the meeting. (Citing MUSER XV, Appendix 1, pp. 219-220). It states that the Written Notice, dated February 8, 2017, and sent to the Parent on February 28, 2017, documented that the team reviewed and considered the list of concerns provided by the Parent at that meeting and that the tape recording of the meeting also indicated that the Parent's concerns were discussed at the meeting. (S -126, Bosse Tr. 241).

### Discussion

As part of the procedural safeguards provided to parents under the IDEA, Maine requires a school district to provide parents with a Written Notice that describes actions taken or refused to be taken regarding the referral, evaluation, identification, programming, or placement, and the reasons for those actions or refusals. MUSER XV, Appendix 1, pp. 220 – 221.

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<sup>10</sup> This issue is number 15 in the Prehearing Report.

The Parent/Student Requests and Concerns, dated February 8, 2017, submitted by the Parent for purposes of discussion at the IEP Team meeting on that day, requested the following: 1) a literacy assessment; 2) consultation by Candice Bray; 3) one-to-one literacy instruction for a 90-minute block; 4) a comprehensive speech and language evaluation; 5) a neuropsychology evaluation; 6) an AT assessment; and 7) a curriculum-based assessment to understand the Student's current functioning with the specifics needed to draft appropriate measurable IEP goals based on present levels of performance.

I find that the Written Notice (S-124-127) provided a description and explanation for three of the Parent's requests. It included plans for a speech and language assessment. It established that curriculum-based assessments had been completed through the use of the NWEA, BRIGACE, and other curriculum-based assessments. It also discussed the Parent's request for one-to-one literacy instruction for a 90-minute block. Barbara Bartlett, Assistant Principal at [REDACTED], explained that all classes at the school were 54 minutes long each and therefore 90-minute blocks were not available in the schedule. Also, the team agreed that the Student would continue to receive 4 hours of "direct instruction." (S-126).

I find that the Written Notice did not sufficiently address the balance of the Parent's requests. Ms. Bartlett's statement that "text-to-speech" is offered to all students on their iPads was unresponsive to the Parent's request for an AT assessment. It did not address the Parent's requests for a literacy assessment or consultation with Candice Bray. Specifically, it states that "Mrs. Bosse reported that Dr. Bray is someone that the district has contracted with, and she has recommended Corrective Reading, and this is a program that is currently used." I find that this is not an explanation about why the District refused the Parent's request for a literacy assessment and/or a consultation with Ms. Bray. Rather it is a statement of what the District already does with respect to its special education reading program for all special education students. Also, the Written Notice did not include a response to the Parent's request for a neuropsychological assessment. It is apparent that the District did not agree to this, since the Parent independently arranged to have a neuropsychological evaluation performed.

Based upon the above, I find procedural violations were made by the District by not including responses to the above requests in the Written Notice. Whether this violation rose to the level of a failure to provide a FAPE will be discussed below.

2. Whether the District failed to address the Student's functional performance at the IEP meeting held on February 8, 2017. If so, did it result in a failure to provide the Student with a FAPE?<sup>11</sup>

### Parent's Argument

The Parent argues that the District did not address a perceived problem that was seen in the classroom. She stated that while the IEP from April 2017 reported that the Student was slapping himself on the face and legs, no one brought this to the attention of the IEP Team on February 8, 2017.

### District's Argument

The District argues that the Student's functional performance was discussed at the meeting after Mr. O'Connell found evidence of an OHI based upon ADHD, as well as the impact it had on his performance. It argues that the Parent wanted to wait to address changing his eligibility category to Multiple Disabilities until the Team had a chance to review the neuropsychological evaluation that she was having done later in February. The District insists, therefore that, the Student's functional performance was being discussed at that time.

### Discussion

I find that the IEP Team began discussing the Student's behaviors at the IEP meeting on February 8, 2017. Mr. O'Connell diagnosed the Student with an OHI due to ADHD, and noted that teachers reported that the Student often exhibited a lack of focus and could not sit still in the afternoon. He would be asked to perform jumping jacks to expend some of his energy. (S-126). While the IEP from April 2017 includes a statement that the Student occasionally would slap himself repeatedly on the cheek and legs, Ms. Sowers-Felch testified that she did not believe this was self-harming behavior, but was part and parcel of his hyperactivity and attention-getting

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<sup>11</sup> This issue is number 11 in the Prehearing Report.



behaviors. She stated that the Student is very active in school and can be distracting to himself and others. (Sowers-Felch Tr. 712.) It was her view that the Student's behavior was a way to gain attention of other students, claiming it was part of his distracting behaviors.

I find that the IEP sufficiently discussed the Student's functional performance at the IEP meeting on February 8, 2017. Therefore, the Parent's complaint on this issue lacks merit.

3. Whether the District violated the IDEA by failing to provide the Parent with an opportunity to review the Student's IEP from April 2017 until June 14, 2017.<sup>12</sup>

#### Parent's Argument

The Parent argues that she did not receive the Student's IEP from April 2017 until June 14, 2017. She states that there is no direct evidence that the District mailed it or, in the alternative, if the District sent the document on April 24, 2017, she never received it. Under either scenario, she believes that the IDEA was violated because she did not have a chance to review it until June 14, 2017, when she requested and received a copy from the District.

#### District's Argument

The District argues that the Written Notice was mailed out on April 24, 2017. It notes that under MUSER, the latest it could have been mailed out was May 16, 2017. The District argues that Ms. Sowers-Felch credibly attested to her business practices when sending out Written Notices and to her belief that she sent the Student's IEP to the Parent on April 24, 2017. The District raises the possibility that the Parent possessed it because of comments she made about it on June 13, 2017, a day before she requested a copy from Ms. Sowers-Felch.

#### Discussion

MUSER requires that an IEP be sent to the parent within 21 school days of the IEP meeting. MUSER IX.3(H) (2017). "School days" means any "day, including a partial day that children are in attendance at school for instructional purposes." MUSER II.7. In this case, the IEP could have been provided to the Parent by May 16, 2017, at the latest, based upon the

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<sup>12</sup> Noted as issue number 1 in the Prehearing Report.

District's calendar (<https://sad1.org/wp-content/uploads/2014/10/16-17-9-to-12-School-Calendar.pdf>).

There is an apparent conflict in testimony over whether the District staff sent the IEP. Ms. Sowers-Felch testified regarding her office practice in sending IEPs to parents. She stated that she prints the final document on the "date sent" to parents, listed on the IEP – in this case, April 24, 2017. She then leaves it for the administrative assistant to mail, which she said occasionally might occur the day after the date noted on the IEP. (Sowers-Felch Tr. 621-23). The Parent testified that she did not receive it until she requested it from Ms. Sowers-Felch on June 14, 2017, and picked it up at the school. (Parent's testimony). However, it is apparent that she must have received it based upon her e-mail about it to Ms. Sowers-Felch on June 13, 2107, wherein she was questioning whether it was completely filled out. (S-A-133).

In her brief, the Parent stated that, "Everyone just assumes it was mailed and even it was, my complaint is not that it didn't get mailed, it was that I didn't receive it. It could have gotten lost along the way, but the fact still stands that I didn't receive it." (Parent's brief).

I find that the District mailed the IEP. There is no evidence to contradict the testimony of Ms. Sowers-Felch, such as prior mailings not being delivered. While this is a credibility determination of Ms. Sowers-Felch's statements, the Parent acknowledged in her brief that the issue was not about whether the District did not send the IEP, it was about whether she received it. Furthermore, I find that the Parent had a copy of it as of June 13, 2017, based upon her email to Ms. Sowers-Felch about the completeness of the IEP. Based upon the lack of evidence that Ms. Sowers-Felch did not send it, I find that it was sent using the regular mailing practices of the District. I find no violation of the IDEA on this issue.

4. Whether the District failed to perform an assessment to determine the AT needs of the Student. If so, did it result in a failure to provide a FAPE?<sup>13</sup>

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<sup>13</sup> This issue is number 4 in the Prehearing Report.

### Parent's Argument

The Parent argues that the District's failure to administer an AT assessment caused a failure to provide him a FAPE. She stated she requested an AT assessment in February and again in April 2017, and was denied each time. She argues that while the IEP Team believes that AT would benefit the Student's educational experience, its refusal was based upon a wait-and-see stance. The Parent asserts that this was not helpful to the Student, especially because he never received the training as promised.

### District's Argument

The District argues that while it is required to consider whether the Student needed AT devices and services, Maine does not address AT evaluations, citing MUSER IX.3(C)(2)(e)(2017). The District argues that it has already provided the Student with AT, including the use of math calculator, text-to-speech/ speech-to-text technology on the Student's iPad, and has other District-owned online applications for his use. (S-181, 302). The District asserts that the IEP Team wanted to see how the Student used the technology in order to determine whether an assessment was warranted.

### Discussion

The IDEA requires that the IEP team consider as a "special factor" whether a child "needs assistive technology devices and services." MUSER IX.3(C)(2)(e). MUSER also discusses the scope of what the term "Assistive Technology" includes and what "assistive technology service" means. MUSER Lx (pg. 135-36) (2017). It states, that "Assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. It includes: i) The evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment; ii) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child; iii) selecting, designing, fitting, customizing, adapting, applying maintaining, repairing assistive technology devices; iv); coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; v) training or technical assistance for such child, or where appropriate, the family of such a child; and vi) training or technical assistance for professionals

(including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of the child.<sup>14</sup>

The Written Notice, dated April 10, 2017, describes the type of AT the IEP Team believed may be helpful to the Student. It notes that Lexia had been ordered for the Student. Ms. Bosse also suggested that the Student access the following on his iPad: “Text-to-Speech and Speech-to-Text”; online mainstream textbooks; and Bookshare for audiobooks. It was noted that the school technology professional, Mr. Hunter, would be available to train the Student and the parents on how to use these applications on the Student’s iPad. (S-168).

However, the Written Notice also states that Ms. Bosse did not want to pursue an AT assessment at that point in time. It stated:

Mrs. Bosse would like to see (the Student) using the technology that the district already has before having a full tech assessment, which the Team agreed upon as the closest person for such an assessment is in Portland. Even though apps are made available to students, the students need to be willing to take advantage of the materials provided.” (S-168).

Ms. Bosse elaborated on her thoughts about AT for the Student, stating that she wanted to try and see how the Student did with what the District already owned before she would agree to an AT evaluation. (Bosse Tr. 199-200). She also acknowledged that training on the use of the AT applications on iPads never happened due to end-of-year obligations on the part of the District’s technology staff. (Bosse Tr. 200).

I find that the refusal to conduct an AT assessment was a procedural violation significant enough to deny the Student a FAPE. I find that the Student had not achieved any meaningful

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<sup>14</sup> MUSER also states that “If the IEP Team determines that an assistive technology device or service is necessary for the provision of a FAPE and specifies the assistive technology device or service within the child’s IEP, the school administrative unit is responsible for ensuring the provision of the assistive technology device or service at no cost to the parents. On a case-by-case basis the use of school purchased assistive technology devices in a student’s home or in other settings is required if the child’s IEP Team determines that the child needs access to those devices in order to receive a FAPE. An Assistive Technology Professional (ATP) must meet the national RESNA ATP Certification and keep the certification current so that the individual is on the Certification Directory. A provider who is already qualified to provide services and consultation on the use of assistive technology in the provider’s practice is not required to also have this National Certification. (Such as OT, PT, or Speech). MUSER IX (p. 136).

progress in his reading and mathematics since first grade due to his SLD and OHI. An AT assessment would have been individualized and offered recommendations individually tailored to the Student's needs going forward into 8<sup>th</sup> grade and beyond. While the District offered him opportunities to use its iPad applications already offered to all students, the District's wait-and-see position effectively delayed and reduced the time he could have been making educational progress. Therefore, I find that the statutory threshold regarding the significance of this procedural violations and find that the District failed to provide the Student with a FAPE as of February 8, 2017.

5. Whether the District failed to provide the Parent with the Student's general curriculum upon her request on April 10, 2017, in violation of the IDEA.<sup>15</sup>

#### Parent's Argument

The Parent argues that she requested access to the Student's general curriculum so he could see what his grade-level peers were working on. She asserts that the District denied both physical books as well as curriculum materials in audiobook form. She states that while the District agreed to provide the materials electronically, it did not follow through with sending them to her until the due process proceeding began. She asserts that what was sent was also incomplete.

#### District's Argument

The District argues that the Parent never made a request at the IEP meeting on April 10, 2017 for copies of the Student's curriculum. It also states that, even if she did, MUSER does not obligate it to provide the general curriculum materials to the Parent. It notes, however, that it has provided the Parent with copies of the Student's curriculum during the 2017-2018 school year so she can work with him at home during the due process proceedings. The District also asserts that the Student was already accessing the general curriculum while he was attending school, either in regular education for social studies and science, with support, or in his special education in math and ELA.

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<sup>15</sup> This issue was noted as number 16 in the Prehearing Report.

## Discussion

A review of the Written Notice, dated April 10, 2017, indicates that the Parent requested that Spire books be sent home so that the Student could practice reading to her. She also requested that the Student have mainstream textbooks on his iPad so that he could listen to them. (S-168). In response Ms. Bosse stated that mainstream textbooks could be accessed online as long as teachers provided access codes, and that the District's technology expert would be available to meet with the Parents and Student to explain how to access and use certain applications on his iPad. (S-168). The Written Notice did not indicate whether the District approved or denied the Parent's request for general curriculum material.

The District is correct that nothing in MUSER or the IDEA requires that a school district provide curricula to parents either in hard copy or electronic form. However, the District has offered grade-level materials to all students on their iPads, allowing them to have access to general curriculum materials outside of school. While not obligated to do so, the District also has provided the Parent with the Student's workbooks and guides in order for him to be able to move through the program while he is at home during the due process proceedings. That was an action taken by the District over and above their obligation in order to alleviate any regression the Student may have experienced based upon the decision of the Parent to remove him from the school setting.

Therefore, I find no violation of the IDEA by not providing the Parent with general curriculum materials.

## **IEP from April 2016 and 2017**

The remaining allegations raise substantive issues about the Student's IEP that was implemented during the 2016-2017 school year. This included the IEP dated April 14, 2016 and April 11, 2017.

1. Whether the IEP included a reasonable description of the Student's Present Level of Academic Performance<sup>16</sup>

### Parent's Argument

The Parent argues that the IEP from April 11, 2017, does not accurately identify the Student's "Present Level of Academic Performance" in section 4.A. (S-175). She states that the IEP inaccurately states that he was performing at a second grade level in ELA with small group instruction and accommodations and at a third grade level in math calculation and reasoning skills. She explains that scores on these standardized assessments place the Student at a kindergarten to first grade reading level, citing the NWEA, WJ-IV, and BRIGANCE assessments. She also points to the testimony of Candice Junkins, who administered the WJ-IV, and who stated that she believed the Student was reading at a beginning kindergarten level. (Junkins Tr. 520).

The Parent defines two problems with the District's assessment that the Student was reading at a second grade level. She first claims that the IEPs do not identify the standards used in its assessment of a second grade reading level. Secondly, the Parent asserts that, even if the CRP Level system had been identified, the District inaccurately reported that the Student had completed Level A. She points to Ms. Sowers-Felch's acknowledgement that the Student never finished Level A at the end of 2015-2016 school year, and her admission that several of the mastery tests were graded incorrectly or had not completed. The Parent cites Ms. Sowers-Felch's decision to place the Student into Level B2, skipping over Level B1, because all the other students were being moved along into Level B2 and she had no additional educational technicians to help her with the Student on an individual basis. (Sowers-Felch Tr. 795). She points out that Ms. Sowers-Felch knew that the Student was unable to process Level B2 work and that at some point after the IEP Team meeting on February 8, 2017, she began providing one-on-one instruction to him at Level B1. It was with this direct one-on-one instruction that he began to make progress. The Parent argues that for over six months, the Student was being taught at a level that was too advanced for him.

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<sup>16</sup> This issue is raised in the Prehearing Report as issue 3(c) and issue 9.

The Parent argues, therefore, that the District misidentified the Student as reading at a second grade level in the IEP when standardized assessment results were placing him either at kindergarten or first grade level performance by April 2017. She urges that by inaccurately identifying his present level of performance, all other aspects of the Student's instructional goals were inappropriate because they were based upon an inaccurate level of present performance. The Parent claims, therefore, that the IEP was not calculated to provide the student with a FAPE.

#### District's Argument

The District acknowledges that it used the scoring from the CRP to determine the Student's present level of academic performance. (District's brief, p. 31, citing Donahue Tr. 611-12; Sowers-Felch Tr. 635-36, 666-67, 674, 739; Bosse Tr. 188-90, 213-14, 224-250). However, it also points out that standardized test scores were also reported in the body of the IEPs. It acknowledges that based upon the use of the CRP methodology, the Student was working on second grade level material. It asserts that there was no evidence presented at the hearing to discount the accuracy of the CRP, which indicates that students successfully performing within the B1 Level are performing at a second grade level and when completed, the student is reading at about beginning third grade level. (S-C-271; Donahue Tr. 576; Sowers-Felch Tr. 635-38, 666-67; Bosse Tr. 224-26).

The District argues that it was appropriate to report performance on the CRP in order to write educational goals based on the reading program actually being used, rather than on goals based on standard scores from evaluations disconnected from the education program being used. It notes that the goals are aligned to the Common Core State Standards, and therefore satisfied Maine's requirement to use these standards. It asserts that using the CRP rubric allows the District to report quarterly on the Student's IEP goals. It suggests that if the IEP Team were to write goals based upon standard assessment performance instruments like the WJ, it would be impossible to report on progress quarterly, since any such standardized test cannot be given more often than annually. It states that it simply makes sense to write goals in the areas being addressed by the CRP. It urges therefore, that there is no IDEA violation by using the Student's present level of performance in the CRP.



## Discussion

MUSER outlines how a student's IEP is to be designed. MUSER IX. All IEP goals must be based on a student's strengths, weaknesses, and needs. IEP goals must also be based on the student's present level of academic and functional performance ("PLAFP"). (*Policy on Standards-Based IEP Goals*, Maine Department of Education<sup>17</sup>). A student's PLAFP must describe a student's academic achievement relative to his grade-level standards, given supplemental aids and services, where appropriate, and identify standards the student has successfully met if the student is not meeting grade-level standards. (MSUER IX.3.A(a)(a)(i, iii); See also *State IEP Procedural Manual*, Maine Department of Education, 12/2014<sup>18</sup>).

The Student's IEP from 2014 indicated that he was performing at a 1.6 grade level in Basic Reading Skills, K.0 grade level in Reading Fluency, 1.1 grade level in Reading Comprehension, 2.4 grade level in Math Calculation, 2.7 in Math Reasoning, 1.8 grade level in Written Expression, 1.5 grade level in Spelling, and 4.2 grade level in Academic Knowledge. (S-F-104). By April 15, 2015, the Student's IEP reported that he was performing at a late 1<sup>st</sup> grade / beginning second grade level in ELA with small group instruction and accommodations. These were based upon standardized assessment results.

By April 2016, the Student's IEP reported that he was performing at a "late" second grade level in ELA. However, his standardized assessments indicated that his literacy skills were at the kindergarten to first grade levels. In the fall of 2016, the Student started 6<sup>th</sup> grade at [REDACTED] and was placed in Level A of the CRP, considered a first grade reading level. His triennial standardized evaluations had been performed during the spring of 2017 and were reported in the IEP from April 2017 under Section 4. They include the WISC-V; WISC IV-I; WJ-IV; ADDES-4; Comprehensive Test of Phonological Processing and the Test of Orthographic Competence; and CELF-5. The record is clear that results from these assessments placed the Student at the kindergarten to 1<sup>st</sup> grade level in ELA.

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<sup>17</sup> <https://www1.maine.gov/doe/proficiency/standards/policyonstandards-basedIEPgoals.pdf>

<sup>18</sup> <http://maine.gov/doe/specialed/forms/iepprocedmanual5214.pdf>

The amended IEP from February 2017 and the annual IEP from April 2017 reported again that the Student was performing at a second grade level in ELA and that he was making “satisfactory” progress on his IEP goals. Again, assessments results from December 2016 through January 2017, included in the Written Notice, reported that the Student continued to perform at a kindergarten to first grade level in ELA. (O’Connell and Junkins assessments in Written Notice. (S-125).

The issue is whether there is a fatal flaw in the IEP by characterizing the Student’s present level of academic performance for ELA at the second grade level in the Student’s IEP from April 2016 and 2017. There is merit to the Parent’s claim that the IEP is confusing in this respect. It is only natural to wonder why the IEP would characterize the Student’s literacy skills as being at a second grade level when all other standardized assessment results placed him below the second grade level.

The District’s explanation clears up some of the confusion. It was using results from the CRP mastery tests that correlate its programming levels with grade levels. Under the CRP rubric, a student should be reading at a second grade level after completing Level A – Word-Attach Basics and at a third grade level after completing Level B – Decoding Strategies. (S-C-271). The question is whether it was proper for the District to gauge the Student’s PLAFP using this rubric in the first place.

PLAFP is a measure of a student’s academic achievement relative to a student’s grade-level *standards*, given supplemental aids and services where appropriate, and identifies standards the student has successfully met in cases where the student is not meeting grade-level standards. The “standards” are based upon the most recent evaluations, as well as other information about the student’s performance. (*Maine State IEP Procedural Manual*, p. 10).

I find that the District did not properly identify the standards used in reporting the Student’s PLAFP in ELA. The District did not identify that it was using the CRP rubric as the sole measuring tool to report his grade-level progress and not standardized evaluations that were cited in the IEP, including the NWEA, WJ, and WISC. All of the results from these assessments

indicated that the Student was reading at a kindergarten to first grade level. While a school district is not obligated to identify the methodology it uses in delivering special education and related services, it must identify the standards being used to characterize a Student's PLAFP. A person reading the Student's IEP would not know that that PLAFP standards were based on the CRP rubric.

Even if the District had identified the standard being used to report on the Student's PLAFP, there was a risk that the CRP rubric could be used improperly, since it is not a standardized assessment. For example, it was established at the hearing that by the end of 6<sup>th</sup> grade, the Student had not completed Level A in CRP. He had failed seven of the 12 mastery tests. However, his teacher placed him into Level B2 at the beginning of 7<sup>th</sup> grade because all the other students in her special education classroom were also being placed at Level B2, and because she did not have additional educational technicians to provide one-on-one instruction to the Student, despite her request for additional staff. (Sowers-Felch Tr.). Based upon these circumstances, it more fully explains why the Student's IEP characterized his present level of academic performance in ELA as being at the second grade level. But his PLAFP, if based upon the Spring 2017 NWEA and BRIGANCE assessments, showed almost no progress in his literacy skills. It is troubling that the lack of progress during fall of 2016 and winter of 2017 were not reported in the Written Notice or the IEP. It appears that he either stalled in making progress or actually regressed based upon Ms. Sowers-Felch decision to pull him back to Level B1 in February 2017.

Based upon the above, I find that the District violated MUSER by using the CRP rubric to report on the Student's PLAFP in his IEP. While the CRP itself may have been an appropriate methodology, it should not have be the sole source of information on which to base his PLAFP.

I also find that the failure to accurately document the Student's PLAFP between the beginning of the 2016-2017 school year and February 8, 2017 was evidence that he was not being provided with a FAPE during that time frame. Ms. Sowers-Felch admitted as much in her testimony when she acknowledged that Level A test results were either inaccurate or missing; that she placed him in Level B2 in the fall of 2016, two levels higher than expected in the CRP,

and that she did so due to the lack of staff and administrative support. Also, by reporting in the IEP that he was making “satisfactory” progress on his IEP goals in November 2016, misrepresented the actual lack of progress he was making at that time. I find therefore, that the IEP was not appropriately implemented during this time frame and prevented the Student from receiving a FAPE.

2. Whether the District inaccurately identified the Student’s strengths and weaknesses in the IEP.<sup>19</sup>

#### Parent’s Argument

The Parent argues that if the IEP from April 2017 did not accurately identify the Student’s reading level, then the description of his strengths and weaknesses must also be inaccurate. She cites apparent inconsistencies in the description of the Student’s challenges identifying suffixes in one area of the IEP and then notes identification of suffixes as a strength in another. She also cites inconsistent statements about the Student’s strengths and weaknesses of his short-term and long-term memory.

#### District’s Argument

The District argues that the IEP accurately and reasonably identified the Student’s strengths and weaknesses in the Student’s IEP from April 2017. The District focuses attention on the appropriateness of gauging the Student’s performance on his achievements within the CRP and on other measures reflected in standardized assessments.

#### Discussion

I find that the description of the Student’s strengths and weaknesses in the IEP from April 2017 were not written with sufficient clarity to be able to understand the Student’s strengths and weaknesses. There is evidence to suggest his strengths and weaknesses with respect to literacy were other than what was reported by standardized assessments and other evaluations. For example, the IEP states that the Student’s strengths were within his comprehension knowledge, that he remembered what had been read to him, and that he could recall such knowledge at a

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<sup>19</sup> This issue is number 8 in the Prehearing Report.

later date. It further stated that he could use the information he remembered in answering comprehension questions. (S-174). However, Mr. O’Connell’s evaluation reported that the Student showed “significant age-based achievement deficits in the areas of abstract thought, working memory, and comprehension knowledge. Profound psychological processing deficits were also evident in the areas of auditory working memory.” (S-107). Other assessments indicated significant deficits in short and long term memory. (Shea, Junkins, Sowers-Felch Tr., and assessments). It is unclear why the IEP identifies the Student’s comprehension knowledge as a strength when, in fact, there were significant deficits in comprehension knowledge found by Mr. O’Connell. Also, it is unknown why the IEP stated that the Student could recall everything that was read to him when Mr. O’Connell found profound deficits in working memory and auditory memory. Also, the Written Notice reporting on the IEP Team meeting on April 10, 2017 indicated that the Student’s weaknesses were in the areas of following directions, recalling sentences, semantic relationships, receptive language, and language memory. (S-168). Again, these weaknesses are stated as strengths elsewhere in the IEP. I find therefore, that the description of the Student’s strengths in the IEP from April 2017 is inaccurate and must be corrected. A discussion of corrective actions to be taken is discussed below.

3. Whether the District incorrectly defined appropriate goals in the Student’s IEP.<sup>20</sup>

Parent’s Argument

The Parent argues that if the Student’s PLAFP is inaccurate, the goals derived from it must be inappropriate. She states that if the goal is to read at a third grade level when, in fact, standardized assessments have him still reading at a first grade level, then the IEP goals must be found inappropriate.

The Parent also suggests that the IEP is inappropriate because it does not have a goal to improve his working memory, something that Ms. Sowers-Felch believed should be in the IEP.

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<sup>20</sup> This issue is noted at number 10 in the Prehearing Report.

## District's Argument

The District addressed this issue above, based upon the theory that it was appropriate to write IEP goals based on the CRP rather than goals based on standard scores from evaluations disconnected from the educational program being used.

## Discussion

Merely having an improper description of the Student's PLAFP is meaningless unless it impacted what the IEP Team decided with respect to his goals and related services..

First, the Parent has not claimed that the CRP methodology used by the District to educate the Student in ELA was inappropriate. It was the reading program recommended to the District by reading expert Candice Bray for students with an LD profile, including dyslexia. (Bosse Tr. 430). The District placed the Student in the CRP, Level A, at the beginning of the 2015-2016 school year when the Student entered sixth grade at [REDACTED]. His standardized test scores at that time indicated he was reading at late kindergarten to first grade level. Level A in the CRP correlates with a first grade reading level, according to its manual. The Parent does not dispute that the Student made progress up through the end of sixth grade.

It is apparent, however, that by the end of the sixth grade, the Student did not complete 13 lessons in Level A and did not pass the Mastery Tests associated with Level A. (Sowers-Felch Tr. 784-794, S-C-298). Despite this, Ms. Sowers-Felch placed the Student in Level B2, skipping over Level B1. It therefore should not have been a surprise that during the fall of the 2016-2017 school year, the Student had intense difficulty with the CRP. By January 2017, Ms. Sowers-Felch expressed her dismay with the Parent and complained to the District's administration that she needed more help in the resource room, but to no avail. In her testimony, she acknowledged that she should not have placed the Student at Level B2, but felt she had no choice because of lack of staff and alternate programming available to offer the Student.

It was sometime in February 2017 when Ms. Sowers-Felch provided one-on-one instruction to the Student using Level B1 materials. His progress was almost immediate. When

Ms. Sowers-Felch reported to the IEP Team on April 10, 2017 that the Student was showing progress after she started providing one-to-one instruction, the IEP Team agreed to continue direct instruction going forward. This was a change from receiving instruction in small groups. The Student's progress in ELA was notable in his NWEA scores between the spring of 2016 and the spring of 2017. His NWEA scores for reading went from 155 to 164, a 9-point improvement, and the largest one-time improvement from the fall of 2015. (S-213).

The IEP goals included in the IEP from April 2017 were based upon the CCSS used by Maine and are aligned with the Maine Learning Results. The methodology used to achieve these goals is the CRP. There is no evidence that the goals themselves are inappropriate given the progress the Student made through April 10, 2017. While he had a significant setback between September and February, he was able to make progress through Level B1. The goals specifically target CCSS in the area of need, which will be addressed in Levels B1 and B2. By the end of April 2018, the goal is for him to complete Level B2. Whether that is a third grade level under the CRP rubric is almost irrelevant. What is important is the skill development. If the CRP is properly delivered, it would be expected that he can make progress, which he already has, and such progress will be confirmed using standardized assessments, such as the NWEA and BRIGANCE, or an AA.

I find that while the Student's progress stalled between the fall of 2016 and February 2017 due to the improper delivery of the CRP, he made reasonable progress from February through June 13, 2017. Once the Student was making progress in Level B1, it was reasonable to design goals going forward. I find that it was reasonable to expect that he could reach a third grade reading level by the end of April 2018, upon the completion of Level B2. Therefore, I find that the goals in the Student's IEP were appropriate.

The Parent raised the question in her written argument of not having a goal around the Student's working memory. She argues that when asked, Ms. Sowers-Felch stated that there should be one in the Student's IEP.

While this is a reasonable question to raise, it was not initially discussed as an issue in the Parent's Hearing Request. The stated issue is around the goals that the IEP created and not about those that the Team should have discussed. The District had no notice of this issue and it was not raised in the Prehearing Conference. Therefore, there will be no ruling on this new issue. However, I do recommend that the IEP Team discuss it.

#### 4. Identification of a Print Disability<sup>21</sup>

##### Parent's argument

The Parent argues, without citation, that the Student has a print disability because he is diagnosed with dyslexia. She asserts that because of this diagnosis, he is eligible for accessible instruction materials ("AIM"), including instructional materials in audiobook form.

##### District's Argument

The District argues that the Student is not a student with a print disability. It asserts this disability designation is reserved for those students who are blind or have a visual impairment. The District cites MUSER IX.3.(C)(2)(c), and 34 C.F.R. § 300.324(a)(2)(iii), which states that in developing an IEP, the IEP team must consider special factors such as blindness or visual impairment in order to consider providing instruction in Braille and the use of Braille. It notes that Maine's IEP form, Section 3, specifically cites MUSER IX.3.(C)(2)(c), which asks whether a child has a print disability that requires AIM to access the curriculum. It asserts that, while the question in Section 3 may be clumsily written, the citation to MUSER makes it clear that the disability is limited to blindness and visual impairment. The District argues that a diagnosis of an LD does not qualify for AIM, which was properly indicated as such on the IEP from April 2017.

##### Discussion

MUSER IX.3(C)(1) and (2)(c) state the following, in relevant part:

(1) In general, -- In developing each child's IEP, the IEP Team, subject to subparagraph (3), must consider: (a) the strengths of the child; (b) The concerns of the parents for enhancing the education of their child; (c) The results of the initial evaluation or most recent evaluation of the child; and (d) The academic, developmental, and functional needs of the child.

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<sup>21</sup> This issue is number 3(a) in the Prehearing Report.



(2) Consideration of Special Factors..(c) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child’s reading and writing media (including an evaluation of the child’s future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child...

Maine’s IEP form, Section 3 – Consideration – Including Special Factors, subsection D, asks “Does the child have a print disability that requires accessible instruction materials (AIM) to access the curriculum? (MUSER IX.3.C.(2)(c). If yes, what type of accessible instructional material (AIM) does the student require? If yes, where is this addressed in the IEP?” (S-172).

The *Maine State IEP Procedural Manual* discusses each part of an IEP and includes the type of information that is required. It states that under Section 3 - Considerations – Including Special Factors, subsection D, “For all children, determine if the child has a print disability (an individual who experiences barriers to accessing standard printed instructional materials in non-specialized formats due to blindness, visual disability, physical limitations, organic dysfunction or dyslexia) that requires AIM to access the curriculum. For Example, a child with a Specific Learning Disability may be determined to have a print disability.” (*Maine State IEP Procedural Manual*, p. 6 (2012).

The federal government requires that each state adopt the National Instructional Materials Accessibility Standards (“NIMAS”) for the purpose of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner. 34. C.F.R. § 300.172(a)(1). It further explains that states are not relieved of the requirement to ensure that children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind, or other persons with print disabilities or who need materials that are not produced from NIMAS files, receive those instructional materials in a timely manner. 34. C.F.R. § 300.172(a)(3). See also 34 C.F.R. § 300.210(3).

While it is apparent that Maine’s IEP form does not fully define who may be eligible for receiving AIM, this does not waive the District’s obligation to follow federal regulations. Clearly, Maine acknowledges that the federal regulations not only include those students who are blind, but also those students with a disability that impacts their use of regular classroom

materials. (*Maine State IEP Procedural Manual, supra.*) I find that the District is required to examine this aspect of the Student's disability to determine whether he is eligible for AIM materials. While he is not blind, he may need AIM as a student with an LD in the form of dyslexia. Maine considers that students with this form of LD may qualify as having a form of print disability and be eligible to receive AIM. It is the responsibility of the IEP Team to make this decision. Therefore, I find that the District failed to consider whether the Student qualified as a student with a print disability, in violation of the IDEA.

#### 5. Inclusion of objectives in the IEP<sup>22</sup>

##### Parent's Argument

The Parent argues that while the District has remedied the failure to include objectives in the IEP, it failed to include objectives in the area of functional performance in the IEP from April 2017. Since the Student is taking the MSAA, the District is required to have objectives in all areas.

##### District's Argument

The District acknowledged that it failed to include objectives in the IEP, but has since drafted them and included them in the IEP, with the agreement of the Father. It noted that it was due to the Parent's participation in the IEP process that the mistake was raised and corrected. The District did not address the lack of objectives for the Student's goal in the functional performance category.

##### Discussion

IEPs for students taking an AA must include a "description of benchmarks or short-term objectives." MUSER IX.3.A(A)(1)(a)(iii); ad 34 C.F.R. § 300.320(a)(2)(ii). An AA is based on grade-level academic achievement standards and measures student achievement against typical grade-level achievement standards. 20 USC Sec. 6311(b)(2)(D); and 34 CFR 200.13 (a)(2)(i).

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<sup>22</sup> This issue is number 3(b) in the Prehearing Report.

While the District acknowledges that it failed to draft objectives for the Student's IEP goals when it was determined that he should take an AA, it corrected this oversight shortly thereafter. However, it is apparent that no objective was drafted for the functional goal that was included in his IEP.

While objectives are necessary when students are taking alternate academic assessments, and objectives are based upon academic progress, there is no comparable assessment to be taken to measure functional performance. However, that does not mean that Maine's IEP form is inaccurate when it includes an area to indicate whether a student needs objectives for his functional performance goals. Therefore, I find that since the Student is taking the AA, an objective is needed for his functional goal. While this problem needs to be corrected within the IEP, I do not find it to be a fatal flaw of the entire IEP or that the Student would be unable to receive a FAPE without it.

6. Reference to other measures, such as BRIGANCE and NWEA in the IEP<sup>23</sup>

#### Parent's argument

The Parent raised this issue in her Hearing Request, but did not argue it during the due process proceeding or in her brief.

#### District's Argument

The District argues that most of the results from various standardized assessments were included in the IEP. It asserts that there is no violation of the IDEA or MUSER if one or some results were not included. It urges that those that were included gave a full view of the Student's educational performance, both academic and functional, and that therefore, there is no violation.

#### Discussion

The IEP from April 2017 includes most, if not all, of the results from the various academic and functional assessments tools given to the Student. While some results are referenced in different parts of the IEP, this is of no import. I find no violation on this issue.

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<sup>23</sup> This issue is number 3(d) in the Prehearing Report.

7. Whether the IEP included appropriate goals for functional performance.<sup>24</sup>

#### Parent's Argument

The Parent argues that the District unilaterally included a goal in the IEP from April 2017 for the Student's functional performance without input from the entire IEP Team. She references the statement in the IEP that described the Student's behavior in slapping himself, which she stated had not been discussed at the IEP meeting.

#### District's Argument

The District argues that based upon the diagnosis of OHI in February 2017, it was necessary to include a functional performance goal in the IEP from April 2017. The District argues that even if it was added outside of the IEP process, the inclusion of it does not make the IEP inappropriate or interfere with the provision of a FAPE to the Student.

#### Discussion

The issue is whether the goal for functional performance in the IEP from April 2017 was appropriate. IEP goals must be measurable and designed to enable the student to be involved in and make progress in the general curriculum, or to meet other educational needs that result from the student's disability. MUSER IX.3(A)(1)(b)(i)-(ii).

The Student has consistently been described as being hyperactive in school, which has interfered with his educational performance and that of other students in the classroom. He was eventually diagnosed with ADHD due to these behaviors and was prescribed medication by his physician. The IEP Team discussed Mr. O'Connell's psychological assessment at the February IEP meeting, wherein the Team agreed to amend the IEP to include the OHI diagnosis.

The functional goal in the IEP from April 2017 stated:

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<sup>24</sup> Noted as issues 5 and 10 in the Prehearing Report.

By April 2018, given direction to move to another spot in the classroom, (the Student) will participate in activity to rid himself of pent up energy in 4 out of 5 trials as necessary. (S-179, D-300).

I find that the IEP functional goal was appropriate. It was based upon the information provided by assessments and teacher input. It provides some measure of expected progress by April 2018. Even if the goal could have been more precise, it did not result in a failure to provide a FAPE to the Student. The progress report from June 2017 indicates that the Student had become more self-aware of his needs to move and release his pent-up energy. Therefore, I find no violation of the IDEA with respect to the appropriateness of this functional goal.

8. Whether the District failed to appropriately identify the Student's least restrictive environment in the IEP.<sup>25</sup>

#### Parent's Argument

The Parent argues that in the Student's IEP from April 2017, the District inaccurately calculated the amount of time that the Student spends with his nondisabled peers. She states that it was less than 49% because he did not spend time on the bus, which was included in the calculation of the school day. She also asserts that there was not an accurate gauge of the length of a school day based upon the inconsistent testimony of Ms. Bosse and Ms. Sowers-Felch. Due to this, the Parent argues that the IEP from April 2017 does not reflect the proper percentage of time that the Student spends with his nondisabled peers and therefore interfered with the provision of the Student's FAPE.

#### District's argument

The District argues that the IEP clearly describes the amount of time the Student spends with his nondisabled peers. It cites the narrative in the IEP and asserts that the percentage noted in the IEP is, if not completely accurate, a close approximation of an accurate calculation. The District argues that even if it is not, the narrative is the guiding language and is clear. Therefore, it asserts that there was no procedural violation on this issue.

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<sup>25</sup> As noted in number 14 of the Prehearing Report.

## Discussion

An IEP form includes a percentage that represents the amount of time that a student spends with his nondisabled peers. It also includes a space for the narrative to explain the extent to which a student does not participate with non-disabled peers in the regular class and in extracurricular and other nonacademic activities. (S-183, 304).

In this case, the District calculated that the Student spent 49% percent of his time with his nondisabled peers. This was based upon a 420-minute school day, beginning at 8:00 a.m. and ending at 3:00 p.m. (Bosse Tr. 455-56). The narrative indicated that the Student needed four hours of specialized instruction in math, ELA, science and social studies due to his qualifying disabilities and their impact on his learning environment. (S-304). It stated that the Student would be with his nondisabled peers for the balance of the time. (*Id.*). The IEP indicated in section 6 that the Student would receive specially designed instruction four times a day for 54 minutes. (S-303). This is interpreted as receiving his four core classes in 54-minute segments.

I find that the school day for the Student runs from 8:00 a.m. to 3:00 p.m. This time period includes not only class time, but nonacademic time as well, such as arriving at school, transitioning to classes in the hallways, lunch, recess, and after school transitions. As such, this totals to 420 minutes per day. The Student is with his disabled peers for 216 minutes of the day. The balance, 204 minutes, is 49% of his day. Therefore, I find that the District correctly calculated the percentage of the time he is with his nondisabled peers.

The Parent's argument that the percentage is something less than 49% lacks merit. There is nothing in the Student's IEP about transportation or the fact that she may drive the Student to school, which may reduce the amount of time that he is with his nondisabled peers. It was the Parent's choice to drive him to school, and therefore reduce the amount of time he can spend with his nondisabled peers. Even if he was taking the bus, that amount of time would increase his total school day to include nonacademic time. However, for purposes of this issue, I find that the 420-minute school day is accurate. Therefore, I do not find a violation on this issue.

9. Whether the District improperly included the alternate assessment (“AA”) in the IEP, and if so, did it result in a failure to provide the Student with a FAPE.<sup>26</sup>

#### Parent’s Argument

The Parent argues that the Student should not be taking the MSAA because she does not believe he qualifies for it. She asserts that he does not meet the standard under Maine’s Alternate Assessment Participation Guidelines, which state that a student must be significantly cognitively impaired with permanent adaptive abilities. She interpreted this criteria to apply to a student who is unable to live on his own and has difficulty in everyday functional activities. She asserts that the Student does not exhibit these characteristics, other than the inability to read. She argues that if he is reading at a second grade level, as the District claims, then this suggests that he has sufficient reading skills to participate in the regular assessment with accommodations. She asserts that low reading ability is not one of the criteria to be used when deciding whether to have a student take an AA.

The Parent also alleges that she was unaware that the IEP Team was considering the use of an AA until she received a letter in the mail from the District informing her that the IEP had been amended to include the AA. She discovered thereafter that the Father had given permission to Ms. Sowers-Felch over the phone to amend the IEP to include it.

The Parent argues that this was a violation of her rights to participate in the IEP process to determine whether the Student should participate in the MSAA.

#### District’s Argument

The District argues initially that the hearing officer lacks jurisdiction to determine whether the District should have considered the Student eligible for the MSAA. It asserts that the MSAA is a creature of the Every Student Succeeds Act (“ESSA”), and not the IDEA, and therefore cannot be raised as a claim to be decided in a due process hearing under the auspices of

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<sup>26</sup> The parties agreed at the hearing that issue number 13 of the Prehearing Report should be restated to this wording. (Tr. 228).

the IDEA's due process hearing procedures. It also asserts that whether the Student takes the MSAA does not implicate the provision of a FAPE.

In the alternative, the District argues that the IEP Team made a reasonable judgment that the Student could be found to be a child with the "most significant cognitive disabilities" given his cognitive measures at the 1<sup>st</sup> percentile range. It asserts that it is not mandated to use MSAA in considering whether a student is eligible for the MSAA. It notes that the ESSA specifically provides that it is the IEP Team that determines when a student will participate in the MSAA, citing 20 U.S.C. § 6311(B)(1)(B), (D)(ii)(I),(E). It therefore argues that there is no IDEA violation in this regard.

### Discussion

Federal and State law requires that all students be assessed in grades 3-8 and high school in math and ELA, and in grades 5, 8, and high school in science. Options for taking these assessments include various AAs for individual students who qualify. In Maine, qualified students are eligible to take an AA in all content areas. Maine's current AAs include the MEA Alternate Mathematics and English Language Arts/Literacy and the MEA Alternate Science. (P-783). The IDEA does not include a standard for determining eligibility for taking an AA. Rather, standards for this determination are found in the ESSA. It also requires states to develop and implement guidelines for AA. In general, the use of AA should be limited to "students with the most significant cognitive disabilities." 20 U.S.C. § 6311(b)(1)(B),(E). It also requires that the determination of whether a student is eligible to take an AA is made by the IEP team. 20 U.S.C. § 6311(b)(2)(D)(ii)(I). MUSER reflects this procedural requirement and requires that an IEP include a statement of why a student cannot participate in regular assessments and identify the particular AA selected for the student. MUSER IX.3(A)(1)(a)(iii), (f)(ii).

A hearing officer's jurisdiction in IDEA matters is limited to resolving disputes relating to a proposal to initiate or change the identification, evaluation, educational placement, or the provision of a FAPE of a child three to twenty years old.<sup>27</sup> MUSER XVI. 5(A)(1). Whether a student is eligible to take an AA is not an issue to be decided under the IDEA or under MUSER.

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<sup>27</sup> The hearing officer may also determine the placement, or provision of appropriate services to a child birth to two years old .



Therefore, I find that I do not have jurisdiction to determine whether the Student was eligible to take an AA under the ESSA.

However, I find that I do have jurisdiction to determine whether the IEP Team failed to include the Parent in determining whether the Student qualified for the AA, since an IDEA violation can occur if parents are not properly included in the decision-making process of designing or amending an IEP. If significant enough, such a violation could lead to a failure to provide a student with a FAPE. MUSER XVI. 15(A)(2).

I find that there was a procedural violation by not including the Parent in the initial decision-making process of determining whether the Student was eligible to take the AA in March 2017. The IDEA clearly and unequivocally demands that a school district make every attempt to persuade parents to participate in the IEP process. C.F.R. § 300. 321 and 322, *et seq.*, MUSER VI.2(H)(1),(2),(3),(4), (I). (“Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate.”). If a school district is unable to convince the parent that they should attend, it must keep a record of its attempts to arrange a mutually agreed upon time and place, including detailed records of telephone calls or attempted call; copies of correspondence; and visits made to the parent’s home or place of employment. MUSER VI.2(H)(4).

The Parent in this case was not made aware that the IEP Team was considering amending the Student’s IEP to include the use of the MSAA. It is also apparent from the record that the only team members making this decision were the Student’s case manager, Ms. Sowers-Felch, and the Father, by a telephone call. (S-152, Sowers-Felch Tr. at 733-34). There is no record of an Advanced Written Notice of an IEP meeting or of the participation by any other IEP Team members in this decision. The first time the Parent was notified about this determination was in a letter she received informing her that the Student’s IEP had been amended to include the MSAA.

However, the IEP Team revisited the issue in the IEP Meeting on April 10, 2017. There was discussion about whether the Student should take the AA, if he should take just the one for ELA or the one that includes both math and ELA. Ultimately the IEP Team concluded that he should take the MSAA based upon the District's belief that the Student's severe cognitive ability made him eligible for it. Based upon on this robust discussion, which included the Mother's participation, I find that the District remedied the procedural violation on this issue and further remedy is required.

10. Whether the District incorrectly assessed the Student's progress on the measurable goals indicated in his IEP.<sup>28</sup>

#### Parent's Argument

The Parent argues that she rarely received progress reports on the Student's IEP goals and it was never discussed in IEP meetings or at parent-teacher meetings.

#### District's Argument

The District argues this point by assuming that the Parent is complaining about how the IEP Team established goals through his progress in the CRP. It asserts that there was no violation of the IDEA in reporting the Student's progress using the CRP Level system. It asserts that because there was never any opposition by the Parent to using the CRP, the Level system for gauging his success was appropriate. It points out that there is no evidence in the record to discount the accuracy of the CRP description. It further states that if Ms. Jarmuz-Smith had doubted the accuracy of the program, she would have discussed it in her evaluation.

#### Discussion

The Parent failed to provide evidence to make any findings regarding the accuracy of the student's progress on his measurable goals. Her argument bears little weight in this regard. Rather, she appears to be complaining more about an alleged procedural violation wherein she believes that she had not been provided with information about the Student's progress over a

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<sup>28</sup> This is number 7 in the Prehearing Report.

period of years. I find that this is unresponsive to the issue. I therefore, find that no violation on this issue.

11. Whether the Student's IEP was implemented with respect to the provision of certain accommodations, including an iPad and specialized pen.<sup>29</sup>

### Parent's Argument

The Parent argues that two accommodations in particular were not implemented during the school year. She discussed the provision of a "specialized reader pen" and applications for the Student's iPad that were not downloaded for him. She also argued that there was no technology assistance provided to the Student to help him learn how to use the applications, specifically regarding the use of text-to-speech technology or downloading the general curriculum.

### District's Argument

The District argues that all accommodations in the Student's IEP were provided to him while he was attending school. It asserts that while the IEP includes many accommodations, it does not include the use of a specialized pen, which was requested during the due process hearing. The District states that while the Student could be provided more help with his iPad, the Parent unilaterally took him out of school after she filed her due process complaint. Therefore, it believes that it does not have an obligation to provide the Student with any additional services.

### Discussion

The District has a responsibility to implement a student's IEP. A failure to implement a material portion of the IEP is a violation of the IDEA. *Ms. M. v. Falmouth Sch. Dep't.*, 67 IDELR 265 (D. Me. 2016); reversed on other grounds, 847 F.3d 19 91<sup>st</sup> Cir. 2017). The failure must be more than *de minimis* to find a denial of FAPE. (*Id.*)

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<sup>29</sup> This issue is number 6 in the Prehearing Report.

The Student's IEP includes the following Instructional Strategies in Section 5:

Read, scribe, small group testing in resource room, provide visuals/models/examples, check for comprehension, repeat/rephrase/review, longer time limits, clear expectations, assist with work completion/organization, provide study guides/lecture notes, modify work to include word banks, multiple choice, short answer, math charts/calculators, allow movement breaks (i.e. standing during class, moving to an alternate location for hyperactivity release by doing jumping jacks) Ability to use text to speech and speech to text via iPad.

The IEP Team agreed to also provide Lexia, a reading program specifically for students diagnosed with dyslexia. Ms. Bosse stated in the IEP meeting on April 10, 2017 that it had been ordered for the Student. However, this was not included as an accommodation for the Student. Also, while Ms. Bosse informed the Parent that she and the Student would be getting technology help on his iPad from the District's technology staff, this did not occur before the Student was removed from school by the Parent on June 13, 2017. (Sowers-Felch Tr.).

I find that the failure to provide technology support before the Student was removed from school was a material violation of the IEP and MUSER. The Parent had requested help for the Student to learn how to use his iPad and access applications that the District owned. The District did not provide any evidence to indicate why technology support was not provided before the Student was unilaterally removed from school, other than to say the technology person, Mr. Hunter, was too busy at that time of year. The Parent's testimony that the technology support was not provided was not disputed. Under MUSER, technology support is considered one of the accommodations if AT services include training or technical assistance for the student and/or the family. MUSER XI, pp.135-136. Based upon the lack of AT support for training the Student and Parents, I find that this was a material violation, which interfered with the provision of a FAPE to the Student. The remedy is discussed below.

The record evidence does not support a finding that the District failed to provide a specialized pen for the Student. Therefore, I find that there was no violation for not providing a specialized pen.

## **FAPE Analysis**

### Procedural Violations

Most of the procedural violations found above are *de minimis* in their effect on the provision of a FAPE to the Student. However, I find that, together, they had a cumulative impact and interfered with the provision of a FAPE for the Student from fall 2016 to June 13, 2017. Failing to provide clearly articulated Written Notice about the refusal or denial of the Parent's requests regarding an AT evaluation; literacy assessment; literacy consult with Candice Bray; a neuro-psychological evaluation; and failing to perform an AT assessment once AT was found to be appropriate for the Student and failing to train the Parents and the Student on ATs, together, warrant a finding that that they have significantly impeded the Student's access to a FAPE.

In addition to the these procedural violations, I find that the substantive failure to provide a FAPE between the fall 2016 and February 2017 (failure to correctly implement the CRP); failure to accurately report the lack of performance in ELA; and failure to clearly articulate strengths and weaknesses in the IEP necessitate a substantive remedy, as well as corrective actions.

## **V. REMEDY AND ORDER**

From the fall of 2016 to February 8, 2017, the District violated state or federal special education law by failing to provide the Student with a FAPE because of cumulative procedural violations of the IDEA and by not appropriately implementing the specially designed instruction required in the Student's IEP, which resulted in the Student not making reasonable educational progress in his program. To compensate the Student for not receiving a FAPE during this time period, the District is ordered as follows:

1. Within 45 days of the date of this decision:
  - a. An assistive technology assessment shall be scheduled and performed. The IEP Team will convene to discuss and implement reasonable recommendations made in the assessment report, including the support services needed for the Student to access AT.
  - b. A literacy assessment shall be scheduled and performed by Candice Bray. The IEP Team will convene to discuss and implement reasonable recommendations made in

the assessment report. If she is unavailable, the District will engage another literacy expert chosen from a list of professionals recommend by the Maine Department of Education or the University of Maine.

2. The District shall provide assistive technology support and training to the Student, both Parents, and Grandmother starting within two weeks of the date of this decision on AT that the District already has available for the Student.
3. The District will engage Candice Bray to provide weekly, 30-minute literacy consultations to the District regarding the Student's progress in meeting his IEP goals for the remainder of the 2017-2018 school year. If she is unavailable, the District will engage another literacy expert chosen from a list of professionals recommend by the Maine Department of Education or the University of Maine.
4. Within 45 days of this Decision, the District will amend the IEP to:
  - a. Include an accurate description of the Student's PLAFP;
  - b. Include clear and accurate strengths and weaknesses (including likes, dislikes, and interests);
  - c. Correct any mistakes in representing CCSS designations attached to the Student's IEP goals;
  - d. Include specific AT that is recommended by the AT assessment report.
  - e. Identify the standardized measures used in reporting the Student's PLAFP, along with other sources of information.
5. The District shall provide the Student with 60 hours of compensatory education in ELA to compensate for not implementing the Student's IEP from the beginning of school in the fall 2016 to February 8, 2017. This shall take the form of one-on-one tutoring at no expense to either parent.
6. The District shall provide monthly updates to the MDOE indicating that the corrective actions have been accomplished and compensatory education has been provided, and reasons if it was not, why not.

This remedy takes into consideration the Parent's action in removing the Student from school on June 13, 2017, and not having him attend since that time. I find that this action surely has had a detrimental impact on the Student's educational progress, both academic and functional, and may have caused significant regression in the progress made by June 13, 2017.

The Parent requests an economic remedy in this matter that is unequivocally denied. Under the IDEA, only compensatory educational instruction and related services are awarded by hearing officers in order to make a student whole in his educational progress due to violations of the IDEA.

It is so ORDERED.

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

Sheila Mayberry, Hearing Officer

January 8, 2018

