

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Parents)
v.) **ORDER**
YORK SCHOOL)
DEPARTMENT)

A due process hearing was held on August 9, 10, 11, 15 and 28, 2017. Present and participating throughout the hearing were: Hearing Officer David Webb, Esq; Amy Phalon, Esq. and Richard O’Meara, Esq., counsel to the Parents; [REDACTED], Parents; Hannah King, Esq., counsel to York School Department (School) and Erin Frazier, Special Education Director, York School Department.

PROCEDURAL BACKGROUND

On June 15, 2017 the Parents (“Parents”) filed a due process hearing request against the York School Department (“School”). On July 17, 2017 a prehearing conference was held with the Hearing Officer, counsel and parties. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on July 25, 2017.

On July 19, 2017 the School filed a partial motion to dismiss the Parents’ claims pre-dating June 15, 2015. There were no factual issues in dispute with regard to the statute of limitations claims as the Parents’ sole basis for asserting claims prior to June 15, 2015 was premised on their argument that Maine never lawfully adopted a two-year limitations period for bringing due process hearing requests. The parties stipulated that no hearing was necessary and that the School’s motion may be decided on briefs. On July 25, 2017 the Hearing Officer granted

the School's Partial Motion to Dismiss, thereby barring claims involving events that occurred prior to June 15, 2015.¹

On July 20, 2017 the Parents filed a motion to quash a subpoena served by the School on Mary Stevens, Esq., one of the Parents' attorneys. The Parents also requested that the School cull duplicative documents due to the School's failure to submit its exhibit list within three business days before the hearing. By order dated August 3, 2017, the Hearing Officer granted the Parents' motion to quash the subpoena served on Ms. Stevens with regard to communications with her clients or co-counsel but denied the motion with respect to communications with third party witnesses. The Hearing Officer denied the Parents' motion to cull duplicative documents, allowing the Parents to re-assert their argument, at closing, for reasonable costs associated with preparing duplicative documents in this case. The parties offered no additional stipulations at the prehearing conference.

The Parents distributed 2361 pages of documents (herein referenced as P-#) and the School distributed 1743 pages of documents (herein referenced as S-#).

The parties requested to keep the hearing record open to allow the parties to prepare and submit closing arguments. Pursuant to a post hearing order issued on August 29, 2017, the closing arguments were due on October 13, 2017. The School requested an extension to the briefing deadline to October 20, 2017 which was granted without objection.

The record closed upon receipt of the briefs on October 20, 2017. The hearing officer's decision is due on November 6, 2017.

ISSUES: Evidence was taken on the following issues:

1. Was the Student's IEP and placement from June 15, 2015 through August 31, 2015 and for the 2015-2016 school year reasonably calculated to provide him with a free and

¹ The Hearing Officer in this Order also rejected the School's argument that the Parents have waived their right to claims arising before June 15, 2015 due to a statement made by the Parents' attorney in a previously filed matter [REDACTED] v. York (17.061H) which was withdrawn by the parents.

- appropriate public education (FAPE) in the least restrictive environment?
2. Was the Student's IEP and placement developed for the Student's 2016-2017 school year reasonably calculated to provide him with a FAPE in the least restrictive environment?
 3. Is the IEP and placement proposed by the School for the 2017-2018 school year reasonably calculated to provide the Student with a FAPE in the least restrictive environment?
 4. If the School has failed to meet its obligations in regard to any of the above, are the Parents entitled to reimbursement for the costs associated with the Student's unilateral placement at the [REDACTED] School or other compensatory relief?
 5. If the Hearing Officer concludes that any IDEA violation was the result of unreasonableness with respect to actions taken by the parents, should this reduce or preclude any remedy?
 6. Was the Student's IEP from June 15, 2015 through August 31, 2015 and for the 2015-2016 school year adequately and appropriately implemented by the School pursuant to state and federal law?

Witnesses:

Testifying at the hearing were:

- [REDACTED], the Student's Mother;
- [REDACTED], the Student's Father;
- **Karl Pulkkinen**, Public School Liaison, Guidance & Transition, [REDACTED] School;
- **Mary Stevens**, Esq., Parents' Advocate.
- **Melissa Camire**, MOTR/L, Former Special Education Director, York School Department;
- **Erin Frazier**, M.Ed., M.S., Special Education Director, York School Department;
- **Sherri Beall**, M.Ed., Literacy Consultant, Exeter Speech and Language Consultants;
- **Christine Peskurich**, M.S. [REDACTED] grade Special Education Case Manager/Teacher, York School Department;
- **Jessie Phillips Rafferty**, M.Ed. [REDACTED] grade Regular Education Teacher, York School Department;
- **Charlotte LeGovlan**, M.S., Proposed [REDACTED] grade Special Education Case Manager/Teacher, York School Department;
- **Victoria Papageorge**, M.Ed., M.S. Consultant.

All testimony was taken under oath.

III. FINDINGS OF FACT

1. The Student is [REDACTED] years old (d.o.b. [REDACTED]) and resides with his Parents in [REDACTED] [REDACTED] Maine, within the York School District. [Testimony of Mother].

2. The Student has attended York schools since kindergarten until his Parents enrolled him at [REDACTED] School in [REDACTED] in June of 2016. [Parent testimony; P-2207-10]. His Parents have elected to continue the Student's placement at the [REDACTED] School for his [REDACTED] grade school year (the 2017-2018 school year). [P-798].
3. In October 2013, due to the Parents concerns about the Student's struggles with reading, they contacted Victoria Papageorge, M.Ed., M.S., of Hyperion Learning Services, to assess the Student. [Testimony of Mother; P-162]. Ms. Papageorge, a consultant with extensive background in reading and learning disabilities, conducted an initial evaluation of the Student. [Papageorge testimony].
4. Ms. Papageorge's testing showed that the Student has a "dual processing" deficit, causing him significant difficulty in learning to read and write. His orthographic weakness, combined with his phonological skill weakness, was "significantly impacting development of basic reading skills." [P-186]. He was "fragile and lacking self-confidence with his reading abilities, so that self-esteem has become an issue." [P-188; P-189].
5. Ms. Papageorge recommended that the Student receive an "integrated reading program which will stimulate both the auditory (phonological awareness and phonological memory) and visual processing realms (orthography) in order to move forward in reading." [P-189]. She specified using two research-based Lindamood-Bell reading intervention programs: LiPS (the Lindamood Phoneme Processing System), to target his phonological deficits, and Seeing Stars, to target his orthographic deficits. [P-189]. Ms. Papageorge recommended that "due to the severity of [the Student's] reading disability, he should receive direct reading instruction one-on-one with a highly

qualified reading specialist or special education teacher trained in Lindamood Bell Processes-5 days a week/50 minutes.” [P-190]

6. At the Student’s IEP Team meeting on December 17, 2013, the Team categorized him as a student with a Specific Learning Disability, and determined that he would be with non-disabled children for 66% of the time. [P-226]. The Team issued a new IEP outlining the LiPS/Seeing Stars services to be delivered. [P-215; P-224]. The School agreed to provide the Student with 1:1 instruction in the LiPS and Seeing Stars programs. [S-8]. At this meeting, it was determined that the Student would receive literacy instruction for 1 hour and 45 minutes per day and 90 minutes weekly for social skills instruction. [P-224]. The School also agreed to provide consultation for LiPS and Seeing Stars curriculum alignment in the amount of five hours per year. [P-224]. Ms. Papageorge was retained by the School for this service and provided consultations on January 23, March 12, and April 30. [S-48].
7. The Student’s literacy programs were being implemented 1:1 by Christine Peskurich, the Student’s special education teacher and case manager since the Student’s [REDACTED] grade year, and Michael Aucoin, a speech language pathologist at the School. [Peskurich testimony]. Ms. Peskurich provided the Seeing Stars instruction and Mr. Aucoin provided the LiPS instruction. [Peskurich testimony]. Ms. Peskurich is a certified special education teacher, with a master's degree in special education and additional graduate credits in literacy. [Peskurich testimony].
8. During the second half of the Student's [REDACTED] grade school year, Ms. Papageorge met with Ms. Peskurich and Mr. Aucoin on an approximately bi-monthly basis. [S-117]. Ms. Peskurich and Mr. Aucoin consulted with each other regarding the Student's programming for a minimum of 30 minutes a week. [Peskurich testimony].

9. In a summary of Ms. Papageorge's consults from January, March and April, 2014, she noted that the Student was making progress as a result of Ms. Peskurich's and Mr. Aucoin's instruction, and that both were "well qualified in learning the program and the most effective ways to integrate it so that the Student will progress." [S-49, 50]. Ms. Peskurich also agreed that the Student was making progress in his programs. [Peskurich testimony].
10. An IEP meeting was held on December 8, 2014, to develop an IEP for the remainder of the Student's [REDACTED] grade school year and the first half of his [REDACTED] grade school year. [S-59]. At that meeting, the IEP team increased the Student's specially designed instruction in literacy from 525 minutes a week (1 hour and 45 minutes a day), to 570 minutes a week (1 hour and 55 minutes per day). [S-77]. The team reduced the Student's social skills instruction from 90 minutes per week to 30 minutes per week noting that the Student had made significant improvement from last year. [S-59]. The team also determined to continue the 5 hours of consultation by a literacy consultant, but removed the reference within the IEP for LiPS and Seeing Stars curriculum alignment. [S-74; P-224]. This IEP determined that the Student would spend 67% of his time with non-disabled peers. [S-92].
11. In her June, 2015 consultation report, Victoria Papageorge recommended that the Student continue to receive 1:1 reading instruction in LiPS and Seeing Stars for his [REDACTED] grade school year and that efforts be made to support integration of the LiPS and Seeing Stars programming [P-283]. Ms. Papageorge did not recommend an increase in consultation. [Id]. In an e-mail dated October 5, 2015, the Parents noted that the Student "had a good year in Tracy Peppin's class last year..."[S-B-22].

- 12.** The IEP team met on April 8, 2015 and offered Extended School Year (“ESY”) services to the Student of one hour per day, three times per week, for four weeks. [P-1861]. The IEP team initially identified the Student’s ESY needs at a frequency of one hour per day for two days per week, the School agreed to increase the frequency as it was a “critical time” for the Student. [S-99]. The Student’s summer instruction was provided 1:1 by Ms. Peskurich and Mr. Aucoin, with Ms. Peskurich providing two of the sessions a week and Mr. Aucoin providing one. [S-B-3; P-256].
- 13.** In an e mail dated June 15, 2015, Ms. Peskurich noted that she was having difficulty with Ms. Papageorge responding to her e mails. [P-1850]. Ms. Peskurich testified that she didn’t feel that Ms. Papageorge was as available as she would have liked. [Peskurich testimony].
- 14.** The Student returned to [REDACTED] for his [REDACTED]-grade year (2015-2016). [Parent testimony]. Jessie Phillips Rafferty was his general education teacher; Christine Peskurich continued to be his special education teacher. [Phillips Rafferty testimony, Peskurich testimony].
- 15.** The School did not renew the contract with Ms. Papageorge and instead signed a contract with Exeter Speech, Language & Education Associates on August 31, 2015. [S-D-22; S-127]. Sherri Beall, the owner of Exeter Speech, Language & Education Associates, has a master’s degree in education and two New Hampshire certifications, one in special education and one in specific learning disabilities. Ms. Beall also has experience with the LiPS program and Precision Teaching.² [Beall testimony].

² Precision teaching is a method of supplementing the LiPs program, reinforcing skills and evaluating the effectiveness of instruction. [Beall testimony]; It uses daily fluency drills both to reinforce skills through repetition. Id. Data from these drills and weekly assessment (probes) is used to inform decisions about teaching effectiveness, and to assess the effects of program changes on individual learning. Id.

16. In a letter from the Parents to Melissa Camire dated September 17, 2015, the parents noted concerns regarding the Student's start of [REDACTED] grade and the School's changing the consultant from Vicky Papageorge to Sherri Beall. [S-127]. The Parents noted in this letter that the Student had a "very positive" experience in [REDACTED] grade and that while his progress was slower than expected, he did make progress and had a positive [REDACTED] grade year overall." [Id.]
17. At the beginning of the Student's [REDACTED] grade year, Ms. Peskurich took over instruction of the LiPS Program from Mr. Aucoin, implementing the programming in one 60 minute block per day with weekly consults by Sherri Beall. [Peskurich testimony].
18. Ms. Beall was not trained in Seeing Stars, however the School arranged for Ms. Peskurich to provide the Student's Seeing Stars programming during his [REDACTED] grade year. [Peskurich testimony] Ms. Peskurich began writing her own LiPS/ Seeing Stars lesson plans, utilizing some of the lesson plans prepared over the previous summer by Vicky Papageorge. [Peskurich testimony; P-2039]. Ms. Peskurich testified that she had been implementing Seeing Stars programming for more than a year at the time Ms. Papageorge stopped working with the Student. With her training, she testified that she was able to implement the Seeing stars program independently. [Peskurich testimony; S-C-7]. Ms. Peskurich testified that she has taken the two-day Seeing Stars training and had been providing the Student's Seeing Stars instruction, including writing lesson plans and integrating the Seeing Stars and the LiPS instruction, for a year and a half with minimal oversight from Ms. Papageorge³. [Peskurich testimony].

³ Vicky Papageorge testified that "as far as she knows" Seeing Stars is a two day training, and that is the only training offered for Seeing Stars. [Rec. at 548]. She further testified that "it takes a good year to learn that program...and you need to have a strong reading background because if you don't, you can't help—you can't teach children how to self correct when there are errors. [Rec. at 547-548].

- 19.** In an e mail dated October 2, 2015, Ms. Peskurich noted that the Student was exhibiting “some work refusal and avoidance behaviors due to the anxiety he is feeling within the class.” [Peskurich testimony]. She explained that “he started to withdraw” and “when it came to small group work he struggled.” [P-1882].
- 20.** Ms. Peskurich administered the Rigby PM reading benchmark Level 22 test to the Student in October, 2015 which revealed that the Student was reading at a beginning █ grade level which is where the Student left off at the end of his █ grade year. [S-178; Peskurich testimony].
- 21.** Exeter Speech, Language & Education Associates provided its first consultation on October 9, 2015. [S-D-23]. During the first half of the 2015-2016 school year, Exeter Speech, Language & Education Associates provided 14.5 hours of consultation services. [S-D-23 to S-D-28].
- 22.** On November 4, 2015, the IEP Team met for the first time with Ms. Beall. [P-299]. In their “statement of concerns” dated November 4, 2015, the Parents stated that the Student “still cannot read,” was anxious, had low self-esteem, and could not access the general curriculum. [P-298]. The School offered to add social work services, however the Parents rejected this offer as they felt that his anxiety was more about his inability to read. [Testimony of Mother; P-300].
- 23.** In a letter dated November 20, 2015, the Parents again noted their concerns with regard to the Student’s continued inability to read, and that there was no consultation by a reading specialist for the Student’s █ grade school year. [Testimony of Mother; P-323]. The Parents also expressed concern about the Student’s anxiety and low self-esteem. [Id].
- 24.** The Student also had trouble with math word problems, including the Everyday Math

program used in his class that heavily featured word problems. [Testimony of Father].

Ms. Phillips Rafferty described how he would “shut down” in math class. [P-1877]. The Parents expressed their concerns to the School. [P-2034].

- 25.** Part way through the Student's [REDACTED] grade school year, Ms. Peskurich began using Precision Teaching with guidance and oversight from Ms. Beall to assist the Student in generalizing isolated skills. [S-224; Beall testimony]. Precision teaching is a research-based methodology of reinforcing skills and evaluating the effectiveness of instruction. [Beall testimony].
- 26.** Ms. Beall set up a “celeration” chart system as part of her precision teaching approach to regularly to measure the Student’s progress over a period of time. [Beall testimony; S-G-14-19]. Ms. Beall testified that the Student’s vowel charts indicated that in December, 2015 he started with 47 words per minute which increased to 115 words per minute by May 2016. [Beall testimony; S-G-14, S-G-19]. The Student also made progress on the “see/say/spell” timing chart between January, 2016 and July 2016 based upon his rates and the level of difficulty of the words in the exercise. [Beall testimony; S-G-230, S-G-19]. The Student’s “word reading” chart shows the student made progress between March, 2016 and May, 2016. [Beall testimony; S-G-231].
- 27.** For the Student’s triennial reevaluation in the fall of 2015, the School contracted with Lauren Cook, Psy.D., a neuropsychologist. [P-1912; P-289; P-2162; P-2173].
- 28.** Ms. Peskurich indicated to Dr. Cook that the Student’s reading skills had not grown since the previous spring and further reported significant difficulties with anxiety and depression⁴ [P-805; 811].

⁴ While Dr. Cook noted in her report that Ms. Peskurich indicated to that the Student’s reading skills had not grown since the previous spring, Ms. Peskurich’s opinion reflects her findings from a period which primarily covered the summer months between June and October, 2015. [P-805; 811].

- 29.** Dr. Cook diagnosed the Student with a Specific Learning Disability in reading. [P-813]. She noted his difficulties with phonological processing, automaticity, word recognition, and fluency. She also diagnosed him with ADHD and generalized anxiety disorder. [Id]. Dr. Cook recommended a comprehensive, evidence-based reading program using a “highly structured, sequential, multi-sensory approach” delivered to the Student 1:1 in a small group setting. [P-816].
- 30.** Dr. Cook recommended that the Student’s educational programming “include a combination of separate and inclusive programming at this time.” [S-159] She also recommended that the Student work with a therapist to "increase his emotional awareness and [to] learn general strategies for coping with anxiety and self-doubt." [S-163]. She recommended that communication between his therapist and school occur so that common language, prompting, and intervention occurs across settings." [S-163]. At the November 20, 2015 IEP team meeting, Dr. Cook recommended that Student's programming include interventions to address reading as well as the social emotional and attentional difficulties." [S-224].
- 31.** At the November 20, 2015 IEP meeting, the team determined that the consultation between Ms. Beall and Ms. Peskurich should increase to 20 hours a year, however the reference to the LiPS and Seeing Stars methodologies was removed. [S-223-24] The School offered an accommodation of adult support in math class to read math problems to the Student to access the regular math curriculum. [S-256]. In addition, the School offered to add 30 minutes per week of direct social work services and 15 minutes per month of social work consultation to the IEP. [S-256].
- 32.** The Written Notice prepared in connection with the November 20, 2015 IEP team meeting noted that Parents were rejecting the social work services because they did not

want the Student to miss any more class time. The school offered to provide the social work services outside of regular school hours, however the Parents continued to reject this service. [Testimony of Mother; S-223].

33. At the November 20, 2015 IEP team meeting, the team also agreed to increase the amount of specially designed instruction in literacy by an hour a week; allotting 180 minutes a week for specially designed instruction in writing and 450 minutes a week of specially designed instruction in reading. [S-256]. The IEP team determined that the Student's "least restrictive environment was 62% of the day spent with non-disabled peers."
34. As measured by the Benchmark Assessment System⁵ ("BAS") administered by the School, the Student began the school year reading at an instructional Level L and M in October, 2015 and by June, 2016 was reading at instructional level P, representing growth from a grade █ reading level to grade █. [S-F-40; S-F-1].
35. During █ grade, Ms. Peskurich no longer provided daily Seeing Stars lessons, but rather provided this instruction on approximately one-quarter of the days from December 2015 through June 2016 (23 of 94 instructional days recorded). [S-G-9 through S-G-13]
36. At the February 2016 IEP team meeting, the School offered 450 minutes per week of specialized reading instruction, plus 60 minutes per week of consultation by Sherri Beall. [P-335] These services were included in an amended IEP. [P-2108] The IEP also added 450 minutes per week for 1:1 specialized reading for █ grade, along with 180 minutes per week for written language, 30 minutes per week of social skills instruction, and 30 minutes of social worker counseling, plus 30 hours per year of consultation. [P-2117]

⁵ Benchmark Assessment System by Fountas and Pinnell measures a student's reading level.

37. In June, 2016, Ms. Beall conducted an Analytical Reading Inventory ("ARI") evaluation of the Student. [S-266; Beall testimony]. The ARI is a diagnostic test that allows for data collection to review areas where a student is making progress as well as areas where a student needs additional help. [Id; Beall testimony]. Ms. Beall first administered the test to the Student in February, 2016 at the [REDACTED] grade level, which the Student was able to read at the "instructional" level. [Id.]. By May, 2016 the test revealed that the Student was able to read at a [REDACTED] grade instructional level and by August, 2016 at the end of the Student's ESY program he was reading at a [REDACTED] grade independent level. [S-267; S-313; Beall testimony].

38. From the spring of 2015 to September 2016, the Student progressed in the Reads Naturally placement assessment from a level 2.0 to 3.0 in fluency. [Peskurich testimony; S-I-62; P-426].

39. The results of the standardized assessment completed by Ms. Papageorge in May of 2016 showed modest growth when compared with Dr. Cook's assessment in October 2015. [S-259-61]. The Student's Word Reading Efficiency as measured by the TOWRE-2 increased from the 1st percentile in 2015 to the 5th percentile at the end of the 2015-2016 school year. [S-260]. In the Sight Word Efficiency subtest of the TOWRE-2, the Student moved from below the 1st percentile to the 10th percentile. [Id]. Similarly, the Student's Basic Skills, as measured by the Woodcock Reading Mastery Tests III (WRMT-III) increased from the 6th percentile to the 8th percentile. [S-259]. On the Gray Oral Reading Test, Fifth Edition ("GORT- V"), the Student went from the 2nd percentile in Accuracy, 1st percentile in Fluency and Rate, and the 9th percentile in Comprehension in October 2015, to the 25th percentile in Accuracy, Rate, and Fluency and the 16th percentile in

Comprehension in May of 2016. [P-339-41]. Ms. Papageorge noted in her report that his “overall performance was significantly below the average range for age.” [P-340].

40. On June 6, 2016, the IEP team met to discuss the Student’s reading progress and to review his transition to [REDACTED] school in the fall of 2016. [S-273]. The IEP team discussed the Student's recent progress report from Ms. Papageorge, Ms. Beal's progress report and Ms. Peskurich's data collection. The IEP team amended the Student’s IEP to reflect 180 minutes per week of written language 1:1 instruction and added a goal to reflect his use of a universal graphic organizer across the curriculum and accommodations to have access to technology. [S-273].
41. Charlotte LaGolvan was assigned by the School to be the Student's [REDACTED] grade case manager. [S-245]. Ms. LeGolvan holds two master's degrees in education, is a certified special education teacher and a certified literacy consultant in Maine, she is trained in LiPS and Precision teaching and has been teaching special education for almost 30 years. [LeGolvan testimony]. In preparation for the Student’s [REDACTED] grade school year, Ms. LeGolvan met with Ms. Peskurich on two occasions and observed The Student's literacy lessons. [LeGolvan testimony]. She also met with Ms. Beall on several occasions, and observed Ms. Beall administer the Student’s summer programming. [Id].
42. On June 17, 2016, Charlotte LeGolvan emailed the Parents and attached his proposed [REDACTED] school schedule. [P-374; P-376]. Under this schedule, the Student would receive his 1:1 reading instruction from 12:25 p.m. to 1:10 p.m. His written language instruction was scheduled from 1:10 p.m. to 1:55 p.m. [P-376].
43. Ms. Frazier testified that as a regular education intervention the [REDACTED] grade classes had additional education technicians that were available to provide support and these adults would have been available to the Student. [Frazier testimony].

44. At the conclusion of the Student's 2016 ESY program, Ms. Beall prepared a summary which showed that the Student had made additional progress with his reading over the summer. [S-312; Beall testimony].
45. The Parents rejected the proposed IEP and [REDACTED] grade placement offered by the School. They submitted their signed agreement to [REDACTED] on June 23, 2016. [P-2210; P-2211; P-2207].
46. [REDACTED] is private special purpose day school in [REDACTED], [REDACTED], specializing in instructing students with dyslexia and language-based learning disabilities. [P-2184]. It is approved by the [REDACTED] Department of Education to educate publicly-funded students with disabilities. It currently has 470 students on two campuses, with 320 faculty and staff. [P-2183] The school uses methodologies like Let's Read, Reads Naturally, and materials from the LiPS program. [S-A-16]. [REDACTED] is over an hour commute each way from the Student's home in [REDACTED], Maine. [Testimony of Mother].
47. The Parents provided notice to the School of their decision to place the Student at [REDACTED] School on August 17, 2016. [S-311]. The Student began school at [REDACTED] pursuant to the Parents' placement in September 2016. [Testimony of Mother].
48. At [REDACTED], the Student received 45 minutes a day, or 225 minutes a week, of 1:1 instruction in literacy. [P-727]. There is not an option at [REDACTED] for a student to receive more than 45 minutes a day of 1:1 instruction. [Pulkkinen testimony]. For the Student's literacy instruction, the school used Let's Read, Reads Naturally, and materials from the LiPS program. [S-A-16]. Although [REDACTED] has a couple of staff members trained in Seeing Stars, [REDACTED] was not using this program with the Student⁶.

⁶ None of the individuals trained in Seeing Stars at [REDACTED] took the two-day training at the Lindamood clinic;

[Pulkinen testimony]. The Student has no access to typically developing peers and [REDACTED]. [Pulkinen testimony]. [REDACTED] does not offer chorus or band. [S-E-63]. The Student did not access any extra-circular activities, including sports at [REDACTED], electing instead to participate in sports in York. [Pulkinen testimony].

49. All of [REDACTED]'s classes are either 1:1 tutorials or small groups (from three to no more than eight students of similar ability). [P-2186] The teachers utilize auditory, visual, and kinesthetic teaching techniques. Homework is designed to reinforce skills and to be done independent of parent assistance. [REDACTED] sends class schedules and teacher assignments to Parents during the first week in September. [Pulkinen testimony].
50. The Parents and [REDACTED] believed that the Student was struggling to establish a positive relationship with Wendy Taylor, the initial tutor chosen for him at [REDACTED]. [Rec. 362-63]. In January of 2017, Michael Cunha was assigned to the Student. Mr. Cunha holds a bachelor's degree in history; however he does not hold any degrees in education, special education, or literacy instruction. [S-E-53; S-E-55]. Prior to being hired by [REDACTED] in June of 2016, Mr. Cunha had not taught reading and his experience in a school setting was limited to working for two years as a behavioral educational technician. [Id]. Two months before he began working with the Student, Mr. Cunha received a six month waiver for a special education certification. [S-E-54-56; Rec. at 365-68].
51. Mr. Cunha was trained in LiPS by [REDACTED], but he was not trained in Seeing Stars. [Id]. Danielle Yaracz, the Student's primary teacher, taught his language arts, enrichment, science, social studies, and oral expression/literature classes. [S-E-47; Rec. 359-63]. Ms. Yaracz does not hold a master's degree, and she had less than three years

of teaching experience when she began teaching the Student in September 2016. [Id].

Ms. Yaracz was first licensed as a teacher on May 22, 2017, however she was supervised by her department head or her academic advisor prior to her certification. [S-E-52; Pulkkinen testimony].

52. On November 17, 2016 the team met to develop an IEP for the Student for the second half of █ grade and the first half of █ grade (2017). [S-324]. Although █ provided the Parents with a five-page initial diagnostic report in October, 2016, no formal data from █ was provided to the IEP team from the Parents at this meeting. [P-445; S-322].

53. The Student's fluency on the Benchmark Assessor increased each time it was measured at █ last year (fall = 52 words per minute, winter = 76 wpm, spring = 84 wpm). [P-504].

54. The Student's fluency on a grade 3.0 Read Naturally passage conducted by █ in September 2016 was 62 words per minute. [P-426]. Ms. Papageorge conducted an observation of the Student in his tutorial at █ at the end of his █ grade school year.⁷ According to Ms. Papageorge's report, the Student was working at a mid-█ grade level, which is a half year beyond where the Student left off at the end of his █ grade school year in the York School District.⁸

⁷ Ms. Papageorge was not able to provide a full response to a subpoena by the School for her e-mails as she makes a practice of deleting them as she sends them out, even though she understood that she would be asked to testify for the Parents prior to deleting her e-mails.

⁸ Mr. Pulkkinen testified as follows with regard to the Student's reading level during Ms. Papageorge's June 1, 2017 classroom observation:

Q. Okay, and he's also working on a passage that comes from the Reads Naturally and so it's a Reads Naturally level 3.5?

A. Yes.

Q. And do you know the reading level of that?

A. Third grade, fifth month...

Q. so there are a few instances where he meets this goal?

A. That's right.

Q. Never on a first read?

55. Ms. Papageorge noted in her July, 2017 report:

Overall this current academic evaluation indicates that while the Student's phonological processing is showing marked improvement in his ability to accurately decode words when reading in isolation and connected text, his working memory, sequencing, processing speed continue to present challenges for the Student in academic areas. The results further indicate that orthographic processing is impacting his sight word development, reading fluency, written language and mathematics. It supports use of a highly structured multi-sensory approach across the curriculum. This multi-sensory work should include visual imaging, kinesthetic techniques, and manipulation of concrete materials to support concept development.⁹ [P-2292].

A. That's right.

Q. Occasionally on a second read?

A. Yes.

Q. Twice on a second read?

A. That's correct. [Record 379-381].

⁹ Ms. Papageorge further summarizes her impressions from her June-July 2017 evaluation: [The Student] is presenting with average visual spatial and fluid reasoning skills, average graphomotor skills and language processing in the below average to average range, with strengths in expressive vocabulary. Phonological awareness and memory fall within the low average range with rapid naming, which consists of a visual component, in the borderline range. Areas of executive functioning for cognitive flexibility and problem-solving were within the average range, while speed for sequencing symbols (letters) was <1st percentile. Working memory and processing speed is in the low average range. In regards to orthographic processing, this current evaluation continues to identify a significant weakness with areas of orthographic processing... These cognitive, neurocognitive and orthographic processing weaknesses are directly impacting The Student's development in reading, mathematics and written language... [the Student] has shown significant improvement in word attack skills moving from the 14th to 45th percentile, or below average to average range. On sight word development, The Student improved from the 5th to 23rd percentile or poor range to below average. This is the area of basic reading skills where The Student continues to perform below average. Although he has made marked gains, his weakness in orthographic processing continues to impact development of sight words... At the word level, using the TOWRE-2, The Student has shown the most significant improvement, increasing skills for sight word efficiency from the 10th to 18th percentile and phonemic decoding efficiency from the 3rd to 37th percentile. evaluating reading fluency for connected text, The Student's Rate score on the GORT-5 remained at the 9th percentile indicating slow progress in terms of rate of reading connected text which involves fluency for sight words as well as phonetically based words in passages. This performance is related to The Student's weak Rapid Symbolic Naming Composite on the CTOPP-2 at the 8th percentile (Cook, 2005) and the Rapid Automatic Naming subtest on the FAR assessment at the 4th percentile, both directly connected to reading fluency. The Accuracy subtest on the GORT-5 did show nice gains from 2016 to 2017 from the 9th to 25th percentile or below average to average range. This suggests that what The Student is learning in decoding skills and sight words in isolation, is now being applied to reading of connected text. The overall Fluency Composite on the GORT-5 remained at the 9th percentile of below average range and is a result of the Rate subtest The last area of the GORT-5, the Comprehension subtest increased between the 2016 and 2017 administration by Hyperion from the 16th to 25th percentile, or below average to average range... Passage Comprehension was at the 47th percentile or average range. He was able to respond to both literal and inferential comprehension questions by processing the vocabulary as well as by using context clues to glean pertinent information when reading short passages. The next academic area, writing, resulted in significant weaknesses with the conventions and cognitive components of written language. These areas are being directly impacted by The Student's below average working memory, sequencing and orthographic processing. He struggled with the mechanics of writing as well as the structure and organization. The Contrived Writing Composite on the TOWL-4 was in the poor range at the 7th percentile as was the Spontaneous Writing Composite. This indicates that The Student's mastery of the mechanics of writing is not well developed, and as a result he is currently unable to apply these necessary conventions to his own writing. [p-2292-2293].

- 56.** Ms. Papageorge also noted in her July, 2017 report that the “Student should continue to receive direct instruction one to one with a highly qualified reading specialist trained in the well-researched multi-sensory approaches (Seeing Stars and LiPS) [P-2296; Rec. at 567]. In her opinion, through her observation, Mr. Cunha qualified as a highly qualified reading specialist]. [Rec. at 567].
- 57.** Karl Pulkkinen, the Public School Liaison at [REDACTED], testified that the Student’s rate of progress at [REDACTED] was “uneven at best.” [Pulkkinen testimony].
- 58.** On November 17, 2016 a proposed IEP was developed for the Student for the remainder of his [REDACTED] grade year and the first half of his [REDACTED] grade year. [P-614 through P-641]. Although the present levels and goals are redesigned, it continues to provide for 450 minutes of reading and 180 minutes of written language instruction per week, 30 minutes per week of executive function coaching, 45 minutes per week of counseling, and 20 hours of consultation services. [P-640]. The IEP continues to propose that the Student be educated in the general education setting for nearly two thirds of his day, including classes for math, science, and social studies. [P-662; S-408].
- 59.** York held an IEP Team meeting on April 21, 2017. [P-530]. At this meeting, which the Parents were unable to attend, the School changed its proposed reading services to 450 minutes per week, with 180 minutes weekly for written language, 30 minutes for executive functioning, 30 minutes for social skills, and 30 minutes for counseling. [P-527].
- 60.** After the April 21, 2017 resolution session, the School received some limited documents from [REDACTED]. [S-353-58]. The school requested that an IEP meeting be scheduled to consider the information from [REDACTED] and make any necessary changes to the IEP based on that information. [Frazier testimony; S-359]. The School also

requested that [REDACTED] staff be available to participate in the meeting. [Id]. A meeting was scheduled for May 24, 2017. [S-359].

61. When asked about specific objections to any component of the IEP, Attorney Stevens expressed concerns regarding teachers who are “just learning methodologies over the summer and then implementing [the methodologies]”. [S-A-49]. Ms. Stevens also stated "it's not so much the four corners of the [IEP], it's how it would be implemented". [S-A-50; S-A-51]. She clarified that "the question is not so much with, you know, with the goals and what is written here, it's you know what does this mean for his day, what methodology are they going to be using . . . what's his schedule going to look like." [S-A-48].
62. A schedule was provided to the Parents at the end of June which arranged for the Student to attend all of his regular education classes, while providing for the specially designed reading and writing instruction provided for in his IEP. [S-408; Frazier testimony].

IV. SUMMARY OF THE PARTIES' ARGUMENTS

Position of the Parents

School districts must offer students with disabilities an appropriate placement in which to implement the IEP. The placement must be capable of fully delivering the services set forth in the IEP in an effective manner. This includes providing the student with appropriately qualified and experienced staff, appropriate staff-student ratios, and appropriate instructional settings to permit the student to progress. If a student's placement impedes or interferes with the implementation of the programming in the IEP, this also will amount to a violation of the child's substantive right to a FAPE.

The First Circuit has interpreted the FAPE standard as requiring an IEP reasonably

calculated to produce a “meaningful, non-trivial benefit,” *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012), but this standard has been superseded by the Supreme Court’s latest pronouncement of a more robust standard. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Andrew F.* decision emphasized that, “for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* at 1000. The Proposed IEP and Placement for the Student’s [REDACTED] grade year failed to meet the *Andrew F.* Test for substantive appropriateness.

The Student’s literacy skills were at least two years behind his peers. The School, however, proposed to place the Student in general education classes for [REDACTED] grade, including one that encompassed both English-Language Arts and Social Studies. Both of these general education classes, estimated to have at least 18 students, require grade level reading and written language skills.

The list of supplementary aids and services in the June 2016 IEP makes no mention of in-class educational technician assistance aside from in math. Ms. LeGolvan, the Student’s prospective case manager, conceded that he required such in-class adult assistance, yet York failed to offer it. The Student’s proposed [REDACTED] grade schedule demonstrates that the delivery of specialized services described in the IEP would have required the Student to miss his science and allied arts classes.

The Student’s IEP also was not reasonably calculated on the issue of specialized instruction. The School no longer was providing consultation services for the integration and lesson planning needed for LiPS and Seeing Stars. Sherrie Beall, the consultant hired by the School to replace Vicky Papageorge, conceded that she had no experience teaching or consulting in the Seeing Stars program. Ms. LeGolvan lacked experience with Precision Teaching and LiPS and admitted that she had no qualifications or experience to instruct the Student using the Seeing

Stars program.

The School cannot offer a placement appropriate to meet the Student's needs. [REDACTED] grade in York, unlike the elementary program, moves away from exclusive use of hands-on projects in social studies and science, and introduces "reading (and writing) to learn" in the content areas. There are no small group classes, as the Student requires. The School's insistence on educating the Student in large general education classes, taught by someone lacking familiarity with the Lindamood Bell programs, introduced an unacceptably high risk to the Student.

The Student is also entitled to compensatory relief for the School's failure to provide the Student a FAPE during [REDACTED] grade (2015-2016). In effect, the School began dismantling the programming the IEP Team had agreed upon for the Student. This began with Ms. Camire's unilateral decision to terminate Ms. Papageorge's consultancy and her subsequent failure to fill that role with a consultant capable of providing lesson planning and integration strategies for the two Lindamood Bell reading programs.

Additionally, Ms. Peskurich had abandoned the plan envisioned by the Student's IEP by opting not to deliver daily Seeing Stars lessons. She did this without ever notifying the Parents of the program delivery change. Between December 2015 and June 2016, she delivered Seeing Stars to The Student on only 25% of instructional days, even though it was supposed to be a daily service. [S-G-9 through S-G-13]

Reimbursement of private school costs is an appropriate remedy when a school district's IEP/placement offer fails to provide the student an appropriate education, and the private placement chosen by the parent is "proper under the Act." *Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The Supreme Court has stated: "[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if education provided by the private school is 'reasonably calculated to enable the child to

receive educational benefits.” *Id.* at 11, *citing Rowley*, 458 U.S. 176. [REDACTED] easily satisfies the liberal test established by the courts. It is a well-established special purpose school and is approved by the [REDACTED] Department of Education to educate publicly-funded students with learning disabilities. After just one year at [REDACTED], testing showed a “marked improvement” in The Student’s confidence and ability to perform academic tasks, despite his persistent orthographic processing deficit. His anxiety has evaporated, and his confidence about reading and learning has soared. [REDACTED] has provided, and continues to provide the Student with “a rich, well-rounded education with ample opportunity to learn alongside and socialize with peers”

Position of the School

While the *Andrew F.* Court rejected the "more than de minimis" standard applied by the Tenth Circuit, the Court adopted the meaningful benefit standard that has been the standard in the First Circuit since the 1984 decision in *Burlington v. Department of Education* 736 F.2d 733, 788 (1st Cir. 1984). The *Andrew F.* Court declined to "elaborate on what 'appropriate progress' will look like" noting that advancement from grade to grade is appropriate progress for mainstreamed students holding instead that "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *137 S.Ct. at 1000-01. Andrew F.* also left untouched other longstanding jurisprudence. For example, nothing about the *Andrew F.* decision alters the basic premise that although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). Furthermore, special education must be delivered in the least restrictive environment. 20 U.S.C. § 1412(a)(5); MUSER §X (2)(B). Methodology and staffing are within the discretion of the school. *Brougham v. Town of*

Yarmouth, 823 F. Supp, 9, 16 (D. Me. 1993), *MUSER 11.3 1 ; MUSER XVII; MUSER XVIII (C)(I)*.

The Student did not regress over the 2015 summer. In their November 4, 2015 Parent Concerns, the Parents conceded that The Student had made progress with decoding and phonemic awareness. Additionally, the Student made demonstrable progress during his [REDACTED]-grade year. The Student transitioned to [REDACTED] grade with the same level of services as in [REDACTED] grade, which is what his Parents had requested. The Parents, who bear the burden on this issue, presented no evidence that the IEPs in place during the Student's [REDACTED] grade school year (2015-2016) were not reasonably calculated to provide the Student with a FAPE. The Parents' argument that the Student was not reading at grade level and was not progressing fast enough is contradicted by the Student's curriculum based assessments, grades, standardized tests and daily data collection.

While the Parents objected to the School changing consultants from Ms. Papageorge to Ms. Beall for [REDACTED] grade, staffing is within the School's discretion, and Melissa Camire, the School's Special Education Director, had legitimate reasons for this staffing change including concerns about Ms. Papageorge's availability and responsiveness, the individualized nature of her recommendations, and the Student's slower progress than expected during [REDACTED] grade. Sherri Beall, the owner of Exeter Speech, Language & Education Associates, had extensive experience with the LiPS program. While Ms. Beall was not trained in Seeing Stars, Ms. Peskurich was going to be providing the Student's Seeing Stars programming during his [REDACTED] grade school year. Ms. Peskurich had taken the two-day Seeing Stars training and had been providing the Student's Seeing Stars instruction, including writing lesson plans integrating the Seeing Stars and the LiPS instruction, for a year and a half with minimal oversight from Ms. Papageorge. During the first half of the 2015-2016 school year, Exeter Speech, Language & Education Associates provided 14.5 hours of consultation services, almost four times the services that Ms.

Papageorge had provided.

As recommended by Ms. Papageorge, the Student continued to receive LiPS and Seeing Stars 1:1 for 60 minutes per day. S-117. Ms. Peskurich took over instruction of the LiPS Program from Mr. Aucoin, implementing the programming in one 60 minute block per day with weekly consults by Sherri Beall. While Ms. Papageorge recommended that efforts be made to support integration of the LiPS and Seeing Stars programming, she did not recommend an increase in consultation, nor did she raise any concerns regarding the qualifications of staff.

During the Student's [REDACTED] grade school year, the IEP team met four times. The first meeting was held on November 4, 2015. At that meeting, the Parents primary concerns were that the Student was experiencing anxiety and that there had been no consultation that year by a literacy consultant.

To address the Parents' concerns that the Student was struggling to access the literacy-heavy [REDACTED] grade math curriculum, the IEP team added an accommodation of adult support in math class to read math problems to the Student. To address the Parent's concerns regarding the Student's anxiety concerns, the School offered to add social work services and consultation to the IEP.

By every assessment measure during his [REDACTED] grade school year, the Student made progress. Ms. Peskurich's data indicated that during [REDACTED] grade the Student had made adequate progress on 9 out of the 13 IEP goals and met the remaining 4 goals. The Student's grades improved from the first to the second trimester. By the end of the school year, the Student was reading at an end of [REDACTED] grade level as measured by the BAS instructional level P. As he had begun the school year at an instructional Level L, he had made approximately a year and a half of growth during [REDACTED] grade. Every educational professional working with the Student, both in the school setting and privately, reported that at the end of the 2015-2016 school year the Student had

friends, was not experiencing bullying or atypical issues with peers and was an "upbeat, focused, confident, happy, well-adjusted boy."

The Parents are not entitled to reimbursement for the private placement at [REDACTED] School. Under the 2-step test established by the United States Supreme Court, parents who unilaterally place the child outside the district are only entitled to tuition reimbursement if: (1) the district's proposed IEP was not appropriate; and (2) the parents' unilateral placement is appropriate. *Town of Burlington v. Dep't of Educ. for the Commonwealth of Mass.*, 736 F.2d 773, 790, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The First Circuit has made clear that reimbursement shall be denied for any private placement that fails to contain the components of specialized instruction that the child requires.

Ms. Papageorge, who conducted an observation of the Student in his tutorial at [REDACTED] at the end of his [REDACTED] grade school year, noted that the Student was working at a mid-[REDACTED] grade level, which is where he left off at the end of his [REDACTED] grade school year at the York School District. [REDACTED]'s own data reveals that the Student made only a half of a year's worth of progress in the "Reads Naturally" Program. There is nothing about the programming that the Student is receiving at [REDACTED] that was not being offered by the York School Department in a significantly less restrictive setting with more qualified staff.

The only witnesses who observed the Student in the general education setting at York, Ms. Phillips-Rafferty, the Student's [REDACTED] grade teacher, and Ms. Peskurich, the Student's special education teacher from [REDACTED] to [REDACTED] grade, testified that, with supports, the Student could access math, science, and social studies curriculum in the mainstream classes. Moreover, [REDACTED] offered 405 minutes less a week of 1:1 specially designed instruction than that offered by York for the 2016-2017 school year, provided staff who was significantly less qualified than York staff, (some of whom are not certified teachers), using methodologies available at the public

school but in a more restrictive setting.

Courts have repeatedly held that Parents should not be allowed to prevail when the inadequacy of an IEP was "created by their own obstructionism. Moreover, families should not be permitted to sit silent at IEP meeting and then later claim that the IEP was deficient when decision were made by the IEP without their input of objection. *See Farrin v. Maine School Administrative District No. 59*, 165 Supp.2d 37, 52 n.3 (D. Me. 2001).

LEGAL STANDARD AND ANALYSIS

Although the Individuals with Disabilities Education Act ("IDEA") is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). As the Parents are challenging the IEP, they bear the burden of persuasion in this matter.

The IDEA provides that every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC §1400(d)(1)(A). The hearing officer must examine whether the Student's educational program contained in his IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The Supreme Court recently addressed the legal standard for substantive appropriateness of an IEP with respect to a child who is not able to achieve on grade level. *Andrew F. v. Douglas County Sch. Dist.*, 137 S.Ct. 988. The *Andrew F.*, Court explained that the IEP must be "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances" and that a student's . . . educational programming must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular

classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.* 137 S. Ct. at 1000 (2017). Specifically, the court noted:

Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” 458 U. S., at 204. This guidance is grounded in the statutory definition of a FAPE. One component of a FAPE is “special education,” defined as “specially designed instruction . . . to meet the unique needs of a child with a disability.” §§1401(9), (29). In determining what it means to “meet the unique needs” of a child with a disability, the provisions of the IDEA governing the IEP development process provide guidance. These provisions reflect what the Court said in *Rowley* by focusing on “progress in the general education curriculum.” §§1414(d)(1)(A)(i) (I)(aa), (II)(aa), (IV)(bb). *Rowley* did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child’s 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. This standard is more demanding than the “merely more than *de minimis*” test applied by the Tenth Circuit. It cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who are not.

Endrew F. v. Douglas County Sch. Dist., 137 S.Ct. at 1000-1001.

The “reasonably calculated” standard of *Endrew* means that crafting an appropriate program of education requiring “prospective judgment” is a “fact-intensive exercise” that must be “informed not only by the expertise of school officials, but also by the input of the child’s parents.” *Id.* at 999. Accordingly, the Student’s IEP and placements must be appropriately ambitious to enable him to make progress appropriate to his circumstances; that is, he must be instructed in how to read using appropriate and effective methods that take into account his unique disabilities. “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U. S., at 206.” *Id.* at 1001.

In the present case, the Student was not “fully integrated” into the mainstream classroom, nor was grade-level advancement a reasonable prospect at any of the applicable time periods at issue in this case.

Ms. Papageorge’s evaluation during the Student’s [REDACTED] grade year in October, 2013 showed that the Student’s orthographic weakness, combined with his phonological skill weakness, was “significantly impacting development of basic reading skills.” [P-186]. Ms. Papageorge recommended that “due to the severity of [the Student’s] reading disability, he should receive direct reading instruction one-on-one with a highly qualified reading specialist or special education teacher trained in Lindamood Bell Processes-5 days a week/50 minutes.” [P-190].

At the Student’s IEP Team meeting on December 17, 2013, the Team categorized him as a student with a Specific Learning Disability and developed an IEP that provided him with 1:1 instruction in the LiPS and Seeing Stars programs as recommended by Ms. Papageorge. This IEP determined that he would be with non-disabled children for 66% of the time. [P-226]. Ms. Papageorge consults from January, March and April, 2014 noted that the Student was making progress as a result of Ms. Peskurich’s and Mr. Aucoin’s instruction, and that both were “well qualified in learning the program and the most effective ways to integrate it so that the Student will progress.” [S-49, 50].

The Student also made progress during his [REDACTED] grade school year. An IEP developed for the Student in December, 2014 increased the Student’s specially designed instruction in literacy from 525 minutes a week to 570 minutes a week and determined that he would spend 67% of his time with non-disabled peers. [S-92]. In her June, 2015 consultation report, Victoria Papageorge did not recommend any significant changes to his 1:1 literacy instruction. In an e-mail dated October 5, 2015, the Parents noted that the Student “had a good year in Tracy Peppin’s class last year...”[S-B-22].

While the Parents have expressed significant concerns regarding the Student's [REDACTED] grade year, the Parents provided no compelling evidence that the Student's IEPs and placements were not appropriately ambitious, or that the Student didn't made progress during his [REDACTED] and [REDACTED] grade years. Even after two years of undisputed progress, however, the Student still demonstrated serious difficulties with his phonological processing, automaticity, word recognition and fluency.

In the fall of 2015, the School contracted with Lauren Cook, Psy.D., to conduct a psychological evaluation of the Student. [S-148]. In her report, Dr. Cook recommended a comprehensive, evidence-based reading program using a "highly structured, sequential, multi-sensory approach" delivered to the Student 1:1 in a small group setting. She further recommended that the Student's educational programming "include a combination of separate and inclusive programming..." [S-159]. This evidence supports a conclusion that the Student does not have, at the present time, a reasonable prospect of being "fully integrated" into the mainstream classroom.¹⁰

The Student's IEP and placements, however, must still be reasonably calculated to enable him to make progress appropriate to his circumstances. Specifically, he must be given reading instruction using appropriate and effective methods that take into account his unique disabilities. *See* 34 CFR 300.39 (b)(3). This does not mean that the School must provide opportunities for the Student to achieve academic success, attain self-sufficiency, and contribute to society in a manner that is substantially equal to the opportunities afforded children without disabilities. *Andrew F.* 137 S.Ct. at 1001.

The record in this case supports a finding that Student's IEPs from June, 2015 to the IEP

¹⁰ Parents even note in their brief that the Student has deficits in processing and working memory that "significantly impact [his] development of basic reading skills" and required intensive 1:1 specially designed instruction in reading." [P. Br. 2, 6-7].

proposed by the School for the 2017-2018 school year were reasonably calculated to enable him to make progress appropriate to his circumstances and to provide him with a FAPE in the least restrictive environment.

The IEP in place in June, 2015 was developed on December 8, 2014, during the Student's █ grade year. The December 8, 2014 IEP was largely based on the Student's December 17, 2013 IEP which incorporated the Student's specially designed instruction in literacy programs as recommended by Victoria Papageorge. As noted above, it is undisputed that the Student made progress during his █ and █ grade years as a result of the programming and supports offered by these IEPs. As the First Circuit stated in *Lessard v. Wilton-Lyndeborough Coop. Sch.*

Dist:

Actual educational progress can (and sometimes will) demonstrate that an IEP provides a FAPE. *See, e.g., Rowley*, 458 U.S. at 209-10; *Nack*, 454 F.3d at 612; *see also Roland M.*, 910 F.2d at 991 (explaining that "actual educational results are relevant to determining the efficacy of educators' policy choices"). But to impose the inverse of this rule -- that a lack of progress necessarily betokens an IEP's inadequacy -- would contradict the fundamental concept that "[a]n IEP is a snapshot, not a retrospective." *Roland M.*, 910 F.2d at 992. Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology *ex post* merely because the disabled child's progress does not meet the parents' or the educators' expectations. *See Lachman v. Ill. St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988).

518 F.3d 18, 29 (1st Cir. 2008).

In addition, the weight of the evidence supports a finding that the IEP in place in June, 2015, and as revised in November, 2015 enabled the Student to make progress appropriate to his circumstances.¹¹ The Student's progress was measured in part through a "celeration chart"

¹¹ The December 2014 IEP was amended on April 8, 2015 to offer ESY services to the Student of one hour per day, three times per week, for four weeks. [P-1861]. The Student's summer instruction was provided 1:1 by Ms. Peskurich and Mr. Aucoin, with Ms. Peskurich providing two of the sessions a week and Mr. Aucoin providing one. [S-B-3; P-256]. At the November 20, 2015 IEP meeting, the team determined that the consultation between Ms. Beall and Ms. Peskurich should increase to 20 hours a year. [S-223-24] The School offered an accommodation of adult support in math class to read math problems to the Student to access the regular math curriculum. [S-256]. In addition, the School offered to add 30 minutes per week of direct social work services and 15 minutes per month of social work consultation to the IEP. [S-256].

system implemented by Sherri Beall which showed that the Student's vowel charts increased from 47 words per minute in December, 2015 to 115 words per minute by May 2016. [Beall testimony; S-G-14, S-G-19]. The Student also made progress on the "see/say/spell" timing chart and "word reading" chart between January, 2016 and July 2016 and March, 2016 and May, 2016.

Based on the Benchmark Assessment System ("BAS") administered by the School, the Student began the school year reading at an instructional Level L and M in October, 2015 and by June, 2016 was reading at instructional level P, representing growth from a grade [REDACTED] reading level to a grade [REDACTED] reading level. [S-F-40; S-F-1]. In June, 2016, Ms. Beall conducted an Analytical Reading Inventory ("ARI") evaluation of the Student which revealed that the Student progressed from a [REDACTED] grade level in February, 2016 to a [REDACTED] grade instructional level by May, 2016. By August, 2016 at the end of the Student's 2016 ESY program, the ARI evaluations revealed that the Student had progressed to a [REDACTED] grade independent level [S-267; S-313; Beall testimony]. From the spring of 2015 to September 2016, the Student progressed in the Reads Naturally placement assessment from a level 2.0 to 3.0 in fluency. [Peskurich testimony; S-I-62; P-426].

The standardized assessment completed by Ms. Papageorge in May of 2016 also showed levels of growth when compared with Dr. Cook's assessment in October 2015, though not at the same levels determined by the School. The Student's Word Reading Efficiency as measured by the TOWRE-2 increased from the 1st percentile in 2015 to the 5th percentile at the end of the 2015-2016 school year. [S-260]. The Student's Sight Word Efficiency subtest of the TOWRE-2 moved from below the 1st percentile to the 10th percentile. [Id]. The Student's Basic Skills, as measured by the Woodcock Reading Mastery Tests III (WRMT-III) increased from the 6th percentile to the 8th percentile. [S-259]. On the Gray Oral Reading Test, Fifth Edition ("GORT-V"), the Student went from the 2nd percentile in Accuracy, 1st percentile in Fluency and Rate,

and the 9th percentile in Comprehension in October 2015, to the 25th percentile in Accuracy, Rate, and Fluency and the 16th percentile in Comprehension in May of 2016. [P-339-41].

While the above results show varying degrees of progress, even the literacy consultant retained by the Parents reveal that the Student made progress during his [REDACTED] grade year. I find that the Student's progress was appropriate based upon the Student's circumstances. As the *Endrew F.* court noted:

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034.
Endrew F. 137 S.Ct. 1002

The Parents argue that the School breached its obligation to provide a FAPE to the Student by failing to include a reference in the Student's IEP to any specialized literacy programming he would receive. The Parents note that Ms. Peskurich had abandoned the plan envisioned by the Student's IEP by opting not to deliver daily Seeing Stars lessons, and instead only 25% of the time between December 2015 and June 2016 though it was supposed to be a daily service.

The IDEA requires that each qualifying child's IEP contain a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child." 20 U.S.C. § 414(d)(1)(A)(i)(IV).

While educational methodology is one of the key facets of programming that must be "specially designed" to meet the unique needs of a child pursuant to 34 C.F.R. § 300.39(b)(3),¹²

¹² "Specially designed instruction" means "adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).

The IDEA does not, however, require schools to include specific instructional methods in an IEP.¹³ *See* 20 U.S.C. § 1414(d)(1)(A)(ii)(I). Accordingly, while school departments generally have the discretion to select the educational methodology to implement a student’s IEP, that methodology must be effective in addressing the Student’s unique needs and allowing him to make appropriate progress in light of his circumstances. *Ms. M. v. Falmouth Sch. Dep’t*, 847 F.3d 19 (1st Cir. 2017), *cert. denied*, 2017 U.S. LEXIS 4882 (Oct. 2, 2017).

The District Court in Maine has also spoken with regard to disputes about educational methodology: “*Rowley* and its progeny leave no doubt that parents, no matter how well motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.” *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993). Instead, as a general rule, educational methodology falls within the discretion of the school district. *See e.g.*, *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993), quoting *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir.), *cert. denied*, 109 S.Ct. 308 (1988). A school’s obligation to provide a specific methodology could be upheld, however, if the IEP included the specific methodology in its description of the special education services to be provided. *Ms. M. v. Falmouth Sch. Dep’t*, 847 F.3d 19 (1st Cir. 2017).

In the present case, while the Student’s December 17, 2013 IEP specifically provided the Student with 1:1 instruction in the “LiPS and Seeing Stars programs” along with consultation for “LiPS and Seeing Stars curriculum alignment” these methodology references were removed from the December 8, 2014 and later IEPs. Instead, the subsequent IEPs generally referenced the Student's specially designed instruction and consultation by a literacy consultant without a

¹³ The Ninth Circuit held that school districts should specify a teaching methodology for some students, unless such specificity is not necessary to enable those students to receive an appropriate education.” *JL and ML ex rel KL v. Mercer Island Sch. Dist.*, 575 F. 3d 1025 (9th Cir. 2009), *citing* 64 *Fed. Reg.* 12,552.

reference to methodology. [S-74; P-224]. Despite the removal of the methodology reference in the Student's IEP, the School continued to provide the Student with 1:1 instruction in the LiPS and Seeing Stars programs, although at a decreased rate of frequency during his [REDACTED] grade year.¹⁴

The Parents also argue that the Student's IEP for [REDACTED] grade (2015-2016) was inappropriate insofar as the School did not continue to retain Victoria Papageorge to coordinate the Student's LiPS and Seeing Stars curricula. The Parents argue that Christine Peskurich, the Student's [REDACTED] grade special education teacher and case manager, was not qualified to implement the Student's Seeing Stars program or coordinate implementation of the two programs. The Parents also argue that the Student's IEP and placement for [REDACTED] grade failed to meet the *Andrew F.* test for substantive appropriateness because the School selected Charlotte LeGolván to be the Student's special education teacher and case manager and that she lacked the training and experience necessary to deliver all aspects of the Student's specially designed instruction Precision Teaching and LiPS.

As noted above, the LiPs and Seeing Stars methodology references were removed from Student's IEPs after December 8, 2014. Instead, the subsequent IEPs generally referenced the Student's specially designed instruction and consultation by a literacy consultant without a reference to methodology. [S-74; P-224]. Of course, since the School opted to continue to use these methodologies, it has an obligation to insure that all staff implementing this part of the Student's program are qualified to do so. MUSER X.2(A)(2).

While staff must meet the minimum criteria under state law, school districts have the sole

¹⁴ The Parent's argument that the LiPS and Seeing Stars methodologies are essential to the Student's educational programming is contradicted by their statements regarding the Student's experience at [REDACTED]. The Parents assert that since the Student has attended [REDACTED], he has shown a "marked improvement" in his confidence and ability to perform academic tasks. [Parent brief at 44]. [REDACTED], however, has not used the Seeing Stars program with the Student. Materials from the LiPS program were used, along with other reading programs, with less frequency on a 1:1 basis than what was being provided by the School.

discretion to assign qualified staff. MUSER II.31; MUSER X.2.A.(5); *East Millinocket Sch. Dept.* 111 LRP 39325 (SEA Me. 2011).

In the present case, the School did not renew the contract with Ms. Papageorge and instead signed a contract with Sherri Beall, the owner of Exeter Speech, Language & Education Associates, who has a master's degree in education and certifications in special education and specific learning disabilities. Ms. Beall also has experience with the LiPS program and Precision Teaching. While Ms. Beall did not have experience with Seeing Stars, the School arranged for Ms. Peskurich to provide this service. Exeter Speech, Language & Education Associates provided its first consultation on October 9, 2015. [S-D-23]. During the first half of the 2015-2016 school year, Exeter Speech, Language & Education Associates provided 14.5 hours of consultation services. At the November 20, 2015 IEP meeting, the team determined that the consultation between Ms. Beall and Ms. Peskurich should increase to 20 hours a year.

The evidence supports a finding that Ms. Beall, Ms. Peskurich and Ms. LeGolvan are qualified to provide the aforementioned services to the Student. Ms. Peskurich is a certified special education teacher, with a master's degree in special education and additional graduate credits in literacy. During most of the 2014-2015 School year, Ms. Papageorge met with Ms. Peskurich and Mr. Aucoin on an approximately bi-monthly basis to address the LiPS and Seeing Stars program, and Ms. Peskurich and Mr. Aucoin consulted with each other regarding the Student's programming for a minimum of 30 minutes a week. Ms. LeGolvan holds two master's degrees in education, is a certified special education teacher and a certified literacy consultant in Maine, she is trained in LiPS and Precision teaching and has been teaching special education for almost 30 years. The Parents have not satisfied their burden to show that changing the Student's consulting services violated the terms of his IEP or had a detrimental impact on the Student's progress.

The Parents argument regarding staff qualifications is supported by Ms. Papageorge who recommended that a "highly qualified" person should provide the Student's literacy program and that to be highly qualified an individual would need "a background in reading, . . . the Seeing Stars workshop and . . .at least a year of Seeing Stars implementing the program." [Rec. at 547-48]. Ms. Papageorge testified, however, that Michael Cunha, who was providing the Student's 1:1 literacy instruction at [REDACTED] was "highly qualified." Mr. Cunha did not have a degree or any educational background in reading instruction. Although he had recently completed his LiPS training, he was not trained in Seeing Stars, and had just received a 6-month waiver for a special education certification. Ms. Papageorge's testimony on this topic is confusing and contradictory, and does little to support the Parent's argument that staff selected by the School were not qualified to implement the Student's LiPS and Seeing Stars programs.

The Parents further argue that the Student's proposed IEP and placement for [REDACTED] grade was not substantively appropriate as it proposed to place the Student in general education classes for [REDACTED] grade, including one that encompassed both English/language arts and social studies, as shown on the proposed schedule issued after the June 2016 IEP Team meeting. [P-376].

With the exception of the adult support accommodation that was provided to the Student to assist in the language based mathematics instruction in his December, 2014 IEP, the Student could access math, science, and social studies curriculum in his [REDACTED] grade regular education classes, with his specially designed instructional supports. Ms. Frazier offered credible evidence that as a regular education intervention, the [REDACTED]-grade classes had additional education technicians that were available to provide support and these adults would have been available to the Student, and this was mentioned to the Parents during the discussions about the Student's programming and schedule for the [REDACTED] grade. [Frazier testimony, Rec. at 1313-1314].

The IDEA requires that students be educated with non-disabled peers "to the maximum

extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); *MUSER* § X.2.B.

Accordingly, a public school may remove a child with disabilities from the regular educational environment only when “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

20 U.S.C. § 1412(a)(5)(A); *MUSER* § X.2.B. The educational benefit and least restrictive environment requirements “operate in tandem to create a continuum of educational possibilities.”

Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990). *See*, 34 C.F.R. § 300.115;

MUSER § X.2.B. The U.S. District Court in Maine, in *Millay v. Surry*, cited the following standard,

The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995). 'Mainstreaming may not be ignored, even to fulfill substantive educational criteria.' *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990). *Millay v. Surry* 07-CV-178-B-W (Dec. 22, 2009), 109 LRP 79729.

In the present case, the evidence supports a finding that the Student’s least restrictive environment is at York ██████ School. As noted above, the Student was able to make reasonable progress and access his regular education program with his non-disabled peers while he attended ██████. Even Dr. Cook's evaluation and report from October 2015, which highlighted the Student’s significant challenges, recommended a combination of mainstream and pullout instruction in the public school. [S-159]. In contrast, ██████ is private special purpose day school in ██████ specializing in instructing students with dyslexia and language-based learning disabilities. ██████ staff does not have the same level of qualifications as offered by York and there are no students at ██████ who are not disabled. ██████ is over an hour from the Student’s home in Maine.

Furthermore, the evidence supports a conclusion that the Student was not making better

progress in reading at [REDACTED] than he was within the York School District. Ms. Papageorge conducted an observation of the Student in his tutorial at [REDACTED] at the end of his [REDACTED] grade school year. According to Ms. Papageorge's report and Mr. Pulkkinen's testimony, the Student was working at a mid-[REDACTED] grade level, which under this evaluation is only a half year greater than where the Student left off at the end of his [REDACTED] grade school year at York. Mr. Pulkkinen, [REDACTED]'s public school liaison, testified that the Student's rate of progress at [REDACTED] was "uneven at best."

On November 17, 2016 a proposed IEP was developed for the Student for the remainder of his [REDACTED] grade year and the first half of his [REDACTED] grade year. [P-614 through P-641]. Although the present levels and goals are redesigned, it continues to provide for 450 minutes of reading and 180 minutes of written language instruction per week, 30 minutes per week of executive function coaching, 45 minutes per week of counseling, and 20 hours of consultation services. [P-640]. The IEP continued the supports and services that allowed him to progress in the [REDACTED] grade, and the School made an offer that included a schedule that allowed the Student to attend his regular education classes and his specially designed instruction. Although the Parents object to this IEP because it includes no specification of the programs to be delivered, this argument is rejected for the reasons stated above. Accordingly, the evidence supports a finding that the Student's IEP for the [REDACTED] grade was reasonably calculated to provide meaningful educational progress.

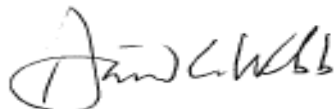
ORDER

After consideration of the evidence presented during this due process hearing,

It is hereby ORDERED that:

1. The Student's IEP and placement from June 15, 2015 through August 31, 2015 and for the 2015-2016 school year was reasonably calculated to provide him with a FAPE in the least restrictive environment.
2. The Student's IEP and placement developed for the Student's 2016-2017 school year was reasonably calculated to provide him with a FAPE in the least restrictive environment.
3. The IEP and placement proposed by the School for the 2017-2018 school year was reasonably calculated to provide the Student with a FAPE in the least restrictive environment.
4. Because the School has met its obligations with regard to the above issues, the Parents are not entitled to reimbursement for the costs associated with the Student's unilateral placement at the [REDACTED] School or other compensatory relief.

Dated November 6, 2017



David C. Webb, Esq.
Hearing Officer