

I. PROCEDURAL BACKGROUND

On July 24, 2017 Parent filed a due process hearing request on behalf of [REDACTED], [REDACTED] [REDACTED] (hereinafter, "Student"). On August 8, 2017 Parent-C [REDACTED] filed an extension request for the prehearing and hearing stating a conflict with mandatory training at her place of employment. On August 9, 2017 Eric Herlan, Esq., Attorney for Perry Public Schools, filed a *Motion for Partial Dismissal* and *Motion to Alter Schedule*. On August 18, 2017 the Hearing Officer conducted a teleconference setting dates as follows: September 29, 2017 - Preliminary Hearing on Perry Public Schools' *Motion for Partial Dismissal*; Friday, October 13, 2017 – Prehearing Conference; October 23, 24 and 25, 2017 – Hearing.

The preliminary hearing resulted in the Hearing Officer granting Perry's motion to dismiss all claims prior to July 24, 2015. See *Ruling on Perry Public Schools' Motion for Partial Dismissal*.

On October 6, 2017 Perry filed a due process hearing request regarding Parent's request for independent psychological and speech-language evaluations of Student at public expense. This hearing request is identified by the Maine Department of Education as case #18.029. Perry requested case #18.029 be consolidated with Parent's hearing request #18.008. The Hearing Officer granted consolidation of the two cases on October 8, 2017. (See Hearing Officer's *Prehearing Report and Order*.)

On October 10, 2017 Parent filed a *Motion for Continuance* of the prehearing scheduled for October 13. Finding the motion's argument unpersuasive, the Hearing Officer denied a continuance.

The prehearing conference was held on October 13, 2017. Present at the prehearing were: Parent; Michele Thompson, Advocate/Tutor of Student, Fiancée of Parent; Beth Cushing, Director of Special Education, Eric Herlan, Esq., Attorney for Perry Public Schools; Melanie Frazek, Esq., Hearing Officer. At the prehearing Parent tendered a *Motion to Stay Put* on behalf of [REDACTED]. On behalf of Perry, Herlan stated the law requires Student to receive the same type and extent of services

throughout the due process hearing until a decision is rendered. Further, Herlan stated Perry knows its obligations and responsibilities to continue to provide services throughout the process. The Hearing Officer denied Parent's motion not only because of the affirmative representations by Perry but also pursuant to the ripeness doctrine.¹

Also at the prehearing, as a follow-up to the Hearing Officer's denial of Parent's October 10 *Motion for Continuance*, Parent asserted that he has not received the totality of Student's educational records. Perry asserted it provided all records relevant to the time period at issue in the hearing request.² Moreover, the Hearing Officer questioned the scope of educational records included in Parent's demand. Parent's production request was overly broad and burdensome. [*E.g.*, Rec. at S-B-36; S-B-41; P-388; P-389; P-390.]

The prehearing conference addressed confirmation of the issues for hearing and witness lists. Documents were exchanged. Parent distributed 519 pages of documents/exhibits (referenced as P-1 through P-519), including a thumb drive audio recording of IEP meetings (referenced as P-84). Perry distributed 741 pages of documents/exhibits: 419 pages (referenced as S-1 through S-419) and 322 pages constituting Appendices A and B (referenced as S-A-1 through S-A-3 and S-B-1 through S-B-319, respectively). Lastly, the parties stipulated to the following: 1) Jeanne Shrumpf will testify by telephone; 2) Michele Thompson will not be present in the hearing room during the hearing proceedings because she is a witness; 3) the Written Notice of the October 5, 2017 IEP Team meeting will be included in Perry's documents upon completion.

The hearing was conducted on October 23, 24, and 25, 2017. Parent tendered several motions at the hearing. The Hearing Officer made the following rulings on the motions: 1) Parent's *Motion for Recusal* – denied; 2) Parent's *Motion in Limine to Exclude Irrelevant and Unduly Prejudicial Evidence*

¹ Parent's *Motion for Stay Put* was disingenuous as Parent was clearly assured of continuing services at the October 5, 2017 IEP Team meeting as documented in two separate places within the Written Notice of that meeting. [Rec. at S-411, 412.]

² Perry provided Parent with Student's records. [Rec. at P-389; P-392; P-410; S-B-29; S-B-40, S-B-44; S-B-56; S-B-190.]

– granted; 3) Parent’s *Motion for Continuance* – denied; 4) Parent’s *Motion to Compel the Production of Evidence* – denied (discussed *supra*). Parent then orally moved to bar the School District’s Written Notice of the October 5, 2017 IEP from evidence. Parent’s oral motion was denied. As stated above, the inclusion of the October 5, 2017 IEP Written Notice into the record was a stipulation arising out of the prehearing conference.

Following these preliminary matters, the hearing proceedings *per se* commenced. The parties waived closing arguments. In lieu thereof, the record remained open through November 17, 2017 for the parties to prepare post-hearing memoranda. The parties further agreed that the Hearing Officer’s decision would be issued on December 8, 2017, extended to December 16, 2017 with agreement by Perry and without objection by Parent.

II. ISSUES

Evidence was taken on the following issues:

1. Did Perry Public Schools deny Student a free appropriate public education (FAPE) during the two year period between July 24, 2015 and July 24, 2017? (Case #18.008)
2. Were the psychological and speech-language evaluations conducted by Perry Public Schools (*i.e.*, those that were discussed at the October 5, IEP Team meeting) inadequate and inappropriate thereby warranting independent evaluations of same at public expense? (Case #18.029)

III. FINDINGS OF FACT

1. Student is [REDACTED] years old (d.o.b. [REDACTED]) and is currently in [REDACTED] grade at Perry Elementary School. [Rec. at S-346.]
2. Parents are divorced and share custody of Student. Father resides in [REDACTED], Maine and Mother resides in [REDACTED], Maine. [Rec. at S-206.]
3. With special permission of the Superintendent, Student is allowed to attend Perry Elementary despite living outside of the school’s residential boundaries. [Rec. at S-158, 159, 160.]

4. At age 6-2, Student was evaluated by Diana Sholtz, Ph.D. at the end of his kindergarten year at Perry (June, 2011). History indicated student missed some days of school due to ear infections and the removal of adenoids. There were concerns regarding his reading and math abilities. Reportedly Student continued to have difficulties counting and identifying the alphabet. Student received speech and language therapy at that time. [Rec. at S-1.]

5. Sholtz's evaluation revealed cognitive ability in the low average range but working memory tested extremely low. Writing was a relative strength at that time. Attentional difficulties were noted. Retention in kindergarten was under consideration. [Rec. at S-3.]

6. Student was retained in first grade. [Rec. at S-206; Testimony of Parent.]

7. A speech-language re-evaluation was administered in March, 2014 when Student was a second grader. His age was just about 9 years. Student had been receiving therapy for articulation and memory skills. Continuing therapy for memory and language was recommended. [Rec. at S-8.]

8. A psychological re-evaluation was also conducted by Kathleen Donkin, Psy. D. in March, 2014. Donkin reported overall low average cognitive functioning with achievement commensurate with aptitude. [Rec. at S-19.]

9. Parents pursued an evaluation at Developmental Pediatrics in Bangor, Maine in July, 2015. This evaluation was administered by Jennifer Curran, Ph.D. who reported that Student exhibited ADHD. [Rec. at S-58.]

10. At an IEP conference on 9/23/15, the beginning of Student's fourth grade, Student's primary eligibility was changed to Other Health Impaired as a result of the ADHD diagnosis. His IEP continued providing services one hour daily in the resource room and one hour weekly speech-language therapy. [Rec. at S-66.]

11. During Student's fourth grade school year (2015-16), Parent made requests for a 1:1 educational technician to assist Student in all of his classes. Parent also requested after school tutoring.

[Rec. at S-84, S-92, S-114, S-135.] Parent made requests for Extended School Year services (ESY).

[Rec. at S-114.]

12. Parent has continued to iterate requests at IEP meetings for after school tutoring, ESY and a 1:1 educational technicians in Student's classroom instead of services provided in the resource room.

[See IEP Written Notices of record to date.]

13. Parent has been accompanied to all IEP meetings since January, 2016 by his fiancée, Michele Thompson, who is presented as Student's tutor/advocate. *Id.*

14. IEP Team meetings have become contentious when the consensus of the IEP Team is not in agreement with Parent and Thompson. [Rec. at P-206 through 218; Testimony of Cushing, Thompson.]

15. Student has been receiving passing grades during his fourth and fifth grade years.

[Testimony of Cushing, Shrumf, Morang, Johnson.]

16. Parent has filed two complaint investigations with the Maine Department of Education. The first was filed in July, 2016. [Rec. at S-163.] The second filing followed in February, 2017. [Rec. at S-243.]

17. The Complaint Investigator required Perry to conduct re-evaluations of Student to reassess his eligibility for special education services. [Rec. at 243.]

18. Parent filed this Hearing Request on July 24, 2017. [Rec. at S-345.] Parent-C■■ does not support the allegations in Parent's Hearing Request. [Rec. at S-86, S-114, S-140.]

19. Parent requested independent evaluations to be provided at public expense. [Rec. at S-392.]

20. Perry refused Parent's request for independent evaluations and filed a due process hearing request for a decision on the issue. [Rec. at S-396.] Perry filed a *Motion to Consolidate* Parent's Hearing Request and Perry's Hearing Request. [Rec. at S-394.]

IV. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

The Supreme Court has held that in an administrative hearing the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct.528, 537 (2005). In the instant case, Parent alleges violations of Student's FAPE; Parent must therefore prove: 1) that Perry Public Schools did not provide a FAPE in its education of Student; 2) that Parent is entitled to the relief he seeks. Regarding the second issue for hearing, Perry bears the burden of proving that the psychological and speech-language evaluations it conducted were appropriate to overcome Parent's request for independent evaluations at the public school's expense.

B. Analysis

Issue I: Did Perry Public Schools deny Student a free appropriate education (FAPE) during the two year period between July 24, 2015 and July 24, 2017?

The first threshold question to be answered is whether Student was denied a FAPE as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1401, *et seq.*, during the pertinent time period of July 24, 2015 – July 24, 2017. *Rowley*, the seminal Supreme Court case addressing a FAPE, held that a FAPE is satisfied if the child's IEP is reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. of Hendrick Hudson Central Schl. Dist. V. Rowley*, 458 U.S. 176 (1982); *accord, Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017). This "reasonable calculation" to confer educational benefit is outlined in a student's IEP developed to address the individual needs of the student. *See Rowley* at 181; *See also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23 (1st Cir. 2008) ("The 'primary vehicle' for delivery of a FAPE is an IEP.")

However, the Court acknowledged Congress's legislative intent and express recognition that "...the process of providing special education and related services to handicapped children is not

guaranteed to produce any particular [educational] outcome.” *Id.* at 192, 208 (citing S.Rep., at 11, Code Cong. & Adm. News 1975, p.1435); accord, *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988 (2017). Moreover, the *Rowley* Court ruled that special education services are not required “to maximize each child’s potential ‘commensurate with the opportunity provided other children.’” *Rowley* at 198.

Parent asserted [REDACTED] was not provided a FAPE because he (Parent) was not allowed the opportunity to make meaningful decisions regarding Student’s education. To support his argument, Parent stated a) lack of educational records from Perry thereby leaving him uninformed and b) impedance by Perry to his meaningful participation in IEP Team meetings. Additionally, Parent asserted inappropriate IEPs not reasonably calculated to result in educational benefit for Student and denial of services Parent deemed warranted. An inextricable effort existed between Parent and Thompson; therefore, Parent advanced the arguments of being uninformed and being denied meaningful participation for her benefit as well.

The issue of whether Parent lacked sufficient information to make informed decisions regarding Student’s education is specious at best. Parent’s *Motion to Compel* regarding a lack of records is addressed *supra*. Suffice it to say the record is replete with relentless emails demanding voluminous amounts of information which, in many cases, Parent would have already received (*e.g.*, IEPs, Written Notices) and proprietary information (*e.g.*, assessment protocols, any and all communications regarding Student, any and all teachers’ notes). [*E.g.*, Rec. at S-B-36; P-391, P-392.] Perry’s only obligation was to allow Parent to *inspect and review* education records. 34 CFR §300.501; MUSER XIV.3. Parent was not uninformed regarding [REDACTED]’s education. Not only did Perry provide records at Parent’s request, Parent was at every IEP Team meeting. Thompson, tutor/advocate, was at all IEP meetings with the exception of one between January 14, 2016 to present. [Rec. at S-25, S-67, S-87, S-90, S-116, S-141, S-228, S-275, S-418.] Both had plenty of information enabling them to provide input at IEP

Team meetings for Student. Thus, Parent's argument that Student was not provided a FAPE because Parent did not have enough information in the way of educational records to provide meaningful input is without merit.

Secondly, Parent alleges that Perry staff impeded his and Thompson's opportunities to be participating members of the IEP Team, thereby denying a FAPE for Student. The record does not support this. The Written Notices of the IEP Team meetings refer to statements made by both during discussions of Student's education at said meetings. [Rec. at S-25; S-67; S-84, 85, 86; S-89, 90; S-114, 115; S-139, 140; S-225, 226, 227; S-274; S-416, 417, 418.] Moreover, Parent initiated several of the IEP Team meetings for the express purpose of discussing his concerns. [Rec. at P-83; P-85, 86; P-104; P- 116, 118; P-191.] Parent provided handouts to Team members itemizing points for discussion and requiring modification of previous Written Notices to his specifications. [Rec. at P-85; P- 92,93; P-95; P-102; P- 107, 108, 109; P-191 through 205.] Clearly Parent actively participated in [REDACTED]'s IEP meetings providing input for consideration by all IEP Team members in the development of Student's free appropriate public education (FAPE).

As Student's tutor/advocate, Thompson testified she was not allowed to fully participate in IEP Team meetings, stating she was frequently interrupted and bullied. [Testimony of Thompson.] This does not comport with the Hearing Officer's reading, in pertinent parts, of Parent's transcription of recorded IEP meetings on May 8, 2017; March 30, 2017; May 10, 2016; and January 14, 2016. [Rec. at P-206, P-219, P-239, P-311, respectively.] Nor does Thompson's assertion comport with the Hearing Officer's listening to parts of the January 14, 2016 IEP meeting on the thumb drive, the audio accompaniment to Parent's transcriptions. [Rec. at P-84.] To the contrary, the record reveals Thompson purposefully interrupting IEP Team members to insistently return to the points she wished to pursue. *Ibid.* Thompson exerted an authoritative demeanor at IEP meetings and, to a certain extent,

appeared condescending to other IEP Team members.³ *Ibid.* Parent's transcriptions reveal that Thompson spoke openly at IEP meetings, frequently more than Parent himself. *Ibid.* The point being, Thompson was not prevented from providing her input at Student's IEP meetings for consideration by all IEP Team members in developing Student's free appropriate public education (FAPE).

The record also reflects that Parent filed his first complaint investigation, with the Maine Department of Education on July 5, 2016 asserting *inter alia* the same issue, *i.e.*, that Perry prohibited meaningful participation of Parent and Thompson in IEP Team meetings. [Rec. at P-162.] In his report of this case, #17.002C, the Complaint Investigator found no violation by Perry.⁴ [Rec. at P-166.]

The above discussion evinces that Parent and Thompson were both afforded meaningful participation in Student's IEP meetings. Perry has complied with the Maine Unified Special Education Regulation (MUSER) requirement which states, in pertinent part: "In developing each child's IEP, the IEP Team... must *consider*... (b) The concerns of the parents for enhancing the education of their child". MUSER IX.3.C(1)(b). (*Emphasis added.*) Therefore, Parent's assertion that Student was denied a FAPE because Parent and tutor/advocate were not given the opportunity to provide meaningful input at IEP Team meetings is without merit.

Thirdly, Parent asserts that the IEPs for Student were not reasonably calculated to provide meaningful educational benefit. In support of his argument, Parent states IEP goals were inappropriate to Student's needs such that he was not making acceptable progress. [Testimony of Parent, Thompson; Rec. at P-200.] Parent states that Student's goals were not measurable. [Testimony of Parent, Thompson.] Parent also states that Student needs a 1:1 educational technician or certified special

³ The behaviors demonstrated by Thompson should not be confused with assertiveness. The Hearing Officer recognizes the value and need for appropriate assertive behavior. Assertiveness is not the descriptor of what occurred here.

⁴ The other two allegations comprising this complaint investigation involved the exclusion of Thompson from one IEP Team meeting on 12/3/15 due to Parent's lack of notification of her attendance resulting in Parent-C's objection to Thompson's attendance. [Rec. at P-163,165.] The second allegation revolved around Perry's refusal to amend Written Notices (WN) to include information Parent wanted included as opposed to Perry's merely attaching the information to the previous WN. Rec. at P-164, 166.] Additionally, if refusing to amend, Perry was obligated to inform Parent of his right to a hearing to challenge allegedly inaccurate educational records. [Rec. at P-167.] These issues have been rectified. [Rec. at S-169.]

education teacher with him throughout the day in all of his classes as opposed to the current IEP implementation whereby Student receives individualized instruction with a certified special education teacher in the resource room one hour per day. [Testimony of Parent, Thompson; Rec. at P-192.; S-85, S-90, S-114, S-139, S-225.] Additionally, Parent states that Perry should provide Student with after-school tutoring. [Testimony of Parent, Thompson; Rec. at S-85, S-90, S-114, S-225.] Lastly, Parent states that Student needs Extended School Year services (ESY) in order to benefit from his education. [Testimony of Parent, Thompson. Rec. at P-193; S-114, S-139, S-225.]

In direct contrast, Perry teachers believe that the IEPs developed for Student were tailored to his needs, and as implemented, enabled Student to educationally progress in regular classes with his peers. [Testimony of Shrumpf, Morang, Johnson; Concurring testimony of Cushing.] Student progressed from grade level to grade level with the services afforded him via his IEP. [Testimony of Shrumpf, Morang, Johnson.] Parent alleged that Student's grades were inflated (*i.e.*, grades reflected Student's work after he received help from the special education resource room teacher and/or the classroom teachers) and therefore were not a true reflection of Student's learning and abilities. [Testimony of Parent.] Morang (Student's 5th grade teacher) and Johnson (Student's 4th grade teacher) stated that their grading practices, as well as opportunities to improve a graded assignment by redoing it, were the same for Student as for all students in their classes. [Testimony of Morang, Johnson.]

Johnson testified that Student was average but did require a little extra help. Student was in all core subject classes with Johnson and he worked on the same fourth grade curriculum as the other students in the class. Student liked to have material read to him or he liked to read it aloud. Thus, if Student chose to take his tests in the classroom instead of the resource room, Johnson would accompany Student to the back of the room where she either read the test to Student or Student would read the test aloud. She read the math tests. Johnson stated that she provided graphic organizers for ████████ to take to the resource room to work on writing skills. She also stated that Student's focus

improved during his fourth grade year. He preferred to sit in the front of the room near her where she could additionally redirect his focus as needed. [Testimony of Johnson.]

Morang testified that he taught Student's fifth grade core subject classes and Student did the same grade level work as the other Students in the class. Morang stated that the fifth graders were a very strong academic group and Student kept up. Student chose to sit in the front of the class; he was eager to learn. Student volunteered to read aloud and always wanted to do the hardest math problems. [Testimony of Morang.]

Shrumpf was Student's special education teacher and case manager during his fourth and fifth grade years. (She is now retired.) Shrumpf testified that provided pre-teaching and post-teaching of curricular concepts and classwork across all subject areas. Shrumpf provided additional guidance and instruction of classroom/homework assignments. She augmented classroom knowledge with "mini-lessons" focused on reading comprehension, spelling, organizational writing skills and following multi-step directions. Shrumpf testified that "[t]his support absolutely revolved around the curriculum." [Testimony of Shrumpf.]

Shrumpf stated that Student worked at low average levels, if not exceeding that level of performance. She indicated Student made tremendous progress, an observation based upon having taught him in his early years at Perry and then more recently in the resource room. Shrumpf stated Student was using the strategies she taught and was applying them in his regular subject classes. She knows Student to be independent and wanting to be as much like the other students as possible. Shrumpf stated her pride in Student's achievement and in his keeping up in his regular classes. She specified that Student's assignments were not qualitatively or quantitatively reduced. [Testimony of Shrumpf.]

Testimony evidenced the close collaborative efforts of Student's teachers in providing the special services detailed in his IEPs, thereby facilitating Student's educational progress. [Testimony of

Shrumpf, Morang, Johnson.] The Hearing Officer finds all three educators to be knowledgeable, competently experienced, and focused on providing Student with the services he needs to succeed. Because Parent has expressed a certain vehemence against Shrumpf and her teaching of [REDACTED], the Hearing Officer makes special note of her testimony. Shrumpf presented as being acutely keen and articulate. She responded to all questions with specificity and without hesitation.

Dr. Keith Hansen, psychologist, reported that Student's Full Scale IQ scores have been fairly consistent across evaluations (2014, 2015, 2017). He reported Student as showing low average ability. In short, Hansen found nothing in his evaluation to support an attention deficit hyperactivity disorder (ADHD) diagnosis. However, he suspected a central auditory processing disorder (CAPD) for which he recommended an audiological evaluation specific to CAPD. Hansen did identify a learning disability in written expression and a relative strength in math. (His evaluation will be addressed further *infra* under Issue 2 regarding evaluations.) [Testimony of Hansen; Rec. at S-357.]

Specifically regarding the issue of progress, Hansen testified that although Student's IQ scores remained relatively consistent in the low average range, his scaled scores increased over time. Throughout the hearing, Parent perseverated on grade equivalent scores and percentiles, therefore believing that Student was not making progress. Hansen stated that percentiles are not good predictors of achievement whereas scaled scores are good predictors because they are normed. [Testimony of Hansen.] The Hearing Officer agrees. Dr. Hansen stated affirmatively that Student is making progress and that "[s]ome intervention somewhere has probably helped." *Id.*

Testimony of the speech-language pathologist, Julie Hardy, also revealed that Student has made significant progress. Student has received two one-half hour sessions of speech-language services weekly pursuant to his IEP. She testified that therapy sessions were spent working on memory skills, phonemic awareness as it relates to spelling, and following directions. According to Hardy, Student's spelling has improved as has his use of expressive language structure. Student uses cues more.

Student is much more confident. Hardy understands from Student's teachers that he advocates for himself more in the classroom. [Testimony of Hardy.] In brief, the most recent speech-language evaluation conducted on May 1, 2017 showed an increase in Student's overall core language score from 85 to 100. [Rec. at S-267, S-270.] (Further discussion of the evaluation is likewise *infra*.)

In addition to the Hearing Officer's review of the evidence above, it is noted that Parent's second complaint investigation filed with the Maine Department of Education on February 3, 2017, #17.046C, addressed Parent's allegation of inappropriate IEPs. [Rec. at P-142 through 159.] Pertinent to the issues in this hearing, the Complaint Investigator found the following:

Allegation 1: Failure to provide special education, related services and supplementary aids and services to enable the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the general education curriculum in violation of MUSER §IX.3.A(1)(d). NO VIOLATION FOUND.

[Rec. at P-153.]

In *Rowley*, the Supreme Court wrote, "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction..., the child is receiving a 'free appropriate public education' under the Act." *Rowley* at 190. Further, *Andrew F.* reaffirmed the recognition of the *Rowley* Court that:

[T]he IDEA requires that children with disabilities receive education in the regular classroom "whenever possible." *Ibid.* (citing 20 U.S.C. §1412(a)(5)). When this preference is met, "the systems itself monitors the educational progress of the child." *Id.* at 202-203. "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material." *Id.* at 203. ... Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 203-204.

Andrew F. at 1000. Testimony of Perry's professionals and Student's advancement from grade to grade conform with the intent of IDEA. The Hearing Officer finds that Student's IEPs were appropriately developed after the consideration of all IEP Team members and were reasonably calculated to provide

meaningful educational benefit. The Hearing Officer finds that Student received specialized instruction through the resource room teacher as she provided individualized services aligned with each classroom teacher's grade level curricula. Classroom teachers likewise supported the special educational efforts within the classroom.

For the record, Parent's argument that the goals in Student's IEPs were not measurable is moot by virtue of Parent's second complaint investigation. Interestingly, the Complaint Investigator found no violation of allegation #4; he found that Student's IEP contained *measurable writing goals*.

[Rec. at P-156.] On the other hand, the Complaint Investigator did cite Perry for other goals which were not satisfactorily measurable. [P-at 156, 157.] However, Perry completed the corrective action required. All special education staff received training in the development of measurable IEP goals and have since been applying that knowledge in their work. [Testimony of Cushing, Shrumpf; Rec. at S-282, S-329.] Moreover, the Department of Education subsequently issued a finding of compliance with the corrective action. [Rec. at S-331.] Even if Parent were to assert that IEPs developed for Student *prior to* the corrective action were inappropriate (for goals not being measurable), Parent must meet his burden of showing that Student suffered a "deprivation of educational benefit". MUSER

XVI.15.(A)(2). Clearly Student did not experience a deprivation of educational benefit in light of the progress he has made. (Discussed *supra*.) Therefore, Parent has not met his burden in proving this allegation of procedural error.

Similarly, Parent asserted issues of not receiving either stand-alone progress reports or updated progress on IEPs, both of which he claimed are a violation of his rights and a denial of a FAPE for Student. Without belaboring the entire procedure followed by Perry, suffice it to say that testimony clearly demonstrated how progress toward IEP goals was provided to parents. Stand-alone reports were sent home with regular quarterly report cards. Updates on the IEPs were marked according to simple codes on a prescribed basis which may or may not have been supplemented with a brief

narrative. [Testimony of Cushing, Shrumpf.] Thus, the Hearing Officer finds that Parent did not prove this alleged procedural error and there was no denial of a FAPE.

Parent asserted that Student requires a 1:1 educational technician or certified special education teacher to assist him in all his regular classes in order to attain a meaningful benefit from his education. [Testimony of Parent; Thompson.] Parent wants this arrangement in lieu of the resource room services. Parent has repeatedly asked for this service at multiple IEP Team meetings. [Rec. at S-85, S-89, S-114, S-225.] Student is already in regular education classes for his core subjects. The idea of placing an adult next to Student in the classroom - singling him out in front of his peers – where Student is of (low) average ability and keeping up with his classes under the current special services plan – is in direct contravention to all of the educators’ professional opinions. [Testimony of Shrumpf, Morang, Johnson, Cushing; Testimony of Hansen.] Furthermore, Student’s mother, Parent-C■■, expressed opposition to this option advanced by Parent. [E.g., Rec. at S-86, S-114.] Parent-C■■ believes Student is receiving the appropriate supports and is progressing in his education. [Rec. at S-140.]

The Hearing Officer agrees. Strapping Student with an adult appendage in the classroom achieves exactly the opposite of what Student wants and has demonstrated, *i.e.*, to be as independently achieving as the other students. [Testimony of Shrumpf, Morang, Johnson.] Furthermore, Student may regress under those circumstances by either rebelling or becoming dependent on the educational technician, thereby losing the independence he has attained. [Testimony of Shrumpf, Hansen.] Morang and Johnson did not believe Student needed a 1:1 in the classroom because Student was doing grade level work. [Testimony of Morang, Johnson.] Dr. Hansen testified that in light of Student’s progress, he questioned whether Student even needed to be removed from class to receive additional services in the resource room. [Testimony of Hansen.] Lastly, the Complaint Investigator in case #17.046C (Parent’s second complaint in February, 2017) also questioned whether Student required special education services. “[I]t appears that he is able to access and progress in the general education

curriculum with the provision of a number of general education interventions and without provision of special education services.” [Rec. at P-155.] As a result of the Investigator’s finding, speech-language and psychological re-evaluations were conducted to reassess Student’s eligibility for special education services. [Rec. at P-155.] (This reassessment of eligibility will occur following the recommended CAPD evaluation. [Rec. at S-411.]) Therefore, the Hearing Officer finds that Parent’s continual assertions of Student’s need for a 1:1 educational technician are unfounded and unsupported by the evidence. Further, Student was not denied a FAPE on this issue.

Similarly, Parent made repeated assertions that Student required Extended Year Services (ESY) to benefit meaningfully from his education. [Testimony of Parent, Thompson; Rec. at S-114, S-140, S-142, S-235.] Student’s educators reported at IEP Team meetings and in the hearing that, having considered Student’s regression and recoupment patterns, he does not need ESY. [Testimony of Shrumpf, Morang, Johnson. Concurring testimony of Cushing.] Student does not regress any more significantly than other students over the summer months and Student does not require significant recoupment time once back at school. [Testimony of Cushing, Shrumpf, Morang.] Lastly, the Complaint Investigator likewise found no violation by Perry’s denial of ESY services for the summer of 2016. [Rec. at S-256, 257.]

Tutor/advocate, Thompson, does not like and “does not accept” the concepts of regression and recoupment as the standards for determining whether ESY is warranted. [Testimony of Thompson.] Her opinion does not automatically supersede the professional opinions of Student’s teachers. It has already been established *supra* that Parent and Thompson provided their input at Student’s IEP meetings. Pursuant to MUSER IX.3.C(1)(b), their input regarding ESY was considered by the IEP Team members. However, the consensus of the IEP Team was that ESY was not appropriate for Student. *Ibid.* Therefore, the Hearing Officer finds that Student was not denied a FAPE by the exclusion of ESY in his IEPs.

Additionally, Parent believed after school tutoring to be provided by Perry was necessary for Student to benefit from his education. [Testimony of Parent, Thompson. Rec. at S-85, S-89, S-114, S-140, S-142, S-225.] IEP Team educators again disagreed and rejected that service. [Testimony of Shrumpf, Morang; Concurring testimony of Cushing; Rec. *Ibid.*] Educators reported that any help Student required should be provided during the school day where there can be collaboration among faculty and the provision of consistent methods. [Testimony of Shrumpf, Morang.] Student's mother, Parent-C█, also expressed disagreement with Parent's proposal of after school tutoring. [Rec. at S-84, S-86, S-114.] Clearly the consensus of IEP Team members was that after-school tutoring was not appropriate for Student. The Hearing Officer finds that Student's IEPs were reasonably calculated to confer meaningful educational benefit without the addition of after school tutoring. Student was not denied a FAPE on this point.

In conclusion regarding the first broad issue of a FAPE, the Hearing Officer finds that Parent has not met his burden of proving by a preponderance of the evidence that Perry Public Schools denied Student a free appropriate public education during the two year period between July 24, 2015 and July 24, 2017. Student's IEPs were reasonably calculated to confer meaningful educational benefit. Although Student may not have progressed to the expectation levels of Parent, evidence showed that Student was making good progress relative to his cognitive ability and demonstrated achievement.

Issue II: Were the psychological and speech-language evaluations conducted by Perry Public Schools (*i.e.*, those that were discussed at the October 5, IEP Team meeting) inadequate and inappropriate thereby warranting independent evaluations of same at public expense?

Parent requested independent evaluations at public expense due to his claim that Perry's evaluations were inappropriate. Parent's reasons for asserting inappropriateness were simple: 1) he did not approve Perry's choice of evaluators nor was he consulted regarding the choice of diagnostic tests to be administered; 2) he did not give his consent. [Testimony of Parent.]

First, to address Parent's objections, there is no requirement in MUSER giving Parent any right or prerogative to choose whom Perry hires or contracts with to provide services or evaluations. *See* MUSER V.2. Nonetheless, Parent persistently made statements indicating he was not informed of, and did not approve, the evaluators. [Testimony of Parent.] Moreover, Parent demonstrated a similar sense of entitlement to be informed of, and approve, the individual tests that would constitute the evaluations. [Testimony of Parent; Rec. at S-416.] Parent has no such entitlement or right. *Ibid.*

Secondly, Parent's lack of consent for the evaluations did not preclude Perry from proceeding with said evaluations. Parent is not the only parent concerned about Student's education. Mother, Parent-C█, has attended and participated in IEP meetings regarding Student. [Rec. at S-23, S-65, S-83, S-88, S-113, S-138, S-224, S-273, S-415.] Parent-C█ gave consent for the evaluations. [Rec. at S-261; Testimony of Cushing.] Parent's personal lack of consent does not invalidate the evaluations conducted by Perry, much less constitute inappropriateness. As an aside, it is curious why Parent would want to obstruct the evaluations that were recommended as a result of his own complaint investigation filing. [Rec. at S-456, 457, P-159.]

Parent's objections do not support his request for independent evaluations at public expense. Moreover, Parent raised no substantive evidence demonstrating that the evaluations provided by Perry were of an inferior quality or otherwise inappropriate under MUSER V.2.(A-C). However, on this issue the burden of proof shifts to Perry to prove that the evaluations conducted by its professionals were appropriate pursuant to MUSER V.2.(A-C), notwithstanding Parent's objections.

Dr. Keith Hansen administered the psychological evaluation on May 15, 2017. He is a licensed clinical psychologist with extensive experience. Hansen is currently affiliated with the Aroostok Mental Health Center (AMHC). His practice includes therapy but mostly assessments, including school assessments. [Testimony of Hansen.]

At the hearing Hansen testified about his review of Student's records including past evaluations. He then proceeded to discuss the tests he administered and the results; he provided detailed context for understanding. Hansen compared his results to previous evaluations. [Testimony of Hansen; Rec. at S-357.] Hansen's choice of diagnostic tests are widely used and respected as valid, reliable instruments. He administered the Weschler Individualized Scale for Children-V (WISC-V) to assess cognitive abilities and the Weschler Individual Achievement Test-III (WIAT-III) to assess achievement. *Id.* Hansen also administered the Integrated Auditory & Visual Continuous Performance Test (IVA-CPT), the Behavior Rating Inventory of Executive Functions (BRIEF) and the AD/HD Rating Scale-IV (AD/HD-IV). He also interviewed Parent-C. [Testimony of Hansen; Rec. at 357.]

The results of Hansen's testing need not be described fully here as the issue before the Hearing Officer is to determine the appropriateness of the school's evaluations. It was apparent that Hansen was very analytical in interpreting the results of Student's evaluations. He keyed in on a potential central auditory processing disorder (CAPD) and explained in detail how the Student's performance led him (Hansen) to suspect CAPD. He recommended formal testing for same. Dr. Hansen did not find evidence to support an ADHD diagnosis. *Id.*

As for cognitive ability and academic achievement, highlights of Hansen's findings are as follows. He noted that Student's IQ scores have remained consistently low average over time but his scaled scores for achievement have increased.⁵ Hansen reported that although Student's reading comprehension is about the same as it was per results of a 2014 evaluation, Student is now reading faster. Hansen stated, "Speed has jumped up but he hasn't lost or sacrificed comprehension." He reported that something happened to cause this improvement; it did not happen by chance. Hansen diagnosed a learning disability in written expression. *Id.*

⁵ Hansen explained that IQ scores are expected to remain relatively consistent. Achievement scores can be expected to change.

Hansen's evaluation of Student was appropriate. It met the requirements as outlined in MUSER, *e.g.*, Hansen used multiple, technically sound measures to assess cognitive abilities and behavioral factors. He provided information to assist Perry staff in planning for Student's educational needs. Clearly Hansen is trained and proficient in his professional practice. MUSER V.2.(A-C).

Also currently at issue is the speech-language evaluation. Julie Hardy, MA, CCC-SLP evaluated Student on May 1, 2017. Hardy is state licensed and certified by the American Speech-Language-Hearing Association. She is currently in her 30th year of professional practice and has experience working in schools, clinics and hospitals. Hardy is employed by Calais Regional Hospital which has a contract with AOS to provide speech-language services in the schools. [Testimony of Hardy.]

Hardy testified that she administered the Clinical Evaluation of Language Function-4 (CELF-4) and took an informal language sample of Student. She compared her testing results [Rec. at S-270] to the previous evaluation [Rec. at S-10.]. Hardy stated that Student's use of expressive language structure has improved significantly. Pragmatic conversational skills were age appropriate. [Testimony of Hardy; Rec. at S-270.]

Hardy's evaluation report states current therapy goals focus on improving overall memory, following directions, and vocabulary/word skills. The results of the evaluation show average range scores in all areas of language. The narrative section of her report details the increases in scores and the improved skills Student now demonstrates (*e.g.*, follow directions without cues, recall verbal information, formulate sentences and use appropriate vocabulary). The report includes observation of vocal quality and fluency of speech being within normal limits. [Rec. at S-270.] The status of speech sound production/articulation was not addressed specifically in the report. Hardy responded to Parent's question regarding same. She testified that testing of speech *per se* was not done. [Testimony of Hardy.] There have been no statements regarding Student's articulatory speech patterns by any

witnesses so it is unclear whether Student's speech sound production is within normal limits or not. On the other hand, because there are no speech articulation goals included in Student's IEPs, it may be local reporting practice that "normal conversational skills" encompasses speech articulation. Further, as a result of the evaluation, Hardy's opinion is that Student no longer qualifies for speech-language services. *Id.* That implies Student's articulated speech is within normal limits.

The status of Student's hearing acuity was questioned by the Hearing Officer. Hardy testified that Maine's school systems screen students and there is a presumption of normal hearing if nothing in the record (subsequently) contradicts that. [Testimony of Hardy.]

The speech-language evaluation was appropriate. The CELF is a comprehensive instrument used to assess receptive and expressive language. Hardy also made observations ruling out other speech-language disorders. Her report included narrative descriptions of Student's speech-language performance in addition to test scores. Hardy is an appropriately licensed, certified and experienced speech-language pathologist. The evaluation conforms to the aforementioned requirements of MUSER V.2.(A-C).

Therefore, on the second issue of evaluations, the Hearing Officer finds that Perry has proven by a preponderance of the evidence that the psychological and speech-language evaluations were appropriate. Parent's request for independent evaluations at public expense is not warranted.

V. ORDER

After consideration of the evidence presented during this due process hearing,
IT IS HEREBY ORDERED THAT:

1. Perry Public Schools did not deny Student a free appropriate public education during the two year period between July 24, 2015 and July 24, 2017.
2. The psychological and speech-language evaluations conducted by Perry were appropriate and Parent is barred from seeking independent evaluations at public expense.
3. Parent's claim for 350 hours of compensatory education of specialized instruction by a special education teacher of Parent's choosing is barred.

4. Parent's claim for 35 hours of compensatory speech-language services is barred.

5. Parent's claim for 45 hours of compensatory Extended School Year services in the form of specialized instruction from a certified special education teacher is barred.

6. Parent's claim for future Extended School Year services during the summers of 2018, 2019 and 2020 is barred as a result of this hearing. Future ESY services are subject to the determination of the IEP Team.


7. Parent's claim for after school tutoring by Perry Public Schools and transportation home thereafter is barred as a result of this due process hearing.

8. Parent's claim for Student's current daily one hour of specialized instruction to be provided solely with Student to the exclusion of other students in the room is barred.

9. Parent's claim to exclude Beth Cushing from the administration of Student's special education is outside the jurisdiction of the Hearing Officer.

10. Parent's claim for AOS 77 to hire a separate administrator to oversee Student's special education is outside the jurisdiction of the Hearing Officer.

Dated: December 15, 2017


Melanie Frazek, Esq.
Hearing Officer