

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

August 4, 2009

09.077H— Parent v. Wells-Ogunquit Community School District

REPRESENTING THE FAMILY: **Richard O’Meara, Esq., and Nicole Bradick, Esq.**

REPRESENTING THE DISTRICT: **Amy Tchao, Esq., and Sara Hellstedt, Esq.**

HEARING OFFICER: **Shari Broder, Esq.**

This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on June 15-19, 2009, at the offices of Murray, Plumb & Murray in Portland, Maine. In addition to counsel and the hearing officer listed above, also present for the proceeding were the Parent and Karen Ropes, Director of Special Services. Testifying at the hearing were:

The Parent	
Laura Slap-Shelton, Psy.D.	Neuropsychological Evaluator
Wendy Hoge, LCSW	Therapist
Jessica Means*	Director, Cape Elizabeth H.S. Choices Program
Alan Fink, Ph.D.	Psychologist
Kristen Rollins, Ph.D.	Psychologist
Karen Ropes	Director of Special Services
Leo Taillon, LCSW*	Therapist

*Appeared pursuant to a subpoena

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND:

On March 17, 2009, the Mother (henceforth “Parent”) filed a due process hearing request on behalf of her son, the Student, against both the Wells-Ogunquit Community School District (“District”) and the York School Department (“York”). The two school districts moved to sever

the school units from the Parent's joint hearing request. On April 15, 2009, Hearing Officer Rebekah Smith issued an order granting the school units' motion, and allowed the Parent to amend her hearing request to reflect severance. The Parent filed a motion to reconsider this order on April 17, 2009, which Hearing Officer Smith denied on May 1, 2009. The Hearing Officer then severed the due process hearing request into two proceedings. The Parent withdrew her hearing request against York.¹

On June 1, 2009, a prehearing conference was held at the offices of Murray, Plumb & Murray in Portland, Maine. Participating in the conference were: the Parent; Richard O'Meara, Esq., and Nicole Bradick, Esq., counsel to the Parent; Karen Ropes, director of special services for the District; Amy Tchao, Esq., and Sarah Hellstedt, Esq., counsel to the District; and Shari Broder, Esq., hearing officer. Documents and witness lists were exchanged in a timely manner. The Parent submitted approximately 390 pages of exhibits, including a CD (herein referenced as P-#), and the District submitted approximately 1500 pages of exhibits (herein referenced as S-# and an Appendix numbered 1-#). The documents in the District's appendix numbered 1-677 to 1-738 were not admitted into the hearing record.

This due process hearing was held on June 15-19, 2009 at the offices of Murray, Plumb & Murray in Portland, Maine. Both parties requested to keep the hearing record open until July 13, 2009 to allow the parties to prepare and submit closing arguments. These were submitted to the hearing officer and opposing counsel electronically that morning, and the

¹ At the prehearing conference, the District objected to the introduction of evidence on the issue of whether York failed to provide the Student with FAPE. Although I allowed evidence regarding the Student's experience in York, because York is not a party to this hearing, I have attempted to avoid making findings of facts regarding York's actions when not necessary to the determination of the issues in dispute in this hearing. For example, the Parent presented hearsay evidence of the opinions of two York teachers, allegedly said while the Student was still attending school there, that the Student would fare best in a residential placement. As this evidence is not particularly reliable or probative to the Student's placement needs while in the District, I have not included it in my findings of fact.

hearing officer received signed hard copies from both parties the following day. The parties further agreed that the hearing officer's decision would be due on August 4, 2009.

II. ISSUES:

1. Prior to the District's February 9, 2009 IEP and offer of placement in the Choices Program, did the District meet its obligation under the IDEA to offer or provide the Student with appropriate programming reasonably calculated to confer educational benefits to him in the least restrictive environment? If not, what remedy, if any, is he entitled to receive?
2. Is the District's proposed IEP and placement in the Choices Program reasonably calculated to provide the Student with FAPE in the least restrictive environment?
3. If not, is the Student entitled to be compensated for past educational losses due to the District's failure to provide FAPE?
4. If the answer to question two is no, does the Student require a residential placement to receive FAPE in the least restrictive environment?

The Parent also raised the issue of whether the Student was entitled to compensatory damages as a result of the emotional and physical harm he incurred due to his treatment by the District. The District objected to this on the ground that the hearing officer has no jurisdiction to make this determination. It is well settled that the hearing officer only has jurisdiction over claims for violations of the IDEA, and this is not such a claim. Furthermore, the IDEA does not authorize tort-like monetary damages. As the First Circuit stated in *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006), Congress made a judgment that such damages would be an unjustified remedy for the IDEA.

III. FINDINGS OF FACT

1. The Student is xx years old (d.o.b. XX/XX/XXXX), and lives with his mother, stepfather and xx year old half brother in Ogunquit, Maine. He is eligible for special education and related services under the category of Emotional Disability.
2. The Student had a traumatic early childhood, characterized by family discord. The Student's biological father no longer has parental rights to the Student.

3. On September 5, 2006, Alan Fink, Ph.D., evaluated the Student for early intervention services. [S-531] At the time, the Student was receiving services for speech and language development, but there were concerns regarding behavior issues at home and within the Student's daycare setting. [*Id.*]
4. Based on Student's aggressive and inappropriate sexualized behaviors the Parent observed, she suspected that the Student might have been sexually abused by paternal relatives. [Testimony of Parent] She obtained both a Medical/ Forensic Evaluation [S-859], and a Behavioral Report [S-863] in August 1998, as well as a Psychosocial Evidentiary Assessment from the Spurwink Child Abuse Program [S-851] in September 1998. Neither evaluation concluded that there was evidence of sexual abuse, and there was no conclusive evidence of physical abuse.² [S-833, 857, 861]
5. The Student began xx in the Biddeford Public Schools (1998-1999). Dr. Fink was involved with the Student again at that point, as the Student was presenting with aggressiveness and sexualized behavior towards his peers. [S-532] According to the Parent, the Student had behavioral issues at Biddeford Primary School, but they were not "catastrophic." [Testimony of Parent]
6. In 1999, Student began counseling with Scott Storm, Psy.D., at the York Psychiatric Association. Dr. Storm performed a psychological evaluation on the Student in June of 1999. The Student's full-scale IQ was 102. [S-847] Other testing showed, among other things, oppositional defiance and depression. [*Id.*]
7. In December 2000, Andy Cook, M.D., conducted a psychiatric evaluation of the Student. [S-842-845] The Student was referred for "excessive aggression, inappropriate touching, acting out, suspended for two school days, and recently kicked out of xx because of inappropriate touching." [S-842]. He was "extremely hyperactive" in both sessions with Dr. Cook [S-843], who listed his diagnoses as probable ADHD and PTSD [S-844].
8. On January 13, 2001, following a series of behavioral incidents, the Student was hospitalized at Spring Harbor Hospital for three weeks. While hospitalized, the Student received a psychological evaluation from Kirsten Wood Milliken, Ph.D. and Linda Marsh, Psy.D. [S-838]. The report notes the Student had no contact with his biological father since the age of xx, but "there is a great deal of chaos and instability in the home."³ [S-838] The Student's full scale IQ registered in the average range (WISC-III standard score of 101), and he was diagnosed with Oppositional Defiant Disorder with underlying Depression [S-840]. According to Dr. Wood Milliken, "It can be

² The Parent reported in most of the Student's assessments that he was abused sexually and physically as a child. *E.g.*, S-815, S-271, S-594, S-531, S-838. Although, as noted above, there was no medical or forensic evidence of this, evaluators took the Parent's report into account in their evaluations.

³ Years later, the Student again had contact with his father, as he makes reference to his father being in and out of his life to Dr. Bell at Spring Harbor. [1-177] He also mentions "serving beer to the father's alcoholic friends" in a session with Ms. Hoge in May of 2007, but it is unclear whether he was referring to his biological father or his stepfather, as he told Dr. Bell he hadn't seen his father in three years. [P-367]

anticipated that if [the Student] does not receive treatment or if his home life does not improve, he will develop more pervasive and chronic Oppositional and Conduct Disordered behaviors.” [S-840].

9. At the start of his xx grade year, the Parent enrolled the Student at the Ogunquit Village Elementary School in the District. [Testimony of Parent] During the first week of school, the Student exhibited aggressive, uncontrollable behavior. [S-532] As a result of these behaviors, the Student’s IEP team referred him to the Sweetser day treatment program early into the school year. [Id.] The Student attended the Sweetser program from grades xx until halfway through his xx grade year, and required crisis services when he was at home during the summer months. [Id.]
10. On August 12, 2003, Wendy Hoge, a licensed clinical social worker employed at York Psychiatric Association, began to work with the Student in family sessions. [Testimony of W. Hoge] She did family therapy with the Parent and the Student’s younger brother during that time, which continued until April of 2004. [Id.]
11. Halfway through the Student’s xx grade year, the Parent removed the Student from Sweetser and enrolled him at the Wells Junior High in the District. [S-532] The Student only received consulting services that year. [Id.] The junior high school did not indicate any major behavioral events or need for changes in programming during that year. [Id.]
12. The Student split his xx grade year between schools in Ohio and New Hampshire. [Testimony of Parent; S-532] In New Hampshire, the Student was mainstreamed for all academic subjects, and while his report card noted poor grades, there was no record of any behavioral concerns. [S-816, P-49]
13. For xx grade (2006-2007), the Parent moved her family to Kittery. The Student attended xx grade at the Shapleigh Middle School from September through December 2006. [P-51] He had multiple disciplinary incidents resulting in suspensions while in Kittery. [P-52; P-54] While the Student experienced some academic success at Shapleigh Middle School, he did not make progress in the social realm. The Parent described him that semester as disorganized, volatile, sad, depressed, and alienated. [Testimony of Parent]
14. A Psychological Evaluation conducted by Nancy Smith-Jewell, Ph.D., in December 2006 [S-815], noted that the Student “still has a few problems with telling extravagant, loud stories to everyone, for everyone to hear and seeming to avoid any sort of extended, meaningful conversation.” [S-816] On the Wechsler Intelligence Scale for Children-IV (WISC-IV), the Student showed strength in processing speed, with a score of 115, the 84th percentile. [S-818] His other scores were 96s and a 97, within the average range. [S-818] Dr. Smith-Jewell administered the Behavior Assessment Scale for Children (BASC) [S-819], which generated a Clinically Significant rating by both teachers for Conduct Problems, and either a Clinically Significant or At-Risk from teachers for most categories, notably Hyperactivity, Aggression, Externalizing Problems, Depression, Atypicality, and the Behavioral Symptoms Index. [S-819] Dr.

Smith-Jewell noted in her report that she was struck by the fact that, despite the Student's complex school and family social history, that he has developed and matured to a point where he is functioning successfully within a mainstream setting. [S-823]

15. Although school was going relatively well for the Student, the residence where he was living with his family was sold, and they had to move. [Testimony of Parent] This was the Student's sixth move and consequent school change in three years. The family relocated to York in the middle of the Student's xx grade year, and the Student enrolled in York Middle School (YMS) on January 19, 2007. [Testimony of Parent; S-811] Similar to his Kittery IEP, the Student was fully mainstreamed for all of his classes at York Middle School. [S-799 to 809] The Student attended homeroom, recess and lunch in a self-contained classroom (the Omni room) to work on peer relationships, study skills, organizational skills, social skills and homework completion. [S-796 -798] At York, the Student experienced increasing difficulties with peer conflict and bullying victimization. [S-532] In May 2007, the IEP team agreed to have the Student attend study hall in the Omni room, as they thought the Student would benefit from a structured study hall where he could have assistance with his work, since he "was easily overwhelmed by daily expectations and needs teacher support to process issues as they arise." [P-97] The amended IEP noted that the Student "struggles to maintain appropriate peer interactions in and out of his classes." [P-97]
16. In late April of 2007, the Student began seeing Wendy Hoge again for individual therapy, and continued to see her for four months for a total of nine sessions. [P-366 to 370] On April 30, 2007, Ms. Hoge noted that "He is very angry, aggressive both verbally & physically abusive." [P-370] The Student agreed to come to therapy under protest, but seemed to enjoy talking. [*Id.*] He explained that he hated YMS, and wished he were back in Kittery. [*Id.*] As a therapy patient, Ms. Hoge found the Student not inclined to talk about relevant emotional matters, and that it was hard to get him to stay on task during therapy. [Testimony of W. Hoge] Ms. Hoge felt the Student did not have much emotional resiliency, and that he used lots of projection, denial and grandiosity. [*Id.*] At the hearing, she testified that she did not believe that outpatient therapy has helped the Student. [*Id.*]
17. On May 3, 2007, the Parent called Ms. Hoge because the Student had a "major meltdown" at school upon being caught writing explicit and exploitive sexual things. [P-369] When the Parent called, the Student was missing in the woods somewhere. [*Id.*] The Parent told Ms. Hoge she was questioning whether the Student should be "placed" at this point, as she was increasingly worried about how her younger son was affected by this. [*Id.*]
18. At the end of the student's xx grade year, the Parent asked the York School Department to hold the Student back for another year of middle school. [Testimony of Parent] The Student received an A+ in physical education, Bs in some classes, but he did poorly in math, and failed the last semester of language arts. [P-103] The York School Department declined this request, and the Student was promoted from York Middle School in June of 2007. [Testimony of Parent]

19. In the fall of 2007, the Student began cc grade as a freshman at York High School. [S-754; Testimony of Parent] At the September 27, 2007 IEP team meeting, all of the Student's teachers who were present reported that the Student was doing very well, both academically and socially. [S-786] At the Parent's request, the Student was fully mainstreamed for all of his classes, and was being successful.
20. On January 10, 2008, the Student's IEP team met to discuss his progress and unanimously agreed to reduce the services in his IEP from direct instructional support to consultation services. [S-780] The Parent expressed her pleasure with the Student's progress as well. [S-781] The IEP Team considered dropping him from special education services altogether, but agreed to continue to make special education supports available within an IEP to address the Student's emotional issues and difficulties with peer relations. [S-782]
21. On January 15, 2008, the Student was suspended for five days for his involvement in a fight. [S-745]
22. The Student became the target of bullying by some boys. [1-130, 1-174] On February 28, 2008, while instant messaging some peers from his home computer, the Student threatened to bring a gun to school and shoot a student. [S-744, 731; Testimony of Parent] The following day, this information was given to Jeremie Sirois, the YHS assistant principal. Mr. Sirois called the police, and removed the Student from class. [S-726, 744] Two or three police officers arrived at school. [S-731-733] The Student was searched and questioned, and he did not have a weapon on him or in his belongings. [S-731, 744] The Student was then transported to York Hospital, but was admitted to Spring Harbor later that day for psychiatric observation. [Testimony of Parent; S-732, 1-223] He was also suspended from school pending a psychological evaluation and manifestation determination. [S-744]
23. The Student was hospitalized at Spring Harbor from February 29, 2008 to March 7, 2008. [1-223] Upon his admission, John Bell, M.D., noted that, "his affect was bright and cheerful. He feels very buoyed by the news that things are being sorted out with the school." [1-120] At the time of his admission, Dr. Bell's working diagnoses were impulse control disorder not otherwise specified (NOS), and "consider oppositional defiant disorder." [1-120] The Student remained cooperative, in good control, cheerful, appropriate, and tolerant of the annoying behaviors of his peers, and had a good appetite throughout his stay there. [1-120, 1-124, 1-156, 1-218] On March 5, 2009, the Student reported, "I would really like to start school, I'd rather be there than on the unit." [1-221]
24. During his hospitalization at Spring Harbor, the Student underwent a risk assessment with Brian Wener, Psy.D., which was required before he could return to YHS. [S-720-725] The Student acknowledged a problem with anger management for many years. [S-721] Dr. Wener's report mentioned the Student's significant history of evolving and escalating anti-social behaviors. [*Id.*] The report quotes the Student as wanting to return

to school, noting that, “by most accounts, this has been [the Student’s] best school year experience in many years. He has made a good academic transition to York High School, and likes to learn, likes his school, and likes his teachers . . . they treat him with dignity and respect, and provide a safe place for him to learn.” [S-721, 724] On the other hand, Dr. Wener noted that being the subject of targeted school bullying was playing a major role in some of the Student’s troubles, but that he was not a totally innocent victim of others’ torments. [S-724] Dr. Wener concluded that because the Student presented little risk for future threats and/or acts of violence, “there would appear no solid reason for [the Student] to be excluded from returning to classes,” and it may not be in the Student’s “best interest to be not permitted to return to an environment in which he is experiencing success.” [Id.] He recommended that the Student undergo “intensive psychotherapy, preferably with a male therapist, with a specialty in anger management training,” that his family consider the appropriateness of psychotropic medication, which the Parent had refused to do during the Student’s hospitalization, and that he be discouraged from viewing violence in any form of media. [S-725] Dr. Bell, the attending psychiatrist, thought the Student would be best served by a period of “very intense psychotherapy intervention and treatment” on an outpatient basis while receiving tutoring. [S-711] He did not feel that the Student should immediately be reintegrated into the full school setting, but that these therapeutic interventions were needed “to address both acute and chronic issues in order to allow a successful transition back to full school re-entry.” [Id.] Dr. Bell added that the providers who were working with him in the community would best judge the Student’s progress towards reintegration. [Id.]

25. While the Student remained hospitalized, the York IEP Team held a manifestation meeting on March 5, 2008. [P-148] The IEP team found that the Student’s behavior was a manifestation of his disability, and that his IEP had been implemented. [P-149] The District noted that the Student had been “bullied by peers in school (which has been addressed by parent and school) and feels threatened at school.” [S-738]
26. At discharge, the Student’s diagnosis was Mood Disorder, NOS. He was referred for eye movement desensitization and reprocessing (“EMDR”) therapy, as well as individual psychotherapy with Debra Fredette, LCSW. [1-156]
27. On March 6, 2008, the Parent met with Wendy Hoge, and discussed the Student’s status. [1-3] Her notes labeled this a “family” meeting. [1-3] She had two more family meetings, on March 12, 2008 and March 18, 2008⁴. [1-3] On March 12, the Parent reported that the Student was out of the hospital and would be starting school on March 18. [1-3] Ms. Hoge reported that the Student was doing “o.k.” and that things were very positive with him at the time. [1-3, Testimony of W. Hoge]
28. The York IEP team met on March 12, 2008 and drafted a reentry plan for the Student so that he could return to school on March 17. [S-713] At that meeting, the IEP Team recommended that the Student “should return as soon as he could safely do so as he has

⁴ It does not appear that the Student was at these meetings, although this is not clear from the record.

had a lot of success at school and wants to return.” [Id.] They amended the Student’s IEP to include social work services at York’s expense to address anger management and bullying issues, and to provide the Student with tutoring until he returned to school. [Id.] The Parent consented to York’s offer of social work services with Leo Taillon, LCSW, for anger management and coping strategies, and with Debra Fredette for EMDR. [Id.] She also signed an authorization, allowing Mr. Taillon and Ms. Fredette to speak to York regarding the Student’s treatment and progress. [S-716-717]

29. Another IEP meeting occurred on March 20. The discussion in the minutes of this meeting [P-155 & S-695] represents that the Parent did not think the Student was ready to return to school, and that York’s special education director, Jean Beetz, agreed with this. [Id., S-696] The Parent also represented that the Student was in therapy four days a week. [S-695] This was not accurate, however.⁵ At that point, the Student had participated in two two-hour sessions with Ms. Fredette, one on March 14 and another on March 17. [1-116-117] The Student had not yet begun treatment with Leo Taillon. As a result, the team agreed that the Student would continue with outside tutoring and therapy [Id., S-696] The IEP dated March 21, 2008 contained home tutoring of two hours per day until June 30, 2008, and 50 minutes of social work counseling. [S-702-703]
30. On March 27, 2008, the Student began counseling with Leo Taillon, the focus of whose practice has been trauma treatment, with certifications in hypnotherapy and EMDR. [Testimony of L. Taillon, 1-36] Mr. Taillon used cognitive behavioral therapies, particularly EMDR, in treating PTSD, although he did not provide EMDR to the Student. [Testimony of L. Taillon] York contracted with him to help the Student with anger management. [Id.] Mr. Taillon saw the Student weekly for 50 minutes until July 1, 2008. During his treatment with the Student, Mr. Taillon did not observe direct symptoms of PTSD, although the Student and his mother reported such symptoms. [Id.] The Student presented a very tough, violent persona as a defensive behavior, but Mr. Taillon did not think the Student had the intent to harm anyone. [Id.] Mr. Taillon felt he was establishing a very positive therapeutic relationship with the Student, who was receptive to treatment, and a very engaged participant. [Id.] Unlike many adolescents who sit in therapy with their arms crossed, resistant to the process, the Student was very verbal, and acknowledged understanding very complicated concepts. They began to make some interventions and progress, but therapy did not last long enough to have definite curative outcomes. [Id.] Mr. Taillon wanted to do some EMDR, as he felt the Student was a good candidate for it, but did not because he was told Deb Fredette was providing this. [Id.] During this time frame, the Student visited the Hyde School, which he liked. [1-38] He told Mr. Taillon that he would not miss his family if he attended school there, and Mr. Taillon felt this was accurate, as the Student was “extremely adaptive.” [Id.] Mr. Taillon testified that Hyde School would be good for the Student, but that he needed intensive treatment, which Hyde did not provide. [Id.] Mr. Taillon felt the Student’s removal from school was adversely affecting him, as he did not have an avenue in which to practice his social skills. [Id.]

⁵ Although the Parent, in her testimony and at statements made during IEP meetings, periodically referred to the Student being in therapy four days a week, there was no evidence in the record to support this.

31. During the same time period, Ms. Fredette was also treating the Student. [1-82 to 1-117] Ms. Fredette, who diagnosed the Student with PTSD and Personality Disorder NOS, initially saw him twice a week for two hours each visit from March 14-April 2, 2008, then once weekly until the end of May, and five times total during June, July and August. [1-82 to 1-117] Although she was supposed to be treating the Student using EMDR, after two separate attempts, Ms. Fredette determined the Student was not a “good candidate” for EMDR. [1-101, Testimony of L. Taillon] Ms. Fredette reported that she had developed a positive therapeutic relationship with the Student, and that he was making progress. [1-101, 1-82 to 1-117]
32. On June 10, 2008, the Parent signed a consent form allowing York to obtain a psychological evaluation of the Student. [S-687-691] The Student completed this school year by continuing his tutoring and social work therapy, earning As and Bs in all of his classes.
33. The IEP team met on June 19, 2008 to discuss the Student’s progress and future placement. [S-678] The Parent attended the meeting with Attorney Robert Powers. Mr. Taillon attended to advocate for the Student. [S-678] The Parent thought Hyde School would be appropriate for meeting the Student’s academic and social needs. [S-678] Although the IEP team did not reach agreement regarding the Student’s placement, they agreed that he needed a program with a social component, therapeutic component, and academic challenge. [S-681] Hyde had no therapeutic component. York also proposed continuing counseling services as the Student’s Extended School Year (ESY) program. [S-682]
34. On June 27, 2008, the IEP team met again to discuss the student’s placement. According to the minutes of the meeting, the meeting got off to a bad start, with Attorney Powers describing the draft IEP as a “non-starter,” but when asked to identify the aspects with which he disagreed and to offer alternatives, Attorney Powers replied that it was not his job to put together a draft. [S-669] Ms. Fredette felt that the “latest traumatic event has diminished [the Student’s] capacity to be in York High School,” but that “he needs a school environment very much, and is ready to return to school” with support. [S-672] Ms. Fredette also informed the team that the Parent had revoked her consent to speak with York. [S-673] The Parent added that she thought it was best for the Student’s “therapeutic team” of Ms. Fredette, Mr. Taillon, and Ms. Hoge (the last of whom he was not treating at the time⁶) to limit their exchange of information to the Parent and Attorney Powers. [S-673] Although York was willing to hire Ms. Fredette and Mr. Taillon to provide therapeutic services for the Student through the summer, Ms. Beetz said it would not be possible to hire Ms. Fredette if York could not speak with her. [S-673] In a note dated July 8, 2009, Mr. Taillon told Ms. Beetz, “Mom triangulated the therapeutic relationship when she took the adversarial stance.” [1-18] He felt he was therefore unable to continue providing therapy for the Student. [Testimony of L. Taillon] Mr. Taillon believed that with the coordination of collateral therapies, including cognitive behavior therapy, EMDR, Family Systems Therapy, and

⁶ Ms. Hoge had last regularly treated the Student in July 2007.

a safe educational milieu that encourages interdependence, trust, collaboration and compassion, the Student's prognosis was very good. [Testimony of L.Taillon, 1-14]

35. The IEP team agreed to reconvene on July 10, 2008. [S-674] At the meeting, York again offered the Student counseling as an ESY service. [S-646] It proposed placing the Student at a public high school other than York with one hour per week of social work counseling service, one hour per month of social work parent consult to support the Parent, and seven behavioral goals. [S-632-635] The Parent rejected this IEP because she did not think it reflected the views of those who knew the Student best, and did not think the Student would be accepted or comfortable in a public high school. [Testimony of Parent, S-643]
36. In early September 2008, the Parent moved her family back to Ogunquit. [Testimony of Parent] On September 15, 2008, she sent a letter to the District enrolling both of her sons in school, and requesting a team meeting for the Student. [P-260; 612] The letter mentioned the Parent's belief that York's IEP was "highly inappropriate," and that the Student was not attending YHS "while awaiting an appropriate therapeutic placement to address his emotional disability." [S-612] The Parent asked that Ms. Fredette, Ms. Hoge, and Mr. Taillon be invited to the IEP team meeting. [S-612]
37. Although the District used e-mail often to communicate, its practice was to always send advance written notice of IEP team meetings by regular mail to everyone on the list of attendees. [Testimony of K. Ropes] In response to the District's scheduling of a September 22, 2008 IEP team meeting [S-598], the Parent submitted to the District a statement of her concerns about the Student's educational needs. [S-594] In it, she related her views that the Student needed (1) services designed to improve his social, behavioral, and coping skills; and (2) a high level of structure and consistency in a therapeutic residential program that offered a strong academic program and after-school activities. [S-598]
38. At the September 22 meeting, the Parent presented the IEP team with a letter from Ms. Hoge. [S-603] Ms. Hoge had not regularly treated the Student since the fall of 2007⁷, and was soon to be his therapist again. In the letter, Ms. Hoge explained her view that the Student required a "residential milieu with in-the-moment social coaching" in combination with a strong and challenging academic and athletic program. [S-603-604] Director of Special Services Karen Ropes explained that when a student transferred, the District was obligated to implement the student's most recent IEP or provide comparable services until an entry/transition plan could be determined and an IEP developed by the District's IEP Team. [Testimony of K. Ropes, S-586-588] At the time, the only expert evidence the District had to support a residential placement for the Student was an undated letter from Ms. Hoge, which did not provide any empirical evidence to support her opinion. [S-589, Testimony of K. Ropes] The IEP team decided to neither reject nor revise the current IEP developed by York until the IEP team had an opportunity to: (1) review the updated psychological evaluation recommended by the

⁷ As noted above, it is unclear from the record whether Ms. Hoge actually met with the Student in March 2008, although the Parent had three sessions with her.

IEP team; (2) complete a thorough review of the Student's educational record; and (3) get updated information from the Student's current and previous mental health providers. [S-586] The IEP team agreed to reconvene as soon as the Student's psychological evaluation was complete. [S-586-588] In the interim, the District offered to provide the Student with up to ten hours of tutoring per week in the areas of math, English/language arts and history and, pursuant to the York IEP, 60 minutes per week of social work counseling. [*Id.*; S- 635] Although the District has always been willing to provide these social work services to the Student, the Parent never accessed them. [Testimony of K. Ropes] The Parent signed a form consenting to a psychological evaluation with Alan Fink, Ph.D., and actually requested Dr. Fink because of his previous experience with the Student. [S-583, Testimony of Parent] The team also requested the Parent's consent to speak with the Student's mental health providers, and provided the Parent with Authorization for Release of Information forms (henceforth "authorizations") for Ms. Hoge, Ms. Fredette, Dr. Wener, Mr. Taillon, and Mary McLean, the Student's former tutor. [S-575- 578]

39. On September 23, the Parent sent a letter to Ms. Ropes expressing her "extreme disappointment" that the IEP team did not attempt to design an IEP and make the residential placement for the Student the Parent outlined in her letter of concerns. [S-581] Ms. Ropes responded by e-mail, explaining that she thought there was consensus at the meeting, and that she was in process of securing a tutor for the Student. [S-582]
40. On September 24, 2008, Ms. Ropes sent the Parent an e-mail informing her that she had found a tutor for the Student so that he would be able to receive educational programming while awaiting the completion of his evaluation process. [S-572] Tutoring was to take place in the Superintendent's office three days each week, from 2:15 to 4:15 p.m., and twice a week at the high school in the morning. [*Id.*] The plan was to begin the following Monday, September 29. [*Id.*] The Parent strongly objected to this proposal, stating that it "goes directly against my parental concerns and will only inflict additional emotional turmoil for [the Student]." [S-572] She said that the Student cannot go to the high school at all. [S-572] The Parent added that the Student was only available for tutoring in the morning, as his afternoons were booked with routine appointments that could not be altered.⁸ [S-573] The Parent requested that tutoring be done either in her home or the Ogunquit Library. [S-573]
41. In a letter to Ms. Ropes dated October 6, 2008, Wendy Hoge wrote that, in her clinical opinion, based upon the Student's current level of functioning, a "home tutoring environment as outlined in Dr. Bell's letter remains the only appropriate option for [the Student's] tutoring" while his team engages in developing an appropriate IEP. [S-541] Dr. Bell's March 19, 2008 letter did not, however, say that the Student needed tutoring at home. [S-711] Ms. Hoge added, "Being in, around, or near a public school setting, such as tutoring at the superintendent's office or Wells Library, is certain to activate

⁸The Parent did not specify what types of appointments these were, and there was no evidence that the Student had appointments in the afternoon. At the time, he was no longer treating with either Ms. Fredette or Mr. Taillon, and was seeing Ms. Hoge approximately once each week.

severe emotional triggers for [the Student] and therefore should be avoided.” [Id.] The District tried to avoid home tutoring when there were other options, and required that another staff person be present in the home with the tutor. [Testimony of K. Ropes]

42. On October 10th, the District received the results of the Student’s psychological evaluation by Dr. Fink. [S-531] Dr. Fink has been the school psychologist for the District, pursuant to a contract, for 30 years, and his practice involves conducting evaluations for this and other school departments. [Testimony of A. Fink] Although he has evaluated children with PTSD, he has not treated them. [Testimony of A. Fink] His evaluation consisted of a review of the Student’s medical and educational records, a four-hour interview with the Student and the Parent, and telephone conversations with Leo Taillon and Wendy Hoge. Dr. Fink decided not to speak with Ms. Fredette because the Parent was not pleased with her. [Testimony of A. Fink] Mr. Taillon told Dr. Fink that the Student was a “willing and engaged participant” in therapy who is “capable of establishing positive relationships with peers in a supportive environment.” [Id.] Ms. Hoge felt she and Dr. Fink seemed to be in agreement about their perceptions of the Student. [Testimony of W. Hoge] In Dr. Fink’s discussions with Ms. Hoge, Ms. Hoge said she did not see anxiety in the Student, but saw bravado. [Testimony of A. Fink] Ms. Hoge’s notes contained no conversations about PTSD triggers. [Id.] Dr. Fink recommended that the Student begin a desensitization process to full participation at Wells High School (WHS), with the goal of full participation as soon as possible. [S-536] He thought the WHS administration could be trusted to protect the Student against bullying. [Id.] Dr. Fink was concerned about taking the Student into a population all of whom were there because of personality and adjustment issues, and thought this posed a bigger risk than the difficulty of adjusting to WHS. [Id.] He gave the Parent a “School Refusal Assessment Scale” to further determine the causes of the Student’s anxiety, but the Parent did not return it until October 16, after the evaluation was already completed. [Id., S-511, 537A] Ms. Ropes forwarded the evaluation report to the Parent on October 10, proposed an IEP meeting on October 22, and offered the possibility of an IEP meeting as early as October 16. [S-530] In her letter, Ms. Ropes also reminded the Parent that she had not received the signed authorizations to allow the District to have contact with the Student’s mental health providers and tutor. The Parent responded to Dr. Fink’s recommendations in an e-mail message on October 14, which stated: “To follow Dr. Fink’s recommendation would require me to ignore the strong recommendations of his treating professionals and place my severely traumatized son into your hands. However, I cannot bring myself to ignore the strong recommendations of his treating professionals and place my son in a setting where he certainly will be harmed because he lacks the basic skills necessary to succeed there.” [517 & P-284]. At that time, the Student’s only “treating professional” was Ms. Hoge.
43. Although the Parent initially agreed to October 22 for the IEP meeting, on October 20 she cancelled the IEP meeting without explanation. [Testimony of K. Ropes] Ms. Ropes checked with the Parent about her availability for rescheduling the IEP meeting for November 7; it was agreeable to the Parent. [S-502, 492] Ms. Ropes sent the Parent the Advance Written Notice for the IEP meeting on October 24 via regular mail, which included a cover letter specifically stating that the District was planning to have

Michael Opuda. Ph.D., attend. [S-485] Dr. Opuda is the District's educational consultant and an employee of the District's law firm. He previously assisted York with the Student's IEPs there. In her letter, Ms. Ropes again sent the Parent authorizations for the release of information from the Student's current and previous therapists, which the Parent had not provided to date. [S-486] Ms. Ropes encouraged the Parent to permit the professional staff in the District to speak directly with the Student's therapists to better understand the Student's needs and develop an IEP based on the collaborative efforts of the school, family and mental health professionals. [S-486] As this was her second attempt to obtain the information, she added that if she did not receive the documents by October 31, 2008, she would assume the Parent did not wish the District to have this information, and that the District would be forced to draft the IEP based upon incomplete information. [S-486] Ms. Ropes also sent the Parent an e-mail dated October 28, 2008, in which she offered to invite Ms. Fredette, Ms. Hoge and Mr. Taillon to the IEP meeting, as requested in the Parent's September 15, 2008 letter. [S-479] She wrote, "Unless I hear otherwise, I will invite them and send an amended Advanced Written Notice out." [Id.] The Parent responded the next day that there was no need to invite either Mr. Taillon or Ms. Fredette to the IEP meeting, and that the Student's current "treatment team" was "Wendy Hoge and his PHD [sic]"⁹. I will see if their schedules permit them to attend and I will let you know." [Id.] At that point, she was unwilling to tell Ms. Ropes the name of the Ph.D. [Testimony of K. Ropes, S-474] Ms. Ropes encouraged the Parent to provide this information so the District could invite the psychologist to the upcoming IEP meeting, and asked permission to speak with this individual. [S-747] In her October 30 letter, she added, "Your continued refusal to allow the school district access to your son and providers treating your son make a collaborative process difficult." [Id.] Ms. Ropes then sent an amended notice of the IEP team meeting to the Parent on October 30 to show that the District had invited Wendy Hoge to attend the IEP meeting, and Dr. Opuda's name was included among the list of attendees on this notice as well. [S-475] Although the Parent acknowledged having received the original notice, she did not notice Dr. Opuda's name on the list of invitees or the cover letter. [P-306, S-485, Testimony of Parent] She did not retrieve her mail from her post office box again until November 3, at which time she found the timely amended notice there, her second notification that Dr. Opuda would be attending the meeting. [Testimony of Parent, P-306] The Parent waited until 9:11 a.m. on the morning of the November 7 IEP meeting, however, to e-mail Ms. Ropes and cancel the 10:00 a.m. meeting. [Testimony of K. Ropes] The Parent testified that she cancelled the meeting because she did not receive "proper notice" that Michael Opuda was planning to attend. [Testimony of Parent] The Parent wrote, "I had not made arrangements for an advocate to attend with me based on your representations, and I certainly do not wish to meet without an advocate if Mr. Opuda is going to be there to intimidate me."¹⁰ [P-306].

44. In the interim, the District continued to try to arrange for tutoring of the Student. The Parent requested Mary McLean, who had previously tutored the Student. [S-563] Ms.

⁹ The Student had not yet begun working with "his PHD [sic]." Dr. Laura Slap-Shelton began her evaluation on November 5, 2008. [Testimony of L. Slap-Shelton, S-270]

¹⁰ The Parent sent a copy of this e-mail to her legal counsel and to Ms. Hoge. [P-306]

Ropes spoke with Ms. McLean around October 1, but Ms. McLean was not available for the next two weeks, and the District wanted to start tutoring as soon as possible. [S-556] Additionally, Ms. McLean informed the Parent that she could not tutor the Student at this point. [S-553] The District again offered tutoring in the Superintendent's office for two hours every afternoon, including transportation. [S-556, 543] The Parent declined the offer. On October 20, 2008, the Parent informed Ms. Ropes that the Student remained available to attend tutoring at the Ogunquit Library from 9:00 a.m. to 1:00 p.m., but that his current therapeutic schedule occupied him four of five afternoons every week.¹¹ [S-502] The Parent wanted tutoring in what she considered a neutral location, and was concerned that the proximity of the Superintendent's office to the high school would be a problem for the Student. [Testimony of Parent] She also thought that ten hours per week of tutoring was inadequate. [*Id.*, S-502] Four days later, Ms. Ropes offered the Student 15 hours per week of tutoring in the mornings at the Superintendent's office, or three mornings and two afternoons at the Wells Public Library. [S-494] The Parent responded on October 28 that, despite her reservations about tutoring "in such close proximity to the public schools," she would accept the offer of tutoring on Monday through Friday from 9:00 a.m. to noon with Mr. Jan Wydra in the Superintendent's office, scheduled to begin the following day, October 29, 2008. [S-481] Mr. Wydra was a retired teacher who had taught the Parent when she attended WHS. [Testimony of Parent]

45. On October 29, 2008, the Parent informed Ms. Ropes via e-mail that, "I have to cancel the tutoring and will let you know when we can resume." [S-478] She explained that the Student was feeling run down and was not able to attend. [*Id.*] As of November 2, according to the Parent, the Student remained ill and unable to attend tutoring. [S-473]
46. The District decided to contract with Gretchen Jefferson, Ph.D., a certified behavioral analyst, to advise the District about the Student's behavioral needs and his re-entry to school, and informed the Parent of this. [S-469] In an e-mail dated November 3, Ms. Ropes told the Parent, "I hope that [the Student's] current therapy providers are able to attend the upcoming IEP meeting." [S-469]
47. On November 4, 2008, the Parent gave the District an authorization to allow Laura Slap-Shelton, the previously undisclosed Ph.D., to have access to the Student's records. [S-466] That day, Ms. Ropes asked the Parent by letter whether she wanted the District to invite Dr. Slap-Shelton to the IEP meeting. [S-464] The Parent still had not returned any of the authorizations requested by the District. [Testimony of Parent]
48. After the Parent canceled the November 7 IEP meeting, the parties agreed to reschedule the meeting for November 20. [S-443] Ms. Ropes sent the advanced written notice for the November 20 meeting [S-445] by both regular mail and e-mail. [S-442] This again notified the Parent that Dr. Opuda would be in attendance, and that the District was inviting Wendy Hoge. [S-445-446] Ms. Ropes then followed up with a November 11 e-

¹¹ As noted above, the Student had therapy at most one day each week, and this was not always in the afternoon. [1-5 to 1-12] Ms. Hoge testified that she kept treatment notes from all of her therapy sessions, and that all of these notes were produced. [Testimony of W. Hoge]

mail to the Parent, emphasizing that the District had invited Dr. Fink, Gretchen Jefferson, and Dr. Opuda, and she explained who these people were. [S-442] Ms. Ropes asked the Parent if she were inviting anyone, and said the District welcomed the participation of people who have worked with the Student. [*Id.*] Ms. Ropes did not specifically discuss the fact that it was the District's practice to pay the professional fee of people it invited to attend these meetings, but it was prepared to pay Ms. Hoge's fee. [Testimony of K. Ropes] Although Ms. Hoge was aware of the meeting from speaking with the Parent, she testified that she never received the meeting notice or other invitation from the District to attend this meeting. [Testimony of W. Hoge] The Parent knew the District had invited Ms. Hoge, and did nothing to encourage her attendance. Additionally, in Ms. Ropes' e-mail, she noted that the Student still was not accessing the agreed-upon tutoring, and asked whether the Parent would provide authorization for the District to contact the Student's physician regarding his lengthy illness. [S-442] She also asked, for the third time, if the Parent would sign the authorizations she had been sent twice before that would allow the District to directly contact the Student's therapists. [S-442]

49. On November 14, 2008, the Parent responded to Ms. Ropes' e-mail. [S-440] In it, she informed Ms. Ropes that the Student's private evaluation would not be available by the November 20 meeting, and questioned the value of the meeting, based on "partial information." The Parent added,

I have a treatment team that knows [the Student] very well and has been working with him for years.¹² The team's work has intensified since March 2008 because York instructed me at an IEP team meeting that [the Student] required intense therapy for 4 hours per week. York paid for one hour of this therapy while I have been responsible to pay for the other 3 hours. This level of intense counseling has remained ongoing,¹³ but much to my disappointment, the WOCS D IEP team and its Ph.D. consultant has not once given any respect or appropriate consideration to the recommendations of [the Student's] clinical treatment team. [S-440]

At this point, the Parent still had not given the District any direct access to the Student's "treatment team." The Parent also said, "your invitation of York (and of Mr. Opuda), when you are acutely aware of the pending litigation, OCR and HRC investigation against the York Schools for their blatant discrimination of my sons, strikes me as retaliatory." [S-440] She questioned the District's request to contact the Student's physician about the illness that had prevented him from accessing his tutoring for over two weeks, and refused to agree to this. [S-441, Testimony of K. Ropes] Ms. Ropes responded that while the District was glad to consider the results of the evaluation, it could not put the IEP process on hold, as it had the obligation to offer the Student

¹² As of this date, however, the Parent could only be referring to Ms. Hoge as someone on the treatment team "that knows [the Student] very well and has been working with him years," as Dr. Slap-Shelton had only met the Student twice for evaluation, on November 5 & 11, and never for treatment.

¹³ As noted in footnotes 4, 6 & 9 and Facts 29 & 30, the Student did not receive anything remotely resembling intensive therapy, aside from a short period of about three weeks in the spring of 2008, when he was seeing both Ms. Fredette and Mr. Taillon regularly.

FAPE without delay. [S-439] She also said the District had no knowledge of any pending litigation against York, and that it was inviting York to participate to seek information regarding the Student's last educational placement.¹⁴ [*Id.*] Ms. Ropes explained that the purpose of a functional behavioral assessment was to gather data on the Student's current behaviors in various settings, and to help the District understand the current barriers to the Student's accessing his education. [S-439]

50. The IEP meeting took place on November 20, 2008. Although the Parent recommended waiting until Dr. Slap-Shelton's evaluation was completed, the District felt it was necessary to move forward and at least provide the Student with tutoring services for the time being. [S-414] In accordance with Dr. Fink's evaluation, the IEP team developed and agreed to a plan to assist the Student with a gradual transition back into the public high school setting at WHS. [S-415] This included starting his educational programming in a currently comfortable setting, providing clinical intervention and collaboration throughout the process, and letting the process be determined by the Student's anxiety level. [*Id.*] As part of this process, the IEP team proposed a functional behavioral assessment ("FBA") of the Student by a board certified behavioral analyst, Gretchen Jefferson, Ph.D., for the purpose of further assisting in identifying behaviors that might interfere with his school success and in planning for his successful entry into an educational program/placement. [*Id.*]

51. Later that day, Ms. Ropes told the Parent that Mr. Wydra was available to commence tutoring on November 26, but that the initial meeting would really be an opportunity for the Student and the tutor to become familiar with one another. [S-411] This was delayed until December 4, due to the family's Thanksgiving travel plans, the Student's prior commitment for an evaluation meeting with Dr. Slap-Shelton, and the Parent's insistence that tutoring be done in the home. [S-383, 411] On or about November 25, the Parent provided Ms. Ropes with a letter from Dr. Slap-Shelton dated November 19, 2008 which said the Student "does not appear to be able to handle tutoring in his school setting," and needed tutoring in a neutral setting, such as a local library or municipal building. [S-437, 392] The District had been offering tutoring at the local library. There was an ongoing dispute between the Parent and Ms. Ropes regarding where and when tutoring would take place, with the Parent insisting that it be done in the home. [Testimony of K. Ropes, S-386] The District was willing to do this, but it made scheduling more difficult because it required the presence of another staff person who would have to accompany the tutor. [Testimony of K. Ropes] The Parent, however, would only agree to tutoring between the hours of 9:00 a.m. and noon. [S-383, 386] Ms. Ropes explained that once the Student was ready to be tutored outside the home, she could adjust the tutoring schedule to 9:00 am to noon, five days a week. [S-383] On December 2, the Parent agreed to begin tutoring on December 4 at the Ogunquit Public

¹⁴ In her closing memorandum, the Parent claims that Ms. Ropes' statement that she had no knowledge of litigation against York was "patently false." [Parent's Closing Memorandum p. 28, ¶126] Although from the outset, the Parent announced to Ms. Ropes that the disagreement between the Parent and York was "being taken to due process by our Attorney [sic]," [S-611] there was no evidence introduced at the hearing that, as of November 14, when Ms. Ropes composed her e-mail, she had any other information about this, or had any knowledge that the Parent filed a complaint against York in any other judicial or governmental forums.

Library from 9:00 a.m. to noon, Tuesdays through Fridays, as the library was not open Monday mornings.

52. On December 2, the Parent sent an e-mail to Ms. Ropes stating that she would like to provide the District with consent to speak with Ms. Hoge and Dr. Slap-Shelton, and requested an authorization form.¹⁵ [S-379] The next day, Ms. Ropes sent the Parent authorization forms for the third time for Ms. Hoge, Debra Fredette, and Leo Taillon, and a form for Dr. Slap-Shelton. [S-371-378] She sent an e-mail to the Parent confirming the same. [S-369]
53. On November 21, the Parent consented to the FBA. Dr. Jefferson had difficulty scheduling a time with the Parent for an interview. The Parent canceled the appointment for December 11, and did not respond to two voicemails left by Dr. Jefferson. [S-360, 357] On December 23, 2008, Ms. Ropes wrote a letter to the Parent about Dr. Jefferson's inability to secure a meeting with the Parent. [S-353] Among other things, Ms. Ropes also informed the Parent that, although the Parent said she would promptly return the authorizations sent on December 2, Ms. Ropes had still not received them. [S-353] Ms. Ropes also expressed her concern about the inability to provide the Student with tutoring on Mondays because the Parent refused to hold these sessions in Wells municipal buildings¹⁶, and the Ogunquit Library was unavailable. [S-354] Although the Parent recommended York County Community College as a possible location, 46 WHS students were attending classes there, and Ms. Ropes asked the Parent whether she should pursue this, in light of the Parent's insistence that the Student not be in an environment with WHS students. [S-354]
54. On December 8, the Parent met with Superintendent Edward McDonough to discuss the Student's placement and programming issues. [S-363] Superintendent McDonough did not instruct Ms. Ropes to "hold-off" on the FBA, and the FBA was never placed on hold. [Testimony of K. Ropes] Furthermore, no one ever informed Dr. Jefferson to put the FBA on hold.
55. On December 30, 2008, the Parent returned signed authorizations for the District to contact Ms. Hoge and Dr. Slap-Shelton, but amended them to require that the Parent be present at any conversations with these individuals, and that the District commit to being responsible for payment of any professional fees arising from the communication [S-349; 349A & 349B, Testimony of Parent] The Parent never returned the forms authorizing the District to obtain information about the Student from Ms. Fredette, Dr. Wener, Mr. Taillon, and Mary McLean. [Testimony of K. Ropes] That same day, Mr. Wydra informed Ms. Ropes that he was unable to continue tutoring the Student, due to other commitments. [S-347] The Student had done very well with his tutoring. Ms. Ropes discussed this with the Parent in an e-mail, and asked her to call to discuss the Student's tutoring needs and the status of his educational program. [S-347] She arranged for Jeff Tufts and Marla Blackwell to continue the Student's tutoring.

¹⁵ At this point, the District had already sent such authorizations twice before, and had been attempting for over two months to obtain them.

¹⁶ As noted above, Dr. Slap-Shelton suggested holding tutoring sessions in a municipal building. [S-437]

56. The Parent met with the Superintendent again on January 6, 2009, this time with Ms. Ropes present. [S-340] At this meeting, they discussed out of district placements for the Student. [Testimony of K. Ropes] The Parent mentioned her research into the New School, Aucocisco, Hyde School and the Chamberlain School. [Id.] Everyone agreed that Aucocisco was not an appropriate placement for the Student. [Id.] Ms. Ropes looked into the Collaborative School and the Choices program at Cape Elizabeth High School. [Id.] Although she did not think the Student needed day treatment, she thought the Collaborative School could be an option, as he needed some clinical services, and the Collaborative School had a rigorous educational program and some very high functioning students. [Id.] The Parent wanted to discuss with her attorney the relevance of the FBA to which she had consented in November. [Id.] Ms. Ropes reported that Dr. Jefferson had informed her that the Parent scheduled an appointment with Dr. Jefferson on January 20, 2009. [Id.] Ms. Ropes also inquired about the status of Dr. Slap-Shelton's evaluation report, as she had scheduled an IEP team meeting for January 26, 2009 to consider the report. [S-340]
57. Because Dr. Slap-Shelton's report was not ready, the IEP meeting had to be rescheduled again. [S-332] The Parent asked to reschedule it for January 30, as she, Ms. Hoge and Dr. Slap-Shelton were all available on that date. [S-329] Because this date was not good for the District, Ms. Ropes offered alternatives. [Id.] Ultimately, the meeting was rescheduled for February 9.
58. Although Ms. Ropes believed that WHS would be an appropriate placement for the Student with a structured entry plan, she continued to look into other options to address the Parent's concerns that the Student needed a structured, therapeutic placement that addressed his strengths in academics and athletics and avoided his exposure to the same peers from the York and Wells-Ogunquit communities who were involved in the February 2008 incident. [Testimony of K. Ropes] On January 27, 2009, Ms. Ropes contacted Dominic DePatsy, special education director for Cape Elizabeth, about possibly placing the Student in the Choices program. [S-323] Choices is a therapeutic day treatment program housed at Cape Elizabeth High School offering a continuum of social, emotional and behavioral support for students. [Testimony of J. Means] There are teachers, two full-time ed tech IIIs, two social workers who provide direct therapy, group sessions and consultation, occupational and speech therapists, nursing services, and psychological consulting with several psychologists, including Kristen Rollins, Ph.D. [Id.] Eleven students are in Choices, and each one has a different program. [Id.] Some are in mainstream classes for all or part of the day. [Id.] Typically, the students have three or more social work goals, and there is a point reward system for meeting goals. [Id.] One of the Students has PTSD, others have anxiety, social phobia, depression or dysthymia. [Id.] A few students in the program had social anxiety totally related to the school setting, and this resolved for all of them. [Id.]
59. The Parent asked the District to pay for Dr. Slap-Shelton and Wendy Hoge to attend this team meeting. [S-315]. This time, Ms. Ropes denied this request, but assumed that Dr. Slap-Shelton and Ms. Hoge would attend anyway. [S-313]. Dr. Slap-Shelton was

available to attend this and other IEP meetings. She knew that MaineCare would pay for her attendance, and told the Parent this, but the Parent told her she was not invited and should not attend. [Testimony of L. Slap-Shelton] Ms. Ropes also informed the Parent that Dr. Opuda would not be attending the meeting. [S-312] Ms. Ropes agreed not to invite Dr. Opuda to attend the Student's IEP meetings in the future.

60. The District received Dr. Slap-Shelton's neuropsychological evaluation on February 4, 2009. [S-270] Dr. Slap-Shelton's practice consists primarily of conducting neuropsychological evaluations, mostly for children, and she currently has three therapy patients. [Testimony of L. Slap-Shelton] She had not treated the Student as a therapist. She and Elizabeth Baker, M.A., administered numerous tests of intelligence, academic achievement, behavior and personality over the course of two and one-half months in six meetings. [S-270-292] She concluded from the testing that the Student had a mild, diffuse brain dysfunction. [S-282, Testimony of L. Slap-Shelton] She interviewed him specifically about events at YHS, including the incident on February 28, 2008. [S-287-288] The Student appeared particularly distressed by his memories of the events that followed the accusation that he had a gun in school. [S-288] Regarding the testing, the Student's lowest area of function behaviorally was in the social realm. [Id.] The Student told Dr. Slap-Shelton that if he were told he must go to WHS, he would not go, and would "freak out." [S-286, Testimony of L. Slap-Shelton] He reported that he would try to resist, and would fight back if someone attempted to get him to attend WHS or Choices. [Id.] From her interview with the Student, Dr. Slap-Shelton concluded that he had symptoms of PTSD "directly related to the incidents of February 2008 and the bullying which preceded it." [S-288] She noted that the Student "has re-experiencing when in proximity of a school building which reminds him of what happened; has very significant avoidance and numbing . . . His anxiety is expressed somatically." [Id.] Dr. Slap-Shelton concluded that, at this point, the Student could not return to public school, as he must recover from PTSD first. [S-290, Testimony of L. Slap-Shelton] It was her opinion that the Student required a highly structured residential school setting for college bound students where he could feel safe, with a positive rule-driven social milieu designed to promote his ability to both learn academically and develop and improve his social skills to a more functional level. [S-290-291, Testimony of L. Slap-Shelton] Although Dr. Slap-Shelton thought Choices sounded like a very interesting program, she was concerned about physically getting the Student to go there. [Testimony of L. Slap-Shelton] She also thought that while *in vivo* desensitization is a good method for some people, it would retraumatize the Student if he were forced to go to public school. [Id.] She recommended weekly individual psychotherapy to address the PTSD. [Id.] Although the Student liked the Hyde School, Dr. Slap-Shelton felt that this would not offer enough psychological support to meet the Student's needs. [Id.] She felt the Chamberlain School might be able to meet his needs, as it offered a lot of therapy, and therapists are in the residence halls. [Id.] Dr. Slap-Shelton also testified that she thought the Student could be successful in a day treatment program with therapists and appropriate academics and supports, and that was not too disruptive with behaviorally impaired children. [Id.]

61. Ms. Ropes encouraged the Parent to visit the Choices program with her before the February 9 IEP meeting, as the District was planning to offer Choices as a placement for the Student, but they had difficulty finding a mutually agreeable time. [Testimony of Parent, K. Ropes, S-244] Ms. Ropes did not think the Student needed a residential placement for educational purposes, as special purpose private school placements are very restrictive, and he would not be with any nondisabled peers. [Testimony of K. Ropes]
62. Ms. Hoge testified that the Student was already convinced he could not succeed at Choices. [Testimony of W. Hoge] Ms. Means thought it would be difficult for the Student to be successful in any plan and feel confident if the Parent did not feel comfortable and confident that it would work. [Testimony of J. Means]
63. Gretchen Jefferson e-mailed her FBA to the Parent the evening before the IEP meeting. [S-209] It was difficult for her to complete this assessment because she could not observe the Student in the environment in which the problem behaviors occurred. [S-175] The primary behavioral concern she identified in both the home and community settings was agitation. [S-175, 197] Dr. Jefferson made recommendations for the Student that included: (1) predictability, particularly a consistent daily schedule; (2) improving self-regulation, initially with mood management; (3) learning problem solving skills; and (4) social skills training. [S-175] She noted that mastery of these skills could be achieved through a variety of courses, including intensive therapy, group training, and the use of cooperative learning models that can be achieved in school settings. [S-176]
64. At the February 9, 2009 IEP meeting, the IEP team discussed Dr. Jefferson's FBA, Dr. Slap-Shelton's neuropsychological evaluation, Dr. Fink's psychological evaluation, the Student's tutoring progress, and what his placement should be. [S-174] The Student made good progress in all of his core academic subjects and formed appropriate relationships with his tutors. He was completing grade level work with grades in the 85-96% range, and was an engaged and motivated student. [*Id.*, 1-301A to 1-355] The Parent noted that the Student did not have good experiences in prior day treatment programs, as they did not offer the higher level academic programming the Student needed, and being placed with lower functioning students was not appropriate. [S-176] Dr. Fink commented that the Student could receive the interventions he needed in a typical school day, and a residential placement would not necessarily maintain the beneficial structure and environment 24 hours a day. [*Id.*] The Parent inaccurately quoted Dr. Slap-Shelton's report as saying that certain day treatment programs, such as those at Spurwink, the Collaborative School and the New School, were detrimental programs. [S-176] In her testimony, however, Dr. Slap-Shelton said she was not sufficiently familiar with the Collaborative School and could not speak to its appropriateness. [Testimony of L. Slap-Shelton] Following the discussion, all members of the IEP team except the Parent determined the Choices program to be an appropriate, least restrictive educational placement for the Student. [S-181] The IEP team rejected the Parent's request for a residential placement as necessary for educational purposes. [S-178] The Parent requested to withhold review of the FBA because she received it at

the last minute, but the IEP team rejected this request. [*Id.*] The IEP team agreed that the effective date of the IEP would be February 23, 2009. [S-179] The team also agreed to update special education services to include “in the moment” support by a special education teacher and therapist, consultation frequency of two times per month for 60 minutes, and tutorial services to continue until February 27, 2009, including during February vacation week. [*Id.*] The team agreed to the addition of social work individual therapy weekly for 60 minutes, and small group social skills training and anger management training, each for 60 minutes once per week, and parent consultation to focus on carry over of social skills and anger management at home. [*Id.*] The Student would also receive support for social skills, anger management, and problem solving throughout the school day. [*Id.*] As a re-entry plan, the team agreed to *in vivo* desensitization during the week of February 23 that included tutoring, visits to the school placement, and social worker services. [S-179-180] He would then begin with a modified school day, with increasing amounts of time in the school setting. [S-180] The Parent objected to the partial day re-entry and slow phase into full day programming, preferring a more swift and structured process to address full time participation without giving the Student choices. [S-180] At the team meeting, the Parent concluded that the District was unable to meet the Student’s emotional, social and academic needs. [S-181]

65. Despite Ms. Hoge’s strong cautions against having the Student “in, around or near a public school setting,” [S-541] the Parent decided to bring the Student to Choices on February 11, 2009, without an appointment, preparation or support, and arrived precisely when school was getting out. [Testimony of Parent] The Student “completely lost it.” [*Id.*] He hid in the back of the car while the Parent met with Jessica Means, the lead teacher, who explained the program. [*Id.*] Dr. Slap-Shelton testified that she would not have recommended doing this. [Testimony of L. Slap-Shelton] Nonetheless, the Parent had a one and one-half to two hour visit there while the Student continued to hide in the back of the car. [Testimony of J. Means] The Parent had a very comfortable conversation with Ms. Means, and the Parent thought Ms. Means was someone with whom the Student could connect. [*Id.*] On the other hand, the Parent was concerned that the only way the Student could access college preparatory classes was in the mainstream, which would require him to pass through the hallways, and possibly be the target of bullying. [*Id.*] Ms. Means successfully dealt with students with this problem regularly, as well as with transitioning students who have been out of school for an extended period. [*Id.*]
66. On February 26, the Parent, Ms. Ropes and Mr. DePatsy had a conference call about Choices. [S-143] Based upon their discussion, they agreed to extend the Student’s tutoring for an additional two weeks, with the understanding that he needed to transition to a full-day program. [*Id.*] In early March, Ms. Ropes sent correspondence to the Parent outlining the next steps for the Student’s entry plan into the Choices program and scheduling an IEP meeting for March 12, 2009 at Cape Elizabeth High School with Choices staff to finalize the entry plan. [S-131 to 133]

67. The Parent obtained letters from Ms. Hoge and Dr. Slap-Shelton expressing their opinion against placing the Student in the Choices program. [S-122-124] Dr. Slap-Shelton believed that forcing the Student to return to the Choices program would cause his PTSD symptoms to rise to an intolerable level and cause further psychological harm. [S-122] The Parent notified Ms. Ropes that she had to follow the advice of these professionals, which made clear that this placement “would be dangerous to the Student’s current fragile emotional state.” [S-110] Consequently, she declined to sign releases for the Student’s records to be forwarded to Choices program. [*Id.*] The Parent requested another IEP team meeting to include the participation of Ms. Hoge and Dr. Slap-Shelton at the District’s expense to “learn directly from them what type of placement [the Student] requires.” [*Id.*] Ms. Ropes declined to hold another IEP team meeting to discuss placement, and reminded the Parent of her procedural rights in this situation. [S-109]
68. The Parent filed a request for due process hearing, which the District received on March 16, 2009. [S-94] The parties entered into a stay-put agreement, pursuant to which the Student has received tutorial services from Maine certified teachers through the end of the 2008-09 school year. [S-52] The District also offered 50 minutes per week of social worker services, and recommended several providers to the Parent. [S-42, 60] The Parent again declined this service, saying the offer of new therapists was inappropriate and that the District should pay for weekly sessions with Ms. Hoge. [S-37, 40] The District left open its offer to provide therapy, but the Parent elected not to access this service. [S-37, Testimony of K. Ropes] As discussed above, the Parent consistently declined therapy offered by the District. [*Id.*]
69. At the request of the District, Kristen Rollins, Ph.D., a clinical psychologist, reviewed the Student’s evaluations (including records from Dr. Bell, Brian Wener, Leo Taillon, Debra Fredette, Wendy Hoge, Dr. Fink and Dr. Slap-Shelton), and assisted in developing a plan for the Student’s entry into the Choices program. [Testimony of K. Rollins] Dr. Rollins did not meet the Student, and did not have full access to the Student’s records, as the Parent would not authorize this. Dr. Rollins’ employment history has primarily been as a school psychologist. [*Id.*] Dr. Rollins was concerned about the absolute nature of how Dr. Slap-Shelton’s report was worded; for example, “never an option” is too absolute. [*Id.*] Dr. Rollins saw more references to anger management and impulse control in the report than to trauma triggers for PTSD. [*Id.*] Dr. Rollins also thought it was erroneous to think a public school would provoke anxiety, but a private school would not when these schools are often indistinguishable from the exterior. Dr. Rollins thought the Choices program would be a good fit for the Student, as it would allow him the flexibility of meeting him where his needs are, both emotionally and educationally. [*Id.*] The IEP contained three 60-minute therapy sessions with a social worker for individual counseling, small group social skills, and small group anger management. Dr. Rollins could provide individual psychological treatment, if appropriate. [*Id.*] She also explained the desensitization plan that would allow the Student to learn how to manage his anxiety, and progress through a stress/fear hierarchy via imagery desensitization or *in vivo* desensitization. [S-3-4, Testimony of K. Rollins] The program would allow the Student to access his educational program in

a setting that coincides with where he is on the stress/fear hierarchy, and with flexibility to meet the Student's needs. [S-4, Testimony of K. Rollins] She disagreed with Dr. Slap-Shelton that *in vivo* desensitization was not an appropriate treatment technique for PTSD, and testified about research supporting PTSD treatment that exposed individuals to the traumatic event in a controlled manner, and reshaped the thought process through cognitive behavioral therapy and other means.¹⁷ [Testimony of K. Rollins]

70. The Student has been out of school since February 28, 2008.

IV. DISCUSSION AND CONCLUSIONS

A. Brief summary of the position of the Parent:

The evidence supports the conclusion that, given the complexity of the Student's needs, the IEPs offered by the District, which were based on a pre-determined public school placement to be preceded by implementation of an improper *in vivo* desensitization plan, were completely inappropriate, in part because their implementation would be emotionally harmful to the Student. The Student needs an educational program that will develop improved executive functioning skills, social skills, and emotional coping skills, all of which are no less "educational" than those needs that fall within the realm of academic performance. This must be provided in a highly structured therapeutic residential program, with a variety of specialized features, including evidence-based therapeutic treatment for his PTSD, college preparatory academic programming and structured extracurricular activities, and intensive social skill instruction with monitored opportunities for practice and in-the-moment behavioral intervention.

The testimony of the District's professionals in support of the appropriateness of the February 2009 IEP and the proposed Choices placement must be discounted because none of them had a sufficient foundation of actual knowledge about the Student, and all lacked any experience in treating students with school-based PTSD. On the other hand, the testimony of the

¹⁷ As the District pointed out in its closing argument, the Parent's own exhibit about PTSD includes prolonged-exposure therapy, in which the therapist guides the patient to recall traumatic memories in a controlled fashion so the patient eventually regains mastery of their thoughts and feelings about the incident. [P-138]

Student's long-time therapist, Wendy Hoge, and Laura Slap-Shelton, a psychologist with considerable experience in this area, support the need for a residential placement for the Student.

The Student is also entitled to compensatory education because the District failed to provide the Student with FAPE. The District's approach to educating the Student during 2008-2009 fell far short of the standard established by the IDEA both before and after the February IEP Team meeting. This most basic academic tutoring, covering only certain core high school courses, did not provide the Student with FAPE. As a high school student with severe functional skill deficits, the Student required much more, including a panoply of specialized services, to be educated appropriately. The District never even attempted to implement any of the therapeutic services outlined in either the November draft IEP or in the February proposed IEP, which called for three hours per week of social work services. In fact, the District did not offer the Student any type of special education services during the 2008-09 school year. For this reason, the Student is entitled to compensation in the form of such additional services as the Hearing Officer should deem necessary to make up for a completely lost year with respect to the development of the critical functional skills he will need to succeed in life. This violation is sufficiently severe to serve as an alternative justification for requiring the Student to be residentially placed in an appropriate private school capable of addressing his complex needs, as described above.

B. Brief summary of the position of the District:

From the date of the initial transfer IEP meeting on September 22, 2008 until March 2009, when the Parent filed this due process hearing request, the District's diligent efforts to (1) develop an appropriate program and placement for the Student based on current evaluative data, and (2) arrange for interim, short-term tutoring services for the Student during the IEP development process, were thwarted every step of the way by the Parent's actions and attempts

to delay and/or obstruct the IEP team process.

Despite the Parent's concern about the Student's behavioral issues and his transition into the Choices Program, the evidence presented at the hearing leaves no doubt that (1) the District's February 9, 2009 IEP for the Student is reasonably calculated to provide him with FAPE; (2) the IEP can be effectively implemented at Choices; (3) placement at Choices satisfies the crucial LRE requirement under the IDEA; and (4) the District's actions leading up to its Choices placement determination were reasonable and met its duties to the Student under the IDEA.

Finally, given that compensatory education is an equitable remedy, and that equitable considerations—including the conduct of the parties—bear upon the scope of the relief to be awarded, the Hearing Officer should completely reject the Parent's claim for additional compensatory education for any educational losses that the Student may have suffered since the February 9th IEP meeting, during which time the Parent has refused the District's reasonable programming offers.

C. Prior to the District's February 9, 2009 IEP and offer of placement in the Choices Program, did the District meet its obligation under the IDEA to offer or provide the Student with appropriate programming reasonably calculated to confer educational benefits to him in the least restrictive environment? If not, what remedy, if any, is he entitled to receive?

The Individuals with Disabilities in Education Act entitles students who are eligible for special education services 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 Student's educational program contained in his IEP must be "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). The First Circuit elaborated that the student's educational program must guarantee "a reasonable probability of educational benefits with sufficient supportive services at

public expense.” See *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law does not

promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows 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.

998 F.2d 1083, 1086 (1st Cir. 1993). In *Roland M. v. Concord School Comm.* the First Circuit described the goal as to provide the student with “demonstrable” benefits. *Roland M.* 910 F.2d 983, 991 (1st Cir. 1990). As the First Circuit explained

The issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate education" as defined in federal and state law . . . For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. See 34 C.F.R. Pt. 300, App. C, Question 38.

Id.

“Education” has a broad meaning under the IDEA, and is not limited to academic progress, as the IDEA requires the IEP team to consider the “academic, development, and functional needs of the child.” 20 U.S.C. §1414(d)(3)(9)(A). Accordingly, the IEP must be designed as a package to target “all of a child’s special needs . . . whether they be academic, physical, emotional, or

social.” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993). The IEP must also be developed in accordance with the procedures set forth in the IDEA. *Rowley, supra*.

In order to decide any of the issues in this case, it is first necessary to determine which party has the burden of proof. As the Supreme Court held in *Schaffer v. Weast*, “we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” 546 U.S. 49 (2005). Therefore, the Parent has the burden of proof.

1. General observations

What is most difficult as a hearing officer is when I am presented with a situation in which a parent, thinking she is acting in her child’s best interest, is actually doing precisely the opposite. Most parents believe they know what is best for their children, and they naturally want what they believe is best. As a hearing officer who has seen many parents grapple with the added struggles of raising and advocating for a disabled child, it is therefore with reluctance that I question a parent’s actions and motives. It is unavoidable here, however, because the District’s attempts to develop an IEP for the Student and provide him with interim tutoring were continually hindered by the Parent’s actions, which are highly relevant to the issue of whether the District met its obligations, and whether the Student is entitled to compensatory education.

It is also necessary to mention credibility. The Parent’s many exaggerations and misrepresentations of the statements of others, some of which are pointed out in the footnotes and others in the findings of fact above, caused me to question the reliability of her testimony. For example, the Parent often referred to the Student’s “treatment team,” which would lead one to believe that a number of medical professionals, particularly mental health professionals, were providing services to the Student at any given time. Often, the “treatment team” consisted solely of Ms. Hoge. Although Dr. Slap-Shelton evaluated the Student, she was not treating him with

therapy at any relevant time herein, nor was there evidence that he received therapy from anyone besides Ms. Hoge after September of 2008. Along these same lines are Fact 49 and footnote 10, in which the Parent mentions, on November 14, 2008, the Student's "treatment team that knows [the Student] very well and has been working with him for years." At that point, only Ms. Hoge knew him for years, as Dr. Slap-Shelton had just met the Student a week earlier. Similar exaggerations are found in Facts 29, 30, 43 and 44. The Parent also told the IEP team that Dr. Slap-Shelton advised against the Collaborative School, when Dr. Slap-Shelton, who was a credible witness, testified that she did not know enough about this school to hold an opinion about it. [Fact #64] The Parent testified that Dr. Slap-Shelton did not attend the February 9 IEP meeting because the Parent could not afford to pay her, but Dr. Slap-Shelton testified that she told the Parent that MaineCare would pay for her attendance, and that she did not attend because the Parent told her she was not invited. [Fact #59] This gave the impression that the Parent was willing to exaggerate and take liberties with the truth to obtain her ultimate goal of a residential placement for the Student. Consequently, the Parent was a less reliable witness than other witnesses, and this led me to decide the few factual disputes that turned on credibility against her.

The Parent, who is a very dedicated and caring mother, nonetheless obstructed both the District's attempts to develop an IEP and its attempts to provide tutoring and social work services to the Student in the interim. The Parent was unusually headstrong in her efforts to have precisely her way on every issue, from the least significant to the most. The Student ended up being the victim of his mother's inability to be reasonable and cooperative, and to put the Student's interests ahead of her animosity towards the District and her determination to get her way.

2. Delaying the IEP process

The evidence shows that the Parent obstructed and delayed the IEP development process by preventing the District from obtaining the information it needed to make a determination about appropriate programming for the Student and delaying the District's efforts to obtain an FBA. When the Parent moved back to the District in September 2008, the District immediately set up an IEP meeting to discuss the Student's educational program. At the September 22 IEP team meeting, Ms. Ropes accurately described the District's obligation under the IDEA to implement the most recent IEP from YHS or provide equivalent services to what the Student was receiving until a new IEP could be developed based on current information. MUSER §IX(3)(B)(5)(a)(i). The Parent, however, expected the District to adopt her position that the Student required the most restrictive educational setting possible, a residential placement, based solely on the word of a social worker, Wendy Hoge, who had not provided individual therapy to the Student for a year, and who offered no empirical evidence to support her opinion. As in *CS and BG v. Five Town Community School District*, 513 F. 3d. 279 (1st Cir. 2008), the cause of the Parent's disruption of the IEP process was her "single-minded refusal to consider any placement other than a residential one." 513 F.3d at 287. The Parent's quest for a residential placement began well before Dr. Slap-Shelton conducted her evaluation and issued her evaluation supporting such a placement. It began no later than May 2007, when she first told Ms. Hoge she wanted the Student "placed" because she was worried about how the Student's younger brother was being affected. [Fact #17]

The District, however, had to adhere to the IDEA and be responsible in its decision-making. The IEP team wanted the opportunity to obtain an updated psychological evaluation, and to complete a thorough review of the Student's educational and mental health records so that

it could make an informed decision about the Student's placement. The Parent, however, would not authorize the release of important and relevant information from mental health professionals who had treated the Student in the past, including Ms. Hoge. The District had to request that the Parent sign these authorizations three times, and the Parent ultimately only signed releases for Ms. Hoge and Dr. Slap-Shelton, which authorizations the Parent did not sign until December 30, 2008.¹⁸ There was also a delay caused by the Parent's decision to obtain a neuropsychological evaluation from Dr. Slap-Shelton, and she wanted the IEP team to wait until that was available before making its determination. It was within the Parent's right to obtain this evaluation, but waiting for this important information, at the Parent's request, prevented the District from making a decision about the Student's educational program for five months. It was evident that the Parent only wanted the District to have information that was favorable to her position, and that she tried to prevent the District from obtaining complete unbiased information that would allow it to make a balanced, informed decision about the Student.

Despite the fact that the February 9, 2009 IEP meeting was scheduled around Ms. Hoge and Dr. Slap-Shelton's availability, neither appeared at the meeting. The District did not encourage the attendance of either at this meeting, as it did with the November meetings, while the Parent actually discouraged Dr. Slap-Shelton from attending the February 9 meeting. [Fact #58]

The First Circuit, in *Five Town*, noted that Congress deliberately intended the IEP development process to be a cooperative one. "In so doing, it expressly declared that if parents act unreasonably in the course of that process, they may be barred from reimbursement under the

¹⁸ Although the Parent would not give the District permission to speak with Ms. Hoge, the Parent wanted the District to invite Ms. Hoge to the IEP meetings at the District's expense. The District sent Ms. Hoge notice of the November 7 meeting, which the Parent ultimately canceled, and the November 20, meeting, both of which Ms. Hoge claimed not to have received.

IDEA.” *Five Town, supra, citing* 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (providing that “[t]he cost of reimbursement ... may be reduced or denied ... upon a judicial finding of unreasonableness with respect to actions taken by the parents”). The Court added “Such Boulwarism¹⁹, whether or not well-intentioned, constitutes an unreasonable approach to the collaborative process envisioned by the IDEA.”

Although it was the Parent’s right to obtain an independent evaluation, the District had no control over the Parent’s choice of evaluator, or how long it took the evaluator to complete her work. As the First Circuit noted in *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist*, whatever delays plagued the development of the IEP were caused by the Parent, which justified the school district’s late implementation of the IEP. 518 F.3d 18 (1st Cir. 2008) Such was the case here. Additionally, the Parent’s failure to cooperate with the District regarding the release of information about the Student so that decisions had to be made without complete information was unreasonable.

The Parent also delayed the IEP process by canceling and postponing IEP team meetings. She declined various meeting dates so the Student’s treating professionals could attend the meeting, but these people never attended. The Parent canceled the October 22 meeting and gave no reason. This was rescheduled for November 7, but she canceled that meeting less than an hour before it was scheduled to begin because the District planned to have its educational consultant present. As set forth in Fact #43 above, the Parent’s reason for canceling this meeting was wholly unreasonable, given that she was notified by mail on October 24, and again on October 30, both of which notices she received, that Dr. Opuda would be attending. The fact

¹⁹ “Boulwarism” is a term originating from the negotiating tactic of “take it or leave it,” when a party arrives at the table with one position, and is unwilling to consider other options. It is worth noting that, while the Parent insisted on settling for nothing less than the residential setting recommended by the treating therapist and Dr. Slap-Shelton, she was much less keen on following expert advise regarding obtaining intensive therapy for the Student.

that she waited until less than an hour before the meeting was scheduled to begin to express her objection and cancel the meeting was more than an obvious delay tactic. It was rude and inconsiderate of the others who were attending. Such an objection would be reasonable, had the Parent made it in a timely manner²⁰, but this was not timely. The District was understandably frustrated by the Parent's conduct.

3. Therapy Services

While the IEP process was underway, the District wanted to provide the Student with tutoring and an hour of social work counseling each week. The Parent never allowed the Student to access the counseling services, despite the undisputed and unanimous recommendations in the Student's medical records that he needed therapy at a level of intensity well beyond what he was receiving. The fact that the Parent could not afford to provide it at the level the Student needed could have been a greater inducement to accept therapy offered by the District as a special education related service. The Parent did not explain her failure to access these services, but in April 2009, she refused to accept any therapist other than Ms. Hoge, and wanted the District to pay for her services. Accessing services offered by the District would have required the Parent to choose one of the therapists on the District's list. The Parent would not give up even a small bit of control over who was providing the Student's counseling to allow him to receive these much needed services. It is well established that the District has the right to choose its service providers, and was under no obligation to hire Ms. Hoge, who, from her own testimony, had admittedly had limited success with the Student.²¹ The Parent elected not to access these services, and cannot now claim that the District failed to provide the Student with any special education services.

²⁰ The District later agreed not to have Dr. Opuda participate in future IEP meetings, due to the Parent's objection.

²¹ See Fact #16, in which Ms. Hoge found it difficult to get the Student to talk about emotional matters and stay on task, and that she did not believe therapy had accomplished anything for the Student.

4. Tutoring

With respect to the Student's tutoring, the delay in beginning this was also primarily due to the Parent's inflexibility about where, when, how and by whom the tutoring would be delivered. The District first offered tutoring on September 23, 2008, which would have begun on September 29, but the Parent would not agree to it in the afternoon, based upon the unsubstantiated claim that the Student's current therapeutic schedule occupied him four of five afternoons every week, and could not be altered. [Fact #44] As noted previously, there was no evidence that the Student had any appointments in the afternoon, other than with Ms. Hoge approximately once each week, and she did not see the Student exclusively in the afternoon. Offers of tutoring in the home, which the District was very reluctant to do, but agreed to in order to placate the parent, were also not scheduled at a time acceptable to the Parent. The Parent's demands made scheduling tutoring unusually difficult, particularly as she was not restrained by a work schedule. The facts set forth above show that the Parent's desire to control the precise time of tutoring caused a delay of her own making.

The Parent also objected to tutoring at the high school, as she believed the Student could not go to the high school at all without encountering emotional turmoil. As noted above, while the District was willing to consider other locations, the Parent insisted on tutoring either in her home or at the Ogunquit Library, and only during certain hours. The Parent's inflexibility about this caused further delays in the Student's tutoring until the end of October, when the Parent finally and inexplicably agreed to tutoring in the Superintendent's office with Mr. Wydra. [Fact #44] The next day, however, the Parent canceled the Student's tutoring, due to an alleged illness that the Parent shrouded in the same secrecy in which she attempted to keep the Student's past mental health treatment history. Because of the Parent's unreasonable demands regarding

tutoring, the Student was deprived of several hours of tutoring on Mondays, offered by the District. The record is clear that the delay in tutoring, and the fact that the Student received less tutoring than the District was willing to provide, were caused by the Parent's intransigence.

5. November 20 IEP

The IEP team met on November 20, 2008 to review Dr. Fink's evaluation and develop an IEP for the Student. At this point, the District still only had Ms. Hoge's letter as evidence that the Student needed a residential placement, and the Parent had not authorized Ms. Hoge or the Student's other therapists to share information with the District. Therefore, based upon the information it had, the IEP team agreed to transition the Student back to the public high school setting at WHS. [Fact #50] Sensitive to concerns about the Student's anxiety, the team agreed to provide a number of supports to assist the Student, and to allow the Student's anxiety level to determine his transition. [Fact #50] The IEP team also agreed to hire Dr. Jefferson to identify behaviors that may interfere with the Student's success in school, and plan for a successful reentry. [Fact #44] Although Ms. Hoge was invited to this meeting, she did not attend.²² Based upon the information available at the time, the IEP team's decision was reasonably calculated to provide the Student with educational benefit, and to address his need to slowly transition into public school.

Lastly, the District only provided tutoring as an interim measure, which lasted far longer than intended because, as discussed above, the Parent delayed and interfered with the IEP development process.

For the reasons discussed above, the District met its obligations under the IDEA.

²² As noted above, the meeting was scheduled so that Ms. Hoge could attend. Although Ms. Hoge claimed to not have received the notice, the Parent did nothing to encourage her attendance. As the Parent was unwilling to authorize Ms. Hoge to share information about the Student with the District, it was not surprising that Ms. Hoge was not at the IEP team meeting.

D. Is the District's proposed IEP and placement in the Choices Program reasonably calculated to provide the Student with FAPE in the least restrictive environment?

The law is clear that special education programming must be delivered in the least restrictive environment. 20 U.S.C. §1412(a)(5); Maine Unified Special Education Regulations (MUSER) §X (2)(B). "It is common ground that the IDEA manifests a preference for mainstreaming disabled children." *Five Town*, 513 F. 3d. 279 (1st Cir. 2008), *citing Rowley*, 458 U.S. at 202; *Roland M.*, 910 F.2d at 987. What is least restrictive depends upon an individual's needs. The goal is to educate the Student, whenever possible, with nondisabled students, and as close as possible to the child's home. MUSER §X (2)(B). An out-of-district placement is only appropriate when the District is unable to provide the Student with FAPE. In fact, the obligation for least restrictive programming will outweigh placement in a more restrictive setting that may offer greater academic benefits, as long as the less restrictive setting meets the IDEA's educational benefit standard. *See Roland M.*, 910 F.2d at 992-993. As the First Circuit explained

The Act does not authorize residential care merely to enhance an otherwise sufficient day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.

Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983). In the *Abrahamson* case, the First Circuit also made clear that the law does not require school districts to support a residential program because of issues in the home. Furthermore, "Parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993). The goal, then, is to find the least restrictive educational environment that will accommodate the student's legitimate needs. *Five Town*, *supra*.

The Choices program is a therapeutic day treatment program that fits almost all of Dr. Slap-Shelton's requirements. Additionally, all of the members of the IEP team except the Parent felt it to be an appropriate placement. It offered social, emotional and behavioral support, appropriate academic challenge in mainstream classes when the Student was ready, and options for sports participation in a public school. The IEP contained three 60-minute therapy sessions with a social worker for individual counseling, small group social skills, and small group anger management, which would be more therapy than the Student has had on a regular basis during his entire adolescence. At the hearing, there was essentially no evidence against the appropriateness of the IEP's goals and objectives, and several witnesses testified to the appropriateness of the goals. These goals and objectives met the Student's needs. The one requirement of Dr. Slap-Shelton's that Choices does not meet is that it is housed at a public school, not a private one. When the dispute here is boiled down to the least common denominator, the question is whether the Student's PTSD prevents him from being educated in any public school environment, even with an appropriate transition plan.

There were various opinions regarding the Student's educational needs and whether he could attend public school. Dr. Bell, the attending psychiatrist at Spring Harbor, was of the opinion at the time of the Student's discharge that the Student should not immediately be reintegrated into the full school setting, but thought he would be best served by a period of "very intense psychotherapy intervention and treatment," and that his therapists would determine when the Student was ready to return to public school. [S-711] Unfortunately, the Student has never had the type of intervention and treatment envisioned by Dr. Bell for reasons outside the District's control. [Fact #24] Dr. Bell did not, however, say what type of school the Student would need, or that the Student needed a residential or private school placement.

At the time the Student left Spring Harbor, Dr. Wener also recommended intensive psychotherapy, preferably with a male therapist. He felt that because the Student posed little risk of violence, there was no reason that he should not return to classes, and that he should be permitted to return to YHS, as he had been successful there. [Fact #24] At this point, the Student wanted to return to school. [Facts #24, 28]

Leo Taillon, who appeared to have the most positive and successful therapeutic relationship with the Student of all the therapists he had seen, also felt that he needed intensive treatment, and that being out of school was hurting the Student, as he did not have an avenue in which to practice his social skills. [Fact #30] Ms. Fredette also felt that being out of school was hurting the Student. [Fact #34] Mr. Taillon was very positive about the Student and his prognosis, felt the Student was “extremely adaptive,” and that he would do well in a residential placement. He did not address how the Student would do in the Choices program.

Both Wendy Hoge and Laura Slap-Shelton held the opinion that the Student required a highly specialized placement in a therapeutic residential setting that could also provide the Student with the academic challenge he needed to attain his post-high school goal of attending college. It was unclear how Ms. Hoge arrived at her conclusion that the Student needed a residential placement and that public school would activate triggers for the Student, as she never discussed the February 28, 2008 incident with him, and had no notes relating to PTSD triggers.²³ [Facts #38, 41, 42] It seemed that much of her information about this came from the Parent, rather than the Student.

When asked by the hearing officer, Dr. Slap-Shelton testified that she thought the Student could be successful in a day treatment program with therapists and appropriate

²³ When she saw the Mother three times in March 2008, the Student was doing well, and she had not seen the Student at the time she wrote the letter in Fact #38.

academics and supports, if it was not too disruptive due to behaviorally impaired children who attended it. [Fact #60] Choices is such a day treatment program. Although Dr. Slap-Shelton thought Choices sounded like a very interesting program, she was concerned about physically getting the Student to go there, and thought *in vivo* desensitization would retraumatize the Student if he were forced to go to public school. [Fact #61]

The Parent refused to authorize the District to release any of the Student's educational records to Dr. Rollins or the Choices staff. Dr. Rollins, based upon the information she had, thought the Choices program would be a good fit for the Student, and would meet both his emotional and academic needs. [Fact #69] Dr. Fink, whose opinion the Parent tried to discredit, as the Parent felt that Dr. Fink did not really know the Student, despite the fact that Dr. Fink had been involved in the Student's education twice before, thought the Student could reintegrate into an appropriate public high school program, including the one at WHS. [Fact #43] He also noted that the Student could receive the interventions he needed in a typical school day, and a residential placement would not necessarily maintain the beneficial structure and environment 24 hours a day. [Fact #64]

I believe Jessica Means "hit the nail on the head" when she said she thought it would be difficult for the Student to be successful in any plan, and feel confident, if the Parent was not comfortable with it. [Fact #63] The problem with finding a placement for the Student is that the Parent is engaging in the type of "Boulwarism" discussed in *Five Town*, and is unwilling to cooperate with any program that is not a residential placement. From hearing the testimony and after getting a very good sense of the Parent over the course of a week of hearings, I believe that she "sabotaged" the Choices placement when she brought the Student there when school was getting out. All members of the IEP team except the Parent agreed that the Choices program was

appropriate for the Student. [Fact #64] The Parent then sabotaged this placement with her visit. It would be naïve to believe that bringing the Student to Choices in the manner that she did could simply have been an oversight on her part, particularly given how actively she has prevented the Student from being anywhere near a public school, and how hard she has tried to manipulate the IEP process. It fits with her other actions that it was her intent to prove that the Student was mentally unable to attend this program by bringing him there at the worst possible time without proper support or advice from either Ms. Hoge or Dr. Slap-Shelton. Dr. Slap-Shelton testified that she would not have recommended doing what the Parent did. Ms. Hoge testified that the Student was already convinced he could not succeed at Choices. How did he change from telling several therapists that he wanted to return to school to being convinced that he could not succeed in the Choices program? It is hard to tease away what part of the Student's aversion to public school may be due to a delayed reaction to the trauma he suffered during the winter of 2008, and what part is due to the Parent's influence, but undoubtedly, the Parent influenced him considerably.

So where does the leave the Student, who has been the innocent victim of this battle? Although the Parent's attitude has had a very negative impact on both the Student and the IEP process, it cannot be allowed to halt the placement of the Student in an appropriate program in the least restrictive setting. He must remain the focal point of this analysis. He deserves appropriate treatment so that he can benefit from the academic programming he is so capable of doing, and become a productive, well-adjusted adult that many of the mental health professionals who have worked with him believe he can be.

I conclude that the day treatment program, Choices, with the supports included in the IEP and the transition plan, was reasonably calculated to provide the Student with an appropriate

education in the least restrictive environment at the time it was offered. It met all of Dr. Slap-Shelton's requirements, except that it was housed in a public school, and aside from Ms. Hoge, the other experts agreed that the Student could be safely transitioned into the program. As Dr. Rollins pointed out, this distinction is not always a logical one, as private schools often look like public schools, and some private schools are even housed in former public schools. In this program, the Student could have received the treatment he has needed for so long without missing more school. The Choices program has been successful integrating other students with aversions to school, and the plan to reintegrate the Student was going to be driven by research-based therapies and flexibility with respect to the Student's needs and anxiety level.

Because of the Parent's actions, however, I am convinced that the Student would not be successful at Choices following the disastrous attempted visit in February. Therefore, while the District was offering FAPE at Choices, and the Student may be able to attend in the foreseeable future, he needs a different, although comparable, setting now.

E. If not, is the Student entitled to be compensated for past educational losses due to the District's failure to provide FAPE?

As the District offered FAPE, and did the best it could without the cooperation of the Parent, the Student is not entitled to compensatory education.

F. If the answer to question two is no, does the Student require a residential placement to receive FAPE in the least restrictive environment?

As discussed above, the Student does not require a residential placement to receive FAPE in the least restrictive environment. He can receive FAPE in a day treatment program.

V. ORDER

After consideration of the evidence presented during this due process hearing, the hearing officer orders as follows:

1. Prior to February 9, 2009, the District met its obligation under the IDEA to offer or provide the Student with appropriate programming reasonably calculated to confer educational benefits to him to the best of its ability. Its failure to offer the Student an educational program sooner was due primarily to the Parent's unreasonable and uncooperative conduct in the IEP process. The District did its best under the circumstances.
2. The District's proposed IEP and placement in the Choices Program was reasonably calculated to provide the Student with FAPE in the least restrictive environment, as the Student required a day treatment program to address his school-related PTSD.
3. The equitable remedy of compensatory education is not appropriate here, as the District offered a program that would have provided the Student with FAPE.
4. As stated in number 2 above, the District offered FAPE in the Choices program, and therefore, a residential placement is not the least restrictive placement. The IEP team shall meet as soon as possible, but no later than 14 calendar days from the date of this decision, and determine an appropriate day treatment program for the Student that can meet the goals of his February 9, 2009 IEP.

SHARI B. BRODER. ESQ.
Hearing Officer