

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

Parents	)	
	)	
	)	
v.	)	<b>DECISION AND ORDER</b>
	)	
	)	
York School Department	)	

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 days took place on July 11, 12, 13, August 20, 27, 30, September 4, 13, 14, 21, 24, and 27, 2018. The hearings were primarily held at the York County District Courthouse, York, Maine, with one day at the DHHS building in Portland, Maine, and one day by conference call. Those present for the proceeding were the Mother, Father, counsel for both parties, Erin Frazier, Director of Special Education, and the undersigned hearing officer. Testifying at the hearing were:

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| 1. [REDACTED]                    | Parent  |
| 2. [REDACTED]                    | Parent  |
| 3. Sherri Beal                   | Literacy Consultant, Exeter Speech and Language       |
| 4. Fran Bodkin, MA, CCC-SP       | Speech Pathologist                                    |
| 5. Mary Louise Brozena, Aud.     | Audiologist   |
| 6. Erin Frazier                  | Director of Special for the Department                |
| 7. Nick Hanlon                   | Seventh grade Special Education Case Manager          |
| 8. Scott Hoch, PhD               | Psychologist  |
| 9. Sean Kotkowski                | Eighth grade math teacher                             |
| 10. Charlotte LeGolvan           | Special Education Teacher and Specialist              |
| 11. Jennifer MacNeil, MA, CCC-SP | Eighth grade language arts teacher                    |
| 12. Nicole Page, MA              | Eighth grade tutor, ninth grade language arts teacher |
| 13. Victoria Papageorge, MA      | Learning Disability Specialist                        |
| 14. Karen Ropes                  | Former Interim Director of Special Education          |
| 15. Laura Rubin, PhD             | Neuropsychologist                                     |

## I. PROCEDURAL BACKGROUND

On May 11, 2018, [REDACTED] (“Parents”) submitted a *pro se* Due Process Hearing Request (“Hearing Request”) on behalf of their [REDACTED] (“Student”) alleging that the York School Department (“District”) failed to provide a free appropriate public education (“FAPE”) to the Student in violation of the Individuals with Disabilities Education Act (“IDEA”), Family Educational Rights and Privacy Act (“FERPA”), Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (“ADA”), and the Equal Opportunities for Individuals with Disabilities (42 U.S.C. §126).

The District submitted a Partial Motion to Dismiss the Parents’ claims arising prior to May 10, 2016, based upon an Agreement and Release that became effective on May 10, 2016. The District also moved to dismiss non-IDEA claims raised in the Hearing Request. On or about May 29, 2018, the Parents engaged Attorney Mary Stevens, Esq. On June 20, 2018, the District’s Motion was granted with respect to non-IDEA claims and claims regarding educational record maintenance under the IDEA. The Motion was found moot with respect to the waiver issue because the Parents stipulated that their claims were limited to those that occurred after May 10, 2016, the effective date of Agreement.

On June 25, 2018, a pre-hearing teleconference was held. Participating in the conference were: the Parents; Mary Stevens, Esq., counsel for the Parents; Hannah King, Esq., counsel for the District; and Sheila Mayberry, Esq., Hearing Officer. Issues were defined, scheduling of hearing dates was determined, subpoena issues were determined, and documents were discussed. A Prehearing Report and Order was issued on June 27, 2017.

The hearing days took place on July 11, 12, 13, August 20, 27, 30, September 4, 13, 14, 21, 24, and 27, 2018, at the York County District Courthouse, York, Maine. The Parties submitted briefs on November 5, 2018, and reply briefs on November 13, 2018. On November

14, 2018, the Parents submitted a Motion to Strike certain documents that were attached to the District's reply brief.<sup>1</sup> The record was closed thereafter.

The Parents submitted 1,661 pages of documents and the District submitted 5,417 pages in this matter.<sup>2</sup>

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<sup>1</sup> The Parents moved to strike two documents that were submitted with the brief filed by the District. Attachment A is entitled "Policy on Standards-Based IEP Goals." Attachment D is a series of documents that purport to be from an earlier due process hearing between the parties. Neither of these documents were submitted by the District within the "5-day rule." The District replies that neither document is "evidence" to establish any factual issue in this due progress hearing. It states that they are provided to support its arguments. It regards the use of Attachment A as similar to case law or statutes of the State of Maine. It asserts that Attachment D is akin to court filings that are accessible as a matter of public information. It states that neither of them requires authentication because they can be confirmed as being reliable through judicial notice.

MUSER XVI.9.D states, in relevant part, that "(t)he hearing officer may exclude irrelevant or unduly repetitious evidence and shall exclude evidence not disclosed to the other party at least five business days prior to the due process hearing.

I find that Attachment A is not evidence. It is a Maine state policy based upon Maine education law. It is used to notify and inform the public and support decision-making, similar to the use of case law. I take judicial notice of its authenticity because it is widely and publicly available from the Maine Department of Education, including its website. Therefore, I find that this document is not evidence, pursuant to the five-day rule. Attachment D is a bit more problematic. These are signed letters regarding an issue to be resolved in this matter. They are evidence that would tend to support allegation of the nature of the status of prior claims. They are not self-authenticating since they are signed by certain individuals. They cannot be judicially noticed because they do not exist in the public realm and are not readily available. I therefore find that Attachment D must be excluded from the record because it is evidence and was not submitted within five business days of the start of the hearing.

<sup>2</sup> During the proceedings the parties briefed objections by the District to the admission of two documents that the District claimed were privileged and should not be allowed into the record. Both parties briefed the issue. I sustained the objection that P-543 was a privileged document and, therefore it will be kept under seal. I determined that P-507, while it was a privileged document, the District waived the privilege based upon the facts that were presented. Both documents will be separated from and marked for purposes of potential appeal.

## II. STATEMENT OF THE ISSUES

1. Did the Parents waive their rights to challenge the appropriateness of the February 2016-February 2017 IEP, including the provision of ESY services for the 2016 summer, by entering into the May 10, 2016 “Agreement and Release” with the District?
2. Did the District fail to offer the Student appropriate IEPs and placements from May 10, 2016 through to the present, including extended school year services (“ESY”)? If so did this result in a failure to provide the Student with a free appropriate public education (“FAPE”)?
3. Did the District violate procedural requirements under the IDEA and accompanying state and federal requirements that a) impeded the Student’s right to a FAPE; b) significantly impeded the Parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE for the Student; or c) caused a deprivation of educational benefit?
4. Did the Department fail to implement the Student’s IEP appropriately during the summer 2016? If so, did this result in a failure to provide the Student with a FAPE?
5. Did the District violate its obligation to evaluate or reevaluate the Student pursuant to the IDEA and accompanying state and federal regulations between May 10, 2016 and the present time? If so, did this result in the failure to provide the Student with a FAPE?
6. Did the District violate evaluation procedures specified under the IDEA and accompanying state and federal regulations when it conducted an evaluation of the Student in 2017? If so, did this result in the failure to provide the Student with a FAPE?
7. Are the Parents entitled to reimbursement for tuition and expenses under state and federal education laws that were incurred in placing the Student at Learning Skills Academy (“LSA”) for eighth and ninth grades, and are they entitled to continue her placement at LSA for tenth grade at public expense?

### III. FINDINGS OF FACT

1. The Student is 16 years old (DOB [REDACTED]) and lives with her Parents within the District's jurisdiction. (S-79). The Student is eligible for special education and related services under the category of Learning Disability. (P-7; P-12; P-14; P-18; P-22; P-28; P-33).
2. The Student has a complicated learning profile that includes both language and learning needs. (P-137; P-145-156; Hoch Tr. 1850; Rubin Tr. 21). Her areas of weakness include math, reading, writing, and spelling, as well as receptive, expressive, and pragmatic language. (Rubin Tr. 21-23; Hoch Tr. 1850). She struggles with tasks that require higher-order thinking. (S-11, 12; Rubin Tr. 22). In 2010, she started receiving medication for Attention Deficit Hyperactivity Disorder (ADHD). (P-130).
3. By 2014, after making adequate progress in her IEP goals, her progress in math and reading began to decline on standardized assessments. (P-1029; P-E-2; P-129). Her teacher reported that the Student was not participating in the learning environment: "(The Student) did not answer any questions or participate publicly in any way." (P-127).
4. The Student was evaluated by Boston Children's Hospital ("BCH") on two occasions – first in August 2014 and again in December 2015. (S-51). Between the two evaluations, she was served by IEPs developed by her York IEP team and implemented at York Middle School during her 6th and 7th grade years. (S-976; LeGolvan Tr. 520; Hanlon Tr. 1464, 1466, 1472, 1477-78, 1480-81).
5. The results of the multi-disciplinary evaluation done by BCH reported that the Student's profile met the criteria for a neurologic impairment and specific learning disability. (P-146). It stated that she had unusual difficulty integrating and making connections. (P-147). It went on to state that her academic deficits were severe and could not be appropriately addressed in an inclusion classroom or in "Response To Intervention ("RTI") services. (P-147). The evaluation indicated that the Student was functioning at an academic level two to three years behind her same age peers. (P-137, 145).
6. The BCH report described the Student's cognitive style as "concrete" and noted that "she does not easily appreciate more abstract concepts and frameworks and thus approaches tasks in rote manner." It described her struggles with integrating information causing her understanding to be "incomplete or fragile" and leading to confusion and a need to rely heavily on adults and other students for support. (P-161).

7. The BCH team made several recommendations for the Student's educational program, stating "She needs explicit teaching of concepts at a comfortable pace," and a "setting in which her cognitive profile can be comprehensively managed throughout the day in an integrated fashion." Recommendations for pre-teaching, highly structured format, anchoring new material to experience and prior knowledge, multiple opportunities for mastery, frequent spiraling back for review, concrete visual models, and having her teacher interpret any restlessness or inattention as confusion or feeling overwhelmed. (P-162).
8. Additionally, BCH reported that "(The Student) met criteria for neurologic impairment and specific learning disability" and "(The Student) needs a cohesive program in which all her academic instruction is provided in a substantially separate small group setting. A language-based classroom is a good model for an appropriate setting." (P-146).
9. The BCH report went on to say that "Because of her specific neurocognitive profile, (the Student) has unusual difficulty integrating and making connections. A pull out model therefore, would not be appropriate for her since she struggles to integrate the special education services with general education." (P-147) Further, Dr. Waber, an author of the report, stated, "(The Student's) academic deficits are severe and could not be appropriately addressed in an inclusion classroom or in an RTI intervention." (P-147).
10. BCH administered the "Word identification" subtest from the Woodcock Reading Mastery Test-Third Edition Form (WRMT-III), which required her to read aloud a list of single words. (P-179). She achieved a score that was "low average" for her age and consistent with mid-fourth grade level. (P-169) This indicated difficulty with single word decoding skills. (P-167). To address this need, BCH made recommendations for decoding intervention that would follow the principle of a 1:1 match, including 1 hour of direct learning of a principal/rule followed by 1 hour of application of it. (P-174)
11. The BCH evaluation included recommendations for reading comprehension instruction. It stated "(The Student's) reading comprehension instruction should incorporate passages that are at the instructional level for comprehension (third grade) rather than her current grade level." (P-174.) It also recommended that encoding instruction should be direct, with student-teacher interaction in a systematic, sequential, and cumulative approach using a multisensory technique and immediate feedback and modeling. (P-175).
12. The District engaged a learning disabilities specialist, Victoria Papageorge, M.Ed., M.S., to solicit advice and recommendations on programming for the Student based

upon the BCH recommendations. (Papageorge Tr. 260; S-G-282). Ms. Papageorge has been a certified special education teacher in Maine for more than 30 years and holds a Master Teacher's Certificate in Maine; she is certified as a learning disabilities specialist and special education consultant. (Papageorge Tr.; P-257).

13. Ms. Papageorge's consultation report made several specific suggestions on how to implement the BCH recommendations. Generally, she recommended:  
    "[an] intensive and well-integrated program through special education where the instruction begins at her level of competence, rather than special education services supporting the regular education program. An inclusion model should be utilized for the content areas of science and social studies, incorporating modifications and academic support (i.e. pre-teaching vocabulary, review and re-teaching of concepts, test preparation).  
    (S-G-283).
14. For reading, Ms. Papageorge suggested implementing the BCH recommendation as follows:
  - Use of a multi-sensory approach for development of sight word and word attack skills using two of the Lindamood Bell programs: Seeing Stars methodology along with the LIPS Program;
  - Several brand-name reading comprehension programs
  - Delivery of services daily for 45-50 minutes in the special education setting for basic skill development and 45-50 minutes 3 to 4 days weekly for reading comprehension.  
    (S-G-284).
15. For written language, Ms. Papageorge suggested implementing the BCH recommendations as follows:
  - For encoding (spelling): Use of brand-name resources for both sight spelling and phonetically based words;
  - For written expression: Use of brand-name resources to support the conventions and cognitive components of written language;
  - Delivery of services: 3 to 4 times weekly for 45-50 minutes.  
    (S-G-284-285).
16. For math, Ms. Papageorge suggested implementing the use of brand-name methodologies to master:
  - Mathematical concepts;
  - Problem solving;
  - Estimation;

- Linguistics of math (S-G-285).
17. Ms. Papageorge also included many academic support recommendations, including pre-teaching and use of highly structured formats (e.g., graphic organizers). (S-G-287-288).
  18. IEP meetings were convened on September 26 and November 14, 2014, to discuss the findings and recommendations of the BCH report. (P-207). The IEP Team agreed to amend the IEP to include the BCH recommendations by adding specifically designed instruction in math and reading, as well as several accommodations. (P-205, 208, 214).
  19. On September 30, 2014, the District and the Parents discussed the Parents' request that the District hire Ms. Papageorge as an ongoing consultant. (P-212). However, the District chose to engage Dr. Chris Kaufman, a neuropsychologist, to consult with the District's special education teacher on a bi-monthly basis. (P-215).
  20. On February 5, 2015, the IEP team met for the Student's annual review and developed a new IEP. The team developed 11 goals for spelling, math, reading, writing, and executive functioning. Services and accommodations were unchanged from the prior amended IEP. The new IEP was effective February 6, 2015. (P-231, 234). The Student's strengths and needs section was very similar to the previous IEP from 2014 (P-221, 222).
  21. Up through the end of the 2014-2015 school year and into the Extended Year Services ("ESY") period in the summer 2015, the Student received special instruction from special education teacher, Nick Hanlon, with consultation advice from Mr. Kaufman and Ms. Papageorge on a bi-monthly basis.<sup>3</sup> (Papageorge Tr. 266-267; S-G-6, 12, 16, 116, 128, 129, 210, 293). Mr. Hanlon used materials offered by Ms. Papageorge and often relied on her advice. (Hanlon Tr. 1603, 1610-1611; S-G-6, 293, 294; S-G-8, 12, 122; S-B-45).
  22. During 6th grade year (2014-15) at York Middle School, the Student made progress in reading and math. On the Fountas and Pinnell Benchmark Assessment System ("BAS"), she progressed from a reading Level Q (beginning 4th grade) in September 2014 to a reading Level Y (end of 6th grade) in June 2015.<sup>4</sup> (S-163; S-950; Hanlon Tr.

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<sup>3</sup> Ms. Papageorge was engaged privately by the Parents in April 2015 and was allowed to consult with Mr. Hanlon along with Mr. Kaufman. (Papageorge Tr. 258-259; S-G-120).

<sup>4</sup> Fountas & Pinnell – Instructional Level Reading Expectations – grade/level chart:

Meets expectations – (beginning of year to end of year):

Grade 1 – D/E to J/K

Grade 2 – J/K to M/N

1489-1490, 1541). On the Qualitative Reading Inventory (“QRI”), she progressed from a level 4 in August 2014 to a level 6 in December 2015. (P-180; S-20-21). She made gains in math and reading on the STAR, a nationally-normed standardized assessment, and made progress on all of her IEP goals. (S-111-118, 256-266; Hanlon Tr. 1487, 1489, 1534, 1542, 1554; Frazier Tr. 2410, 2491).

23. During the 2015-2016 school year, the Student received her literacy instruction from Mr. Nicolas Hanlon (Hanlon Tr. 1464), and had an additional literacy workshop with Ms. Charlotte LeGolvan. (LeGolvan Tr. 522). Charlotte LeGolvan holds a master’s degrees and several special education certifications. (LeGolvan Tr. 509-510; Frazier Tr. 2426). She has over 30 years of teaching experience and is trained in the entire suite of Lindamood Bell programs including LiPS, Seeing Stars, and Visualizing and Verbalizing. (LeGolvan Tr. 511-514). She had worked closely with Mr. Hanlon during the 7<sup>th</sup> grade (2016-2017) school year and was familiar with effective strategies for working with the Student given her disability-related needs. (LeGolvan Tr. 522).
24. The IEP team met on October 7, 2015 at the Parents’ request. The Parents shared a list of 12 concerns and requested that York School District pay for an updated evaluation from BCH. The team denied the request, explaining that the school would provide those assessments identified by the IEP team as necessary to continue appropriate programming for the Student. (P-834).
25. By November 2015, the Student was making “adequate” progress on all of her IEP goals. (P-268-273).
26. A re-evaluation of the Student was administered by BCH in mid-December 2015. (S-6-63). In its “Integration of Finding,” the BCH stated that the Student had made “excellent academic progress” in the time between the two evaluations. (S-51, 58, 64-64). In reading, she had progressed from a 3rd to a 5th grade level. (S-51). In math, she had progressed from a 3rd to a mid-4th to a mid-5th grade level. *Id.*
27. This was consistent with the progress seen by staff at the York school. (Hanlon Tr. 1489-90). The expected rate of progress for a typically developing student is a year’s worth of growth in a year’s time. (Hanlon Tr. 1489-90).

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Grade 3 – M/N to P/O  
Grade 4 – P/O to S/T  
Grade 5 – S/T to V/W  
Grade 6 – V/W to Y/X  
Grade 7 – Y to Z  
Grade 8+ - Z to Z  
(S-880)

28. The BCH findings indicated that, from a cognitive perspective, her scores on IQ testing clarified that there was a significant discrepancy between her verbal average scores and non-verbal reasoning below average scores. (S-63). “She “encounters far more difficulty with tasks that require fluid reasoning and novel problem solving as well as integration and making connections. Visual material can be particularly challenging for her. Thus, although (the Student) possesses considerable knowledge and skills, she is less able to integrate them and apply them in service of more novel complex and abstract tasks. (*Id*). The report indicated that because these were more deceptive weaknesses, she would need continued and “intensive” specialized support. (*Id*).
29. BCH endorsed the programming provided by York (S-51), writing “(The Student)’s current educational program has been quite successful and is fully endorsed.” (S-60). The evaluation commended the contribution of one instructor in particular, Nick Hanlon, who was also her case manager. The report anticipated that Mr. Hanlon would not always be the Student’s teacher and made recommendations regarding a future transition: “(Nick Hanlon) should be closely involved in any transition to other teachers so that they can continue to provide the kinds of approaches that he has so successfully developed and implemented with her.” (S-90).
30. The BCH report also noted that the Student had “shown important gains in her emotional status.” (S-60). Normed behavior rating scales completed by both the Mother and Mr. Hanlon resulted in no clinically significant scores. The report stated that the Student has a “very benign profile with most scores better than those of girls (the Student’s) age.” (S-31). The Parent reported to evaluators at BCH in December 2015 that the Student “gets along well with peers and has many friends” with whom she socialized on a regular basis. (S-55). Based on the testing, evaluators concluded that the Student was “basically a well-behaved, well-adjusted girl with some signs of internalizing problems (anxiety and somatic complaints) in both home and school settings.” (*Id*). The report noted that behaviors that she “once exhibited, especially, protesting going to school are not as evident.” (*Id*).
31. On December 11, 2015, the Parents requested that the District reimburse the Parents for the BCH re-evaluation. (S-G-156). The District declined and submitted a due process hearing request. (Mother Tr. 1163).
32. On January 28, 2016, the Parents filed a due process hearing request challenging both the appropriateness and implementation of the Student’s IEPs at York and in response to the due process hearing filed by the District regarding reimbursement for the BCH evaluation. (16.046H). (Mother Tr. 1235-36, 2030).

33. Sometime in February 2016, the York school staff, including the Student's special education teachers Nick Hanlon and Charlotte LeGolvan, attended a telephonic conference with Dr. Deborah Waber, the Director of BCH's Learning Disability Program, to discuss the BCH report dated December 2017.<sup>5</sup> (Hanlon Tr. 1486; LeGolvan Tr. 520-21; S-51).
34. On February 4, 2016, the Student's IEP team convened to develop an IEP for the remainder of her 7th-grade year (2015-2016) and the beginning of her 8th-grade year (2016-2017) (S-75), based upon the re-evaluation and recommendations from BCH. (S-75). The team agreed that the IEP should include the same level of supports and services as the prior IEP, with an additional 30 minutes a week of social work services as recommended by BCH. (S-61, 75-76). The Written Notice indicated that the Parents requested that her programming needed the same type, level, frequency, and intensity of services. (S-76). The team also ordered an assistive technology evaluation for the Student. The Team developed goals in every area of need with input from the Parents, Ms. Papageorge, and Mary Stevens, the Parents' attorney who attended the meeting. (S-75). There was no suggestion that the Student required an out-of-district placement. (Mother Tr. 2040; Hanlon Tr. 1529).
35. The IEP dated February 4, 2016 included statements of the Student's academic and functional strengths, weaknesses, and instructional levels, and how they adversely affected her educational performance. It stated that, with respect to the impact on her academic performance:
- At the present time, (the Student) does not have the foundations, cognitive or academics, to participate in grade-level curriculum without intensive supports and accommodations and modifications. She is vulnerable with larger volumes of information since she has difficulty integrating such information within a conceptual framework that would allow her to anchor it in meaning. (The Student) had previously been diagnosed with ADHD-inattentive Type by Boston Children's Hospital. Further testing did not support this diagnosis, but found that her inattention is due to (the Student's) feeling overwhelmed and confused by academic material. When (the Student) is engaged in a task at her level of competence, she can be highly engaged and focused. If (the Student) is displaying increased restlessness or inattention, this should be viewed as signals that she is feeling overwhelmed and confused. Efforts should be made to redirect her attention by reframing

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<sup>5</sup> Dr. Waber had completed the Neuropsychological Evaluation for both the August 2014 and the December 2015 Evaluation and the Coordinated Findings for the December 2015 Evaluation. (P-163; S-13, 62).

or modifying the task clarifying her understanding, assuring that she is engaged, and assisting to self-identify her confusion and need for assistance. In order to gain access to the curriculum, (the Student) requires an intensive and well-integrated program of special education that is appropriate for her needs. Because of her specific neurocognitive profile, (the Student) has unusual difficulty integrating and making connections. Instruction must be directed to her level of competence rather than attempting to support her in curriculum at her grade level. Evaluations indicate that (the Student) has average cognitive abilities in reasoning and memory, but a weakness in processing speed. This means that (the Student) may take longer to process information presented to her, she may need repetition of information, review of concepts, wait time for responses, individual check ins for understanding. (S-87).

36. The IEP included nine math literacy goals and four math goals. (S-88-92).
37. The IEP included the following services:
  - Specially designed instruction for 5 times 45 minutes per week in reading
  - Specially designed instruction in curriculum support, preteaching/reteaching 2 times 45 minutes per week
  - Specially designed instruction consultation 60 minutes per month to review accommodations.
  - Special education support for 4 times 55 minutes per week in language arts
  - Special education support for 4 times 55 minutes per week in math
  - Special education consultation to the case manager for 60 minutes per month
  - Extended school year services 4 hours per week for 5 weeks in math and reading
  - Social Work for 30 minutes per week  
(S-97; Mother Tr. 2036)
38. The IEP also described the adverse effect of her functional weaknesses:  
(The Student) struggles with executive functioning skills in the areas of organization of material, breaking tasks down, understanding work expectations, initiating tasks, and remembering assignments/turning them in. She does very well in a highly structured environment. Due to academic demands and expectations of sixth grade level curriculum at the beginning of last year, (the Student) demonstrated anxious behavior, appeared overwhelmed, and complained of somatic symptoms that keep her from attending school on occasion. Since October of last year, given clarified work expectations appropriate accommodations and modifications, and in-

class supports, (the Student) has appeared less anxious and very rarely complains of somatic symptoms that keep her from attending school or having to leave early. She continues to be overwhelmed by directions/multi-step assignments, but has been able to generate plans to complete the tasks with moderate assistance from teachers or educational technicians. (S-93).

39. Based upon her executive functioning deficits, one goal was developed to address it along with numerous accommodations and supports. (S-93-94). In addition, many other accommodations were included for reading, writing, math, memory and testing. (S-96). This included support from special education personnel in social studies and science. (S-96). Social work was also added as a related service. (S-97).
40. The IEP indicated that, based upon the need for specialized instruction and services the Student could not participate with her non-disabled peers 44% of the time in the general education setting. (S-98).
41. On February 29, 2016, the Mother emailed Nick Hanlon to say “[w]e would like to put the social work on hold for now and will meet this need privately for the time being.” (S-B-668.4). Mr. Hanlon responded: “I am going to leave the social work service off of the IEP we developed on February 4th, and will send home another Written Notice outlining the decision.” (S-B-673). The Mother responded: “Sounds great.” (*Id.*) A Written Notice issued on March 7, 2016 described the amendment to the IEP as follows: “the school agreed to put social work in the school setting on hold and honor parents request to seek outside services.” (S-106; Mother Tr. 2057-2060).
42. Ms. Frazier testified that although the social work services had been officially taken off the IEP, the language remained on the IEP through a “clerical error” until October 2016. (Frazier Tr. 2419; S-276).
43. On April 13, 2016, an assistive technology evaluation was completed by Alltech. (S – 119). Recommendations included the use of text-to-speech technology to help develop literacy skills; use of an external keyboard versus an onscreen keyboard of an iPad; use an online typing program; use of ear buds for listening in classes with others present; note-taking app for the iPad; use of online calendaring; receiving a Language Evaluation. (S-132-133).
44. On May 10, 2016, the Parents and the York School Department entered an Agreement and Release (“Agreement”) related to due process hearing request consolidated cases 16.037H and 16.046H. (S-138; Mother Tr. 2031). As part of the Agreement, the parties

withdrew their hearing requests. (S-138). The Parents' waived any and all claims against the York School Department up through the date of the Agreement. The signed Agreement, dated May 10, 2016, specifically stated the following (S-138, 139):

...(the Parents) waive any and all claims, causes of actions, suits, or sums of money, whether legal, equitable, and/or administrative in nature (collectively, "Claims"), known or unknown and whenever arising, based on the past or existing state of things up through the date of this Agreement, including without limitation any Claims that relate in any what whatsoever to a) (the Student's ) education by York or its agents or treatment by the Releasees, b) any services whatsoever that (the Student) did or could have received from the Releasees or its agents, c) the delivery of a free appropriate public education to (the Student), d) reimbursement for or payment of private evaluations pursuant to MUSER V.6; and g) any damages incurred by (the Student) sounding in any in state or federal law, statutes, or disability laws, and specifically including, and intending to release, all Claims that were or could have been raised in (*Parents v. District*) (consolidated 16.037H and 16.046H) and all Claims based on, alleging or arising out of the alleged negligence of the Releasees or its agents with respect to (the Student).

45. On May 12, 2016, the IEP team, convened to review the Assistive Technology Evaluation. (S-143, 145). The IEP already included access to "technology to provide accommodations for reading, writing, math, and executive functioning." (S-95). The team agreed to add 60 minutes per month of consultation services to assist the Student in using and maximizing the technology. (S-144; Mother Tr. 2038). The team also accepted the evaluator's recommendation for a speech and language evaluation. (S-133, 144). Mary Condon reported that she had done an interest interview with the Student, who stated that she was interested in working with animals. (See also S-110). She also reported on her discussion with the Student about her transition into high school, e.g., navigating the building, keeping up with course work. (S-144-145). She suggested strategies organization and planning for making the transition easier. (S-145). Those present at this meeting included Ms. Papageorge; the Parents; Mr. Hanlon; Mr. Ropes (who was still the Special Education Director at that time; Mary Condon, special education teacher; Alix Kiburis, education consultant<sup>6</sup>; Lou Isom, Alltech evaluator; and Nancy Lindom, social studies teacher (who was referenced in the Written Notice but not listed as a participant). (S-145).

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<sup>6</sup> Dr. Kiburis started in early February 2016 and resigned from the District sometime in mid-May, 2016, (S-B-16-17). She had been the replacement for Dr. Chris Kaufman who had resigned earlier in the year.

46. The team also reviewed the Student's plan for ESY services and determined that no changes were needed. (S-144). At the Parents' request, the team ordered updated academic testing in reading. (S-144). No other changes were made to the IEP. (*Id.*). Out-of-district placement was not raised as an issue by the Parents or the District. (Mother Tr. 2040,41).
47. In addition, in 7th grade (2015-2016), the Student demonstrated the ability to access general education classes in social studies and science with the accommodations included in her IEP. (S-76, 145; Hanlon Tr. 1473-75; LeGolvan Tr. 522).
48. During 7th grade, the Student regularly and timely attended school and missed only a handful of days. (S-1010). In addition, she visited the school nurse on only three occasions, none of which were for anxiety or somatic complaints. (S-1071). Additionally, there are only two documented instances of the Mother contacting the school about anxiety; on both occasions, the Mother reported that the Student was anxious because she had misplaced or failed to complete an assignment. (P-279, 369). While Mr. Hanlon testified that the Student still experienced some anxiety during the 7th grade year, he believed that she was able to talk through issues and resolve them better in 7<sup>th</sup> grade. (Hanlon Tr. 1556).
49. On the math Star assessment growth report, the Student's progress as a percentile was not keeping up with her age group. (S-149). While she made progress, her progress was slowing. (S-149).<sup>7</sup>
50. On the reading Star assessment growth report, the Student's progress had an increase in scaled scores over two testing periods (10/8/2015 and 5/20/2016) from 556 to 693. (S-151). Her grade equivalent on May 20, 2016 was 6.2, with an instructional reading level at grade 5.8. (S-152, 155).
51. On June 14, 2016, Mr. Hanlon emailed the Mother to share that he was leaving his role at the middle school to accept a teaching job at the high school. (S-G-179).
52. On June 15, 2016, Mr. Hanlon met with Eric Lawson, the District's Technology Director, to set up the assistive technologies that the Student would be using in the fall and to decide on the type of instruction she needed to access it. (S- 371).
53. On June 20, 2016, the Mother requested an IEP meeting to discuss how the Student's programming would be impacted due to the departure of Mr. Hanlon. (S-B-28, 36). Ms.

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<sup>7</sup> Over four tests from October 2015 to May 2016, her scaled scores were 691, 795, 701, and 701. (S-149).

Ropes replied that a meeting should be held after the reading and speech/language assessments were completed over the summer. (S-B-39).

54. On June 21, 2016, the Parents were sent the Student's IEP. It reported progress, indicating that she had made "Adequate" progress on her IEP goals, with the expectation of one goal. (S-111, 117). Her progress was "Inconsistent" on her goal to improve her ability to compare the value of fractions, decimals, and percents, noting that she had a 75% rather than an 80% success rate on curriculum based measures. (S-117). This was decrease from April 2017, wherein she had a 90% accuracy rate of success.
55. In a Program Review, dated June 20, 2016, Ms. LeGolvan reported on the Student's progress in the Literacy Workshop, citing the material she read over the year. (P-380). Ms. LeGolvan stated that the Student was now able to repeat multi-syllabic words with appropriate articulation and accent and break words into syllables. She was able to track sounds within syllables, including beginning medial and ending syllables. She was also able to separate suffixes from base words (S-381).
56. During the summer of 2016, starting on July 11, 2016, the Student received ESY services in the amount of four hours a week for five weeks as stated in the IEP developed on February 4, 2016. (Hanlon Tr. 1566-1568; S-97; S-B-32, 44). It required that ESY services be provided by a "special educator" in a "special education setting." (S-97). No specific staffing had been discussed at the IEP meeting. (Hanlon Tr. 1567). No objections from the Parents or their advocates had been raised regarding staff for ESY services. (S-75, S-144). The Student received the ESY services from educational technicians who were trained in various reading programs and under the supervision of Mr. Hanlon. (Hanlon Tr. 1568; S-B-43, 45). This was an unexpected change in staffing, to which the Student had difficulty adjusting. (Hanlon Tr. 1676; S-B-46). At the hearing, the Mother acknowledged that the Student received ESY services for 4 hours per week for 5 weeks as written in the IEP during the summer of 2016. (Mother Tr. 2074-2075.)
57. On July 13, 2016, the Mother asked if she could meet with District staff, including the new special education director, Erin Frazier. (S-B-41). Ms. Frazier, who had been recently hired, suggested that they speak at Parent's Night in early August. (S-B-41). The Mother commented to her that the Student had "made so much progress both academically and emotionally" over two-year time frame and hoped that the Student could continue her progress with her new teacher. (P-385).

58. Also on July 13, 2016, Ms. Frazier wrote to Mr. Hanlon, “I cannot really figure out why (The Student) is receiving ESY, but I’m sure it was a recommendation out of Boston?” (S-B-42).
59. On July 19, 2016, the Mother wrote to Ms. Frazier explaining why the Student was not attending ESY on that day, stating that due to her neurological profile, she had difficulties with transitions and confusion causing her anxiety, which had happened quite often before she began working with Mr. Hanlon in 2014. (S-B-46).
60. On July 20, 2016, Ms. Frazier responded “I’m buying a house/moving this week” but that she would be in touch the following week to set up the Student’s reading evaluation. (S-B-46).
61. Thereafter, also on July 20, 2016, the Mother initiated the process for enrolling the Student at Learning Skills Academy (“LSA”). (S-F-142). LSA is a special purpose private school approved by the State of New Hampshire to instruct students in grades 3-12 with learning disabilities, including Specific Learning Disability, Speech and Language Disability and Other Health Impairment. (Kotkowski Tr. 1269, 1276-1279; MacNeil Tr. 612). LSA has a heavy focus on teaching students with specific learning disabilities where teaching literacy is based upon teaching and reteaching language fundamentals through the curriculum, which is described a “language-based” teaching method. (P-A-67-75; MacNeil Tr. 612-613)<sup>8</sup>.
62. In her communication with LSA staff, the Mother explained the reason for the private placement: “We had thought Nick Hanlon would have been her teacher for 8th grade and had intended to continue at (the District’s middle school) for 8th grade. His change in position has caused us to look at our options sooner than we had expected.” (S-F-141).

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<sup>8</sup> Ms. MacNeil, a speech and language pathologist who contracts with LSA, described language-based teaching in her testimony as: “So with language-based instruction, there are -- the tenets sort of are based on the idea that you look at the students' learning strengths and the students' learning weaknesses. Depending on where students are at, you engage in a process of cycling that begins with pre-teaching of material, re-teaching of material, opportunities of verbal expression on the students' part, ongoing questioning with students, allowing them to be really the center of the classroom where you're engaging in dialogue that allows them to take -- really look at the discrete skills of learning and then build upon them. So, for example, in an ELA class, we might begin reading and work on those core skills of reading fluency, projecting text to a dry erase board where kids who are working on those underlying skills of identifying syllable types. If they're stuck, you would actually engage them in going to the board, breaking apart a syllable and revisiting what they may have learned in a one-to-one tutorial or a small group tutorial. That becomes integrated in that learning process where you're really, as the ELA teacher, looking towards the goal of comprehension but you're continuously bringing back the parts of language instruction that they have become familiar with so they can utilize that across the curriculum.” (MacNeil Tr. 613).

63. On July 30, 2017, the Mother emailed LSA staff stating, “We do want to place (The Student) privately no matter what the procedure is.” (S-F-144). On August 4, 2017, the family submitted the first tuition payment. (S-F-143).
64. York prepared for the Student’s 8th-grade school year (2016-2017). York made arrangements for Pat Pongrace to be the Student’s special education case manager and to provide specially designed instruction in math and language arts to the Student. (S-281; Frazier Tr. 2425). Ms. Pongrace has a special education certification for K-8 and over 25 years of teaching experience. (Frazier Tr. 2425-26; LeGolvan Tr. 549). The District also planned for Charlotte LeGolvan, who had worked with the Student in 7th grade, to continue to provide specially designed instruction in reading to the Student. (S-281). The District also prepared for Sherri Beall, a private literacy consultant, to provide consultation to the Student’s special education teachers in 8th grade. (S-162).
65. The Student’s instructional team in the District believed that her IEP could be implemented in the District. (LeGolvan Tr. 549-50; 554-55, 598, 601-02; Hanlon Tr. 1480, 1481, 1486, 1487, 1528-30, 1530, 1533, 1698; Tr. Bodkin 2622-2624). In fact, as a student with a language-based learning disability, the Student would have benefitted from exposure to typically developing peers. (LeGolvan Tr. at 601-602).
66. On August 10, 2016, the Parents provided York with notice of their intent to unilaterally place the Student at LSA for her 8th-grade year (2016-2017) and seek reimbursement for tuition and related costs. (S-182). In their letter, the Parents state the following:

As the parents (of the Student), a rising eighth grader, we wish to provide notice that the proposed IEP and placement at (the District’s middle school) for the upcoming academic year are inappropriate to meet her significant educational needs. (The Student’s) programming, as recommend by (BCH), requires significant instructional planning and effort, as well as close consultation from experts. We have become very concerned by Nick Hanlon's departure from ██████'s program, as he was the principal reason her program has been successful during sixth and seventh grades. Planning for ██████'s evaluation and consultation over the summer has been non-existent or in disarray. In addition we are concerned by ██████'s highly negative emotional reactions to the instructional services provided in her ESY program. No effort has been made to transition her successfully to new staff for eighth grade, and she is now a highly anxious emotional wreck on the subject of going back to school. ██████ continues to require smaller classes and highly specialized instruction by a skilled instructor, as recommended by Boston Children's Hospital, to address her disabilities and academic

deficits. For the upcoming 2016-2017 school year, therefore, we have determined to enroll [REDACTED] unilaterally at the Learning Skills Academy in Rye, NH on a full-time basis. This unilateral placement is fully capable of providing [REDACTED] with the appropriate educational services she requires and will be an excellent fit given her disability-related learning needs. We intend to seek reimbursement from the district for all costs associated with [REDACTED]'s unilateral placement at LSA, including tuition, related services, transportation, and other related expense so that the placement ultimately will be at public expense.

67. On August 11, 2016, Erin Frazier, conducted an academic evaluation of the Student. (S-208; Frazier Tr. 2403-2412). Specifically, Ms. Frazier conducted the Gray Oral Reading Test (“GORT”) and the QRI-5. (*Id.*) Testing indicated that the Student was continuing to make progress. (S-208; Frazier Tr. 2410). On the GORT the Student scores on her reading rate, accuracy and fluency measure were all at the low end of the “average” range (anywhere between the 25%ile to 57%ile). (S-209). On the GORT’s Oral Reading Index, the Student scored an 86, which was in the “below average” range compared to her same age peers. (*Id.*) On the QRI-5 the Student scored in the “average” ranges across the subtests. However her comprehension was in the “below average” range as compared with same age peers. (S-210). The assessment indicated that the Student was performing at a grade 5 level or quoting accurately from text when explaining what the test says explicitly as well as inferences drawn from it. She was at grade 6 for citing textual evidence to support analysis of what the text says explicitly as well as inference drawn from it. These standards are drawn from Common Core State Standards. (*Id.*) Ms. Frazier stated that any instructional support provided should continue to support and broaden the Student’s ability to show competency on standards associated with grades 7 and 8. (*Id.*) Ms. Frazier concluded that that Student is challenged with immediate memory recall performing in “below ranges” which impacts her ability to capture verbal information auditorily or visually and remember information to comprehend grade level text. This also impacts her listening comprehension that relates to complex language patterns presented in the classroom without support through preteaching and notes provided prior to lectures. Ms. Frazier noted that while the Student’s reading errors are not significant, she is more challenged decoding “higher level words that do not follow a typical pattern,” memory recall that interferes with her ability to comprehend what she reads, and making inferences from texts. (*Id.*)
68. Ms. Frazier recommended several strategies that were included in the District education consultant’s report, as well as additional ones. These include:

- Using verbal questioning framework to activate prior knowledge and make prediction in texts;
- Using graphic organizers especially webbing and mapping to increase comprehension when reteaching vocabulary and concepts
- Using thinking aloud activities to activate prior knowledge;
- Using meta cognitive skills;
- Repeated reading and listening opportunities;
- Preteaching concepts and vocabulary;
- Using strategies to increase memory through process of reading (stop and summarizing, “post it” notes, note taking, templates);
- Engaging in word mapping and connecting previous learning to increase word knowledge;
- Containing to assess assistive technologies.

69. On August 16, 2016, Ms. Papageorge conducted an independent evaluation of the Student at the Parents’ request. (S-183). Evaluations that were administered included the Comprehensive Test of Phonological Processing (CTOPP-2); Woodcock Johnson Mastery Test III (“WRMT-III); Test of Reading Comprehension-4 (“TORC-4”)(selected subtests); Symbol Imagery Test; Comprehensive Mathematical Abilities Test (“CMAT”); File Review; Interviews with parents; and a behavioral observation. (S-185-186).
70. The Student received an overall “average” score on the CTOPP-2, suggesting to Ms. Papageorge that the Student had average phonological processing skills. (S-188). However, the Student’s score on the Symbol Imagery Test for orthographic processing was in the “poor” range at the 3<sup>rd</sup> percentile or 7-11 age equivalency. (S-189). She explained that orthographic skills include the ability to establish detailed visual or mental representations of letter strings and words and to have rapid fluent access to these representations. (S-188). She stated that this cognitive processing can be measured by testing “symbol imagery,” the ability to create mental representations for the sounds and letters in words, and involves the ability to visualize the identity and sequence of letters in words. Symbol imaging assists with phonological and orthographic processing in reading and spelling. *Id.*, citing authorities.
71. The Student’s basic reading skills was at the 5<sup>th</sup> grade level and reading comprehension was at the 6<sup>th</sup> grade level, (“below average” range in basic skills, based on the WRMT-III results.(S-190, 201). She noted that these scores were lower than what BCH had reported in 2015. (S-201). The Student scored at the 4.9<sup>th</sup> grade level on the TORC-4 for reading comprehension. (S-193). Her scores on the CMAT subtests ranged from grade 3.7 in addition to grade 9 in measurement and time. (S-195). She was functioning

“below average” on Global Mathematics Ability. (S-196). Ms. Papageorge stated that the Student’s overall basic calculation composite was at the 1<sup>st</sup> percentile over “very poor” range. (S-197).

72. In summary, Ms. Papageorge found that the Student had processing weaknesses as they relate directly to reading, math, and writing, citing “significant weakness with orthographic processing.” (S-201, 203). She stated that the Student would require direct instruction to cognitively stimulate this sensory area, which would facilitate development of basic decoding and encoding skills. (*Id.*) She explained that this instruction would require a multi-sensory, integrated approach for “remediation” using a methodology specifically designed to stimulate orthography, such as provided with the Seeing Stars Program by Lindamood Bell. (*Id.*) Ms. Papageorge explained that the components of the Lindamood Bell methodology that would help the Student develop visual processing in order to improve basic skills in sight word development, particularly for multi-syllabic words, and spelling (S-203). She stated that Seeing Stars would assist with both sight word recognition and encoding. She recommended fluency drills to improve the efficient sound to symbol recognition in reading, citing the LIPS manual, Wilson Readers, and Six Way Paragraphs. (S-204). She suggested the use of graphic organizers to systematically teach higher level comprehension. (S-204-205).
73. Ms. Papageorge recommended methodologies for teaching basic math facts, procedures, and applied math problems including the Sharma program and Problem Solving Step by Step. (S-205-206). She also recommended a math reference book for the Student to access vocabulary and procedures. (S-206-207).
74. On September 2, 2016, Ms. Bodkin completed a speech and language evaluation for the Student as ordered by her IEP team in order to further assess her functional receptive and expressive language skills. (S-212, 214). Based upon several assessment tools, Ms. Bodkin found that the Student’s language skills were characterized by strengths in the areas of expressive language skill (recalling sentences, formulated sentences, semantic relationships) and vocabulary (antonyms and synonyms). The Student’s language weaknesses included receptive language (word classes, understanding spoken paragraphs), flexible thinking (sentence assembly), grammaticality judgment, nonliteral language, ability to draw meaning from context, inferencing, comprehension of ambiguous sentences, and pragmatic judgment. (S-220).
75. Ms. Bodkin made several recommendations to address the Student’s weak language skills, including supporting skill development for language comprehension and social pragmatics by:

- Using strategy of re-authorization (repeating information to herself) for short term recall of information;
- Teach the Student to “chunk” information and develop and use mnemonic strategies for more efficient long-term recall of information;
- Teach the Student to listen for key words to identify examples, reason, comparisons, and pertinent information;
- Use visualization strategies, in which she pictures herself carrying out the instruction before she executes her response;
- Read narrative stories aloud and have her summarize the information, identify the main idea, and make inferences and predictions;
- Provide instruction in figurative and abstract language with opportunities to generalize skills to small, structured peer group settings with adult support.  
(S-220-221).

76. Ms. Bodkin also provided recommendations to use across the general curriculum, including:

- Pairing oral instructions/presentations of information with visual support, such as pictures, handouts, worksheets, etc.
- Checking in with the Student after a task has been initiated to monitor her progress;
- Providing concrete examples to support comprehension of novel learning tasks;
- Dividing long term projects into smaller steps;
- Repeating and summarizing key information frequently;
- Allowing sufficient time for the Student to respond to presented questions;
- Providing extra time to accommodate for language needs and moderate the volume of work in favor of quality and precision.  
(S-221).

77. At the end of August 2016, the Student started school at LSA. (Mother Tr. 2082). No one from LSA contacted the District’s staff to discuss the Student’s programming or IEP to support the Student’s transition to LSA. (Hanlon, Kotkowski Tr. at 1359). LSA implemented the Student’s IEP until January 2018, when it developed its own Student Services Plan (“SSP”) for her. (Tr. MacNeil 614; Kotkowski Tr. 1366-67, 1382-83; Mother Tr. at 2082-84).

78. None of the Student’s teachers at LSA were certified in special education, with the exception of one reading tutor, Nicole Page. (MacNeil Tr. 781, 724, 817, 819-20; Kotkowski Tr. 1353; Page Tr. 876; P-1006, 1014).

79. In her first year at LSA, the Student received specially designed reading instruction from Ms. Page for a total of 270 minutes every two weeks. (Page Tr. 876-878).
80. Since the Student was privately placed at LSA, the District convened eight (8) IEP meetings on the following dates:
- October 5, 2016 (S-231)
  - January 31, 2017 (S-380)
  - March 30, 2017 (S-425)
  - June 14, 2017 (S-490)
  - June 28, 2017 (S-531)
  - January 19, 2018 (S-708)
  - February 9, 2018 (S-719)
  - May 21, 2018 (S-769)
81. On October 5, 2016, the IEP team convened with Ms. Frazier, Ms. Bodkin, the Parents, and their advocate. (S-231, 235). The team reviewed Ms. Bodkin's speech and language evaluation and Ms. Frazier's academic evaluation. (Frazier Tr. 2413). The team added speech and language services to the IEP at a frequency of 30 minutes, two times a week, as well as a speech and language goal. (Bodkin Tr. 2616; Frazier Tr. 2416; S-271). These goals included a social pragmatics goal to ensure compliance with BCH's recommendations. (S-271; Mother Tr. 2061-62; Bodkin Tr. 2618-19). Ms. Frazier also discussed doubts about whether the Student continued to need encoding instruction. (Audio of meeting on October 5, 2016 at 55:51). However, no other changes were made to the specially designed instruction in the IEP. (Frazier Tr. 2417-18). Ms. Frazier testified that her views about the Student's need for encoding instruction changed over time as she better understood the Student's disability. (Frazier Tr. 2568-70).
82. Thereafter, the District removed social work services pursuant to the Parents' request in February 2016 to put these services on hold. Ms. Frazier stated that while an amended Written Notice had been issued at that time, the IEP had not been amended to remove it. (Frazier Tr.)
83. On January 9, 2017, LSA implemented an SSP for the Student. (P-851). This SSP was not provided to the District until May 23, 2017. (S-533).
84. On January 31, 2017, the IEP team convened again for an annual review of the IEP and to identify needed assessments in anticipation of the Student's triennial reevaluation. (S-359, 382). The Parents attended the meeting with two of their advocates. (S-383).

85. The IEP Team reviewed available present level data, including data from the end of the Student's time at York and Ms. Frazier's assessment. (S-382). No progress data was provided to the District from either LSA or the family. (S-382; Mother Tr. 2019; S-F-18.6).
86. The IEP Team decided on the following assessments: academic and developmental testing; a psychological evaluation; an observation; and speech and language testing. (S-381).
87. The IEP Team also decided to continue providing the Student with support in her mainstream classes as an accommodation, but the language used in the IEP to describe the accommodation changed in anticipation of her transition to the high school. The prior IEP had described this support as: "Inclusion support from special education personnel in social studies and science." (S-274). At the IEP meeting on January 31, 2017, the Team changed the language regarding the accommodations. One accommodation read as follows: "Use of individual 'check ins' during classes with embedded brief review, preteaching and reteaching of concepts." (S-401). Another accommodation read as follows: "Preteaching and reteaching of vocabulary and concepts." (*Id*). Both accommodations were intended to provide the Student with adult support in the general education and special education setting. (*Id*). (Frazier Tr. 2443-2445).
88. Under the staffing approach used at the high school, mainstream classes are staffed with a regular education teacher and either a special education teacher or a paraprofessional. (Frazier Tr. 2445). Given this, either a special education teacher or paraprofessional would have been available to provide academic support to the Student. (Frazier Tr. 2445, 2448; S-571). The IEP continued to provide for adult support in her mainstream classes. (Frazier Tr. 2443-2448).
89. At the meeting, the family's advocate shared copies of assessment data from Ms. Papageorge. (S-382). The team members had not had an opportunity to review the data before the meeting, so the data was not discussed. (*Id*).
90. Also at the meeting on January 31, 2017, the IEP team decided to reduce the total number of minutes of specially designed instruction in math and literacy starting in the fall of 9th grade (September 2017) to allow for an increase in time spent in a mainstream classroom in order for her to spend more time with her non-disabled peers. (S-381; Frazier Tr. 2416-17). Participants at the meeting included District staff, the Parents, a Parental advocate, a friend of the Parents, and the District's attorney. (S-

383). The IEP contained eight literacy goals, four math goals, and 10 functional goals. (S-394-400). It included a myriad of supports and accommodations. (S-401-402).

91. The draft IEP became final on February 4, 2017. (S-386). The document included the most recent results of Ms. Frazier's academic evaluation and a classroom observation by Ms. Ropes, as well as prior evaluation information. (S-389). Information presented on the day of the meeting was not included since the Team did not have time to absorb and discuss the material. (S-381-382). It included the Student's present levels of academic performance. Her instructional reading was at the 5th /6th grade range according to the last QRI and at end-of-6th grade - level Y (Fountas & Pinnell). (S-393). It reported her math skills as between 80% to 100% accuracy. KeyMath scores from 2015 indicated she was at in the "average" range for basic math concepts and applications, but below average in operations for a 5.9 grade level in math overall. (S-391). Her language arts progress indicated that she met 7th grade expectations for written work. (*Id.*).
92. The IEP contained the following specially designed instruction(S-402-403):
- February 4 to June 30, 2017:
    - Reading: 45 minutes for 5 days per week
    - Executive functioning: 45 minutes for 2 days per week (pre-teaching/re-teaching and other support)
    - Language Arts: 55 minutes for 4 days a week
  - Starting in 9th grade (2017-2018)
    - Executive Functioning: 120 minutes per week for specific reading and math skills, pre-teaching and re-teaching
    - Reading and writing skills: 200 minutes at week
    - Math and Language Arts: 90 minutes per week each
    - Program consult: 60 minutes twice a week
    - ESY services: 4 hours per week for 5 weeks (7/2017-8/2017)
93. The IEP also included speech and language therapy for 30 minutes twice a week. (S-403).
94. There were questions over whether social work should have been in the IEP. (S-B-115-117, S-B-142,). Ms. Ropes removed it because of the Parents communication with Mr. Hanlon about it in February 2016. The Parents clarified to Ms. Ropes that a deeper discussion about it with the IEP was necessary. (S-B-117).

95. During the IEP meeting on January 31, 2017, the Team ran out of time to discuss specific goals, the accommodations, or the types, frequency, or duration of the services in the IEP. (S-381; Mother Tr. 2121-24). The Team agreed that the Parents would review the draft IEP and that the Team would reconvene to address any concerns. (S-381).
96. On March 30, 2017, the IEP team reconvened to discuss an evaluation by Ms. Papageorge. Ms. Papageorge had completed the evaluation in August, 2016, however the District did not receive it until February 22, 2017. (S-426).
97. In March 2017, the District referred the Student for a psychological evaluation with Dr. Courtney Hale, with whom it had a contract for services. (S-E-2). The Mother, however, refused to sign the required consent form for Dr. Hale's evaluation, because it stated that Dr. Hale would not provide copies of testing protocols. (S-E-3-6; Frazier Tr. 2441; S-B-193). As a result, Dr. Hale withdrew as an evaluator on April 10, 2017. (*Id.*).
98. On April 12, 2017, the District referred the Student to Dr. Scott Hoch for a psychological evaluation. (S-451; S-465).<sup>9</sup> Dr. Hoch conducted a full record review of 13 prior evaluations of the Student. (S-479, 483; Hoch Tr. 1843-48). He then selected additional testing instruments to supplement the existing data. *Id. at.* 1851. Dr. Hoch opted not to complete a full battery of IQ measures because the Student had received the WISC within a year and guidelines prohibited re-administering the test within a year. *Id. at* 1850-51. Additionally, he concluded that there was consistency in scores relating to the Student's cognitive assessments over years of assessments and concluded that it was unnecessary to complete a full cognitive assessment in the spring of 2017. (Hoch Tr. 1851). Dr. Hoch assessed the Student's cognitive functioning (S-1856 WRML-2, S-484 CAS-2), executive functioning skills (S-484 TOWL-4), social emotional health, including assessing for the presence of clinically significant anxiety and depression (S-1861-64 Achenbach Behavior Checklist, Clinical Interview, Interviews with Parents and Staff, Thematic Apperception Test, Incomplete Sentences, Rorschach), and academic skills (S-480; Hoch Tr. 1846-47 Review of Ms. Papageorge's 2016 Comprehensive Academic Assessment 2016 GORT-V and 2015 KeyMath completed by York). (S-478, S-485). He conducted extensive clinical interviews with the Student, her parents, and her teachers at LSA. He observed the Student at LSA, as well as in the public school setting.

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<sup>9</sup> Dr. Hoch has a doctorate from the University of Virginia in Clinical, Child, and School Psychology and has been licensed as a school psychologist in Maine since 1981. (S-A-122; Hoch Tr. 1837). Over the course of his career, he has completed at least 2,000 three-year reevaluations. (*Id at* 1838). In an email to York staff and outside consultants, the Mother acknowledged Dr. Hoch's credentials and experience. "Dr. Hoch is a PH.D. level psychologist with outstanding credentials and extensive experience in the field." (S-G-244; Mother Tr. 2142; Stipulation by Attorney Stevens).

99. In summary, Dr. Hock confirmed the Student's language-based learning disability. (S-486). He stated that she benefits from having a supportive academic program where she is able to rely upon staff who can provide her with the structure and support to help her overcome her language-based processing problems involving complex sequential learning. He stated that her social and emotional makeup, along with her average cognitive ability and problems with processing complex, language-based information impacts her self-esteem and heightens stress and anxiety. He explained that since she is motivated to do well in school her cognitive profile results in becoming anxious and worried at times about doing well in school. He acknowledged that she does well with preteaching and reteaching and non-judgmental assistance and feedback to help her understand concepts and assignments if they become confusing to her. (S-486).

100. Dr. Hoch included 13 recommendations in his report, including (S-486-480):

- Integrate his report into an appropriate, least restrictive educational program;
- Having a case manager who can act also as a social and emotional support;
- Preteaching and follow-up in her programming, especially in Language Arts;
- Using of online homework and programs that allow feedback;
- Regular communication from case manager with parents;
- Ensuring that homework is not overwhelming;
- When transitioning to the mainstream setting, consider a structured time for the Student to meet with the case manager in the morning and afternoon;
- Considering which mainstream courses to assign with respect level of instruction and number of students;
- Providing extra time for test-taking and in a small group setting;
- New concepts should be taught with care and with follow-up;
- Homework difficulties should not be penalized;
- Scheduling should include those who know and understand the Student;
- Having the IEP Team meet with the Student a week prior to a transition into the mainstream setting to explain and help with the transitioning to new academic material to allow her to ask questions about her own programming.

101. Based upon his assessments, Dr. Hoch determined that the Student could receive a FAPE in the public school setting. (Hoch Tr. 1872-73). He developed a plan for

transitioning her from LSA back to the public school for her 9th grade school year (2017-2018). (S-487; Hoch Tr. 1870-71).

102. On May 23, 2017, the District received the Student's SSP from LSA for the first time. (S-533). The Student's present levels of performance in math were at the 6<sup>th</sup> grade level as January 6, 2017, when the SSP became effective. (P-864). Her current grade levels of performance in areas of literacy were not included in the SSP. The SSP included goals for receptive language; expressive language - "higher order thinking;" reading comprehension; language arts; spelling; and math (P- 858-863). The receptive language goal and reading comprehension, spelling, and math goals stated that she would be working at her instructional level. Instructional levels were not included in expressive language - "higher order of thinking" or reading comprehension. *Id.* The Aimsweb academic monitoring tool was indicated for monitoring reading comprehension and spelling. (P-860, 862).
103. The LSA SSP also included various supports, accommodations, and modifications, including ESY services. (P-865-867). It did not include social work services.
104. On June 14, 2017, the IEP team convened to discuss the results of Dr. Hoch's evaluation and the results and recommendations of a Central Auditory Processing Evaluation conducted by Mary Louise Brozena.<sup>10</sup> (S-490).<sup>11</sup> The team determined that the Student continued to qualify for special education based on a Specific Learning Disability. Based upon review of the auditory processing evaluation, the team added speech and language goals and accommodations to the IEP. (S-491). The team also added a social work goal and social work services in the amount of 30 minutes two times a week to address self-advocacy and coping skills. (S-491). The team also increased the level of consultation to 160 minutes a month. (*Id.*) The team agreed to reconvene at the end of June 2017 to review the IEP amendments with LSA staff. (S-491).
105. On June 28, 2017, the IEP team convened again to review the IEP goals, accommodations, services, and placement of the Student's IEP in light of progress data recently received from LSA and with input from LSA staff. (S-533). The Parents attended with their advocate, and their consultant, Ms. Papageorge. (S-537). Ms. Staines, Director of LSA, was also in attendance. (*Id.*)

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<sup>10</sup> At the hearing, Ms. Brozena testified that all of her recommendations could be implemented in any classroom, including a classroom at York. (Brozena Tr. 218).

<sup>11</sup> At the meeting, Ms. Ropes noted that the District had been trying to gather pertinent and accurate information from LSA for many months, but that the District continued to receive only partial information or no information at all from LSA. (S-533).

106. The IE Team reviewed the goals of LSA's SSP, dated January 9, 2017, and all were in agreement as to the appropriateness of these goals. (S-534). Given this, the team decided to adopt the goals from the LSA SSP for the York IEP. (S-534; Frazier Tr. 2452-53). The team believed that these goals could be implemented at York. (*Id.*) The parents agreed that the LSA goals were appropriate but objected to York adopting them, complaining that such an approach was unfair since LSA had done "all the work." (S-535; S-H-106). The Parents' advocate complained that the District was adopting the LSA goals simply "to bolster their due process position." (S-H-108). The Mother expressed frustration that she was helping develop an IEP when they were just going to end up in due process, stating that "(i)f we can't get past the placement agreement at the end, we are going to due process." (S-H-105, 106).
107. The Mother requested that accommodations "A" through "K" of the LSA SSP be incorporated wholesale into the IEP. However, the team opted not to do this, explaining that these accommodations and supports were already reflected in the IEP. (S-F-27; S-252, 382, 531). The Mother acknowledged this at the hearing. (Mother Tr. 2238-2251).
108. The IEP Team continued the accommodation of providing the Student with access to an adult support person in both the special education and general education setting. (S-532; Frazier Tr. 2447-49).
109. At the Parents' request, the IEP Team did not complete the speech and language eligibility form because they viewed the Student's primary disability as a specific learning disability. (S-532; Frazier Tr. 2440).
110. The District staff at the IEP meeting asked for input regarding proposed IEP services from Karen Staines, Director of LSA. (S-H-162; S-535). The Parents' advocate objected, explaining that LSA staff did not know York's program. (S-H-162; S-535). The Mother added: "Karen doesn't teach at (the District's high school), Karen is not aware of the teachers at (the District's high school)... And this is not Karen's school, so to ask Karen for that I think is inappropriate." (S-H-163).

111. The IEP Team agreed to increase the total number of minutes of specially designed instruction to the following amounts (beginning in September 2017) (S-567, 532):
- Writing 200 minutes biweekly in the special education setting
  - Math 200 minutes biweekly per week in the special education setting
  - Executive skills 200 minutes biweekly in the special education setting
  - 100 minutes biweekly in math in the general education setting
  - 100 minutes biweekly in ELA in the general education setting
  - 80 minutes 5 times per week in reading in the special education setting
112. Placement was discussed during intermittent times. The Mother stated early on in the meeting while goals were being discussed, “With the understanding that (the District) can provide it, and I’m going to end up going to due process at the end of this and I’ve just created -- I don’t understand this whole, like, process. I understand it’s for (the Student), which I wish I could believe that we were going to do what’s right by (the Student) at the end of the day, but I’m concerned that that’s not with the end result.” (S-H-106). She was asked to clarify if she was wondering why they had to go through the IEP planning if she was going to go to due process anyway. (S-H-106). She stated, “If we can't get past the placement agreement at the end, we're going to due process.” (S-H-106). At the end of the meeting, after the goals, accommodations, and services of the IEP had been determined, Ms. Frazier summarized the programming that was being offered and stated that she believed that appropriate placement was in the District. (S-H-226). Immediately, the Mother stated “Great, so we’ll be going to due process.” (S-H-227). The Parents’ advocate added that they did not believe the District was the least restrictive environment for the Student and that she was in the appropriate placement at LSA. (S-227).
113. The Father stated that, while the District may have had the best interests of the Student in mind:
- [T]he District is just not going to meet her needs. It can’t meet her needs. The way you’re trying to structure it, it’s like bolting on pieces onto, you know, it’s like, we’ll bolt this on, we’ll do this, we’ll change this goal, we’ll add this to the service, we’ll do this. It’s not a program that’s designed for someone like (the Student). It’s someone that’s designed for the 90%, the 95%, and we’ve been blessed we have three kids that are 95% and (the District) has done a wonderful job for those three kids and I’m thankful for what they have delivered. ... (The Student), if she goes into (the District’s) schools, is going to go down the tube again. It’s going to be floundering, it’s going to be a failure, and we have four years left. This isn’t second grade where I can take a risk and say you know what,

even though (the District) has never been able to deliver on (the Student) in seven years she was here, I'll take a (inaudible). Because if I take a (inaudible) on it and I put her in in year in high school, that could undo all the good we did last year and it could leave (the Student) just – how's she going to--. (S-H-52).

114. All of the IEP team members from the District's staff testified that the Student's IEP could be implemented at the District's high school. (S-535; Hanlon Tr. 1529-30; Frazier Tr. 2501-02; Bodkin Tr. 2626-2627; LeGolvan Tr. 551-52, 560). (*Id.*) None of the five evaluations that had been completed in the prior year had recommended an out-of-district placement. Dr. Hoch's evaluation included a plan for transitioning the Student back to public school. (S-487; Hoch Tr. 1870-71). The Written Notice indicated that the Parents did not want to place the Student in the District's high school. The Mother was afraid the Student would become overwhelmed and the Father believed the Student would fail. (S-535). Ultimately, the IEP Team determined that the Student's placement would be at the District's high school, her least restrictive environment. *Id.*
115. On August 4, 2017, Ms. Staines followed up with an email to Ms. Frazier and Ms. Ropes saying that she did not agree that the IEP could be implemented in the District's public school. (S-B-341).
116. On September 17, 2017, the Parents requested the Student's educational records. (S-B-457). York provided copies of the Student's educational records for the Parents in two large file boxes on September 29, 2017. (S-B-456; Mother Tr. 2006, 2253). In addition, during the 2017-2018 school year, the Parents were given an opportunity to go to the District's Central Office and review the Student's educational records. (S-B-475). Over the course of three days, accompanied by Jennifer McNeil, a private educational advocate and former LSA teacher, the Mother reviewed the records. (Mother Tr. 2259).
117. In the fall of 2017, the Parents requested a hearing under the Family Educational Rights and Privacy Act ("FERPA"), which was held on November 15, 2017. (P-708-713). The hearing concerned the contents of the Written Notice for the October 5, 2016 meeting, at which the parents declined to sign a 7-day waiver. (*Id.*) The hearing officer concluded the following:

As of September 28, 2016, the parents were aware that the student's IEP Team meeting would be held on October 5, 2016, at 10:00 a.m. On October 1, 2016, Ms. Frazier provided the parents with the location of the meeting along with an Advance Written Notice, including a section that called for the parents to waive the 7 day advance notice of the meeting, by email. There is

no indication in the record that the parents did not agree to the meeting date or requested it be postponed nor that anyone was unable to attend due to a lack of notice. Nevertheless, the language of the Advance Written Notice should be modified to avoid being misleading and to provide a full picture of the circumstances of the parents' refusal to sign the 7 day advance notice waiver. (P-712)

118. The hearing officer did not order any correction to the Written Notice but did order that additional detail be included in the Written Notice regarding the parents' refusal to sign the waiver. (P-712-713). She ordered that the Written Notice be revised to read as follows:

The parents were informed of the meeting date on or before September 28, 2016. They were provided the 7 day advance notice waiver, as part of the Advance Written Notice, electronically on October 1, 2016. The parents were asked to sign the waiver near the conclusion of the IEP Team meeting on October 5, 2016. They refused to sign the waiver although they had not objected to the date or time of the meeting at any time prior to or during the meeting and they actively participated in the meeting. (P-713).

119. On January 19, 2018, the IEP Team convened again for an annual review of the Student's IEP. The Parents attended, accompanied by Ms. Papageorge and Jennifer MacNeil, their private educational consultants., as well as District and LSA staff (S-709, 727). The Team reviewed an evaluation by Ms. Papageorge conducted in August 2017, which had been received by the District on January 15, 2018. (S-709).
120. At the meeting, Ms. Frazier noted that the Team did not have up-to-date data on the Student from LSA. (S-709). The Mother clarified that she would only consent to LSA providing data to the District when she was included in the discussion — in other words, she was withdrawing her consent for LSA to disclose information directly to York. (*Id.*).
121. At the meeting, the Parents made no objections to the IEP from 2017-2018. (S-712). Although the team had intended to discuss a draft IEP for the remainder of the Student's 9th-grade year and the beginning of her 10th-grade year, the Team ran out of time. As a result, the Team planned to reconvene on February 9, 2018. (S-709).
122. The IEP Team reconvened on February 9, 2018 to discuss the draft IEP. Attendees included the parents; two of their consultants (Ms. Papageorge and Ms. MacNeil); Lisa McManus, Education Director for LSA, Mr. Sean Kotkowski, the Student's math teacher from LSA; and District staff members. (S-727).

123. In advance of the meeting, the Parents had shared a list of 17 concerns, which the Team discussed at the meeting. The list of concerns included a perceived omission of records in response to FERPA requests; emails from the District's staff, which the Parents viewed as inappropriate; district-wide programmatic challenges; the District's consulting psychologist; and other topics. (S-715-718).
124. The Parents' concerns included information they have received from the District pursuant to their FERPA request, including inter-District emails, that discussed the Parents' advocacy activities. (S-715). The Parents believed that they indicated that the District was engaged in "passive aggressive" and "confrontational" methods against them and did not take the Parents' concerns seriously. *Id.* They believed that the Student's records had not been provided to them intentionally to circumvent their participation in the process. (S-716).
125. One of the concerns related to the Student's IEP and programming; the Parents believed that the Student required a language-based program and that the District could not implement such a program. (S-724). The Parents listed accommodations "A" through "J" from the LSA's SSP as the services they believed the District could not provide. (S-717, S-F-27).
126. The IEP team explained to the Parents that the listed accommodations were already in the IEP. (S-721). During the due process hearing, the Mother acknowledged that these accommodations were already in the IEP. (Mother Tr. 2238-2251).
127. The IEP team also reviewed a draft IEP as well as the LSA SSP. (S-721). After reviewing the appropriateness of the goals from the LSA SSP, the team decided to adopt them for the District's IEP. (S-721). The Team then discussed placement and determined that the least restrictive environment for the Student would be the District's high school. (*Id.*) The Parents disagreed and stated that they did not believe York would be able to implement the IEP. (*Id.*)
128. By the end of the fourth quarter, 2018 the Student was meeting all expectations of her goals at LSA. (S-F-93-99, S-F-100.)
129. The Mother is the administrator of a social media website. (Mother Tr.). The website has posted comments and dialog about the District's special education programming. (P-G-107; P-F-9; P-F-45; P-F-54; P-F-56; P-F-51; S-B-514; S-K-33; S-K-36; SK-41; S-K-666; S-K-74; S-K-58-67; S-K-74). Parents have been a party to complaints made to the District's superintendent about the District's special education personnel. (S-K-34).

130. On May 11, 2018, the Parents filed an 87-page request for a due process hearing. (Hearing Officer – 1).
131. On May 21, 2018, the IEP Team convened for a resolution session. (S-769). Ms. Frazier opened the meeting by explaining: “What we do in the resolution session is to look at the IEP and determine if there's anything in the IEP that you feel is not well-calculated to capture.” (S-H-327). To that, the Mother responded: “Well, we can skip that part,” explaining that it was not the IEP itself but the District’s ability to implement the IEP that was the issue. (S-771; S-H-327-328). Ms. Frazier offered to use the same methodologies use at LSA and add consultation in the area of reading. (S-771). The Parents explained that the only way to resolve the dispute would be for the District to agree to pay tuition at LSA. (S-770-771; S-H-329, 335).
132. The District declined to agree to pay tuition at LSA and maintained that its high school was the Student’s least restrictive environment. In an effort to resolve the dispute, however, York offered the following (S-770): 1) To provide instruction to the Student using the same methodologies as LSA to ensure continuity in her programming, despite the fact that the District was under no obligation to provide such methodologies; and 2) To add consultation in the area of reading to the Student's IEP for 20 hours per year. The Parents declined, stating they felt that District was trying to “beef up the IEP.” (S-H-334).
133. Also on May 21, 2018, the Parents revoked consent for the District to receive or share confidential information from LSA. (S-777).
134. On June 28, 2018, the Parents and the District met for a resolution session in an attempt to resolve this matter. (S-H-325-360). The Parties could not resolve the issue of placement. The Parents stated their belief that the District was able to implement the Student’s program. *Id.*

#### **IV. POSITIONS OF THE PARTIES**

**Issue 1: Did the Parents waive their rights to challenge the appropriateness of the February 2016-2017 IEP, including the provision of ESY services for the 2016 summer, by entering into the May 10, 2016 “Agreement and Release” with the District?**

##### **Parents’ Position**

The Parents argue that the hearing officer does not have jurisdiction to determine this issue because she does not have the authority to interpret or enforce settlement agreements. They state that hearing officers are granted statutory authority under the IDEA only to determine if a school district failed to provide a student with a FAPE. They assert that only a state or federal court of competent jurisdiction can enforce a settlement agreement or by a third enforcement mechanism designated by the state. Citing 20 U.S.C. §§ 1415(e)(2)(F)(iii); 34 C.F.R. §300.510(d)(2); §300.537. They suggest that since Maine has not adopted a third enforcement mechanism for hearing officers to enforce settlement agreements, they are prohibited from doing so. Citing *H.C. v. Colton-Pierrepoint Cent. Sch. Dist.*, 341 Fed Appx. 687 (2<sup>nd</sup> Cir. 2009); *J.K. et al. v. The Council Rock School District*, 833 F. Supp. 2d 436 (E.D. Pa. 2011); *Justin R. v. Matayoshi*, 2011 WL 2470624, at 13 (D. Haw. 2011).

In the alternative, the Parents argue that the issues contained in the Agreement do not cover those raised in this due process hearing request, submitted on May 11, 2018. They note that the Agreement and Release (“Agreement”) resolved claims in *Parents v. District* (consolidated 16. 037H and 16.046H) that were alleged prior to May 10, 2016<sup>12</sup>, the execution date of the Agreement, but that the allegations in this Hearing Request concern those that occurred during the summer of 2016 and thereafter.

##### **District’s Position**

The District argues that the Parents released all past, present and future claims arising prior to May 10, 2016, and therefore are barred from challenging the appropriateness of the 8<sup>th</sup> grade IEP, including ESY services. It asserts that on May 10, 2016, the Parents entered into the

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<sup>12</sup> In their brief, the Parents incorrectly cited the date of the Agreement’s execution as May 11, 2016, however, the document was fully executed on May 10, 2016.

Agreement with the District that included an express waiver and release of all claims and potential claims based upon circumstances that existed up through May 10, 2016, whether known or unknown, and any claims that were or could have been raised in *Parents v. District* (consolidated 16. 037H and 16.046H) (“prior consolidated cases”). Citing *Kingstown Ch Comm. v. Joanna S.*, 773 F.3d 344, 352 (1<sup>st</sup> Cir. 2014) (settlement agreement addressing IDEA claims enforceable even if it didn’t result from one of the IDEA statutory resolution processes); and *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F. 3d 417 (5<sup>th</sup> Cir. 2009) (settlement agreement resolving IDEA claims enforceable). The District therefore urges that the Parents are barred from raising future claims, known or unknown, arising on or prior to May 10, 2016.

The District also applies this argument to claims that the Student’s ESY services were inappropriate during the summer of 2016. It asserts that these services were proposed at the IEP meeting on February 4, 2016. The Parents were aware of the proposal and could have challenged the appropriateness of the programming in the due process consolidated cases in 2016, but chose not to do so. It asserts that the Parents therefore waived their rights to challenge the ESY services or thereafter. It asserts that even if the Parents had unanswered questions about summer services, and did not raise them at the IEP meeting on May 12, 2016, they waived all claims to ESY services, since they were “known or unknown” up through the date of the Agreement and Release. Citing *Kingstown. Id.*

**Issue 2: Did the District fail to offer the Student appropriate IEPs and placements from May 10, 2016 through to the present, including extended school year services (“ESY”)? If so, did this result in a failure to provide the Student with a free appropriate public education (“FAPE”)?**

### **Parents’ Position**

#### Amended IEP, Dated May 12, 2016

The Parents argue that the annual IEP, dated February 4, 2016 and amended on May 12, 2016, was inappropriate because it did not accurately address the Student’s orthographic processing deficits. They argue that while the District had information about the Student’s

processing needs, based on two BCH evaluations and Ms. Papageorge's evaluations and recommendations, the District failed to fully understand the complexity of her specific learning disability. They cite the amended IEP, which describes her "communication needs," yet also stated that verbal communication was a strength for the Student. (P-333). They assert that a language-based learning disability was well established. (P-75-77, 300-301, 304, 308, 328-347; S-100; Hoch Tr. 1850; Hanlon Tr. 1578).

The Parents argue that the IEP did not address the "significant" discrepancy between the Student's verbal comprehension and perceptual reasoning as determined by BCH in 2015. They assert that this was due to the District's lack of understanding about this issue, which resulted in the IEP not addressing it. (S-14). The Parents state that the language in the "Academic Needs" section of the IEP was never changed from November 2014, and therefore did not include the issues related to the imbalance between her verbal comprehension and perceptual reasoning deficits as explained by BCH.

The Parents argue that the Student's present levels of academic and functional performance were not embedded in the statement of her goals as stated in the IEP. They argue that this caused the LSA staff to place the Student in core classes that were too difficult for her when she first arrived at LSA. They stated that she was reassigned to classes that were more aligned to her instructional level several weeks thereafter.

The Parents also argue that there was neither a goal nor a methodology in the IEP to address the Student's orthographic processing deficit. They assert that the District did not heed the recommendation from Ms. Papageorge in 2014 to include the Seeing Stars methodology and the ending grid of the LiPS program. The Parents claim that the Student was regressing in reading and writing because of this lack of attention.

#### Statement of Goals

The Parents argue that the goals stated in the amended IEP dated May 12, 2016 were based upon 7<sup>th</sup> grade Maine Common Core Standards, despite the Student not being at the

seventh-grade ability level. It cites the BCH recommendation that the Student should be taught at her ability level, rather than at her grade level. (P-146-147).

The Parents cite the testimony of Ms. MacNeil, an LSA teacher, wherein she states that the writing goal (using complex sentence structure in a five-sentence paragraph) in the IEP dated May 12, 2016 was not appropriate because the Student did not have the prerequisite skills necessary to write a paragraph.

The Parents also argue that the Student's math goal was inappropriate. They cite the testimony of Mr. Kotkowski, the Student's 8<sup>th</sup> grade math teacher at LSA, wherein he opined that the Student had not secured foundational skills and therefore her math goal in the IEP was not based on her current abilities and skills. They noted that he testified that the Student was not able to perform the four operations near the number 10,000, as required in the goal, but instead was practicing the four operations using single digits. The Parents also cited a math goal that expected the Student to multiply and divide numbers containing decimals using the standard algorithms. However, they cite Mr. Kotkowski's statement that the Student was not yet able to accurately multiply and divide whole numbers, and that he would not ask her to work with decimals. The Parents state that this was also true with respect to her ability to compare the value of fractions, decimals and percentages, since she was only secure in her ability to work with whole numbers.

The Parents also claim that the Student's goal relating to the ability to respond to inferential questions about texts at her independent level with 80% accuracy was inappropriate. They state that not only was she doing this 83% of the time, but also that her current level in this area was not cited in the goal or performance level. They assert that this goal was not appropriately ambitious in light of her circumstances.

The Parents also claim that the ESY services provided in 2016 were delivered by two educational technicians, not a special education teacher. They argue that the Student became so anxious about going to ESY services that she refused, and therefore that the ESY services for 2016 were not implemented for the Student.

The Parents also claim that the District neither offered nor provided transportation to ESY for the Student during the summer of 2016.

Amended IEP, dated October 5, 2016

The Parents argue that the IEP was amended to include speech and language goals based upon Ms. Bodkin's evaluation, yet it did not include instruction in figurative and abstract language as academic needs, citing Ms. Bodkin's recommendations. They also state that the speech and language functional goals were not measurable because there was no data regarding the starting point or present levels of performance, or a definition of the grade-appropriate level or Lexile at which the Student was to be working. The Parents reasserted their concern that teaching methodology was not specifically incorporated into the IEP.

The Parents also assert that the IEP meeting held on October 5, 2017 did not include a general education teacher as part of the IEP and therefore violated state and federal regulations. They state one was required because the team discussed regular education issues.

The Parents also allege that the District inappropriately removed social work services from the IEP. They discredit the District's explanation that there had been a clerical error when it had not been removed at their request to Mr. Hanlon in May 2016. They assert that at that time they wanted to keep social work on hold.

New Annual IEP, dated February 4, 2017

The IEP Team met for the Student's annual IEP meeting on January 31, 2017. The Parents argue that the resulting IEP was inappropriate in several respects. They first indicate that the statement of the Student's present performance levels was inaccurate. They stated that her present performance levels were taken from progress reports from June 2016, six months earlier, while she was still attending public school in the District, and on testing done in September 2016, four months earlier. The Parents stated that the District had been given consent to obtain records from LSA as of November 9, 2016, and that a classroom observation had been completed on January 26, 2017. They state that data from Ms. Papageorge's assessments from

August 2016 was presented to the District at the meeting. The Parents argue that the District ignored all of this information when it proposed the Student's IEP goals.

The Parents argue that the literacy and math goals created from the IEP meeting on January 31, 2017 were inappropriate because they did not comport with BCH's recommendation to have them align with the Student's level of performance. To support this allegation, they cite an email from Karen Ropes, the Student's case manager, in which she stated that she would write the Student's IEP goals similar to those for others who participate in co-teaching in 9th grade.

The Parents also assert that assessments used to gauge progress in reading were not identified and that the Seeing Stars methodology was not included in the IEP.

The Parents argue that according to the BCH recommendation, LSA was the appropriate placement for the Student because it was based upon a language-based learning model. They aver that the Student began to progress at LSA over the course of a few months. They state that she was engaged in her classes. They cite Mr. Kotkowski's testimony in which he observed that the best environment for the Student was when she had consistent teachers for course work and tutorials using the same math language.

The Parents argue that the District removed the service of inclusion support from special education personnel in social studies and science, as an accommodation, over the objection of the Parents. They assert that the Student would have needed this support if she were to be in the general education classes as recommended by evaluators. They do not credit the District's position that there was merely a change in semantics in the IEP and that the District did not remove the accommodation.

#### Amended IEP, dated March 30, 2017

The Parents argue that the failure to include the recommendations by Ms. Papageorge to address the Student's orthographic deficits in the IEP, and to use Seeing Stars and LiPS ending grid methodologies, made the IEP inappropriate. They claimed that the only changes made to the IEP were to correct the service grid to indicate that the Reader-Writer Workshop was a general

education program, not special education instruction. They also assert that the Student's present level of academic performance continued to be inaccurately recorded. They cite the District's failed attempt to pick up records from LSA in mid-March 2017, materials that could have informed the District and helped the IEP Team amend the IEP to reflect the Student's current level of performance.

Amended IEP, dated June 4, 2017

The Parents argue that while the IEP included functional goals to address the auditory deficits based upon the results of an auditory evaluation, no academic goals were designed around these weaknesses. They asserted that because the Student's delays in her "interhemispheric communication" and "speech noise" impacted her access to academic learning, the IEP should have included both functional and academic goals.

The Parents also argue that they raised the issue of placement for the Student at this meeting, but were ignored. They cite Ms. Ropes' decision at the IEP meeting that the District's public school was the appropriate placement and that discussion of the issue would be postponed until the next meeting. They also report that the Written Notice from that meeting did not indicate that the issue of placement was even raised at the meeting.

Amended IEP, dated June 28, 2017

The Parents argue that at the IEP meeting held on June 28, 2017, the IEP Team made decisions that reflect back on why the Parents believe the prior IEP was inappropriate. They assert that the District agreed to adopt all of the goals that LSA had designed and implemented since January 2017, evidence that the prior goals were inappropriate. The Parents further state that while the goals were adopted, they were incorrectly drafted, citing the exclusion of "Blooms Taxonomy"<sup>13</sup> and "Saddleback Educational Publishers."

The Parents argue that the District still failed to determine that LSA was the appropriate placement. They argue that instead, the District discussed what the Student's 9<sup>th</sup> grade curriculum would be and what requirements she needed to meet in order to graduate from YHS.

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<sup>13</sup> See P-A-58.

The Parents also argue that the information given to them at the IEP meeting did not align with the written graduation requirements posted by YHS. The Parents cite Ms. Papageorge's concerns, stated at the meeting, that she was worried that the Student would struggle in math due to the pace of getting through materials to meet deadlines in algebra.

The Parents further argue that the Student's interest in science was not factored into the IEP's transition plan because it did not include a course of study in science during 9<sup>th</sup> grade. Instead, the Parents assert that the District offered reading and writing materials in her core classes that were focused on science-related subjects. The Parents argue that despite a change in graduation course requirements after this meeting, the decision to neglect the Student's post-secondary interests at the meeting was inappropriate.

#### Amended IEP, dated February 9, 2018

The Parents state that by January 19, 2018, the IEP Team was on notice that the Student had made significant progress at LSA pursuant to the recommendations of BCH and Ms. Papageorge. It points out that her reading level had progressed to 9<sup>th</sup> grade reading comprehension on the Woodcock Reading Mastery Test-III and that her comprehension on the Gray Oral Reading Test-5 had moved into the average range.

The IEP Team met again on February 9, 2018 to finalize the new annual IEP that included goals drafted by LSA, leading the Parents to believe that the District was unable to draft an IEP that could be implemented at YHS. However, the Parents assert that the IEP was inappropriate because it did not include a transition plan for the Student. They also state that the Student was available, but not invited to attend.

The position of the Parents, based upon their foregoing arguments, is that the District failed to meet the requirement under *Andrew F.* for all the IEPs to be substantively appropriate.

#### **District's Position**

The District argues that the IEP developed on February 16, 2016 was appropriate under the *Andrew F.* standard. The District cites Ms. Papageorge's involvement in developing the IEP

that was transferred to LSA when the Student was unilaterally placed there in the fall of 2016. It states that the IEP adopted most of her recommendations for goals that she put forth at two IEP meetings during the spring of 2016. It claims she did not raise any concerns at the meetings, despite having participated in at least one during the spring of 2016. It also urges that Ms. Pappageorge neither testified that the entire IEP was inappropriate nor offered any objection to the accommodations, related services, or specially designed instruction for placement at the public school. The District also states that there was no other credible testimony of any objections to the IEP at the time it was drafted.

The District further argues that no one from LSA was present during the formulation of the goals in the spring of 2016, and those representatives from LSA that testified about the goals were not certified special education teachers. Rather, it asserts that the representatives of the District that provided testimony about the goals were, in contrast, certified special education teachers who provided insight into how the goals were developed at the time of the IEP meetings. As such, the IEP was appropriately developed under the *Endrew F.* standard because it provided the kind of expertise expected by the Court. Citing *Endrew F.*, *supra*, 137 S. Ct at 1002. The District stresses that the IEP Team made its decisions not in hindsight, but with the information and expertise it had at the time the IEP was being developed. Citing *Roland M.*, 910 F.2d at 992.

The District observes that the Parents' argument, that the goals drafted in February 2016 were not aligned to the Student's then-current level of performance and were therefore inappropriate, is an inaccurate analysis of goal development. The District asserts that the Maine special education regulations require that annual goals be "designed to [meet] the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum which must be... for children 5-20 aligned with the system of Maine's Learning Results." Citing MUSER IX.3(A)(1)(b)(i). It notes that Maine regulations require that the IEP reflect the individual goals to successfully meet the content standards of the system of Maine's Learning Results. MUSER IX.3(A)(1)(b)(iii).

The District states that in practice, IEP teams identify the disability-related deficits in skill sets underlying each of the grade level content standards, such as reading fluency, and the team then drafts a goal around that skill deficit that is intended to assist the student in making progress, with the overarching goal of assisting that student in achieving that grade level standard. It argues that if the goals include a student's present level or instructional level, s/he may be working below grade level performance due to the disability-related weaknesses. It also states that the goal would also reference the grade level common core standard and contain components designed to assist the student in achieving or working towards that standard. It urges that a goal may be tied to a grade level standard even though the Student's present level, and thus the goal itself, would be at a lower grade level. The District stresses that the reference to a grade level standard does not mean that the goal is presuming a present level, but that the goal is intended to support the student in progressing toward grade-level performance in that particular standard.

With respect to the Parents' claim that the IEP amended on May 12, 2016 does not cite or address the Student's "language-based disability," the District explains that a "language disability" is not one of the 13 disability conditions enumerated in the state or federal education laws. Citing 2-A M.R.S.A. 7001(B0(2)); 20 USC 1414 (b); MUSER XVII.2. The District notes that the proper category under which to include this condition is under the "Specific Learning Disability," which is what has been indicated in the Student's IEP. It also notes that while the condition could also be captured in the "Speech and Language" category, the IEP Team chose, at the Parents' insistence, to use the Specific Learning Disability designation. In addition, the District emphasizes that the IEP Team addressed the Student's needs based upon all the information it had from BCH and Ms. Papageorge regarding her language disability, and that it implemented recommendations offered from these evaluations, specifically those relating to receptive language, flexible thinking, inferences, and pragmatic judgment.

The District further avers that no one from LSA contacted any District staff in the fall of 2016, before the Student was placed in classes at LSA, to determine more information about the Student's current level of performance. It asserts that LSA chose to place the student in courses

that were not at her academic level without the insight it could have obtained by communicating with District staff.

The District also cites the endorsement of the Student's programming by BCH. It states that BCH found that the Student had made excellent progress in her public school programming during her 7<sup>th</sup> grade year. In addition, it cites the testimony of all the Student's teachers that the IEP was reasonably calculated to provide her with a FAPE and that she could have received a FAPE at YHS. It also noted that she also would have been with her typically developing peers if she had entered YHS. The District also cites the Parents' request at the IEP meeting on February 4, 2016 to continue to provide the same type, frequency, and intensity of services using the same methodologies she was currently receiving (S-72; Mother Tr. 2039-40). It states that it complied with the Parents' request, and that it also added social work services to the IEP, as recommended by BCH, which were then declined by the Parents at the next IEP meeting.

#### Amended IEP, dated May 12, 2016

The District argues that the Parents' challenge to the IEP, as amended on May 12, 2016, is limited and insufficient to establish that the IEP was not reasonably calculated to provide a FAPE. It cites *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1090 (1<sup>st</sup> Cir. 1993) for the proposition that the law does not mandate consideration of each unique need in isolation or a determination that each individual need is being met by the IEP, that such a requirement would inappropriately "balkanize the concept of educational benefit." *Id.* It asserts that the law mandates that the IEP should be viewed as a unitary whole in determining whether it is appropriate in light of the student's circumstances. It argues that while the Parents' challenges to the IEP are limited, they also lack evidentiary support.

The District asserts that with respect to the Student's orthographic processing goal, the IEP Team developed appropriate goal language that gives direct multisensory instruction in encoding that will allow the Student to spell words at the syllable juncture level with 90% accuracy. It states that the methodology that was used by Mr. Hanlon, a special education teacher, was Seeing Stars, as recommended by Ms. Papageorge. Mr. Hanlon had formal training in the Seeing Stars program. It emphasizes that the methodology used by the District's staff is

not to be decided upon by the Parents and not required to be in the IEP in order for a student to make progress. Citing *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993), and other cases. The District also cites progress that the Student made during 6<sup>th</sup> and 7<sup>th</sup> grades using various multi-sensory methodologies.

The District argues that the IEP dated February 4, 2016 was amended in a few aspects at the IEP meeting on May 12, 2016 IEP. The IEP Team added 60 minutes of consultation to assist the Student in understanding and accessing the assistive technology already in the IEP.

The District also asserts that a change of placement was never raised at the IEP meetings on February 4, 2016 or May 12, 2016. The District cites the District staff as indicating that the Student would be able to receive a FAPE in the public school. It points out that the Parents wrote to the District in July 2016 saying that over the prior two years in attending the District's school, the Student had made "so much progress both academically and emotionally." (P-385).

**Issue 3: Did the District violate procedural requirements under the IDEA and accompanying state and federal requirements that a) impeded the Student's right to a FAPE; b) significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE for the Student; or c) caused a deprivation of educational benefit?**

### **Parents' Position**

#### Placement Decisions – 2016

The Parents argue that the District engaged in predetermination that deprived the Parents of participation in the IEP decision-making process. They assert that placement decisions were never raised or discussed during the IEP meeting held on May 12, 2016. They cite Ms. Frazier's testimony, wherein she states that the staff included at IEP meetings tended not to give their opinions about placement, nor were they asked for their opinions. They also cite Ms. Frazier's testimony that District staff "typically don't speak unless spoken to." The Parents state that the District refused to open discussions about placement or put the topic on the agenda.

### Placement Decisions – 2017

The Parents state that the meeting held on June 28, 2017 was to review the IEP program and placement. They note that this was the first time the issue of placement was put on the agenda and the Parents raised it as an issue. They state that Ms. Frazier merely asserted that placement would be at the District without a full discussion about it.

### Records

The Parents argue that the District failed to provide all the evaluative data collected by its providers' evaluations of the Student. They specifically assert that they were not provided with the protocols of testing done by Dr. Courtney Hale, despite several requests; assessment data from Ms. Frazier's evaluation in the fall of 2016; and documents requested from Mr. Hanlon and Ms. LeGolvan.

### IEP Team Members

The Parents allege that the District violated procedural requirements by not having a regular education teacher present at the IEP meeting on October 5, 2016. They assert that this meeting included discussion about how to implement the IEP in the regular education setting. The Parents claim that by only having Ms. Frazier present at that meeting to discuss the regular education setting, the IEP Team did not have the ability to fully assess the placement of the Student.

They also assert that Ms. Frazier never informed the Parents that they inadvertently destroyed the Student's records and testing protocols from the reading assessments she administered in August 2016. They also cite their requests for educational records collected by Mr. Hanlon and Ms. LeGolvan, which they assert have continued to be ignored.

### Alteration of the IEP outside the IEP Team Process

The Parents argue that the social work services were removed from the IEP on October 5, 2016 without notifying the Parents. While they acknowledge that the removal was based upon their own request to not provide social services included by the IEP Team in February 2016, they

state that the District did not actually remove the language from the IEP until October 2016. The Parents argue that they should have been notified when the social services were actually removed.

### **District's Position**

#### Placement Decisions – 2016

The District argues that at all material times, the Parents have been active participants in the decision-making process during IEP meetings and have made their views known that they believe that LSA is the Student's most appropriate placement.

#### Placement Decisions – 2017

The District argues that the Parents raised and discussed the issue of placement four times during the IEP Team meeting that was held on June 28, 2017. The District acknowledges that the Parents freely discussed their view that the Student should attend LSA to receive special education. The District states, however, that it did not believe that the Parents presented any credible information as to why the District could not provide the instruction, given, in its view, that the Student had made progress in public school. At that time, the District continued to believe that it could implement the Student's IEP.

#### Placement Decisions – 2018

The District argues that at the IEP meetings held on January 19 and February 9, 2018, the IEP Team, including the Parents, had a "robust" discussion regarding placement. It states that the Parents had many opportunities to discuss their views about placement. The District asserts that there was simply no data or evaluation to support a conclusion that the Student's least restrictive environment was anything other than the public school.

#### Records

The District argues that it has provided the Parents all of the documents they requested, on September 29, 2017. The Parents were also given the opportunity to review the Student's records during the 2017-2018 school year. They cite the Mother's testimony that she had

received all of the Student's records by December 2017, but was still questioning whether she had the same records the District had, especially the emails and testing protocols.

The District asserts that at no time were Dr. Hale's protocols in the District's possession, despite making repeated efforts to obtain them. It asserts that since the Parents' declined to sign Dr. Hale's consent agreement, none of the protocols were ever scored.

The District also argues that in any event, it is not required to provide the Parents with any protocols by Dr. Hale. It cites state statutes that prohibit the disclosure of neuropsychological or psychological test materials or test data. Citing 22 M.R.S. § 1725(2)(A).

The District also acknowledges that test protocols used by Ms. Frazier were inadvertently destroyed in August 2016. Therefore, they were no longer considered educational records that could be provided to the Parents.

In the alternative, the District argues that even if such records remained in existence, a failure to provide them would not result in an impediment to FAPE, educational deprivation, or a significant impediment to the Parents' ability to participate in the IEP team process.

#### IEP Team Members

The District argues that the lack of a regular education teacher at the IEP meeting on October 5, 2016 was not a violation of the IDEA because the Student, who had been unilaterally placed at LSA, was not in a regular education placement and therefore a regular education teacher was not required at the meeting. Citing MUSER VI.2(B) and 34 C.F.R. Pt. 300 App. A-Question 20 (1999).

The District also asserts that even if a regular education teacher was required, it did not result in a failure to provide a FAPE. It avers that this is especially true since the meeting itself was focused on reviewing a speech and language evaluation and a reading evaluation, resulting in the addition of speech and language services and language goals. The District also notes that

the Parents did not raise any concerns that a regular education teacher was not present at the meeting.

#### Removal of Social Work Services Outside the IEP Team Process

The District argues that the removal of social work services from the IEP after the meeting on October 5, 2016 merely reflected the Parents' request to remove the services in March 2016. It acknowledges that it had erred in not removing it as soon as the District, through Mr. Hanlon, acknowledged the Parents' notice to the District that they would be not accepting those services at that time. It states that tardy removal of those services from the IEP did not reflect action by the District that was not in concert with the Parents' wishes or notice.

#### **Issue 4: Did the District fail to implement the Student's IEP appropriately during the summer 2016? If so, did this result in a failure to provide the Student with a FAPE?**

##### **Parents' Position**

The Parents argue that the ESY services provided during the summer of 2016 were defective because Mr. Hanlon was not included as one of the Student's ESY teachers, and therefore it was a significant change from the ESY services provided the prior summer. They argue that the Student felt as though her time was being wasted and she did not want to attend. They describe the difficulty her Mother had in trying to coax her to go to school each morning. The Parents assert that as a result, the Student regressed in the following school year. The Parents also argue that the District failed to offer or provide the Student with transportation to her ESY services during the summer of 2016.

##### **District's Position**

The District argues that it provided ESY services during the summer of 2016, as written in the IEP. It asserts that while the Mother believed that those services were to be provided with one-on-one instruction by Mr. Hanlon, there was nothing in the IEP that required that level of direct instruction or by Mr. Hanlon himself. It cites the testimony of Mr. Hanlon who explained that despite having one-on-one instruction during the summer of 2015, staffing levels in 2016 did not allow direct instruction at that level, and that the IEP did not call for it.

**Issue 5: Did the District violate its obligation to evaluate or reevaluate the Student pursuant to the IDEA and accompanying state and federal regulations between May 10, 2016 and the present time? If so, did this result in the failure to provide the Student with a FAPE?**

**Parents' Position**

The Parents do not make an argument that the District failed to evaluate the student between May 10, 2016 and the present time, with the exception of their view that Dr. Hoch failed to complete his comprehensive evaluation in 2017. See below.

**District's Position**

The District argues that since May 2016, it completed the Student's triennial reevaluation in April and May 2017. The reevaluation included an updated speech and language evaluation, a psychological evaluation, and classroom observations in the educational setting. It also states that it conducted an assistive technology evaluation, a speech and language evaluation, and an academic assessment in reading. It notes that the IEP reviewed three private evaluations, a central auditory evaluation, and two academic evaluations completed by Ms. Papageorge (one in August 2016 and one in August 2017). It included the assessment by Dr. Hoch, which included classroom observation, full record review of 13 prior evaluations, selected additional supplemental testing, and a partial IQ battery.

**Issue 6: Did the District violate evaluation procedures specified under the IDEA and accompanying state and federal regulations when it conducted an evaluation of the Student in 2017? If so, did this result in the failure to provide the Student with a FAPE?**

**Parents' Position**

The Parents argue that the Student's triennial evaluation did not test all areas of suspected disability. It asserts that the District did not include a full battery of IQ tests, broadband academic measures, or executive functioning assessments. They further argue that Dr. Hoch's evaluation was incomplete because he failed to complete his testing, thereby did not achieve reliable results.

The Parents further argue that while Dr. Hoch may have decided not to complete a full battery in his evaluation because, in his view, there was consistency in cognitive assessments over many different years that made it unnecessary to complete a full cognitive evaluation, this was not true. The Parents assert that there was, instead, scatter in results over the years that showed a change from stronger nonverbal/perceptual and weaker verbal skills in 2009 to stronger verbal comprehension and weaker perceptual reasoning in 2015. They state that this would have made it important to have another complete full evaluation.

### **District's Position**

The District explained that Dr. Hoch opted not to complete a full battery of IQ measures because he had already administered the WISC, and ethical guidelines and standards prohibit re-administration of the WISC within the same year. He also concluded that there was consistency in cognitive assessments over many different years since the Student began school, making it unnecessary to complete a full cognitive assessment in the spring of 2017. Dr. Hoch's evaluation included cognitive functioning; executive functioning skills; social emotional health; extensive clinical interviews; and student observations. The District noted that Dr. Hoch has a doctorate from the University of Virginia in Clinical Child and School Psychology, and has been licensed as a school psychologist in Maine since 1981. He has completed at least 2,000 three-year evaluations.

The District also notes that the Parents' concern over Dr. Hoch's shortened testing on a spelling subtest on the OWL-4 assessment was not a concern for Dr. Hoch, and did not impact the results of the entire assessment as a whole.

The District argues that the Student's triennial evaluation was complete and reliable. It asserts that it was not required to replicate current, relevant evaluative data from other sources that already existed, including data from private evaluations, such as Ms. Papageorge's earlier evaluation that was still timely. Citing MUSER V.3(A).

The District also argues that the Student was assessed in all areas of suspected disability. Citing MUEER V.2(C)(4). For the Student, this included areas of Specific Learning Disability and Emotional Disturbance.

**Issue 7: Are the Parents entitled to reimbursement for tuition and expenses under state and federal education laws that were incurred in placing the Student at Learning Skills Academy (“LSA”) for eighth and ninth grades, and are they entitled to continue her placement at LSA for tenth grade at public expense?**

### **Parents’ Position**

The Parents argue that if the IEPs that cover school years 2016-2017, 2017-2018, and 2018-2019 are found to be inappropriate, then placement at LSA is proper under the IDEA because it is a reasonable placement. Citing *Burlington Sch. Comm. v. Dep’t. of Educ.*, 471 U.S. 359, 370 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 6 (1993); *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1st. Cir.2002). They assert that LSA is reasonable because it provides a language-based program across the curriculum, which has been recommended by BCH and Ms. Papageorge. They cite the Student’s progress in her academic and functional goals, and testimony that it is an appropriate placement. The Parents argue, therefore, that they are entitled to reimbursement for the years the Student has attended LSA.

The Parents argue that while reimbursement may be reduced based upon obstruction or lack of cooperation by parents, they assert that they have engaged only at the highest levels of participation. They argue that their involvement in the community as it relates to the District’s public school functions (volunteering on the hiring committee and helping friends and neighbors navigate the IEP process) has in no way impeded the IEP process for the Student.

### **District’s Position**

The District argues that at all material times, the Student’s IEP has been appropriate, therefore the Parents are not entitled to reimbursement. It argues in the alternative that even if the IEP was inappropriate, a remedy should be denied. It argues that LSA is not an appropriate placement because the Student has no access to typically developing peers and there is no

evidence that she requires a restrictive setting. It also asserts that the program does not meet Maine state standards.

The District also argues that even if the IEPs in this matter were deemed inappropriate, the Parents should not be awarded reimbursement based upon their unreasonable conduct. Citing *C.G. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 286 (1st Cir. 2008). It alleges that the Parents stated that if the District did not place the Student at LSA, then they would file for due process. The District claims that the Parents prevented IEP team members from providing input and failed to provide private evaluation and records from Ms. Papageorge and LSA. The District accuses the Parents of intimidating, slandering, and disparaging District staff on social media and actively working to have Ms. Frazier terminated. It asserts that this conduct impeded the staff from fully participating in IEP meetings. The District argues that despite this alleged conduct, the District continued to make significant efforts to develop and offer an appropriate program to the Student in her neighborhood school.

## **V. LEGAL FRAMEWORK**

Congress enacted the IDEA to ensure that all children with disabilities are provided a free appropriate public education and that the rights of disabled children and their parents are protected. 20 U.S.C. § 1400(d)(1)(A)-(B). The general prerequisite to a state's receipt of federal funds to provide public education is the provision of a free appropriate public education ("FAPE") in the least restrictive educational environment ("LRE" or "least restrictive environment") to all disabled children residing within the state pursuant to the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§1412(a)(1), (5). See *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 295, 126 S. Ct. 2455, 165 L.Ed.2d 526 (2006). A FAPE consists of an educational program "that emphasizes special education and related services designed to meet the unique needs" of each child. 20 U.S.C. §1400(d)(1)(A), by affording "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. §1401(29). By also requiring that education and related services be provided in the least restrictive environment, Congress sought to ensure that children with disabilities are educated alongside non-disabled students "[t]o the maximum extent appropriate,"

so that “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes ... cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). See also MUSER X.2(B); *Ms. S. v. Regional Sch. Unit 72*, 829 F.3d 95, 113 (1st Cir. 2016).

A FAPE includes both “special education” and “related services.” 20 U.S.C. §1401(9). “Related services” are the support services “required to assist a child ... to benefit from” that instruction. 20 U.S.C. §§ 1401(26), (29). A state covered by the IDEA must provide a disabled child with such special education and related services “in conformity with the [child's] individualized education program.” 20 U.S.C. §1401(9)(D).

The IEP is the “centerpiece of the IDEA’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). When determining whether a school district has offered a FAPE to a child with a disability, hearing officers and judges must assess whether the educational program set out in the IEP is appropriate to meet the child’s needs. The federal district court for the District of Maine has described the IEP as the “legal touchstone for hearing officers and judges to assess [a school district’s] efforts to educate students with disabilities.” *York Sch. Dep’t v. S.Z.*, No. 2:13-CV-000420NT, 2015 U.S. Dist. LEXIS 23959, 2015 WL 860953, at 32 (D. Me. Feb. 27, 2015), citing *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23 (1st Cir. 2008). When determining whether a school district has met its obligations to a student under the IDEA, the hearing officer must determine whether the IEP offered by the school is substantively appropriate for the student. *Id.*

The legal test for the substantive appropriateness of a child’s IEP was established by the Supreme Court in 2017 in *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 993. The Court in *Endrew F.* discussed the gray area in the IDEA language relating to a defining standard by which to determine whether an IEP provided adequate instruction and services to be compliant and provide a FAPE. *Id.* at 1101.

The Court noted its decision in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, wherein it declined “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act” since no court can promise a particular outcome for any one child. *Id.* at 202, 102 S.Ct. at 3034. It stated that Rowley “was not concerned with precisely articulating a governing standard” for the appropriateness of an IEP and left that question open. *Andrew F., Id.* at 137 S. Ct. at 996. The Court opined, however, that *Rowley* and the statute itself pointed to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Id.* at 999.

The Court affirmed that the “reasonably calculated” qualification reflected a requirement in the IDEA that an appropriate program needs the prospective judgment by school officials and parents based upon a “fact-intensive exercise” to inform their decision-making. *Id.* at 999, citing *Rowley, supra*. It reaffirmed the view that any review of an IEP must appreciate that the question is whether the IEP is reasonable, not ideal. *Id.*, citing *Rowley, supra*.

The Court further affirmed that the IDEA’s purpose was to ensure that educational programming for students with qualifying disabilities must aim to enable them to make progress. *Id.*, at 994, citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV). “A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.” *Id.* page 999.

While the Court affirmed the language in *Rowley* that for a child who is fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 996, citing *Rowley, supra*. It recognized that this could not be the standard for a student is not fully integrated in the regular classroom. *Id.* at 1000.

For the student who is not fully integrated in the regular classroom, the IEP “must be appropriately ambitious in light of [a student’s] circumstances, just as advancement from grade

to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* at 1000. The Court noted that “Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot. *Id.* at 1000-1001. It emphasized that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Id.* at 1001.

In determining whether an IEP is appropriate under the IDEA, the Court refused to attempt to elaborate on what “appropriate” progress will look like from case to case. “This absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* at 1001, citing *Rowley, supra* 458 U.S., at 206. Instead, the Court instructed that the courts (and hearing officers) must defer to the application of expertise and the exercise of judgment by school authorities. “The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child.” “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1001-1002.

When determining the appropriateness of an IEP, the “[a]ctions of school systems cannot be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective.” *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). Where an IEP is found to be legally appropriate, “[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement.” *R.E. v New York City Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012); *M.O v. New York City Dep. Rec of Educ.*, 793 F.3d, 236, 244 (2d Cir. 2015) (finding that the parents' challenge of their son's proposed placement was speculative, the 2nd Circuit held that the district's offer of a FAPE precluded the parents from recovering the child's

private school costs); see also *N.S. v. New York City Dep Rec. of Educ.*, 13CV7819, 2014. WL 2722967 (S.D.N.Y. June 16, 2014) (Even if there is some evidence to suggest that other students at the proposed placement have not received all of the services in their IEP, “a parent must offer something more than mere speculation that the same problem would present itself in her child's case in order to be eligible for tuition reimbursement.”) citing *T.F v. NYCDE*, 14 CV3401 S.D.N.Y. (Sept. 23, 2015).

The IDEA imposes additional procedural and substantive requirements with regard to the IEP. See, e.g., *Roland M., supra.* at 987-88 (1st Cir. 1990). For example, parents have the right to be part of the IEP “team” along with the teachers and other educational professionals charged with formulating a child's particular IEP. 20 U.S.C. § 1414(d)(1)(B); *Lessard, supra*, 518 F.3d at 23. The purpose behind such procedural safeguards is to “guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.” *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993).

Under the IDEA, the denial of a FAPE may be shown only if the procedural inadequacies a) impeded the child's right to a FAPE; b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or c) caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii).

## VI. ANALYSIS

**Issue 1: Did the Parents waive their rights to challenge the appropriateness of the IEP in place between February 2016 and February 2017, including the provision of ESY services for the summer of 2016, by entering into the “Agreement and Release,” dated May 10, 2016, with the District?**

As an initial matter, a determination of whether the Parents are barred from raising certain claims must be reached. The District argues that the Agreement and Release (“Agreement”) prohibits the Parents from bringing any claims against it relating to the Student’s

progress as it existed prior to May 10, 2016, the date the Agreement was fully executed. The Parents argue that the hearing officer does not have jurisdiction to decide this issue.

The IDEA states that hearing officers in due process hearings are to decide issues outlined in 20 U.S.C. § 1415(b)(6)(A) and (k), which defines the subject matter jurisdiction to include “matter[s] relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”. *Id.*; see also, 20 U.S.C. § 1415(f)(1)(A). The hearings are a means of resolving complaints when a school district either “(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child,” 20 U.S.C. § 1415(b)(7)(A)(III). The IDEA provides other mechanisms for alternative dispute resolution of claims made pursuant to the IDEA, including mediation. 20 U.S.C. § 1415(e) and (f). The state of Maine also endorses private settlement agreements. See MUSER §§XV.12). A mediated agreement reached through a state-sponsored process or one reached through the resolution process can be enforced by state or federal courts of competent jurisdiction. 20 U.S.C. § 1415(e) and (f). In this case, the parties reached a private settlement agreement.

While the IDEA is unclear with respect to whether a hearing officer has jurisdiction to interpret and apply a private settlement agreement, several courts, including the First Circuit, have weighed in on the issue. See *South Kingstown School Committee v. Joanna S.*, 2014 WL 197859, \*11-12 (D.R.I. 2014). See also, e.g., *School Bd. Of Lee County, Fla. v. MM.* ex rel. MM., 2009 WL 3182971(11th Cir. 2009) (because breach of Settlement Agreement claim relates to FAPE, claim must first be considered in an administrative due process hearing before it can be considered by court); *H.C. v. Colton-Pierrepoint Cent. School Dist.*, 2009 WL 2144016 (2nd Cir. 2009) (“due process hearing before an IHO [impartial hearing officer] was not the proper vehicle to enforce the settlement agreement” but IHO had responsibility to “consider the settlement agreement to the extent it might have been relevant to the issue before him, i.e., whether H.C.’s 2006-07 IEP provided her with a FAPE”); *T.L. ex rel. G.L. v. Palm Springs Unified School Dist.*, 304 Fed.Appx. 548 (9th Cir. 2008) (exhaustion of administrative due process required where claim is breach of settlement agreement regarding educational services under the IDEA); *JP. v.*

*Cherokee County Bd. Of Educ.*, 218 Fed.Appx. 911 (11th Cir. 2007) (claims regarding alleged breach of contract involving special education issues must be addressed through administrative due process remedies prior to consideration by the court); *Shawsheen Valley Regional Vocational Technical School Dist. School Committee v. Commonwealth of Mass. Bureau of Special Education Appeals*, 367 F.Supp. 2d 44, 55-56 (D.Mass. 2005) (court implicitly indicated appropriateness of Massachusetts BSEA hearing officer's consideration of whether settlement agreement had been complied with for purposes of ruling on parent's compensatory claim).

Where there is a settlement agreement resolving and/or waiving allegations of violations of a student's educational programming, a parent will only be allowed to raise issues that had been part of the settlement agreement if there is a material or sufficient change in the student's conditions or circumstance. *South Kingstown Sch. Comm. v. Joanna S.*, *supra*, 773 F.3d at 352, 354-355 (1st Cir. 2014)(No material change had occurred after the settlement agreement was executed that warranted an additional evaluation that was not agreed upon as part of the settlement.); *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 109 F. 3d 896, 900 (3d. Cir. 1997)(A change in the cost of an alternative school placement was not a material change.)

The First Circuit Court of Appeals has given leeway to administrative actions (hearing officer decisions) in effecting private state-law settlement agreements in federal-question IDEA cases. *South Kingstown v. Joanna S.*, *supra*, 773 F.3d at 352. It stated that federal courts may give effect to state-law settlement agreements in federal-question cases, citing *D.R. ex rel. M.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 898 (3d Cir. 1997) (relying on a state-law contract settling an IDEA claim). Since the IDEA plainly permits settlements of disputes within its scope, the First Circuit saw no reason to read it to require a different result. *Id.*

Based upon the leeway the First Circuit has given in administrative actions relating to the interpretation of private settlement agreements by hearing officers, I find that I have jurisdiction to interpret the Agreement and give effect to the waiver and release language in order to determine the parameters of the issues to be decided. In other words, I am not enforcing it; I am interpreting it to determine the scope of the issues to be decided in this due process hearing.

A special education settlement agreement is considered a contract. See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898. In Maine, a contract is properly formed when the parties “mutually assent to be bound by all its material terms, the assent is either expressly or impliedly manifested in the contract, and the contract is sufficiently definite.” *McClare v. Rocha*, 86 A.3d 22, 28 (2014). When interpreting an agreement that allegedly waives parental rights under the IDEA, the “more searching standards reserved for waivers of civil rights claims, rather than general contract principles,” apply. Additional factors must be considered, such as whether the language of the agreement allegedly waiving IDEA rights was “clear and specific”. *W.B. v. Matula*, 67 F.3d 484, 498 (3rd Cir. 1995) Also, a waiver of a parent's rights under the IDEA or state special education law must be knowing. *Id.*

There is no dispute that the parties signed and entered into the Agreement on May 10, 2016 to resolve the consolidated hearing request in (*Parents v. the District*) (cases numbers 16.037H and 16.046H), and that the cases were withdrawn based upon the Agreement. The Parents do not contest the existence of the Agreement. Rather, the Parents contest the scope of its application.

Paragraph three of the Agreement contains the relevant waiver and release language. The issue is determining whether paragraph three releases the District from any claims in the instant Hearing Request that were settled under the terms of the Agreement. Paragraph three of the Agreement states:

In consideration of this Agreement and Release (“Agreement”), (the Parents), for themselves, their heirs, successors and assigns, and on behalf of their minor daughter (the Student), her heirs, successors and assigns, (individually and collectively the “Releasers), forever release and discharge the Town of York, (the District), its school committee and committee members, its past and present Superintendents of Schools and its past and present Directors of Special Education, and all York employees, agents and attorneys (past or present) in both their official and personal capacities (individually and collectively, the “Releasees”), from any and all claims, causes of actions, suits, or sums of money, whether legal, equitable, and/or administrative in nature (collectively, “Claims”), known or unknown and whenever arising, based on the past or existing state of things up through the date of this Agreement, including without limitation any Claims that relate in any way whatsoever to a) (the Student's) education by (the District) or its agents or treatment by the Releasees, b) any services whatsoever that (the Student) did or could have received from the Releasees or its agents, c) the delivery of a free appropriate

public education to (the Student), d) reimbursement and compensatory education costs related to (the Student), attorney fees and other litigation costs related to (the Student), f) reimbursement for or payment of private evaluations pursuant to MUSER V.6, and g) any damages incurred by (the Student) sounding in any way in state or federal law, statutes, or disability laws, and specifically including, and intending to release, all Claims that were or could have been raised in (Parents v. the District) (consolidated 16.037H and 16.046H) and all Claims based on, alleging or arising out of the alleged negligence of the Releasees or its agents with respect to (the Student).

Releasors specifically reserve and do not waive any claims related to matters involving any of their other minor children.

Releasees also release and discharge Releasors, their heirs and assigns, from any and all claims, causes of action, suits or sums of money, whether legal, equitable, and/or administrative in nature, known or unknown and whenever arising based on the past or existing state of things up through the date of this Agreement, and specifically including, and intending to release, all Claims that were or could have been raised in (Parents v. the District) (consolidated 16.037H and 16.046H).

The relevant phrase is the release of the District “from any and all claims, causes of actions, suits, or sums of money, whether legal, equitable, and/or administrative in nature (collectively, “Claims”), known or unknown and whenever arising, based on the past or existing state of things up through the date of this Agreement.” I find that the language is unambiguous. “Any and all claims...known or unknown and *whenever* arising” (emphasis added) includes future claims. I find that this language specifically includes any future claims concerning the Student’s programming as it existed prior to or on May 10, 2016, the day that the Agreement was executed.

#### 1.A Whether There Was a Change in the Student’s Circumstances

If a student’s circumstances have not changed, then the “clear and unambiguous” terms of a settlement agreement apply and are binding on the parties. *East Brunswick Board of Education, supra*, 109 F.3d at 901. However, if there has been a material change in those circumstances, then Parents may have an opportunity to challenge the efficacy of the educational programming in place. *South Kingstown Sch. Comm., supra*, 773 F.3d at 352, 354-355.

When the Agreement was executed on May 10, 2016, the Student's effective IEP was dated February 4, 2016. Therefore, the next level of analysis is to determine whether there were any material changes to the IEP or to the Student's programming after May 10, 2016. If there were, the Parents would have the ability to make new and unrelated claims that arose outside the scope of the Agreement.

I find that there were no material changes to the IEP or how it was implemented until October 5, 2016. While the Parents argue that staffing was different during the summer 2016 ESY due to personnel changes, there is no evidence in the record that the ESY services were not offered as written in the IEP. While the District acknowledged that Mr. Hanlon, the Student's 6<sup>th</sup> and 7<sup>th</sup> grade teacher, supervised the special educational technicians teaching that summer, the District has the discretion to assign personnel as needed in order to provide the services. An IEP does not need to include the identity of particular teachers. *Letter to Hall*, 21 IDELR 58 (OSERS 1994); and *S.M. and G.M. v. State of Hawaii, Dep't of Educ.*, 56 IDELR 193 (D. Hawaii 2011).

I find that there were no material changes made to the IEP or its implementation during the summer 2016 or when the Student was unilaterally removed from the District and enrolled at LSA. The District continued to offer the specially designed instruction and related services, as well as ESY services, as they existed in the IEP on February 4, 2016. On August 11, 2016, the Parents informed the District of their decision to unilaterally remove the Student. Their stated reasons were the departure of Mr. Hanlon; "Non-existent" planning during the summer 2016 for evaluations and consultation; and the Student's "highly negative emotional reactions" to the summer ESY services. (S-182). Until mid-July 2016, the Parents had been satisfied and very happy with the Student's progress.

When the Student enrolled at LSA, her IEP went with her and was implemented by LSA. The IEP Team met on October 5, 2016 to review a speech and language evaluation that had been scheduled earlier, and the Parent's request to amend the level of instruction she was receiving. The following amendments to the IEP were made at that time:

- Amend consultation about modifications and accommodations to specifically include general education teachers;

- Change special education support to specifically designed instruction in language arts and math;
- Increase special education consultation from monthly to bi-monthly;
- Add speech and language services;
- Update accommodations on state and district assessments (separate setting; allow portions to be read to the Student);
- Add a speech and language goal.  
(S-247, 275-276).

No other goals were amended from the annual IEP dated February 4, 2016. No services, accommodations, or modifications had been removed, other than social work, which the Parents had already requested to be removed in February 2016.

I find that these were discrete material changes to the IEP and therefore, the District is not released from claims about them under the Agreement. I further find that the District continued to be released from all other claims based upon the annual IEP dated February 4, 2016. I also find that no other material changes occurred in the District's programming and annual IEP until February 4, 2017, when a new annual IEP went into effect.

**Issue 2: Did the District fail to offer the Student appropriate IEPs and placements from May 10, 2016 through to the present, including ESY services? If so, did this result in a failure to provide the Student with a FAPE?**

2.A Annual IEP, Amended on October 5, 2016

As found above, claims relating to the Student's programming as stated in the annual IEP dated February 4, 2016 were released pursuant to the Agreement, with the exception of amendments that were made to it on October 5, 2017. The Parents' allegations with respect to the speech and language goals in the IEP were not related to the programming as described in the annual IEP dated February 4, 2016. I find that this was a material change to the IEP and therefore, the District is not released from this claim pursuant to the Agreement.

The Parents allege that the speech and language goals included in the IEP on October 5, 2017 were inappropriate because they were not measurable against baseline data or present

levels of performance; that “grade appropriate levels” were not defined; and no description of the measurable level of “Lexile” is included in any of the goals.<sup>14</sup> The Parents also allege that while the speech and language evaluation recommended “instruction in figurative and abstract language,” there were no goals that reflected that instruction.

#### 2.A.i Speech and Language Goals

The speech and language goals were developed by the IEP Team, including Fran Bodkin, the speech and language pathologist. (Bodkin Tr. 2616-2620). She was credible in her testimony that the goals were appropriate. The Parents have a valid concern, however, that the goals did not reflect the level of instruction at which she would be working and against which to measure her progress. Her present level of academic performance indicated that “instruction must be directed to her level of competence rather than attempting to support her in curriculum at her grade level.” (S-261). However, her Present Levels of Functional Performance are descriptive and do not directly indicate the age or grade level at which she is working. The IEP states that the present levels of instruction are embedded in the goals. However, a review of the language of the speech and language goals reveals that the present levels of instruction are not embedded within them. (S-269-270). In fact, one of them, increasing language comprehension and recall skills, has her working at a “grade appropriate” level. This phrase is at least misleading. It should read at her instructional level in 4.A.

Whether this lack of clarity makes these goals inappropriate is debatable. The Student’s present level of academic performance is included in the body of the IEP. An educator or provider reading the IEP would understand that the Student was not working at grade level in reading and writing, and therefore tailor the speech and language therapy to the Student’s instructional level. While it would be helpful to have more detail about the Student’s instructional level in the goals, the IEP must be read as a whole. A provider would have understood the instructional level by referring the present level of academic performance in Section 4.A. Therefore, I find that the goals are appropriate. I would recommend a statement clarifying the instructional level.

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<sup>14</sup> <https://web.archive.org/web/20120917093355/https://www.lexile.com/m/uploads/dibels/LinkingDIBELSORF-LexileFramework.pdf>. A “Lexile” measure is defined as “the numeric representation of an individual's reading ability or a text's readability (or difficulty), followed by an “L” (Lexile).

## 2.A.ii Language Comprehension and Social Pragmatic Language Skills

Mrs. Bodkin recommended that the Student receive support in the area of language skills and made suggestions to improve her language comprehension and social pragmatics development. (S-220). One of the six suggestions was to include “instruction in figurative and abstract language with opportunities to generalize skills to small, structured peer group settings, with adult support.” (S-221). One of the goals in the IEP stated, “Given social situations and scenarios, (the Student) will answer questions regarding perspective taking, possible outcomes and alternative solutions with 80% accuracy as measured by clinical data and observation.” (S-271). In her testimony, Ms. Bodkin stated that this goal targeted social pragmatic skills using “high order thinking skills and interpreting language,” which she also described as “abstract language.” (Bodkin Tr. 2618-2619). I find that since one of the Student’s weaknesses centered on her ability to perceive and understand social cues and her ability to make inferences when interpreting spoken language in various social and educational circumstances, this social pragmatics goal targeted the weaknesses cited by Ms. Bodkin. Therefore, I find that the IEP appropriately includes the “figurative and abstract language” instruction as recommended.

## 2.B Annual IEP, dated February 4, 2017

The IEP Team created a new annual IEP, effective on February 4, 2017. The Student had been at LSA since late August 2016 at that point. Communication between the Parents and the District had been minimal after the Student enrolled at LSA. Ms. Ropes, who became the Student’s case manager from the District, completed an observation at LSA on January 26, 2017. The record indicates that the IEP meeting on January 31, 2017 was lengthy and difficult for both parties, and needed to be continued to a later date. During the interim period of time, the District issued a new annual IEP on February 4, 2017 to have one in place until a finalized IEP could be issued. The Parents were vehemently opposed to agreeing to this interim IEP since they had not reviewed the goals and services. As part of their Hearing Request, they allege that the interim IEP was inappropriate in a number of areas.

## 2.B.i Present Level of Academic Performance

The Parents argue that the Student's present level of academic performance was inaccurately drafted in the Student's annual IEP dated February 4, 2017. At that time, LSA had been implementing the District's IEP. No progress reports from LSA had been submitted to the District for discussion at the IEP meeting on January 31, 2017.

The IEP that resulted from the meeting on January 31, 2017 included a summary of evaluations indicating the Student's current level of academic and functional performance based upon information available at that time. Section 4.A. of the IEP included results from the WISC-IV (2014); WIAT-III (2014); 2015 BCH evaluation (2015)(which included the Woodcock Reading Mastery Test-3 (2014 and 2015) and the Test of Adolescent and Adult Language (2015)); GORT (2014, 2015, fall 2016); York School Assessments (fall 2014-winter 2016); STAR Assessments (Spring 2015-to Winter 2015-16); QRI (fall 2016); IEP progress report (June 2016); Classroom Observations (2014, January 2017); Key Math (2015); CELF-5; CASL; and IEP progress reports (June 2016)(including Fountas & Pinnell-Guided Reading reports). The section on Present Levels of Performance indicated that she was reading at an end-of-grade 6 level and could read unfamiliar text at grade 7 and 8 levels using the Fountas & Pinnell-Guided Reading assessment. While no grade level in math was stated, the Student was able to multiply numbers containing decimals at a rate of 80% while dividing multi-digit decimals number by a non-decimal divisor at a rate of 100%. She met grade level 7 written work expectations. (S-393).

An academic assessment completed in August 2016 by Ms. Victoria Papageorge, the Parents' private educational consultant, was not shared at the IEP meeting on January 31, 2017, nor did she attend the meeting. The Parents presented some of the results from that evaluation on the day of the IEP meeting. I find that the District was reasonable not to include this information in the IEP because it was not a complete report and the IEP Team members were unable to properly review and discuss what had been given to them.

The Parents cite S-B-85, S-88, and P-477 as evidence that the District had ample opportunity to obtain the Student's current performance levels from LSA and had obtained some updated information that it failed to include in the IEP. The documents at S-B-85 and S-B-88 are emails between the Parents, Ms. Tuttle from LSA, and Ms. Ropes about observations that were

being planned at LSA. The documents at P-477 are emails between Ms. Ropes and Dyann Tuttle from LSA referring to quarterly reports of unknown students. I find that these cannot be used as a basis to conclude that the District had in its possession updated written performance information and data about the Student at that time of the meeting on January 31, 2017. Also, the Parents cite to S-B-110 as evidence that the Parents had provided written consent by January 26, 2017 for the District to receive records from LSA. However, S-B-110 is an email chain about when the District would be submitting documents to the Parents before the IEP meeting on January 31, 2017 meeting. I find that this document does provide evidence that the Parents had provided consent to LSA to provide the Student's records to the District.

I find that the IEP properly assessed the Student's present levels of performance based upon the information the IEP Team had at the time of the IEP meeting.

#### 2.B.ii IEP Goals

The Parents allege that the goals in the IEP dated February 4, 2017 were not individualized. The IEP had eighteen goals: four literacy and writing goals, four math goals, and ten functional goals. The Parents argue that the goals failed to cite current levels of instruction, specific modifications, and supports; they also state that they were inappropriately tied to grade level common core standards. They also argue that some goals were too vague and others did not identify the assessments that would be used to track progress; they specifically noted the failure to include the Seeing Stars methodology in one of the goals.

#### 2.B.ii.a Current Instructional Levels

I find that the eight literacy goals and two of the four math goals included the Student's instructional levels, either explicitly or implicitly. Six literacy goals explicitly referred to her "instructional level" as the basis from which to teach the specific material to reach the goal. Her instructional level for the independent reading goal, while not specifically stated in the goal itself, was cited in Section 4.A of the IEP: "(The Student's) over all reading is below average given her grade 8 placement. She is currently at an instructional level within the 5th/6th grade range (QRI-5 9/20/16)." Also, while not explicit, the goal for Vocabulary and Spelling was to define and accurately spell "core vocabulary from general curriculum classes." I find that

implicit in this phrase is the understanding that the Student would be working on defining and spelling words from the 8th and 9th grade general curriculum, since she was in 8<sup>th</sup> grade at the time.

One other literacy goal does not specifically refer to or infer the Student's instructional level: ELA-Written Language: CCSS ELA Literacy W9-10.2. (S-395). However, her present level of academic performance in writing indicated that she had met grade 7 level in her written work expectations. (S-393). I find that since she was in 8th grade at the time that the IEP was written, it would have been reasonable to refer to Section 4.A to understand that she would be working at the 8th grade instructional level. I do not find that these literacy goals were written inappropriately.

Her math goal for word problems specifically cited the Student's present level of performance, stating that she should be working from a 6th grade to 8th grade level. Her math goal for value comparisons of fractions, decimals, and percentages was to work from 4th grade to 6th grade level of performance. Section 4.A also included her grade equivalents in several areas of math. (S-391). Therefore, I find that the District properly cited the Student's current level of performance in the IEP.

The language in the remaining two math goals, "Math-CCSS Math Content.8EE.A3" and "Mathematical Practices – CCSS High School Functions – Introduction," on page 11 of the IEP (S-396) is problematic. They are aligned with common core grade level standards. However, there is no language indicating whether the Student would be working at her instructional level. At the time of the IEP meeting on January 31, 2017, the information about the Student's level of performance in math was from the WIAT III from 2014 and the KeyMath assessment from 2015. The KeyMath assessment indicated that her highest-grade level equivalent was 6.7 in "Basic Concepts." The common core math standards used for the two goals appear to be for either 8th grade or high school math curriculum. While I understand that the goal may need to align with the language of common core standards, most of the other goals indicated that the Student would be working toward them at her instructional level. These two do not.

The Parents point this out in their arguments and I agree. I find that there is insufficient information in the language of the IEP's present level of performance section that can support the decision to draft these two goals without an explanation of her current level of performance or current skill level at the time it was drafted. Therefore, I find that these two math goals were inappropriate at the time they were written.

#### 2.B.ii.b Measure and Frequency of Progress

I find that all the goals indicated the measurement of progress on a quarterly basis. The District has the discretion to determine what method and tools to measure progress. The Parents did not present evidence indicating that the method of assessments was inadequate or inappropriate. Therefore, I find that the goals were appropriate in this regard.

#### 2.B.ii.c Methodology

The Parents argue that the methodology used for the Student's programming should have been specifically cited in the IEP. The IDEA does not give a parent the right to "compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993). In this case, the District was implementing various methodologies that were working, according to the assessment of the BCH as well as the District's own evaluations. Furthermore, the Parents were pleased with the Student's progress by the end of the 2016-2017 school year. There was no evidence indicating that the District's teaching methodologies were inadequate or inappropriate. It should be noted that the District often used the Seeing Stars materials in the Student's literacy program. However, there was no requirement to have it included in the IEP.

#### 2.B.iii Educational Support

The Parents argue that one-on-one educational support was not included as an accommodation in the annual IEP dated February 4, 2017. The Parents cite comments made by Ms. Frazier and Ms. Ropes that they believed the term "ed tech" should not be used in an IEP to reflect this accommodation.

The District asserts that it was never its intent to remove the academic support in the general education setting, but that the language changed from the IEP dated February 2, 2016. It refers to the Student's draft high school schedule, wherein it included educational technical support in social studies and science.

The language for this accommodation in the IEP dated February 4, 2017 stated:

Use of individual "check-ins" during classes with embedded brief review, pre-teaching and re-teaching of concepts." (page 16 of the IEP). S-401.

It is noteworthy that this language was amended in June 2017 to state:

Access to supportive adult in the school for the purpose of discussion reaching understanding helping with applying strategies in difficult academic and non-academic situations, and general guidance. (S-566).

I find that the District used broad enough language that included individual support in the IEP so as to not disturb the ongoing accommodation that was understood to be necessary. This finding is supported by the robust discussion over how to formulate the language to fit the intent. The amended language, used in the later IEP in June 2017, is a reflection that the District was attempting to find the best terms, and not find a way to remove the accommodations itself. I find no violation to the language in the IEP dated February 4, 2017 that reflected the need for individual support.

Therefore, the only fault I find with this annual IEP is the lack of a phrase in two of the math goals that should cite the Student's instructional level. I find that the IEP, as a whole, while not perfect, was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances.

#### 2.B.iv Placement

The Parents allege that the District is unable to implement the IEP in the District because it does not have language-based programming. The Parents failed to cite any evidence to indicate why a different educational placement is needed to implement the IEP. The least restrictive environment is the District's public school in her own neighborhood. If the IEP is appropriate, which I find it is, then it must be implemented at the public school. There is nothing about LSA

that makes the District's placement any less appropriate. The only evidence on the record indicating why the Parents chose to remove the Student from the middle school was the departure of Mr. Hanlon, her teacher. If he had not left, the Student would have stayed at the middle school. She was happy, the Parents were happy, and she was making progress. Staff changes are inevitable and schools have discretion on personnel assignments. Therefore, I find that the District's public school was the appropriate placement.

#### 2.C Amended IEP, dated March 30, 2017

The Parents continued to allege that the IEP failed to include the Student's present level of academic and functional performance and failed to include LSA as the Student's appropriate placement. The Parents also allege that the IEP failed to address orthographic processing issues cited by Ms. Papageorge's report, which was reviewed at the IEP meeting on March 30, 2017.

#### 2.C.i Current Levels of Performance

The Parents allege that the Student's present levels of academic performance were inaccurate. As stated above, I find that the present levels of academic performance were properly stated. In addition, a review of the results from evaluations provided by Ms. Papageorge indicates a rough equivalence to the Student's levels of performance already recorded in the IEP. On the WRM-III, Basic Reading Skills were scored at the 5<sup>th</sup> grade equivalent and Reading Comprehension was scored at the 6<sup>th</sup> grade equivalent. The results of the Test of Reading Comprehension indicated that the Student was at the 4.9 grade level for Text Comprehension ("average range"). These results were comparable to what Ms. Frazier determined in September 2016 on the QRI Instructional Level results: Word Reading – 5<sup>th</sup>-6<sup>th</sup> grade; Comprehension – 5<sup>th</sup> grade. Therefore, I find that changes to the literacy (reading, writing, spelling) goals in the IEP were not needed.

With respect to math, Ms. Papageorge's evaluation determined that the Student's Global Mathematics Ability on the Comprehensive Mathematical Abilities Test was at the 4.7 grade equivalent. Grade equivalents on subscores ranged from grade 3.7 (addition) to grade 9 (measurements and time). These ranges were roughly comparable to the KeyMath scores from 2015: Basic Concepts at grade 6.7; Operations at grade 4.5. Acknowledging that subscores are

highly relevant in determining the student's instructional level in specific areas, I find that the Parents failed to introduce evidence indicating that the Student's math goals were no longer appropriate, given that she would have been working at her instructional levels.

What is concerning about the IEP meeting on March 30, 2017, and the resulting amended IEP, is the lack of hard data about the Student's progress during the fall of 2016 and first quarter of 2017 while she was at LSA. Neither the Parents nor LSA offered to send progress updates to the District in time to be reviewed by the IEP Team before the IEP meeting on March 30, 2017. Instead, LSA staff presented an oral summary on the day of the meeting. Since the IEP Team did not have time to absorb this oral report at the meeting, it did not include it in the amended IEP. One comment of concern made by the LSA Education Director at the meeting was that the Student was performing at the second-grade level in math. However, the Written Notice indicated that she contacted the District after the meeting and indicated that this information may have been incorrect. I therefore find that the amendments to the IEP about the Student's current level of performance were based on the information the IEP Team had about the Student's circumstances at the time of the meeting.

#### 2.C.ii Orthographic Processing Deficits

The Parents argue that the IEP failed to address the Student's orthographic processing deficits, despite recommendations from Ms. Papageorge's academic evaluation discussed at the IEP meeting on March 30, 2017.

The IEP's statements of the Student's academic performance included language that described the impact on her academic development caused by her specific learning disability:

(The Student's) revealed weaknesses in the areas of processing speed, perceptual reasoning, and phonological processing as noted in the results of the WISC-IV and CTOPP (2015). (The Student's) processing speed weaknesses result in needing extra time to process and produce an outcome. Given (the Student's) weak perceptual reasoning, she has needs in the areas of organization, drawing inferences and problem solving. These two processing need areas adversely affect her achievement in reading, math, and writing. Her weak phonological processing as revealed on the CTOPP result in difficulties with reading and writing especially with decoding and written vocabulary. (The Student) continues to demonstrate needs in the areas of comprehension of text,

mathematical word problems, slow computation, and development of written essays. She struggles with higher level language and inferences. (S-437).

I find that this description of the Student's language abilities includes the orthographic processing weaknesses exhibited by the Student. Ms. Papageorge explained in her evaluation that symbol imaging is a cognitive function that allows a person to visualize strings of letters and whole words. She stated that this cognitive function is the basis for orthographic awareness and processing – the ability to see and understand strings of letters and whole words – and is directly correlated to reading fluency, word recognition, and encoding words (spelling). (S-189). The Student scored in the “poor range” at the 3rd percentile based on age in this area of cognitive functioning. As such, Ms. Papageorge opined that this orthographic deficit causes difficulty and directly impacts the Student's academic performance in the areas of reading, math, and written language. She recommended the use of the Seeing Stars program. She offered other recommendations to increase reading fluency given the Student's challenges with efficient sound to symbol recognition. *Id.*

Significantly, the BCH evaluation from 2014 and 2015 also found these language deficits in cognitive processing. As a result, the District provided specially designed instruction in 2015 and 2016, in consultation with Ms. Papageorge, to address these areas of weakness. It did so with positive results, as reported in BCH's reevaluation in 2015 and by the Parents up through mid-July 2016. In addition, Ms. Papageorge attended the IEP meeting on March 30, 2017, when her evaluation was discussed. The IEP Team agreed on amendments to the IEP at that time. It would appear that if additional instruction around orthographic processing was needed, Ms. Papageorge and the Parents would have specifically requested it. I find no basis to conclude that the IEP did not provide appropriate instruction in literacy, including orthographic processing.

I find that the IEP amended March 30, 2017 continued to offer a FAPE in light of the Student's circumstances.

### 2.C.iii Placement Decisions

The Parents continued to believe that placement at LSA was the Student's most appropriate educational placement to meet her educational needs. However, despite this belief,

and even if LSA provided a superior program, this does not negate the ability of the District to continue to provide a legally appropriate FAPE. I find that since the IEP continued to be appropriate, the District's public school was the appropriate placement in the least restrictive environment for the Student. *Lenn, supra*, 998 F.2d at 1086; see also *Burlington II*, 736 F.2d at 789. n. 19.; *Ronker*, 700 F. 2d at 1063.

#### 2.D Amended IEP, dated June 28, 2017

The IEP Team convened a two-day IEP meeting on June 14 and then again on June 28, 2017, to review the new evaluations produced for the Student's triennial evaluation. The IEP Team meeting was reportedly intense and the members dove deep into assessing the new information about the Student's complicated profile. The team also reviewed the additional psychological evaluation administered by Dr. Hoch; the central auditory process evaluation administered by M.L. Brozena, AuD.; and the observation conducted by Ms. Bodkin. These items refined the team's understanding of the Student's complex deficits and her ability to learn. No one questioned the complexity of the Student's disabilities at these IEP meetings. The evaluations presented continued to confirm her cognitive processing deficits in the areas of procedural reasoning and processing speed. Dr. Hoch's evaluation results continued to find that her significant weakness was with processing complex sequential information, which was consistent with the evaluations from BCH in 2014 and 2015. The results of the Central Auditory Processing Evaluation performed by Ms. Brozena indicated that the Student had significant delays in "interhemispheric communication" and in "Speech in Noise." The team discussed the Student's profile, along with classroom observations made by Ms. Ropes in April 2017. She reported that the Student participated in class, was confident, and appeared to be engaged in the learning process at LSA. This correlated with Dr. Hoch's description of the Student's personality profile of being polite, pleasant, cooperative, and concerned about doing well in school.

#### 2.D.i IEP Document

Ultimately, the IEP Team's lengthy discussion about amending the Student's goals based upon her current progress resulted in a consensus that the IEP should include all the goals designed by LSA and the accommodations its staff was using, as well as additional goals for social pragmatics and auditory processing. Additional supports and services not provided by

LSA were also added. These included social work services; experiential, kinesthetic, and multi-sensory learning opportunities; and those accommodations that were already in the IEP. ESY and consultation services were also to be included in the IEP. In addition, the IEP drafted two functional goals around auditory processing and included functional goals to address background noise issues.

#### 2.D.ii.a Auditory Processing

The Parents allege that the IEP Team drafted vague functional goals around auditory processing and did not consider adding an academic goal that reflected the Student's deficits in a specific auditory processing deficit identified by Ms. Brozena in her evaluation of the Student.

The auditory deficit was described by Ms. Brozena as delays in two discrete areas: "interhemispheric communication" and "Speech in Noise" (or "auditory "figure-ground") (S-462). The inter-hemisphere communication deficit was described as a delay in the ability of the right side of the brain to communicate with the left side of the brain to incorporate information she hears and the ability to verbally express what she heard in an orderly pattern that she understands (e.g., relaying the plot of a movie or providing turn by turn directions to a familiar location). (S-461; Brozena Tr. 202-203). "Speech in Noise" deficits concern the impact of acoustics in the Student's physical surroundings that impact her ability to attend to tasks (e.g., background noise coming into a room from an open door, HVAC blowers, hallway traffic). (S-460). The IEP Team added functional goals and accommodations to address these deficits. (S-560-561, S5-63).

The Parents argue that the functional goal was too vague, citing Ms. Brozena's testimony. Ms. Brozena stated that she would not have drafted the goals as written because they did not explain what activities would be in place to address the delays or incorporate her own recommendations. In her report, she recommended the use of games to drill verbal and non-verbal patterns using the battery-operated "Simon" toy with tones and four-color patterns; barrier games (similar to the game of Battleship); and use of story-telling in conjunction with drawing scenes from the story to retell it (e.g., in comic book style). (S-463). These activities would help develop the Student's interhemispheric communication pathways. *Id.*

A review of the functional language goals includes “auditory closure/auditory figure-ground activities,” and the use of “visual activities to support interhemispheric communication.” (S-559-560). I find that this language is sufficiently broad to include the type of activities Ms. Brozena specifically named in her recommendations. The District is not required to name the methodologies used in its special education programming. In this case, the District can be flexible with the type of activities it could use to improve the discrete auditory processing delays. Therefore, I find that these functional goals are adequately written.

The Parents also argue that an academic goal is necessary because auditory processing deficits “require[s] more effort to take in information, leaving her with less cognitive capacity to do higher level thinking or higher-level tasks.” (Parents’ brief at 42, citing Ms. Brozena’s testimony at Tr. 200-201).

I find that the Student’s auditory processing deficits are appropriately addressed by the functional goals and accommodations in the IEP. There is no evidence in the record to conclude or explain that an academic goal is necessary. It is reasonable to believe that given the activities provided in the goal and accommodations around noise reduction, the Student would be able to access her academic programming more successfully, which will lead to a higher level of thinking.

The Parents’ argue that some aspects of the goals were not appropriate because they did not cite the use of Bloom’s Taxonomy or materials from Saddleback Educational Publishers, which they believe were important components for both instruction and progress monitoring. I find that the District had the discretion to identify methodologies used to provide special education instruction. *Brougham, supra*, 823 at 16. There is no evidence in the record that explained why either of these two brand-name educational materials were unequivocally necessary to implement the Student’s IEP. As such, I find that it was not necessary to cite them in the IEP in order for the Student to be provided a FAPE. I find that in totality, the programming included in the amended IEP dated June 28, 2017 was appropriate given the Student’s unique circumstances.

## 2.D.iii Placement

The Parents and their advocates continued to be clear in their view that LSA was the only appropriate placement for the Student. They were set in their belief that the IEP could not be implemented by the District in the regular education setting. They believed that the IEP could be implemented only using a “language-based” program that was offered at LSA.

In explaining why they did not believe the Student would thrive in a general education setting, the Mother expressed that anxiety would beset the Student once she was in the general education setting. The Father was concerned that the Student would be lost and confused in that setting and she would likely fail. He did not want to take that risk.

The Parents were also concerned that the Student would not be able to take the full complement of science classes to align with her interest in working in the veterinary field. The Parents also believed that if she did not take a science class in her senior year, pursuant to school policy, she would not be able to graduate. Ms. Frazier was credible in her explanation that the policy would not have been interpreted that way. Nevertheless, the District amended the policy thereafter, which would have alleviated the concern about the Student not being able to graduate.

The District has been clear that it was fully capable of implementing the Student’s IEP in its public school given all of the supports and accommodations that would be provided. Ms. Frazier explained that the Student could have a flexible schedule to offset the concerns about heavy deadlines and fast-paced review of material. She offered to have “push-in” rather than “pull-out” support, along with supplemental instruction inside and outside of the classroom if that was what was needed. Social work services would be added back into the services offered. The District’s view that it was still able to provide a FAPE to the Student was confirmed in Dr. Hoch’s opinion, that with the right transition plan back into the public school setting, the Student could be successful in her education. (S-487).

I find that Parents failed to provide objective evidence to conclude that the District could not continue providing a FAPE as it had been doing prior to mid-July 2016, before the Student

was unilaterally removed and placed at LSA. As stated above, even if LSA was providing a superior program and the Student was thriving, there is no evidence that the District could not provide a legally sufficient FAPE. Therefore, I find that the District's public school was an appropriate placement for the Student in her least restrictive environment.

#### 2.E Annual IEP, dated February 16, 2018

The IEP Team met on January 19, 2018 and February 9, 2018 in order to develop the Student's annual IEP. Attendees included several District staff and their providers, the Parents and their advocate, Ms. Papageorge, and attorneys for both parties. At the second meeting, LSA staff members were also present. By this time, as stated above, the District had adopted the goals that LSA was using for the Student's programming.

#### 2.E.i The IEP Document

The IEP is extensive. It catalogs every evaluation, including the data and results. Based on the information in the document, there is no question about the Student's present level of performance. I find that the goals directly address the complexity of the Student's learning disability that includes deficits in reading, writing, math, executive skills, and language. The IEP contained extensive functional goals and services to address her communication and social pragmatic deficits. Her accommodations included support in every aspect of her education, both inside and outside of the classroom. At the time, this IEP had the approval of the entire IEP Team, except for the issue of placement in the District's high school.

#### 2.E.ii Transition Planning

The one area challenged by the Parents, other than placement, was an allegation that the IEP did not include a post-secondary transition plan. The IEP Team discussed developing a transition plan at the IEP meeting on January 19, 2017, however because LSA staff was not present, the decision was made to adjourn the discussion until the next IEP meeting, which was held on February 9, 2018. At that meeting, the IEP Team had a fulsome dialog about the Student's interests and post-secondary goals, including her interest in the sciences and in pursuing post-secondary education working with animals in the veterinary sciences. The LSA

staff indicated that they were interested in the District's offer to provide access to Naviance, a program designed to refine career interests of students.

As a result of the discussion and the information that the District had at the time of the IEP meetings, the IEP included language on transition planning on pages 36 to 38. It indicated that after high school, she could participate in post-secondary education/training in the area of cosmetology or veterinary sciences and could be employed in one of those areas. The IEP indicated the Student would take part in "positive goal setting" using the "Habitudes" text, which emphasizes personal focus, resilience, decision-making skills, and self-advocacy. She would also complete O\*Net career interest inventory during 9th grade. The IEP was clear that if she pursued post-secondary education, the Student would continue to need academic support and accommodations, including speech therapy.

The IEP indicated other transition activities as well, including:

- Exploring internships; working on independent living skills (banking, taxes, budgeting);
- Seeking volunteer and job opportunities in her home community (such as York Center for Wildlife); obtaining her driver's license and registering to vote;
- Taking part in a field study learning opportunity, including job shadowing;
- Exploring part-time summer employment;
- Continuing ongoing community activities, such as sports.

Based about the above language in the IEP's transition planning section, I find that it includes sufficient and appropriate transition planning, especially in light of the fact that the District is relying on information from LSA and the Parents, and not on their own ability to seek out the Student's interests and plan goals for her directly.

### 2.E.iii Placement

The Written Notices from the IEP meetings on January 19, 2018 and February 9, 2018, indicate that the Parents had become more discouraged and distrustful of the District's ability to offer a FAPE to the Student. The relationship between the Parents and District staff appears to have gotten worse, rather than better. It is apparent that the Parents came into possession of emails between District staff, including their attorney, that suggested that the Parents were

“playing games” with the IEP process. The Parents documented their concerns in writing, which were included in the Written Notices.

The District’s special education staff and their attorneys were also the subject or target of disparaging communications on a community social media web site managed by the Mother. While she may not have been the author of some personally disparaging comments about the District’s special education personnel and their attorneys, the District staff clearly connected them with the agency of the Mother.

I find that the relationship between the Parents and the District was almost irreconcilable and heightened the Parents’ view that the District could not provide a FAPE to the Student. They were already anxious about the possible impact that the general education setting would have on the Student, even with transition supports, as recommended by Dr. Hoch. The parental concerns included in the Written Notice clarified the increased level of distrust and animus the Parents had toward the District.

There is some case law that provides support for the position that parents may be justified in unilaterally placing their child in an out-of-district placement because of the extent of a negative relationship with a school’s administration. In *Greenbush School Committee v. Mr. and Mrs. K*, 949 F. Supp. 934 (D. Me. 1996), the court found that while there was persistent acrimony between the parents and the school district, it was the student’s added hostility towards the District that was so fraught with emotion that he was unable to access his education in that setting and the court approved an out-of-district placement. In this case, however, there is no evidence that the Student exhibits negativity towards the District. The only piece of evidence provided by the Parents was how upset she became in the summer of 2016 when Mr. Hanlon did not directly provide her ESY services. Prior to that time, there is no evidence that she had shown visceral distaste of the District’s staff. These disagreements are between the Parents and the District. As such, I find insufficient evidence to conclude that the District was unable to provide a FAPE to the Student.

**Issue 3: Did the District violate procedural requirements under the IDEA and accompanying state and federal requirements that a) impeded the Student's right to a FAPE; b) significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE for the Student; or c) caused a deprivation of educational benefit?**

### 3.A Predetermination of Placement

In enacting the IDEA, “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley, supra* 458 U.S. at 205-06. While IEP teams are required to work toward consensus, schools have the ultimate responsibility to ensure that “... the child’s placement is in the least restrictive environment.” MUSER VI.2(I). “[I]t is not appropriate to make.... Placement decisions based upon a majority ‘vote.’” *Id.*

The Parents allege that the District did not engage the Parents in discussions about placement options for the Student during the IEP meeting when the Team discussed the Student’s 9<sup>th</sup> grade year.

The record is clear that since the Parents unilaterally placed the Student at LSA, the Parents have made their views known to the District at most of the IEP meetings, stating their belief that LSA is the most appropriate placement for the Student. This is clear from the Parents’ stated concerns at IEP meetings held on June 28, 2017, January 19, 2018, and February 9, 2018. A review of the transcripts from these meetings indicates that the Parents were prepared and clearly articulated their reasons for believing that the District was not the Student’s least restrictive environment. In particular, they did not believe that the District was serious about providing a FAPE to the Student based upon the internal staff emails that they assert belittled the IEP process. Ms. Frazier responded for the District at the end of the meetings, acknowledging the Parents’ concerns and explaining that the District’s view was that the Student’s IEP could be implemented in the District.

The District continued to make recommendations for implementing the IEP, including additional goals and accommodations (e.g., addressing her audio processing deficits, her need for adult support throughout the day, and social work services that LSA could not provide). Specifically, the District engaged in brainstorming over how to provide the kind of setting at the high school that was comparable with LSA. The Parents were concerned that having various teachers and “pull-out” services in high school would make her anxious and unable to focus on her programming. Ms. Frazier discussed ideas about how to structure the Student’s day so that her program could be provided in the mainstream setting without much interruption. While the District’s staff was aware of the Parents’ high level of advocacy and spoke about it internally, there was no evidence that they spoke about not being able or willing to provide a FAPE to the Student. The dialog in the internal communications was about the Parents and not the Student or her programming. I find no evidence that the District predetermined its view that it could continue providing the Student with a FAPE in the least restrictive environment.

### 3.B Parents’ Request for Student Records

#### 3.B.i Courtney Hale’s Evaluation Protocols

The Parents allege that the District withheld the evaluation data generated by Dr. Courtney Hale and that withholding these records interfered with their opportunity to participate in the decision-making process regarding the provision of a FAPE for the Student. Dr. Hale, who had been engaged by the District to evaluate the Student, ended her evaluation before it was completed when the Parents refused to sign her own consent form. Ms. Frazier credibly testified that the District never had Dr. Hale’s protocols in its possession and no information from the evaluation was passed on to the District.

I find no evidence to show how the Parents were unable to participate in the IEP decision-making process without this information because the evaluator had not drawn any conclusions or recommendation from the incomplete data. Also, the Parents were not prejudiced by not having the information, especially since the District also did not have it. I find that this allegation lacks merit.

### 3.B.ii Reading Assessment Protocols

The Parents allege that they never received reading protocols from the District reading assessment administered by Ms. Frazier in August 2016. Unfortunately, Ms. Frazier admitted that she inadvertently destroyed these documents during a reorganization of her office. This fact had not been communicated to the Parents until the due process hearing. However, Ms. Frazier credibly testified that there was no information in the protocols that was not reported in the evaluation. (Frazier Tr. 2414, 2541). I find that while the District mismanaged its student records, it did not prevent the Parents from participating in the IEP process because the information and results were contained in the report itself.

### 3.B.iii Other Records

The Parents allege that there are outstanding records that they requested from Mr. Hanlon and Ms. LeGolvan. I find that there are certain testing protocols for the KeyMath and GORT assessments from November, 2015, as well as Seeing Stars and EasyCBM materials produced by Mr. Hanlon when he was assessing the Student, that have not been provided to the Parents. Mr. Hanlon was clear in his testimony that no District staff asked him to produce them and he believes that they must be under lock and key in his classroom. (Hanlon Tr. 1660-1662). I do not find that Ms. LeGolvan failed to produce District records when asked to do so. She credibly testified that she gave the District's administration her running records and other records they requested. Whether they were submitted to the Parents is unclear from the record, in light of the Mother's testimony that her records for the Student were complete as of December 2017. (Mother Tr. 2263-2264). Therefore, I find no merit to this allegation.

### 3.C Meeting Participants at IEP Meeting on October 5, 2016

The Parents allege that a general education teacher was not present during the IEP meeting held on October 5, 2016, which they allege violated the IDEA. Participants at this meeting included Ms. Frazier, Special Education Director; Mrs. Bodkin, speech pathologist; the Mother; and the Mother's friend.

MUSER VI.2(B)(2) states that a regular education teacher for a student is required if the student is participating in the general education environment. At the time of this meeting, the

Student had been unilaterally placed at LSA. Therefore, I find that the District did not violate the IDEA or accompanying regulations by not having a general education teacher at the IEP Meeting held on October 5, 2016.

**Issue 4: Did the Department fail to implement the Student's IEP appropriately during the summer of 2016? If so, did this result in a failure to provide the Student with a FAPE?**

#### 4.A 2016 ESY Services

The Parents allege that the District failed to implement ESY services during the summer of 2016 by failing to provide transportation for the Student and by not providing the same level of services that she had received the summer before.

The IEP in effect for that time period included ESY services for four hours a week for five weeks, two hours for reading and two hours for math per week, to be delivered by a special educator in a special education setting. (S-948). The record lacks evidence that the District failed to offer or provide transportation for these ESY services.

The IEP does not indicate that ESY services would be provided by a special education teacher. During the summer 2016, Mr. Hanlon took on the supervision of special education staff who provided ESY services to students. As such, he supervised the special education staff providing services to the Student. The Mother testified that the Student did not transition well to these services, stating that they were expecting to have Mr. Hanlon teach ESY, as he did the year before. While the District should have been more aware of the impact that personnel changes would have on the Student, there is no evidence in the record that the services were defective or were not provided properly. I find, therefore, that ESY services for the summer of 2016 were properly offered as written in the IEP.

**Issue 5: Did the District violate its obligation to evaluate or reevaluate the Student pursuant to the IDEA and accompanying state and federal regulations between May 10, 2016 and the present time? If so, did this result in the failure to provide the Student with a FAPE?**

### 5.A 2017 Triennial Reevaluation

The Parents allege that the Student's triennial evaluation in 2017 did not test all areas of suspected disability because it did not include a full battery of IQ tests, broadband academic measures, and executive functioning assessments. They also allege that the psychological evaluation administered by Dr. Hoch was not conducted correctly because he stopped the testing before it was complete, and therefore it did not provide reliable results.

#### 5.A.i Extent of Evaluations Administered

The IDEA requires that schools conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability, using a variety of reliable and technically sound instruments. 20 U.S.C. §§1414(a)(1), (b)(2)-(3). Once a child has been identified as eligible for special education, schools are required to complete reevaluations at least once every three years, but not more than once a year. MUSER V.1(B)(1). The Student was identified as having a Specific Learning Disability in prior years and reconfirmed by Dr. Hoch. The Student's triennial reevaluations were due in mid-June 2017. Some assessments were conducted during April and May, 2017 and some had been done within a year of the reevaluation, including a GORT; QRI; KeyMath; ongoing reading assessments using the Fountas and Pinnell BAS assessments; CBM math monitoring; a comprehensive achievement evaluation by Ms. Papageorge completed in August 2017; and an academic evaluation by Ms. Frazier in September 2016. The Parents argue that the triennial evaluations were missing components, including executive function assessments, a full battery of IQ tests, and broadband academic measures.

I find that the Student was not suspected of having a disability with respect to her executive functioning at the time of the triennial evaluation period. In 2014, the BCH evaluation included the BRIEF assessment for executive functioning, and found that her scores were not significant in this area. In Dr. Hoch's report, he had reviewed the BCH evaluation and determined that BCH found that the Student's executive functioning was adequate. While Dr. Rubin testified for the Parents that she would have included an executive functioning evaluation as part of the triennial evaluation, her opinion was based upon a records review and no other

contact with the Student. I credit Dr. Hoch's opinion and credibility over Dr. Rubin based upon his extensive review of her record and direct work with the Student herself. Therefore, I find that it was unnecessary to assess the Student's executive functioning as part of her triennial evaluation.

Dr. Rubin testified that either the Woodcock Johnson or the WIAT-III should have been administered for additional academic measures, despite the comprehensive academic evaluation completed by Ms. Frazier and Ms. Papageorge in August 2016, completed within a year of the reevaluation. Ms. Papageorge's evaluation included a host of academic assessments, including the CTOPP-2; WRMT-III; TORC-4; Symbol Imagery Test; CMAT; and interviews with the Parents. (S-186).

I find that because these academic evaluations were already completed within a year, along with other current evaluations, neither of the other two assessments was necessary because all areas of the Student's learning disability were assessed.

Dr. Rubin also testified that she would have assessed the Student's IQ, since she had found a variation in her scores between the two BCH assessments and scores from 2009. While it may have been a point of interest to the IEP Team, I find that it was not necessary given the extensive amount and variety of information gathered over the course of the 12-month period prior to the reevaluation about the Student's Specific Learning Disability.

I find, therefore, that the District did not fail to administer an array of evaluations over the course of several months that assessed the Student's suspected specific learning disability.

**Issue 6: Did the District violate evaluation procedures specified under the IDEA and accompanying state and federal regulations when it conducted an evaluation of the Student in 2017? If so, did this result in the failure to provide the Student with a FAPE?**

The Parent alleges that Dr. Hoch's 2017 psychological evaluation was conducted incorrectly because he stopped testing before the Student reached the ceiling of three wrong answers thereby not achieving reliable results. I find no factual basis to the allegation. Dr. Hoch credibly testified about his methods for evaluation. His methodology was not challenged by any

expert testimony other than that of Ms. Rubin, whose file review was not as in depth as Mr. Hoch's in-person assessment. I credit his 30-year history of evaluating students in approximately 2,000 cases. Therefore, I find this allegation lacks merit.

**Issue 7: Are the Parents entitled to reimbursement for tuition and expenses under state and federal education laws that were incurred in placing the Student at LSA for eighth and ninth grades, and are they entitled to continue her placement at LSA for tenth grade at public expense?**

When the parents of a child with a disability enroll the child in a private school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the parents only if she finds that (1) the school district had “not made FAPE available to the child in a timely manner prior to that enrollment,” 34 CFR 300.148 (C); and (2) the private placement chosen by the parents is “proper under the Act.” *Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Parents make a unilateral placement at their own financial risk, but are entitled to an equitable recovery if their decision to reject the offered IEP and placement and enroll the student in an alternative placement is determined at hearing to have been correct. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993), Citing *Burlington*, *supra* at 373-374. . Parents may employ this self-help remedy in order to timely provide their child with an appropriate education. *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1st Cir. 2002), citing *Florence County Sch. Dist. Four*, *supra*, at 13-15. A unilateral placement is considered “proper” under the IDEA when it is reasonably calculated to provide the child with an educational benefit appropriate to her circumstances. *Burlington School Comm.*, *supra*, 471 U.S. 359, at 370.

For purposes of reimbursement, “[a]n IEP need only be reasonably calculated to provide likely progress” and, thus, where an IEP meets this standard, “speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement.” See e.g., *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012); *M.O v. New York City Dep. Rec. of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015) (finding that the parents' challenge of their son's proposed placement was speculative, the 2nd Circuit held that the district's offer of

a FAPE precluded the parents from recovering the child's private school costs); *C.E. ex rel. D.E. v. Chappaqua Cent. Sch. Dist.*, 16-2591-cv (unpublished), 70 IDELR 31, (2nd Cir. 2017); see also *N.S. v. New York City Dep. Rec. of Educ.*, 13CV7819, 2014. WL 2722967 (S.D.N. Y June 16, 2014) (Even if there is some evidence to suggest that other students at the [p]roposed placement have not received all of the services in their IEP, "a parent must offer something more than mere speculation that the same problem would present itself in her child's case in order to be eligible for tuition reimbursement.") citing *T.F v. NYCDE*, 14 CV3401 S.D.N. Y. (Sept. 23, 2015).

As determined above, the District has specifically designed and offered the Student IEPs that meets her unique needs for 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> grades. There was virtually no evidence provided during the lengthy hearing that warrants a finding that the District was unable to implement each of these IEPs and provide a FAPE to the Student. The Parents' arguments are focused on evidence of the progress that the Student has made at LSA since her unilateral placement there. While this progress is real and significant, that does not diminish either the progress made by the Student while she was in the District or the ability of the District to continue to provide her with a FAPE going forward into high school.

Therefore, I find that the Parents are not entitled to reimbursement of tuition or other costs associated with the unilateral placement of the Student at LSA.

## VII. SUMMARY

In summary, I find that:

1. Pursuant to the Agreement, dated May 10, 2016, the District is released of any claims made by the Parent that challenges the Student's IEP and programming as it existed on or before May 10, 2016.
2. The District offered the Student appropriate IEPs and placements from May 10, 2016 through to the present, including ESY services, with the exception of two math goals in the IEP dated February 4, 2017.
3. The IEP dated February 4, 2017, includes two math goals that must be corrected in order for them to be appropriate.
4. The District did not violate procedural requirements under the IDEA and accompanying state and federal requirements.
5. The District did not fail to implement the Student's IEP appropriately during the summer of 2016.
6. The District did not violate its obligation to evaluate the Student pursuant to the IDEA and accompanying state and federal regulations between May 10, 2016 and the present time.
7. The District did not violate evaluation procedures required under the IDEA and accompanying state and federal regulations when it conducted an evaluation of the Student in 2017.
8. The Parents are not entitled to reimbursement for tuition and expenses under state and federal education laws that were incurred by placing the Student at LSA for 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> grades.

## VIII. CORRECTIVE ACTION

Two math goals in the IEP dated February 4, 2017 need be amended to reflect that the Student would have been working at her instructional level. They include the goals referenced as “Math -CCSS.Math. Content.8EE.A3” and “Math-Mathematical Practices – CCSS High School Functions – Introduction.”

It is so Ordered.



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Sheila Mayberry, Hearing Officer

December 14, 2018