# STATE OF NEW HAMPSHIRE DEPARTMENT OF EDUCATION

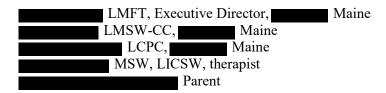
Student/The District School District IDPH-FY-22-08-003

### **DUE PROCESS DECISION**

### I. INTRODUCTION

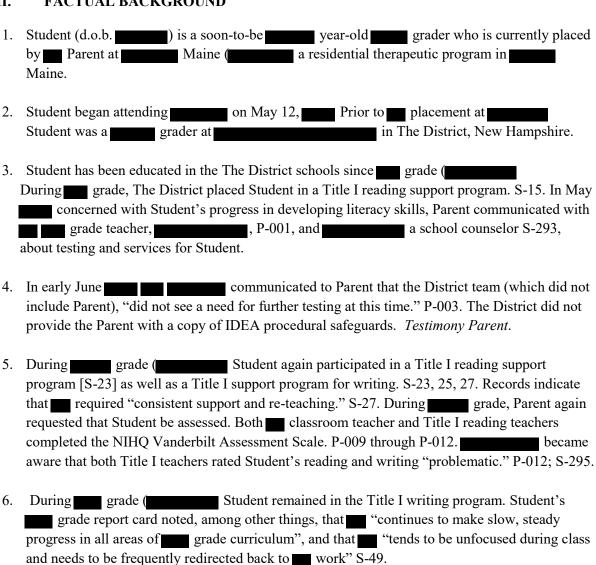
This due process proceeding was initiated by the Parents on August 9, After several continuances, the due process hearing was held via Zoom over three days: December 16 and 17, and January 4,		
Issues for due process were as follows:		
1. Did the The District School District (District) fail to timely and appropriately evaluate Student in all areas of suspected disability?		
2. Did the District fail to timely identify Student as eligible for special education and related services under the IDEA?		
3. Did the District's IEP offer for Student in April-May fail to provide with a free appropriate public education, either for procedural or substantive reasons?		
4. Did the District fail to provide Student with an offer of placement to implement the programming requires, thereby denying a free appropriate public education?		
5. Is the Student's parent entitled to reimbursement for the costs associated with placement at Maine since May either under the <i>Burlington</i> test or as a compensatory remedy?		
6. Is the Student entitled to complete placement at Maine at public expense either to provide with a free appropriate public education or as a compensatory remedy?		
The District presented first, and bore the burden of proof, pursuant to RSA 186-C:16-b, as to the appropriateness of its proposed IEP and placement from May of and as to whether it met its Child Find obligations. The Parents presented their case on the second and third days, and bore the burden of proof as to the appropriateness of unilateral placement at and request for reimbursement for costs of that placement.		
The following individuals testified for the District:		
Director of Special Education grade Language Arts teacher Academic Support Coordinator Guidance Counselor School Psychologist Psychologist		

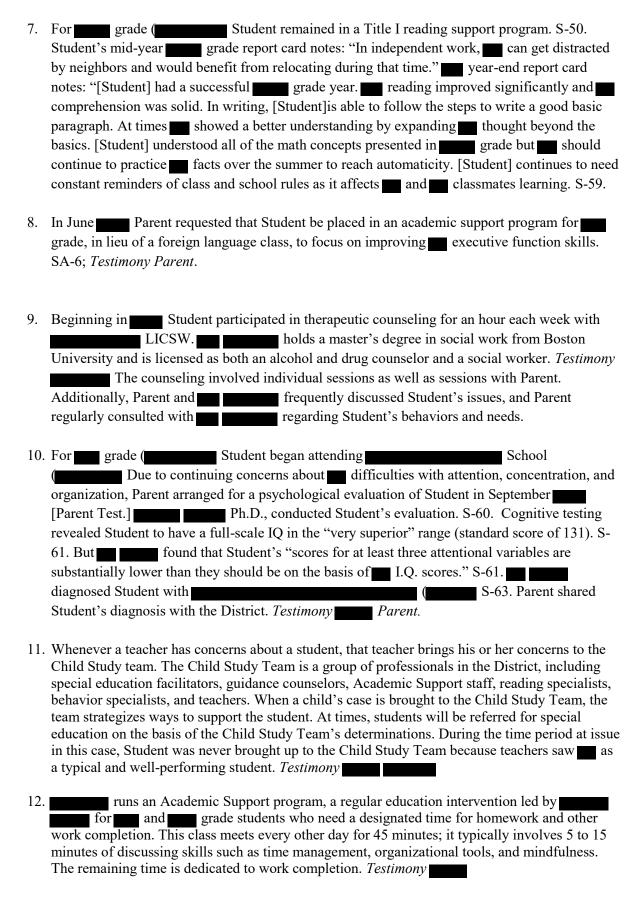
The following individuals testified for the Parent:



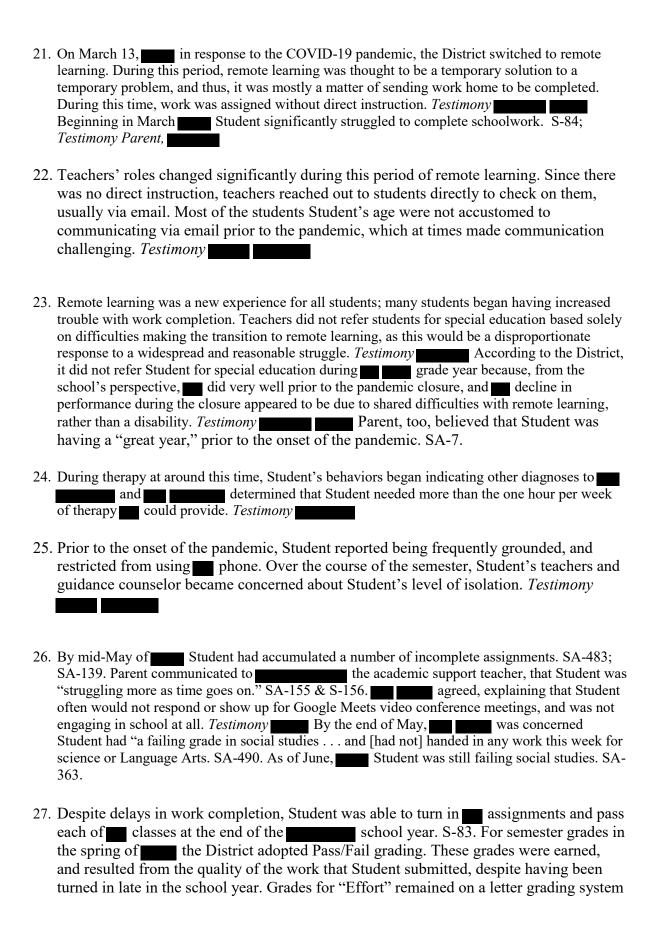
Both parties submitted exhibits, all of which were admitted without objection. Both parties filed post-hearing submissions, including a supplemental memorandum addressing a reimbursement question, prepared at the hearing officer's request.

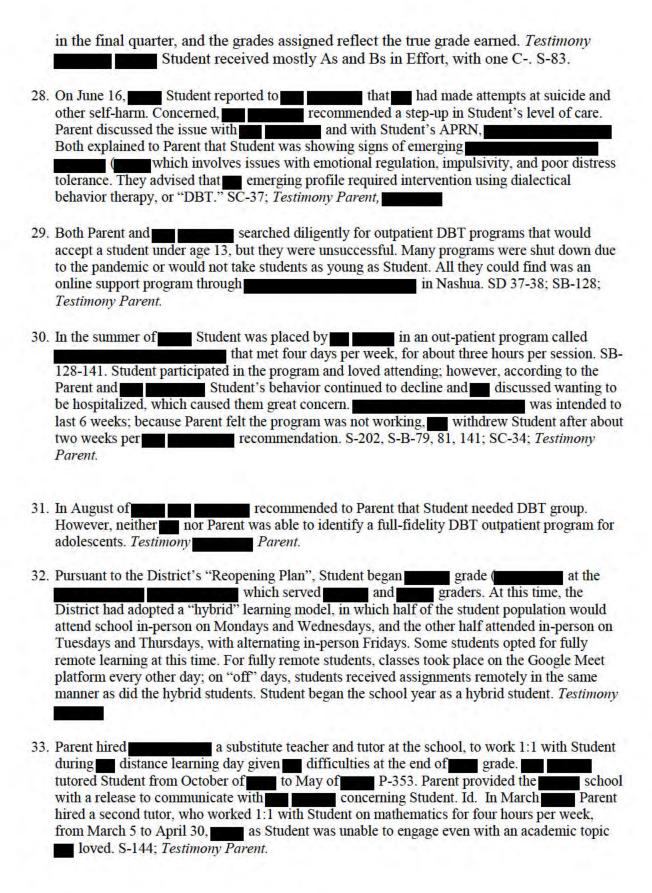
#### II. FACTUAL BACKGROUND

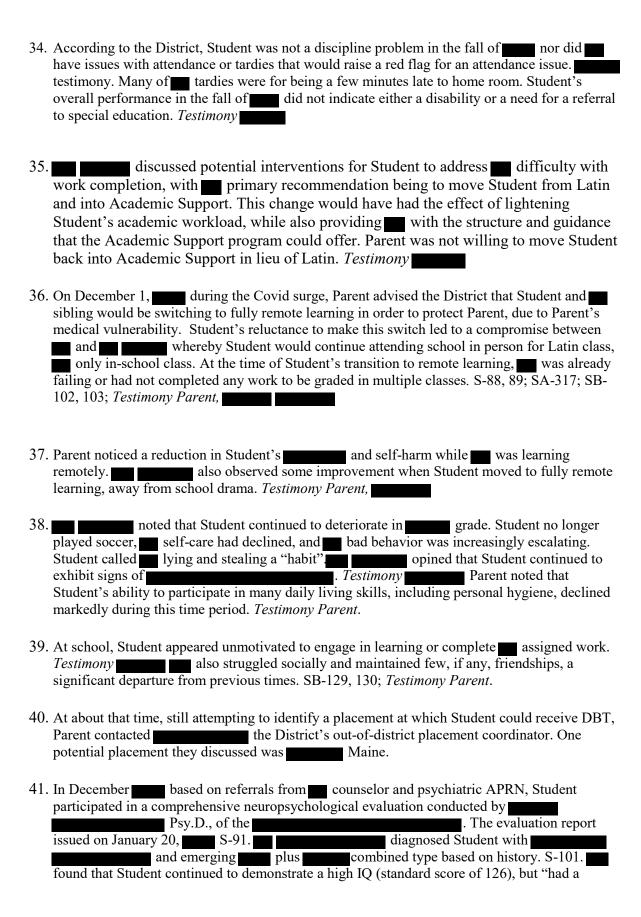




13. The Academic Support class meets at the same time as World Language class; students who are not enrolled in a world language are enrolled in Academic Support. <i>Testimony</i>
14. At Parent's request, Student attended Academic Support during grade school year (In Academic Support, Student worked on completing late assignments. Although Student turned in work that was well done, at times turned in assignments late. According to school staff, this was not unusual for students of Student's age. Testimony At the end of grade, the school discharged Student from Academic Support, believing that no longer needed the support it provided, and also mistakenly believing that Parent agreed. At Parent's request, Student was re-enrolled in Academic Support for grade year, instead of taking a world language. Student was disappointed not to be taking a world language.  Testimony
15. Student had good grades and attendance at school throughout grade year (S-83, 84. Prior to switching to remote learning in March of Student was earning straight As all but one quarter (in which received one B grade). S-83. Student was seen as a typical, average to above-average student during this time, and was actively involved in extra-curricular activities. <i>Testimony</i>
16. During Student's and grade years, school staff did not believe was a student that should have been referred for special education. According to school staff, Student was never a "discipline problem" at school, nor did exhibit defiant or oppositional behavior at school. engaged with peers at a typical level, and seemed mature for age in ability to interact with adults. <i>Testimony</i>
17. In February of midway through grade, Student began taking medication for due to escalating symptoms of initially, the medication appeared to have a positive effect on both and make and positive effect on both symptoms, and the District noted that Student's demeanor was improved and was more focused on tasks. SA-166, 167; <i>Testimony Parent</i> .
18. During the spring of in therapy sessions, noted that Student was becoming more involved in everyone else's lives (rather than focusing on experiencing more symptoms, and having more temper outbursts. changed diagnostic impression of Student to . <i>Testimony</i> SD-92.
19. Student continued at grade school year ( Despite some initial confusion at school, Student continued to receive academic support that year. SA-215, 220. During and grade at grade
20. Throughout September and October of Student experienced repeated sexual harassment, bullying, and assault on the school bus at the hands of peers. The incidents were substantiated by the school's investigation. S-76, 78 – 82; SA-296, 432.

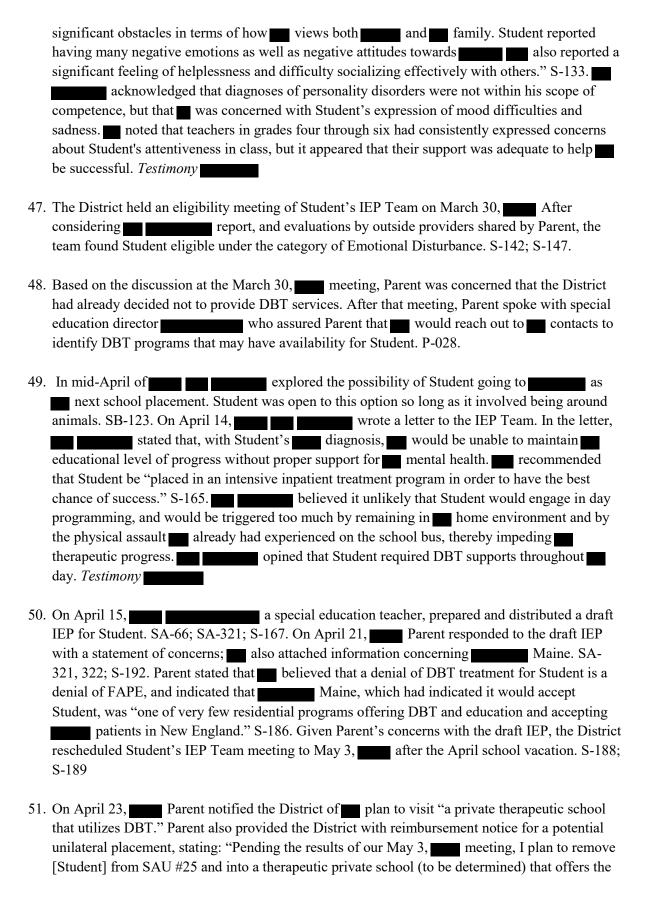


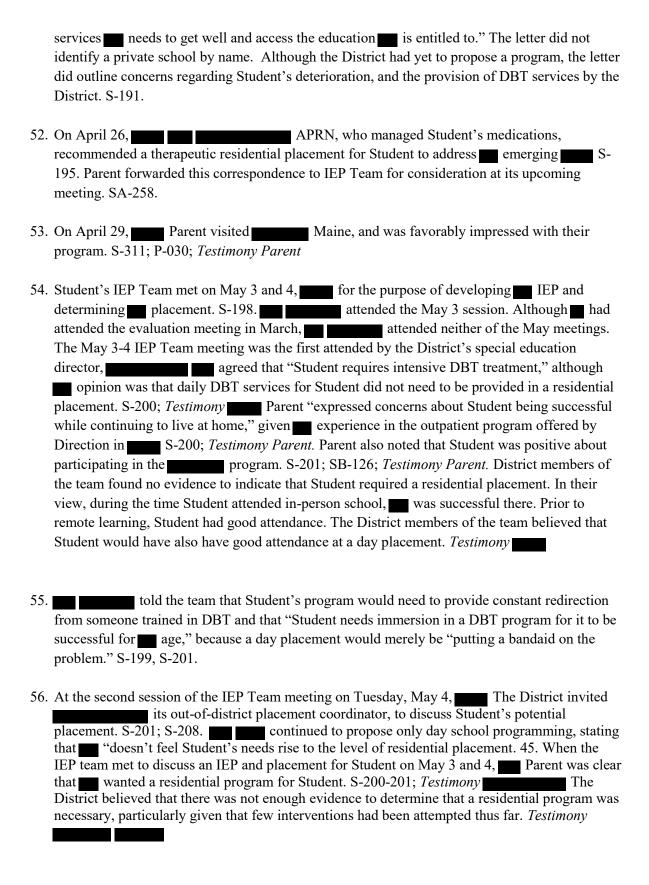


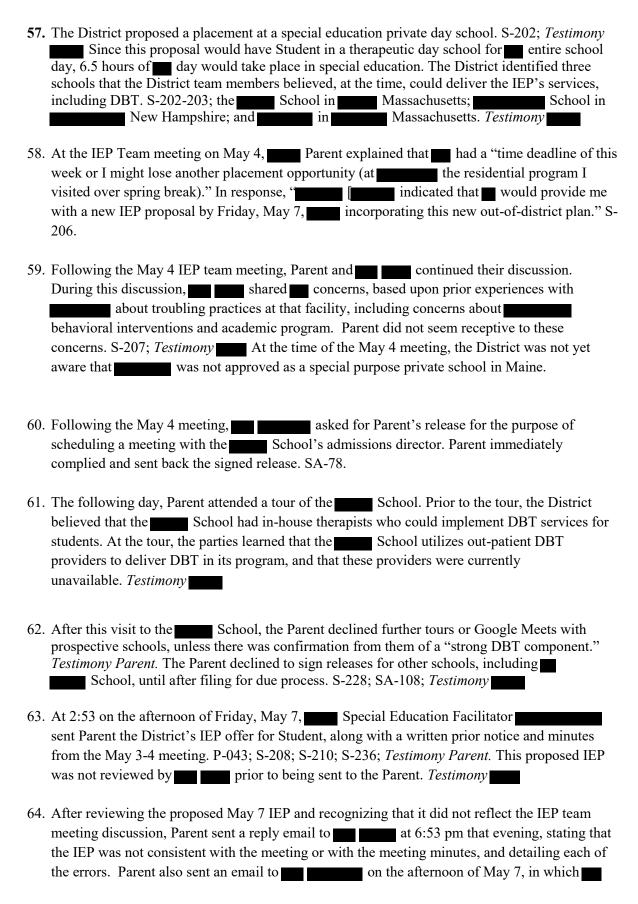


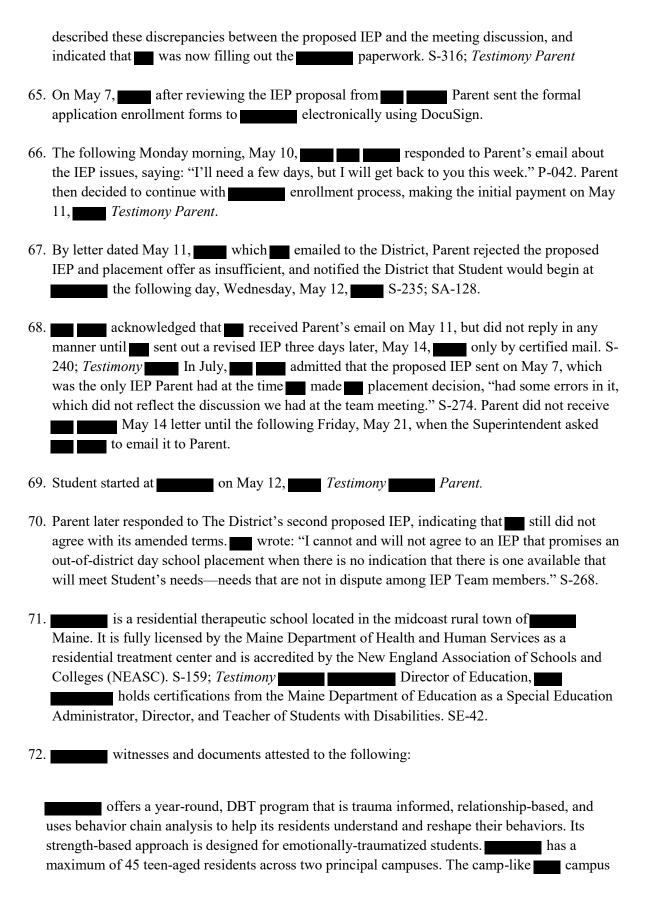
suggested difficulties with processing speed. S-96, 98. According to "Student currently needs intensive intervention to learn how to get what needs from environment more effectively. This can be done by 42. According to improving ability to regulate emotions, tolerate distress when it arises, and use more effective interpersonal skills." strongly recommended that Student receive intensive intervention using DBT to improve ability to regulate emotions, tolerate distress, and develop more effective interpersonal skills. also endorsed Student's eligibility for special education services, and predicted that Student likely would experience slow overall gains even with intensive therapeutic intervention. S-101, 102. the District commenced an IDEA referral of Student. S-106 & S-107; S-114. 43. In January Prior to this point, Parent had always trusted and supported the District educators and had believed their consistent advice that Student did not require further evaluation. hopeful that The District would be able to help find an appropriate DBT treatment program for Student, given the difficulties had encountered during wown search. S-145, 146; Testimony Parent. 44. Parent and continued their search for a placement capable of delivering DBT for ent, exploring Maine; in Virginia; the among others. S-202; P-015 through P-019; Student, exploring SC-49; SB-106; Testimony Parent. Only Maine remained as a potential fit, in Parent's view, for Student among available placement options within reasonable visitation distance. Parent therefore filed an initial electronic application with SF-1 through SF-8; *Testimony of Parent*. Parent also exchanged emails with the admissions director, Sue 45. The District convened an initial IEP Team meeting for Student on February 1, Parent signed the District's permission for evaluation form on February 4, S-124. In an addendum to the meeting minutes, dated February 9, Parent noted "pattern of self-harm, suicidal ideation, and self-harm that reports as suicide attempts." S-118; S-119. 46. the school psychologist, conducted issued his psychoeducational evaluation on March 15, and issued his report on March 22, S-126; SA-144. Student's Latin teacher, provided the teacher rating scales for this report, noting that Student's "emotional state is up and down" and rating as "Often" the number of times Student exhibited negative behaviors. S-130. Student completed rating scales as well, reporting what recognized as "many significant social and emotional challenges for a child age." S-131. As part of his evaluation, reviewed prior evaluations of Student, including the psychological evaluation by found that Student had many negative emotions and attitudes towards and faced obstacles with family. S-198. Despite social-emotional challenges, found that Student's academic skills had been developing effectively, with superior abilities in application of math skills. was not comfortable with the diagnosis of some of the criteria for the diagnosis seemed inappropriate to apply to someone of Student's age. For example, adolescents have an inherently fluctuating sense of self, the presence of which is one of the diagnostic criteria for concluded that Student was "an emotionally restless who has

surprising amount of difficulty reading a group of words quickly and accurately," which









	is for students at levels 1 and 2 of the program, while the students at levels 3 and 4. There is approximately an equal number of males and females at students receive a school-approved wardrobe to diminish distractions, and are not allowed access to cell phones, internet, or television, so they can focus internally while at employs ten masters-level therapists, plus residential staff, academic faculty, and awake overnight staff. All staff members are trained in the fundamentals of DBT. Staff members communicate with the therapists to provide insight as well as in-the-moment support for students. utilizes four DBT modules of 2-3 months each with its students: mindfulness, distress tolerance, motion regulation and interpersonal effectives. Because DBT skills require practice to become internalized, "DBT lessons are enhanced when the skills are reinforced daily within the behavioral milieu, during individual and family therapy." Testimony Hendy.
73.	Although the District continues to maintain that there are day school programs available that could provide DBT programming for Student, its offer ultimately focused exclusively on the School in Massachusetts. Confirmed Parent's experience when reached out to colleagues seeking DBT placement options, only to discover that DBT programs are difficult to find for students of Student's age. Testimony Parent.
74.	Parent visited the website seeking information on whether that school provided a DBT treatment program. of responded to Parent in late August and informed that does not offer any specialized DBT programming, although some of the clinicians employed there do have some DBT training that they may utilize. <i>Testimony Parent</i>
75.	According to the District, Student could receive twice-weekly DBT services from the DBT-trained clinicians, with the option of increasing the number of sessions as needed. also determined that has a strong academic component, and offers a six-week summer program. At the September meeting at has a strong academic component, and offers a six-week summer program. At the September meeting at has a strong academic component, and offers a six-week summer program. At the September has a strong academic component, and offers a six-week summer program. At the September has a strong academic component, and offers a six-week summer program, and would not offer the type of programming Student is receiving at hand suggested adding on services outside the school day. Testimony
76.	On November 2, conducted an assessment of Student's reading skills at assessment included test administration, observation of the learning environment, and an interview with Student concluded that Student had strong reading skills, and does not fit the profile for a specific learning disability. S-283; <i>Testimony</i>

#### III. DISCUSSION

#### A. The District's Proposed Placement

The appropriateness of a school district's action must be reviewed in terms of what was reasonable at the time the IEP was developed. See Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1st Cir. 1990), cert.denied 111 S. Ct. 1122 (1991). The IDEA and federal and state special education regulations require that Student be placed in the least restrictive appropriate environment. See 20 U.S.C. §

1412(a)(5)(A) (emphasis added). Schools must make available a "continuum" of placement options, ranging from mainstream public school placements, through placement in special day schools, residential schools, home instruction and hospital placement. See 34 C.F.R. § 300.551(b)(2), 300.552(c), (e), 300.553; Ed. 1115.04(b) (emphasis added). In other words, a student must be placed in the least restrictive environment in which the student can make meaningful educational progress.

Under the IDEA, students must be educated in the least restrictive environment that meets the requirements of educational benefit. <u>Kathleen H. v. Mass. Department of Education</u>, 154 F.3d 8 (1<sup>st</sup> Cir. 1998). The question is whether Student requires residential programming in order to achieve meaningful educational progress in light of all the circumstances. <u>Endrew F. v. Douglas City School District R.E.-1</u>, 580 U.S. , 137 S. Ct. 988 (2017).

At the outset, it should be clarified that the District's formal IEP and placement proposal is the one sent by to the Parent on May 14, which is the Parent on May 7, which contained errors and did not reflect the team's actual decisions. The second IEP, sent out by on May 14, which is the District's IEP and placement proposal and is consistent with the team discussions.

The proposed IEP reflected Student's need for DBT therapy, a central issue in this case. The IEP included goals for addressing social conflicts, and a goal for addressing emotionally challenging circumstances. S-253. The executive functioning goal addresses Student's difficulty with work completion. The IEP includes classroom accommodations. The placement proposal in the IEP is for a private special education school. According to \_\_\_\_\_\_\_ Student would receive specialized instruction with behavioral and emotional support throughout the day, in a small group setting with low teacher/student ratio. The IEP proposed individual counseling twice per week, for 30 minutes, and group counseling once per week for 30 minutes; these would be DBT sessions. The District also offered to arrange and fund appropriate wrap-around services and other supports, which would have provided Student with access to additional DBT sessions, and to other supports as needed. *Testimony* 

In this case, the evidence is inconclusive as to Student's need for residential program in order to benefit from education. The District's proposed IEP, as amended and sent to the Parent on May 14, was reasonably calculated to provide Student with educational benefit in the least restrictive environment. However, it is unclear whether actual DBT therapies, or private day placements – including were then available to implement the IEP.

#### B. Parent's Unilateral Placement at Reimbursement

#### a) Notice

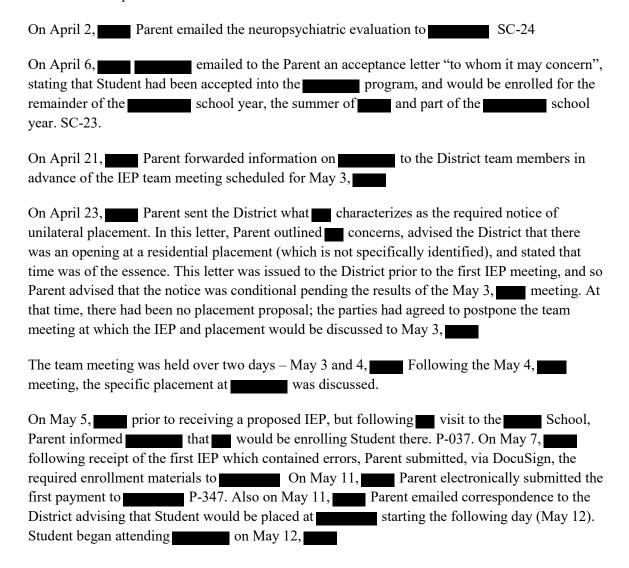
Parents who intend to seek reimbursement for a private unilateral placement must provide proper notice to the District. Reimbursement may be denied or reduced if:

(I) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to

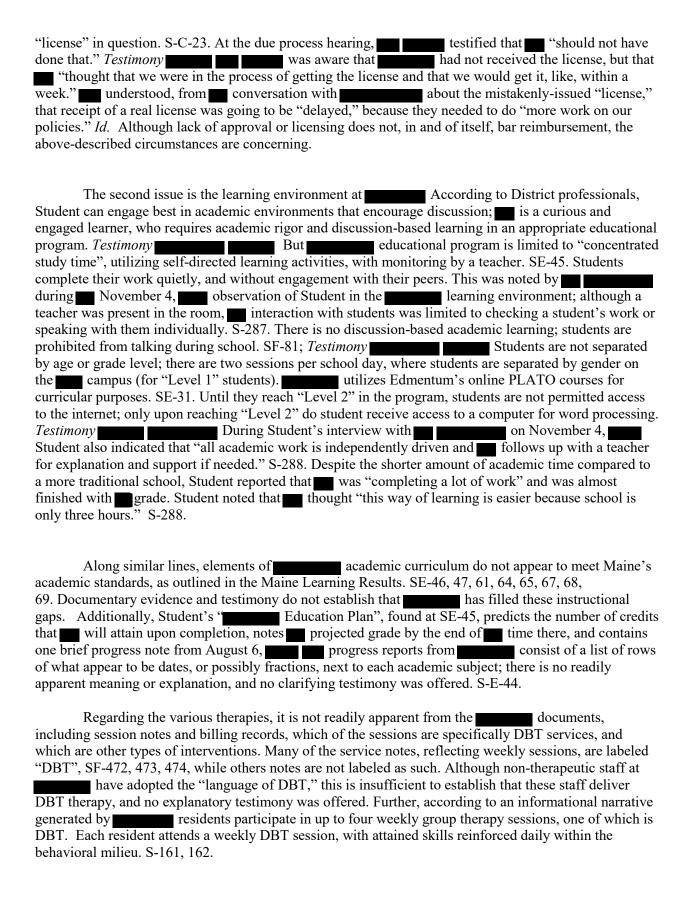
- provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (II) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (I).

20 U.S.C. §1412(a)(10)(C)(iii); 34 C.F.R. §300.148. The notice requirement "serves the important purpose of giving the school system the opportunity, before the child is removed, to assemble the Team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." <u>Greenland School District v. Amy N.</u>, 358 F.3d 150, 160 (1st Cir. 2004).

The relevant sequence of events is as follows:



Whether proper notice was given turns on whether the April 23, letter met the IDEA notice requirements. The April 23, letter does not identify a specific placement, but it does articulate Parent's concerns generally and advises the District of a time-limited opening at the residential program. That Parent made this notice conditional pending the results of the May 3, letter meeting is evidence of good faith on part. Taken together with the April 21, letter meeting is evidence information, the letter constitutes adequate notice to the District.
The District points out that the April 23, letter could not have been a "rejection of a placement proposal" because a proposal had not yet been made. But had the Parent waited until the placement proposal on May 3 or 4 before providing notice, risked forfeiting the spot being held open for the following week. In other words, it would have been impossible to both wait for a placement proposal and provide timely notice, without likely losing the spot.
Some courts have held that "removal" occurs when parents sign an enrollment contract; others have held that it occurs when the student first attends an orientation session or classes at the private school. (citations omitted). In this case, whether removal occurred on May 7 when Parent forwarded the enrollment materials, on May 11 when Parent made the first payment, or on May 12, when Student began attending timely notice was given as of April 23,
b) Appropriateness of Placement
Parent has the burden of proof regarding whether is appropriate. <u>D.B. v. Esposito</u> , 675 F 3d. 26, 35 (1st Cir. 2021). As noted above, although the IEP as amended was reasonably calculated to provide Student with a FAPE, it is not apparent whether the agreed-upon DBT therapies were actually available and ready to be implemented in a timely manner at any of the private day schools proposed by the District.
Regardless, for the reasons set forth below, I find that was not an appropriate placement. See Rafferty v. Cranston Public School Committee, 315 F. 3d 21 (1st Cir. 2002).
First, there is approval status, and the way in which represented it. is a for-profit corporation; it is not and has never been an approved special purpose private school (SPPS). For about three years, was continuously engaged in applying for SPPS status from the Maine Department of Education (Maine DOE), before abandoning the project around July See SE-3. is no longer seeking certification as a SPPS. Testimony In September of the Maine Department of Education mistakenly sent See SPPS License in an email to See SE-3. Compliance Director at the time. Ryan was the only individual on the email; See SE-3 was mistakenly issued, and that See See SE-3 was mistakenly issued, and that See See SE-3 was not authorized to operate a SPPS at this time. See SE-3 was mistakenly issued, and that See See SE-3 was not authorized to operate a SPPS at this time. See SE-3 was not a licensed SPPS. Despite having received this explanation from the Maine DOE, held itself out as a SPPS using the mistakenly-issued "license". SC-23; Testimony
was the Executive Director during the time Parent was applying to for Student, and while was deciding whether to enroll Student there. In an email to Parent on April 6, represented to Parent that was applying to fine the parent that was applying to fine the parent that was applying to fine the parent was applying to



orange vest whafter engaging a Student was material Testimony current sleeping are at risk of drag follow the rules level. It can tal removed; it is a for vest removation can effect everyone else to 1'." Thus, a proviolators (emphysical contents).	practices are problematic. described, in considerable detail, a ention at involving requiring students who commit an infraction to wear an ich identifies that student as a rule violator. Student was made to wear this vest the day in "pushback" with staff. P-197, 198. The behavioral notes are unclear as to how long add to wear the orange vest, but did wear it for at least two days. P-195 - 197; In addition to wearing the orange vest, Student was required to move out of grarrangements and into a different location. Students and staff recognize that vest-wearers opping a "level" due to their rule-breaking. Students wearing the vest are required to softhe level below them, and are not allowed to access the privileges associated with their ke "a few days" before a student to demonstrate improvement sufficient to have the vest also unclear how long a student must wear the vest generally, or what criteria must be metal. According to wearing the vest makes the student stand out with peers, ctively alter behavior. Stated that the vest "is a consequence for behavior. It shows that that resident is not allowed to do certain things because they're back at 'Level imary intent behind the use of the vest is to identify children to their peers and staff as rule hasis added). Significantly, noted that other students are expected to let staff is broken. Testimony
Per s	taff and documentation, other practices include the following:
-	limiting students' access to and communication with their parents; for the first 30 days, a student is not permitted to call home under any circumstance.
-	Taking a student's shoe laces to prevent him or her from running away. Children commonly run away from it is typical for more than one student to run away each summer. Runaways are less common in the winter months, but not unheard of.
-	Requiring students to ask permission before speaking – to a peer or to a staff member – and requiring any conversations to be monitored by staff; according to this monitoring "contributes to self-awareness and mindfulness…creates a habit of thinking

before speaking." *Testimony* 

14, 23, 25, 36, 40, 54; P-242; *Testimony* 

Students are not permitted to return home for holidays. This rule is in place because without it, had to "battle getting [the students] back." *Testimony* 

Students may not "push back" against any expectations, whether it concerns how much they wish to eat, or the amount of time they need in the bathroom. P-231; S-F-77.

Students may be punished for such things as failing to turn in one's food log on time, or

In addition to the "vest" described above, utilizes an intervention known as "going on reflection," which is similar to a time out, and which can last as long as an entire day. Reflection sometimes takes place in a gazebo. While on reflection, a student is sometimes assigned a writing task, or a physical chore to complete. Student has received both writing assignments and chores when has gone on reflection. SF-9, -

being one of the last to stand and line up during a group transition. S-F-25, -40.

A particularly troublesome intervention that has occurred with respect to Student involves insistence that become willing to eat mayonnaise and yogurt - two foods that has always disliked - to the point of consequating for not eating these foods. Student has been disciplined whenever a meal with either ingredient is served and declines to eat them. Student has been placed "on reflection," many times for not eating what was served. SF-9, 14, 17, 23, 32, 43, 55; P-235; P-236. At times, this forced to miss school. SF-494. This has also forced to miss therapy sessions. P-243. Eventually, getting Student to willingly eat mayonnaise and yogurt became a focus of therapy time. SF-100; Testimony Staff in the program asked Student to compare "fixed mindset" regarding mayonnaise to "[the fixed mindset] of an addict." SF-28.

New Hampshire law prohibits "any technique that unnecessarily subjects the child to ridicule, humiliation or emotional trauma." RSA 126-U:4; see also Ed 1203.03(c)(1)(G). Maine law contains a similar provision, prohibiting the use of any substance or stimulus "intended to modify behavior, which the person administering it knows or should know is likely to cause physical and/or emotional trauma to a student, even when the substance or stimulus appears to be pleasant or neutral to others. Such substances and stimuli include, but are not limited to: ....water spray, noxious fumes, extreme physical exercise, costumes, or signs." Maine DOE Rules 05 071, ch. 33, §2.1 (2013) (emphasis added).

The Parent maintains that, even if practices violate state law, this neither supports nor requires a denial of reimbursement. The District argues that these practices violate state law, and therefore reimbursement is barred. <sup>2</sup> I find the District's argument persuasive.

Reimbursement under the IDEA is an equitable remedy. A unilateral placement is made at a parent's own financial risk. *See* School Committee of Town of Burlington v. Dept. of Educ. for the Commonwealth of Massachusetts, 736 F. 2d 773 (1st Cir. 1984; *aff'd* 471 U.S. 359, 373-74 (1985). Even in cases where the public school's proposed IEP is found to be deficient, reimbursement is not automatic; a private placement may not necessarily be found to be "proper" under the IDEA. *See* Mr. and Mrs. I. v. M.S.A.D. No. 55, 480 F. 3d 1, 24 (1st Cir. 2004); Rafferty v. Cranston Public School Committee, 315 F. 3d 21 (1st Cir. 2002).

The court in <u>Rafferty</u> denied reimbursement because the student spent four to five hours a day, five days a week, alone with a clinician working on reading. The court noted that, although the tutoring improved the student's reading ability, did not study any other academic subjects. The court noted that "Mainstreaming may not be ignored, even to fulfill substantive educational criteria." <u>Rome School</u> Committee v. Mrs. B., 247 F. 3d 29, 33 (1st Cir. 2001).

Citing Florence County School District Four v. Carter, 510 U.S. 7 (1993), Parent states that it would be unfair to expect a parent to know of a violation prior to making a unilateral placement. Unlike the parent in Florence County case, Parent here was made aware, at least on May 4, page of school personnel's concerns regarding practices. Additionally, on July 1, after learning from the

<sup>&</sup>lt;sup>1</sup> Student is the child of an alcoholic , raising some question regarding the propriety of making such a statement to

At the request of the undersigned hearing officer, the parties were asked to brief the specific issue of whether, if practices were found to have violated state law, reimbursement was barred as a matter of law.

District that was not listed as an approved SPPS, Parent reached out to Maine officials seeking to clarify licensing status.		
Parent argues that the New Hampshire RSA 191-U:4, cited above, does not apply to a private school in Maine, but rather, applies only to private schools approved by the New Hampshire State Board of Education or serving as a provider of a component of a child's individualized education program. As a unilateral parental placement, Parent reasons, meets neither criterion. This analysis does not hold water. is providing services to a New Hampshire student, who has been identified as eligible for special education under the IDEA, and for whom an IEP has been proposed. The request is for public funds to support a private school whose practices may well bar reimbursement or placement had they occurred in an approved New Hampshire school.		
According to staff and Parent, Student has experienced successes at and has made notable academic and therapeutic gains. But success at a private placement "does not establish that such placement is the requisite adequate and appropriate education." Rome School Committee v. Mrs. B., 247 F.3d 29, 43 (1st Cir. 2001). In this case, despite Student's progress, the circumstances warrant a denial of both reimbursement, and of placement at public expense.		
C. Timeliness of Identification/Compensatory Education		
Based upon this record, the District should have identified Student as eligible for special education as of the start of grade year (Accordingly, the Student is entitled to compensatory services for a period of time equivalent to the start of school in September of to the time of referral for special education in late January of The services will be in the form of DBT therapy sessions, weekly, unless otherwise agreed. The IEP team will determine the appropriate time frame for the provision of these services. In addition, Parent is entitled to reimbursement for the math and general tutorial expenses, as set forth in P-353.		
IV. PROPOSED FINDINGS OF FACT AND RULINGS OF LAW		
Parent and District's Proposed Findings of Fact and Rulings/Conclusions of Law are incorporated herein.		
Parent's Proposed Findings of Fact: Numbers 1-7, 9, 11, 12, 14-26, 30-31, 34, 36, 37-43, 50, 51,53, 54, 56, 59,63, 65, 68-74, 77, 79, 80, 82, 83, 86, 88-99, 101, 102, 105, 108, 109, 110-114,116-120, 122, 124-128, 132-139, 141-148, 151,156-160, 162, 163-165, 167, 168, 170-173, 176, 178, 182, 184-191 are granted; the remaining proposed findings of fact are neither granted nor denied as written, except that, to the extent that they conflict with this Decision, they are deemed denied.		
<u>Parent's Proposed Rulings of Law</u> : Number 5 is granted in part, with respect to school year set forth above. All other proposed Rulings of Law are denied as written.		
<u>District's Proposed Findings of Fact:</u> Numbers 1, 4-9, 11, 12, 14, 16-22, 24-26, 28-43, 45, 47, 48, 53, 54, 56, 59, 60-65, 66-77, 79-84, 88-95 are granted; the remaining proposed findings of fact are neither granted nor denied as written; except that, to the extent that they conflict with this Decision, they are deemed denied.		
<u>District's Proposed Conclusions of Law:</u> Numbers 1, 2, 4, 5, 8, 9, 12 are granted; Number 3 is denied as to the school year through the IDEA referral in January of as detailed above; Number 7		

is denied. The remaining proposed conclusions of law are neither granted nor denied as written, except that, to the extent they conflict with this Decision, they are deemed denied.

#### V. CONCLUSION AND ORDERS

A.	The District's IEP offer in May of was reasonably calculated to provide Student with FAPE, but there was insufficient evidence that the placement and services offered were actually available and could be implemented;
В.	The District appropriately evaluated Student in all areas of suspected disability;
C.	The District should have initiated the special education process as of the start of the school year; as such, the Student and Parent are entitled to an award of compensatory education as set forth in Part III, C. above;
D.	The Parent has not met burden of showing that is proper under the IDEA;
E.	Parent is not entitled to reimbursement for the placement, and Student is not entitled to complete placement at public expense.
Date: February 11,	
	Amy B. Davidson, Hearing Officer

#### **APPEAL RIGHTS**

If either party is aggrieved by the decision of the hearing officer as stated above, either party may appeal this decision to a court of competent jurisdiction. The Parents have the right to obtain a transcription of the proceedings from the Department of Education. The School District shall promptly notify the Commissioner of Education if either party, Parents or School District, seeks judicial review of the hearing officer's decision.

# STATE OF NEW HAMPSHIRE DEPARTMENT OF EDUCATION

School District (IDPH-FY-22-08-003)

## PROPOSED FINDINGS OF FACT

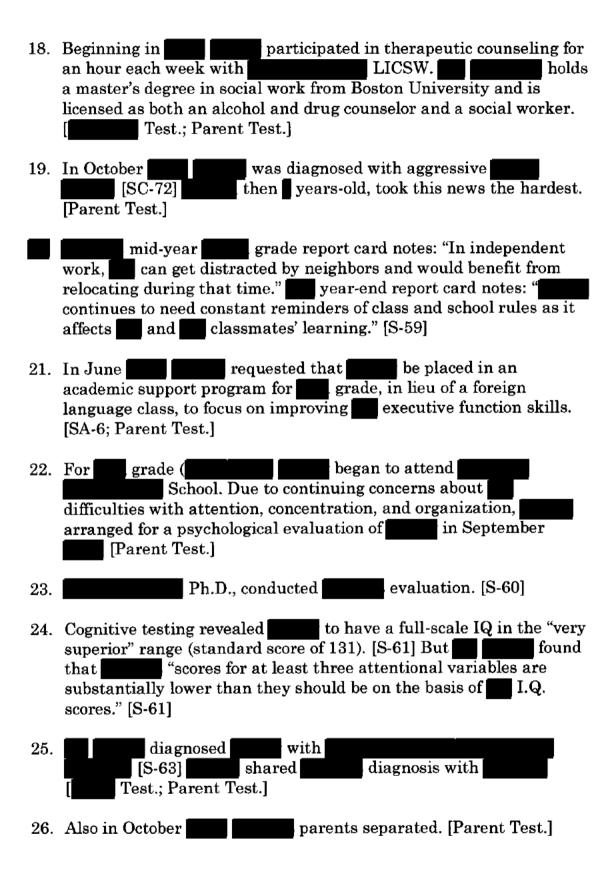
1.	grader (d.o.b.
2.	parent, (" is a single parent with three other children and is a survivor. has always been an active supporter of the public schools and its teachers, heading up the group known as which works to promote the school budget and teacher contracts. [Parent Test.]
3.	rejected IEP offer and placed unilaterally at Maine, a therapeutic residential school in ME, on May 12, [Parent Test.]
4.	Prior to placement at grade remote student at School in
5.	has been educated in the Schools since grade (Schools since Grade) Others have described as smart and delightful, though has struggled with focus and learning to read.  [Parent Test.; S-12]
6.	During grade, placed in a Title I reading support program. [S-15]
7.	In May concerned with progress in developing literacy skills, communicated with grade teacher, [P-001], and a school counselor [S-293], about testing and services for
8.	Despite multiple requests, including a formal discovery request, claimed to have no documents in its possession related to

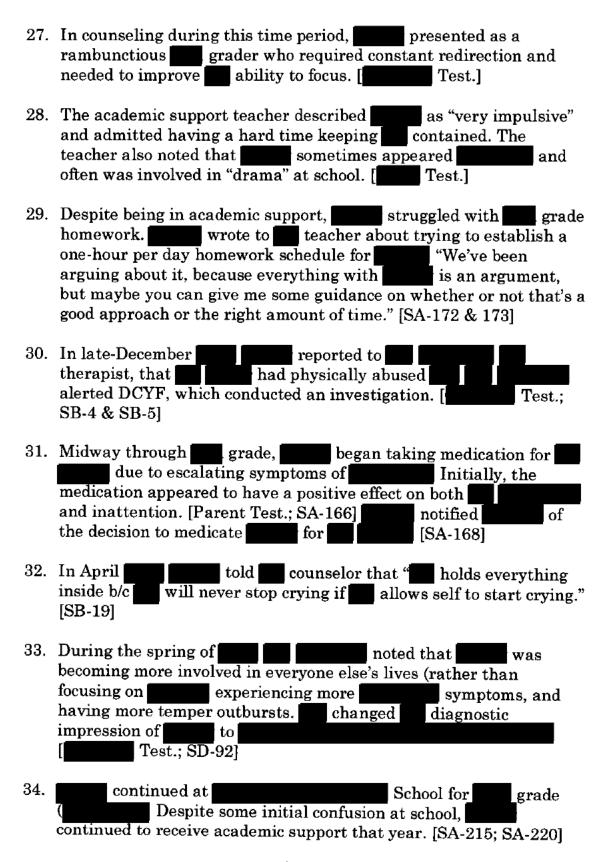
[Parent Test.; S-136] 9. In early June communicated to "team," which did not include "did not see a need for further testing at this time." [P-003] request for testing, 10. In denying did not provide IDEA procedural safeguards. [Parent Test.] with a copy of 11. During grade ( again participated in a Title I reading support program [S-23] as well as a Title I support program for writing. [S-23, 25, 27] required "consistent support and re-teaching." [S-27] again requested that 12. During grade, assessed. Both classroom teacher and Title I reading teachers completed the NIHQ Vanderbilt Assessment Scale. [P-009 through P-0121.1 became aware that both Title I teachers rated reading and writing "problematic." [P-012; S-295] took no steps to evaluate or identify 13. despite knowing that was concerned. [S-295; Parent Test.] 14. During grade ( again raised concerns, including about decision to remove from the Title I writing program after became "extremely alarmed" seeing the written work compared with peers'. [P-014] quality of 15. remained in the Title I reading support program during grade, but remained excluded from writing support. [S-34; S-36] 16. grade report card noted that "tends to be unfocused during class and needs to be frequently redirected back to work." [S-49] 17. For grade ( remained in a Title I reading support program. [S-50]

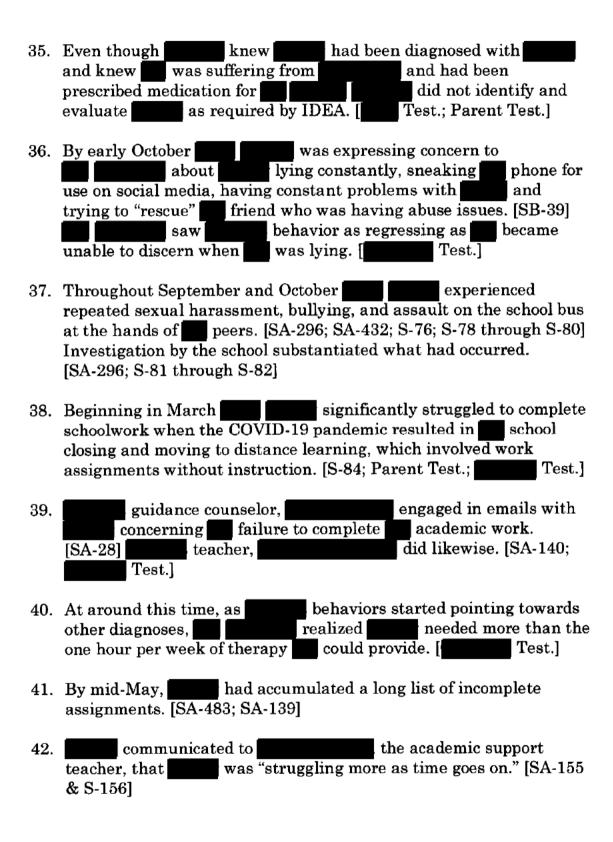
this communication until it distributed S-293 through S-299 as

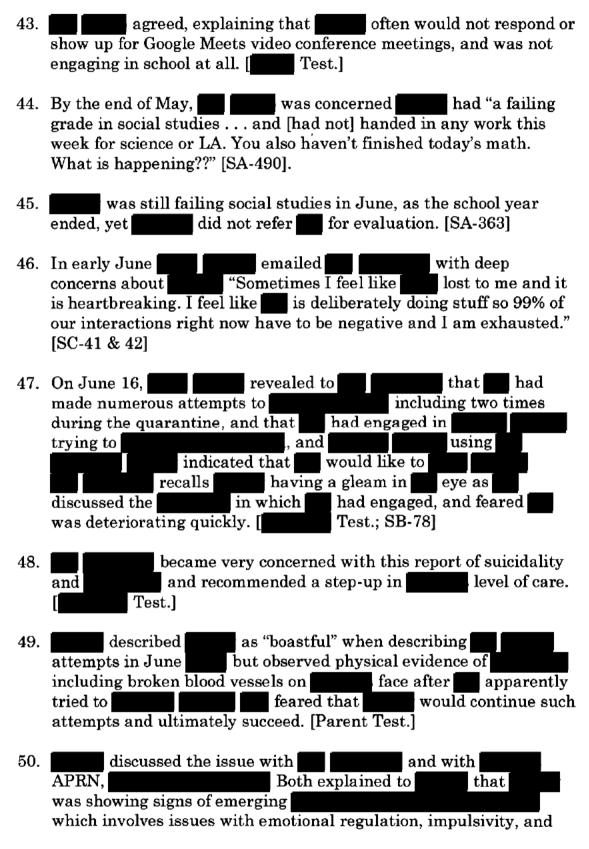
motion to dismiss claims that arose more than two years ago.

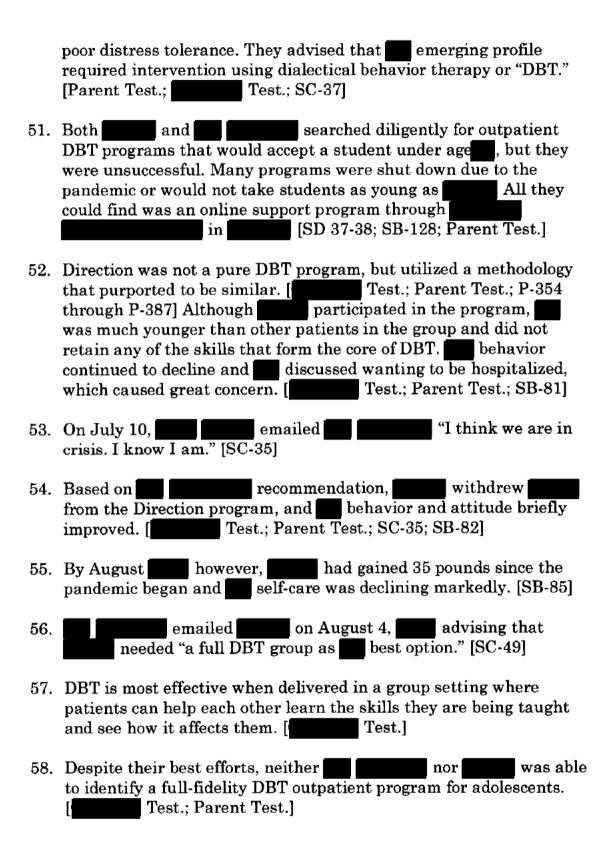
school district exhibits for this hearing after prevailing on its partial

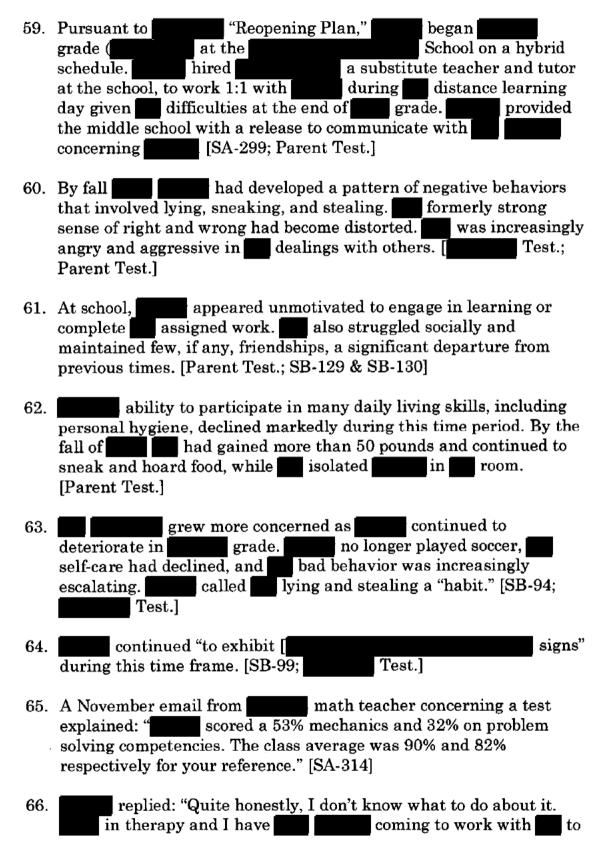




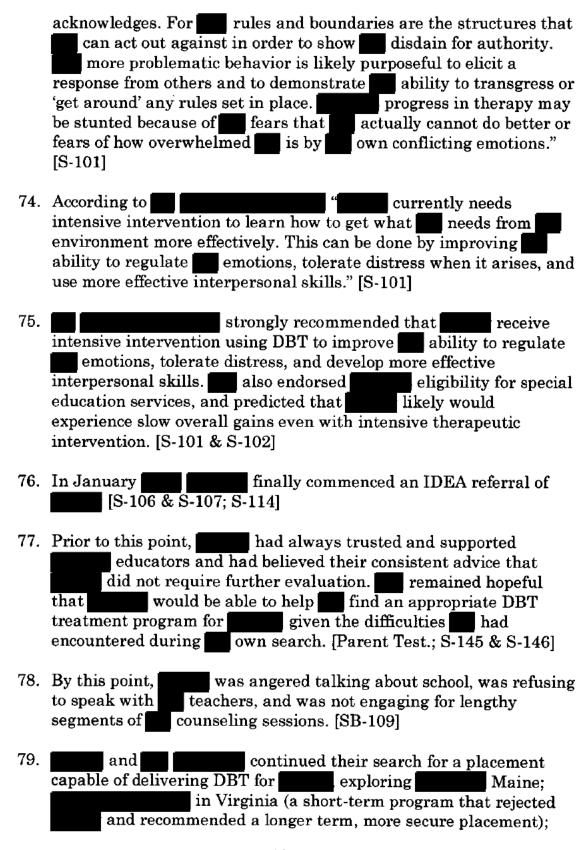


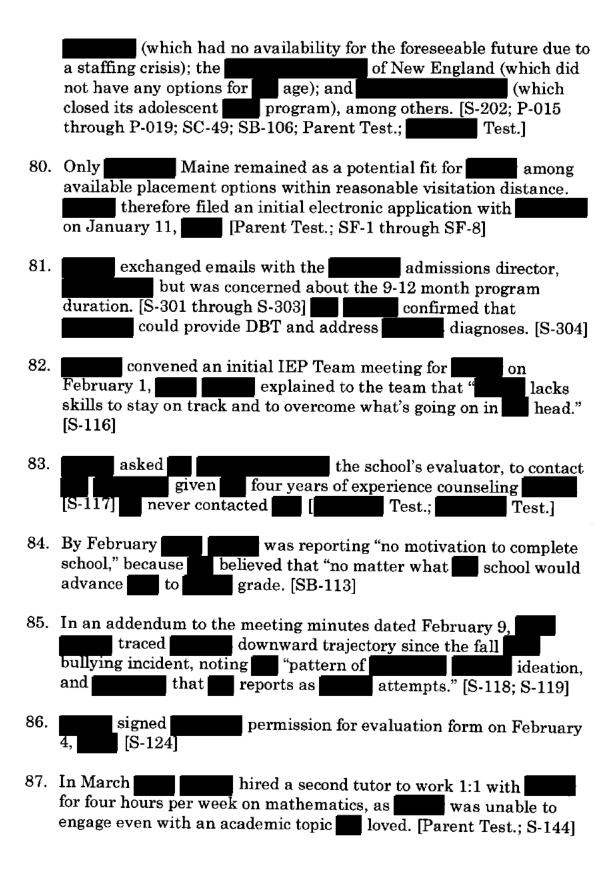


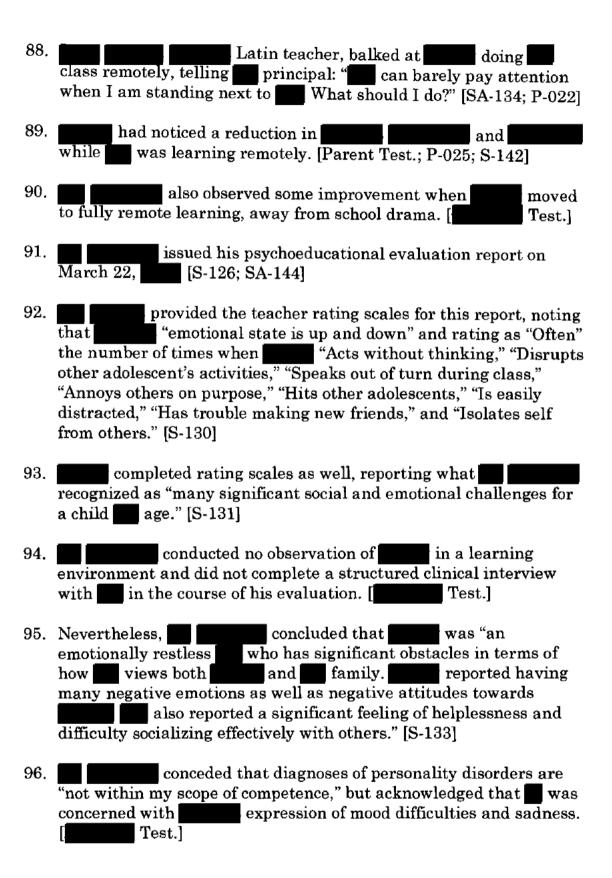


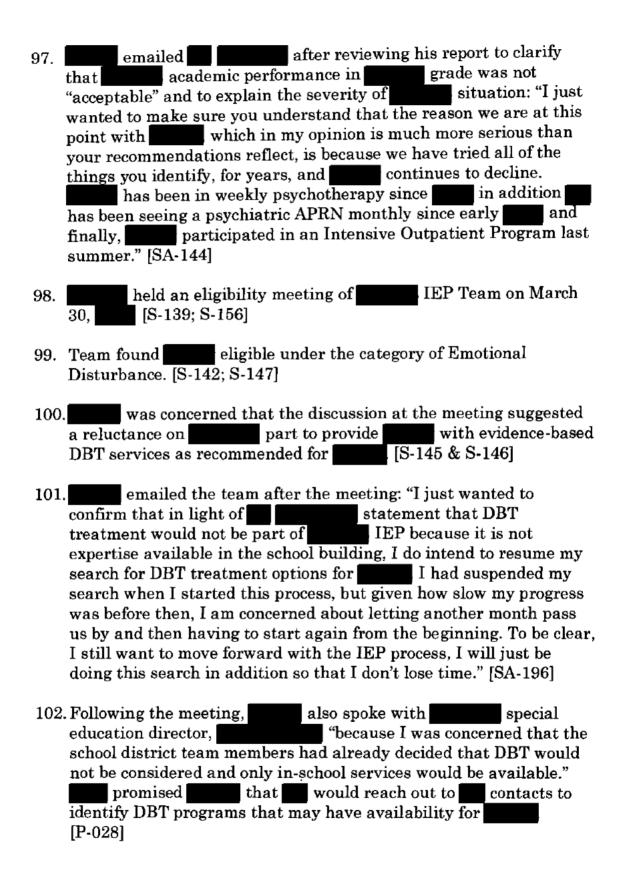


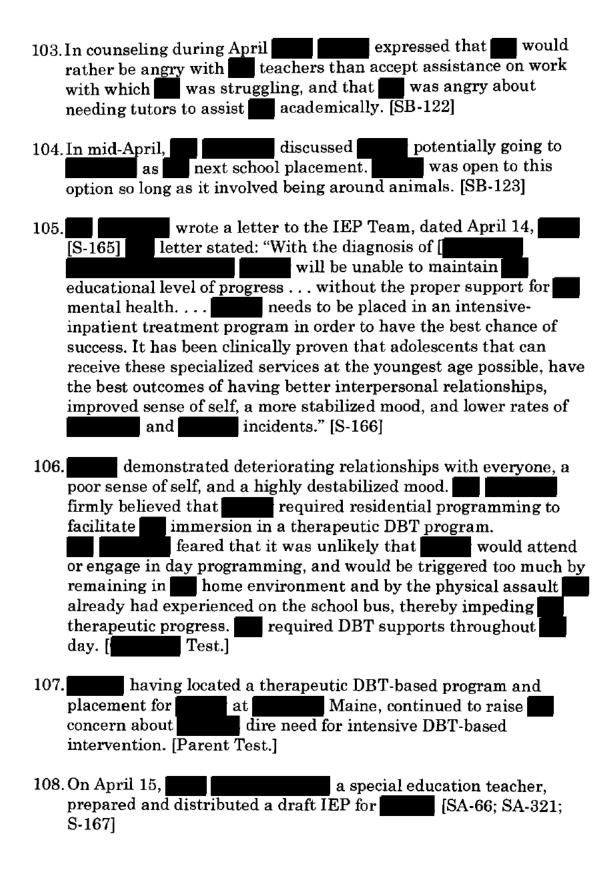
	try to keep on task. But even just me mentioning this mail turned into a shouting match." [SA-315]
67.	At about that time, still attempting to identify a placement at which could receive DBT, contacted out-of-district placement coordinator. One potential placement they discussed was Maine, which praised. [Parent Test.]
68.	In early December as COVID cases surged, and became remote students to protect their due to medical vulnerability. only in-school class was Latin. [S-88; SA-317; SB-102]
69.	At the time of transition to remote learning, was already failing or had not completed any work to be graded in multiple classes. [S-89; SB-103 (* is behind in all of classes")]
70.	In December based on referrals from counselor and psychiatric APRN, participated in a comprehensive neuropsychological evaluation conducted by Psy.D., of the of New England. The evaluation report issued on January 20, [S-91]
71.	diagnosed with plus based on history. [S-101] found that continued to demonstrate a high IQ (standard score of 126) [S-95], but "had a surprising amount of difficulty reading a group of words quickly and accurately," which suggested difficulties with processing speed. [S-98]
72.	who feels unappreciated, and in some ways cheated by others. moods are erratic and reacts to internal states impulsively but also unapologetically. has difficulty considering or caring about how behaviors affect other people, because internally consumed with getting own needs met." [S-101]
73.	report states: "sense of self is very unstable right now and is prope to more negativistic rumination than willingly

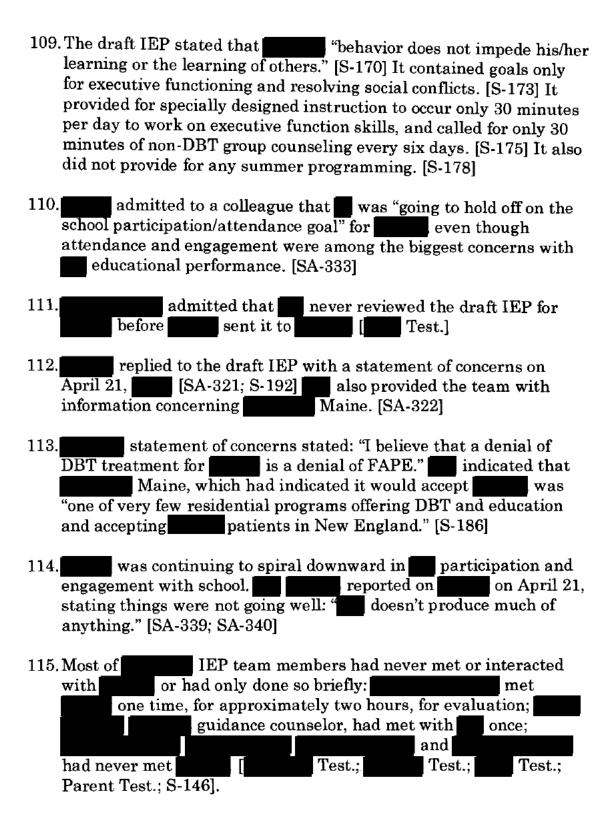


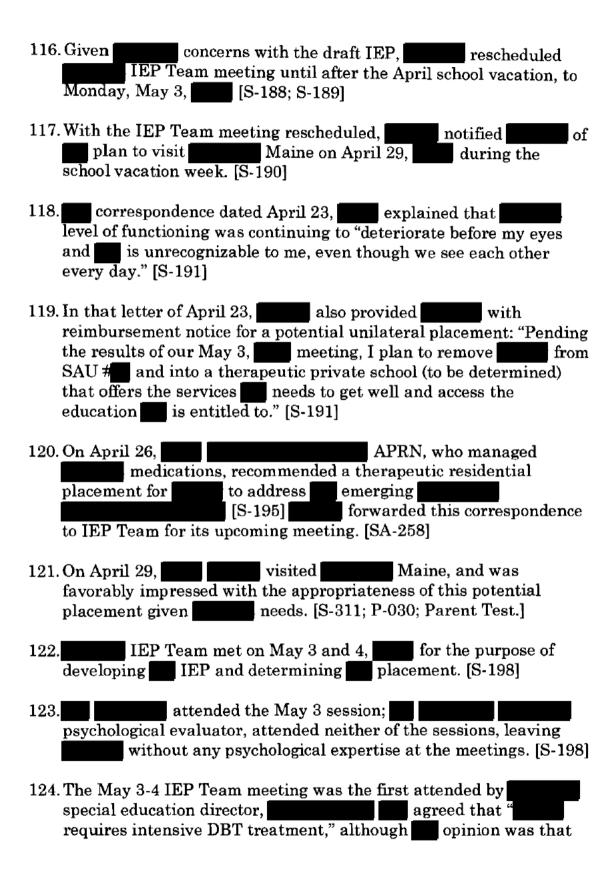


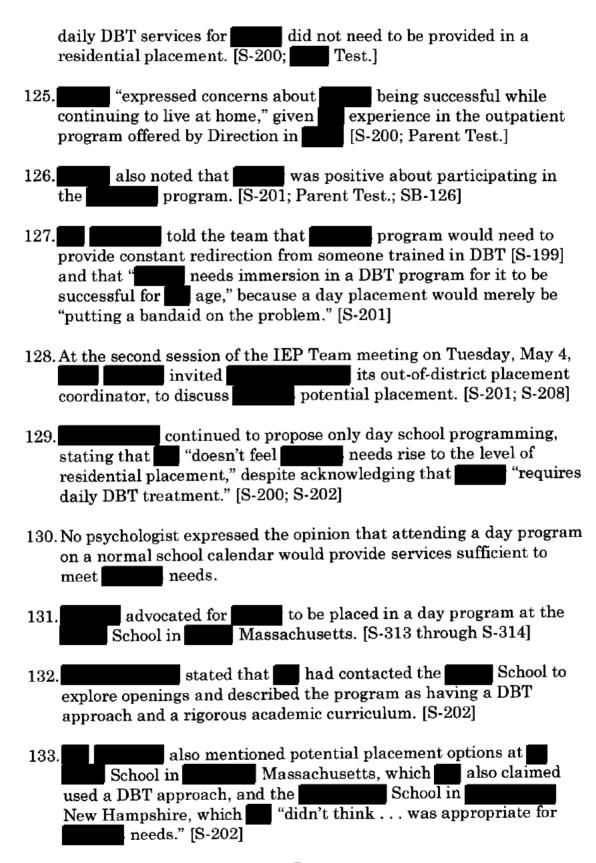


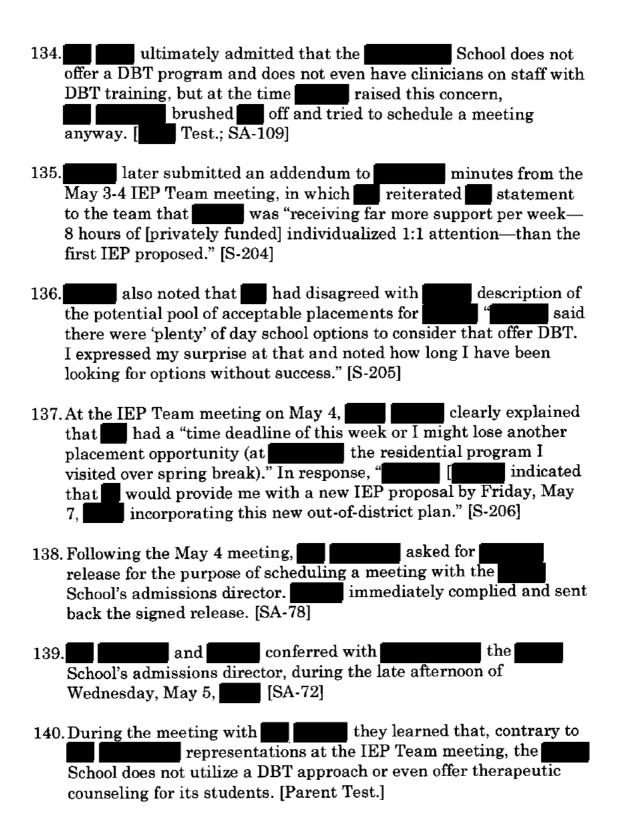


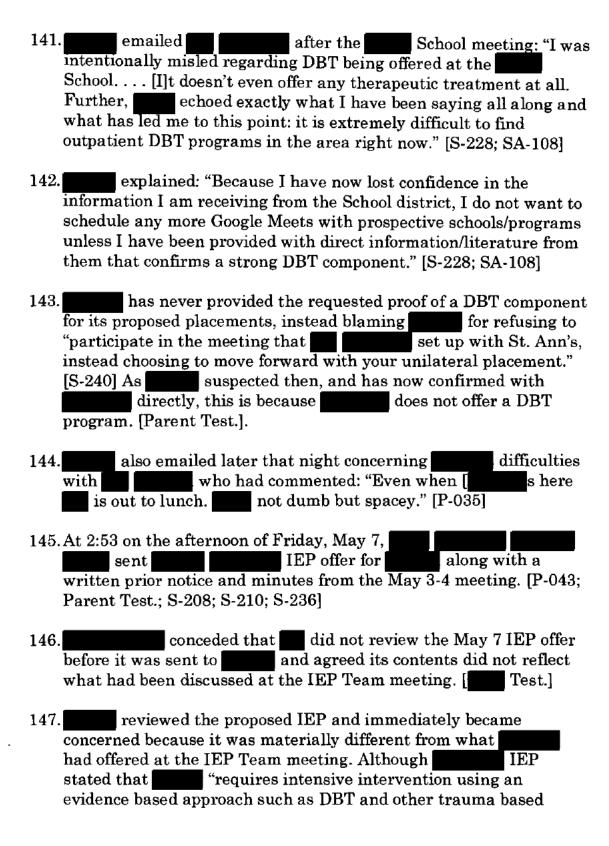


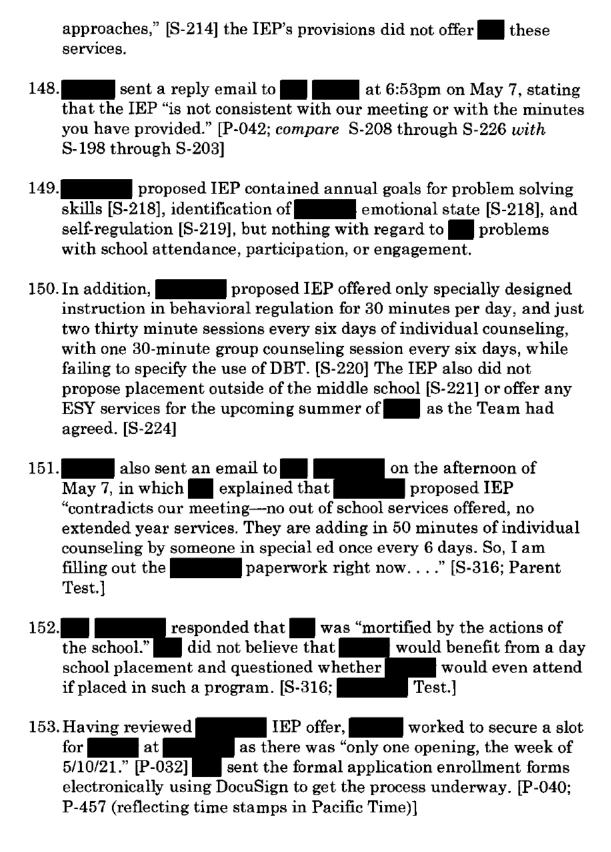


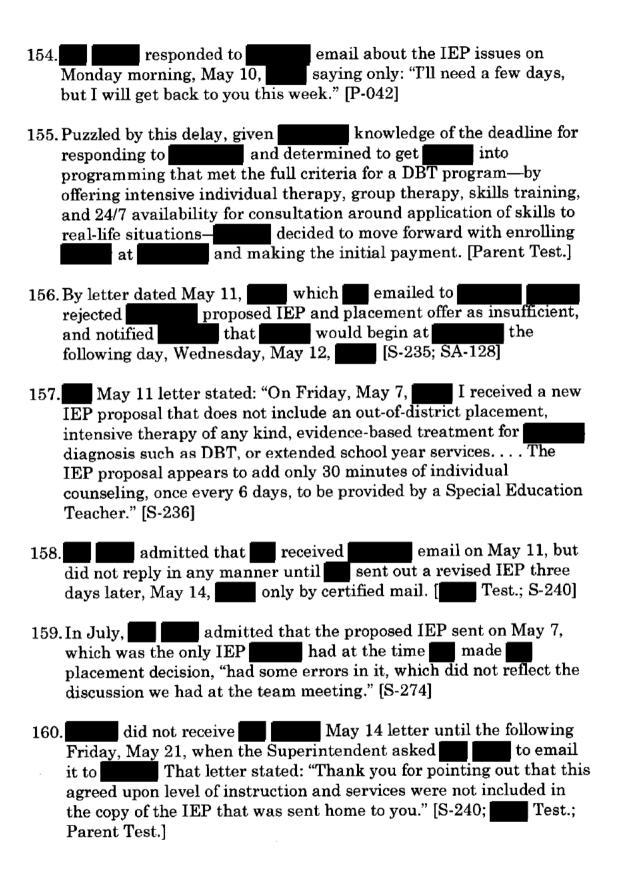


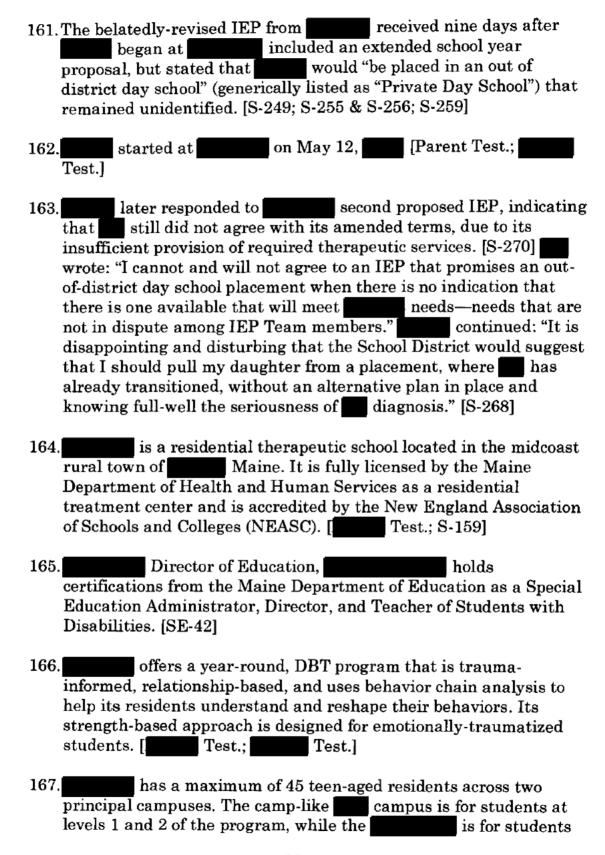


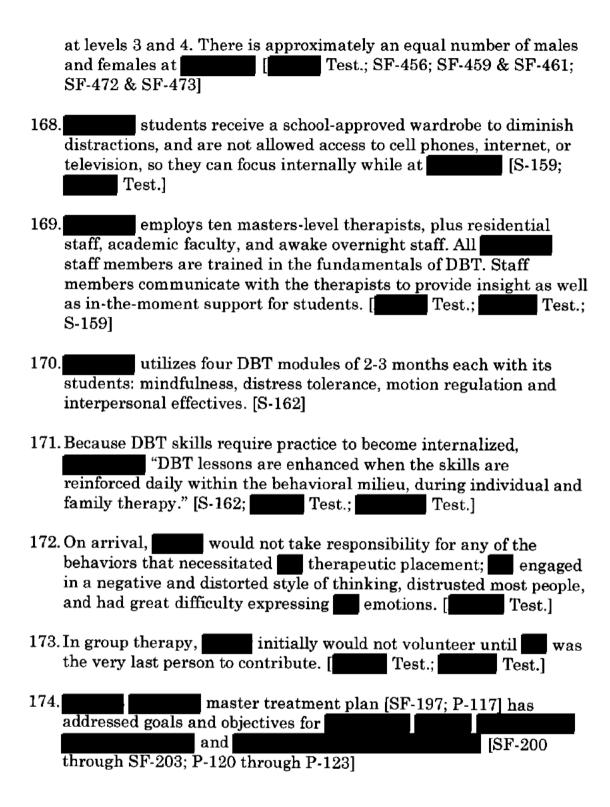


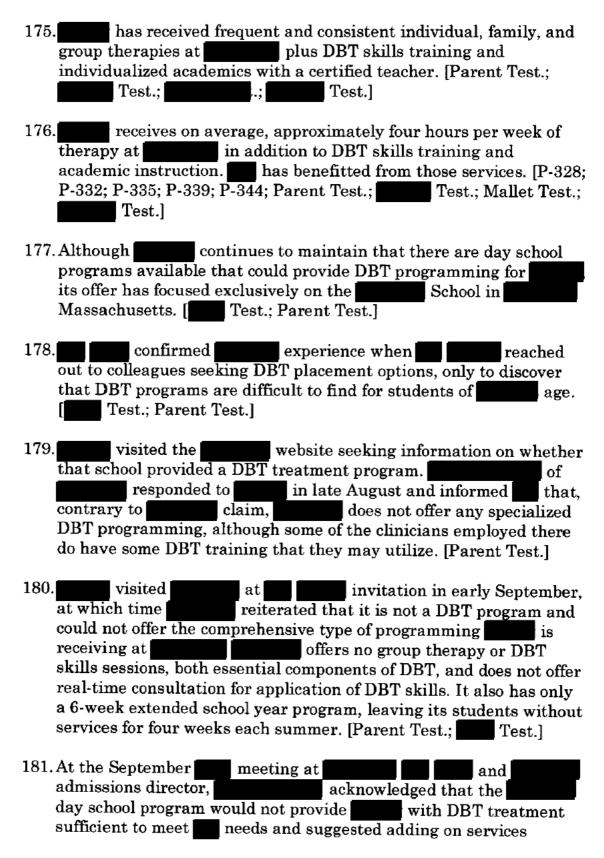


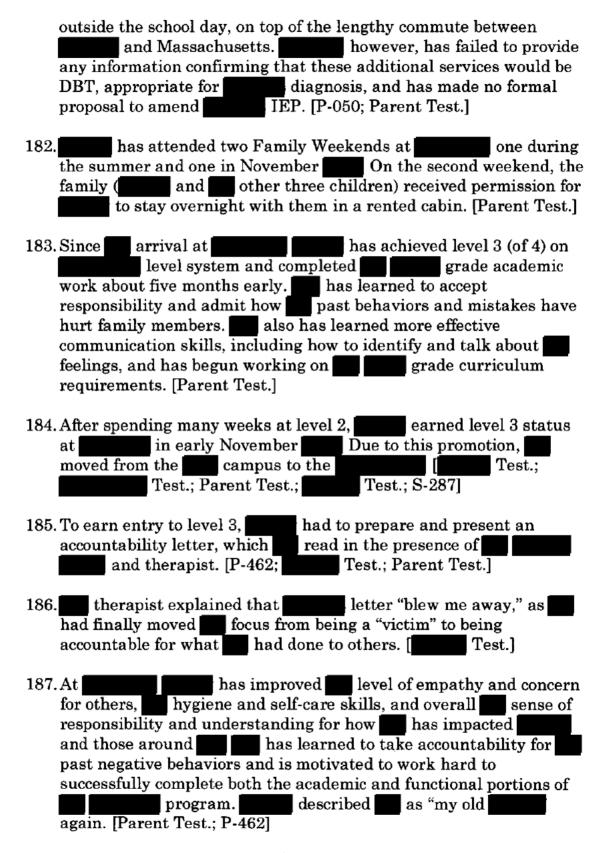


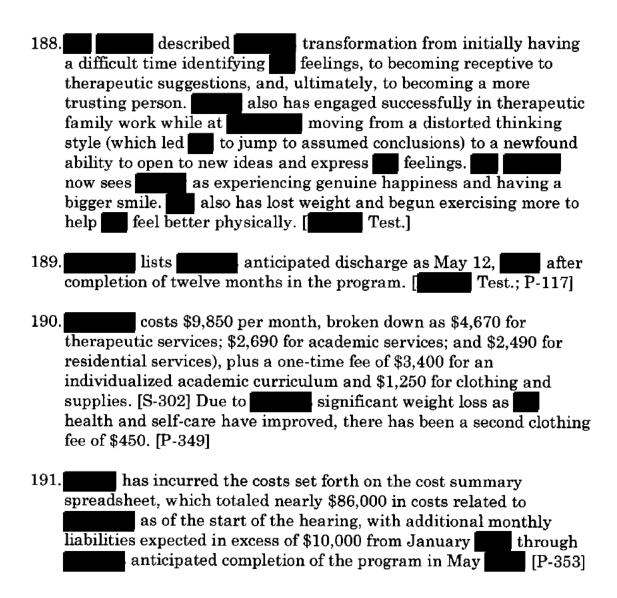












## CONCLUSION

For all the reasons enumerated above, respectfully requests that Hearing Officer issue an order in favor against awarding reimbursement of related expenses and awarding compensatory educational services, consistent with the proposed rulings set forth below.

#### PARENT'S PROPOSED RULINGS

- 1. has failed to meet its burden of proving by a preponderance of the evidence that the IEP sent to Parent on May 7, was appropriate under the IDEA, per the standard set forth in Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (
- 2. Although not necessary for resolution of the issues in this case, also has failed to meet its burden of proving by a preponderance of the evidence that the IEP sent to Parent on May 21, proposing a non-existent private day school placement capable of offering a DBT program, was appropriate under the IDEA, per the standard set forth in Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (
- 3. Parent has met burden of proving by a preponderance of the evidence that Student's unilateral placement at Maine is proper under the IDEA, per Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993).

4. Parer	nt is therefore entitled to re	imbursement of the enumerated costs related
to Stu	udent's placement at	Maine from May through
comp	oletion of the program, antic	ipated to occur in May
5.	violated Child I	Find rights under the IDEA by failing to
refer,	, evaluate, identify, and init	tiate programming for until thereby
entitl	ling to an award of c	ompensatory educational services.
Dated: Janı	uary 21,	Respectfully submitted,

### STATE OF NEW HAMPSHIRE

#### STATE DEPARTMENT OF EDUCATION



IDPH- FY-22-08-003

## SCHOOL DISTRICT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Set forth below are School District's proposed findings of fact and conclusions of law. Beyond what is set forth in this document, the School District ( the Hearing Officer to approve all the factual statements in its posthearing memorandum that would be central to a ruling in a favor on the six issues in this case.

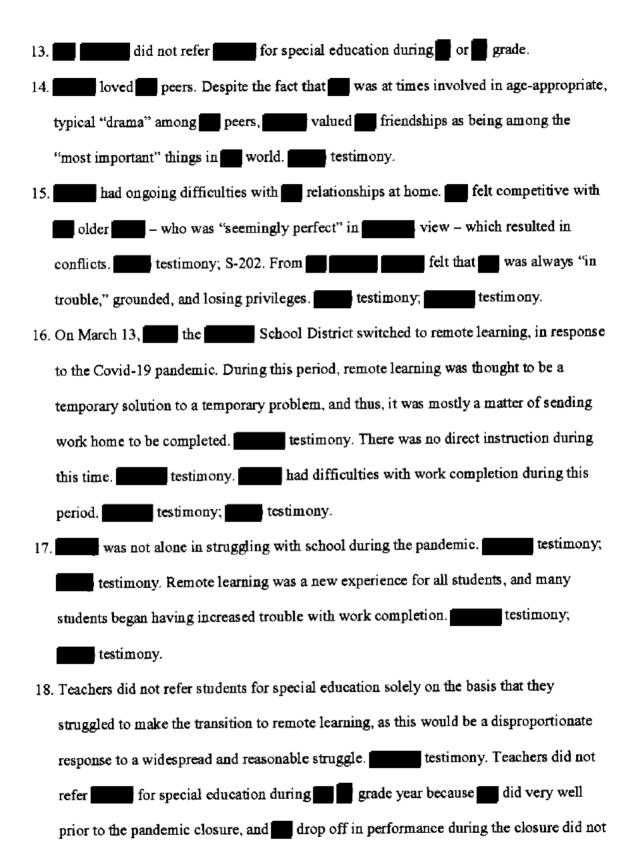
### Proposed Findings of Fact

- IEP and IEP development were appropriate.
- year-old child with a birthdate of is a Complaint.
- educational career has been marked by above-average performance.
- was never a "discipline problem" at school, nor did exhibit defiant or oppositional behavior at school. testimony; testimony; S-83. engaged with peers at a typical level, and seemed mature for age in a ability to interact with adults. Id. presents as "wise beyond years." testimony. testimony. did not seem at school. or
- runs an Academic Support program for students who need a designated time to work on homework and other work completion. testimony. Academic Support is a leads the Academic Support program regular education intervention. Id.

for students in and grade. Id. Academic Support is a class that meets every other day, for 45 minutes. Id. The Academic Support period typically consists of 5-15 minutes of discussing skills such as time management, organizational tools, and mindfulness. The remaining time – around 70 percent of time in Academic Support – is dedicated to work completion. Id.

- Students who are not enrolled in a world language are enrolled in Academic Support,
   which meets at the same time as world language classes.
- 6. Whenever a teacher has concerns about a student, that teacher brings his or concerns to the Child Study team. testimony; testimony. The Child Study Team is a group of professionals in the School District, including special education facilitators, guidance counselors, Academic Support staff, reading specialists, behavior specialists, and teachers. testimony; testimony. When a child is brought to the Child Study Team, the team strategizes ways to support the student. testimony; testimony. At times, students will be referred for special education on the basis of the Child Study Team's determinations. testimony. During the time period at issue in this case, was never brought up to the Child Study Team because teachers saw as a typical and well-performing student. testimony; testimony.
- 7. attended Academic Support during the school year, on the Parent's request. S-A-232. was not referred to Academic Support on the basis of teacher concerns. Id. In Academic Support, would work on completing late assignments. testimony; testimony. Although turned in well-done work, at times turned in assignments late. testimony; testimony. This was not unusual for students of age. testimony; testimony.

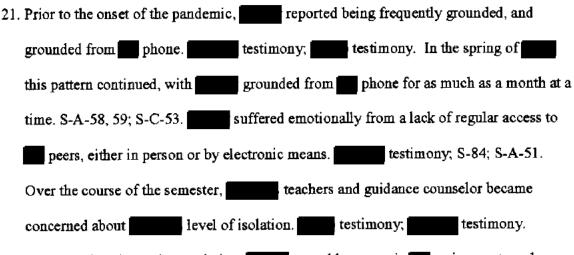
8.	did not require specialized instruction in order to turn assignments in on time.
	testimony; testimony. At the end of grade year, was
	discharged from Academic Support on the basis that no longer needed the support in
	provided, and on the misapprehension that the Parent agreed with dismissal.
	testimony. Upon learning of this change at the start of the school year, the Parent
	requested that be re-enrolled in Academic Support instead of taking a world
	language. S-A-232; testimony. agreed, and re-entered Academic
	Support for grade year. testimony.
9.	was disappointed not to be taking a world language. testimony.
	permitted to use the Academic Support period as a "study hall." testimon
	was seen as a leader in Academic Support. testimony; S-84.
10.	had good grades and attendance at school throughout the school year
	S-83, -84. Prior to switching to remote learning in March of was earning
	straight As all but one quarter (in which received one B grade). S-83.
	typical, average to above-average student during this time, and was actively involved in
	extra-curricular activities. testimony. During and and grade years,
	was "never" a student who would have been referred to special education.
	testimony.
11.	Following the school year, was able to leave Academic Support, and
	instead enroll in Latin, due to strong academic success and progress.
	testimony.
12.	believed that was having a "great year," prior to the onset of the
	pandemic. S-A-7.



many students. Id.

19. did not require special education in grade. testimony; testimony.

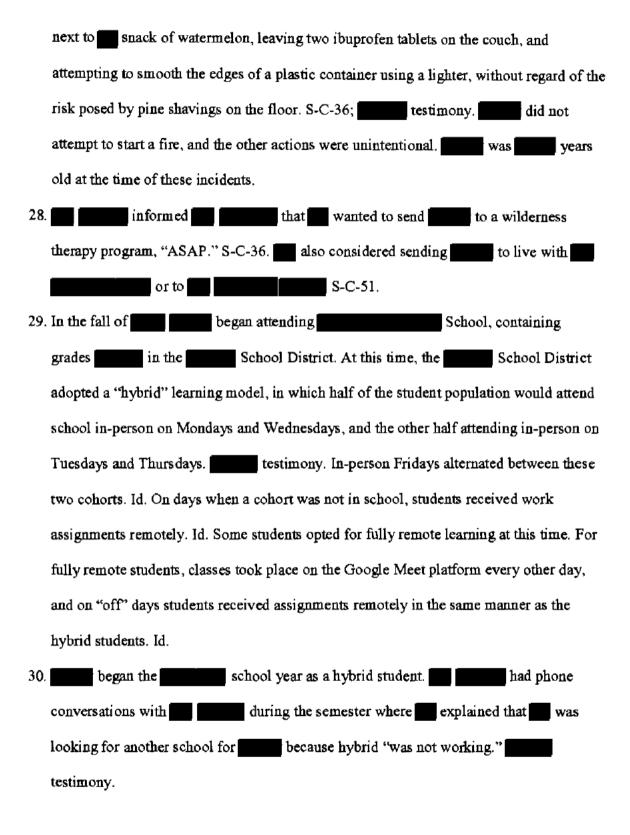
20. Teachers' roles changed significantly during this period of remote learning. Since there was no direct instruction, teachers reached out to students directly to check on them, usually via email. testimony. Most of the students age were not accustomed to communicating via email prior to the pandemic, which at times made communication challenging.

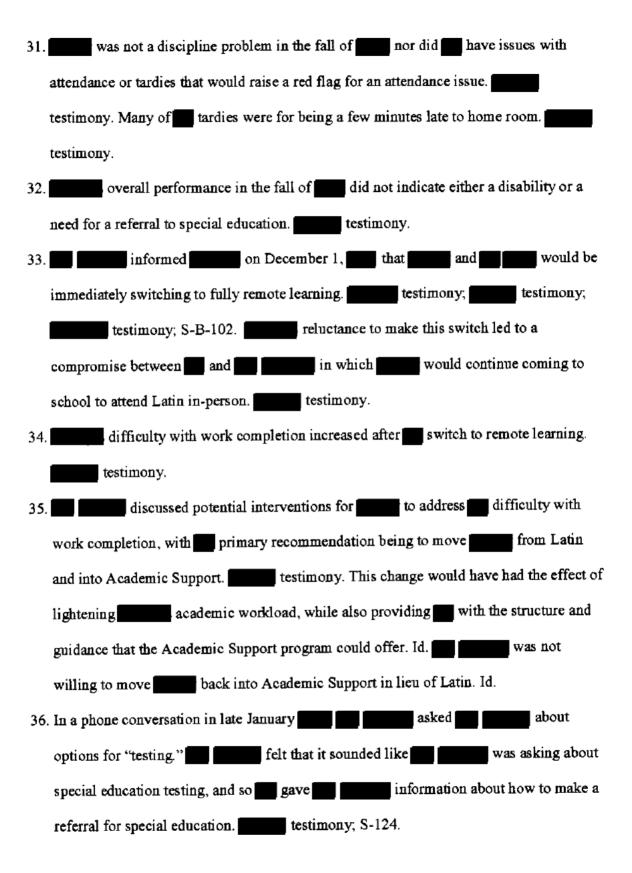


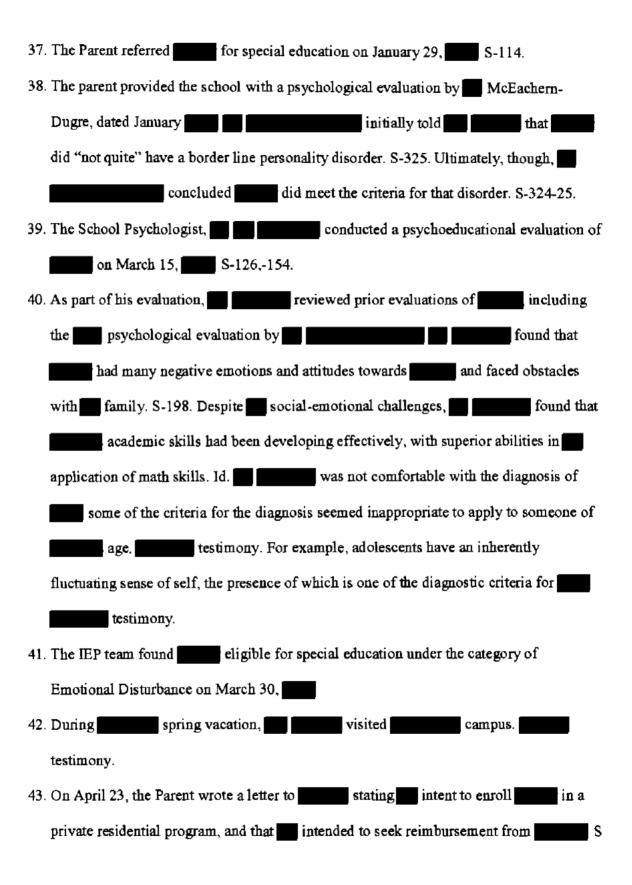
each of classes at the end of the school year. Itestimony; S-83. For semester grades in the spring of adopted Pass/Fail grading. These grades were earned, and resulted from the quality of the work that submitted, despite having been turned in late in the school year. See testimony; testimony. Grades for "Effort" remained on a letter grading system in the final quarter, and the grades assigned reflect the true grade earned.

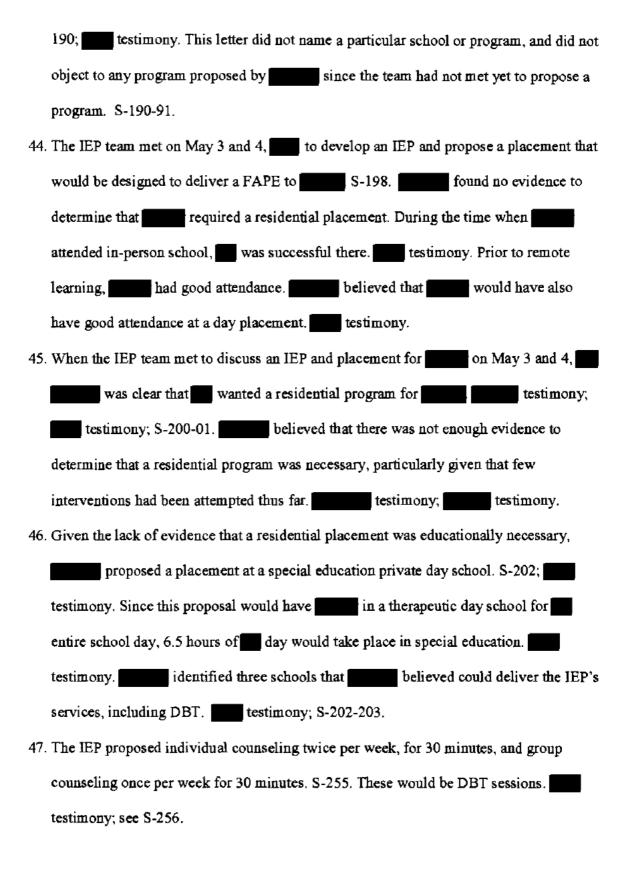
one C-. S-83. reported to counselor, that had 23. On June 16. on a couple of occasions. S-B-78. I made this report almost in a attempted bragging manner. testimony. Fortunately this was the only time gesture. See testimony. In January had not made any statements in the past six months, which was since that initial report in June testimony. S-F-5; in an out-patient DBT program was placed by In the summer of that met four days per week, for about called three hours per session. S-B-128-141. This program was intended to last 6 weeks, but after about two weeks in the program, the Parent withdrew from the group, on the basis that the Parent felt the program was not working, and was "making worse." S-202, S-B-79, 81, 141; S-C-34. pulling out. S-Cprogram prior to "loved" attending the 43. about things frequently reported to therapist, did during this time that made upset. This included verbally fighting not doing chores quickly or correctly, not cleaning up after after crafting or cooking, and leaving apple cores and food containers in room. S-C-45-48. was "unsafe" and "not in right reported to that "unsafe" behaviors included negligently leaving a paring knife

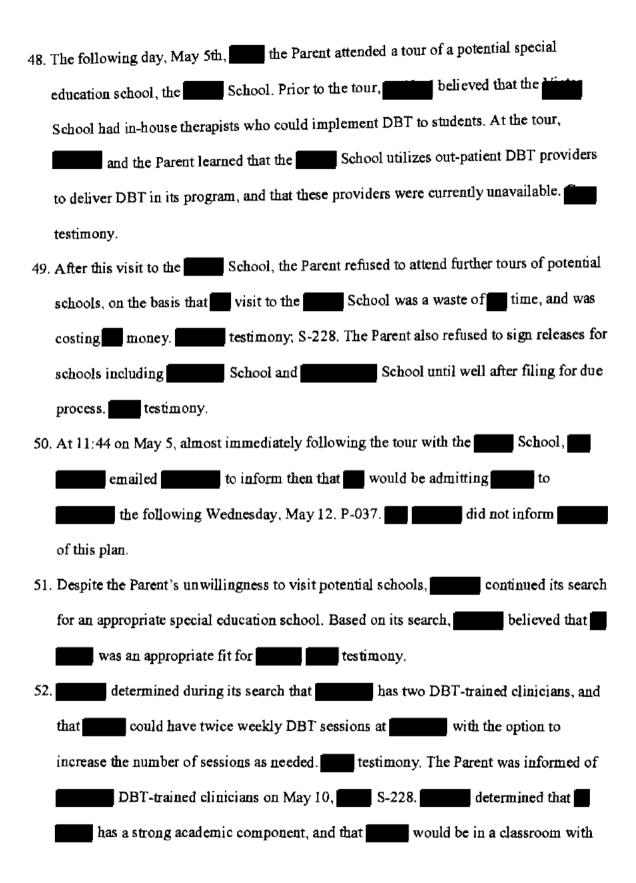
primarily reflect work completion. Id. received mostly As and Bs in Effort, with

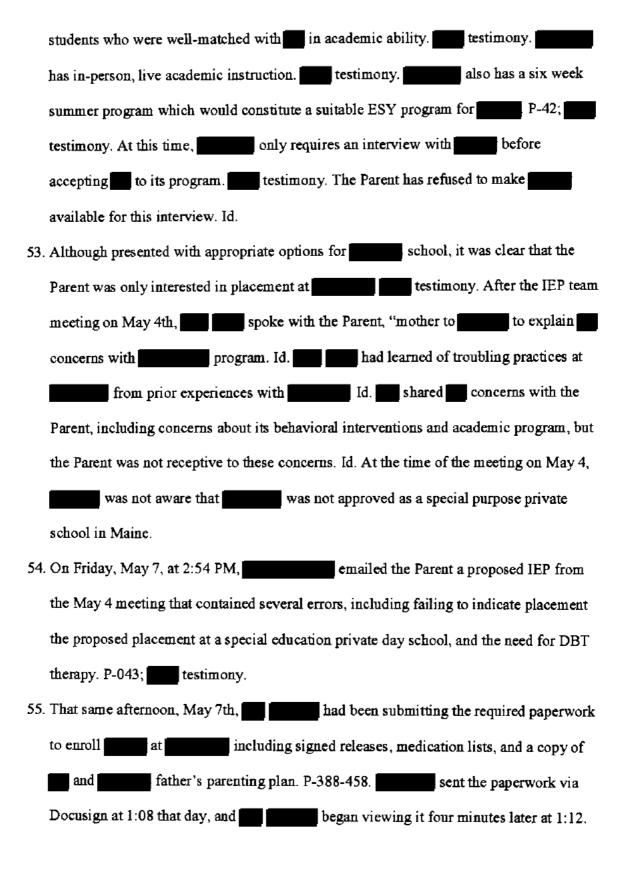


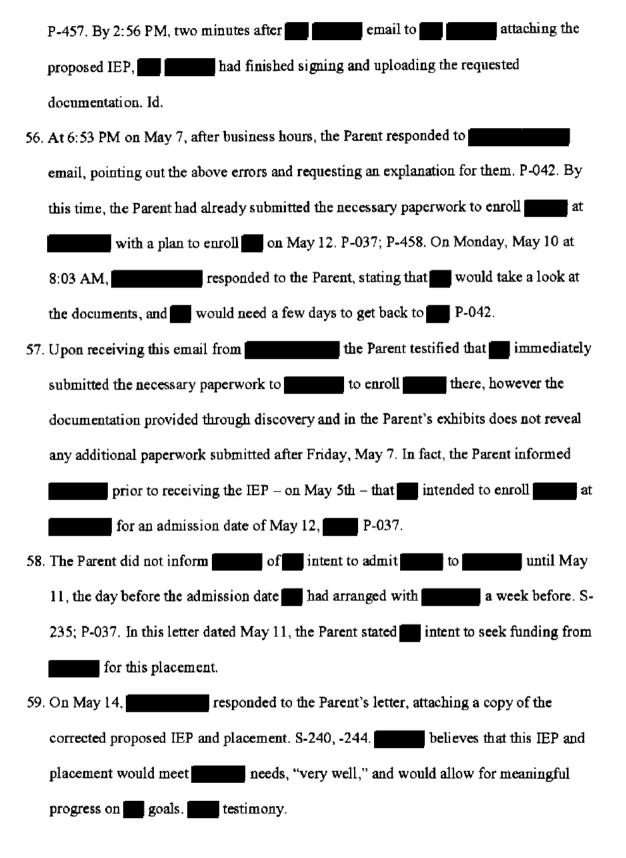












60.	The contents of this corrected proposal reflect the IEP team's discussions and decisions.
	testimony. The proposed placement at a private day school would include summer
	services, as reflected in ESY portion of the IEP. S-259.
61.	This IEP would have provided with a FAPE. testimony.
62.	The Parent signed rejecting the proposed IEP on June 4, S-270.
63.	Over the summer, made efforts to resolve the Parent's concerns with
	proposed placement, including by offering to help arrange wrap-around services, which
	would include additional DBT sessions and in-home supports. testimony.
64.	The family requested this due process hearing challenging the IEP and placement on
	August 9,
65.	had to lead to conduct an assessment of the reading skills while
	was at submitted that report to the
	Parent and the District. S-283. See Section 2012 concluded that strong reading
	skills and does not have a profile for a specific learning disability.
	testimony.
	b. is not an appropriate placement for
	i. is too restrictive for
66.	is not and has never been an approved special purpose private school. It is a
	for-profit corporation.
67.	engages in legally prohibited behavioral interventions, including the use of
	aversive techniques, as defined by Maine and New Hampshire law.

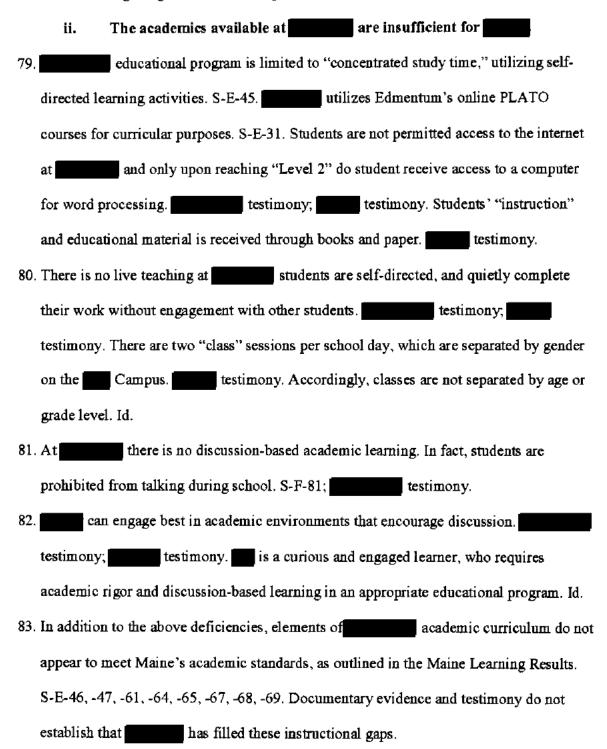
- has a practice of limiting children's access to and communication with their parents. In the first 30 days of a child's stay at or or is not permitted to call home under any circumstance.
- away. testimony. Children commonly run away from it is typical for more than one student to run away each summer. Id. Runaways are less common in the winter months, but not unheard of. Id.
- 70. has a practice of requiring a child to ask permission before speaking to a peer or to a staff member and of requiring any conversations to be monitored by staff.
- 71. Children at are required to ask permission before either sitting or standing.

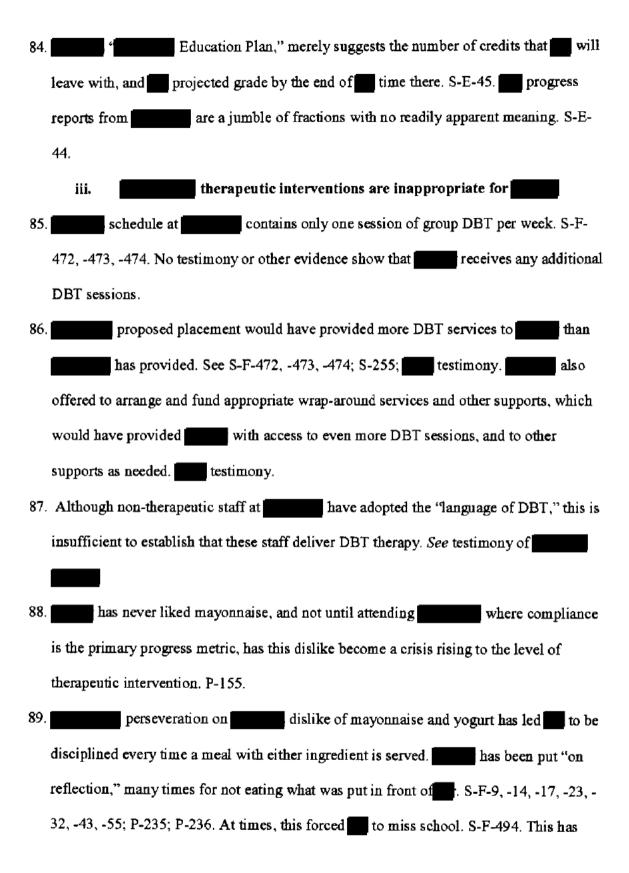
  testimony.
- 72. Children at may not "push back" against any expectations, whether it be how much they wish to eat, or the amount of time they need in the bathroom. P-231; S-F-77.
- 73. Children at may be punished for any manner of failures to meet adult expectations, from failing to turn in one's food log on time to being one of the last to stand and line up during a group transition. S-F-25, -40.
- was the victim of one of aversive techniques when was made to wear a vest that identified as a rule violator. P-197; testimony. This is a common intervention at a "received the vest" the day after having engaged in "pushback" with staff. P-198; P-197. The behavioral notes are unclear as to how long was made to wear the orange vest, but did so for at least two days. P-195, -196, -197; testimony. In addition to wearing the orange vest,

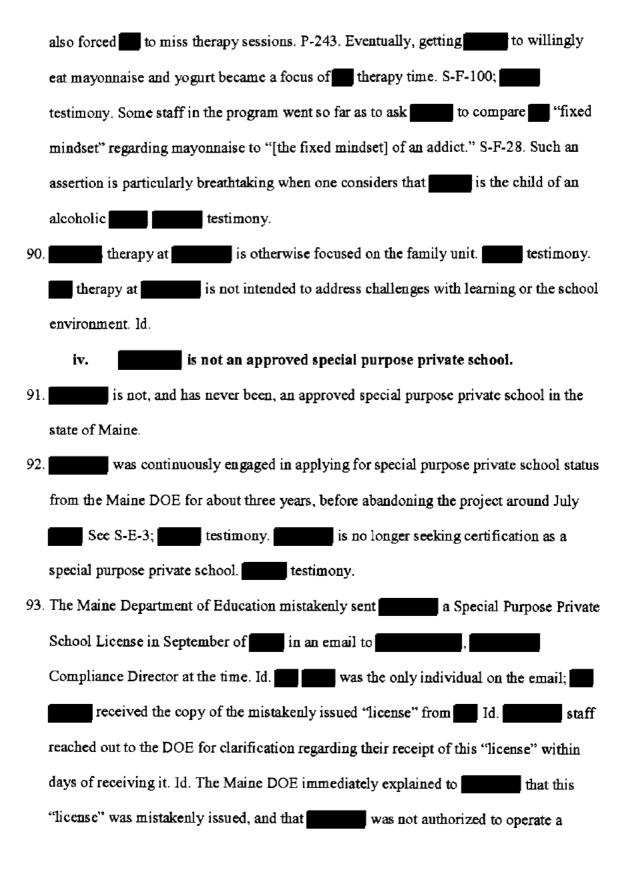
was required to move out of current sleeping arrangements and into a different location. The purpose of the vest is to identify children as rule violators. testimony. Children and staff recognize that vest-wearers are at risk of dropping a "level" due to their rule breaking. Id. Children wearing the vest are required to follow the rules of the level below them, and are not allowed to access the privileges associated with their level. Id. It can take "a few days" before a child can demonstrate improvement sufficient to have the vest removed. Id.

- 75. testified that wearing the vest makes the child stand out with peers which can effectively alter behavior. stated that "[The vest] is a consequence for behavior. It shows everyone else that that resident is not allowed to do certain things because they're back at level 1." Id.
- 76. Other behavioral interventions include students "going on reflection," which is similar to a time out, and can last as long as an entire day. Id. Reflection sometimes takes place in a gazebo. Id. While on reflection, a student is sometimes assigned a writing task, or a physical chore to complete. has received both writing assignments and chores when has gone on reflection. S-F-9, -14, -23, -25, -36, -40, -54; P-242.
- 77. Children at are not permitted to return home for holidays. This rule is in place because without it, had to "battle getting [the students] back." testimony.
- 78. Other violations of rules and expectations include:
  - a. Doodling on the inside of one's hat; P-187.
  - b. Reading or having books that are not approved as "classics" or self-help; S-F-479.
  - c. Having a fidget toy; S-C-12.

- d. Discussing news events; S-F-86.
- e. Failing to agree to have one's picture taken. S-F-55.







- about this communication about the DOE, and made aware that was not a licensed SPPS. Id.
- 94. Despite having received this explanation from the Maine DOE, held itself out as a special purpose private school using the mistakenly-issued "license." testimony; S-C-23.
- was the Executive Director at the time when applied to was deciding whether to enroll for and at the time when represented in an email to there. testimony. had received SPPS status. S-C-23. testified that "should not have done that." testimony. was aware that had not received the license, but that "thought that we were in the process of getting the license and that we would get it, like, within a week." Id. understood, from about the mistakenly-issued "license," that receipt of a conversation with real license was going to be "delayed," because they needed to do "more work on our policies."
- 96. knowingly misrepresented itself as a special purpose private school.

#### Proposed Conclusions of Law

- The District has the burden of proof regarding its IEP and placement, and whether the District met IDEA's child find requirements. RSA 186-C:16b; Order (12-10-21).
- The Parent has the burden of proof regarding whether is appropriate. D.B. v. Esposito, 675 F.3d 26, 35 (2012); see also Schaffer v. Weast, 546 U.S. 49, 57-58 (2005). Prehearing Conference Report (Amended) (11-30-21).

- The District did not violate its child find or referral duties during the time periods at issue in this case.
- 4. The District evaluated in all suspected areas of disability.
- 5. The IEP and placement proposed by in its corrected IEP on May 14, are reasonably calculated to provide with meaningful educational benefits in the least restrictive environment. See, e.g., Endrew F. v. Douglas County School District, RE-1, 137 S.Ct. 988, 1001 (2017); C.D. v. Natick Public School District, 924 F.3d 621, 629 (1st Cir. May 2019); Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).
- 6. engages in aversive behavioral interventions that are illegal in both Maine and New Hampshire. RSA 126-U:4, IV; Ed. 1114.07(c); Me. DOE Rules 5 071, ch. 33, § 2.1 (definition), 6.2(F) (2013).
- 7. The Parent failed to provide the required notice in a timely manner of intent to seek reimbursement for enrolling at 20 U.S.C. § 1412(a)(10)(C)(iii).
- 8. The Parent's placement of at is not proper under the Act, and therefore cannot support a reimbursement order. See Sch. Comm. Of Town of Burlington, Mass. V. Dep't of Educ. of Mass., 471 U.S. 359, 373-74 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993).
- 9. proposed placement included summer programming, and met state and federal special education obligations that govern extended year programming. See Ed

  1110.01(b) see also RSA 186-C:15, L
- 10. Parent obstructed ability to propose the placement at an IEP team meeting by stalling the search process for an appropriate special education school.

- 11. Compensatory education is an equitable remedy. The equities do not support a compensatory education order because the Parent's actions were unreasonable. The Hearing Officer may reduce or deny reimbursement for a unilateral placement where the actions taken by the parents were unreasonable. 20 U.S.C. § 1412(a)(10)(C)(iii).
- 12. The IEP team process followed by did not violate any of the procedural requirements of state and federal law. See generally Ed 1120; 34 C.F.R. § 300.320, .321, .322, .323, .324.
- 13. Even if there was a procedural violation under state and federal special education laws, any such violation did not have the requisite impact on or the Parent so as to warrant a remedy under state and federal special education laws. See 20 U.S.C. § 1415(f)(3)(E)(ii).

Respectfully submitted,

SCHOOL DISTRICT
By and through its attorneys,

By:

January 21,

# CERTIFICATE OF SERVICE

I certify that on this 21<sup>st</sup> day of January I mailed by first class mail and sent by electronic mail a copy of the within Proposed Findings of Fact and Conclusions of Law to Attorney for the Parent.