

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Nos. 06-1368; 06-1422

MR. I., AS PARENT AND NEXT FRIEND OF L.I., A MINOR;
MRS. I., AS PARENT AND NEXT FRIEND OF L.I., A MINOR,

Plaintiffs – Appellees/Cross-Appellants

v.

MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 55,

Defendant – Appellant/Cross-Appellee

On Appeal from a Judgment of the United States
District Court for the District of Maine

BRIEF OF APPELLEES/CROSS-APPELLANTS MR. AND MRS. I

Richard L. O'Meara
Amy M. Sneirson
Staci K. Converse
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651
Counsel for Appellees/Cross-Appellants
Mr. and Mrs. I

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STANDARD OF REVIEW

The standard governing appellate review in an IDEA case is “firmly settled” in this Circuit: in the absence of a mistake of law, which would be subject to *de novo* review, the Court of Appeals should accept the District Court’s resolution of issues that present mixed questions of fact and law so long as the District Court’s conclusions are not clearly erroneous on the record as a whole. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1087 (1st Cir. 1993); *Kathleen H. v. Massachusetts Dept. of Educ.*, 154 F.3d 8, 13 (1st Cir. 1998).

STATEMENT OF THE ISSUES

1. (School’s Appeal) Did the District Court commit clear error in determining that L.I. is eligible for special education and related services under the IDEA and parallel Maine special education law?
2. (Family’s Cross-Appeal) Did the District Court err in determining that the Family is not entitled to reimbursement of the costs associated with L.I.’s unilateral placement at The Community School and/or in declining to issue an order specifically awarding L.I. compensatory educational services?

INTRODUCTION

The appeal and the cross-appeal arise out of a dispute as to whether L.I., a student with Asperger's Syndrome who attempted suicide at age eleven due to extreme social difficulties in her public school resulting from her disability, is eligible for special education and related services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* (1999).

As accurately described by the District Court, Asperger's Syndrome is "a clinically recognized pervasive developmental disability," *App.70*, that is properly categorized as "an autism spectrum disorder." *App.71*. It is 'one of a distinct group of neurological conditions characterized by a greater or lesser degree of impairment in language and communication skills, as well as repetitive or restrictive patterns of thought and behavior.'" *App.71* (*quoting* Nat'l Inst. of Neurological Disorders & Stroke, Nat'l Inst. of Health, Pub. No. 05-5624, Asperger Syndrome Fact Sheet (2005)). The symptoms of Asperger's can include limited interests or an unusual preoccupation with a particular special interest to the exclusion of other activities, repetitive routines or rituals, peculiarities in speech and language, the inability to interact successfully with peers, and problems with non-verbal communication. *App.70*. As the District Court explained, although early intervention may be beneficial, "Asperger's Syndrome is continuous and lifelong," *App.71*, and incurable by medication, *App.89*.

The District Court issued a decision, *App.69-122*, agreeing with the Family that L.I. is eligible for IDEA services. It concluded that the Hearing Officer had erred in ruling otherwise in her administrative order, *App.18-25*, and rejected the Magistrate Judge’s Recommended Decision, *App.26-68*, which had suggested that the Hearing Officer’s legal error was harmless.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

The District Court deferred to the factual findings made by the Hearing Officer, yet correctly made its “own factual findings on issues that she failed to resolve or address because of her [legal] error.” *App.83*. With respect to the facts that it found, the District Court stated that although “[t]he parties color [the facts] differently, . . . [t]here are no serious disagreements.” *App.72*.

The District Court found the following facts, shown by citations to its Memorandum Decision and Order in the Appendix. *App.69-122*. Supplemental evidence offered in this Statement of the Case, principally set forth in the footnotes to provide additional detail, is cited to the Record:

L.I. was born in January 1992, *App.72*, and attended kindergarten and first grade in a multi-age (K-2) classroom at the Hiram Elementary School in M.S.A.D. No. 55. *App.72*. L.I.’s parents then transferred her to her home school, Cornish

Elementary School. *App.72*. L.I. performed well academically there during grades 2 and 3. *App.72, 86*.

As nearly everyone who knows L.I. has described her, she is the type of child who appears to “want the world her way only.” *App.89*.¹ This disability-related trait began to take a toll on L.I.’s social performance and emotional well-being at school. Beginning in fourth grade (2001-2002), L.I. began to exhibit emotional issues at school, including anxiety and sadness, as well as difficulties with peer relationships. *App.72*.

During the summer before fifth grade (2002-2003), L.I. began to request that her mother provide her with a home-school program. She begged not to have to go back to Cornish Elementary, *App.72*, but her mother refused this request, because of her confidence that the public school staff she already knew very well as colleagues and friends could be relied upon to address L.I.’s issues appropriately. *Mrs. I at 606*. Despite her mother’s confidence, L.I.’s emotional issues worsened, as documented by her fifth grade teacher, who noticed “that [L.I.] seemed to be exhibiting signs of depression” and “sat at a distance from her peers whenever

¹ L.I. has irrationally strong, black-and-white feelings about certain issues of special importance to her. *Dep. Hannon at 11-12; Mrs. I at 597*. She has yet to learn how to identify and appreciate the perspective of others. *R81; Dep. Hannon at 11-12*. As a result, she spent so much of her time at Cornish Elementary unreasonably upset by perceived unfairness that she came to see it as a prison-like, hostile environment. *Mrs. I at 603; R102*.

possible;” the same teacher also noted that the “health teacher and school counselor commented about [L.I.’s] emotional as well as physical distance from others.” *App.72, 87.*² Counseling sessions and Prozac did not improve L.I.’s situation. *App.72.*³

In fifth grade, L.I.’s circle of peers was restricted to a very narrow group of “misfit” boys, and one female friend who happened to share her special interest in Japanese anime. *App.72-73.*⁴ L.I.’s grades dropped from “high honors” to “honors” and she began to lose her motivation to maintain good grades. *App.86.*

² The fifth grade teacher wrote also wrote that certain school rules “were a major issue for her.” *R103; R363* (Principal’s letter acknowledging that “the rules have always been difficult for [L.I.]”). Similarly, the school counselor wrote about L.I.’s difficulties during fifth grade having been obvious at school: “It should be noted that I had concerns about [L.I.’s] mental health, particularly her depressed state. This was obvious in her comments and writings. It is challenging for [L.I.] to explain and process her emotions with another person She is a unique individual with many strengths but also one who has a disability, which makes it difficult for her to make and maintain social relationships She has a black and white way of thinking when it comes to fairness and can be unreasonable at times as it relates to this.... [M]y feeling is that [L.I.] didn’t feel safe or comfortable here at Cornish Elementary This was L.I.’s perspective and because of this it became very difficult to meet her needs within this environment.” *R104.*

³ Throughout fifth grade, L.I. continued to request home-schooling, stating repeatedly and emphatically that she no longer could tolerate public school. *Mrs. I at 603.*

⁴ The fifth grade teacher lamented that L.I. “so often is not relating to any of her classmates on a personal level or they to her.” *R101.*

Going into the sixth grade at Cornish Elementary (2003-2004), L.I. tried to change her appearance, her clothing, and her study habits (*i.e.*, she tried to do worse academically) in an attempt to fit in socially with her peers. *App.73*. Her difficulties at school rapidly became acute, however, as she missed four days of school within the first three weeks. *App.73*. Her sixth grade teacher quickly realized that she was unable to reach L.I. the way she could other students and that L.I. was not engaging with her or with other students in the class. *App.87*. The teacher also noted that L.I. tended to create a social distance between herself and the other students, except for certain younger “underdog” or “misfit” students. *Id.*⁵

The teacher observed that L.I. was having “difficulties with peer relationships, perhaps due to a ‘serious lack of awareness of the social and emotional ‘state’ of her peers and perhaps adults.” *App.73*.⁶ Further, at a parent-teacher conference in September 2003 Mrs. I first noticed red, swollen cuts and scratches that L.I. had carved into her arm. The teacher acknowledged that L.I.

⁵ In reports made for the purposes of evaluation, the sixth grade teacher listed the following as areas in which she was seeking help for L.I.: “Concerns about hostility to peers, ‘world,’ refusal to complete work, passive resistance to meeting learning goals, including those she helped to create.” *R196*. L.I.’s fifth and sixth grade teachers also co-authored a letter in which they reported that, while in their classes, L.I. seemed unable “to understand or interpret social situations with peers. Unless she is guided through encounters she finds difficult, she can interpret events and/or comments in ways that tend to make her withdraw” *R455*.

⁶ The teacher also wrote that L.I.’s “sense of fairness and appropriateness are [sic] evidently distorted.” *R200*.

had been taking prolonged breaks to visit the restroom during class time and might have been “carving into her arms” while in there. *App.*73. Mrs. I and the teacher proposed to address L.I.’s combination of missed days and unacceptable new study habits by proposing a “contract” that would reward her for successful completion of work assignments. *Id.*

L.I. reacted negatively to the academic contract, however, and remained home from school for the two days leading up to the date when the signing of the contract was to occur. *Id.* On the day it was to be signed, October 1, 2003, L.I. attempted to commit suicide by an overdose of various medications. *Id.*⁷ The hospital social worker told Mr. and Mrs. I that in order to produce a positive effect on L.I.’s emotional functioning (and allow her to be released to their custody), they would have to promise her that something significant would change. *Id.*

Addressing the root of the problem, they assured L.I. that she would not have to return to Cornish Elementary. *Id.*⁸

⁷ There can be no doubt that the suicide attempt resulted from school issues. In the emergency room, L.I. repeatedly acknowledged that she hated school. *R366-369*. Subsequently, both the treating counselor and expert evaluator confirmed the indisputable causal link. *Northrop at 578, 582; Popenoe at 696-697*.

⁸ The social worker who began to treat L.I. shortly after her attempted suicide offered a preliminary diagnosis of Asperger’s Syndrome and arranged for neuropsychological testing to be completed by Dr. Popenoe. *R387*. The School, repeating an attempt to distort the record that failed in oral argument before the District Court, alleges in its Brief that “her doctors recommended that LI return to school after two days.” *School’s Brief at 4*. This is an inaccurate reference to a

The Family notified the School of the suicide attempt and indicated that L.I. would not be returning to school immediately. *App.73*.⁹ The School convened an initial PET meeting for L.I. on October 30, 2003.¹⁰ *App.73*. The School did not seek to perform its own evaluation of L.I. and instead determined to await the results of the neuropsychological testing already being conducted by Dr. Ellen Popenoe; in the meantime, the PET ordered that L.I. would receive tutoring outside of school for “up to ten hours per week until the evaluations are reviewed.” *App.73 (R88-89)*. Despite the parents’ continuous efforts and frequent attempts to

note on the emergency room chart recommending that L.I. not return to school for the next two days while under suicide watch, and making no recommendation concerning whether, when, or under what conditions L.I. should return to school by the ER personnel. *Compare Transcript of Oral Argument* at 29, line 23 (assertion by School’s counsel that “her own doctors . . . said she should stay out of school for two days”); with *id.* at 42, line 2 through 43, line 4 (Family’s counsel explaining emergency room report, which states: “Mother to sleep with patient for continued safety precautions. Patient to remain out of school the next two days. Family to maintain high safety precautions.”); *R125*.

⁹ An e-mail message from Mrs. I. to the School’s special education director read: “There’s no way my daughter is coming back to MSAD #55 for the time being, because she has suffered too much emotional pain with her classmates. So we’re looking at alternatives. The school where her older sister goes [The Community School] might be appropriate, but we don’t know yet.” *R362*. They later had a telephone discussion about potential placement options, including the Aucocisco School. *Mrs. I at 612-13*.

¹⁰ The District Court’s decision contains a typographical error: The initial PET meeting took place on October 30, not October 10, 2003. *App.73; R86*.

communicate with the special education director concerning tutorial arrangements, the School never delivered the promised tutor for L.I. *App.73.*¹¹

In her neuropsychological evaluation report, Dr. Popenoe reported that L.I.’s “adaptive behavior is below average and an area of significant weakness. Thus while she is very bright, her ability to navigate in real life settings is more limited.” *App.90.* Dr. Popenoe’s testimony at the hearing amplified this concern, as she explained that L.I.’s “adaptive functioning is in the borderline range which is close to what you see in mental retardation.” *Id.* Her report also indicated that L.I. demonstrated weaknesses in “skills needed to protect her health and response to illness and injury.” *Id.* As the District Court properly found, these “are not consequences flowing from a short-term mental health crisis, but from L.I.’s underlying, permanent condition of [Asperger’s Syndrome].” *Id.* Indeed, as Dr. Popenoe concluded, L.I.’s depression resulted from “the severe stress she was under socially and her feelings of loss over not being accepted and having close friends. This is common in adolescents with Aspergers.” *Id.*

¹¹ All through November and December, Mrs. I attempted to prompt the School to provide the tutoring ordered by the PET. *Mrs. I at 613.* On November 4, the special education director promised to call potential tutors that very day and get back to Mrs. I. “ASAP.” *Mrs. I at 613; R358.* On December 4, after further prompting, the special education director undertook to “try and reach [a potential tutor] this afternoon to discuss the tutoring for [L.I.]” *R355.* By mid-December, the tutor had still not been contacted by the School. *Mrs. I at 615; R351.*

Concluding that L.I. “has significant needs if she is to return to school,” *App.97 n.14*, Dr. Popenoe made numerous recommendations, among the most important of which were a speech-language evaluation and therapy (including both individual and group components), direct social skills teaching, constant supervision at school and protection from teasing, a social skills coach (“to help her build social skills and develop social judgment”), alternative strategies for discipline, cognitive behavioral therapy (to develop “skills for coping with depression”), transitional assistance, and the opportunity to type all of her written work. *App.92.*¹²

L.I. also was evaluated by Amber Lambke, a speech-language expert, who concluded that L.I. “show[ed] deficits in her ability to tolerate conversations and people that are outside her areas of interest” and presented with “significant social understanding deficits which impact her overall emotional and social well being.” *App.90.*¹³ Ms. Lambke made several recommendations for L.I.’s school program,

¹² Dr. Popenoe explained that L.I. “reports very negative feelings about school,” including “feelings of alienation and dissatisfaction regarding school,” *R77*, and concluded her report with a warning that “the outlook for [L.I.] is very good, but dependent on the level of intervention she receives over the years. Perhaps the most important thing to remember is that with [L.I.’s] strengths and weaknesses, she will do very well at many things, but poorly at some others. Thus, it may seem that she should be more capable of some things than she actually is.” *R83*.

¹³ Ms. Lambke also observed that “there is evidence that [L.I.] is subject to black and white interpretations of problems, she can lack an understanding of the reasoning behind which a particular action is taken, and demonstrates naïveté and

including certain computer software to teach nonverbal emotions directly, specific teaching about deciphering fact from fiction, alternative strategies in lieu of punishment, and familiarizing L.I.'s therapist with Asperger's Syndrome. *App.92.*

Given the School's failure to provide the promised tutoring, Mrs. I attempted to home-school L.I. beginning in November 2003, but this effort was unsuccessful.

App.74. In January 2004, desperate for some kind of educational program and receiving no help from the School, the Family succeeded in persuading a private school known as The Community School to accept L.I. on a part-time, trial basis.

App.74; 102 n.17 (L.I. attended a single class during January, and later four days of classes per week in February 2004). On January 5, 2004, Mrs. I. sent a letter to the School recounting its failure to provide L.I. with the PET-ordered tutor and

indicating that L.I. would be "beginning private school this month."¹⁴ *App.74,*

App.101. On January 28, 2004, Mrs. I. sent a second letter to the School indicating

simplistic understanding with certain topics including things like employment, dating, discrimination, sexism, etc. Some of her responses on the [testing] also suggest difficulty applying her knowledge in a particular situation to the world at large and her own personal experiences. . . . The degree to which she allows herself to become upset over events in her life appears disproportionate to how a typical individual might. ***In order to improve her social understanding in these areas, [L.I.] will require direct teaching of these skills.***" *R69 (emphasis added).*

¹⁴ The special education director never replied to this letter. *Mrs. I at 617; R349.* On January 20, 2004, having received no response, Mrs. I wrote separately to the School's Superintendent. *R349.* Although the Superintendent called the Family to promise a response to the letter, the Family never received one. *Mrs. I at 617.*

that the Family was “planning to enroll” L.I. at The Community School; this letter referred to payment being made by the School for this private placement and to the IDEA’s 10-day notice requirement. *App.74, 102.*

The Community School is a small private day school for students in grades 7-12 with a student-to-staff ratio of 8:1. *App.74, n.2; App.104.* It fosters “an environment where other students respect differences, discourage teasing, and cliques are not as common.” *App.92 n. 10.* These characteristics “are unique, not mainstream, and [are] not reflective of L.I.’s time at public school.” *Id.*¹⁵ At the time L.I. enrolled there, The Community School already had one publicly placed IDEA student with Asperger’s Syndrome and previously had enrolled other students with various disabilities. *App.104.*

L.I. still had not been officially accepted as an enrolled student at The Community School by the end of February 2004. *App.102.* The PET convened on March 3, 2004, to consider the evaluation results and make a determination about

¹⁵ The Community School achieves these attributes through a non-competitive learning environment, in which it has high expectations for all students, but awards only pass-fail grades. *R419.* It has satisfied the 84 rigorous standards required to become fully accredited by the New England Association of Schools and Colleges. *Id.* Its philosophy is to give students “a voice in how their school is run,” allowing them to “consider diversity, human values, and conflict resolution.” *R418.* In March 2004, the School’s special education director visited The Community School and reported back to the PET feeling that it was “wonderful” and that he was “more than impressed.” *R294.*

L.I.'s eligibility for special education services. *App.74.*¹⁶ The PET easily reached consensus on L.I.'s dual diagnoses of Asperger's Syndrome and Adjustment Disorder with Depressed Mood, as determined by Dr. Popenoe. *Id.* The PET also discussed the observations of L.I.'s sixth grade teacher, who described how L.I. had distanced herself socially, failed to engage, and disappeared into the bathroom during class time. *App.88.* As the District Court found, these "findings were not disputed, objected to, or called into question: instead, the only reason the PET did not find L.I. IDEA-eligible was because of its unfounded belief that academic performance had to be affected." *Id.*¹⁷ Still, there was agreement at the PET

¹⁶ In preparation for this meeting, L.I.'s parents provided the PET with a list of their concerns, noting that L.I. had "felt unsafe in the public school environment last fall and was unable to continue going to school there," and that there had been a lack of physical safety there as evidenced by L.I.'s cutting herself in the school bathroom. *R55.* They also stated: "We are concerned that, although [L.I.]'s disability has been known to the District for more than five months, no IEP has been developed and no placement has been offered. Since she became unable to attend Cornish Elementary School in early October 2003, [L.I.] has been receiving some informal home schooling and has tried attending TCS in South Tamworth, New Hampshire, where her sister is an enrolled student. TCS appears to us to be an appropriate placement for [L.I.], providing not only emotional support and structure but also the academic challenges and appropriate curriculum she needs in order to succeed. However, she has not yet been accepted there as an enrolled student. We have held off making a unilateral placement in an attempt to give the District an extended opportunity to respond to her needs. We are concerned that the District still has yet to offer [L.I.] an appropriate educational placement that takes into account her need for a setting that is 'safe' emotionally." *R57-58.*

¹⁷ The School personnel involved in considering and determining L.I.'s eligibility for special education services either never had met L.I. and/or lacked significant training in or experience with Asperger's Syndrome. *R336-44; Mrs. I at 617;*

meeting that L.I. needed and should be afforded what the experts recommended for her at school, *App.97-98*, including specially designed instruction in social skills and pragmatic language, using scripts and social stories, and that she needed an individualized program that recognized her cognitive strengths, *App.74*.

Another team meeting occurred on March 8 for the purpose of considering L.I.'s qualification for accommodations or other services under Section 504 of the Rehabilitation Act. At that meeting, after the team reached consensus that L.I. met the criteria for Section 504 eligibility, the School proposed that she should be pulled out of her current successful placement at The Community School and kept at home, where she would receive a tutorial program for three hours a day prior to and during a transition back to public school, supplemented by two hours per week of speech-language therapy services, two half hour sessions of social work service per week, close supervision, and access to gifted and talented offerings as available (though only in art and music). *App.74-75*. The Family rejected this plan as inappropriate, particularly its reliance on restrictive home tutorial services, given their recent experience with the School's failure to provide promised tutorial

McDevitt at 635. The School did not invite either Dr. Popenoe or Ms. Lambke to be part of the special education eligibility discussions, nor did the School take any steps to include information from L.I.'s treating social worker in the course of determining her eligibility. *R285*. Even though L.I.'s disability had led to a suicide attempt and prevented her from attending public school since October 1, 2003, the School members of the team assiduously followed the lead of the Superintendent, who left the meeting shortly after announcing that she did not view this as a special education issue. *R51 & 341*. The family disagreed. *R52*.

services and L.I.'s recent success in a far less restrictive environment at The Community School; instead, they requested an IDEA due process hearing.

*App.75.*¹⁸

At The Community School, which she has attended since March 2004, L.I. has made excellent progress in all her classes and, over time, she has developed some positive peer relationships, all the while becoming less withdrawn and isolated from her peers. *App.75.*¹⁹ Her social relationships continue to be significantly impaired, however, as her interactions with peers have centered almost exclusively on her intense special interest in Japanese anime; outside of school, she has shunned social contact with peers, even those with an interest in anime. *Id.*

Over the summer of 2004, L.I. spent “nearly all waking hours” at the computer, engaging in anime-related role-playing, instant messaging, and “fan

¹⁸ Desiring L.I.'s eventual return to public school, the Family requested that, instead of providing a restrictive home tutoring program (which never had materialized despite being promised since October 2003), the School place her temporarily at The Community School and provide her with an appropriate array of speech-language, social work, and counseling services, along with a plan to accomplish her gradual transition back to a public school setting. *R318-19, 333.*

¹⁹ The costs incurred by the family in connection with L.I.'s attendance at The Community School, from February through June 2004, amounted to \$4,500 of tuition, plus \$660 in van transportation. *R459-62.* The family continued to incur comparable monthly costs for the ensuing two school years, and now has been forced to spend a total of approximately \$20,000 to educate L.I. privately due to the School's refusal to provide her with an appropriate special education program.

fiction” writing; she left the computer only to use the bathroom. *App.75*. During that summer, L.I. refused her mother’s repeated efforts to get her together with her schoolmates either in person or by telephone. *Id.* In addition, L.I. resisted offers to socialize with former classmates from Cornish Elementary School because it was “too overwhelming.” *Id.* When L.I.’s family went on a week-long vacation to a beach house, L.I. refused to invite a friend because she believed it would interfere with her preferred activity of watching an entire anime television series on DVD. *Id.*

Consistent with this inflexibility and desire for sameness, L.I. has dramatically limited the foods she will eat to pizza, carrots, red pepper, broccoli, macaroni and cheese, and milk. *App.75*. Further, she refuses to go outdoors, except to get into or out of a vehicle. *Id.* L.I.’s most recent counselor, who has had extensive experience working with children with Asperger’s Syndrome, views L.I.’s peer relationships as “atypical” because they are “based upon her special interest rather than the qualities of her peers” and because of the “lack of shared emotional experiences.” *App.76*.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Mr. and Mrs. I filed a request for an administrative due process hearing with the Maine Department of Education on April 23, 2004. *App.18*. The hearing was held on May 26 and 28, 2004. *Id.* The Hearing Officer, while noting the parties’

agreement that L.I. “has Asperger’s Syndrome and a depressive disorder,” found that L.I.’s disability did not “adversely affect” her educational performance. *App.24* (citing *Maine Special Education Regulations (“MSER”)* §§ 3.2, 3.5 and 3.10). The Hearing Officer framed the issue as “whether a school department is required to address social and emotional needs when there are *no* academic needs,” *App.25* (emphasis in original), and concluded that neither federal nor state law requires “a school district to provide special education issues to address what is essentially a mental health issue.” *Id.*

On July 23, 2004, Mr. and Mrs. I filed a complaint in District Court seeking judicial review of the administrative decision pursuant to the IDEA, 20 U.S.C. § 1415(i)(2)(A); they also asserted an alternative claim under Section 504, 29 U.S.C. § 794. *App.3.* On June 13, 2005, the U.S. Magistrate Judge issued a Recommended Decision finding that the Hearing Officer had committed legal error in requiring that a student’s disability “adversely affects educational performance.” However, despite concluding that “Maine’s broad definition of the term ‘educational performance’ reflects and harmonizes with the recognition of both Congress and the Maine legislature that the purpose of education is not merely the acquisition of academic knowledge but also the cultivation of skills and behaviors needed to succeed generally in life,” *App.54* (omitting citations), the Magistrate Judge found the Hearing Officer’s error to be harmless.

The District Court (Hornby, J.) rejected the Recommended Decision almost entirely. *App.69-117*. In a lengthy, carefully constructed Memorandum Decision and Order dated January 30, 2006, the District Court found that L.I. is eligible for IDEA services as a “child with a disability” within the meaning of the IDEA. *App.70-110*. It ordered the School to convene a team meeting and develop an “appropriate IEP for [L.I.], taking into account her unique needs as they exist now and the recommendations of all experts, educational and psychological.” *App.99-100*. The District Court, however, denied the Family’s request for reimbursement of costs associated with L.I.’s unilateral placement at The Community School, finding that this private school, although it had been “good for L.I.,” had not provided her with special education services. *App.102-107*. It also declined to award L.I. any specific compensatory education remedy for L.I. “at this point,” despite the delay of over two years in her receipt of needed services. *App.108*. Finally, it denied the Family’s Section 504 claim on the merits. *App.110-117*. The School timely filed a Notice of Appeal concerning the Judgment entered in favor of the Family on the IDEA claim. The Family timely filed a Notice of Cross-Appeal concerning the District Court’s adverse rulings on the scope of IDEA relief and the 504 claim.²⁰

²⁰ Although the District Court ruled against the Family on its alternative claim under Section 504, and although this adverse ruling was identified in the Family's notice of cross-appeal, the Family has determined not to pursue this portion of the

Cross-Appeal. This Court's recent decision in *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. June 16, 2006), makes clear that, when a student's IDEA rights are violated, the remedies available under section 504 are no greater than those available under the IDEA. *See id.* at 29 ("We hold that where the underlying claim is one of violation of the IDEA, plaintiffs may not use §1983 – or any other federal statute for that matter – in an attempt to evade the limited remedial structure of the IDEA.").

SUMMARY OF ARGUMENT

1. On the School's appeal, this Court should affirm the decision of the District Court that the School violated L.I.'s rights under the IDEA by failing to identify her as a student with a disability eligible for special education and related services. The IDEA contains a two-part test for eligibility, which first requires evidence that a child has a disability in one or more of the enumerated categories, and then a showing that, "by reason thereof," she "needs special education and related services." 20 U.S.C. § 1401(3). The District Court properly interpreted federal and state regulatory language that requires a showing on the first prong of this test that the student's disability "adversely affects" her "educational performance" in a manner consistent with the purpose and text of the statute and with the broad definition of "educational performance" under Maine law. Further, its determination that the Hearing Officer committed legal error that was not harmless when she purported to require proof of an adverse effect on academic performance is fully supported by the governing law and the record evidence. In addition, its interpretation of the phrase "adversely affects . . . educational performance" will not result in over-identification of students under the IDEA. All eligible students still must demonstrate a need for special education and related services "by reason" of their disability under the second prong of the IDEA's test, a fact that was conceded in this case by the School through its conduct and

statements in the team meeting process, in the statutorily-required Prior Written Notice it issued concerning its decision, and in the framing of the issues at the administrative hearing.

2. On the Family's cross-appeal, this Court should reverse and remand the portions of the District Court's remedial order in which it denies the Family reimbursement of the costs associated with the student's unilateral private school placement and declines to enter a specific award of compensatory education for the student. First, in denying reimbursement, the District Court improperly relied upon a Sixth Circuit decision restricting reimbursement to cases in which the private school chosen by the family provides elements of the special education services in which the public school placement was deficient. As indicated in a new decision from the Second Circuit, the Supreme Court's test for determining whether a unilateral placement by parents is proper is more liberal, and application of the proper legal test would warrant reimbursement on the record in this case. In addition, even if the more restrictive test were properly employed, the District Court committed clear error in failing to recognize that services its decision elsewhere acknowledges to fit comfortably within the rubric of "special education" were, in fact, provided by the private school in this case, as its own finding of fact attest.

Second, in declining to enter an order specifying an award of compensatory education for the student, the District Court improperly delegated any remedy in this regard to the student's IEP team. The purpose of a compensatory education award is to ensure that the student is provided with services over and above any IEP services designed to confer an "appropriate" education so as to compensate for past violations of the student's IDEA rights – here a two-plus year delay by the School in identifying her as eligible and providing appropriate services. The goal of compensatory education is, through services provided after-the-fact, eventually to restore the student to the position she would have occupied but for the violation. The District Court's order does not provide for such a remedy and, instead, leaves the matter in the hands of the party that committed the violation, while providing the Family with no enforcement option in the event of disagreement other than to litigate from scratch through the IDEA's administrative process. This Court should remand the case with instructions for the District Court to specify the terms of a compensatory education award designed to correct the effects of the past violation or at least put in place a procedure to ensure that this occurs, with appropriate judicial oversight.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT L.I. QUALIFIES FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE IDEA AND PARALLEL MAINE SPECIAL EDUCATION LAW.

Public school districts that receive IDEA funding are required to locate, evaluate, and identify students who are in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). Schools must provide these students with special education and related services, pursuant to an Individualized Education Program (“IEP”), such that they receive a “free appropriate public education,” 20 U.S.C. § 1412(a)(1) & (4), that is “reasonably calculated to enable the child to receive educational benefits.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

In this case, the District Court correctly reversed the legally erroneous decision of an administrative Hearing Officer and properly held that L.I. is eligible to receive an IEP that is capable of providing the special education and related services she needs to receive a free appropriate public education. The District Court applied the correct legal standards and concluded both (1) that L.I.’s disability “adversely affected” her “educational performance,” as those terms are defined by Maine law, and (2) that the School, having conceded that L.I. needed special education services during the team meeting process and having failed to raise this issue before the Hearing Officer, could not belatedly contest this issue during the federal court litigation. Both these conclusions should be affirmed.

A. The District Court Employed The Proper Legal Standard For Determining L.I.'s Eligibility For Special Education.

The School begins by assailing the sound, thoughtful approach taken by the District Court to address the issue of L.I.'s IDEA eligibility, claiming first that the Court applied the wrong legal standard in its analysis. This assertion is completely without merit.

As the School acknowledges, the IDEA has a two-part requirement for determining whether a student is a "child with a disability" entitled to special education: (1) the child must have a disability in one or more of the enumerated categories, and (2) "by reason thereof," the child "needs special education and related services." 20 U.S.C. § 1401(3); *see also MSER* § 3.1 (defining "student with a disability" under Maine law to include any student who has "been evaluated according to these rules and has been determined to have a disability which requires the provision of special education and supportive services").

In their regulations, both the U.S. and Maine Departments of Education have included what the School incorrectly describes as a third eligibility requirement: in all but one of the IDEA's disability categories ("specific learning disability" being the lone exception), the federal and state criteria include a statement that the disability in question must "adversely affect[] the child's educational performance." 34 C.F.R. § 300.7(c)(1)-(9), (11)-(13); *MSER* §§ 3.2-3.10, 3.12-3.14. In fact, this is not a third requirement at all, but merely a regulatory gloss

with respect to the first prong of the inquiry – whether the child has a qualifying disability. It adds nothing of substance to the two-step statutory definition, which ultimately turns (as it should) on whether the child needs special education to benefit from his or her education, except perhaps to flesh out the statutory phrase “by reason thereof.” Indeed, any child who, in the words of Congress, “needs special education and related services” obviously must be experiencing an adverse effect on his or her educational performance in the absence of such services.

The District Court’s decision properly interprets the statute and correctly rejects the School’s attempt to turn this innocuous regulatory language into a major new obstacle for children seeking IDEA eligibility. Although the School responds by raising the specter of run-away over-identification of children in wake of the District Court’s decision,²¹ its argument completely misses the point that it is the

²¹ The current rate of IDEA identification in Maine’s schools has no relevance to this case, which turns on an individual student’s entitlement to federally-mandated services. Nor is there any substance to the School’s assertion that the District Court’s interpretation of the regulatory language will further increase identification rates. This “prediction” fails to take into account that, regardless of whether a student’s disability “adversely affects her educational performance” (and regardless of how low the bar is set on this initial “disability” step of the eligibility inquiry), the IDEA continues to require proof that she needs special education services. As a result, this Court can be certain that nothing in the District Court’s opinion will affect by one iota the rate at which children will be identified as eligible under the IDEA in Maine or elsewhere.

In addition, the School’s “policy” argument, said to be based on statistics regarding identification of special education students in Maine and nationwide, ignores the recent and rapid increase of autism in our society. Statistics published by the

second statutory criterion crafted by Congress (whether “by reason of” her disability, the child “needs special education and related services”), not language added by the regulators requiring that the disability “adversely affects educational performance,” that performs the critical function of ensuring that IDEA funds are spent only on those students properly entitled under federal law to receive special education services. In other words, regardless of whether a student’s qualifying disability is found to adversely affect her educational performance, she still must pass through the finer screen of showing a need for special education services before IDEA eligibility will attach.²²

Maine Department of Education show that, since 1997, there has been an almost five-fold increase in the number of Maine students identified with autism: See December 1 Child Count/Percent to Total by Disability 1997-2005, www.maine.gov/education/speceddata/percentchart.htm. The Department characterized this as “significant growth,” noting that autism was one of only three categories showing increased identification from 2004-2005 to 2005-2006. See Spec. Educ. Child Count, Part B, IDEA, 2002-2005 Comparison by Exceptionality, www.maine.gov/education/speceddata/documents/exceptcomparison06.doc. This trend is not unique to Maine. Nationwide, “[t]he number of children ages 6 through 21 diagnosed with autism receiving services under IDEA has increased more than 500 percent over the past 10 years, from under 20,000 in 1993 to almost 120,000 in 2002, according to data collected for the Department of Education.” *Special Education, Children with Autism, United States Government Accountability Office, Report to the Chairman and Ranking Minority Member, Subcommittee on Human Rights and Wellness, Committee on Government Reform, House of Representatives*, GAO-05-220, p.17 (January 2005). This recent and dramatic rise in the prevalence of childhood autism renders the School’s references to historical Congressional percentage targets irrelevant.

²² The District Court’s decision correctly states that the federal IDEA regulations provide no definition of the phrase “adversely affects . . . educational

This is a case where the student’s diagnosis with a chronic and serious neurological disability has not been challenged and where the School acknowledged in March 2004 that she requires both specially designed instruction and related services to benefit from her education. These indicators make it an easy case to resolve. The School’s attempt to argue against L.I.’s eligibility on the asserted ground that her disability does not adversely affect her educational performance, while conceding her Asperger’s diagnosis and having acknowledged

performance,” and it cites to a Second Circuit decision, *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000), for the proposition that state law must give “substance to these terms.” *App.* 79. As the District Court acknowledges, however, in its subsequent citation to this Court’s ruling in *Town of Burlington v. Dep’t of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985), reliance on state law is proper only where the state standards under consideration equal or exceed the requirements of federal law. This Court clearly has held that the IDEA encompasses a wide spectrum of “educational” needs and ensures the provision of services designed to target “all of a child’s special needs, whether they be academic, physical, emotional, or social.” *Id.* at 788; *see also Lenn v. Portland School Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993) (finding appropriate an IEP designed, among other things, to address student’s disability-related “self-esteem and social skills needs” through use of social skills facilitator). This properly reflects the intent of Congress in enacting the IDEA. *See, e.g.*, H.R. Rep. No. 410, 98th Cong., 1st Sess. 19 (1983), *reprinted in* 1983 U.S. Code Cong. & Admin. News 2088, 2106 (“it is the intent of the Committee that the term ‘unique educational needs’ be broadly construed to include the handicapped child’s academic, social, health, emotional, communicative, physical, and vocational needs.”). If a state were to enact regulations defining either “adversely affects” or “educational performance” in a manner that restricted the eligibility of students who by reason of their disabilities need special education and related services to receive a beneficial education, such a regulation would be inconsistent with the plain letter of the congressional mandate that animates the IDEA, as recognized by this Court, and would be unworthy of enforcement.

her need for specially designed instruction in pragmatic language and social skills, should be soundly rejected by this Court, just as it was below.

1. “Adversely Affects.”

The School spends much of its brief criticizing the District Court for determining that, in those disability categories for which the regulations require proof that the student’s disability adversely affects educational performance, it is sufficient at the first stage of the inquiry to ask if there is any adverse effect on educational performance caused by the disability, “however slight.” Despite the School’s strenuous protestations, there is no error here at all and no cause for alarm. The sky is most definitely not falling.

First, the function of the “adversely affects . . . educational performance” language in the regulations is merely to ensure that the student in question has a qualifying disabling condition that is having a negative impact on the student’s educational experience. Obviously, if a student has been diagnosed with a disability, but it does not affect some aspect of her educational performance, then there is no sense asking whether the student in question requires special education services to succeed in school. Such a student would have no chance of being identified as eligible under the IDEA. Thus, while a determination of “adverse effect” may be *necessary*, it is by no means *sufficient* for a determination of IDEA

eligibility: ultimately, an eligibility finding always requires analysis of whether the student needs special education services by reason of her disability.

Second, the District Court’s interpretation of the regulatory language makes perfect sense. As its decision explains, the regulators chose not to modify the “adversely affects” language in any respect, despite the presence of many other terms in the same regulations that are modified by terms of degree such as “significantly” or “to a marked degree.” *App.80-81*. Given the second prong of the inquiry posed by Congress, which asks whether the impact on the student is so great as to require the provision special education services – as opposed to merely accommodations of the regular curriculum as are available under Section 504 – there would be no purpose served by regulatory language seeking to “raise the bar” on the first prong of the test. The District Court was correct to take the regulators at their word and not read in an unstated modifier of the unadorned phrase at issue, “adversely affects.” Such an implied modifier is not only unnecessary for ensuring the proper application of the statutory test, but certainly could pose a danger of improperly limiting eligibility if interpreted to entail a more arduous showing of entitlement than what Congress chose to require.

As part of its argument, the School also asserts an illogical comparison of the breadth of eligibility under IDEA and under Section 504. It begins this argument with the proposition that “the federal regulators believed that IDEA

eligibility was narrower than under Section 504, not broader.” *Brief* at 31. The Family wholeheartedly agrees with this statement of the law, but the School then attempts to argue that the District Court’s decision has created a situation where children could qualify for special education under IDEA, but not qualify under Section 504, thereby leaving IDEA as the more inclusive statute. The School reaches this conclusion, however, using flawed logic: it is able to posit this result only by contrasting just the first prong of the IDEA test (with the District Court’s reading of “adversely affects educational performance”) with Section 504’s complete eligibility standard. This, of course, is akin to comparing apples and oranges, because the School’s argument entirely omits any discussion of the *second*, narrowing filter in the eligibility test created by Congress to ensure that, for IDEA eligibility to attach, a student also must be shown to need special education services.

The correct view is this: Whereas Section 504 requires just a “substantial limitation” of a major life activity (and nothing more) for a student to be determined eligible for accommodations and other services, it is a much smaller group – in fact, only that subset of Section 504 students whose disabilities are significant enough to require special education services – that also will qualify for eligibility under the IDEA. When the proper comparison of the two statutes’ eligibility tests is made, it is clear that there is absolutely no danger that any

student could qualify for special education under the IDEA, yet not have a substantial enough limitation to also qualify under Section 504. The School's argument to the contrary is pure sophistry.²³

2. **“Educational Performance.”**

Next, in its attempt to identify a legal issue on which to hang its hat, the School turns to the regulatory phrase “educational performance” and argues that the District Court was wrong to interpret this term “expansively” to include numerous “performance indicators” associated with the Maine Learning Results. This argument also lacks merit, as it misperceives the analytical approach taken by the District Court in attempting to determine the breadth of the term “educational performance” as defined in Maine’s special education regulations.

In attempting to discern whether there was an adverse impact on L.I.’s “educational performance” due to her disabilities, the District Court properly started with the language of the pertinent Maine regulation, which defines “educational performance” broadly as including “academic areas (reading, math.

²³ The School also faults the District Court for failing to identify “any disability category at all for L.I.,” *Brief* at 33, but this assertion is belied by the District Court’s order. Its decision specifically names the three disability categories under which the PET agreed it potentially could qualify L.I. for IDEA services (autism, emotional disability, and other health impairment). The decision also states, correctly, that “[t]he parties agree that L.I.’s condition fits within those enumerated,” with the only dispute being whether L.I.’s disability adversely affects her educational performance, a requirement common to all three categories.

communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments.” *MSER* § 2.7. Even the School concedes (finally) that “educational performance in Maine is more than just academics,” *Brief* at 37, so the issue boils down to what other skills are encompassed by Maine’s broad definition of “educational performance.”

The District Court approached this issue carefully and correctly, first by noting that Maine’s broad definition was consistent with the legislative purpose as stated by Congress and the Maine Legislature, as well as with First Circuit case law. *App.80* (citing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990)); *see also Rowley*, 458 U.S. at 202 (the IDEA “requires participating states to educate a wide spectrum of handicapped children”); *Mary P. v. Illinois State Bd. of Educ.*, 919 F. Supp. 1173, 1180, *amended in part by* 934 F. Supp. 989 (N.D. Ill. 1996) (“‘Educational performance’ means more than a child’s ability to meet academic criteria. It must also include reference to the child’s development of communication skills, social skills, and personality, as the Code, itself, requires.”); *see also, supra*, at 26 n.22.

The District Court then sought to determine the breadth and scope of Maine’s regulatory language in section 2.7. It was only in the course of this exercise that it surveyed the regulations issued by the Maine Department of

Education pursuant to the legislative mandate concerning the Maine Learning Results, *Code of Maine Rules*, 05 071 131-1 (1997). Finding numerous “performance indicators” in the Department’s Maine Learning Results regulations implicating skills that would be affected by L.I.’s disability, the District Court felt comfortable in concluding that the Department’s definition of “educational performance” in *MSER* § 2.7 was sufficiently broad to permit L.I. to satisfy the first prong of the IDEA’s eligibility test: her disability, regardless of which of the three categories was used to describe it, did indeed adversely affect her “educational performance” within the broad meaning of that term as it is used in Maine. At no time did the District Court *equate* the performance indicators with the definition of “educational performance,” as the School would have this Court believe; instead, it merely *used* the performance indicators as illustrations of the breadth of the regulatory language in section 2.7, while noting that its “conclusion on this score derives from interpreting the statutory and regulatory language, not second-guessing educational decisions.” *App.83*.

In short, there was no legal error affecting the District Court’s analysis of the issue. It properly interpreted the regulatory language concerning adverse effect and correctly considered Maine’s performance indicators as one source for determining the breadth of “educational performance” under Maine law.

B. The District Court’s Determination That L.I.’s Disability Adversely Affected Her Educational Performance Was Not Clearly Erroneous.

The District Court also properly applied the legal standards described above in determining that L.I. has a disability that adversely affects her educational performance. On this first prong of the IDEA test, the District Court was careful not to base its decision only on L.I.’s diagnosis with Asperger’s Syndrome; instead it engaged in the necessary individualized inquiry to conclude that “on this record L.I.’s Asperger’s Syndrome is a condition that does indeed adversely affect her educational performance.” *App.86*. The District Court’s analysis began, as it should have, with the factual finding of the Hearing Officer that L.I. “is a troubled young woman” with a “depressive disorder as well as a disability that challenges her in social situations.” *App.97; R558*. The Court also noted the administrative finding that, due to her Asperger’s Syndrome, L.I. “will probably always have some difficulties in social situations.” *Id.* It then considered other evidence.

Despite achieving academic success through fifth grade, as would have been expected given her superior level of cognitive ability, L.I. had begun to make repeated requests of her parents during fourth and fifth grades to remove her from public school due to the social difficulties and increasingly intense feelings of frustration and depression that she was encountering. *Ms. I at 599-603 & 606-07*. Her teachers also noticed the developing problem of her social isolation, her

increasing sadness, and her inflexible reaction to school rules she perceived to be unfair. *R101-104, 198-200, 363 & 455; Slegona at 672*. Ultimately, both Dr. Popenoe and L.I.'s treating social worker agreed that the emotional difficulties she experienced resulted directly from the growing frustration she experienced as a student with Asperger's Syndrome attempting to negotiate a public school environment that she perceived as rigid, intolerant, boring, and hostile. *R81-82; Northrop at 582 & 584*.

For L.I., everything went south quickly at the start of sixth grade: she suffered through a terribly difficult first month of school, during which she sought to gain social acceptance by not completing her academic assignments. This downward emotional spiral culminated in her serious suicide attempt, at the tender age of eleven, on October 1. *Mrs. I at 607-10*. At the hospital, her major complaints were that she was unsuccessful socially at school, was often teased by peers, and had "hated" school for a long time; in short, she attempted to end her life due to her disability-related difficulties in successfully navigating the social environment of her public elementary school. *R366-69 & 386*.

The District Court, in applying the law to these facts, easily concluded that "L.I.'s Asperger's Syndrome is a condition that does adversely affect her educational performance." *App.86*. It cited numerous instances of functional

difficulties experienced by L.I. at school, all falling within areas that Maine law counts within the definition of “educational performance,” including:

- The many teacher reports documenting L.I.’s increasing depression, the steps she took to distance herself from her peers socially, and her failure to engage with either the teacher or peers in the classroom, *Id.*;
- The evidence of L.I.’s rigidity and inflexibility, including her serious lack of awareness of the social and emotional states of others, her inability to see and appreciate the perspectives of others, and her intolerance of conversations with people outside her area of special interest, *App.87, 89, 90*;
- The fact of L.I.’s self-mutilation at school during long absences from the classroom, implicating her failure to understand the relationship between healthy behaviors and injury prevention, *App.88, n.8*; and
- The evidence of L.I.’s deficits in nonverbal communication, including her difficulty reading social cues, and limited pragmatic language skills, *App.88 & n.8, 89*.

In light of all the evidence in the record, and what it properly characterized as “Maine’s broad definition of ‘educational performance,’” the District Court cannot be said to have clearly erred in concluding that “many of L.I.’s social and communication deficits, including her isolation, inflexibility, and self-mutilation

during school time, are precisely in the content areas and skills that Maine mandates educationally,” *App.89*, or that “[a]ll these failings demonstrate an adverse effect on L.I.’s educational performance, as measured by academic areas, non-academic areas, and the goals outlined in Maine’s broad general curriculum standards.” *App.91*.

Further, although L.I. has made some progress in addressing the deficits caused by her disabilities since her suicide attempt, she continues to have serious difficulty forming peer relationships that are not centered on her obsessive special interest and that include any type of shared emotional experience. *Dep. Hannon at 17-19*. She has continued to shun personal contacts with former and current peers from school. *Dep. Mrs. I at 10-12*. She has become increasingly obsessed with writing Japanese fan fiction and role playing on the computer, to the point that she has been virtually unable to be separated from her computer, even to meet her own basic needs. *Id. at 5-7*. She even has exhibited a deterioration of basic functional abilities, inflexibly refusing to eat anything not contained on a very short list of preferred foods and demonstrating extreme inhibition about going outdoors. *Id. at 18-20*. As the District Court properly perceived, although her experience at The Community School has been beneficial because it “alleviate[d] some of the social pressures that L.I.’s disabilities make difficult to navigate,” L.I.’s chronic condition promises to affect her performance even more adversely when she attempts to

return to a mainstream setting that is not nearly as protective, accommodating, and tolerant as The Community School. There was no clear error here.

C. The District Court’s Determination That L.I. Needs Special Education Services By Reason Of her Disability Also Was Not Clearly Erroneous.

As noted above, the second prong of the IDEA eligibility definition requires evidence that, by reason of the student’s disability, she requires special education services. The District Court’s determination of this issue with respect to L.I. was neither infected by legal error nor clearly erroneous.

The District Court began by considering the recommendations of the experts that had evaluated L.I. in the wake of her suicide attempt. The decision notes that Dr. Popenoe, the neuropsychological evaluator who first diagnosed L.I. with Asperger’s Syndrome and an Adjustment Disorder, had recommended (among other things) that she receive speech-language therapy, direct social skills training, a social skills coach, alternative strategies in lieu of punishment, cognitive behavioral counseling, and transitional assistance; the decision also describes the similar recommendations made by Amber Lambke, L.I.’s speech-language evaluator. *App.92*. Importantly, the District Court found that the Pupil Evaluation Team did not dispute the appropriateness of the expert recommendations in these reports and, in fact, “adopted virtually all their suggestions.” *App.93*. As the District Court determined, although there was a dispute between the parties about

L.I.’s IDEA eligibility, “the team reached consensus that L.I. needed ‘social-skills and pragmatic-language instruction, and access to a program that recognized her cognitive strengths.’” *Id.*

As a threshold matter, the District Court is correct that the central portion of the services package for L.I. – on which the School and parents were in full agreement at their team meetings in March 2004 – included both special education and related services, as those terms are defined by federal law. *App.95-96*. The IDEA defines “special education” as “specially designed instruction . . . to meet the unique needs of a child with a disability,” 20 U.S.C. § 1401(25), and its regulations specify that “specially designed instruction” means “adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction” to address the child’s unique needs and ensure the child’s access to the general curriculum, 34 C.F.R. § 300.26(b)(3).

The School criticizes the District Court for referencing the broad definition of special education services that is found in the Maine Revised Statutes, 20-A M.R.S.A. §77001(5), which in its view “eliminate[s] the distinction between special education and related services.” This argument, however, is a complete red herring. The District Court’s decision is crystal clear that “[m]any of the changes the experts recommend for L.I.’s educational experience (agreed to in large part by the School District) rise to the level of ‘specially designed instruction . . . to meet

the unique needs of a child with a disability’ *as defined by the IDEA.*” *App.95* (emphasis added). In other words, the District Court did not rely upon the allegedly broader state law definition of “special education” in resolving this issue. Indeed, the decision then goes on to explain in further detail how several of the services agreed upon for L.I. meet the *federal* definition of “specially designed instruction,” and therefore amount to “special education” within the meaning of the IDEA. *Id.* Nothing in the District Court’s decision indicates that its conclusion rests exclusively, or even primarily, on the apparently broader definition of special education in the Maine statutes. This Court, therefore, need not tarry over the issue of whether the Maine Legislature intended to exceed IDEA requirements, as the School tried to suggest.

Second, the School assails the District Court’s failure to consider whether L.I. truly “needs” special education services, within the meaning of the statutory language. The decision below, however, resolved this issue entirely correctly. As the District Court was careful to point out, the School did not quarrel with L.I.’s need for special education services at the time of the two team meetings held in March 2004. *App.97.* Indeed, as the Court found, “the PET meetings proceeded on the basis that everyone agreed that L.I. ‘needed’ and should be afforded what the experts recommended for her.” *Id.; see also R42 & 320-23.* At that time, the School specified one and only one reason for denying L.I. eligibility under the

IDEA, namely, its contention that her disability did not adversely affect her educational performance, a term the School improperly viewed as referring only to academics. The School made this much perfectly clear in the statutorily-required Prior Written Notice that it issued to the Family following the team meetings in March. *R53*.

The Prior Written Notice makes no mention whatsoever that the School contested L.I.'s need for special education services, many of which it already had stated its willingness to provide. *R 53*. The School's failure to contest whether L.I. needed special education and related services during the team meetings was a critical omission. The IDEA is replete with procedural protections for parents of children with disabilities. As this Court has written, "Congress' special emphasis on the provision of procedural protections springs from the hope that an abundance of process and parental involvement will help ensure the creation of satisfactory IEPs acceptable to all concerned." *Roland M.*, 910 F.2d at 995 (1st Cir. 1990); *see also Rowley*, 458 U.S. at 206 (noting "legislative conviction that adequate compliance with the procedures prescribed [in the Act] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP");²⁴ *Murphy v. Timberlane Regional Sch. Dist.*, 22 F.3d 1186, 1193 (1st Cir.

²⁴ "When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached

1994) (“procedure is at the very core of the IDEA”).²⁵ Among the most important of these procedural protections is the parents’ right to receive “Prior Written Notice” of any action taken or refused by the child’s team. 20 U.S.C. § 1415(b)(3) & (c) (1997); 34 C.F.R. § 300.503 (1999); *MSER* § 12.3. Under longstanding federal and state law, this procedural protection assures that a school district must provide families not only with written notice of its decision each time it proposes or refuses to initiate or change a student’s identification or program, 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(1); *MSER* § 12.3(B)(1), but must also provide the parents with an “explanation of why the agency [*i.e.*, the school] proposes or refuses to take the action,” a “description of any other factors that are relevant to the agency’s proposal or refusal,” and information for the parents about their procedural safeguards, including the right to challenge the determination through

to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that 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, *see, e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-206.

²⁵ Indeed, Congress places so much emphasis on the enforcement of the IDEA’s procedural protections that it has crafted the law in a manner that prevents school districts from relying upon any of the statutory factors available to reduce or deny the entitlement of prevailing parents to an award of attorney’s fees if the school district is found to have violated section 1415, the procedural protections section of the IDEA. *See* 20 U.S.C. § 1415(i)(3)(F) & (G); 34 C.F.R. § 300.513(c)(4) & (5).

the IDEA's due process hearing procedures. 20 U.S.C. § 1415(c)(2), (5) & (6); 34 C.F.R. § 300.503(b)(2), (5) & (6); *MSER* § 12.3(B)(2), (5) & (6).

The Prior Written Notice, therefore, is the critical first step in framing a potential dispute for a due process challenge. It is the only notice to which the parents are entitled that sets forth the information they need to know concerning the scope and basis of the School's decision, and also informs them how they can exercise their right to challenge the information provided by the notice if they disagree: "The purpose of the notice is to provide sufficient information to protect the parents' rights under the Act. It should enable the parents to make an informed decision whether to challenge the [school's] determination and to prepare for meaningful participation in a due process hearing on their challenge." *Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992). For this reason, the School should be bound by the content of its Prior Written Notice; as the District Court implicitly recognized, to do otherwise would merely flout the procedural protections so carefully erected by Congress in creating the IDEA.

In this case, not only did the Prior Written Notice explicitly state that the sole basis for denying L.I. eligibility was an alleged lack of adverse effect on her educational performance, but the School also did not raise the issue of her allegedly not needing special education services when it appeared before the Hearing Officer at the pre-hearing conference. Indeed, as the District Court

properly found, it was not until the parties filed simultaneous briefs with the hearing officer after the conclusion of the evidence that the School first sought to take a position, *contrary to the information provided in the Prior Written Notice*, that L.I. does not require special education services to receive a beneficial education. *App.98*. As the District Court described the situation:

The School District’s lawyer may have belatedly recognized and raised at the hearing the issue that the statutory definition of ‘need’ might differ from the usage the parties had employed, but that realization was too late without explicit notice to the parents and an invitation to respond. The School District should at least have requested a ruling from the Hearing Officer that ‘need’ was a live issue, thereby alerting the parents that they must present testimony and argument.

App.99. The District Court resolved this issue in the only proper and practical way available, by concluding that the parties should be held “to their original understandings and their pre-hearing framing of the issues,” such that L.I.’s need for special education services – the second prong of the IDEA eligibility test – “is not a contested issue.” *App.99*. This conclusion is neither clearly erroneous as a matter of fact, as the record supports all of the District Court’s findings concerning the consensus reached by the parties in their team meetings and the parties’ respective conduct during the litigation, nor improper as a matter of law, as it correctly recognizes the IDEA’s prior written notice provision as a central feature

of the statute's procedural protections for parents of children with disabilities.²⁶

Any argument on the second prong of the statutory test has been foreclosed by the School's own conduct.

In the end, therefore, for all the reasons described above, the District Court's decision is both legally and factually sound, and should be affirmed.

²⁶ Even if the Court were to require *de novo* consideration of whether L.I. "needs" special education, the existing evidence easily would support a finding in favor of her IDEA eligibility. The factual findings made by the District Court confirm that L.I. has a myriad of social and communication deficits. The expert evaluators not only have documented her serious and continuing executive skill weaknesses, her difficulty with social and pragmatic language skills, and her difficulties with organization, strategic thinking, sustained performance, and shifting gears, *R 81-82*, but also have specified that, without specialized, direct teaching designed to assist her in overcoming these learning deficits, she will continue to lack the ability to learn necessary social and functional skills and never become capable of self-sufficiency or maintaining employment as an adult. *Dep. Hannon at 13-14 & 20; R83* (Dr. Popenoe); *R69* (Amber Lambke). For a student like L.I., "the ability to generalize social and behavioral skills" must be considered and addressed under the IDEA. *See, e.g., David D. v. Dartmouth Sch. Comm.*, 615 F. Supp. 639, 647 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985). After all, the IDEA's chief purpose is "to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and *prepare them for employment and independent living.*" 20 U.S.C. § 1400(d)(1)(A) (emphasis added). Given the uncontested evidence of L.I.'s "need" for specially designed instruction if she is to have any hope of becoming a functioning, productive adult, the record fully supports the conclusion that, by reason of her disability, she needs special education services.

II. THE DISTRICT COURT ERRED IN FAILING TO AWARD THE FAMILY ANY REMEDY IN RECOGNITION OF THE TWO-PLUS YEAR PERIOD DURING WHICH THE SCHOOL DENIED L.I. A FREE APPROPRIATE PUBLIC EDUCATION BY REFUSING HER IDENTIFICATION UNDER THE IDEA.

The IDEA charges the District Court with granting “such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(B)(iii). In crafting the remedy to be awarded to the Family in light of the School’s failure to identify L.I. as a student with a disability in March 2004, the District Court first ordered the School to convene a PET meeting to develop an IEP “that meets her unique needs as a student with Asperger’s Syndrome and a depressive disorder.” *App.100*. It then proceeded directly to a consideration of the Family’s requests for reimbursement of the costs it has incurred (approximately \$20,000 to date) for L.I.’s unilateral placement at The Community School, as well as its request for an award to L.I. of compensatory educational services given the lengthy delay in her eligibility identification.

In the end, although the District Court awarded prospective relief, requiring that the School find L.I. eligible for IDEA services and convene a PET meeting to develop an IEP appropriate to address her unique needs, *App.99-100*, it declined to award reimbursement of the costs incurred by the Family for over two years of private educational services provided to L.I. It also made no specific ruling on L.I.’s entitlement to compensatory education services for the two-plus year delay

in the provision of IDEA services, though it pointedly suggested that the School should offer her a prospective IEP designed to “take into account the effect of the School District’s failure to identify and offer L.I. special education services earlier,” and invited the Family to commence a new round of litigation if it deems L.I.’s new IEP to be inadequate. *App.108* (“If she has more needs as a result of the delay, they should be apparent in the PET meeting.”). It was erroneous for the District Court to deny reimbursement entirely and to leave the matter of fairly compensating L.I. to the School-based team designing her 2006-2007 IEP.

A. The District Court Erred In Denying The Family’s Right To Reimbursement Of Unilateral Placement Expenses Based On The Community School’s Alleged Failure To Provide L.I. With Special Education Services.

On the issue of reimbursement, the District Court first made a threshold finding that the Family had met its requirement to provide notice to the School of its intentions to place L.I. unilaterally and seek reimbursement, in compliance with the requirement set forth in *MSER* § 12.11(S). *App.100-101*.²⁷ It then went on to

²⁷ The Court correctly found Maine’s regulation, § 12.11(S), to be more protective of student and parent rights than the federal notice rule set forth in 20 U.S.C. § 1412(a)(10)(C)(iii) and 34 C.F.R. § 300.403(d)(1)(i), and therefore the proper governing standard pursuant to *Town of Burlington*, 736 F.2d at 792. *App.101*.

consider the appropriateness of the unilateral placement the Family chose for L.I. at The Community School.²⁸

In the course of its analysis, the District Court made a series of important findings of fact regarding The Community School that support the appropriateness of that private placement given the nature of L.I.'s disability:

- As found by the Hearing Officer, The Community School, though not an approved special education placement, is a small school with an 8:1 student-teacher ratio, which at that time enrolled one publicly placed student with Asperger's Syndrome and previously had enrolled other students with various disabilities. *App.104*.
- "The Community School is an environment where other students respect difference, discourage teasing, and cliques are not as common. [R588]. These characteristics help alleviate some of the educational pressures that L.I.'s disabilities make difficult to navigate, but these characteristics of the Community School are unique, not mainstream, and not reflective of L.I.'s time at public school, or her eventual integration into the wider world after graduation." *App.92 n.10*.
- "[H]appily, [T]he Community School appears to have been good for L.I. The parents have served their daughter well." *App.106*.

²⁸ Although the District Court stated that it did not reach the threshold question of "whether L.I. was denied a free appropriate public education," *App. 106*, there can be no dispute on this issue as a matter of law. The IDEA requires that each eligible student with a disability must be provided with an Individualized Education Program that is appropriate to meet his or her needs. Indeed, the IDEA's definition of "free appropriate public education" cannot be satisfied unless the child's educational services "are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9)(D). Given that the School refused to find L.I. eligible under the IDEA and, consequently, never offered her an IEP of any variety, the only conclusion that a court could reach as a matter of law is that L.I. has not been provided with a free appropriate public education since March 2004.

In the end, however, the District Court determined to deny reimbursement, resting its decision solely on the basis that The Community School did not provide L.I. with “any expert-recommended special education services.” *App.106*. In reaching this determination, it relied on the legal ruling of the Sixth Circuit in *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003), that only a unilateral placement that “provide[d] some element of special education services in which the public school was deficient” would qualify the Family for reimbursement of private school costs. *App.106*.

The District Court’s conclusion is incorrect as a matter of law, as its reliance on *Berger* caused it to apply an overly restrictive legal standard. In addition, however, even applying the improper restrictive legal standard set forth in *Berger*, the District Court’s conclusion is clearly erroneous in light of the factual findings that it made on the record.

1. **The District Court Employed An Overly Restrictive Legal Standard In Measuring The Propriety Of L.I.’s Unilateral Private Placement.**

First, the law does not require a private placement to provide the special services denied by the public school as the touchstone of whether the costs of that placement may be reimbursed under the authority of *School Comm. of the Town of Burlington v. Dep’t of Education*, 471 U.S. 359 (1985). It is well established, for instance, that reimbursement may be awarded even if the private school chosen by

the parents does not meet state educational standards or hold state approval.

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14-15 (1993). Indeed, the test established by the Supreme Court is purposely lenient: “when a public school system has defaulted on its obligations under the Act, a private school placement is ‘proper under the Act’ if education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Florence County*, 510 U.S. at 11 (internal quotations omitted); *see also Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 27 (1st Cir. 2002) (rejecting claim that parent may choose “any alternative school she wishes if the public school education is inadequate,” but reinforcing that unilateral placement simply must be “reasonably calculated to enable the child to receive educational benefits”).

This Court already has recognized the leniency of the Supreme Court’s test in a decision involving a unilateral residential placement of a Maine student.

Mrs. B. v. Rome Sch. Comm., 247 F.3d 29 (1st Cir. 2001), explaining:

The hearing officer endorsed Mrs. B.’s unilateral placement of DC only after finding that Rome had failed to provide DC with an adequate educational program. That is a different issue, and ***one viewed more favorably to the parent, than the question whether this residential placement was required*** in order to provide a free appropriate education to DC.

Id. at 34 n.5. Other circuits have held likewise, properly interpreting the decision in *Florence County* to mean that the Supreme Court requires only a showing of a

beneficial placement for the child, not a perfect one. *See, e.g., Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) (“the test for the parents’ private placement is that it is appropriate, and not that it is perfect”).

A very recent decision of the Second Circuit is particularly on point and speaks persuasively to this issue. In *Frank G. v. Board of Educ. of Hyde Park*, ___ F.3d ___, 2006 WL 2077009 (2d Cir. July 27, 2006), it ordered that a parent be reimbursed for unilateral placement at a private program, even though the private school did not offer special education and related services. Contrary to the *Berger* decision relied upon by the District Court, the Second Circuit held:

No one factor is necessarily dispositive in determining whether parents’ unilateral placement is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child’s individual needs. *See Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001) (holding that a unilateral private placement was appropriate where, *inter alia*, class sizes were small, the student made significant educational progress, and his grades and behavior improved significantly).

Frank G., 2006 WL 2077009 at *6. Although the private school in question in *Frank G.* did not provide the student with an individual aide or direct consultant teacher services, the Second Circuit upheld the trial court’s award of

reimbursement because the student’s private school teacher worked individually with the student whenever possible and “she also made certain testing and other academic modifications [] to assist him in successfully completing his assignments.”²⁹ *Id.* at *4. The Second Circuit also held that providing a student with instruction in a small class comes within the ambit of the IDEA’s definition of “specially designed instruction ... to meet the unique needs of a child.” *Id.* at *7 (*citing* 20 U.S.C. § 1401(29)).

This Court should reject the Sixth Circuit’s narrow *Berger* test in favor of the more lenient and comprehensive multi-factor test relied upon by the Second Circuit in *Frank G.*, thereby removing any categorical bar to reimbursement when the unilateral placement does not provide traditional “special education services” to the child. Parents, especially those in the throes of a crisis arising from their child’s inability to receive a beneficial education in public school, have limited choices of private placements. A case-by-case test is necessary to determine if the parents made a defensible choice that provides their child with educational benefit in light of the issues raised by the child’s disability. Applying the *Frank G.* test in

²⁹ In *Frank G.*, the private school teacher adapted her instruction to meet the student’s needs by working with him one-on-one, creating a communications book, giving him extra time to complete work, allowing him to work in isolated areas of the classroom, and adapting the methodology of instruction by allowing the student to take tests orally. *Id.* at *7. The student also received assistance from a volunteer teacher’s assistant, who, while working with other students, assisted the student greatly throughout the day. *Id.*

this case plainly would support the Family’s choice to enroll L.I. at The Community School, after a lengthy trial period, given the significant academic and social benefit she received there as a result of that program’s unique features, and given the dereliction of duty by the School in never even identifying a tutor for L.I. *See M.S.A.D. No. 35*, 321 F.3d at 19 (“being caught between a rock and a hard place is no excuse for dereliction of duty.”)

2. The District Court’s Decision That The Community School Has Not Provided L.I. With Specially Designed Instruction Adapted To Meet Her Unique Needs Is Clearly Erroneous.

Second, the conclusion to deny reimbursement also is clearly erroneous to the extent the District Court based its conclusion on a finding that “[i]n fact, the Community School does not offer L.I. any of the special education services recommended by the experts or the PET.” *App.105*. Actually, the record plainly supports that The Community School did provide L.I. with services that the District Court determined, elsewhere in its decision, to be sufficient to satisfy the IDEA’s definition of “special education services,” as described above. Because the evidence found by the District Court shows that The Community School adapts “the content, methodology, or delivery of instruction” in a manner sufficient to “address the unique needs of the child that result from the child’s disability,” as required by federal law, the District Court’s decision to the contrary should be

reversed and remanded with instructions to determine the correct amount of reimbursement to be awarded to the Family. 34 C.F.R. § 300.26(b)(3).

For example, the District Court properly concluded elsewhere in its decision that providing one-to-one tutoring would qualify as “adapting the ‘methodology’ and ‘delivery of instruction’ to meet L.I.’s ‘unique needs,’” and therefore qualify as specially designed instruction. *App.95*. The Community School can meet the unique needs of students like L.I. by providing classes with a much lower student-teacher ratio (8:1) than is found in most public schools. This adaptation of the methodology and delivery of instruction is, like the tutorials discussed by the District Court, a form of “specially designed instruction.” Also, as the District Court acknowledged, The Community School provides a social milieu for learning that is “unique” and different from the mainstream, and its democratic social structure and intolerance of teasing and cliques has protected L.I. from “some of the educational pressures that L.I.’s disabilities make difficult to navigate.” *App.92 n.10*. Because the District Court elsewhere determined correctly that meeting the evaluators’ recommendations to provide L.I. with supervision and protection from harassment and from abuse of peers due to her high risk of being victimized, and providing her with a “safe person” who can help her facilitate problem solving, compromise, and conflict resolution, all were sufficient to “meet the federal and state definitions of special education,” *App.96*, the system used at The Community

School to provide this protection certainly fits comfortably within the “special education” rubric. Finally, it is telling that some New Hampshire school districts have chosen The Community School as an appropriate placement for their IDEA-eligible students,³⁰ including another student with Asperger’s Syndrome who was attending the school at the time of the hearing and, like L.I., probably benefiting from the school’s unique approach to instruction and its innovative democratic social structure.

In light of all this record evidence concerning features of The Community School placement that the District Court both acknowledged in its findings of fact and elsewhere found sufficient as a matter of law to satisfy the federal definition of “special education,” it was clearly erroneous for it to bar reimbursement on the basis that The Community School did not provide any of the “special education” services that L.I. requires. Instead, as the District Court recognized when it praised L.I.’s parents for their choice of her placement, *App.106 n.18*, the record demonstrates that L.I. has enjoyed a beneficial placement at The Community

³⁰ Under New Hampshire’s special education regulations, public school districts may seek and obtain “Individual Program Approval” from the state educational agency to place their IDEA-eligible children in private schools that are not generally approved for special education students, but that offer programming that would be beneficial to the particular student with disability in question. *See* N.H. Ed. 1129.04 (2002) (entitled “Placements In In-State Programs Not Currently Approved to Provide Special Education and Related Services”). Some school districts in New Hampshire use this mechanism to place IDEA-eligible students at The Community School. *Carlson at 625-26*.

Schools for over two years, during a period of time when her own school district refused to provide her with IDEA eligibility and an appropriate IEP, and also refused to offer her the services she would have required to transition from The Community School to an appropriately supported public placement. *R294-335 (minutes of March 8 meeting)*. Attempting to recover from an event as traumatic as a suicide attempt by their eleven-year-old daughter required Mr. and Mrs. I. first to take the proper steps to stabilize her emotionally, followed by steps designed to return her to an appropriate educational setting. They did all they reasonably could be expected to do in the face of a lack of cooperation from the School. The Family does not contend that L.I.'s placement at The Community School has been perfect, and L.I. certainly has yet to receive the transitional services that her parents have requested so she can begin to progress appropriately in a more mainstream environment, as promised by the IDEA. Still, her unilateral placement at The Community School has provided her with a myriad of beneficial services that fall comfortably within the definition of "special education services" so as to permit her an opportunity to make progress academically while beginning the process of making social connections with peers, even if those relationships have remained limited. It was clearly erroneous, therefore, for the District Court to deny reimbursement. This Court should instruct the District Court on remand to award full reimbursement of The Community School expenses the family has incurred.

B. The District Court Erred In Failing To Order Explicitly That L.I. Is Entitled To Some Form Of Compensatory Educational Services.

While the District Court’s decision hints that L.I. likely is entitled to some form of compensatory services for the two-plus year delay (from age twelve to age fourteen) in her receipt of the IDEA services to which she was and is entitled, it declined to make any specific order in this regard. The Family had requested compensation in the form of “future services aimed at addressing the deficits resulting from the past deprivations of LI’s rights,” *App.107*, but the District Court opted to leave this matter to the discretion of the School, noting its belief that the team shaping her IEP would “take into account the effect of the School District’s failure to identify and offer L.I. special education services earlier,” while inviting the Family to file a new due process complaint if the School’s IEP offer failed to accomplish this goal. *App.108*. Despite this grudging acceptance that L.I. is entitled to some remedy for the lengthy deprivation of her IDEA rights, without an order clearly entitling her to services designed to compensate her for past deprivations – as opposed to a 2006-2007 IEP that the IDEA requires only to be “appropriate” to address her current needs – L.I. never may be able to attain the position she would have occupied *but for* the School’s default of its IDEA responsibilities. This is the very essence of compensatory services – to provide *more* than just an “appropriate” level of prospective services to a student whose

IDEA rights have been violated for a significant period of time, in order to make the student whole in view of the past deprivations of her rights.

The statutory authority for an award of compensatory education stems from 20 U.S.C. §1415(i)(2)(C)(iii), which confers broad discretion to “grant such relief as the court determines is appropriate.” Compensatory education “is not a contractual remedy, but an equitable remedy, part of the Court’s resources in crafting ‘appropriate relief.’” *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). The precise nature of the relief to be provided is not further specified, except that it must be “appropriate.” *Burlington Sch. Comm.*, 471 U.S. at 369 (“If an IEP from a past year is found to be deficient, the Act may require services at a future time to compensate for what was lost.”).

This Court has recognized the important role compensatory education can play in making students whole, holding that “a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187-188 & n.7 (1st Cir. 1994). More recently, this Court commented that “a child eligible for special education services under the IDEA may be entitled to further services, in compensation for past deprivations, even after his or her eligibility has expired. . . . Such a child’s claim for compensatory education begins to accrue when his or her IEP is so

inappropriate that the child is receiving no real educational benefit.” *M.S.A.D. No. 35 v. Mr. and Mrs. R.*, 312 F.3d 9, 17-18 (1st Cir. 2003).

An award of compensatory education is a particularly appropriate method of providing a remedy to a student who has been wrongfully deprived of eligibility for special education and related services. Because the clock cannot be turned back to the time of the deprivation, the only tool available to a court crafting relief is its ability to order a commitment to prospective services that hold the promise of righting the wrong. Merely ordering an appropriate 2006-2007 IEP that “will take into account the effect” of the violation, is insufficient. In the absence of an order directing compensation for past violations, that IEP will be subject to just the general “appropriate education” standard of the IDEA, which ensures provision of only those services required to result in meaningful progress going forward, as opposed to those necessary for L.I. to recapture gains she was entitled to have received over the past two years. As this Court has explained, “[a]ppropriateness and adequacy are terms of moderation,” *Lenn*, 998 F.2d at 1086, and by virtue of the improper delay of her identification, she is now entitled to more than moderation.

The D.C. Circuit’s decision in *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005), is one of the most recent and thorough appellate discussions of compensatory education. It begins by stating the broad

understanding that the essence of equity is “to do equity and to mould each decree to the necessities of the particular case” using “[f]lexibility rather than rigidity.” *Reid*, 401 F.3d at 524. For this reason, the *Reid* court rejected mechanical or hour-per-hour calculations of compensatory relief “and instead adopt[ed] a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA . . . [because] just as IEPs focus on disabled students’ individual needs, so must awards compensating past violations rely on individualized assessments.” *Id.*

The *Reid* court focused on the “compensation” to be awarded, finding that the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued in the past had the proper special education services been supplied at the time they were required: “Whereas ordinary IEPs need only provide ‘some benefit,’ compensatory awards must do more – they must *compensate*.” *Reid*, 401 F.3d at 524-25 (emphasis in original). While *Reid* notes that some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies, whereas others may need extended programs exceeding an hour-for-hour replacement of the time they spent without an appropriate education, *id.*, the point of compensatory services is to “elevate [the student] to the position he would have occupied absent the school district’s failures.” *Id.* at 527. For this reason, it is not proper merely to trust the

development of an appropriate remedy to an IEP meeting between the Family and the School – which by law is tasked only with satisfying the *Rowley* standard of providing educational benefit that is meaningful – especially when that meeting will occur in the absence of both a clear order directing compensatory services and outside the District Court’s enforcement power to monitor the School’s response. In this case, the District Court improperly provided the Family with no recourse other than to repeat the torturous path of litigation they have traveled since the Spring of 2004 if they find the School’s compensatory efforts wanting. *App.108*. For all these reasons, this portion of the remedial order should be vacated and remanded with instructions for the District Court to order not only an appropriate 2006-2007 IEP for L.I., but also such additional services as may be needed to compensate her for the past violation of her IDEA rights. *See Parents of Student W.*, 31 F.3d at 1497 (appropriate compensatory education award may provide for “optimal” level of services to enable currently eligible student to make up for ground lost during earlier time periods when appropriate services were not delivered).

Although many courts have issued detailed compensatory education awards, *see, e.g., Millersburg Area School Dist. v. Lynda T.*, 707 A.2d 572 (Pa. Cmwlth. 1998), it is permissible for the matter to be remanded for an administrative proceeding focused on determining the precise scope, type, and intensity of the

compensatory services to be provided. *See, e.g., Mr. R. v. Maine Sch. Admin. Dist. No. 35*, 295 F. Supp. 2d 113 (D. Me. 2003) (on remand of this Court’s decision, district court remanded matter to administrative hearing officer for determination of compensatory education remedy); *Reid*, 401 F.3d at 526. Virtually the only step that is not appropriate in awarding compensatory education is merely to delegate to the student’s IEP team the full authority to determine, reduce, or discontinue compensatory services, *Reid*, 401 F.3d at 526, yet that is precisely what the District Court did here. At the very least, even if the IEP team ultimately is determined to be best suited to monitor and ensure implementation of a compensatory education remedy, this Court should ensure at the very least that guidelines governing the type, form, intensity, and duration of services are specified to assist the parties in moving forward without confusion or acrimony. Prime among these guidelines should be confirmation that L.I. now is entitled to more than just an “appropriate” education and needs to receive “compensatory” services as well.

For all the reasons stated above, the District Court order leaving the entire matter of compensatory education to the discretion of the IEP Team, subject only to challenge through a new due process filing, is contrary to law and should be reversed.

CONCLUSION

For the foregoing reasons, Appellees/Cross-Appellants Mr. and Mrs. I respectfully request the Court to affirm the decision of the District Court with respect to liability on the IDEA eligibility claim, but to reverse and remand the remedial ruling with instructions to enter an order awarding reimbursement to the Family and/or a specific award of compensatory educational services to L.I.

Dated: August 15, 2006

Respectfully submitted,

Richard L. O'Meara
Amy M. Sneirson
Staci K. Converse
Counsel for Appellees/Cross-Appellants
Mr. and Mrs. I

MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Appellees/Cross-Appellants Mr. and Mrs. I, one paper copy and one electronic copy on disk, were served upon the counsel of record by first-class mail, postage prepaid, addressed as follows:

Eric R. Herlan, Esquire
DRUMMOND, WOODSUM & MACMAHON
245 Commercial Street
P.O. Box 9781
Portland, Maine 04104-5081

Frank P. D'Alessandro, Esquire
PINE TREE LEGAL ASSISTANCE, INC.
88 Federal Street
P.O. Box 547
Portland, Maine 04112-0547

Peter M. Rice, Esquire
Chad T. Hansen, Esquire
DISABILITY RIGHTS CENTER OF MAINE
24 Stone Street
P.O. Box 2007
Augusta, Maine 04338-2007

Brendan P. Rielly, Esquire
JENSEN, BAIRD, GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112-4510

Dated: August 15, 2006

Richard L. O'Meara
Counsel for Appellees/Cross-Appellants
Mr. and Mrs. I

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 15,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 font.

Dated: August 15, 2006

Richard L. O'Meara
Counsel for Appellees/Cross-Appellants
Mr. and Mrs. I